

TERRORISM PREVENTION AND INVESTIGATION MEASURES IN 2012

FIRST REPORT OF THE INDEPENDENT REVIEWER ON
THE OPERATION OF THE TERRORISM PREVENTION
AND INVESTIGATION MEASURES ACT 2011

by

DAVID ANDERSON Q.C.

Independent Reviewer of Terrorism Legislation

MARCH 2013

Presented to Parliament
pursuant to section 20 of the
Terrorism Prevention and Investigation Measures Act 2011

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EXECUTIVE SUMMARY

What are TPIMs? (1.1-1.3)

- Terrorism Prevention and Investigation Measures are the successor to control orders.
- Introduced by the TPIM Act 2011, their aim is to protect the public from the risk posed by persons believed to have engaged in terrorism-related activity, but who can neither be prosecuted nor deported.
- TPIMs are imposed by the Home Secretary but subject to quasi-automatic review in the High Court. Those reviews are held partly in closed sessions in the presence of special advocates but without the TPIM subject being present.
- TPIM subjects in 2012 were subject to restrictions including overnight residence at a specified address, GPS tagging, reporting requirements and restrictions on travel, movement, association, communication, finances, work and study.

Are TPIMs similar to control orders? (2.23-2.24, 5.5-5.18, 11.33-11.38)

- TPIMs resemble control orders in most respects.
- There are however some significant differences, notably:
 - Their maximum two-year duration
 - The inability to relocate TPIM subjects to places remote from their alleged associates
 - Less onerous conditions, especially as regards search powers, overnight residence and the use of electronic communications.
- Those differences render TPIMs more rights-compliant than control orders, and less likely to be a focus for community grievance. They also underline the need for alternative strategies to contain the risk from those believed to be dangerous terrorists, especially once TPIMs have expired.

Who were the TPIM subjects? (4.1-4.17)

- 10 men were subject to TPIMs during 2012, all believed by the Home Secretary to have been involved in al-Qaida related terrorism and nine of them British nationals. Those nine had all previously been subject to control orders.
- The allegations against some subjects are at the highest end of seriousness, even by the standards of international terrorism. AM and AY are said to have been, respectively, a would-be suicide bomber and a key co-ordinator of the 2006 airline liquid bomb plot. Others are alleged to be hardened terrorists involved in attack planning in the UK or abroad.

Why could they not have been prosecuted or deported instead? (7.1-7.23)

- I observed no unwillingness on the part of police, intelligence agencies or Crown Prosecution Service to prosecute, and some institutional self-interest in doing so. However:
 - Four TPIM subjects have previously been acquitted on terrorism charges.
 - The CPS has advised that none of the ten could now be prosecuted, in each case on the basis that sufficient evidence probative of their guilt cannot be deployed in an open criminal court.
- That advice has been given not because intercept evidence is inadmissible but because of what is said to be the impossibility of disclosing in open court evidence that has been derived from sensitive human or technical intelligence sources.
- Deportation was not a feasible option for the one TPIM subject who is not a British citizen.

How were TPIMs managed? (8.1-8.23, 9.3, 10.1-10.10, 11.24, 11.58)

- Ministers and officials performed their functions in a thorough and conscientious manner, as demonstrated by the six High Court judgments in 2012 which largely upheld TPIM notices on seven individuals.
- The power to impose TPIMs was exercised with commendable restraint, particularly during the pre-Olympic period when no new TPIMs were served.
- Three TPIM subjects were charged with breach of their TPIMs during 2012, resulting so far in one acquittal and (in the well-publicised case of a TPIM subject found to have been crossing the Olympic Park) one decision not to pursue the prosecution.
- There was one abscond, in December 2012. A thorough investigation is in progress, on which I do not comment at this stage. It is possible that the end to relocation

might have made absconding easier; but it must be recognised that no system of this nature can be made proof against absconds.

Were TPIMs effective? (11.3-11.8)

- TPIMs are likely to have been effective in preventing terrorism-related activity during 2012. They were undoubtedly effective in releasing resources for deployment in relation to other pressing national security targets.
- TPIMs were not effective as an investigation measure. This is no surprise, given the subjects' awareness that they were under scrutiny and their knowledge that if terrorism-related activity is avoided, they are likely to be free of all constraints after two years.

Were TPIMs fair? (9.1-9.37, 11.18-11.21)

- Though reservations have been expressed at the highest judicial level about the fairness of closed material proceedings, none were expressed by any of the judges who determined TPIM reviews during 2012. Where sensitive national security evidence is concerned, some compromise between the principles of full disclosure and open justice will always be required.
- Thanks to the efforts that were put into designing the closed material procedure, and the resourcefulness of the lawyers and judges who have operated it over the years (including, crucially, the European Court of Human Rights), something resembling a fair litigation procedure has emerged.
- Special advocates however continue to have concerns about the fairness of proceedings, and the representatives of TPIM subjects point with justification to the lengthy periods that can elapse before determinations of the Home Secretary can be tested.

What happens when TPIMs expire? (6.23, 11.33-11.38)

- Control orders could be extended year on year without limit. The TPIMs imposed at the start of 2012, by contrast, are likely finally to expire, after the single permitted extension, in early 2014.
- Some subjects who have been judged by the Home Secretary and by the courts to be potentially dangerous will then, absent prosecution or new evidence of terrorism-related activity, be free and unconstrained.
- However:
 - Substantial extra resources for MI5 and the police have resulted in the assessment that the change from control orders to TPIMs should mean “*no substantial increase in overall risk*”.
 - A draft Bill providing for enhanced TPIMs can be introduced at short notice if required.
 - Even if control orders had continued in force, it is not realistic to suppose that persons could have been kept under restraint indefinitely without proof of their guilt.
- The Government’s aim of a less intrusive system that still protects the public has thus been achieved – though at a cost.

Conclusion and recommendations (11.39-11.45, 11.53-11.58, 12)

- The TPIM regime has been vigorously attacked – from opposite directions – by civil libertarians and by the more security-minded. Nobody could feel entirely comfortable about it, or wish it to survive for any longer than necessary. I nonetheless conclude that it provides a broadly acceptable response to some intractable problems.
- I have made eight recommendations for improvements to the operation of the system, in particular:
 - to provide a forum for the resolution of continuing concerns relating to the fairness and speediness of legal proceedings (Recommendation 5) and
 - to strengthen the formulation of coherent exit strategies for TPIM subjects, including by the use of PREVENT and probation expertise (Recommendations 6 and 7).

1. INTRODUCTION

TPIMs in a nutshell

- 1.1. Terrorism Prevention and Investigation Measures **[TPIMs]** are imposed on individuals by a TPIM notice. Their primary intention is to protect the public from the risk posed by persons whom the Home Secretary believes to have engaged in terrorism-related activity, but whom it is feasible neither to prosecute nor to deport. Ten TPIM notices were in force at the end of 2012, nine of them on British citizens and all of them on men believed to have participated in al-Qaida related terrorist activity.
- 1.2. Restrictions from up to 12 specified categories may be imposed, depending on the circumstances of the case. All TPIM subjects in 2012 were subject to a requirement of overnight residence at a specified address, GPS tagging, restrictions or notification requirements concerning travel, movement, association, communication, finances, work and study, and a duty to report daily to the authorities in person and/or by telephone. TPIM notices require extension after a year, and may remain in force for a maximum period of two years.
- 1.3. Though TPIM notices are executive orders, imposed by the Home Secretary, they require the prior permission of a judge save in urgent cases where permission may be obtained retrospectively. Furthermore, TPIM notices are subject after imposition to a quasi-automatic process of review by the High Court. Such reviews are conducted so far as possible in open court: but sensitive national security evidence is heard in a closed material procedure **[CMP]** from which the subject of the TPIM is excluded; and the conclusions expressed in an open judgment are supplemented by confidential reasons contained in a closed judgment.

Historical and international context

TPIMs and UK anti-terrorism law

- 1.4. There are 20th century precedents (notably, the **internment** to which many Republicans in Northern Ireland were subject during the early 1970s, and **exclusion orders**) for the imposition of restraints on persons who are suspected of terrorist activity but cannot be put on trial for it. However no such mechanism was thought necessary by Parliament when it enacted the Terrorism Act 2000 **[TA 2000]**, which was intended as a comprehensive anti-terrorism code.
- 1.5. The attacks of 9/11 produced a legislative reaction in the form of Part 4 of the Anti-Terrorism Crime and Security Act 2001 **[ATCSA 2001]**, which provided for

the *indefinite detention* of non-nationals who were suspected of terrorism but were undeportable.¹ That regime was famously declared discriminatory and thus incompatible with the Human Rights Act 1998 [**HRA 1998**] by the UK's highest court, then known as the House of Lords, in December 2004.²

- 1.6. After that ruling, the 2001 detention regime was replaced by the system of **control orders** under the Prevention of Terrorism Act 2005 [**PTA 2005**]. Between 2005 and 2011, a total of 52 control orders were imposed upon men suspected of terrorism-related activity, 24 of whom had British citizenship. The men were not imprisoned, as had been the case under the previous regime, but were required to reside in a place of the Home Secretary's choosing (which in 23 out of 52 cases meant involuntary relocation to another city, away from their former associates) and were often subject to further onerous restrictions on their movements, communications and association. The courts accepted the principle of control orders but set a number of limits on the exercise of the power. I submitted a detailed report on the operation and effectiveness of the control order system, with particular emphasis on the last year of its life, in March 2012.³
- 1.7. A further relaxation came with the introduction of TPIMs by the Terrorism Prevention and Investigation Measures Act 2011 [**TPIMA 2011**], which came into force in December 2011. This change was prompted not by any legal ruling or obligation, but by the Coalition Government's aim of:

"mov[ing] to a system which will protect the public but will be less intrusive, more clearly and tightly defined and more comparable to restrictions imposed under other powers in the civil justice system".⁴
- 1.8. That objective was achieved in a number of ways: a higher legal test for imposition; a maximum duration of two years without evidence of new terrorism-related activity; the requirement of a warrant before a residence could be searched; and a finite range of restrictions which does not include involuntary relocation or the removal of all access to computers, landlines and mobile phones.
- 1.9. More detailed historical context is provided in my report of last year on control orders,⁵ and in the Explanatory Notes to the TPIMA 2011.⁶

¹ Classically, because of the judgment of the European Court of Human Rights in *Chahal v UK* (1996) 23 EHRR 413, establishing the principle that foreign nationals could not be deported to countries where there was a real risk that they would be tortured or mistreated.

² *A v SSHD* [2004] UKHL 56; see also the judgment of the European Court of Human Rights in *A v United Kingdom*, 19 February 2009.

³ D. Anderson, *Control Orders in 2011*, freely downloadable from my website <http://terrorism-legislation-reviewer.independent.gov.uk/>, as are the annual reports of my predecessor, Lord Carlile of Berriew CBE QC, on the operation of PTA 2005.

⁴ *Review of Counter-Terrorism and Security Powers* Cm 8004, January 2011, §23.

Other parallels

- 1.10. Measures for restraining suspected terrorists, other than through the criminal justice and immigration systems, are to be found in some other countries. I briefly summarised some of them in my previous report.⁷ The measures most closely analogous to TPIMs, Australian control orders, are currently under review both by the Independent National Security Legislation Monitor, Bret Walker SC, and by the Council of Australian Governments in a Review of Counter-Terrorism Legislation chaired by The Hon. Anthony Whealy QC, with whom I have had the benefit of some valuable contact.
- 1.11. It is also true that restrictive powers aimed at preventing criminal behaviour exist, in the United Kingdom, even outside the national security field. As Walker and Horne summarise the position:
- “The problem of dangerousness presented by terrorism suspects is not unique. Other civil powers apply to suspected terrorists including, for example, asset freezing and immigration powers such as deportation, exclusion and deprivation of citizenship. There also exist preventative civil measures beyond national security – serious crime prevention orders, gang injunctions, football banning orders, risk of sexual harm orders, and domestic violence protection orders / notices.”⁸
- 1.12. Measures with similarities to TPIMs thus exist both for countering national security threats and for the prevention of other types of serious crime. Outside the national security field, however, measures of comparable severity have not been imposed upon unconvicted persons. Even serious crime prevention orders [**SCPOs**], which may contain restrictions concerning communications, association, finances, travel within the UK and abroad, access to and use of premises and use of the internet,⁹ have not yet been imposed by the High Court – as statute allows – without a prior criminal conviction.¹⁰

Remaining concerns

⁵ D. Anderson, *Control Orders in 2011*, March 2012, 2.3-2.8.
⁶ <http://www.legislation.gov.uk/ukpga/2011/23/section/2/notes>.
⁷ D. Anderson, *Control Orders in 2011*, March 2012, 2.14-2.19.
⁸ A. Horne and C. Walker, “The Terrorism Prevention and Investigation Measures Act 2011: one thing but not much the other?” (2012) *Crim LR* 421, 430. I gave further details of most of these measures in D. Anderson, *Control Orders in 2011*, March 2012, 2.20-2.26.
⁹ Prompting the CPS Legal Guidance on SCPOs to comment that “*the possible terms of an order could restrict the person’s life in almost any respect, and to a very significant degree, including his/her home and where he/she lives*”. As I remarked last year, it seems likely that the SCPO was modelled at least in part on the control order; an example of counter-terrorism power seeping into other parts of the criminal law.
¹⁰ Serious Crime Act 2007 sections 1-41 and Schedules 1-2; *R v Hancox (Dennis)* [2010] EWCA 102, [2010] 1 WLR 1434.

- 1.13. The journey from indefinite detention (2001) through control orders (2005) to TPIMs (2011) has been in a liberalising direction - though with the important caveat that British citizens as well as non-nationals have been subject to the latter two regimes. It remains the case however that the current arrangements impose restrictions on a few individuals that far exceed anything that was possible, outside the criminal justice context, immediately prior to 9/11.
- 1.14. This has produced a situation in which the TPIM regime has been vigorously attacked from both sides. On the one hand, the Government has been criticised for diluting the effectiveness of control orders - in particular, by ending the practice of relocation.¹¹ On the other hand, the TPIM regime has been attacked on civil liberties grounds by NGOs.¹² They object to TPIMs, as they objected to control orders:

“ ... because they are imposed without the person on whom they are applied being convicted for the terrorist activity in which he is judged to be engaged, because of the use of closed material and because of the very intrusive restrictions that they can involve.”¹³

One of the functions of this report is to assess the force of these competing criticisms, and to present the information that may assist politicians and public to reach a view on whether the correct balance is struck by TPIMA 2011 as it is currently operated.

The background threat

- 1.15. No review which seeks to evaluate the necessity for and proportionality of the TPIM regime can be conducted without reference to the background threat from terrorism. Official threat levels are set by the UK's Joint Terrorism Analysis Centre [**JTAC**], the UK's official centre for the analysis and assessment of international terrorism, which is located at the headquarters of MI5 but draws its expertise from a wide variety of Government departments and agencies. The threat level was changed in July 2011 from “*severe*” to “*substantial*”, a reduced level which still means that a terrorist attack is a strong possibility and may well occur without further warning. It remained at “*substantial*” for the rest of the year and throughout 2012, a year covering such high-profile public events (and potential terrorism targets) as the Diamond Jubilee celebrations, torch relay and Olympic and Paralympic Games.

¹¹ Hansard HC 8 January 2013, col 162, Rt Hon Yvette Cooper MP, Shadow Home Secretary: “*The right hon. Lady chose to ditch relocations, and she has personally made it easier for people to abscond.*”

¹² Liberty, in its report *TPIMs – Terrorist Prevention and Investigation Measures*, described TPIMs as “*simply a ‘control order-lite’, replicating the worst aspects of the control order regime*”.

¹³ *Review of Counter-Terrorism and Security: Review Findings and Recommendations Cm 8004*, January 2011, p. 37.

- 1.16. No more detailed official assessment of the threat level is routinely published in unclassified form. Some foreign and international organisations in possession of classified information publish useful annual reports, for example Europol and the National Counter-Terrorism Centre (the US equivalent of JTAC). For the United Kingdom, the public must make do with information obtained by NGOs and investigative journalists, statements from politicians and occasional speeches from the Director General of MI5.¹⁴ There is no reliable and publicly-accessible analysis of the threat, such as might assist in evaluating the necessity and proportionality of the many anti-terrorism laws that exist in the United Kingdom. Such an analysis would be a valuable contribution to the public debate: see Recommendation 1, below.
- 1.17. I used my privileged access to read a number of reports from JTAC during the period under review, and received regular briefings from JTAC on the terrorist threat. I have been impressed by the objectivity that is displayed at all levels of the organisation, and by the fact that threat levels are set without political involvement. I am also briefed from time to time by police, intelligence officers or civil servants on specific operations, including some which are not publicly known.
- 1.18. The threat should not be exaggerated. After all:
- (a) Leaving aside Northern Ireland related terrorism, in respect of which control orders and TPIMs have never been used, it is several years since anyone was killed by terrorists in the United Kingdom (though UK nationals have been captured and killed abroad). As a 21st century cause of mortality in western countries, terrorism barely registers in the statistics.¹⁵
 - (b) The capacity of al- in its core territories has been very significantly degraded in recent years, as military action or weapons targeted from drones have removed key leaders and opinion-formers including most famously Osama bin Laden (in Pakistan) and Anwar al-Awlaki (in Yemen).
 - (c) Al-Qaida related terrorists have not succeeded in deploying chemical, biological or nuclear weapons; and the ever-present threat of cyber-attack is still largely associated with foreign governments rather than terrorists.
 - (d) Despite (or because of) appreciably better intelligence coverage within the UK, current plots appear to be neither as numerous nor as sophisticated as was the case during parts of the last decade.

¹⁴ Most recently, the Director General's Address at the Lord Mayor's Annual Defence and Security Lecture, Mansion House, 25 June 2012, accessible through the MI5 website.

¹⁵ Some comparisons are given in D. Anderson, *The Terrorism Acts in 2011*, June 2012, chapter 2.

1.19. I am in no doubt however that it remains necessary to take the threat of Islamist terrorism seriously – not only in volatile parts of the world where UK nationals and UK interests are at stake, but within the United Kingdom itself. In particular:

- (a) The death tolls of almost 3,000 on 9/11, almost 200 in the Madrid train bombings of 2004 and over 50 in the London bombs of 2005 give a sense for the damage that can be inflicted by those (unusual, even among terrorists) who are prepared to lose their own lives in an attempt to kill and injure large numbers of civilians in stable western democracies. The effects of such major attacks are measurable in terms not only of casualties but of fear, anxiety and breakdown in trust.
- (b) Movements linked to varying degrees with al-Qaida have recently been active in a number of countries including Yemen, Iraq, Somalia, Libya, Syria, Nigeria and Mali. While the strength of these movements fluctuates and they are for the most part regional in their outlook, western targets are sometimes contemplated also. A document found in 2011 on the body of an al-Qaida commander in Somalia named Eton College, the Ritz and Dorchester Hotels and Jewish communities in north London as possible targets for “*low-cost operations*”.¹⁶ In May 2012, skilled intelligence work foiled a plot by al-Qaida in Yemen to blow up an airliner over the Atlantic using explosives concealed in clothing.¹⁷ At least 37 hostages from eight countries, together with 11 Algerian workers and 29 hostage-takers (themselves from a variety of countries) were killed at an Algerian gas facility in January 2013.
- (c) Though the Home Affairs Select Committee has ventured the opinion that “*violent radicalisation is declining within the Muslim community*”,¹⁸ the reality remains that “*[i]n back rooms and in cars and on the streets of this country there is no shortage of people wanting to mount terrorist attacks here*”.¹⁹ While much of that activity may be no more than unpleasant chatter, MI5’s assessment, which I have no reason to doubt, is that “*Britain has experienced a credible terrorist attack plot about once a year since 9/11*”.²⁰
- (d) The more sophisticated and potentially deadly plots directed to UK targets nearly always involve foreign travel, as well as face-to-face and electronic

¹⁶ “Ritz, Dorchester and Eton all on al-Qaeda wishlist”, Daily Telegraph, 13 July 2012.

¹⁷ “Al-Qaeda underwear bomber ‘was undercover agent’”, BBC website, 10 May 2012.

¹⁸ *Roots of violent radicalisation* HC 1446, February 2012, Conclusions para 1. The Netherlands Government has similarly spoken of “*a stagnation in domestic radicalisation, and a growing resistance to violence within the Dutch Muslim community*” since 2008, whilst noting that the country is “*still regarded as a legitimate target in jihadist circles*”: *National counter-terrorism strategy 2011-2015*, June 2011, p. 28

¹⁹ Jonathan Evans, Director General of MI5, Address at Lord Mayor’s Annual Defence and Security Lecture, Mansion House, 25 June 2012, para 11.

²⁰ *Ibid.* The conviction in February 2013 of three Birmingham men for preparing acts of terrorism, largely in 2011, is a recent illustration: <http://www.bbc.co.uk/news/uk-21414522>.

communication between those involved. For much of the last decade, most travel for the purposes of training was to Afghanistan or the Federally Administered Tribal Areas of Pakistan [FATA]. But as was noted in the summer of 2012: “.. a small number of British would-be jihadis are .. making their way to Arab countries to seek training and opportunities for militant activity, as they do in Somalia and Yemen. Some will return to the UK and pose a threat here.”²¹

- 1.20. The key to successfully countering terrorism is intelligence work. At least since the London bombs of 2005, MI5 has a record to be proud of in this respect. However TPIMs, like control orders before them, have a supporting part to play in preventing manifestations of terrorism ranging from travel for training to financing, recruitment, attack planning and implementation. The “public” that they seek to protect is not limited to the public within the United Kingdom.²² The point of restrictions on residence, travel, association and communication is to inhibit individuals who are believed to have a track record of involvement in terrorism from giving effect to their plans. They also reduce the cost of keeping subjects under observation, releasing resources for other targets. Such measures cannot, of course, guarantee public safety: but they can increase it. The case for TPIMs rests on the proposition that by imposing proportionate restrictions on a very small number of people, they make an appreciable contribution to the security of the population as a whole.

Independent review

- 1.21. Independent review has been a feature of UK anti-terrorism law since the 1970s. The uniqueness of the Independent Reviewer’s post derives from the combination of two factors:
- (a) complete independence from Government; and
 - (b) unrestricted access, based on a very high level of security clearance, to documents and to personnel within Government, the police and the security services.

The authority of the Independent Reviewer derives also from the statutory obligation of the Home Secretary to lay his reports before Parliament “on receiving” them – in other words, promptly.²³ There should thus be no question

²¹ *Ibid.*, para16.

²² As is true generally of UK anti-terrorism measures: TACT 2000 section [].

²³ As the Government has acknowledged: see D. Anderson, *The Terrorism Acts in 2011*, June 2012, 1.22-1.25, citing the Security Minister in Hansard (Public Bill Committee) vol 532 col 253, 30 June 2011.

of the Reviewer's reports being blocked or delayed for political reasons. The role of the Independent Reviewer is more fully described on my website.²⁴

- 1.22. As Independent Reviewer, I am provided with a room in the Office for Security and Counter-Terrorism within the Home Office, which I use in particular for meetings and for inspecting secret documents. My base however remains in my own Chambers, where I continue to practise as a self-employed member of the independent Bar.²⁵
- 1.23. As is the case for other anti-terrorism statutes,²⁶ Parliament has provided for annual independent reviews of the operation of TPIMA 2011. This report summarises the first of those reviews. The period under review runs from 15 December 2011 to 31 December 2012.²⁷
- 1.24. Annual reviews of the control order system by my predecessor, Lord Carlile CBE QC, were timed so as to inform the annual parliamentary renewal debates for PTA 2005 that took place between 2006 and 2010. TPIMA 2011 will require renewal only in December 2016, though the Secretary of State may repeal the TPIM powers by statutory instrument at any time.²⁸ While the annual renewal debates were described by Lord Carlile as "*a bit of a fiction*",²⁹ the Joint Committee on Human Rights considered the absence of annual reviews of the TPIM regime to be regrettable, since its effect is to normalise a system whose utility remains controversial.³⁰ It may at any rate be agreed that the absence of an annual parliamentary debate points up the need for other review mechanisms, of which this Report is one.
- 1.25. I have read the secret files that prompted each of the 10 TPIM notices that were imposed in 2012, the advice of the Crown Prosecution Service [**CPS**] concerning the prospects for prosecution in each case and the open and closed judgments in all TPIM cases decided during the year. In addition, I have sought to speak to the widest possible range of informed persons when conducting this review. These have included the Home Secretary (Rt. Hon. Theresa May MP) and Security Minister (James Brokenshire MP), other politicians from all sides of both Houses of Parliament, civil servants from the Office of Security and Counter-Terrorism at the Home Office and elsewhere, police officers from SO15 and

²⁴ www.terrorism-legislation-reviewer.independent.gov.uk.

²⁵ Though not, of course, in cases falling within the ambit of my responsibilities as Independent Reviewer.

²⁶ Currently the Terrorism Act 2000, Part I of the Terrorism Act 2006 and the Terrorist Asset-Freezing &c. Act 2010.

²⁷ TPIMA 2011 section 20(2) and Schedule 8, para 8.

²⁸ TPIMA 2011, section 21.

²⁹ TPIM Bill, Public Bill Committee, 21 June 2011, col. 23 Q70.

³⁰ Joint Committee on Human Rights, *Renewal of Control Orders Legislation 2011, Eighth Report of Session 2010-2011* HL Paper 106 HC 838, March 2011

regional forces, lawyers at the Serious Crime and Counter-Terrorism Division of the CPS, members of the intelligence agencies, special advocates, counsel for the Home Office, counsel for TPIM subjects and judges of the High Court and above with experience of control order and TPIM cases. I attended part of the closed proceedings in the first TPIM review to be heard in the High Court during 2012.³¹

- 1.26. I wrote to the solicitors for all TPIM subjects in November 2012, requesting a meeting with their clients. Though no such meeting has yet been facilitated, some of those solicitors (together with two former controlled persons and a friend of a TPIM subject) have been able to tell me of their concerns and frustrations. I have visited Abu Qatada, a former controlled person who is now subject to more onerous constraints as a condition of immigration bail. I maintain regular contacts, in person and online, with a wide range of NGOs and community groups interested in (and in some cases, opposed to) TPIMs. My Special Adviser, Professor Clive Walker, briefs me regularly on the academic literature³² and other relevant developments, and gives me the benefit of his unequalled legal knowledge of the field.
- 1.27. I hope that this report may help to inform the public and political debate on TPIMs and anti-terrorism law generally. It is longer than future reports are likely to be, reflecting the fact that it is the first review of a new Act. It has been checked by the Government for factual mistakes and inadvertent disclosure of secrets, but all views expressed (and any remaining errors) are my own. I welcome contact through my website from anyone with information or experience that I can take into account in subsequent reviews.

Control Orders in 2011 and the Home Secretary's response

- 1.28. I sought in my report of March 2012 to conduct a comprehensive appraisal of the control order system as it operated in 2011 and (by extension) generally.³³
- 1.29. Having noted my observations of the control order system in operation, and commented on whether it was effective, enforceable, counter-productive and fair, I concluded (summary at p. 7):

³¹ *SSHD v BM* [2012] EWHC 714 Admin.

³² See, e.g., A. Horne and C. Walker, "The Terrorism Prevention and Investigations Measures Act 2011: one thing but not much the other?" (2012) Crim LR 421; C. Walker, "The reshaping of control orders in the UK: time for a fairer go, Australia!", paper delivered to UNSW stakeholder event, 12 December 2012; A. Hunt, "From control orders to TPIMs: variations on a number of themes in British legal responses to terrorism" (2013) Crime Law and Social Change 59.

³³ D. Anderson, *Control Orders in 2011*, March 2012, p. 7.

“In summary, control orders were an effective way of protecting the public from a small number of suspected terrorists who presented a substantial risk to national security, but whom it was not feasible to prosecute. A conscientious administrative procedure, coupled with close judicial scrutiny and an improved disclosure regime, ensured a substantial degree of fairness to the subject. But there is something unsettling about any system which allows the executive to impose intrusive measures on the individual, challengeable only by way of a closed material procedure and after significant delay. Accordingly, while some compromise of fairness may be justifiable in the interests of national security, it is essential that the use of this and similar powers should be kept to an absolute minimum.”

1.30. While noting that my scope for recommendations was limited, since PTA 2005 had ceased to operate and TPIMA 2011 had scarcely begun, I made a number of general recommendations in relation to the operation of the TPIM regime. These related, in particular, to:

- (a) ensuring that TPIM orders were **used only as a last resort**, when prosecution, deportation or less intrusive executive measures are not a feasible alternative (Recommendations 1 and 2)
- (b) ensuring that no individual measure is imposed unless the Secretary of State is satisfied that it is **necessary** for purposes connected with preventing or restricting the individual’s involvement in terrorism-related activity (Recommendation 3);
- (c) ensuring the **highest possible degree of fairness** in the closed material procedure, by giving sufficient information in all TPIM cases to enable the subject to give effective instructions and by addressing the consistent concerns expressed by Special Advocates (Recommendations 4 and 5);
- (d) improving **transparency**, in the form of the quarterly reports issued under TPIM 2011 (Recommendation 6); and
- (e) inviting Parliamentary Committees to consider how best I can assist them in future with the task of keeping the necessity for and operation of TPIMA 2011 under **parliamentary review** (Recommendation 7).

1.31. The Home Secretary published the Government’s Response to my report on 7 September 2012.³⁴ It was generally, though not invariably, receptive to my recommendations. As to the last of those recommendations, the Joint Committee on Human Rights – which reported twice during the currency of the

³⁴ *The Government Response to the Report by David Anderson QC – Seventh Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, CM 8443, freely downloadable from my website (fn 3, above).

TPIM Bill – has indicated its intention of reporting on the operation of TPIMs during the first half of 2013. I very much welcome its attention to this important subject, and hope that this report may be of some use in its deliberations.

- 1.32. I deal with my specific recommendations from 2012, and the Government's response to them, in the relevant parts of this report.

2. THE STATUTORY SCHEME

- 2.1. By modern legislative standards, TPIMA 2011 is not unduly difficult for a lay person to read and understand. A detailed commentary on it, arranged by section and by Schedule, is to be found in the Explanatory Notes.³⁵ This section summarises the principal features of the Act, and indicates the main areas of difference from the control order regime in PTA 2005.
- 2.2. Also of note are the two reports produced by the Joint Committee on Human Rights during the passage of the TPIM Bill through Parliament.³⁶ I refer to various points made by the Joint Committee in later sections of this report.

Conditions for imposing a TPIM notice

Conditions A-E

- 2.3. A TPIM notice may be made by the Secretary of State if five conditions are satisfied,³⁷ as follows:
- (a) The Secretary of State must reasonably believe that the individual is or has been **involved in terrorism-related activity**, as very broadly defined³⁸ (“*Condition A*”);
 - (b) Some or all of that activity must be “**new**” (“*Condition B*”), though in the case of a first TPIM to be imposed on a given subject, this condition adds nothing since activity occurring at any time is deemed to be “*new*”.³⁹
 - (c) The Secretary of State must reasonably consider that it is **necessary**, for purposes connected with protecting members of the public (whether in the UK or overseas) from a risk of terrorism, for **TPIMs to be imposed** on the individual⁴⁰ (“*Condition C*”);
 - (d) The Secretary of State must reasonably consider that it is **necessary**, for purposes connected with preventing or restricting the individual’s

³⁵ <http://www.legislation.gov.uk/ukpga/2011/23/section/2/notes>.

³⁶ *Legislative Scrutiny: Terrorist Prevention and Investigation Measures Bill (First Report)* July 2011; (*Second Report*), 18 October 2011.

³⁷ TPIMA 2011 sections 2-3.

³⁸ TPIMA sections 3(1), 4. Involvement in TRA encompasses the commission, preparation and instigation of acts of terrorism [**CPI**], conduct which facilitates or encourages CPI or is intended to do so, and conduct which gives support or assistance to individuals who are known or believed to be engaging in CPI, facilitation or encouragement. It is immaterial whether the acts of terrorism are specific acts of terrorism or acts of terrorism in general. It is also immaterial whether an individual’s involvement in TRA occurs before or after the entry into force of TPIMA 2011. “*Terrorism*” has the same (broad) meaning as under TA 2000: TPIMA 2011 section 30(1).

³⁹ TPIMA 2011 sections 3(2), 3(6).

⁴⁰ TPIMA 2011 section 3(3).

involvement in terrorism-related activity, for ***the specified TPIMs to be imposed*** on the individual⁴¹ (“*Condition D*”);

- (e) The High Court must give ***prior permission*** for the TPIM notice to be imposed, such permission to be withheld when the decisions of the Secretary of State on Conditions A-D are “*obviously flawed*”, save in urgent cases where permission may be obtained retrospectively⁴² (“*Condition E*”).

- 2.4. In practice, the key conditions are Condition A (which is the equivalent of the old “*reasonable suspicion test*” under PTA 2005) and Conditions C and D (which replicate and supplement, respectively, the old “*necessity test*”). The Secretary of State is under a continuing duty to keep under review, throughout the currency of a TPIM notice, whether Conditions C and D are met.⁴³ Condition B is of no practical importance where a first TPIM is concerned, and Condition E is a procedural requirement which should be straightforward in any case where a TPIM notice is reasonably sought.⁴⁴

Inability to prosecute

- 2.5. A further important condition, appearing later in the Act, is the requirement on the Secretary of State, before applying or imposing a TPIM, to consult the chief officer of the appropriate police force (who must in turn consult the relevant prosecuting authority) about whether there is evidence available that could realistically be used for the purposes of prosecuting the individual for an offence relating to terrorism.⁴⁵ That is supplemented by an additional obligation on the chief officer to keep the individual’s conduct under review with a view to prosecution for an offence relating to terrorism throughout the period the TPIM notice is in force.⁴⁶
- 2.6. I recommended in my report on control orders that:

No TPIM notice should be made or retained in force in circumstances where prosecution, deportation or less intrusive executive measures would be a feasible alternative

(Recommendation 2).

⁴¹ TPIMA 2011 section 3(4).

⁴² TPIMA 2011 sections 3(5), 6-7 and Schedule 2.

⁴³ TPIMA 2011 section 16.

⁴⁴ No application for a TPIM has been rejected by a court at the prior permission stage. The court looks at the application on the papers, though it may call in the Government’s lawyers for questioning.

⁴⁵ TPIMA 2011 section 10(1)(2). The functions of the chief officer of police are in practice delegated to the Senior National Co-ordinator of Terrorist Investigations at SO15 (DAC Stuart Osborne).

⁴⁶ TPIMA 2011 section 10(4)(5)(7).

The Government in its Response agreed, save in what it described as “*certain, rare circumstances*” in which “*the imposition of a TPIM notice may be necessary to protect the public before prosecution of an individual has entirely been ruled out or as an interim measure while we are seeking deportation*”.⁴⁷ The position is thus as it was described, on the highest judicial authority, in relation to control orders:

“*The control order regime is not intended to be an alternative to the ordinary processes of criminal justice, with all the safeguards they provide for the accused, in cases where it is feasible to prosecute with a reasonable prospect of success.*”⁴⁸

TPIM notices, like control orders before them, are a measure to be contemplated only when prosecution is not possible.

Duration of a TPIM notice

- 2.7. A TPIM notice is in force for an initial period of one year. The Secretary of State may by notice extend it for a further period of one year, so long as conditions A, C and D are met.⁴⁹ Where a TPIM notice replaces an earlier notice which has been quashed or revoked after court proceedings, the replacement notice may remain in force only for as long as the original notice would have done so.⁵⁰
- 2.8. The two-year maximum duration was recommended by the Government’s Counter-Terrorism Review, “*to emphasise that they are a short term expedient not a long term solution*”. That recommendation was endorsed by my predecessor, Lord Carlile, in his final report on control orders.⁵¹

The range of possible TPIMs

- 2.9. The measures that may form part of a TPIM notice are exhaustively set out in Schedule 1 to TPIMA 2011, in twelve categories. These are:
- (a) **Overnight residence measures**, requiring the subject of a TPIM notice to reside and to spend the night either in his own residence or in premises provided by the Government in an “*appropriate*” or agreed locality. In the latter case, the individual may be required to comply with any specified terms of occupancy in the lease. An appropriate locality is one in which the individual resides or with which he has a connection, making it impossible to relocate a TPIM subject without consent to an unfamiliar town or city.

⁴⁷ Government Response to the Report by David Anderson QC, Cm 8443, p. 6.

⁴⁸ *SSHD v E* [2008] 1 AC 499, per Lord Bingham at §14.

⁴⁹ TPIMA 2011 section 5.

⁵⁰ TPIMA 2011 section 14.

⁵¹ Lord Carlile, *Sixth report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, §55: see further 11.33-11.38, below.

- (b) **Travel measures**, restricting travel outside the United Kingdom (or Great Britain, or Northern Ireland)
- (c) **Exclusion measures**, imposing restrictions on the individual entering a specified area or place, or a place or area of a specified description;
- (d) **Movement directions measures**, requiring compliance with police instructions for the purpose of securing compliance with other specified measures;
- (e) **Financial services measures**, imposing restrictions on the holding of more than one bank account and on the possession of cash;
- (f) **Property measures**, placing restrictions on the transfer of property and requiring disclosure;
- (g) **Electronic communication device measures**, limiting the possession and use of such devices, but allowing the individual at least a fixed-line telephone, an internet-enabled computer and a mobile telephone without internet access;
- (h) **Association measures**, which may require permission to be obtained for association or communication with specified persons or descriptions of persons, or notice to be given prior to associating or communicating with other persons;
- (i) **Work or studies measures**, which may require permission to be obtained for specified activities, or notice to be given prior to carrying out any work or studies;
- (j) **Reporting measures**, which may require regular reporting to a police station;
- (k) **Photography measures**, requiring the individual to allow himself to be photographed; and
- (l) **Monitoring measures**, which generally require the wearing of a GPS-enabled tag which should be charged at the individual's residence for at least 30 minutes, twice a day.

Powers to vary, revoke and revive TPIM notices

- 2.10. TPIM notices may be **varied**, either on written application by the individual concerned or on the initiative of the Secretary of State. The latter course may be taken only if the variation consists of the relaxation or removal of measures, or if

the Secretary of State reasonably considers (tracking Condition D) that the variation is necessary for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity.⁵²

- 2.11. A TPIM notice may be **revoked** at any time, on application by the individual concerned or on the initiative of the Secretary of State.⁵³ There is also a procedure (not used in 2012) for TPIM notices to be **revived** after they have expired after only a year, or after they have been revoked other than by direction of the court. In both cases, conditions A, C and D have to be met.⁵⁴
- 2.12. The practical effect of revocation can be to push back the last possible expiry date of a TPIM notice. Thus, if a TPIM subject is taken into custody after being charged with or convicted of the breach of a TPIM, the TPIM notice may be revoked, stopping the clock and allowing it to be restarted at a later date. This was done in the case of CC, when he was charged in December 2012 with control order breaches and remanded in custody.⁵⁵ A TPIM notice could in principle be revoked also after a subject has absconded, though there was no revocation in the case of the only TPIM abscond to date, that of Ibrahim Magag (BX) on Boxing Day 2012.⁵⁶

Review and appeal

- 2.13. Every TPIM notice automatically becomes the subject of a review hearing in the High Court (known as a "**section 9 review**"), unless the subject decides otherwise or the court decides (after hearing representations) to discontinue the review. Directions are given within seven days of the service or confirmation of the TPIM notice, and must provide for the review hearing to be held as soon as reasonably practicable.⁵⁷
- 2.14. The function of the section 9 review is to review the decisions of the Secretary of State that Conditions A-D were met and continue to be met. In doing so the court "*must apply the principles applicable on an application for judicial review*" – though such review will be particularly intense.⁵⁸ The court has power not only to quash the TPIM notice or individual measures specified in it, but to give directions in relation to its revocation or variation.⁵⁹

⁵² TPIMA 2011 section 12.

⁵³ TPIMA 2011 section 13(1)-(5).

⁵⁴ TPIMA 2011 sections 13(6)-(8),12(9)(10).

⁵⁵ Revocation in such circumstances is arguably appropriate (or even required) because a TPIM notice is not "*necessary*" to protect the public when the subject is in prison.

⁵⁶ BX's one-year TPIM expired without being extended in January 2013, and has not so far been revived.

⁵⁷ TPIMA 2011 sections 8, 9(3).

⁵⁸ See 9.4-9.12, below.

⁵⁹ TPIMA 2011 section 9.

- 2.15. In addition, **appeals** lie to the High Court against any decision to vary, extend or revive a TPIM notice and any decision to refuse to vary or revoke a TPIM notice.⁶⁰
- 2.16. Though heard by a High Court judge, these reviews and appeals operate in a significantly different way from ordinary civil litigation. As much as possible of the evidence is heard in public, and the reasons for the court's decision are expressed as fully as possible in an open judgment. However a "*closed material procedure*" is invoked for dealing with evidence that the Government claims and the court accepts could not be disclosed in public, for example because disclosure could jeopardise a covert human intelligence source, expose surveillance techniques or release intelligence supplied by a foreign power under the "*control principle*".⁶¹ In essence:
- (a) The Secretary of State makes only such disclosure to the TPIM subject about the reasons for her decision as is not contrary to the public interest.
 - (b) Full disclosure is however made to a "*special advocate*", chosen by the subject from a panel of security-cleared barristers appointed by the Attorney General and entrusted with representing the subject's interests in litigation.
 - (c) The court then considers whether closed material may be withheld from the TPIM subject, having heard submissions from counsel for the Secretary of State and the special advocate. If the court decides that information must be disclosed in order for the subject to have a fair hearing, the Secretary of State must decide whether to disclose the information or to withdraw the material from the case, with the effect that she may no longer rely on it in the proceedings.
 - (d) The review or appeal is then conducted partly "*in closed*", with the special advocate present but the subject and his own legal representatives absent.
 - (e) The special advocate may apply to the court for further disclosure to the subject, and may (in theory) call evidence. The efficacy of the special advocate is however limited by the fact that once proceedings have gone into closed, she may not communicate with or take instructions from the subject, save on strict conditions aimed at ensuring that no additional disclosure is inadvertently made.

⁶⁰ TPIMA 2011 section 16.

⁶¹ TPIMA 2011 Schedule 4; Civil Procedure Rules part 80. The control principle provides that intelligence provided by a partner may not be passed on without that partner's consent.

- 2.17. That closed material procedure is similar to those operated in other national security-sensitive contexts,⁶² and to that which is proposed in the Justice and Security Bill for civil litigation that raises national security concerns. It contains however one additional safeguard, as a consequence of the judgment of the House of Lords in *AF (No. 3)*⁶³ that the subject must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. The gist of any secret material relied upon, referred to as the open national security case, is served on the subject in accordance with directions given by the High Court after it has granted permission for a TPIM to be imposed.
- 2.18. A Law Lord, subsequently President of the Supreme Court, has commented that where *AF (No. 3)* disclosure was given, “*there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations.*”⁶⁴ Since that time, judges presiding over control order and subsequently TPIM reviews have not expressed concerns as to lack of fairness.⁶⁵ Misgivings about the fairness of closed material procedures have however continued to be expressed by other senior judges,⁶⁶ and by special advocates in their response to the Green Paper which led to the Justice and Security Bill.⁶⁷

Sanctions for breach of a TPIM

- 2.19. Contravention of a TPIM without reasonable excuse constitutes a criminal offence, triable either way. It is punishable in the Crown Court by a maximum period of five years’ imprisonment, or in the Magistrates’ Court by a maximum of 12 months.⁶⁸

⁶² Notably the Special Immigration Appeals Commission (SIAC) and Proscribed Organisations Appeals Commission (POAC).

⁶³ *SSHD v AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269, following (with some misgivings) the judgment of the Grand Chamber of the European Court of Human Rights in *A v UK* (2009) 49 EHRR 625. The requirement of *AF (No. 3)* disclosure applied even to light-touch control orders (*SSHD v BC* [2009] EWHC 2927 (Admin), [2010] 1 WLR 1542): it may be assumed to apply also to the full range of TPIMs, though in the absence of any light-touch TPIMs to date, the point has been neither conceded nor tested in court.

⁶⁴ *SSHD v AF (No. 3)*, per Lord Phillips at §59, following *A v UK* at §220.

⁶⁵ For TPIM judgments, see chapter 9 below, and contrast the early case in which Sullivan J referred to the “*thin veneer of legality*” applied by PTA 2005 to a procedure which provided for “*executive decision-making, untrammelled by any prospect of effective judicial supervision*”: *MB* [2006] EWHC (Admin) 1000, §103. The position he described was improved by the appellate decisions in that case and subsequently by *AF (No. 3)*: see D. Anderson, *Control Orders in 2011*, March 2012, 3.82.

⁶⁶ *Al-Rawi v Security Service* [2011] UKSC 34: see in particular Lords Dyson, Hope and Kerr.

⁶⁷ “*CMPs are inherently unfair; they do not ‘work effectively’, nor do they deliver real procedural fairness*”: Green Paper on Justice and Security, Response to consultation from Special Advocates (Cabinet Office website), December 2011, §15. See further 9.30-9.34, below.

⁶⁸ TPIMA 2011 section 23.

Powers to enter, search, take fingerprints etc.

- 2.20. TPIMA 2011 Schedule 5 confers powers upon the police to search an individual and premises when a TPIM notice is served, and to search premises in order to determine whether a subject has absconded or for anything that might assist in his pursuit or arrest. An individual may also be searched for public safety purposes. However, in a departure from the control order regime, searches of the individual or of a residence for the purposes of assessing TPIM compliance require a court warrant, which may be granted only if the court is satisfied that they are necessary. Not every application for such a warrant in 2012 was successful.
- 2.21. Fingerprints and non-intimate DNA samples may be taken pursuant to TPIMA 2011 Schedule 6, which also makes provision for their retention and destruction. Where an individual has no previous convictions, fingerprints and DNA profiles may be kept for six months after the TPIM notice ceases to be in force. The material need not however be destroyed if a chief officer of police (or chief constable) determines that it is necessary to retain that material for purposes of national security. In such circumstances it may be retained for a two-year period, which may be renewed. This conforms with the position for material taken under the Police and Criminal Evidence Act 1984 and TA 2000, as now set out in the Protection of Freedoms Act 2012.

Transitional provisions

- 2.22. Following debates in the House of Commons on 2 March and the House of Lords on 8 March 2011, the powers in PTA 2005 were renewed until 31 December 2011.⁶⁹ A 42-day transitional period, running from the date of commencement (15 December 2011), was provided for by TPIMA 2011 Schedule 8. This enabled control orders to remain in force on each of the nine individuals subject to them while replacement TPIM notices were drafted and submitted to the court for permission.

Differences between the control order and TPIM regimes

- 2.23. The main differences between the TPIM regime and its predecessor respond to the Coalition Government's expressed desire to remove the more intrusive elements of control orders and improve the safeguards for those subject to them. The changes have been presented by the Home Office in a table reproduced at [Annex 1](#) to this Report, and may be broadly summarised as follows:

⁶⁹ The Prevention of Terrorism Act 2005 (Continuance in Force of sections 1 to 9) Order 2011, 2011 No. 716.

- (a) The reasonable suspicion test in PTA 2005 has been replaced by a test of **reasonable belief** that a person is, or has been, involved in terrorism-related activity.⁷⁰ Reasonable belief is a harder test to satisfy, since it requires the decision-maker to believe that there *has* been involvement in terrorism-related activity, not that there *may have been*.⁷¹
- (b) A TPIM notice may be in force for a **maximum of two years**,⁷² whereas control orders could be extended indefinitely (and in some cases, were in force for more than four years).
- (c) There is a **finite list of permissible restrictions**,⁷³ as opposed to the illustrative list in PTA 2005.
- (d) Many of those **restrictions are less onerous** than the equivalent restrictions that were routinely included in control orders. In particular:
- Forced **relocation** to other towns or cities is no longer permitted.
 - The **power to confine** persons to a particular area is replaced by a weaker **power to exclude** them from particular specified areas or places (e.g. the nearby street, or distant town, where an associate lives).
 - **Curfews** of up to 16 hours are replaced by (shorter) “**overnight residence measures**”.⁷⁴
 - A power to ban all **electronic communications** is replaced by a provision which requires the subject to be allowed the use of a fixed line and a mobile telephone, and a computer with internet access.⁷⁵
 - Limits on the **freedom to associate** are relaxed, at least at the level of policy. Association with named individuals can still be prohibited, but the previous practice of prohibiting all prearranged meetings outside the home, save with the prior agreement of the Home Office,

⁷⁰ TPIMA 2011 section 3(1).

⁷¹ *A and others v Secretary of State for the Home Department* [2004] EWCA Civ, [2005] 1 WLR 414, per Laws LJ at para 229. See to the same effect *HM Treasury v Ahmed* [2010] UKSC 2, per Lord Brown at para 199: “*to suspect something to be so is by no means to believe it to be so: it is to believe only that it may be so*”.

⁷² TPIMA 2011 section 5. A new TPIM notice could in theory be issued thereafter, but only if there is believed to have been new terrorism-related activity occurring after the imposition of the first TPIM notice: sections 3(2), 3(6)(b).

⁷³ TPIMA 2011, Schedule 1.

⁷⁴ TPIMA 2011 Schedule 1 para 1(2)(c). The average curfew in 2011 was however less than 12 hours: *Control Orders in 2011*, Annex 1.

⁷⁵ TPIMA 2011 Schedule 1 para 7(3). Control order subjects were very rarely allowed computers.

has been abandoned in favour of a policy to require new associations to be notified on the first occasion only.

- **Police searches** for the purpose of determining whether there is compliance with TPIMs now require a warrant from the appropriate judicial authority.⁷⁶
- A TPIM notice may require the subject, when he is required to live in accommodation specified by the Secretary of State, to comply with any specified **terms of occupancy** of that residence.⁷⁷

2.24. A further difference is that TPIMA 2011 does not require annual renewal. The Secretary of State's powers under the Act will expire (absent prior repeal) in December 2016, and may be renewed by order for further five-year periods after consultation of the Independent Reviewer, the Intelligence Services Commissioner and the Director-General of MI5.⁷⁸

⁷⁶ TPIMA 2011 Schedule 5 para 8.

⁷⁷ TPIMA 2011 Schedule 1 para 1(6).

⁷⁸ TPIMA 2011 section 21.

3. ENHANCED TPIMs

Status of the draft ETPIM Bill

- 3.1. The Counter-Terrorism Review concluded that there might be exceptional circumstances in which the Government would need to seek Parliamentary approval for more extensive and intrusive measures than TPIMs. Some would have preferred it to trust to the Civil Contingencies Act 2004 for this purpose, or to provide for an emergency order-making power under TPIMA 2011 itself. Instead, the Government prepared and published draft primary legislation in the form of the draft Enhanced Terrorism Prevention and Investigation Measures Bill [**draft ETPIM Bill**].
- 3.2. The draft ETPIM Bill was published on 1 September 2011. A Joint Committee of both Houses [**the Joint Bill Committee**] was established following a passage of a motion in both the House of Commons and the House of Lords on 28 June 2012. The Joint Bill Committee took oral evidence from six witnesses (including me) and received written evidence from JUSTICE, the Equality and Human Rights Commission and Liberty. Its report was published on 27 November, giving “*cautious approval*” to the draft Bill but asking for greater clarity over the circumstances in which the Bill would be introduced and the ability of Parliament adequately to scrutinise whether the powers were necessary to meet the particular threat identified.⁷⁹
- 3.3. The Government’s response to the report of the Joint Bill Committee was published on 25 January 2013.⁸⁰

The decision to use draft primary legislation

- 3.4. This is the second occasion in recent years when a liberalisation of counter-terrorism law has been accompanied by a draft Bill which, if Parliament should choose to enact it, will go some way to restoring the previous powers. The first such occasion was the shortening of the pre-trial detention period in terrorism cases from 28 days to 14 days, accompanied by a draft Bill which, if enacted, would once again allow detention for 28 days.⁸¹
- 3.5. The practice of preparing emergency legislation in advance was approved by Rt. Hon. Lord Lloyd of Berwick in chapter 18 of his influential 1996 *Inquiry into*

⁷⁹ *Draft Enhanced Terrorism Prevention and Investigation Measures Bill* HL Paper 70 HC 495. Cm 8536, January 2013.

⁸⁰ See the report of the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills Committee (2010-2012): HL Paper 161, HC Paper 893, discussed in D. Anderson, *Report on the operation in 2010 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006*, July 2011, §§ 7.12-7.16 and 7.48-7.51. The reduction to 14 days was eventually given statutory force in the Protection of Freedoms Act 2012, section 57(1).

Legislation against Terrorism.⁸² The mechanism, though ponderous, has certain advantages. In particular:

- (a) The existence of a fallback Bill containing the former powers may help diminish concerns, at a time of continued uncertainty, about initiatives to liberalise anti-terrorism laws, and so provide the impetus for such liberalisation to take place.
- (b) It allows the time for pre-legislative scrutiny that may not be possible when an emergency Bill is introduced at a time of crisis.
- (c) The combination of Act and draft Bill may also provide a pragmatic solution to some of the problems of coalition government.

3.6. Most of those advantages could have been ensured also by the alternative means of inserting an order-making power into TPIMA 2011, whereby the Secretary of State (with the prior or subsequent approval of Parliament) could have introduced ETPIMs in circumstances specified in the Act. That solution would have had two further merits: statutory conditions could have regulated the exercise of the extraordinary power;⁸³ and it would have avoided the need to recall Parliament should the need for ETPIMs arise during recess.

3.7. Such an order-making power would have been preferred by the Joint Bill Committee, just as it would have been preferred by the equivalent Committee which considered the draft Bills on detention of terrorist suspects. I spoke favourably of it myself, before both Committees. It was largely rejected by the Government, on the basis that “*the additional powers that are contemplated are so stringent that they should not routinely be available on the statute book*”.⁸⁴ However, recognising the difficulties that would ensue should emergency primary legislation be required just before a General Election, TPIMA 2011 allows the Secretary of State to impose ETPIMs for up to 90 days where she considers that it is necessary to do so by reason of urgency when Parliament is dissolved.⁸⁵

Content of the draft ETPIM Bill

3.8. The idea behind the draft ETPIM Bill can be simply summarised. It would reintroduce the ***stricter restrictions*** that were characteristic of control orders, while granting the ***enhanced safeguards*** (notably, as regards maximum

⁸² Cm 3420, October 1986.

⁸³ Whereas no legal preconditions can be placed on the introduction of primary legislation.

⁸⁴ James Brokenshire MP, Parliamentary Under-Secretary for Crime and Security, in evidence to the Draft ETPIM Bill Committee, 31 October 2012, Q217.

⁸⁵ TPIMA 2011 sections 26, 27, echoing a similar provision regarding the extension of detention periods (which partly echoed my own advice to the equivalent Joint Bill Committee) in the Protection of Freedoms Act 2012, section 58).

duration) that exist under the TPIM regime. In one respect – the level of certainty that must exist as regards a subject’s involvement in terrorism-related activity [TRA] – those safeguards are exceeded.

3.9. So far as **permitted restrictions** are concerned, ETPIM notices – if they are ever legislated for – seem likely to resemble control orders. Relocation without consent to a different town or city will once again be permitted;⁸⁶ curfews will no longer be limited to the night-time period;⁸⁷ and much tighter restrictions will be available on movement, communication and association.⁸⁸ It is true that the list of possible restrictions will be exhaustive, whereas under PTA 2005 it was only illustrative.⁸⁹ The list is broadly drawn however, containing most or all of the restrictions that were in practice imposed as part of control orders.

3.10. So far as **duration** is concerned:

(a) The operative powers of the ETPIM Bill will last for only a year, unless extended – for a maximum further period of one year – after consultation with the Independent Reviewer of Terrorism Legislation, Intelligence Services Commissioner and Director-General of MI5.⁹⁰ Control order powers also lasted for only a year, but could be (and were) extended on an annual basis without limitation.

(b) Individual notices will be subject to the same two-year time limit as TPIM notices – though time served on a TPIM will not count towards time served on an ETPIM, or vice versa.⁹¹ This contrasts once again with control orders, which could be extended on an annual basis without limitation, and which in two cases were in force for more than four years.

(c) It will be possible to stop the clock by the revocation and revival of an ETPIM, in appropriate cases.⁹²

3.11. So far as **other safeguards** are concerned, the draft ETPIM Bill replicates the structures devised under PTA 2005 as repeated or developed in TPIMA 2011. Thus, if it is enacted:

(a) The Secretary of State will have to consider that the ETPIM as a whole and each measure in it was “*necessary*” for preventing or restricting the

⁸⁶ Schedule 1, para 1(3).

⁸⁷ Schedule 1, para 1(2)(c).

⁸⁸ Schedule 1, paras 2-5, 8 and 9.

⁸⁹ Clause 1(2).

⁹⁰ Clause 9.

⁹¹ Clause 4. If the introduction of ETPIMs coincided with the end of a two-year TPIM notice, the individual who had been subject to that notice could thus be placed under an ETPIM for up to two further years.

⁹² Clause 3 and TPIMA 2011 section 13.

individual's involvement in terrorism, and to keep the necessity of the ETPIM and of each measure in it under review throughout the period of the notice.⁹³

- (b) The same requirements will apply as under TPIMA 2011 in relation to consultations regarding the possibility of prosecution.⁹⁴
- (c) The same powers and safeguards will apply as under TPIMA 2011 concerning searches, seizures, fingerprints and samples.⁹⁵
- (d) Judicial supervision will follow the pattern familiar from PTA 2005 and TPIMA 2011: initial permission, automatic review and subsequent rights of appeal.⁹⁶
- (e) The Independent Reviewer appointed under TPIMA 2011 section 20 will conduct annual reviews of ETPIMs and prepare annual reports, to be sent to the Secretary of State and laid before Parliament.⁹⁷

3.12. So far as *involvement in TRA* is concerned, the draft ETPIM Bill, as indicated at 3.8 above, affords a higher safeguard to the individual than either PTA 2005 or TPIMA 2011. Before imposing a TPIM, the Secretary of State will have to be satisfied "*on the balance of probabilities*" that the individual is or has been involved in terrorism-related activity. That is a notably stiffer test than applied under PTA 2005 (where only reasonable suspicion of TRA was required), and a stiffer test even than applies to TPIMs (where the requirement is of reasonable belief). The only similar precedent for the balance of probabilities threshold is in the "*derogating control orders*", harsher measures than normal non-derogating control orders, provided for by PTA 2005⁹⁸ but never used.

3.13. This higher safeguard may be considered paradoxical, granted that ETPIMs are envisaged only in the event of "*a very serious terrorist risk that cannot be managed by other means*".⁹⁹ The conventional wisdom – that a major threat to national security may justify *lesser* protections for the individual – appears to have been turned on its head. Seeking logic in that outcome, one might conclude that a higher threshold applies because ETPIMs are potentially more onerous than TPIMs.¹⁰⁰ But if a balance of probabilities threshold can be accepted for ETPIMs (and indeed for derogating control orders), it is not easy to

⁹³ Clauses 2(3); 2(4); clause 3(1)(a) and TPIMA 2011 section 11.

⁹⁴ Clause 3(1)(a) and TPIMA 2011 section 10.

⁹⁵ Clause 3(1)(e) and Schedules 5 and 6.

⁹⁶ Clause 3(1)(a)(e) and TPIMA 2011 sections 16-18 and Schedule 4.

⁹⁷ Clause 6.

⁹⁸ Sections 4-6.

⁹⁹ ETPIM Bill Explanatory Notes, §6.

¹⁰⁰ As was the case with derogating control orders: PTA 2005 section 4(7). But unlike derogating control orders, which would have been made by the courts, it is envisaged that ETPIMs would be made by Ministers.

see why a lower standard should be applicable to TPIMs. I return to this at 11.47-11.52 and in Recommendation 8, below.

When might the ETPIM Bill be introduced?

- 3.14. No one can fetter the ability of Parliament to adopt such primary legislation as it thinks fit, for whatever reasons it thinks justifiable.¹⁰¹ However, I have not detected any present enthusiasm for the enactment of the ETPIM Bill, or any expectation that it will be introduced in the current threat climate. While acknowledging that “*it is always good to have a Plan B*”,¹⁰² the police, Government and agencies have all told me that they are content with the powers that they have.
- 3.15. It would be for Government to introduce the ETPIM Bill to Parliament. In the circumstances it is understandable that the Joint Bill Committee should seek clarification from the Security Minister as to the circumstances in which its introduction was envisaged.
- 3.16. The Security Minister stressed in response that the circumstances could not be circumscribed in advance, but offered two illustrative examples:
- (a) credible reporting pointing to a series of concurrent attack plots, all of which appeared imminent, or
 - (b) in the wake of a major terrorist attack, potentially with the prospect of further attacks to follow.¹⁰³
- 3.17. Such circumstances could indeed prompt the introduction of the ETPIM Bill. As Horne and Walker have stated, however:

“[W]hat should really be focused upon is not the threat but the capability of agencies dealing with it and whether they are overwhelmed.”¹⁰⁴

ETPIMs are not a general counter-terrorism power but rather (as the name suggests) an enhancement of an existing, very specific power. There could be no logical justification for proceeding with ETPIMs simply as a way of signalling a tough or decisive response to a major attack or increased threat. Any decision to

¹⁰¹ A point on which I expanded in my evidence of 11 July 2012 to the Joint Bill Committee, QQ9-11.

¹⁰² DAC Stuart Osborne, Head of Metropolitan Police Counter-Terrorism Command and Senior National Co-ordinator for Counter-Terrorism, evidence of 17 October 2012 to the Joint Bill Committee, Q80.

¹⁰³ James Brokenshire MP, evidence of 31 October 2012 to the Joint Bill Committee, Q213. The same formulation was used in the Government’s response of January 2013 to the Committee’s report: Cm 8536, §3.

¹⁰⁴ A. Horne and C. Walker, “The Terrorism Prevention and Investigation Measures Act 2011: one thing but not much the other?” (2012) Crim LR 421, 427.

introduce the draft ETPIM Bill to Parliament should be based not only on the existence of a threat, but on an assessment that it is necessary to supplement TPIMs by ETPIMs in order to deal with the threat –most obviously, because the sheer scale of the threat requires the redeployment of resources that were used to manage TPIMs but would not be required to manage ETPIMs.¹⁰⁵

- 3.18. Accordingly, I welcome the Government's recent acknowledgment, in its response to the report of the Joint Bill Committee, that "*A decision to enact the ETPIM legislation is unlikely to be triggered solely by a change to the overall terrorism threat in the absence of other factors.*"¹⁰⁶

How should Parliament be informed?

- 3.19. A question that preoccupied the Joint Bill Committee was how best to ensure that Parliament was in a position to verify that the introduction of ETPIMs was being proposed for good reason, given that:

"it is almost certain that a large part of the Government's case for legislation will rest on privileged intelligence information not publically available and unavailable to Members of Parliament."¹⁰⁷

- 3.20. The Joint Bill Committee recommended, in agreement with my own evidence,¹⁰⁸ that

"the Government takes steps to formalise a mechanism whereby a select group of properly vetted Members can be briefed in advance on the nature of the particular threat that necessitates the introduction of these measures.

and that:

"members of the ISC [Intelligence and Security Committee] should be briefed on the nature of the threat and then asked to formally communicate to Parliament a recommendation on whether, in its opinion, the Government's case for the need for the ETPIMs Bill has been made."¹⁰⁹

- 3.21. The Government responded that it "*would like .. to discuss with the ISC how they might be duly briefed*", and suggested that the most suitable approach may be

¹⁰⁵ Analogously to the latter point, the courts have held that the specific obligations to be imposed on an individual may depend, in part, on "*the resources available to the Secretary of State and the demands on those resources*": see 9.11, below.

¹⁰⁶ Cm 8536, January 2013, §3.

¹⁰⁷ Report of Joint Bill Committee, para 33.

¹⁰⁸ Evidence of 11 July 2012, QQ 16-19.

¹⁰⁹ *Ibid.*, paras 37-38.

for the Home Secretary to provide more detailed, confidential briefings to appropriately cleared members of each House.¹¹⁰

- 3.22. The issue of legislators being asked to approve measures, the exact basis for which is not divulged to them, arises in a number of national security sensitive contexts, and in all parliamentary democracies. In the United Kingdom, Parliament is expected to scrutinise orders proscribing terrorist organisations, despite not having access to the confidential information that prompted the Home Secretary's decision to proscribe, and – should the draft Bill ever be presented – scrutiny of the proposal to raise maximum detention periods for terrorist suspects from 14 to 28 days.
- 3.23. The potential for a well-informed ISC to make a meaningful contribution was seen in the recent debates in both Houses over the Justice and Security Bill. The ISC had recently visited the United States and had confidential discussions with security personnel and congressional committees there. On that basis, members of the Committee were able to express informed views on the likely implications of the Bill for the intelligence-sharing relationship. My own views, based on my own contacts in the US, were also referred to in debate.¹¹¹
- 3.24. As a supplement to the briefing of Members of Parliament, thought might be given to involving the Intelligence Services Commissioner and/or the Independent Reviewer, each of whom has the requisite security clearance and a statutory role in relation to the possible extension of both TPIM and ETPIM powers.¹¹² This could give Parliament a further, independent reference point in seeking to identify whether the introduction of the ETPIM Bill was necessary. It would not of course be a substitute for the advance briefing of Members of Parliament, which would remain the chief priority. See further Recommendation 2, below.

¹¹⁰ Government Response, Cm 8356, January 2013, §5.

¹¹¹ See e.g. Hansard HL 21 November 2012, cols 1825, 1838.

¹¹² TPIMA 2011 section 21(3); ETPIM Bill, clause 9.

4. THE TPIM SUBJECTS

- 4.1. TPIM subjects, like controlled persons before them, are usually anonymised in their own interests.¹¹³
- 4.2. While some statistical details are given in its quarterly reports (Annex 2), the Home Office does not release even the most basic details of individual TPIM subjects (save for confirming whether or not they are British citizens). In cases where reviews and/or appeals have been determined by the High Court, however, the open judgments generally contain a significant amount of detail. The amount that it is possible to say about the 10 TPIM subjects during the period under review thus depends on whether judgments in their cases have been given. That was the case for seven of the 10 who were subject to TPIMs in 2012, or nine if judgments in control order cases are included.

Statistical information

- 4.3. The four quarterly reports required during 2012 by TPIMA 2011 section 19 were laid before Parliament 26 days, 19 days, 7 days and 6 days respectively after the end of the reporting period. The increased promptness in the second part of the year is to be welcomed. Copies of the relevant quarterly reports (which cover the period from 15 December 2011 to 30 November 2012) are at Annex 2 to this report.
- 4.4. The information in those reports may be simply summarised:
- (a) Nine TPIMs were served early in 2012, on the nine British citizens who had been subject to control orders at the expiry of that regime.
 - (b) One further TPIM was served in the autumn quarter (September-November), on a non-British citizen, bringing the total to 10.
 - (c) No TPIM notices were revoked (though CC's TPIM notice was revoked in January 2013, after he was remanded in custody when charged with breaches of his TPIM).
 - (d) No TPIM notices were revived or extended during the period under review.¹¹⁴
 - (e) 64 variations to measures specified in TPIM notices were made, and 45 applications to vary such measures were refused.¹¹⁵

¹¹³ *SSHD v AP (No. 2)* [2010] UKSC 26.

¹¹⁴ An extension is possible, under TPIMA 2011 section 5, only once a TPIM notice has been in force for a year. There were six extensions in January 2013: see 4.16, below.

(f) Two individuals were charged with breaching a TPIM under TPIMA 2011 section 23, one in the spring quarter (March-May) and one in the summer quarter (June-August). There were no convictions during 2012.

(g) No one subject to a TPIM notice was charged with or convicted of any other offence.

4.5. In my previous report I regretted the discontinuance, in the last quarter of 2011, of the Government's previous practice of giving a geographical breakdown of TPIM subjects as between London and the rest of the country. As I noted at the time, this may have been connected with the ending of relocation, and the consequent expectation that a number of controlled persons would be returning to London from elsewhere.¹¹⁶ Now that the particular sensitivities created by the Olympic and Paralympic games no longer exist, I am emboldened to repeat last year's proposal that a regional breakdown of TPIM subjects should be given in the Home Office's quarterly reports: see Recommendation 3, below.¹¹⁷ No reason against this proposal was given in the Government's response, it merely being stated that "[w]e will keep inclusion of this information under review".¹¹⁸

4.6. What can be said is that:

(a) Six of the nine persons subject to control orders at the end of 2011 (BM, BX, CC, CD, CE and CF) had been subject to relocation; and that

(b) As of 10 September 2011, only one controlled person was in London.¹¹⁹

The return of several relocated men to London after their control orders were replaced by TPIMs is documented in the open judgments in their cases.

The individual TPIM subjects

4.7. Ten men were subject to TPIMs at the end of the period under review. Nine of them – all British citizens – had previously been subject to control orders for periods ranging from a few months to almost five years. The tenth – a foreign national – was placed under a TPIM notice in October 2012.

4.8. Each of the TPIM subjects was suspected of Islamist terrorism. As in previous years, no TPIM notice was made in connection with Northern Ireland-related terrorism (despite the threat level in Northern Ireland remaining at "severe"). The reasons for this, as I noted last year, include both the difficulty of preventing

¹¹⁵ Both figures are appreciably lower than the equivalent figures for the last year of control orders (265 and 87: see D. Anderson, *Control Orders in 2011*, 4.3 and Annex 6).

¹¹⁶ D. Anderson, *Control Orders in 2011*, March 2012, 4.4.

¹¹⁷ *Ibid.*, Recommendation 6(c).

¹¹⁸ Government Response of September 2012, Cm 8443, p. 8.

¹¹⁹ D. Anderson, *Control Orders in 2011*, March 2012, 4.9 and Annex 5 p. 113.

absconding across the Irish border and undesirable echoes of internment and of the exclusion orders that were so resented in the nationalist community in the late 20th century.

- 4.9. Open judgments were handed down during 2012 in relation to seven of the ten TPIM subjects.¹²⁰ Though these men can be identified only by letters (which are not the initials of their names), the judgments in each case clearly outline the reasons why the Home Secretary believed that TPIMs were required, and some of them, for example in the cases of AY, CC, CF and CD, contain considerable detail.
- 4.10. A full picture of the case against these seven men can be obtained only by inspecting the closed judgments, which are classified as Top Secret. Though this is inevitable in view of the subject matter, it is of course not ideal: full confidence in any judicial process depends on both the process and its product being fully exposed to the public. The closed judgments contain no major surprises, because at least the gist of each element of the Government's case is disclosed to the TPIM subject and recorded in the open judgment.¹²¹ However, the detailed evidence referred to in closed judgments (whether it is the result of electronic surveillance, human source reporting or intelligence provided by other sources) has never been disclosed to the TPIM subject. While it is always shown to the special advocates acting on the subject's behalf, who are free to cross-examine the witness provided by MI5, to make submissions on the evidence and to apply for it to be released into open, they cannot take instructions on it from the subject, and are in practice unable to locate or to call contrary evidence.
- 4.11. I have reviewed all the closed judgments so far given in TPIM cases. Each one sets out the secret matters which are relied upon in support of the conclusions that are given (and supported by open reasoning) in the open judgment. The closed judgments vary greatly in length, depending on the complexity of the points raised and how much of the relevant evidence had to be given in closed. Some are shorter than the open judgments that they accompany; some are longer. They indicate to me that as would be expected, the High Court judges in question dealt fully and conscientiously with the closed evidence that it fell to them to consider. In many cases, their conclusions derive substantial support from the closed evidence.

¹²⁰ *SSHD v BM* [2012] EWHC 714 (Admin); *BF* [2012] EWHC 1718 (Admin); *SSHD v AM* [2012] EWHC 1854 (Admin); *SSHD v AY* [2012] EWHC 2054 (Admin); *SSHD v CC and CF* [2012] EWHC 2837 (Admin); *SSHD v CD* [2012] EWHC 3026 (Admin). Each judgment is freely available to all via the BAILII website.

¹²¹ In accordance with the judgment of the House of Lords in *SSHD v AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269.

4.12. The open judgments, available to any interested reader, reveal the following information about the men subject to TPIMs during 2012:

(a) **AM** is a British citizen aged 24 in 2012, placed in June 2007 under a control order that was upheld (with some modifications) by Wilkie J in December 2009. An appeal to the Court of Appeal, and three modification appeals, were unsuccessful. The control order was replaced by a TPIM notice in January 2012, which was upheld by Mitting J in July 2012 after a four-day hearing. At that hearing, AM's involvement in TRA, though not formally conceded, was "*not a live issue*".¹²²

AM was suspected of would-be participation in the airline liquid bomb plot of 2006 [**the Overt plot**], described by Mitting J as "*a viable plot to commit mass murder by bringing down transatlantic passenger airlines by suicide bombings which was disrupted by the arrest and prosecution of a number of individuals in the United Kingdom on 9th August 2006*", and by Enriques J, who presided over one of the three Overt trials, as the "*most grave and wicked conspiracy ever proved within the jurisdiction*".¹²³ The plot led to 12 convictions and eight life sentences, but AM was never arrested or put on trial. Mitting J however found "*a compelling case*" that AM had been involved in TRA, adding that "*But for the disruption of the transatlantic airlines plot, there is every reason to believe that AM would have killed himself and a large number of other people.*" The Secretary of State was reasonably entitled to believe that:

- AM had received terrorist training in Pakistan during 2004 and 2005 (aged 16 and 17);
- AM had been contacted shortly before the arrests by an acquitted defendant, whose role in the plot was to act as explosives advisor and co-ordinator in the United Kingdom, and whose purpose was to provide AM with details of his role in the plot and to help him make a martyrdom video; and that
- AM remained committed to future TRA, as he explained to an associate in October 2006, and he did not tell the truth about the purpose of a trip to Oman in April 2007.¹²⁴

¹²² *SSHD v AM* [2012] EWHC 1854 (Admin), §8.

¹²³ Quoted by Silber J in *SSHD v AY* [2012] EWHC 2054 (Admin) at §46. 12 individuals were convicted after three trials, eight of receiving life sentences with minimum terms of between 18 and 40 years.

¹²⁴ Wilkie J found in 2009 that AM "*remains prepared to be a martyr in an attack designed to take many lives*", describing him as "*highly trained, security conscious and committed*". The reasoning in Wilkie J's judgment was described by the Court of Appeal in June 2011 as "*meticulous and compelling*".

(b) **AY** is a British citizen, aged 30 in 2012. In August 2006 he was arrested on suspicion of involvement in the Overt plot, placed on trial and acquitted in September 2008 whereupon he was placed under a control order. The control order was upheld in July 2010 by Owen J,¹²⁵ and replaced by a TPIM notice in January 2012 which was itself upheld by Silber J after a three-day hearing in July 2012.

Silber J concluded there to be “*an overwhelming case*” that the Secretary of State was reasonable in her belief that AY had been involved in TRA. He described the assessments of MI5 as fair and reasonable. Those assessments were, in summary, that:

- AY was a key co-ordinator in the Overt plot and had been sent to the UK from Pakistan to assist Assid Sarwar (who was sentenced to life imprisonment for his part in the plot, with a minimum of 36 years) with the development of explosive devices.
- AY had carried out terrorist training between 2002 and 2006 with other members of the Overt plot. He had collated suicide videos and had planned to travel to the North West of England in order to brief AM on the construction of IEDs and to record a martyrdom video.

Silber J also noted that though further incriminating evidence relating to AY emerged at the second of the three Overt trials, it was decided not to prosecute him again.

(c) **BF** is a British citizen aged 30 in 2012, married with three children and employed until 2010 as a train driver. His first control order, imposed in March 2009, was revoked when he was charged with an alleged attempt to travel to Pakistan for TRA earlier that year and made subject to bail terms similar to those of his control order. After his acquittal by a jury in November 2010, he was placed under a further control order. He was then arrested in April 2011 on suspicion of various breaches of the control order for which there was alleged to be no reasonable excuse. However, after receipt of a psychiatric report, no evidence was offered and formal verdicts of acquittal were entered in December 2011. The control order was replaced by a TPIM notice in January 2012. That TPIM notice was upheld by McCombe J in June 2012 after a four-day hearing. He echoed the conclusions of Davis J on a previous control order review, again heard over four days.¹²⁶

Both Davis J and McCombe J had “*no doubt*” that BF had been involved in TRA, accepting the assessment of MI5 that he had been part of a network of

¹²⁵ [2010] EWHC 1860 (Admin).

¹²⁶ *SSHD v BF* [2011] EWHC 1878 (Admin).

UK extremists seeking to obtain terrorist training in Pakistan, that he had travelled to Pakistan for such purposes in 2008 and that he had intended to do so again in 2009.

- (d) **BM** is a British citizen aged 39 in 2012, married with five children. His assets were frozen in 2007 and he was placed under a control order in May 2009, which was replaced by a TPIM notice in January 2012. He was relocated from London to Leicester in May 2009, but returned to London in July after a successful appeal against this relocation. In March 2010 he was relocated to Bristol, where he remained until the control order expired whereupon he returned to East London. His control order was upheld by the High Court in February 2010, but quashed by the Court of Appeal, following “*an unacceptable and unexplained delay*”,¹²⁷ in April 2011. A further control order was then served upon him. The validity of that control order, and the subsequent TPIM notice, were upheld by Collins J after a four-day hearing in March 2012.

As to the alleged TRA, Collins J:

- was satisfied on the balance of probabilities that BM was involved in TRA prior to August 2007, mainly in Pakistan but also in the UK;
- had no doubt that after April 2009, BM was involved in facilitating his brothers’ travel to Pakistan for TRA;
- found that it was established “*at least to the standard of reasonable belief*”, after consideration of eight further allegations (which included planning to abscond to Pakistan for TRA, and co-ordination of attempts to transfer funds to his brothers), that “*he is likely to pursue TRA if not subjected to a TPIM*”.

- (e) **CC** is a British citizen, whose age is not stated in the open judgment. He was served with a control order in March 2011, on his return from Somalia, and with a TPIM notice in February 2012. Both were upheld by Lloyd Jones J after a 10-day hearing (also covering the case of CF) on 19 October 2012.¹²⁸

Lloyd Jones J came to the “*clear conclusion*” that the Secretary of State had reasonable grounds for believing that CC had been involved in TRA, on the basis of evidence that:

¹²⁷ *SSHD v BM*, para 12.

¹²⁸ An application for judicial review, focusing on CC’s Schedule 7 examination, was also brought: *CC v MPC and SSHD* [2011] EWHC 3316 (Admin).

- CC was closely linked to a well-established network consisting of an East Africa-based group and a UK-based group, whose functions were to support the activities of associates in Somalia, to seek to recruit and radicalise further individuals and to co-ordinate the transfer of money, equipment and individuals to Somalia.
 - He received terrorist training in 2008 from experienced al-Shabaab operatives in Somalia, and fought on the front line in support of al-Shabaab.
 - He facilitated the travel of several individuals from the UK to Somalia to enable them to take part in terrorism-related activity.
 - He facilitated the support of the UK-based network for TRA in Somalia, including by procuring funds.
 - Between 2008 and 2010 he was engaged in procuring weapons for use in furthering his TRA, including fighting and attack plans.
 - He played a role in planning attacks in Somalia and overseas, including an attack intended for the Juba Hotel in Mogadishu in August 2010.
 - Shortly before his arrest he was involved in attack planning, potentially intended for western interests in Somaliland.
- (f) **CD** is a British citizen who was 28 in 2012. He was served with a control order in February 2011, which required him to be relocated from north London to Leicester. His challenge to the relocation was rejected by Simon J in May 2011, and his challenge to the control order by Owen J in July 2011. He was charged with breaching the control order and remanded in custody at HMP Belmarsh from June to September 2011. At his trial for these breaches he was acquitted on two charges: 13 others, on which the jury could not agree, were left on the file. In January 2012 the control order was replaced by a TPIM notice, and CD returned to London. The TPIM notice was upheld by Ouseley J after a 3-day hearing in November 2012.

Ouseley J recorded that Condition A was “*amply satisfied*”, adding “*I believe, and firmly so, that CD has been involved in terrorism-related activity, although to a markedly reduced extent since the imposition of the Control Order and TPIM*”. He accepted the assessments of MI5, to the effect that:

- He attended a terrorist training camp in Cumbria in 2004, his companions including four of the five attempted suicide bombers involved in the failed attacks on London on 21 July 2005.
- He undertook “extremist training” in Syria between 2005/06 and 2009, and began developing plans to launch attacks against the United Kingdom while he was there.
- On his return from Syria in 2009, he raised funds for procuring firearms, attempted to procure firearms from North London-based criminal associates and (displaying a very high level of security awareness) developed plans to carry out attacks potentially using firearms.

(g) **CF** is a British citizen, whose age is not stated in the open judgment. He was served with a control order in May 2011 and with a TPIM in January 2012. Both were upheld by Lloyd Jones J after a 10-day hearing (also covering the case of CC) in October 2012.

Lloyd Jones J came to the “*clear conclusion*” that CF had been involved in TRA. That conclusion was supported by evidence that:

- He sought to travel to Afghanistan in 2008, to fight jihad and engage in suicide operations. There was clear evidence of this, notwithstanding his acquittal at a criminal trial in which he was charged with terrorism offences arising out of this attempted travel.
- He undertook terrorist training in Somalia after June 2009, having absconded from bail during his criminal trial in the United Kingdom. He was involved in fighting alongside al-Shabaab.
- He was linked to the group of six British citizens with which CC was associated, providing advice to others on travelling to Somalia, and attempting to recruit fighters in the UK for fighting overseas.
- He engaged in fund-raising activities for al-Shabaab.
- He was involved with CC’s attack plans to target Western interests in Somaliland.

The Judge commented that while CF may not have operated at the same level within the network as CC, his involvement was “*undoubtedly real and substantial*”.

4.13. Strikingly, and notwithstanding a marked judicial tendency to draw adverse inferences from silence,¹²⁹ at none of these hearings did the TPIM subject choose to give oral evidence.¹³⁰

4.14. Of the three men currently subject to TPIMs whose cases have not been reviewed in 2012:

(a) **BX** was placed under a control order in October 2009 and relocated to the West of England shortly thereafter. His appeal against that relocation was rejected in May 2010, Collins J judging that “*it is too dangerous to permit him to be in London even for a short period*”.¹³¹ BX chose not to press his control order to a review hearing. The control order was replaced by a TPIM notice in January 2012: as he had done in relation to his control order, BX chose to discontinue the quasi-automatic review process.

On New Year’s Eve 2012, the anonymity order under the TPIM was lifted and the police reported that a person named as Ibrahim Magag had absconded from his TPIM on 26 December. The equivalent anonymity order under BX’s control order was also lifted, allowing BX to be identified as Ibrahim Magag.

In 2010 Collins J described the case against BX as being that he had attended a training camp in Somalia, and financed and arranged travel for terrorism to East Africa.¹³² In a 2012 judgment in another case, Ibrahim Magag was named as a member of the UK-based network for TRA in Somalia with which CC and CF were also connected.¹³³

(b) **CE** is a British citizen of Iranian origin, aged 28 in 2012. He was placed under a control order in March 2011, and relocated to a place not specified in the open judgment. An appeal against the relocation, due to be heard in April 2011, was withdrawn. The control order, including the relocation condition, was upheld by Lloyd Jones J in December 2011 after a 7-day hearing.¹³⁴ It was replaced by a TPIM notice in January 2012.

The Home Secretary’s case in relation to the control order was that CE:

- received terrorist training in Somalia in 2006-07;

¹²⁹ 9.21-9.22, below.

¹³⁰ Though AM gave evidence in his 2009 control order review proceedings before Wilkie J, who described him as “*a determined and systematic liar*”: *SSHD v AM* [2009] EWHC 3053 (Admin) §193.

¹³¹ *BX v SSHD* [2010] EWHC 990 (Admin) §§ 18, 22.

¹³² *Ibid.*, §7.

¹³³ *SSHD v CC and CF* [2012] EWHC 2837 Admin, §35(5).

¹³⁴ *SSHD v CE* [2011] EWHC 3158 and 3159 (Admin).

- after his return, was part of a network of UK and East Africa-based Islamist extremists which provided extensive funds to Somalia for terrorism-related purposes;
- attempted to travel to Somalia in 2010; and
- had a continuing intention to travel to Somalia to engage in TRA.

Lloyd Jones J considered that the Home Secretary had reasonable grounds to suspect that CE had engaged in TRA, for each of the above reasons (suspicion, rather than belief, being the applicable test under PTA 2005). The review of CE's TPIM was stayed at the subject's request behind his abortive appeal from the December 2011 judgment of Lloyd Jones J, and is expected to be heard during 2013.

- (c) **DD** is a non-British citizen, never under a control order. He was acquitted of terrorism offences after a trial in 2009 and placed under a TPIM notice for the first time in October 2012. He is believed by the Home Secretary to have been associated with the funding and promotion of TRA in East Africa. No further information about him is likely to become public until an open judgment is given in a case concerning his TPIM notice. Like BX, however, he has waived his right to have his TPIM notice reviewed at a section 9 hearing.

The TPIM subjects - summary

4.15. As may be seen from the above individual pictures:

- (a) The allegations against some TPIM subjects are at the highest end of seriousness, even by the standards of international terrorism. The cases against AM and AY, said to have been respectively a would-be suicide bomber and a key co-ordinator of the airline liquid bomb plot of 2006, stand out, as do the cases against CC, CF and CD – each of them alleged to be a hardened terrorist involved in attack planning in the UK or abroad.
- (b) The open allegations against some other TPIM subjects, though still serious, are not of the same order. Thus BF is alleged to have undergone terrorist training in 2008 and to have attempted to travel to Pakistan for further training in 2009, but is not alleged to have participated in funding, recruitment or attack planning. When BX absconded at the end of 2012, the Security Minister said that his TPIM “*was intended to prevent fundraising and*

overseas travel”, adding “*We do not believe his disappearance is linked to any terrorism planning in the UK*”.¹³⁵

- (c) Four TPIM subjects (BF, AY, CF, DD) have previously been acquitted of charges which continue to form at least part of the case against them.
 - (d) There has been no requirement that the relevant allegations be proved, whether beyond reasonable doubt or on a balance of probabilities, under either the control order or the TPIM regime.
 - (e) The Home Secretary’s belief that the subject was involved in TRA, and her decision that a TPIM notice was necessary to protect the public, were however upheld as reasonable by a High Court judge in each of the seven TPIM cases so far to have been reviewed.
 - (f) In some cases (AM, AY, BF, CD, CF), the judges used language suggesting that a higher test might also have been satisfied.
 - (g) Nine of the 10 TPIM subjects were previously subject to control orders, four of them for more than two years.¹³⁶ The two alleged to have been associated with the Overt plot had been subject to control orders since 2007 (AM) and 2008 (AY) respectively.
- 4.16. Six of the 10 TPIM subjects (AM, BF, BM, CD, CE and CF) had their TPIM notices extended for a second year in January 2013. Unless there is evidence of their involvement in “*new*” TRA after January 2012, or unless their TPIM notices are revoked, the constraints on each of those subjects will thus definitively expire, without the possibility of extension or replacement, in January 2014.¹³⁷
- 4.17. Of the other four:
- (a) One (DD) has been subject to TPIMs only since October 2012, and is thus still in the first year of his TPIM notice.
 - (b) One (CC, who is in custody awaiting trial for breach) had his TPIM notice revoked in January 2013.
 - (c) The TPIM notices of two (AY, who was then in custody, and BX who absconded) were allowed to expire in January 2013.

¹³⁵ “Terror suspect absconds while being monitored”, Daily Telegraph website, 31 December 2012.

¹³⁶ The periods for which the initial nine TPIM subjects (who are identical to the last nine controlled persons) had been under control orders are set out in tabular form in D. Anderson, *Control Orders in 2011*, 4.11. The similar table at 3.47 shows that over the duration of the control order regime, a total of 15 people were subject to control orders for longer than two years.

¹³⁷ As a consequence of TPIMA 2011 sections 3(2), 3(6)(b) and 5(3)(b).

TPIM notices which have been revoked or allowed to expire may in future be revived if the statutory conditions are met.¹³⁸

¹³⁸ TPIMA 2011, section 13(6).

5. THE MEASURES IMPOSED

- 5.1. The twelve categories of measure permitted under TPIMA 2011 Schedule 1 are summarised at 2.9, above. The actual restrictions imposed as conditions of each of the TPIM notices in force during 2012 are presented in tabular form at Annex 3 to this report.
- 5.2. A typical notice is reproduced at Annex 4 to this report. Each of the ten TPIM notices contained a comprehensive range of restrictions. They resemble in that respect the later control orders, but differ from many of the early control orders, which contained a relatively small range of restrictions (limited in some cases to the removal of passport and a requirement to report to a police station). No such “*light touch*” measures have been in force since 2010.¹³⁹
- 5.3. Each measure to have been the subject of a judgment so far was upheld by the High Court, save for the association measure in the case of *AM* which was directed to be modified.
- 5.4. The restrictions imposed under the TPIM regime were in significant respects less onerous than those which were imposed as part of control orders. The main differences between measures forming part of control orders and TPIM notices are summarised below.

The ending of relocation

- 5.5. The end to ***involuntary relocation*** was the most significant change and also the most publicised, since it brought six controlled persons back to London at the start of Olympic Year. During the lifetime of the control order regime (2005-2011), 23 controlled persons out of the total of 52 were relocated for national security or practical reasons, not including those who moved voluntarily.¹⁴⁰ Relocation was in some cases very strongly resented by those subject to it, and their families, who claim to have encountered loneliness and racism in the places to which they were relocated. In four cases relocations were struck down by the courts (three times because they were considered disproportionate, and once on disclosure grounds). The others were however upheld as necessary and proportionate by the High Court.
- 5.6. Involuntary relocation to an unfamiliar location (usually two or three hours’ journey from the controlled person’s home) has now ended, though it should be noted that the power remains to require a TPIM subject to reside in “*premises*

¹³⁹ Light-touch orders on BB and BC had been substituted in October 2009 for the previous more onerous control orders, in the hope of avoiding the *AF (No. 3)* gisting obligation. That hope was dashed by the judgment of Collins J in *SSHD v BC* [2010] EWHC 2927 (Admin), [2010] 1 WLR 1542.

¹⁴⁰ The 13 are identified by initials in D. Anderson, *Control Orders in 2011*, March 2012, fn 81.

provided by or on behalf of the Secretary of State that are situated in an appropriate locality¹⁴¹ This must be a locality in which the subject has a residence or connection. Eight out of the 10 TPIM notices in 2012 required the subject to reside in accommodation provided by the Home Office.¹⁴² The extent of a “locality” is an issue that has not yet been tested in the courts.

5.7. It was a bold step to remove a relocation power, which even as the TPIM Bill was going through Parliament, was being described by the Home Secretary – supported by the courts – as necessary for the purposes of protecting the public from men believed to be dangerous terrorists. As the courts have consistently found, relocation could be effective in disrupting terrorist networks that were concentrated in particular areas, and could also reduce the risk of abscond (which may be assumed to be easier in areas where associates are available to help).

5.8. However, I did not oppose the change and do not do so now. As I said in my report of last year:

“Relocation was not indispensable. A majority of control orders never featured relocation, and in other cases relocations were struck down by the courts. It is also the case that increased surveillance may in some cases be an alternative to relocation – though the two are not exact substitutes, since the purpose of covert surveillance is to detect rather than to disrupt.”¹⁴³

5.9. The effects of reversing an involuntary relocation are neither uniform nor, always, predictable. Surveillance may need to be more intensive when a subject is close to former associates. Furthermore, there is the possibility that an end to relocation will make it easier for a subject to abscond.¹⁴⁴ However:

(a) To allow a subject back home may expose him not only to malign influences but also to the beneficial influence of family and friends. This may help encourage and facilitate a change in outlook – sometimes the only viable exit strategy from a TPIM order.¹⁴⁵ I have seen limited evidence of this tendency during the year under review.

(b) There is always the possibility, at least in theory, that a subject who is close to former associates will be tempted into TRA which, if detected, could enable him to be dealt with through the criminal justice system. That may be considered preferable to serving out a TPIM notice in a town where he

¹⁴¹ TPIMA 2011, Schedule 1 paras 1(3)(b) and 1(4)

¹⁴² Annex 3 to this report.

¹⁴³ *Ibid.*, 6.13.

¹⁴⁴ See 8.17-8.23 and 11.30-11.32, below.

¹⁴⁵ As the High Court said in a case when it directed the relaxation of an association measure for exactly this reason: *SSHD v AM* [2012] EWHC 1854 (Admin), §30; see also *SSHD v CC and CF* [2012] EWHC 2837 Admin, §§ 67-69.

remains potentially dangerous but does not act because he has no accomplices.

- 5.10. The reason the public was not thought endangered by the removal of the relocation power is because the change to TPIMs was accompanied by a very substantial additional grant to the police and MI5. As a result, the Director General of MI5 was able to say that the changes – including, notably, the ending of involuntary relocation – had resulted in “*no substantial increase in overall risk*”.
- 5.11. There will be some for whom the concept of relocation (or “*internal exile*”, as it was dubbed by some NGOs) is so abhorrent that no price would have been too high to see its removal. Others would wish to see the price tag before making up their minds. It is unfortunate, therefore, that the amount of the additional resources is not in the public domain. Though there was talk before a parliamentary committee of £50 million, that figure was not confirmed and is in any event meaningless in the absence of some indication of the time period over which it extends.¹⁴⁶ Accordingly, while the committee in question appears to have believed that the financial cost of the move to TPIMs was justified,¹⁴⁷ the material is not there upon which others could form a view.

Ending of the power to search premises at any time

- 5.12. One little-remarked aspect of the change from control orders to TPIMs is the ending of the former power for the police to search the premises of the subject at any time for the purposes of ascertaining whether control order obligations had been or were about to be contravened.¹⁴⁸ This power was a cause of considerable anxiety to controlled persons and their families, not just by its exercise but by anticipation of its exercise. As one family member of a controlled person put it:

“One of the most testing and strenuous effects of living with someone under virtual house arrest is the lack of privacy. Police officers retain the right to come and go as they please and unannounced. They are free to search your property whenever they visit and the restrictions on the detainee’s freedom results in an entire restructure of your life. ... The fear of what tomorrow may bring makes sleeping virtually impossible and the nights endless. On many

¹⁴⁶ DAC Stuart Osborne, Senior National Coordinator for Counter-Terrorism at SO15, said to the Joint Committee on the Draft ETPIM Bill, 17 October 2012, Q63: “*I think total package was £50 million; not all of that went to policing.*” An enigmatic footnote however adds “*This figure is not ratified or confirmed at this time*”.

¹⁴⁷ Report of the Joint Committee on the Draft ETPIM Bill, Session 2012-13, HL Paper 70, HC 495, 21 November 2012, §64: “The shift from control orders to TPIMs is a welcome step in terms of rebalancing liberty against security but this rebalancing has come at an increased cost to the taxpayer. We believe that this financial cost is justified to ensure that measures like ETPIMs remain the exception and not the norm.”

¹⁴⁸ See, e.g., the sample control order at Annex 2 of D. Anderson, *Control Orders in 2011*, March 2012, p. 89, 7.2).

occasions I looked out the window in the early hours of the morning after morning prayer just to calm myself. Any shuffling outside our front door, any slight movement fill me with dread, the heart-sinking feeling experienced during three previous early morning raids.”¹⁴⁹

- 5.13. The removal of the power to search the premises at any time without a warrant has reduced (though not, of course, eliminated) the permanent anxiety that may understandably be experienced in houses occupied by a TPIM subject. It has also reduced the opportunities for interaction between police and the subject and his family.

Controls on movement, association and communication

- 5.14. While TPIM subjects remain subject to “*no-go areas*”, for example streets or estates lived in by known associates and (prior to and during the Games) the Olympic Park and other venues, they are not restricted to particular patches of territory as controlled persons could be and frequently were. When combined with the ending of relocation, this change is significant. A controlled person could be forced to live in an unfamiliar town, two hours or more distant from his home, and confined save with the consent of the Home Office to a particular area of that town – albeit an area that always included a mosque and other vital facilities.¹⁵⁰ A TPIM subject, by contrast, lives at home or close to home, and within the constraints of his reporting requirement may travel to any place that is not specifically prohibited.
- 5.15. So far as association is concerned, the practice under many control orders was to prohibit all pre-arranged meetings outside the home, save for specified categories of person or with the prior agreement of the Home Office.¹⁵¹ Under a TPIM notice, prior permission for association may be required only in respect of specified persons or descriptions or persons, though notification may still be required.¹⁵²
- 5.16. Whereas controlled persons could be deprived of any telephone or computer access, TPIM subjects must be allowed a landline, a mobile phone without internet access and an internet-enabled computer.¹⁵³ There may however be imposed a requirement of prior approval for any website the subject wishes to visit. Other permissible requirements which have been considered appropriate in

¹⁴⁹ The wife of controlled person CA, writing in *The Muslim Weekly* on 16 December 2011. She was described by the High Court Judge Mitting J as “*an impressive witness and person*”, the truth of whose evidence was accepted “*without reservation*”: *CA v SSHD* [2010] EWHC 2278, §3.

¹⁵⁰ See, e.g., the sample control order at Annex 2 of D. Anderson, *Control Orders in 2011*, March 2012, at p. 91, 11).

¹⁵¹ *Ibid.* at pp. 87-88, 5).

¹⁵² TPIMA 2011, Schedule 1 para 8.

¹⁵³ TPIMA 2011, Schedule 1 para 7(3).

particular cases include a ban on entering computer or phone shops, and a ban on public or broadcast lecturing or discussion.

Reporting requirement

- 5.17. The requirement to report daily to a police station survives (save in two TPIM notices, where it is substituted by a requirement to telephone the monitoring company). The reporting requirement aggravates some TPIM subjects, who cannot understand why it should be considered necessary when a GPS tag is able to disclose their location. Some of the reasons may be given in open.¹⁵⁴ In other cases, they are developed in closed session, with only special advocates to represent the interests of the TPIM subject, and decided upon in a closed judgment.¹⁵⁵

Overnight residence measures

- 5.18. Curfews under the first control orders in 2005 were uniformly set at 18 hours, providing some justification for those who described the regime as akin to house arrest. Curfew lengths however subsequently declined, partly as a consequence of litigation¹⁵⁶ and partly because of a more flexible and individual approach. In both 2010 and 2011, the average length of curfew was between 11 and 12 hours.¹⁵⁷ In 2012, as may be seen from Annex 3, the overnight residence requirement in a TPIM notice never exceeded 10 hours and averaged 9.4 hours.

¹⁵⁴ *SSHD v CD* [2012] EWHC 3026 (Admin), §25.

¹⁵⁵ *SSHD v CC and CF* [2012] EWHC 2837 (Admin), §73.

¹⁵⁶ *SSHD v JJ* [2007] UKHL 45, [2008] 1 AC 385, in which an 18-hour curfew was said to amount to a deprivation of liberty, in breach of Article 5 ECHR. Curfews in excess of this however continue to be ordered as bail conditions in immigration cases: for a particularly onerous example, see the 22-hour curfew imposed on Omar Othman (Abu Qatada) in February 2012 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/othman-bail-order.pdf>.

¹⁵⁷ A table showing the duration of curfews year by year, extracted from reports of the Independent Reviewer, is provided by A. Hunt in his article "From control orders to TPIMs: variations on a number of themes in British legal responses to terrorism", (2013) *Crime, Law and Social Change* 59. As he points out, the average curfew length in 2011 was 11.1, hours not (as stated in Annex 1 to my last report) 11.9 hours.

6. IMPOSITION, VARIATION AND EXTENSION

Purpose of review

- 6.1. It is not my function to second-guess the decisions of the Home Secretary as to whether the conditions for making a TPIM notice in any particular case were made out.¹⁵⁸ The High Court adjudicates on the lawfulness of those individual decisions at the end of the section 9 review that takes place automatically in these cases. Though some control orders (and some conditions imposed as part of control orders) have in the past been struck down by the courts, TPIM notices have been substantially upheld, by six different High Court Judges, in the seven section 9 reviews that have been held to date.
- 6.2. By examining the file in each of the 10 cases in which TPIM notices were made during 2012, I have been able:
- (a) to evaluate the quality of the advice given to Ministers, and the manner in which Ministers approached their task;
 - (b) to check for any systemic faults in the way TPIMs are imposed; and
 - (c) to understand, and review in outline, the basis on which it is said that TPIM subjects could not have been prosecuted for terrorism offences.

Transition from control orders

- 6.3. The nine control orders that were in force immediately before commencement of TPIMA 2011 (on 15 December 2011)¹⁵⁹ were either revoked during the 42-day transitional period or ceased to have effect at the end of it. All nine individuals were served with TPIM notices in January (or in the case of CC, who had been in custody, February) 2012.

Procedure for imposing TPIM notices

- 6.4. The procedure for imposing TPIM notices is very similar to the procedure for making control orders that I described in my last report.¹⁶⁰
- 6.5. The five statutory conditions which must be satisfied before a TPIM notice can be imposed are set out at 2.3, above. The key requirements are that the Secretary of State must reasonably believe the intended subject to be or to have

¹⁵⁸ As the role of Independent Reviewer was described to Parliament, during the debate that placed it on a regular footing: “[H]e would not be an appellate authority. It would not be his task to say that the extension of the detention of Mr. Smith was wrong but that of Mr. Jones was right.”: Lord Elton (Home Office Minister), Hansard, HL Deb 8 March 1984, vol 449 col 405.

¹⁵⁹ TPIMA 2011 section 31(2).

¹⁶⁰ D. Anderson, *Control Orders in 2011* (March 2012), 3.4-3.8.

been involved in TRA (Condition A), that the imposition of TPIMs is necessary for purposes connected with protecting members of the public from a risk of terrorism (Condition C) and that each specified TPIM is necessary for the same purpose (Condition D). The feasibility of prosecution must also be considered, as discussed at 2.5-2.6, above.

- 6.6. I have inspected the full files for each of the 10 TPIM notices imposed during 2012, nine of them in relation to subjects who had previously been subject to control orders. I have also visited the CPS to read the secret advice that was given in each case on to the prospects for prosecution, and to speak to some of the lawyers in the Special Crime and Counter-Terrorism Division of the CPS who are entrusted with this task.
- 6.7. Normal practice was as follows:
- (a) The request that a TPIM be considered was formulated (by MI5) with an accompanying dossier of evidence to which material was added as it became available.
 - (b) A CPS lawyer was invited to examine both the evidence held by the police and any intelligence emanating from intelligence agencies and foreign liaison partners and held by MI5, with a view to assessing whether prosecution was a feasible option. Where the case had previously been the subject of criminal proceedings, the CPS lawyer involved in those proceedings would perform this task.
 - (c) The CPS lawyer prepared a secret note of advice on the prospects for prosecution which – in the case of all those in respect of whom TPIM notices were imposed – was unambiguously negative. In some cases there was little to discuss: in other cases, the advice (or previous advices to which it referred) could be fairly substantial. The CPS advice was summarised in a letter to the police who, in turn, wrote to the Home Office. The last letter was treated as disclosable and so was extremely brief in the statement of its reasons.
 - (d) Independent counsel (a security-cleared barrister in private practice) was shown the dossier of evidence and gave written advice as to:
 - whether Conditions A-D were satisfied as regards both the making of the TPIM notice and its specific conditions; and
 - whether the procedure for challenge could be conducted in a manner compliant with ECHR Article 6.

Any concerns identified by counsel would be addressed so far as possible, e.g. by amending the proposed terms of the TPIM notice. In the absence of positive advice from counsel, no application for a TPIM notice would be made.

- (e) Other departments and agencies were consulted, resulting in a meeting of the TPIM Liaison Group **[TLG]**, chaired by the Senior National Co-ordinator of Terrorist Investigations at SO15 (currently DAC Stuart Osborne) or his deputy. The function of the TLG is to gain formal multi-agency agreement for a recommendation that the Secretary of State impose a TPIM notice and for the operational plan for serving and managing that notice.
- (f) A detailed dossier was prepared, often extending to multiple lever arch files, summarising and annexing the evidence which was relied on in relation to Conditions A-D.
- (g) A submission was put up to the Security Minister and the Home Secretary, summarising the evidence on which reliance was placed and drawing their attention to any countervailing factors. That submission contained a personal endorsement from the senior civil servant responsible for the oversight of TPIMs and dealt with:
 - The applicable legal test
 - The risk that the person was assessed to present
 - Why a TPIM notice was considered necessary
 - The prospects for prosecution
 - Proposed measures
 - Impact on ECHR rights
 - Exit strategies.

Accompanying the submission would be a number of annexes: a more detailed assessment by MI5; personal details and known family circumstances; the proposed schedule of measures; and a draft of the witness statement that it was proposed should be submitted in support of the section 3(5) application to the High Court for permission. The full dossier of evidence was also supplied, save where urgency dictated otherwise.

- (h) The Home Secretary and/or the Security Minister would not infrequently come back with queries or requests for further detail (for example,

concerning possible alternative disposals) which would be answered by further oral briefing or written submission.¹⁶¹ It was rare however for Ministers to depart materially from the recommendations made.

- (i) The decision to apply for permission to impose a TPIM Order was taken by the Home Secretary (or, on one occasion when she was absent, delegated by her to the Security Minister).

6.8. Any administrative procedure of this kind inevitably relies heavily on untested evidence. However thorough or fair-minded, it can be no more than the prelude for a contested judicial hearing at which the affected person (or at least a special advocate charged with defending his interests) is given full disclosure of all material with a bearing on the case, and an opportunity to rebut the evidence that is relied upon. The need for caution is particularly great when – as will often be the case – much of the evidence was second or third-hand (hearsay or multiple hearsay), or a “*mosaic*” composed of many small indications, often in the form of coded conversations or snippets of human source information, none conclusive in itself.

6.9. Subject to that vital caveat, the procedure seemed to me to be an exemplary one. Much depends on the submission put to Ministers being scrupulously fair, reflecting for example any reservations or qualifications voiced by counsel. So far as I was able to judge, this was the case. My conversations with all concerned gave me no cause to doubt the seriousness with which the process was treated by all concerned.

6.10. Though TPIM notices are commonly (and correctly) described as “*executive orders*”, it is worth emphasising the extensive legal scrutiny that is required before a TPIM notice is made. Thus:

- (a) CPS lawyers marshal disparate and often abundant sources of intelligence, assess which elements of it could be converted into evidence admissible and usable in a criminal court, combine it with the contents of the police file and advise on the prospects for prosecution.
- (b) Legal advice from independent barristers is in each case sought on the statutory tests and on the application of the ECHR.
- (c) Save in urgent cases, any TPIM notice requires application to be made to the High Court, which can reject the application if it is “*obviously flawed*”.¹⁶²

¹⁶¹ A Home Office official told the High Court in 2012 that the Home Secretary “*takes a very dedicated approach to this work and has been known to point out matters arising even in footnotes*”: *SSHD v BF* [2012] EWHC 1718 (Admin), §45.

¹⁶² This is Condition E: TPIMA 2011 sections 3(5), 6-7 and Schedule 2.

The threshold for rejection is a high one, and no TPIM notice has been rejected at this stage. The High Court has however emphasised that “*the judge must be fully informed of the relevant circumstances*”. The fact that disclosure at this stage was deficient will not necessarily lead the court to quash the TPIM notice, though that outcome would be more likely if non-disclosure were deliberate, or if the application for permission were judged to have been an abuse of process.¹⁶³

If the CPS lawyer advised that prosecution was possible or if the independent barrister advised that a TPIM notice would not be upheld, it is my understanding that no TPIM notice would be made. Nor, of course, would a notice be imposed unless a court gave its permission (Condition E). This amounts to a meaningful series of legal obstacles to any misuse of the TPIM regime, even in advance of the availability of after-the-event review and appeal.

Procedure for variation of TPIMs

6.11. The great majority of variations of TPIMs were consensual, and were implemented after exchange of correspondence between the Home Office and the subject’s solicitors. Non-consensual variations were typically implemented after tripartite discussions between the Home Office, MI5 and the police. In particularly significant cases, ministerial approval is sought.

Procedure for extension of TPIMs

6.12. Under TPIMA 2011 section 5, a one-year TPIM may be extended, once only, for a second year.

6.13. Seven of the 10 TPIMs in force during 2012 were extended in January 2013.¹⁶⁴ Each was extended by decision of the Home Secretary, in some cases with variations. The extensions fall outside the period under review. Nonetheless, I have sampled two of the extensions and would comment on the procedure as follows.

6.14. Representations from the subjects were specifically requested approximately two months in advance, giving a deadline of one month to respond. When received, those representations were discussed at a TPIM Extension Meeting [TXM], as was advice from independent counsel on whether the statutory tests are met. The function of the TXM is to gain formal multi-agency agreement for a recommendation that the Secretary of State either extends or does not extend a

¹⁶³ *SSHD v CC and CF* [2012] EWHC Admin, §§ 169-176. Though this aspect of the case was concerned with a control order, similar reasoning is likely to apply to TPIM notices.

¹⁶⁴ Of the others, one (CC) was revoked and two (AY and BX) were allowed to expire. AY and CC were remanded in custody pending trial for breach, and BX absconded.

TPIM notice for a further year. The TXM adopts a similar format to the TPIM Review Group [TRG] described at 8.7-8.12 below, and indeed in 2012 coincided with (and to a large extent supplanted) the regular end-of-year TRG meetings.

- 6.15. A submission was then put up to the Home Secretary and the Security Minister, prepared by OSCT and endorsed by a senior civil servant with responsibility for TPIMs and by the Legal Advisers' Branch. This document set out the test, the background, the national security case for extension, the proposed measures in the extended TPIM notice, the impact of the TPIM notice on the subject, an account of court review proceedings, a summary of counsel's advice and advice on exit strategies. Annexes provided further information on personal details and known family circumstances, representations received, the MI5 assessment (together with supporting documents), the proposed schedule of measures and the extension notice for signature.
- 6.16. In the sample cases that I have reviewed, those documents were thoroughly and fairly prepared and given active consideration by Ministers.
- 6.17. Extensions must be for a full year, but are granted on the understanding that a TPIM notice may be revoked at any time and must be revoked if it is no longer considered necessary.

Cost of TPIMs

- 6.18. The cost of control orders and TPIM notices to the Home Office in 2011/12 was £3,079,000, midway between the costs of control orders in 2009/10 (£3,195,000) and 2010/11 (£2,859,000). A breakdown is at [Annex 5](#) to this Report.
- 6.19. The bulk of these costs (74%) has consisted of legal expenses, both of the Home Office and of the Special Advocates' Support Office [SASO]. Other elements include staff and administrative costs, the cost of accommodation, subsistence, council tax, telephone and utility bills paid for controlled persons and the daily fee paid to the Independent Reviewer in respect of his work on reviews such as this one.
- 6.20. In order to inform the public debate, I have sought quantification of the costs incurred by other public authorities, with the following results:
- (a) **Legal Services Commission [LSC]** costs, relating to legal aid for controlled persons and TPIM subjects, have been calculated at £519,000 for 2011/12. Further detail for this and adjacent periods is in [Annex 6](#) to this Report, which contains a number of caveats.
 - (b) **HM Courts and Tribunal Service [HMCTS]** figures for the judicial costs of control orders have been calculated by HMCS at £349,000.

- (c) **Ministry of Justice** costs relating to the electronic monitoring of control orders have been calculated at £40,000, together with implementation costs of £52,000.
- 6.21. Not included in these figures are the far more substantial costs incurred by the police and MI5 in relation to control orders and TPIM notices, including surveillance costs.
- 6.22. That omission makes it impossible to compare the overall costs of administering TPIM notices – including the cost of such surveillance as may be necessary to buttress the regime – with what is sometimes suggested as an alternative: the 24-hour surveillance of each control order subject. It is certain, however, that **the cost of full surveillance would greatly exceed the cost of administering a TPIM notice**. Constant surveillance is remarkably expensive.¹⁶⁵ To the extent that the need for it can be removed or reduced by the restrictions inherent in a TPIM notice, substantial savings are likely to be made – even after allowance has been made for the legal and other costs of control orders.¹⁶⁶ The ability of a TPIM notice to reduce the potential cost of keeping a subject under surveillance, and thus to release limited resources for other important targets, is indeed one of the principal justifications for its existence.
- 6.23. On the same principle, it is plain that viewed in the round, **TPIM notices are more expensive to administer than were control orders**. Shorter curfews, greater freedoms of association and above all the end of relocation are liable substantially to increase the cost of monitoring a subject. While comparative figures are once again not in the public domain, the £50 million figure mentioned by former Security Minister Baroness Neville Jones and by Senior National Counter-Terrorism Co-ordinator DAC Stuart Osborne in the course of evidence before a Parliamentary Committee,¹⁶⁷ with apparent reference to the police rather than to MI5, gives a sense for the order of magnitude, albeit without any information as to the number of years for which this sum was made available or the additional sums that might have been made available to MI5.

¹⁶⁵ Lord Carlile gave figures of between £11 million and £18 million per subject per year in evidence to the Public Bill Committee on the TPIM Bill: 21 June 2011 col 26 Q83. It is not open to me to comment on the accuracy of those figures.

¹⁶⁶ The Government has stated that “*the costs of surveillance exceed by a considerable margin the costs of control orders: Review of Counter-Terrorism and Security Powers*, Cm 8004, p. 38 §13.

¹⁶⁷ Joint Committee on the Draft ETPIM Bill, 17 October 2012, Q63: see fn 146, above.

7. ALTERNATIVES TO TPIMS

Could TPIM subjects have been prosecuted?

- 7.1. This question is of the highest importance. It is widely acknowledged, including by the Government, that save possibly on an interim basis, “*no TPIM notice should be made or retained in force in circumstances where prosecution .. would be a feasible alternative*”.¹⁶⁸ If those subject to TPIMs could have been effectively disrupted by prosecution, any possible justification for TPIMs falls away.
- 7.2. The decision not to prosecute does not fall within the ambit of a section 9 court review; and even if it did (thereby adding greatly to the complexity of such reviews), the judges would no doubt be reluctant to second-guess the recommendations of the CPS.¹⁶⁹
- 7.3. There is perhaps particular value, therefore, in my examining the basis upon which it is said that the prosecution of those now subject to TPIMs was not possible. To this end I have looked in each case at:
- (a) the opinion prepared by a lawyer from the Special Crime and Counter-Terrorism Division of the CPS;
 - (b) the letter from the CPS to the police setting out the reasons why a prosecution cannot take place; and
 - (c) the letter from the police to the Home Office certifying that there is no realistic prospect of conviction.

Of these documents, only the first contains an appreciable amount of detail.

Attitude of the CPS and others

- 7.4. The decision not to prosecute was taken every time on the basis that there was considered to be insufficient evidence to provide a realistic prospect of conviction. In no case, therefore, was it necessary to address the follow-up question of whether it was in the public interest to prosecute.¹⁷⁰

¹⁶⁸ D. Anderson, *Control Orders in 2011*, March 2012, Recommendation 2, with which the Government in its Response agreed (Cm 8443, p. 6): 2.5-2.6, above.

¹⁶⁹ “*The general approach of the courts is to disturb a decision of an independent prosecutor only in highly exceptional cases*”: *R (Gujra) v CPS* [2011] EWHC (Admin), [2012] 1 WLR 254 at §41.

¹⁷⁰ The sufficient evidence and public interest tests are set out in the Code for Crown Prosecutors (7th edn., January 2013), and determine charging decisions across the full range of the criminal law.

- 7.5. I detected no undue reticence on the part of the CPS to prosecute. Its business is prosecution, and the statistics are not suggestive of any over-cautious tendency to prosecute only when conviction seems assured.¹⁷¹ In one case that was drawn to my attention, the CPS lawyer who reviewed the request for a TPIM notice was able to point out that there was a possible basis for prosecution, with the result that by common consent no further consideration was given to the making of a TPIM notice. That commendable action is testimony to the important role played by the CPS as an independent prosecuting authority.
- 7.6. Nor did I observe any unwillingness to prosecute on the part of the police or of MI5. If the type of TRA that is alleged against a TPIM subject were charged, the expected outcome would be a substantial period of remand in custody followed by trial and, if convicted, a long prison sentence. The disruptive effect would be high, and the effort required from police and from MI5 would be low. TPIM notices, by contrast, last for a maximum of two years. They are not as secure as imprisonment, carrying an unavoidable risk of abscond. While TPIM review and appeal proceedings tend to be appreciably shorter than a terrorism trial, that advantage is offset from MI5's point of view by the fact that its officers have to give evidence in TPIM reviews (for which very extensive preparation time is normally taken) but not, as a rule, in criminal trials. The day-to-day management of a TPIM notice is highly resource-intensive for police and intelligence agencies alike. Furthermore, once a TPIM notice has expired, it is possible that further costly surveillance will be deemed necessary in order to mitigate any continued risk.
- 7.7. Institutional self-interest thus pulls in the same direction as regard for the rule of law: in favour of prosecutions, with TPIMs reserved only for those cases in which no prosecution is possible. During the period under review, the system appeared well set up to achieve that end.

Reasons for not prosecuting

- 7.8. It remains to ask why the CPS advised that subjects could not be prosecuted when those men are believed by the intelligence agencies to be dangerous terrorists from whom the public needs to be protected by an onerous series of TPIMs. That paradox is understandably productive of public suspicion: if the danger is as grave as the authorities assert, why do they not have the courage of their convictions and place the subject on trial?

¹⁷¹ Of the persons arrested for terrorism-related offences between September 2001 and April 2012, 61% of those charged were convicted: Home Office Statistical Bulletin 11/12, 13 September 2012, 1.8 and Table 1a.

Prior acquittal

- 7.9. A short and partial answer is that four of the 10 TPIM subjects (AY, BF, CF and DD) had already been prosecuted in respect of some or all of the conduct relied upon. In each case the jury, applying the criminal standard of proof, had not been sure of their guilt.
- 7.10. The imposition of TPIM notices after acquittal has never been criticised by the courts. The argument that it is improper was robustly dismissed, in the control order context, by Owen J in the case of AY.¹⁷² He added that there is no legal obstacle to taking into account in such proceedings material that was or could have been relied upon in a criminal trial.¹⁷³
- 7.11. The imposition of a control order or TPIM notice after acquittal has conventionally been justified by:
- (a) the discrepancy between the high criminal standard and the lower threshold for the imposition of a TPIM notice; and
 - (b) the fact that material probative of guilt is not always capable of deployment in a criminal court (see 7.13-7.19, below).
- 7.12. There is certainly an uncomfortable feel to the imposition of TPIMs on acquitted persons. The practice is however troubling not because it constitutes an abuse of the TPIM system, but because it reveals an unpalatable truth: that while it should always be the first and preferable option for dealing with suspected terrorists, the criminal justice system – whose open nature may prevent some relevant national security evidence from being used – is not always enough to keep the public safe.

Non-admissibility of intercept

- 7.13. In the remaining cases, prosecution was not attempted. So far as I have been able to ascertain from the CPS opinions, the invariable reason for this is because of the difficulties of converting intelligence into evidence that can be deployed in a criminal court.
- 7.14. One of these difficulties is that domestic intercept material (such as the product of phone taps) is not admissible as evidence in UK criminal proceedings.¹⁷⁴ The UK (and, in practice, Ireland) are unique among common law countries in not admitting such evidence; and the advantage of allowing it to be admitted are

¹⁷² *SSHD v Y* [2010] EWHC 1860 (Admin), §§ 12-23.

¹⁷³ *Ibid.*, §§ 24-28.

¹⁷⁴ It is however admissible in closed material proceedings, including for the review of TPIMs: TPIMA 2011, Schedule 7 para 4.

plain. There are undoubtedly cases, most obviously perhaps in the field of serious and organised crime, in which the admissibility of intercept evidence could help tip the balance in terms of whether a prosecution would have reasonable prospects of success. There would certainly however be implications for resources, particularly when one takes into account the absence of any legal or organisational distinction in the UK between interception for law enforcement purposes and interception for intelligence purposes.¹⁷⁵ The admissibility of intercept evidence has been the subject of no fewer than eight investigations since 1993, the last of which is still ongoing.¹⁷⁶ I have not sought to replicate the work of those investigations but will certainly support a relaxation of the ban on intercept if a feasible manner of achieving it can be devised.¹⁷⁷

7.15. Even a relaxation of the ban would not however on its own be sufficient to render TPIMs redundant. I asked the CPS to tell me whether their decisions not to charge any of the ten TPIM subjects would have been different had intercept evidence been admissible in criminal proceedings. Having consulted the relevant case lawyers, they advised me, without confirming whether or not such material existed in any case, that their charging decision would have remained the same in each of the 10 cases.

7.16. I have not sought independently to verify that conclusion. That would be a time-consuming task, which could properly be undertaken only by a person with extensive experience of prosecuting such cases. However:

(c) A similar answer was reached by independent senior criminal counsel, who as part of the work of the Chilcot Review in 2007 made a detailed study of the cases of nine controlled persons. He concluded that the admissibility of intercept evidence would not have enabled a criminal prosecution to be brought in any of the cases studied, in four cases because such intercepted material as existed, even if admissible, would not have been of evidential value, and in the other five cases because deploying the crucial pieces of intercepted material as evidence would have caused wider damage to national security, greater than the potential gains offered by prosecution in those cases.¹⁷⁸

¹⁷⁵ Such a distinction exists in many other countries. Its absence is however prized by some as one of the reasons for the close and generally harmonious working relationship between police and intelligence agencies in the UK.

¹⁷⁶ These include the Interception of Communications Act Review of 1993-94, the Harrington Review of 1998-99, a Home Office Review of 2002-2003, the Privy Council (Chilcot) Review of 2007/08 and the current review, overseen by Privy Councillors, announced in January 2011.

¹⁷⁷ Of less practical relevance is what must be assumed to be the inadmissibility in criminal proceedings of answers given under compulsion during examination after port stops pursuant to TA 2000 Schedule 7. They may not be admissible even in TPIM proceedings, though the point was left undecided in 2012: *SSHD v CC and CF* [2012] EWHC 2837 (Admin), §37.

¹⁷⁸ Privy Council Review of Intercept as Evidence, Cm 7324, February 2008, §58.

- (d) Lord Carlile, my predecessor as Independent Reviewer, told a parliamentary committee in 2012:

“I do not think the use of intercept evidence would significantly reduce the number of people subject to TPIMs. I specifically looked into the issue as Independent Reviewer of Terrorism Legislation, and I was able to identify one case out of over 50 control orders that had been made in which intercept evidence might have led to a prosecution rather than a control order. When I started to deal with that in detail with the Home Office, I was persuaded that in fact it would not have made any difference in that case. It would not make a significant difference.”¹⁷⁹

- (e) It is also worth noting that at least some common law countries in which intercept evidence is admissible in criminal proceedings nonetheless have on their statute books procedures that allow constraints to be imposed on suspected terrorists outside the context of the criminal justice and immigration systems.¹⁸⁰ While there may be many explanations for this, it does once again indicate that the admissibility of intercept is no “*silver bullet*”.

Accordingly, and though I have not verified it, I have no reason to doubt the assurance given to me by the CPS that the admissibility of intercept evidence would not have enabled the prosecution of those subjected to TPIMs in 2012.

Unwillingness to deploy sensitive evidence in open court

- 7.17. The inadmissibility of domestic telephone intercepts is by no means the only difficulty in converting intelligence into evidence usable in a criminal court. Intelligence takes a number of other forms: in particular human source reporting, the product of technical surveillance and information supplied by foreign intelligence agencies. Subject to compliance with disclosure obligations, all such intelligence is admissible in a UK criminal court. But that does not mean that it could ever in practice be used.
- 7.18. Criminal courts are public places, in which defendants and (save in rare cases) the press and members of the public have the right to hear all the evidence deployed by the prosecution.¹⁸¹ For precisely that reason, human source reporting can frequently not be deployed, not for any technical reason of

¹⁷⁹ Joint Committee on the Draft ETPIMs Bill, Oral evidence of 17 October 2012, Q106.

¹⁸⁰ See, in particular, Australian control orders, Canadian peace bonds and the various measures available in the United States: D. Anderson, *Control Orders in 2011*, March 2012, 2.15-2.18.

¹⁸¹ The proposals for closed material procedures, currently before Parliament in the Justice and Security Bill, have never extended to criminal proceedings. They are designed to address the equivalent difficulties in adducing national security evidence that arise in civil proceedings, where the solution may be more readily deemed tolerable because the liberty of the subject is not at stake.

admissibility, but because to deploy it (even in anonymised form) is likely to disclose to the defendant the existence of an informant whose utility will then be lost and whose safety may be jeopardised. The intelligence agencies apply similar arguments to the product of listening devices: for example, the snatches of conversation that are and are not recorded can indicate to a sophisticated criminal where devices have been planted or what their technical capabilities and limitations are. Where intelligence has been supplied by liaison partners, there is the additional difficulty that the “*control principle*” prevents it from being used for purposes not authorised by the supplier.

- 7.19. I have not sought to form my own view as to whether the intelligence services have been over-cautious as regards the deployment of sensitive evidence in open court. No doubt there is an element of “*better safe than sorry*” in their approach. Some comfort may however be derived from the fact that, as already remarked, the intelligence services have an institutional self-interest in ensuring that suspected terrorists are prosecuted rather than subjected to the temporary and labour-intensive expedient of a TPIM notice.¹⁸²

Could TPIM subjects have been deported?

- 7.20. British citizens may not be deported; and with the exception of DD, whose TPIM notice was imposed in October, all TPIM subjects have had British citizenship. There is no consistent practice to consider, therefore, as regards the consideration of possible deportation as an alternative to TPIMs.
- 7.21. The deportation of a foreign national will not be possible if the person in question would face a real risk of torture or ill-treatment, or of a flagrant denial of justice (for example, by the admission at his trial of evidence obtained by torture).¹⁸³ Those risks may be removed or reduced by the negotiation of an appropriate memorandum of understanding with the state of deportation, but the adequacy of such arrangements will be scrutinised by the courts and do not always pass muster. It was specifically to deal with the risks presented by foreign nationals who could not be deported because of the risk of torture that ATCSA 2001 Part IV, the precursor of the control order regime, was enacted.
- 7.22. If national security concerns would be satisfied by deportation and deportation is lawful, the Government would have no hesitation in deploying it in preference to a TPIM. It is unlikely that a TPIM request would even be made if deportation were a feasible alternative.

¹⁸² 7.6-7.7, above.

¹⁸³ *Chahal v UK* (1996) 23 EHRR 413; *Othman (Abu Qatada) v UK*, European Court of Human Rights (Grand Chamber), 17 January 2012.

7.23. I do not consider, therefore, that there is any practical risk of a TPIM being imposed on a person in respect of whom the national security concerns could be satisfied by deportation.

8. MANAGEMENT AND ADMINISTRATIVE REVIEW

Management of TPIM notices

- 8.1. The Metropolitan Police Service [**MPS**] in London, or the relevant force elsewhere, is responsible for the day-to-day management of TPIM notices. Each TPIM subject has one or more contact officers who can conduct plainclothes visits and liaise with the subject.
- 8.2. Very considerable extra resources were made available to the police and to agencies, as part of the arrangements that resulted in change to the less restrictive TPIM regime. I understand from the police that these resources were made available in a timely and effective manner, so as to enable the transition from control orders to TPIMs to be properly managed.
- 8.3. There have been, and remain, examples of contact officers who, after a period of time, have built up a useful rapport with subjects. The police told me however that the opportunities for interaction with TPIM subjects have reduced for two reasons:
 - (a) the fact that issues in relation to rental properties are now resolved directly by the Home Office without the involvement of the police; and
 - (b) the removal of the power that control orders gave the police to search the premises at any time, which means that absent a warrant they may be refused entry.

The presence of police thus tends to be associated solely with compliance issues. It has become "*more difficult to steer subjects on to other things*": and in view of their law enforcement function, it would in any event not be realistic to look primarily to the police to gain the confidence of TPIM subjects who are bound to be wary in their presence.

- 8.4. Cross-agency processes are in place, led by the police, for the regular review of each subject's compliance with his TPIM notice, and the discussion of any actions taken or to be taken. These processes culminate in the quarterly TRG meetings discussed at 8.7-8.12, below.

Review of feasibility of prosecution

- 8.5. As noted at 2.5, above, the police are under a continuing duty to keep a TPIM subject's conduct under review with a view to prosecution for an offence relating to terrorism.

- 8.6. That duty is discharged through reports which are made known to the CPS. In practice, most discussion tends to be of the subject's compliance with the terms of his TPIM notice, and the feasibility of prosecution for breach. I am told that if evidence were to come to light of engagement in TRA prior to or during the currency of a TPIM notice, the mechanisms exist to ensure that the CPS would be asked to supplement its advice on the feasibility of prosecution. This is, however, not common in practice.

The TPIM Review Group

- 8.7. The TRG closely resembles its predecessor the Control Order Review Group **[CORG]**. Its function is to bring together the departments and agencies involved in making, maintaining and monitoring TPIM notices to keep all cases under frequent, formal and audited review on a quarterly basis. The last quarter is reviewed, and plans made for the forthcoming quarter. More pressing decisions may be made on an *ad hoc* basis between TRG meetings. A full copy of the TRG's terms of reference is at [Annex 7](#).
- 8.8. I attended as an observer four of the eight meetings of the TRG in 2012, witnessing at least one of the quarterly reviews of each TPIM notice, and in some cases two or three. The meetings are hosted at OSCT in the Home Office, and attended by the civil servants with operational responsibility for TPIMs. Each case is discussed in the presence of officers from the relevant police force and case handlers from MI5. A senior representative from the CPS will sometimes attend. In addition, solicitors for the TPIM subjects are aware that their own representations will be placed before quarterly TRGs and considered there. They will sometimes but not always take advantage of this opportunity – particularly prior to the TXM, when their representations are specifically invited some weeks in advance. Such written representations are always considered, but there is no advocate at the meeting to speak directly on behalf of the TPIM subject.
- 8.9. The discussion of each subject is structured and unhurried. Within the constraints of a meeting which is attended only by the authorities, every effort is made to be fair. Considered, in turn, are:
- (a) whether there are continued reasonable grounds for belief that the subject is or has been involved in TRA;
 - (b) whether there is a continued necessity for the TPIM notice;
 - (c) any changes to the national security case;
 - (d) the prospects for prosecution;

- (e) the manner in which the TPIM notice is being managed;
- (f) any alleged breaches of the TPIM notice, and the progress of any prosecutions for breach;
- (g) any indications of mental or physical health problems;
- (h) the observed impact of the TPIMs on the subject and his family, together with any representations received from the subject;
- (i) any variations and permissions requested, refused or granted;
- (j) whether there are individual measures that may no longer be needed, or new measures that may be required;
- (k) exit strategy; and
- (l) whether an anonymity order is still required, including discussion of community impact issues.

In the TRGs immediately preceding extension decisions, there is also discussion of whether it is necessary to extend the TPIM notice for a further year, and if so on what terms.

8.10. Discussion of the earlier issues (continued necessity for some restraint, changes to the national security case, prospects for prosecution) tends to be brief, unless there has been some material change since the last meeting. Much of the discussion is often about detailed issues concerning the individual TPIMs: how a curfew should be adapted to deal with possible night work; whether it is feasible to transfer a reporting requirement to a neighbouring police station or to remove it altogether; whether it is safe to allow a subject to have devices such as iPods with the facility to store digital data;¹⁸⁴ how far it is possible to expand the range of individuals with which a subject is permitted to associate. Frequently, the TRG will identify an issue that requires ministerial decision.

8.11. The TRG discussions are about as fair-minded as could be expected, given the fact that all participants in those discussions are representatives of the authorities. The dangers of groupthink can be to some extent mitigated by “*devil’s advocate*” type interventions from one or other attendee – something that I occasionally observe and would very much encourage. If and to the extent that my recommendation concerning the involvement of the probation service bears fruit, the balance of these meetings could also benefit from the presence of a senior probation officer, particularly where exit strategy is discussed.

¹⁸⁴ An issue raised in *SSHD v CC and CF* [2012] EWHC 3026 Admin, §66.

- 8.12. Self-evidently, however, the TRG is no substitute for independent review of the type that (at least where Conditions A-D are concerned) can be conducted by the courts. The TRG has a strong responsibility to make proportionate decisions. Whilst excessive measures can be corrected by the courts, the months that tend to elapse before appeals and reviews, coupled with the tendency to delay specific appeals pending section 9 reviews, can be heard mean that this remedy is far from immediate.

Investigation of criminal offences

- 8.13. The “I” in TPIM stands for investigation – a nod to the notion that subjects might, during the currency of a TPIM, engage in TRA which could be detected and then used as evidence in a criminal trial.
- 8.14. As an opportunity for the gathering of evidence usable in a criminal trial, control orders could not be counted a success. Only nine persons formally on control orders were arrested on suspicion of a terrorist offence; and only one of those was charged with a terrorist offence. The activity in respect of which he was charged pre-dated the control order; and the charges did not result in a conviction.
- 8.15. For obvious reasons, I cannot give a running or even a static commentary on the extent to which TRA may or may not have been uncovered during the current TPIM notices. A Senior Investigative Officer is assigned to each TPIM subject, with this purpose in mind. It would be unwise however, in my opinion, to anticipate that TPIMs will present a significant investigative opportunity to the police. Constrained as subjects are, both by measures that they know about and by what they must recognise as the possibility of additional covert surveillance, only the rashest among them would seek to engage in significant TRA. The temptation to do so is further reduced by the knowledge that the maximum duration of the TPIM notice is only two years. The logical course for any TPIM subject is simply to lie low.
- 8.16. The reality appears to be that TPIMs are effective as preventive measures but not as investigative measures. Indeed it is precisely because they are effective in *preventing* TRA (at least for as long as they last) that they afford little opportunity for *investigating* it.

Absconds

- 8.17. The first (and so far only) abscond by a TPIM subject was at the end of the period under review, on Boxing Day 2012. The ensuing days saw the lifting of the anonymity orders both his TPIM notice and the control order to which he had been subject since October 2009. Under both regimes he had been known as

BX. His name has now been revealed to be Ibrahim Magag. Further details of his case are at 4.14(a), above. As of the date of going to press, he had not been found.

- 8.18. On 7 February 2012, a man referring to himself as BX had telephoned the LBC Breakfast show and been interviewed by Nick Ferrari. I have read the transcript of that interview. He talked about his experiences under a control order and a TPIM notice, and emphasised a number of times his wish to “go back” to Somalia.
- 8.19. Absconding may be easier in a place where associates are available to help with the getaway. It must therefore be asked whether the ending of relocation has made absconds more likely. I said in my own report of last year that the absence of absconds since 2007 under the control order regime “*coincided with the trend away from light-touch control orders, and/or the more extensive use of relocation*”. A similar point was made by a High Court judge, in BX’s own case, when he upheld an involuntary relocation to the West of England on the basis that it would be more difficult for him to make arrangements to abscond or to engage in TRA while out of London. Indeed the court added, when rejecting an application that he should be allowed to stay in London with his wife after the birth of a child, that “*it is too dangerous to permit him to be in London even for a short period*”.¹⁸⁵
- 8.20. It is fair to point out, however, that no bail-type system is immune from the possibility of absconds, and that indeed there were seven absconds from control orders (though all were pre-July 2007; the majority were from light-touch control orders; and none of the absconders were relocated at the time).
- 8.21. The circumstances of BX’s abscond are currently being exhaustively examined in a Home Office-led investigation, and the necessary technical, operational and strategic lessons are in the process of being identified. The Home Secretary has ensured that I will continue to be fully briefed on that investigation, as I would expect given the nature of my role. I expect to comment in due course, within the limits imposed by national security, on its outcome.¹⁸⁶ As matters stand, however, I consider that such comment would be premature. I make only two points of a general nature, which are reflected in Recommendation 4, below.
- 8.22. First, absconds are always likely to attract publicity, as did the seven absconds from control orders prior to July 2007. But maturity is called for in the public debate. The only certain way to prevent absconds is to lock people away in high-security prisons. Yet for British citizens who have been neither charged

¹⁸⁵ *BX v SSHD* [2010] EWHC 990 (Admin) §§ 18, 22.

¹⁸⁶ As the Home Secretary indicated that she expected me to do: Hansard 8 January 2013, vol 556 col 163.

with nor convicted of a criminal offence, such a solution would be unprecedented and – one would hope – unthinkable. The highest standards of vigilance are essential if absconds are to be prevented: but it needs to be recognised that a TPIM notice free of all abscond risk does not and will never exist.

- 8.23. Secondly, vigilance is also required against a different risk: that of over-reaction. It is right and indeed necessary that existing practices should be reviewed in the light of BX's abscond. However, in a confrontational political and media climate, it would be easy to lose sight of the principle that TPIM requirements – like bail conditions – fall to be determined by reference only to the risks (including the risk of abscond) that are posed by the individual in question. Cool heads are thus called for. All concerned with the process have a duty to ensure that any change to TPIM requirements or processes are driven not by political considerations but by operational requirements and (in the case of those nearing the end of their TPIM notices) the need for an appropriate exit strategy.¹⁸⁷

¹⁸⁷ See further at 11.28-11.29, below.

9. JUDICIAL REVIEW

- 9.1. The legal recourse available to a TPIM subject is summarised at 2.13-2.18, and the principal judgments on section 9 review are referred to, in the context of their factual findings, at 4.12-4.14, above.¹⁸⁸
- 9.2. Section 9 reviews have been determined in the cases of all TPIM subjects with the exception of CD, BX (Ibrahim Magag) and DD. CD's review has yet to be heard. BX decided in April 2012 not to contest his TPIM notice by way of section 9 review, just as he had previously chosen to discontinue the quasi-automatic review of his control order. DD has also decided to discontinue his section 9 review proceedings.
- 9.3. The six TPIM review judgments to date, in seven cases, are notable for three things:
- (a) their remarkable **consistency of approach**;
 - (b) their **endorsement of the Home Secretary's belief as regards TRA**; and
 - (c) their **readiness to accept the necessity** for nearly all of the measures under consideration.

The judgments rely and build upon the large body of case law concerning control orders, the highlights of which I summarised in my last report.¹⁸⁹ Though none has yet been tested on appeal, they contain a number of rulings and comments on legal issues of general importance in TPIM cases. I summarise those rulings and comments below.

Condition A – reasonable belief in TRA

- 9.4. Reasonable belief is a higher threshold than reasonable suspicion (the test under PTA 2005): it requires belief that something *is* the case, as opposed to belief that it *may be* the case.¹⁹⁰
- 9.5. Reasonable belief does not however require proof that any of the alleged primary facts that grounded the Secretary of State's belief are true, even to the standard of the balance of probabilities. Nor does it require the court to satisfy itself that

¹⁸⁸ There were, in addition, two appellate judgments relating to control orders no longer in force: *AT v SSHD* [2012] EWCA Civ 42, in which the Court of Appeal allowed an appeal against a control order on non-disclosure grounds, and *CB and BP v SSHD* [2012] EWCA Civ 418, in which the Court of Appeal reversed the decision of Silber J to stay control order proceedings on the basis that they served no useful purpose because the relevant control orders had been revoked.

¹⁸⁹ D. Anderson, *Control Orders in 2011*, March 2012, 3.64-3.83.

¹⁹⁰ *SSHD v BF* [2012] EWHC 1718 (Admin), §15; *SSHD v AM* [2012] EWHC 1854 (Admin), §§ 20-21; *CD*, §8.

the belief is justified, or that it shares the belief. The court must decide whether the facts relied upon by the Secretary of State amount to reasonable grounds for believing that the subject is or has been involved in TRA: but it is not necessary for the underlying facts to be found to exist to any particular standard, and “*there is certainly no requirement that particular TRA needs to be established to the standard of at least more probable than not*”. Rather than examine each allegation in isolation, the entire national security case must be considered.¹⁹¹

9.6. It follows that prior acquittal is no bar to the imposition of TPIMs: indeed “*a TPIM could in many appropriate cases be imposed on a person who had been acquitted of terrorism-related activities.*”¹⁹²

9.7. The fact that the individual is very security-conscious has been said to amount to a “*building-block*”, one of the factors which may entitle the Secretary of State reasonably to believe that the subject was or has been involved in TRA.¹⁹³

Condition B – “new” TRA

9.8. Where a TPIM follows on from a control order, the requirement that there be evidence of “*new*” TRA may be satisfied by evidence pre-dating the control order, even if that same evidence formed the basis for the control order, and even if the control order had itself lasted longer than two years. However the absence of “*recent TRA*” will carry weight, and will mean that it is more difficult for the Government to establish that a TPIM is necessary.¹⁹⁴

Conditions C and D – necessity

9.9. The courts must apply “*intense scrutiny*” to the claimed necessity for each of the TPIMs imposed upon an individual (rather as it will do in relation to the bail conditions which it imposes itself), though it is also said that “*a degree of deference*” must be given to the Secretary of State, who is better placed than the court to decide which measures are necessary to protect the public against the activities of a terrorist suspect.¹⁹⁵

9.10. Outward signs of a change in outlook may militate against the continued necessity of a TPIM notice: but where a person is believed to have been particularly dangerous, “*convincing evidence of a change of heart*” is likely to be required before the Secretary of State can conclude that preventative measures

¹⁹¹ *SSHD v AY* [2012] EWHC 2054 (Admin), §22; *SSHD v BM* [2012] EWHC 714 (Admin), §§ 31-34; *SSHD v CC and CF* [2012] EWHC 2837 (Admin), §§ 23-29 and 51, all citing the Court of Appeal (Neuberger LJ) in the SIAC case *A and others v SSHD* [2005] 1 WLR 414.

¹⁹² *AY*, § 35: see further 7.9-7.12, above,

¹⁹³ *AY*, §127.

¹⁹⁴ *BM*, §§15-17; *AM* §§ 9-16; *AY*, §§ 130-168; *CD and CF*, §§ 20-22.

¹⁹⁵ *BF*, §17, applying *SSHD v MB* [2007] QB 415, CA.

are no longer required. There are said to be “*numerous ways*” in which the renunciation of previous views can be demonstrated, without the TPIM subject incriminating himself.¹⁹⁶

- 9.11. The specific measures that are imposed may depend not only on the nature of the subject’s alleged involvement in TRA, but on “*the resources available to the Secretary of State and the demands on those resources*”, including the arrangements that can be put in place for surveillance.¹⁹⁷
- 9.12. As a matter of principle, it has been held not to be necessary that there should be evidence of the subject having engaged in the specific activity to which a prohibition relates. It is sufficient that the prohibition is necessary to prevent such an activity.¹⁹⁸

Association measures

- 9.13. Where deportation is impermissible and prosecution unlikely, the only viable exit strategy from a TPIM Notice may be “*encouraging and facilitating a change in outlook*”. It is thus imperative that the subject is encouraged to lead as normal life as possible, consistent with protecting the public.
- 9.14. A requirement that one subject give two days’ prior notification before meeting someone for the first time or inviting them into his home had an unduly chilling effect on the subject’s social life and personal development: it had to be replaced by a requirement for notification *after* first meeting or visit.¹⁹⁹ In another case, the Judge urged the parties to discuss further possible amendments to an association measure.²⁰⁰

Overnight residence measures

- 9.15. Overnight does not reasonably stretch beyond the period 9 p.m. – 7 a.m.,²⁰¹ though in another case the residence requirement was fixed at midnight to 8 a.m.²⁰² (and it may be varied if appropriate to accommodate night work or prayers).

¹⁹⁶ AM, §§ 20-25; AY, §§ 172-174.

¹⁹⁷ AY, §§ 29-30, applying to TPIMs the guidance of the Court of Appeal in *SSHD v MB* [2007] QB 415 at §63.

¹⁹⁸ CC and CF, §66.

¹⁹⁹ AM, §30.

²⁰⁰ CC and CF, §§ 67-69.

²⁰¹ BM, §52.

²⁰² AM, §26; CC and CF §64.

Tag / reporting measure

- 9.16. New-style “GPS tags”, though larger than the previous model, have been an effective and proportionate way of ensuring compliance with other measures. While their introduction has resulted in the removal of the previous requirement to telephone on entering and leaving the residence (a requirement the need for which I questioned in my last report),²⁰³ they will not necessarily make it unnecessary to report daily to a police station.²⁰⁴ A reporting requirement may complement the effectiveness of the tag and may also require the subject to “engage” with the police.²⁰⁵

Disclosure required from the Government

- 9.17. On the “without notice” application for permission to impose measures at section 6 of TPIMA 2011, the duty of candour on the Government requires it to disclose to the judge “anything to the knowledge of the party applying that might weigh against the making of an order”. That duty extends to material that might found an abuse of process argument and is all the stronger for the high degree of resulting interference with individual liberty and the likely substantial delay before an *inter partes* hearing takes place. However, the consequence of non-disclosure will not necessarily be the quashing of the TPIM notice, particularly when the non-disclosure was not deliberate, when the argument that the undisclosed material could have supported was in the end unsuccessful and when there was strong evidence that the TPIMs were necessary for the protection of the public.²⁰⁶
- 9.18. Prior to the hearing of the substantive section 9 review, *AF (No. 3)* disclosure (in short, sufficient information about the allegations against the subject to enable him to give effective instructions to the special advocate) is required in TPIM cases. There is no material difference from control order proceedings, notwithstanding that TPIM restrictions may be “slightly less severe”. The need for disclosure is not avoided because the view is taken that there is no answer to the undisclosed material – not least because the subject and others must know and understand why the TPIM notice was imposed upon him.²⁰⁷ Disclosure is kept under review throughout the substantive hearing.²⁰⁸

²⁰³ D. Anderson, *Control Orders in 2011*, March 2012, Recommendation 3(b).

²⁰⁴ *CC and CF*, §73.

²⁰⁵ *CD*, §25.

²⁰⁶ *CC and CF*, §§ 160-176.

²⁰⁷ *BM*, §§ 20-21.

²⁰⁸ *CC and CF*, §53.

Evidence required from the Government

- 9.19. The fact that evidence may not be first-hand or “*best evidence*” (e.g. the assessment of an MI5 officer who has not had direct involvement with a subject) goes to its weight but not to its admissibility.²⁰⁹
- 9.20. The admissibility in principle of answers given in interviews under TA 2000 Schedule 7 (the port examination power, under which it can be compulsory to answer and interviews are not always recorded) was not decided.²¹⁰

Participation of the subject in proceedings

- 9.21. As already noted, not one of the TPIM subjects whose cases were heard in 2012 gave evidence in his own defence. This tendency was slightly described by one judge as:

“hid[ing] behind the not uncommon and rather flimsy shield of many in his position, which is that he can say nothing about anything until he has had every detail about everything, treating it rather as a criminal charge, which it is not.”²¹¹

Notwithstanding the TPIM subject’s limited knowledge of the evidence against him, which may in some cases increase the perils of giving evidence, it has been held consistently that a failure to deal with allegations to the extent which is possible having regard to the disclosure given can be taken into account against a subject.²¹² Although silence cannot create reasonable grounds for the requisite belief where none exist without it, silence in the light of this detail can strongly reinforce a belief which is already reasonably grounded.²¹³

- 9.22. The subject is not required to explain himself: but a failure to take steps reasonably open to him to deal with any of the allegations that have been put to him can help ground an adverse conclusion – as, for example, when a subject gave no explanation for phone numbers that were found on him, or two pairs of scissors that might have been used to sever his tag.²¹⁴

Standard of review

- 9.23. In relation to Conditions A and B (TRA), the review is “*particularly intense*”. While it does not involve substituting the view of the court for that of the Home

²⁰⁹ *BM*, §30 (Collins J).

²¹⁰ *CC and CF*, §37. The Schedule 7 interviews were excluded from consideration in that case for the different reason that they had been held to be *ultra vires* in judicial review proceedings.

²¹¹ *SSHD v CD* [2012] EWHC 3026 (Admin), §17, per Ouseley J.

²¹² *BM*, §§ 22-23, 36; *CC and CF* §§ 30-32; cf. *AF (No.3)* per Lord Hope.

²¹³ *CD*, § 17.

²¹⁴ *BM*, §§ 36, 45; *AY*, §124.

Secretary, an experienced judge has gone so far as to say that “*if I do not agree with her I would be likely to decide that there was insufficient to support a reasonable belief*”.²¹⁵

- 9.24. In relation to Conditions C and D (necessity), the court must apply “*intense scrutiny*” to the claimed necessity for each of the TPIMs imposed upon an individual (rather as it will do in relation to the bail conditions which it imposes itself). The court will be “*vigilant to ensure that these extraordinary measures are necessary*”, though “*a degree of deference*” must be given to the Secretary of State, who is better placed than the court to decide which measures are necessary to protect the public against the activities of a terrorist suspect.²¹⁶

Relevance of prior judicial findings

- 9.25. Previous judicial findings in the control order context will not be treated as determinative in section 9 reviews, particularly when they were reached some time previously, or in proceedings where the subject knew little or nothing about the case against him. Rather, it is for the judge to form his own conclusions and then check them against the previous findings.²¹⁷

Abuse of process

- 9.26. The High Court has jurisdiction to hold that TPIM proceedings are an abuse of its process.²¹⁸ In general, *AF (No. 3)* disclosure obligations do not apply in relation to abuse of process applications.²¹⁹ That is however no reason to displace the normal rule that the burden of proof in abuse of process applications rests on the parties alleging abuse, in a case where those parties know what allegations they make.²²⁰
- 9.27. The court may refuse to uphold a TPIM notice where it would offend its sense of justice and propriety to do so, and may not “*simply subscribe to the view that the end justifies the means*”. The threshold for abuse of process is however a very high one, and requires possible lack of confidence in the justice system to be balanced against the need to protect the public.²²¹ Although the Court was prepared to assume that the arrest, detention and deportation of CC and CF were not in accordance with Somaliland law, their submissions on abuse of process (together with public law challenges arising out of the same matters) were rejected.

²¹⁵ *BM*, §30.

²¹⁶ *BF*, §17; *AY*, §§29-30; *CC and CD* §42, all applying *SSHD v MB* [2007] QB 415, CA.

²¹⁷ *AY*, §§ 38-45; *CD*, §9.

²¹⁸ *SSHD v CC and CF*, interlocutory judgment, [2011] EWHC 3647 (Admin).

²¹⁹ *SSHD v CC and CF*, interlocutory judgment, [2012] EWHC 1732 (Admin).

²²⁰ *SSHD v CC and CF* [2012] EWHC 2837 Admin, §§ 82-87.

²²¹ *Ibid.*, §§ 90-112, 137.

Fairness of the proceedings

Judicial comment

9.28. Some members of the Supreme Court have expressed disquiet about the fairness of closed material proceedings, even when (as in control order and TPIM cases) there is sufficient disclosure to enable the subject to give effective instructions to the special advocate. The numerous speeches in the two leading cases, *al-Rawi* and *Tariq*, disclose a number of different views. Particularly widely quoted by opponents of CMPs has been the short speech of Lord Kerr in *al-Rawi*, who in warning against the use of closed material proceedings into civil litigation commented as follows:

“To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one’s opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However acute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.”

He went on to describe the special advocate system as one which “*should always be a measure of last resort; one to which recourse should be had only when no possible alternative is available*”.²²²

9.29. No doubt the six experienced High Court judges who determined the TPIM reviews in 2012 had this and similar warnings well in mind. But if any misgivings were felt as to the fairness of the closed material procedure, they were not voiced. The open judgments – each of which upheld the TPIM notice under review – suggest a high degree of confidence on the part of their authors. In at least one case, the national security case against the TPIM subject was “*not a live issue*”²²³ – though the court nonetheless set out its conclusions on it.

Concerns of special advocates

9.30. All concerned with the process know however that considerable vigilance is always likely to be necessary in cases of this kind. Oral evidence from the Home Office and MI5 is not usually first-hand, but is delivered by omnibus witnesses whose role has been to collate it. The decision of a TPIM subject not to give

²²² *Al-Rawi v Security Service* [2011] UKSC 34, §§ 93-94. I gave a concrete example of the proposition that “*evidence that has been insulated from challenge may positively mislead*”, drawn from control order proceedings, in my report of last year: D. Anderson, *Control Orders in 2011*, March 2012, 3.75.

²²³ *SSHD v AM* [2012] EWHC 1854 Admin, §8.

evidence may be motivated by factors other than acceptance of the allegations against him. Reduced to cold print, the transcript of a person who talks about perpetrating acts of terrorism may be unpleasant or even chilling: but it is necessary to focus also on whether that person has simply been boasting, or whether he is really minded and equipped to carry out the acts. Even a person who has unquestionably been involved in TRA (as it is very broadly defined)²²⁴ may not pose such an acute threat to the public as to justify the exceptional constraints of a TPIM notice. The restraint shown to date by the Home Office and MI5, evident in the small number of control orders and TPIMs imposed to date and their very high success rate in defending them, is always liable to be put to the test in a high-profile case. It is no reflection on current Ministers or officials, whom I have observed to approach their task conscientiously, to say that the risk of over-reaction will be present for as long as these measures are imposed by the executive and not by the courts. The role of the courts in reviewing them remains crucial.

9.31. For all these reasons, I take very seriously the complaints of special advocates who believe that they are not in a position to defend TPIM subjects as effectively as they would wish. There can be no doubt that as the judges themselves have often testified, special advocates can do an excellent job and, on occasion, turn the result of a case.²²⁵ The special advocates have however drawn my attention during the period under review to what they consider to be continuing difficulties in the way of properly performing their functions, including:

- (a) what is said to be persistent ***late and piecemeal disclosure*** of material by the Government, which not only causes case management issues but can force the subject to respond to part of the case against him without knowledge of the fuller case that he will later be shown. It was suggested to me that this process of “*iterative disclosure*” can effectively be used to reward engagement and to penalise non-engagement by the subject;
- (b) the late service of ***expert evidence***, to which there is no practical ability for the special advocates to respond;
- (c) the occasional ***over-use of closed material proceedings*** for evidence which could safely have been heard in open, or by other procedures such as an *in camera* hearing; and

²²⁴ TPIMA 2011, section 4(1); see fn 38, above.

²²⁵ Ouseley J claimed to be speaking for other judges as well as himself when he indicated in *AHK and others v SSHD* [2012] EWHC 1117 Admin. §78 that the special advocates had underestimated their own effectiveness. An example of a case in which the closed submissions of the special advocates may have been particularly influential is the immigration case *Zatuliveter v SSHD* (SIAC, 29 November 2011).

- (d) too absolute a **bar on their ability to communicate** with the subject and the open advocate after the case has gone into closed.

Many of these complaints are of very long standing. Some are disputed by counsel instructed by the Government, and by the Government itself. Some might be described as case management matters for the discretion of the judge in the individual case. None of them lies within my own competence to resolve. Nonetheless, I have been struck by the forcefulness and sincerity with which the special advocates have expressed their views to me. Some of them went so far as to say that they have asked themselves whether, by continuing to serve as special advocates, they are helping to “*legitimise a bad system*”.

- 9.32. I recommended in my last report that:

“A forum should be established, preferably (and if the Lord Chief Justice consents) under the chairmanship of a High Court judge experienced in control order and TPIM litigation, in which the long-standing concerns expressed by Special Advocates (relating in particular to communication with open advocates, practical ability to call evidence and challenge non-disclosure, consultation of closed judgments and issues relating to the adequacy and timing of disclosure in closed material proceedings) are considered in a constructive spirit by all interested parties. With specific reference to TPIMs, the objectives of such a process should include shortening the delays criticized in 2011 by the Court of Appeal and recommending change to rules and practices if it is considered that such changes are necessary.”²²⁶

- 9.33. The Government stated in its Response that it was “*considering*” my proposal,²²⁷ but has so far chosen to proceed by way of meeting and dialogue. Save as to the database of closed judgments, I am not aware of progress having been made on any of the special advocates’ concerns.

- 9.34. I am however encouraged by the Government’s recent reiteration of

“the Home Secretary’s commitment in her response to the Independent Reviewer’s Final Report on Control Orders to ensure that the Special Advocate system operates as effectively as possible, and that unnecessary delays are avoided.”²²⁸

Accordingly, I repeat at Recommendation 5, below, my suggestion that a forum be convened under the chairmanship of a High Court Judge (if the Lord Chief

²²⁶ D. Anderson, *Control Orders in 2011*, March 2012, Recommendation 5.

²²⁷ Response of September 2012, Cm 8443, p. 8.

²²⁸ Government Response to the Report from the Joint Bill Committee on the Draft ETPIMs Bill, Cm 8536, January 2013, §25.

Justice consents), with the power to recommend, though not to implement, changes to rules and practice.

Appeals against modifications

- 9.35. A further specific respect in which it has been suggested to me that TPIM proceedings do not operate fairly is in relation to the practical ability to appeal modifications. Solicitors acting for TPIM subjects have estimated that the average time for a variation appeal to come to court is in the region of six months. Very often, the process is so long delayed that the modification is listed to be dealt with at the main review hearing.
- 9.36. The Government argues that time is needed to ensure that TPIM subjects have a fair trial, and so that the Home Office and the special advocates can comply with their proper duties of disclosure and review. The ambit of a modification hearing is however restricted, for it does not put in issue the main national security case against a subject, but only the necessity of the condition whose modification was refused. There is a marked contrast with the treatment of applications to SIAC to vary bail conditions, which I understand to be handled usually on the papers by the Chairman and to be capable of resolution with great speed, sometimes within a day.²²⁹
- 9.37. It seems to me that this matter should also be addressed, preferably in the forum suggested under Recommendation 5, below. If modifications are as a matter of practice not subject to timely appeal, there is a risk that the executive, however well-intentioned, will use its power to refuse modifications in an insensitive manner – or even that it will be over-influenced by political or media pressure to be harsh.

²²⁹ The two situations are not directly comparable: whereas SIAC is the decision-maker in relation to bail conditions, the High Court in a TPIM case is reviewing the decision of the Home Secretary. However, as was demonstrated in some relocation appeals, the High Court can in appropriate cases act speedily.

10. PROSECUTIONS FOR BREACH

Successes and failures

10.1. In my report on control orders I referred to “*the considerable difficulties attending prosecutions for breach of control orders*”. Successes for the prosecution were indeed rare: over the lifetime of the regime (2005-2011), only two controlled persons who were charged with breach of control order obligations were convicted. Nor did all the failures relate to minor or technical breaches: in December 2007, a controlled person who had absconded was acquitted of breaching his control order obligations, apparently because the jury considered that mental health issues alleged to have been caused by the terms of the order constituted a “*reasonable excuse*”.

10.2. Annex 8 to this Report presents summarises the charges for breach of TPIM notices during 2012. There have been only three. In brief:

(a) One subject (BM) was charged in April 2012 with failing to ring the monitoring company and failing to report to the police station. After a trial in October 2012, he was acquitted by a jury.

(b) Another subject (CF) was charged in June 2012 with entering the Olympic Park, an excluded area, without permission. The CPS decided not to pursue the prosecution in September 2012.

(c) A third subject (CC) was charged in December 2012 with failing to report to the police station. That case (like that of a fourth subject charged outside the period under review, in January 2013) has not yet come to trial.

BM and CF were bailed pending the hearing of their cases, their TPIMs remaining in force. CC was remanded in custody and his TPIM notice revoked. The effect of a revocation is to “*stop the clock*” on a TPIM notice, allowing it (if subsequently revived) to last longer than would otherwise have been the case.

10.3. The second case was colourfully publicised during the pre-Olympic period.²³⁰ Indeed it even left its mark in the oral proceedings of a Parliamentary Committee.²³¹ The alleged breach consisted of CF sitting on an over-ground train as it crossed the Olympic Park, on his way to visit his solicitor in Stratford. After receipt of evidence to the effect that the subject had been advised to take that route by a junior employee of the solicitor’s firm, charges were dropped –

²³⁰ See, e.g., “Al Qaeda terror suspect caught at Olympic park”, Daily Telegraph, 7 July 2012. He was swiftly dubbed a “*would-be suicide bomber*” in press reports and blogs.

²³¹ Joint Committee on the Draft ETPM Bill, Oral Evidence of 11 July 2012, Q29 (Baroness Neville-Jones).

presumably on the basis that if the case had been left to them, the jury would inevitably have found there to be a reasonable excuse.

- 10.4. The rarity of successful prosecutions, whether under control orders or TPIMs, does not seem to have encouraged subjects to believe that they can flout their TPIMs with impunity. Friends and legal advisers to subjects told me that the prospect of a prison sentence of up to five years for a breach weighs heavily with them and can be a major source of anxiety. That mirrors the experience of designated persons under the Terrorist Asset-Freezing Act 2010.²³²

Why are prosecutions for breach so difficult?

- 10.5. There are many reasons why prosecutions are difficult. For example:
- (a) The CPS has to review unused material from a number of sources, including intelligence agencies, so as to ensure that any material that might undermine the prosecution case or assist the defence is disclosed. The time and resources required can be huge, and may seem disproportionate in relation to the likely sentence on conviction.
 - (b) Defendants invariably opt for trial by jury; and juries will not always take a serious view of repeated small breaches of apparently mundane requirements whose necessity is not evident to them.
 - (c) Trials are often delayed until after the High Court has heard reviews or appeals: while a sensible course, this tends to mean that the alleged breaches are already old by the time they come to trial. They may appear trivial if viewed in the light of improved compliance thereafter.
 - (d) There are cases in which evidence of non-compliance could not be deployed in court, because to do so would divulge the means by which intelligence was collected.
 - (e) Factors such as recent changes to reporting procedures or mental health difficulties, whether or not attributed to the measures imposed, may be successfully advanced by way of “*reasonable excuse*”.

Prosecution policy

- 10.6. Given the surprising complexity of prosecutions for breach and their low success rate, one may question why they are brought at all.

²³² D. Anderson, *First report on the operation of the Terrorist Asset-Freezing etc. Act 2010*, December 2011, §§ 7.18-7.26.

- 10.7. The obvious answer is that there must be a credible deterrent for breach of TPIMs if the regime is to be enforceable. The police underlined to me what they consider to be the importance of strict and consistent enforcement. Compliance across the range of TPIM subjects was reasonably good during the period under review: but if enforcement is seen to be off the table, the incentive to breach would increase.
- 10.8. I am mindful that those concerned with the management of a TPIM notice could have other reasons to wish to prosecute for breach, particularly if (as has often been the case in control order and TPIM cases) bail is refused once charges have been brought. A TPIM subject is easier to control when remanded in custody than when living under the TPIM notice. Furthermore, he may if the Home Secretary so chooses have his TPIM notice revoked while he is in prison, with a view to reviving it once he is released after trial or sentence. The effect of so doing is to allow the period in which the TPIM notice was revoked to be added on to the statutory period, thus allowing the subject to remain constrained for longer than the two year maximum available under the TPIM regime.
- 10.9. The desire to prosecute for breach may thus be strong, particularly as TPIMs come towards the end of their extended life. It is all the more important, therefore, that the CPS should continue to make its charging decisions independently and in accordance with the principles set out in the Code for Crown Prosecutors. I have no reason to doubt its strong and continuing commitment to doing so.
- 10.10. A “*zero tolerance*” approach to compliance has its advantages. So too, however, has a tailored exit strategy for each TPIM subject, which may – depending on the circumstances – involve assisting or at any rate not impeding the subject into work, studies or association with people not considered to be dangerous (see further 11.39-11.46, below). There will be cases where those two approaches will come into conflict with each other. The decision whether to seek to prosecute for breach in any given case should, as it seems to me, to be weighed against any possible negative impact on the exit strategy: see Recommendation 6, below.

11. ASSESSMENT

Purpose of the change to TPIMs

- 11.1. The replacement of control orders by TPIMs was a political decision. It was not prompted by any court judgment, either from the United Kingdom or from Strasbourg. Its effect was to modify a control order regime that I have described as “*towards the more repressive end of the spectrum of measures operated by comparable western democracies*”.²³³ It did so by relaxing the extremely tight constraints that were imposed on a small number of men reasonably suspected by the Home Secretary to be dangerous terrorists, and by placing a two-year limit on the period for which, without new evidence, they could be constrained under the new measures.
- 11.2. The shortening of curfews, the ending of forced relocation and the allowing of greater freedoms to communicate and associate were always liable to increase the risk that subjects of these measures would be able by one means or another to maintain their networks, thus facilitating continued TRA and perhaps even the ability to abscond. The Government sought to neutralise that risk by a large increase in the resources made available to the police and to MI5 for covert investigative techniques, including human and technical surveillance. The aim was either to ensure that subjects did not engage in TRA (the “*prevention*” element of the TPIM) or to allow any continued engagement in TRA to be detected, investigated and prosecuted (the “*investigation*” element).

Are TPIMs effective?

- 11.3. The full name of the TPIM – Terrorism *Prevention* and *Investigation* Measures – reflects the different preoccupations of different constituencies in the political debate. The majority looked to TPIMs to prevent TRA. Some hoped that, to a greater extent than control orders, they would afford investigative opportunities that could result in criminal charges.
- 11.4. Both constituencies could not be right. Put simply, if the existence of a TPIM *prevents* TRA, there will be no TRA to *investigate*.
- 11.5. So far, TPIMs have been effective in preventing TRA but not in enabling TRA to be detected.

²³³ D. Anderson, *Control Orders in 2011*, March 2012, 2.19.

Preventative function

- 11.6. The proposition that TPIMs prevent TRA needs to be approached with caution, since it asserts not only that the TPIM notice imposes effective constraints but also that but for the TPIM notice, the subject would pose a threat.
- 11.7. There has as yet been no full-scale analysis of the extent to which key national security targets have been disrupted by TPIM notices.²³⁴ The evidence I have seen suggests to me, however, that some TPIM notices at least are likely to have been effective in **disrupting terrorism**. Men in respect of whom there is considerable evidence of past involvement in TRA have been restricted in their ability to fund terrorism, to recruit terrorists and to plan attacks. Whether they would have engaged in such activities in the absence of their TPIM notices can never be definitively answered: but on the evidence presented, it is at least possible. The same conclusion is implicit in the various review judgments in which it has been held that TPIM notices were and remain necessary for the protection of the public.²³⁵
- 11.8. In addition, because a TPIM subject is considerably easier and cheaper to monitor than a person who is entirely free of constraint, TPIM notices were undoubtedly effective in **releasing resources** for use in relation to other pressing national security targets.

Investigation

- 11.9. So far at least, men who are credibly assessed to have a history of involvement in TRA are not being prosecuted (otherwise than for breach of measures) on the basis of evidence discovered during the currency of their TPIM notices, despite the authorities having every incentive to request the CPS to do so. This mirrors experience with control orders: no former controlled person has ever been successfully prosecuted for a terrorist offence.²³⁶
- 11.10. That should come as no surprise, given the subjects' awareness of the scrutiny to which they are subject and their knowledge that if TRA is avoided, they will be free of all constraints within two years.

²³⁴ As there was in relation to the control orders in place before May 2010: see D. Anderson, *Control Orders in 2011*, March 2012, paras 6.7-6.8.

²³⁵ See, e.g., Ouseley J's comment that "*I believe, and firmly so, that CD has been involved in terrorism-related activity, though to a markedly reduced extent since the imposition of the Control Order and TPIM.*": *SSHD v CD* [2012] EWHC 3026 (Admin) §13.

²³⁶ D. Anderson, *Control Orders in 2011*, March 2012, §§ 3.19-3.21, 3.51.

Are TPIMs enforceable?

- 11.11. There have to date been no successful prosecutions for breach of a TPIM. Of the three subjects charged with breach in 2012, one was acquitted; the prosecution of one was discontinued; and the third awaits trial. This recalls the experience of control orders, where over the lifetime of the system (2005-2011) there were just two convictions, resulting in sentences of 20 weeks' and 15 months' imprisonment respectively.²³⁷
- 11.12. Enforcement of TPIM notices has however been reasonably good, assisted by what is described as a no-tolerance approach on the part of the police. The removal in most cases of the requirement punctually to telephone from the home, which formed the basis of many previous prosecutions, has taken away a fertile source of minor breaches. The requirement to report at a police station, which generally speaking remains, has been a source of continued irritation to TPIM subjects.
- 11.13. The most obvious exception to a generally good record of compliance is the abscond of BX on 26 December 2012, which is briefly discussed at 8.17-8.23, above.

Are TPIMs counter-productive?

- 11.14. If a counter-terrorism strategy is to be effective in the long term, it requires that measures taken to address the threat must not unnecessarily exacerbate tensions or alienate communities. The risk of this is particularly high when the impact of the measure in question is extreme, or concentrated on certain communities, or when the measure is widely used. The first two factors apply in relation to TPIMs, though not the third.²³⁸
- 11.15. The ETPIM Bill Committee took evidence on this point in late 2012 from two academics who had conducted research within Muslim communities. Professor Anthony Glee of the University of Buckingham, who had undertaken research in the Aylesbury Vale district, drew a distinction between policing that was portrayed as spying on Muslim communities, as to which there was real concern, and stronger and more specific measures addressed to individuals, as to which he said:

²³⁷ More detailed figures are given in D. Anderson, *Control Orders in 2011*, March 2012, para 3.62. There were, in addition, convictions of two non-controlled persons: one for aiding and abetting a breach (Abdul Rahman, sentenced to three years' imprisonment on a guilty plea), and one for conspiring to breach a control order (Faisal Siddiqui, sentenced to two years' imprisonment on a guilty plea).

²³⁸ All 10 TPIM subjects to date have been Muslims. The same was true of all 52 controlled persons (nine of whom became TPIM subjects).

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

Professor Helen Fenwick of the University of Durham, who conducted research for the Equalities and Human Rights Commission with Muslim communities in various areas, including London, agreed with the solicitor Gareth Peirce that control orders were capable of creating “*a narrative of injustice, in the sense that of course they are executive interference without a criminal trial*”. She made the same distinction as Professor Glees, however, between measures that were perceived to be targeting the community as a whole (citing the stop and search power in TA 2000 section 44, now repealed) and more specific measures such as ETPIMs which she did not anticipate would have an immense impact.

11.16. This coincides with my own less scientific impressions from contacts and discussions with Muslims and their representatives. Since the repeal of TA 2000 section 44, the issues most often raised with me are alleged over-use of Schedule 7 port stops and what are seen as intimidating or heavy-handed attempts by police or MI5 to seek information and recruit informants. Organisations such as Cageprisoners do highlight the plight of controlled persons and TPIM subjects,²³⁹ and coverage in Muslim media may well evoke a degree of sympathy, particularly for family members.²⁴⁰ It is striking however that when surveyed by Muslim Voice UK in 2007, only 10.3% of Muslims believed that control orders should be abolished, though 71.7% thought controlled persons should be put on trial.²⁴¹

11.17. Such limited evidence as there is suggests, therefore, that control orders and TPIMs – although so far directed exclusively towards Muslims – have not become a major source of grievance among Muslim people generally. The grounds for such grievance have, furthermore, been substantially reduced as a consequence of the replacement of control orders by the less onerous TPIMs. As I said last year in relation to control orders, however, the situation could rapidly change if TPIM notices begin to be used on a significantly greater scale, or against less apparently dangerous targets, than has been the case to date.

Are TPIMs fair?

²³⁹ See, e.g., C. Bullivant (a former controlled person whose control order was set aside by the High Court), “Trial by press but where’s the Jury”, Cageprisoners website 14 January 2013.

²⁴⁰ See e.g. the article from Muslim Weekly of 16 December 2011, quoted in D. Anderson, *Control Orders in 2011*, March 2012 at 3.39.

²⁴¹ *What perceptions do the UK public have concerning the impact of counter-terrorism legislation implemented since 2000?*, Home Office Occasional Paper 88, March 2010, Table 4.

- 11.18. The administrative procedure by which TPIMs are made seems to me to have been a sound (if inevitably one-sided) one. The fairness of the system can however only be tested by reference to the ability of controlled persons to challenge the restrictions placed upon them in the courts.
- 11.19. During the lifetime of control orders, legislators, officials and judges put enormous effort into devising and refining a closed material procedure, based on the operation of special advocates, that is ECHR-compliant and that aspires to the highest standards of procedural fairness required in civil cases. That system, and its attendant case law has been to a very large extent inherited by the TPIM regime, with the happy result that important issues concerning Articles 5 and 6 of the ECHR will not have to be re-litigated from first principles.
- 11.20. That something resembling a fair litigation procedure was fashioned out of PTA 2005 during the six years of its operation is a tribute to the conscientiousness and resourcefulness of the judges and advocates who operated the system. It is a tribute also to the European Court of Human Rights, whose intervention in relation to disclosure was timely and decisive.²⁴²
- 11.21. It must never be forgotten, however, that no closed material procedure can be wholly fair. Nor may the existing system be assumed to be functioning as well or as speedily as it could. In that regard, I take seriously the continuing concerns expressed to me by the Special Advocates and by those acting for TPIM subjects, summarised at 9.30-9.37, above: see Recommendation 5, below.

Was the power to impose TPIMs appropriately used in 2012?

- 11.22. Without commenting on individual cases, I have concluded that the power to impose TPIMs was appropriately used during the period under review. By that I mean that there is no evidence either of TPIMs having been too freely imposed in undeserving cases, or of unnecessary obstacles existing to their imposition when needed. It is important however, particularly in view of political and media pressures following the first TPIM abscond, that all TPIMs remain proportionate and tailored to the specific risks presented by the TPIM subject.

Too freely imposed?

- 11.23. It would be hard to make the case that TPIMs have been too freely imposed in circumstances when all seven of those to have come before the High Court have been substantially upheld as necessary and proportionate.

²⁴² See *A v UK* (2009) 49 EHRR 625, applied to control orders in *SSHD v AF* (No. 3) [2009] UKHL 28, [2010] 2 AC 269. The major appellate decisions on control orders are summarised in D. Anderson, *Control Orders in 2011*, March 2012, 3.82.

11.24. As the Olympic and Paralympic Games drew nearer, and the security concerns of every country in the world turned towards London, it would not have been surprising to see urgent applications for TPIM notices being made. The resources of police and MI5 were widely stretched – a factor which the courts have accepted may be relevant.²⁴³ Ministers and agencies however held their nerve. No TPIM notice was imposed between February and October 2012. I commend those concerned for their proper restraint.

Unnecessary obstacles?

11.25. The converse risk is that TPIMs might have become too hard to impose. They could certainly seem a less attractive option to the Government than were control orders: they are limited to two years; they provide for less extensive controls, and so potentially for a higher risk of abscond; they are more expensive to administer; and initial signs are that they are likely to be no more effective than were control orders as investigative measures.

11.26. That said, my impression is that Government, police and MI5 remain committed to TPIMs in appropriate cases. The preference will always (and correctly) be for prosecution, particularly in view of the two-year limit on a TPIM. Even the reduced control afforded by a TPIM notice is likely however to be more effective, and cheaper to manage, than a regime based merely on overt or covert surveillance.

11.27. I commented last year that after *AF (No. 3)*, a few control orders had to be revoked, and the enhanced disclosure requirement may have deterred others from being made.²⁴⁴ MI5 told me recently that there have been a number of cases in which a potential TPIM case was not put to the Home Office because it was judged that the necessary disclosure would be harmful to national security. My view however remains that *AF (No. 3)* disclosure has been rightly considered by the courts to be an irreducible minimum in cases where restrictions of the kind contained in a TPIM notice are placed on an individual's ability to lead his life.

The need for measures to be proportionate

11.28. It remains important to ensure that the measures imposed on a given subject are no more onerous than public protection requires. A single abscond during the period under review is not enough to justify a general ratcheting up of TPIMs (any more than one bail breach could justify a general hardening of bail conditions). The range of measures on each subject has to be individually

²⁴³ *AY*, §§ 29-30, applying to TPIMs the guidance of the Court of Appeal in *SSHD v MB* [2007] QB 415 at §63.

²⁴⁴ D. Anderson, *Control Orders in 2012*, March 2012, 3.76.

assessed on the basis of the risk presented by that subject: see in this connection 8.23, above, and Recommendation 4, below.

- 11.29. Nor should the ever-present possibility of abscond forever rule out the imposition of relatively light-touch TPIM notices (or the equivalent pursuant to other powers), on the analogy of the light-touch control orders that were imposed prior to 2010 on people in respect of whom the chief danger is that they might seek to travel abroad.

Relocation

- 11.30. I concluded last year that of all the restrictions contained in control orders, relocation had the potential to be the most disruptive – both to family life and to terrorist networks. It was prized for national security purposes as much as it was resented by families.²⁴⁵
- 11.31. Balancing those requirements as the courts were obliged to do, some relocations were overturned but a significantly greater number were upheld.²⁴⁶ For example, the Government submitted in the case of BX, when it was last before a court in 2010, that “*relocation a substantial distance from London*” was needed, among other reasons, “*to assist in preventing the appellant from travelling abroad.*”²⁴⁷ The judge concluded that notwithstanding what he described as the severe interference with BX’s human rights, “*removal from London was properly regarded as necessary*”, and “*it is too dangerous to permit him to be in London even for a short period*”.
- 11.32. The possibility of relocation has now been removed. That step was not required by the courts (which had indeed shown themselves generally supportive of relocation as a deterrent to TRA). It was however a perfectly proper decision for Parliament to take on civil liberties grounds; and it is one to which the police and MI5 have managed, generally speaking, to adapt. Whether the ending of relocation was a decisive factor in the BX abscond is a question on which it will be possible to comment only once the current investigation is complete.

The two-year limit

- 11.33. The boldest and most significant aspect of the change from control orders to TPIMs was not the ending of relocation but the imposition of a 2-year maximum

²⁴⁵ D. Anderson, *Control Orders in 2011*, March 2012, 6.13-6.14. The police stated to Parliament that the loss of the power “*will significantly increase the challenges that we have to face*”: DAC Stuart Osborne, Hansard (Public Bill Committee) 21 June 2011, col 6.

²⁴⁶ 23 were imposed and four overturned, three on proportionality grounds and one for non-disclosure.

²⁴⁷ *BX v SSHD* [2010] EWHC 990 (Admin) §§ 18, 22.

time limit on TPIM notices. This was, once again, a free political choice. Its results are potentially very significant. Thus:

(a) In two cases (AM and AY, men alleged to have been associated with the Overt plot to bring down transatlantic airliners in 2006), judges had previously upheld control orders for periods in excess of four years. Unless their extended TPIMs are revoked or struck down, they will thus have been constrained for between six and seven years by the time they expire: and had the system of control orders not been replaced, their orders could have been annually renewed even beyond that point.

(b) By contrast, any future TPIM subjects believed to pose an equivalent risk will be limited to a maximum of two years' constraint, unless they engage in further TRA during the currency of their TPIM notice.

11.34. The practical consequence of the change is that unless new evidence of TRA comes to light during the currency of their existing TPIMs, many of the original nine TPIM subjects – all of them British citizens – will be freed of constraint in early 2014.²⁴⁸ Depending on the risk they are assessed to pose, they could of course remain thereafter the subject of overt and/or covert surveillance, at least if they chose to remain in the United Kingdom. But unsupported by the apparatus of a TPIM notice (e.g. the overnight residence requirement and GPS tagging), this is expensive: and there are many competing priorities for the limited surveillance resource.

11.35. The two-year maximum limit on TPIMs was supported by my predecessor, Lord Carlile. He stated in his last report on control orders:

“In the current system, and for its replacement, I remain of the opinion I have expressed before about duration. I agree with the intention expressed in the Counter-Terrorism Review that there should be a maximum duration of the intervention of two years, with a new one available after that time only if there is new evidence that the individual has continued to be engaged or has re-engaged in terrorism-related activities.”²⁴⁹

11.36. It is tempting, in the most serious cases, to wish for longer. After all:

²⁴⁸ The potential expiry date may be later for some subjects, e.g. CC (whose TPIM was revoked when he was charged with breaches in December 2012 and remanded in custody) and BX (whose TPIM was allowed to expire after his abscond).

²⁴⁹ Lord Carlile, *Sixth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, February 2011, §55. He went on to suggest that the threshold for intervention after two years should be raised to the balance of probabilities.

- (a) The allegations against some TPIM subjects are at the highest end of seriousness, even by the standards of international terrorism.²⁵⁰
- (b) Some subjects have (without conceding their involvement) chosen not to contest the national security case against them.²⁵¹
- (c) In each case decided to date, High Court judges have largely backed both the Home Secretary's belief of involvement in TRA and her decision that a TPIM notice was necessary to protect the public

11.37. I agree however with Lord Carlile's support for the two-year maximum, essentially for four reasons:

- (a) The longer a TPIM notice is allowed to last and the heavier its restrictions, the harder it becomes to defend it as a preventative measure rather than as part of a shadow system of punishment that bypasses both the criminal courts and the criminal burden of proof. As a court has already said in relation to "preventative" asset freezes, measures which normally have considerably less personal impact than a TPIM notice:

*"In the scale of a human life, 10 years in fact represent a substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal now seems to be an open one."*²⁵²

- (b) Even the two years of constraint now permitted is a very strong power by international or indeed historic British standards: it exceeds anything that was on the statute book, save in relation to foreign nationals, prior to 2005.²⁵³
- (c) While the procedures for judicial scrutiny have been much improved since 2005, the courts do no more than review (albeit "intensively") decisions taken by the Home Secretary. In that process, there is "*certainly no requirement that particular TRA needs to be established to the standard of at least more*

²⁵⁰ 4.15(a), above.

²⁵¹ AM proceeded with review but did not seek to challenge the evidence of his alleged participation in the Overt plot (4.12(a), above). BX and DD chose not to proceed with review of their TPIM notices: 9.2, above.

²⁵² Case T-85/09 *Kadi II*, judgment of 30 September 2010 at §150 (currently under appeal). A similar point was made by the UN Commissioner for Human Rights: see further D. Anderson, *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010*, December 2011, 2.7-2.8.

²⁵³ Not even Part IV of ATCSA 2001, passed in the months after 9/11 and declared incompatible with human rights by the House of Lords in 2004, made provision for British citizens to be constrained on the basis of suspicion or belief of their involvement in terrorism.

probable than not.²⁵⁴ a low threshold to justify a lengthy period of constraint, even if it is in practice usually exceeded.

(d) The two-year limit is short enough to render TPIMs an unattractive alternative to criminal prosecution. It gives a number of healthy incentives to the authorities: in particular, to find ways of allowing sensitive evidence to be deployed in criminal proceedings and to devote serious and constructive thought to TPIM exit strategies.

11.38. The stakes in this particular debate are particularly high. All things considered, however, the two-year maximum seems to me an acceptable compromise between the various interests involved.

Exit strategy

11.39. One respect in which it seems to me that minds need perhaps to be concentrated more than has previously been the case is in the area of exit strategy: in particular, engagement with the subject during the currency of his TPIM notice and co-ordination with any related PREVENT activity. See Recommendation 7, below.

11.40. I have been struck from time to time by the incongruity of a system that allows young men who have been characterised as dangerous terrorists to be closely controlled for a period of up to two years, but takes no advantage of the opportunities thus provided for dialogue. TPIMs aim to prevent terrorist offending in the short term: but the chosen method is containment rather than engagement. I believe that more could be done, in some cases at least, to engage with TPIM subjects other than through the police and MI5.

11.41. Defendants who are convicted in the Crown Court generally have their sentences decided upon with the assistance of a probation officer who, on the basis of an in-depth interview, proposes in a pre-sentence report the disposal best calculated to promote rehabilitation. The probation service also provides supervision of offenders in the community. Further multi-agency support and intervention is available, for offenders who have been released from prison, pursuant to multi-agency public protection arrangements **[MAPPA]** reinforced by licence conditions. Interaction may be with probation officers or with other organisations working with them, such as Active Change Foundation and the Unity Initiative.

11.42. The situation of a TPIM subject is not directly comparable: he has been convicted of no crime, and is likely to be particularly wary of saying anything that

²⁵⁴ *SSHD v BM* [2012] EWHC 714 (Admin), endorsed in *SSHD v CC and CF* [2012] EWHC 2837 (Admin).

might be construed as an admission. He is however subject to a TPIM notice because he is reasonably believed to have been involved in terrorism; and the objectives of probation or MAPPA work, which are essentially preventative rather than punitive, apply to him as much as they do to a convicted offender.

- 11.43. It would be naïve to suppose that all TPIM subjects, particularly those who may already be hardened terrorists, could be effectively diverted away from TRA by interventions of this kind. All are however human beings; all are and will remain members of society; and some have first come under constraint while still quite young.²⁵⁵ If nothing else, an element of intervention could give them a point of reference distinct from those which are believed to have led them into TRA. At best, it could help to set them on a different path.
- 11.44. I have discussed this idea with representatives of the Metropolitan Police, the National Probation Service, the Serious and Organised Crime Agency and the Home Office. While I did not seek a concluded view from any of them, those discussions were positive and have emboldened me to put this idea on the table so that all concerned (including the intelligence agencies, who obviously have an interest) can discuss it in a more formal way and, I hope, find some merit in it.
- 11.45. It was emphasised to me that any probation-style intervention is unlikely to be effective without a power of compulsion, of the kind that exists at all stages of the criminal justice system from preparation of pre-sentence report through to licence conditions on prison release. Unless such a power could be characterised as an association measure,²⁵⁶ it is likely that an additional express power to require attendance at meetings with specified persons would have to be inserted into TPIMA 2011 Schedule 1.²⁵⁷
- 11.46. In any case where probation intervention is achieved, I add that it would be advantageous for the responsible senior probation officer to attend TRG and XTM meetings. The depth and quality of discussion at those meetings, especially in relation to exit strategy, could be improved if the probation service were able to bring additional insights into the subject's motivation and potential for rehabilitation.

²⁵⁵ For example, AM was 19 when first placed under a control order in June 2007.

²⁵⁶ TPIMA 2011 Schedule 1, para 8.

²⁵⁷ Australian control orders include among their permitted restrictions "*a requirement that the person participate in specified counselling, or education*" (Criminal Code 1995, section 104.5(3)(l)). However the requirement to take part in counselling or education operates only if the controlled person agrees to participate (section 104.5(6)), and no such restriction was present in the two control orders made to date.

The threshold for establishing Condition A

11.47. I raised the question last year of why the Government should not be required to establish involvement in terrorist activity *on the balance of probabilities* (i.e. to the civil standard of proof). It is relevant that:

- (a) Precisely that standard would have been required for the making of a derogating control order,²⁵⁸ and would in the future be required if the ETPIM Bill were enacted.²⁵⁹ Even at the time of greatest national emergency, therefore, it has been accepted by the Government and by Parliament that a balance of probabilities test is appropriate for measures of this kind.²⁶⁰
- (b) Lord Carlile recommended a balance of probabilities standard in respect of second and subsequent TPIMs.²⁶¹
- (c) A balance of probabilities test is applied in relation to Australian control orders, the closest international comparator to TPIM notices.
- (d) Even Condition B, which requires that some or all of the relevant activity *is* new terrorism-related activity,²⁶² appears to be couched in the language of balance of probability.

11.48. Save in cases of urgency, where a lower standard might be needed on a temporary basis, there is thus no obstacle in principle to requiring proof on the balance of probabilities before a control order or TPIM could be made.²⁶³ Such a requirement would be limited in its scope, applying only to the “*binary*” question²⁶⁴ of whether or not a person had been involved in TRA,²⁶⁵ and not to the more discretionary issues of necessity under Conditions C and D.

11.49. There are also reasons of fairness why a higher standard might be considered appropriate. Whilst the purpose of TPIM notices – crucially – is prevention rather

²⁵⁸ PTA 2005 section 4(7).

²⁵⁹ ETPIM Bill clause 2(1). Note however that in cases falling short of the balance of probability, it would still be open to the Home Secretary to make a TPIM on the basis of reasonable belief.

²⁶⁰ In its response to the Report from the Joint Committee on the Draft ETPIMs Bill, the Government “*welcome[d] the Committee’s conclusion that it would be appropriate to raise the legal threshold for imposing an ETPIM notice from reasonable belief – as with the current TPIM notice requirement – to the balance of probabilities.*”: Cm 8536, January 2013, §10.

²⁶¹ *Sixth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, §56.

²⁶² TPIMA 2011 section 3(2).

²⁶³ See, in this regard, the recommendations of the Joint Committee on Human Rights: *Legislative Scrutiny: Terrorist Prevention and Investigation Measures Bill (Second Report) 2010-2012* HL 204 / HC 1571, October 2011.

²⁶⁴ *In re B* [2008] UKHL 35, per Lord Hoffmann at §2.

²⁶⁵ I can see no argument for replacing the “*reasonably considers*” test in Conditions C and D, where questions of necessity depend on an assessment in respect of which it is appropriate for the court to exercise only a review function.

than punishment, they do function in some respects as an alternative to the criminal process. They give an advantage to the Government by allowing intelligence to be taken into account which could not be deployed in a criminal court. With all that evidence available, why should the Government not be kept at least to the civil standard of proof in making out their case on TRA?

- 11.50. Objections have been put to me, concerning both consistency with other similar regimes (proscription, asset-freezing) and fears, alluded to in my report of last year, that the criminal protections in Article 6(3) of the ECHR could unwittingly be brought into force by a change in the burden to be satisfied on Condition A.²⁶⁶ Those concerns, though cogent, do not seem to me conclusive.
- 11.51. It is also suggested that there may have been a few cases, particularly under the control order regime where only reasonable suspicion was required, in which the higher balance of probabilities test was not actually met. That may be so, though it is not easy in the absence of specific judicial indications to assess whether it was the case or not.
- 11.52. I said last year that since Parliament had only recently decided after thorough debate upon the appropriate standard of proof in relation to Condition A, it would be desirable for consideration of any amendment to wait until more experience has been accumulated of the operation of that new standard. Barely a year into the operation of the Act, I repeat that observation. I shall however continue to keep both the feasibility and the likely consequences of a legislative shift to balance of probabilities under careful review. I urge others to do the same: Recommendation 8, below.

Conclusion

- 11.53. As noted at the outset,²⁶⁷ the TPIM regime has attracted vigorous criticism from opposing directions. Civil libertarians see it as having inherited many of the objectionable features of control orders, notably the imposition of intrusive restrictions on unconvicted individuals and the use of closed material proceedings in the courts. The more security-minded attack it for diluting the effectiveness of control orders, most obviously by the ending of relocation and the introduction of the two-year maximum.
- 11.54. Both criticisms have real force. TPIM notices do invade liberty and compromise traditional ideas of a fair trial. They also give less extensive protection than control orders, providing at best a temporary solution to the genuine and serious problem that they seek to address.

²⁶⁶ D. Anderson, *Control Orders in 2011*, March 2012, fn 179.

²⁶⁷ 1.14, above.

- 11.55. Nobody could feel entirely comfortable about the TPIM regime, or wish it to survive for any longer than necessary. But messy political compromise though it was, it seems to me to represent a broadly acceptable response to some intractable problems.
- 11.56. In terms of **security**, the TPIM regime continues to provide a high degree of protection against untriable and undeportable persons who are judged on substantial grounds to be dangerous terrorists, while acknowledging that it is unacceptable to place persons who have not been charged with or convicted of crime under indefinite constraint.
- 11.57. In terms of **liberty**, the TPIM regime – at considerable financial cost – allows more autonomy to subjects and their families, reduces the scope for exploiting grievance, and demonstrates the vital truth that even after 9/11, “*an irreversible downward spiral in rights protections is not inevitable*”.²⁶⁸ It takes its place alongside other recent measures which, together, have amounted to a cautious liberalisation of our anti-terrorism laws.²⁶⁹
- 11.58. **Operationally**, the TPIM regime in its first year has been the beneficiary of lessons learned from seven years of administrative practice and judicial decision-making under PTA 2005. Ministers and officials performed their functions in a thorough, conscientious and restrained manner. The courts provided the necessary careful scrutiny, if not always as quickly as might have been ideal. Unremitting pressure from lawyers and NGOs over the years has played an important part in rendering the system fairer than could otherwise have been the case. It remains imperfect, however. My suggestions for further improvement are set out in chapter 12, below.

²⁶⁸ D. Cole, “English lessons: a comparative analysis of UK and US responses to terrorism” (2009) 62 *Current Legal Problems* 136-167, p. 167.

²⁶⁹ Notably, the repeal of a no-suspicion stop and search power, changes to the terrorist asset-freezing regime and the reduction in the maximum period of detention without charge from 28 days to 14 days. I have suggested that the process of cautious liberalisation may have further to travel, particularly in the context of proscription of organisations, Schedule 7 port examinations and Schedule 8 detention: see the recommendations in D. Anderson, *The Terrorism Acts in 2011*, June 2012, chapter 12.

12. RECOMMENDATIONS

Recommendation 1

JTAC should be invited to explore the possibility of providing an authoritative open account of the threat from terrorism, in the form of a regular publicly-accessible report (1.16, above).

Recommendation 2

In the event that it should be decided to bring the ETPIM Bill into force, some such formal mechanism for involving the Intelligence and Security Committee as was recommended by the Joint Bill Committee should be given effect, supplemented as may seem appropriate by the involvement of the Intelligence Services Commissioner and/or the Independent Reviewer of Terrorism Legislation (3.19-3.24, above).

Recommendation 3

Information regarding the location of TPIM subjects, broken down by region, should be supplied in future quarterly reports under TPIMA 2011 section 19, as recommended in my last report (4.5, above).

Recommendation 4

The technical, operational and strategic lessons of BX's recent abscond should be identified and implemented, without abandoning the principle that TPIM requirements must reflect only the risks that are posed by the individual upon whom they are imposed (8.21-8.23 and 11.28-11.29, above).

Recommendation 5

A forum should be established under judicial chairmanship, as recommended in my last report, with the power to consider procedural concerns raised by special advocates and representatives of TPIM subjects and to recommend change to court rules and practices if it considers that such changes are necessary (9.30-9.37, above).

Recommendation 6

It should be recognised that a “zero tolerance” approach to TPIM compliance will not always be appropriate. In particular, its advantages may need to be weighed in a particular case against any possible negative impact on the exit strategy for that subject (10.6-10.10, above).

Recommendation 7

More work should be done on developing exit strategies from TPIMs. In particular, any related PREVENT activity should be integrated into the management of TPIMs, and consideration should be given to involving the probation service where appropriate, pursuant to a new or existing power to require attendance at meetings with specified persons (11.39-11.46, above).

Recommendation 8

The feasibility of requiring involvement in terrorist-related activity to be proved on the balance of probabilities should be kept under careful review, with a view to possible future legislative change (3.12-3.13 and 11.47-11.52, above).

ANNEX 1

Home Office table: control orders and TPIMs

Table of differences between control orders and TPIMs

	Control orders	TPIMs
Legal Test	Legal test for imposition of control order: reasonable suspicion of involvement in terrorism-related activity; order must be necessary to protect the public.	Legal test for imposition of TPIM notice: reasonable belief of involvement in terrorism-related activity; measures must be necessary to protect the public.
Duration	Order lasted maximum of 12 months. Renewable if necessary to protect the public; no maximum number of renewals where necessity test satisfied. Orders in place in a small number of cases for over 4 years.	Order lasts maximum of 12 months extendable once, giving <u>maximum time limit of 2 years</u> . Evidence of further engagement in terrorism-related activity required to justify a further notice beyond 2 years.
Obligations (general)	Any obligation to protect the public could be imposed where judged necessary and proportionate to disrupt terrorism-related activity. (The obligations were not set out in detail on the face of the legislation.)	A narrower range of measures – described in detail on the face of the Act – can be imposed where judged necessary and proportionate to disrupt terrorism-related activity.
Curfew / Overnight residence requirement / Residence requirement	Maximum curfews of up to 16 hours for non-derogating control orders with electronic tagging available to monitor compliance.	A requirement to reside overnight at a specified residence (most TPIM notice specify 10 hours) – with limited stays at other locations possible. Electronic tagging available to monitor compliance.
Relocation	Option to relocate individuals to Home Office provided accommodation – potentially several hours travel away from current residence.	No power to relocate away from local area without agreement. A power to provide alternative accommodation within the locality of the home address.
Communication	Option to have complete prohibition of access to mobile phones, computers and the internet (and associated technology/equipment).	All individuals have a right to use one mobile phone without internet access and one landline telephone. All individuals will be able to have access to the internet through one home computer. Use of equipment will be subject to necessary controls e.g. regular inspection and notification of passwords.
Association	Option to prohibit association with any named individuals where necessary. And option to prohibit association without permission with anyone other than named	Option to prohibit association with named individuals retained. Association with any other person requires notification. (Policy intention is that notification will be

	individuals and specified descriptions of persons.	required on the first occasion (and will be unrestricted on subsequent occasions)).
Work/study	Option to require notification and/or approval of work and study.	Option retained.
Boundary	Option to impose a very restrictive geographical boundary – limiting the individual to a relatively narrow area and excluding him from areas of significant concern. Option to impose a limit on entry to one of more mosques.	No geographical boundaries. Power to exclude from particular places – streets or specified areas or towns – or descriptions of places (e.g. airports, specified mosques).
Travel abroad	Option to prohibit travel abroad.	Option to prohibit travel abroad without permission of Secretary of State.
Police reporting	Option to require daily reporting to the police.	Option retained.
Financial	Option to place restrictions on use of financial services and transfers of property and requirements to disclose details of property.	Option retained.
Renewal	Annual renewal of Act	Renewal of Act every five years
Derogation	Derogating control orders possible – if Government was to derogate from Article 5 (right to liberty) of the European Convention on Human Rights – imposing 24 hour curfew (house arrest).	No power to make derogating orders.
Prospects of prosecution	Police must keep prospects of prosecution under review, consulting CPS as necessary	Police must keep prospects of prosecution under review, consulting CPS as necessary. Police under statutory duty to inform Home Office of outcome.

ANNEX 2

Quarterly reports 2012

HOME OFFICE

Terrorism Prevention and Investigation Measures (15 December 2011 - 29 February 2012)

The Secretary of State for the Home Department (Theresa May): Section 19(1) of the Terrorism Prevention and Investigation Measures Act 2011 (the Act) requires the Secretary of State to report to Parliament as soon as reasonably practicable after the end of every relevant three-month period on the exercise of her TPIM powers under the Act during that period.

The level of information provided will always be subject to slight variations based on operational advice.

TPIM notices in force (as of 29 February 2012)	9
TPIM notices in respect of British citizens (as of 29 February 2012)	9
TPIM notices imposed (all of the individuals who were subject to a control order at the time the TPIM Act received Royal Assent are now subject to a TPIM notice)	9
Variations made to measures specified in TPIM notices	4
Applications to vary measures specified in TPIM notices refused	7

During the reporting period: no TPIM notices were extended; no TPIM notices were revoked; and no TPIM notices were revived.

A TPIM Review Group (TRG) has been set up in order to keep every TPIM notice under regular and formal review. The TPIM Review Group met twice during this reporting period.

No individuals were charged in relation to an offence under section 23 of the Act (contravening a measure specified in a TPIM notice without reasonable excuse) during the period.

Section 16 of the 2011 Act provides rights of appeal against decisions by the Secretary of State in relation to decisions taken under the Act. Four appeals were lodged under section 16 during the reporting period.

Section 16 of the 2011 Act provides right of appeal against decision by the Secretary of State in relation to decision taken under the act. No appeals were lodged under section 16 during the reporting period and no judgements have been handed down by the High Court in relation to TPIM cases.

End of Statement.

Tuesday, 19 June 2012

HOME OFFICE

Terrorism Prevention and Investigation Measures (1 March 2012 to 31 May 2012)

The Secretary of State for the Home Department (Mrs. Theresa May): Section 19(1) of the Terrorism Prevention and Investigation Measures Act 2011 (the Act) requires the Secretary of State to report to Parliament as soon as reasonably practicable after the end of every relevant three-month period on the exercise of her TPIM powers under the Act during that period.

The level of information provided will always be subject to slight variations based on operational advice.

TPIM notices in force (as of 31 May 2012)	9
TPIM notices in respect of British citizens (as of 31 May 2012)	9
Variations made to measures specified in TPIM notices	21
Applications to vary measures specified in TPIM notices refused	19

During the reporting period: no TPIM notices were imposed; no TPIM notices were extended; no TPIM notices were revoked; and no TPIM notices were revived.

A TPIM Review Group (TRG) keeps every TPIM notice under regular and formal review. The TPIM Review Group met twice during this reporting period.

One individual was charged in relation to an offence under section 23 of the Act (contravening a measure specified in a TPIM notice without reasonable excuse) during the period.

Section 16 of the 2011 Act provides rights of appeal against decisions by the Secretary of State in relation to decisions taken under the Act. Four appeals were lodged under section 16 during the reporting period.

One judgment has been handed down by the High Court in relation to a TPIM notice. On 27 March 2012, the High Court handed down the first judgment in relation to the review of a TPIM notice under s.9 of the Act. In *Secretary of State for the Home Department v BM [2012] EWHC 714* (admin) the High Court upheld the TPIM notice and the control order which preceded it.

Most full judgments are available at <http://www.bailii.org/>

End of Statement.

HOME OFFICE

Terrorism Prevention and Investigation Measures (1 June 2012 to 31 August 2012)

The Secretary of State for the Home Department (Mrs. Theresa May): Section 19(1) of the Terrorism Prevention and Investigation Measures Act 2011 (the Act) requires the Secretary of State to report to Parliament as soon as reasonably practicable after the end of every relevant three-month period on the exercise of her TPIM powers under the Act during that period.

The level of information provided will always be subject to slight variations based on operational advice.

TPIM notices in force (as of 31 August 2012)	9
TPIM notices in respect of British citizens (as of 31 August 2012)	9
Variations made to measures specified in TPIM notices	27
Applications to vary measures specified in TPIM notices refused	12

During the reporting period: no TPIM notices were imposed; no TPIM notices were extended; no TPIM notices were revoked; and no TPIM notices were revived.

A TPIM Review Group (TRG) keeps every TPIM notice under regular and formal review. The TPIM Review Group met twice during this reporting period.

One individual was charged in relation to an offence under section 23 of the Act (contravening a measure specified in a TPIM notice without reasonable excuse) during the period.

Section 16 of the 2011 Act provides rights of appeal against decisions by the Secretary of State in relation to decisions taken under the Act. No appeals were lodged under section 16 during the reporting period.

Three judgments have been handed down by the High Court in relation to the review of TPIM notices under section 9 of the Act. In *Secretary of State for the Home Department v BF* [2012] EWHC 1718 (admin), handed down on 25 June 2012, the High Court upheld the TPIM notice imposed on BF. On 6 July 2012, in *Secretary of State for the Home Department v AM* [2012] EWHC 1854 (admin), the High Court upheld the TPIM notice imposed on AM and the renewal of the control order which preceded it, with a minor amendment to one measure. AM has applied to the Court of Appeal for permission to appeal this judgment. On 19 July 2012, in *Secretary of State for the Home Department v AY* [2012] EWHC 2054 (admin), the High Court upheld the TPIM notice and dismissed the appeal

against the renewal of the control order which preceded it. Most full judgments are available at <http://www.bailii.org/>

End of Statement.

HOME OFFICE

Terrorism Prevention and Investigation Measures (1 September 2012 to 30 November 2012)

The Secretary of State for the Home Department (Mrs. Theresa May): Section 19(1) of the Terrorism Prevention and Investigation Measures Act 2011 (the Act) requires the Secretary of State to report to Parliament as soon as reasonably practicable after the end of every relevant three-month period on the exercise of her TPIM powers under the Act during that period.

The level of information provided will always be subject to slight variations based on operational advice.

TPIM notices in force (as of 30 November 2012)	10
TPIM notices in respect of British citizens (as of 30 November 2012)	9
Variations made to measures specified in TPIM notices	12
Applications to vary measures specified in TPIM notices refused	7

During the reporting period: one TPIM notice was imposed; no TPIM notices were extended; no TPIM notices were revoked; and no TPIM notices were revived.

A TPIM Review Group (TRG) keeps every TPIM notice under regular and formal review. The TPIM Review Group met twice during this reporting period.

No individuals were charged in relation to an offence under section 23 of the Act (contravening a measure specified in a TPIM notice without reasonable excuse) during the period.

Section 16 of the 2011 Act provides rights of appeal against decisions by the Secretary of State in relation to decisions taken under the Act. No appeals were lodged under section 16 during the reporting period.

Two judgments have been handed down by the High Court in relation to the review of TPIM notices under section 9 of the Act. In *Secretary of State for the Home Department v CC and CF* [2012] EWHC 2837 (Admin), handed down on 19 October 2012, the High Court upheld the TPIM notices imposed on CC and CF (and the control orders which they were subject to before the TPIM notices). CC and CF have applied for permission to appeal the judgment. In *Secretary of State for the Home Department v CD* [2012] EWHC 3026 (Admin), handed down on 5 November 2012, the High Court upheld TPIM notice imposed on CD. Most full judgments are available at <http://www.bailii.org/>

End of Statement.

ANNEX 3

Obligations on TPIM subjects November 2012

MEASURE		1	2	3	4	5	6	7	8	9	10
Overnight residence:	confined hours										
	HO provided accommodation	X	X		X	X	X	X	X	X	X
Travel:	must not leave GB	X	X	X	X	X	X	X	X	X	X
	surrender documents	X	X	X	X	X	X	X	X	X	X
Exclusion:	specific areas/places	X	X	X	X	X	X	X	X	X	X
	classes of area/place	X	X	X	X	X	X	X	X	X	X
	All mosques		X								
Movement directions:	comply with directions	X	X	X	X	X	X	X	X	X	X
	one bank account		X	X	X	X	X	X	X	X	X
Financial services:	credit subject to permission		X		X	X	X	X	X	X	X
	limit on cash held				X	X	X	X	X	X	X
Property:	notify premises and vehicles	X	X	X	X	X	X	X	X	X	X
	no international transfers		X	X	X	X	X	X	X	X	X
	limit on domestic transfers				X						
Electronic communications:	one computer, landline, mobile	X	X	X	X	X	X	X	X	X	X
	website access subject to permission										X
Association:	Specific individuals	X	X	X	X	X	X	X	X	X	X
	notify meetings in residence	X	X								X
Work/studies:	notify meetings outside residence	X	X		X	X	X	X	X	X	X
	no international communication		X	X	X	X	X	X	X	X	X
	preaching and publishing subject to permission										X
Reporting:	notify work/studies	X	X	X	X	X	X	X	X	X	X
	not work in notified fields	X	X	X	X	X	X	X	X	X	X
Photograph:	daily to police station		X		X	X	X	X	X	X	X
	allow photo to be taken	X	X	X	X	X	X	X	X	X	X
Monitoring:	curfew tagging	X	X	X	X	X	X	X	X	X	X
	GPS tagging	X	X	X	X	X	X	X	X	X	X
	call in at specified times	X		X							

Average length of overnight residence period: 9.4 Hours

Correct on 30 November 2012

ANNEX 4

Sample TPIM notice

SCHEDULE OF MEASURES IMPOSED BY THIS TPIM NOTICE

This schedule sets out the measures imposed on: XXXXXX

GENERAL

This schedule refers to Schedule 1 to the TPIM Act 2011, which is enclosed.

In places this schedule provides that you:

- must give notice to the Home Office before doing something;
- must give notice to the Home Office after doing something; or
- must not do something without obtaining the prior permission of the Home Office.

This schedule sets out the information you must supply when **giving notice**. In some cases the Home Office may write to you for additional information. A requirement for you to give notice will not be complied with until you receive written notice from the Home Office that your notice has been received and no further information is required from you.

The information you must provide when **seeking permission** under the measures in this schedule will be notified to you separately in writing. In some cases the Home Office may write to you for additional information. Any request for permission will not be considered further unless all such information is provided. Where permission is granted, this will be notified to you in writing. Permission may be granted subject to conditions, and you must comply with all these conditions.

A breach of any measure (including failing to comply with the conditions of any permission granted) without reasonable excuse is a criminal offence.

OVERNIGHT RESIDENCE MEASURE

- 1.1) You must reside at XXXX (“your residence”).
- 1.2) You must remain inside your residence between the hours of 21.00 and 07.00. For this purpose, “residence” means only the house at XXXX and does not include any garden associated with it.
- 1.3) You may only be away from your residence between the hours of 21.00 and 07.00 if the Home Office has given you permission to do so.
- 1.4) You must comply with the terms of occupancy associated with your residence, which are enclosed with this notice.

TRAVEL MEASURE

- 2.1) You must not leave Great Britain unless the Home Office has given you permission to do so.
- 2.2) On service of this TPIM notice, you must surrender your travel documents to a police officer.
- 2.3) You must not possess or take any step to obtain any travel document unless the Home Office has given you permission to do so.

2.4) "Travel document" means:

- a passport, as defined in paragraph 2(4) of Schedule 1 to the TPIM Act 2011; or
- any ticket or other document that permits you to make a journey from Great Britain to a place outside Great Britain or between places outside Great Britain.

EXCLUSION MEASURE

3.1) You must not enter any of the following areas ('the excluded areas') unless the Home Office has given you permission to do so. The excluded areas are:

- (a) Area A: XXXX
- (b) Area B: XXXX
- (c) Area C: XXXX
- (d) Area D: XXXX
- (e) Area E: XXXX
- (f) Area F: XXXX
- (g) Area G: XXXX

(Maps enclosed with this notice.)

3.2) You must not enter any of the following places ('the excluded places') unless the Home Office has given you permission to do so:

- (a) XXXX
- (b) XXXX;
- (c) XXXX
- (d) any café, shop or other premises that provides internet access to customers or clients;
- (e) any shop or other premises that carries on any business that exclusively or mainly provides currency exchange or money transfer facilities whether domestic or international other than branches of the bank(s) that holds your nominated or any permitted account (see the Financial Services Measure);
- (f) any shop or other premises that carries on any business that is exclusively or mainly a travel agency; or
- (g) any shop or other premises that carries on any business that exclusively or mainly provides rental or sale of electronic communication devices (within the meaning of paragraph 7(5) of Schedule 1 to the TPIM Act 2011).

3.3) You must not enter any of the following places unless the Home Office has given you permission to do so:

- (a) any airport or sea port;
- (b) any railway station from which rail services to overseas destinations depart;
or

- (c) any building, car park, collection point, drop off point or other area that is within, located at or is connected or adjacent to any place mentioned in (a) or (b).

3.4) You must not enter any of the areas set out in the attached document entitled 'Olympic/Paralympic Excluded Areas' until the time set out in that document.

MOVEMENT DIRECTIONS MEASURE

4.1) You must comply with any directions given to you by a police officer in accordance with paragraph 4 of Schedule 1 to the TPIM Act 2011.

FINANCIAL SERVICES MEASURE

5.1) You must not hold or use any account other than one "nominated account", which must be held with a bank (as defined in paragraph 5(4) of Schedule 1 to the TPIM Act 2011, which includes a building society or the Post Office), unless the Home Office has given you permission to do so.

5.2) On service of this TPIM notice you must provide to the Home Office:

- (a) within two working days, notification of the name of the financial services provider, the name(s) in which the account is held, and the account number and sort code (or equivalent account details) for all accounts you hold;
- (b) within two working days, notification of which account will be your nominated account;
- (c) within 10 working days, closing statements showing that you have ended your interest in any account other than your nominated account or any "permitted account" (an account for which you have obtained permission in accordance with 5.1), or evidence that you have instructed the financial service provider to end your interest in such account/s;
- (d) within two working days, notification of any loan, credit or mortgage facility to which you have access (including credit cards, store cards or consumer credit agreements) and for each facility the name of the provider, any card or account number and the value of money you are able to borrow.

5.3) You must provide to the Home Office:

- (a) notification of the name of the financial services provider, the name(s) in which the account is held and the account number and sort code (or equivalent account details) for any permitted account opened after the service of this TPIM notice, within two working days of opening that account;
- (b) statements in relation to your nominated account and any permitted account, on a monthly basis, within five working days of your receiving them.

5.4) You must not acquire access to any loan, credit or mortgage facility (including credit cards, store cards or consumer credit agreements) unless the Home Office has given you permission to do so.

5.5) You must not possess more than £150 in cash unless the Home Office has given you permission to do so. "Cash" has the meaning given in paragraph 5(6) of Schedule 1 to the TPIM Act 2011.

- 5.6) A reference in this measure to holding an account has the same meaning as in paragraph 5(7) of Schedule 1 to the TPIM Act 2011.

PROPERTY MEASURE

- 6.1) Within five working days of service of this TPIM notice, you must notify the Home Office of:
- The address of any building, land, or other premises in the United Kingdom that you own (solely or jointly), other than your residence.
 - The address of any building, land or other premises in the United Kingdom that you rent, hire, or in which you have any other interest or in relation to which you may exercise any right (including a right of use or a right to grant access), and the nature of your interest or right.
 - The make, model and registration number of any motor vehicle that you own or are the registered keeper.
- 6.2) If you subsequently acquire ownership of, or any other interest in or right over, any building, land or other premises in the United Kingdom, or ownership (or registered keeper status) of any motor vehicle, you must notify the Home Office of this within two working days.
- 6.3) At least one working day in advance of the first occasion on which you drive any motor vehicle you must notify the Home Office of its make, model and registration number.
- 6.4) You must not transfer, or arrange for the transfer of, any money or other property to a person or place outside the United Kingdom unless the Home Office has given you permission to do so.
- 6.5) You must notify the Home Office at least two working days before transferring, or arranging for the transfer of, any money in excess of £500 (or the equivalent amount in any other currency) or other property worth more than £500 to a person or place within the United Kingdom.

ELECTRONIC COMMUNICATION DEVICE MEASURE

- 7.1) Subject to 7.2 to 7.8, you must not (directly or indirectly):
- (a) use or possess (whether inside or outside the residence);
 - (b) bring into the residence; or
 - (c) knowingly permit another person to bring into the residence

any electronic communication device (within the meaning of paragraph 7(5) of Schedule 1 to the TPIM Act 2011) unless the Home Office has given you permission to do so.

- 7.2) You may possess and use:
- (a) inside the residence only, one computer of a make and model agreed in advance by the Home Office that provides access to the internet by connection to a fixed line (only), including any apparatus necessary and agreed in advance for that purpose (“the permitted computer”);
 - (b) inside the residence only, fixed telephone line (“the permitted telephone line”);

- (c) one mobile telephone that does not provide access to the internet (“the permitted mobile”) and one SIM card (“the permitted SIM card”); and
 - (d) any device provided to you in accordance with the Monitoring Measure.
- 7.3) You may permit another person to bring the following devices into the residence whilst you are in the residence, provided the devices are switched off (where applicable) and not used at any time whilst you are in the residence:
 - (a) mobile telephones and associated SIM cards;
 - (b) memory sticks;
 - (c) digital music players;
 - (d) digital cameras;
 - (e) dictating machines;
 - (f) recordable disks;
 - (g) e-book readers;
 - (h) portable gaming devices; and
 - (i) pagers.
- 7.4) The prohibition in 7.1 against knowingly permitting electronic communications devices into the residence does not apply to devices belonging to:
 - (a) police officers
 - (b) employees of the electronic monitoring company
 - (c) anyone authorised by the Home Office;
 - (d) anyone required to be given access to the residence under the terms of occupancy or for the maintenance of the water, electricity, gas or telephone supply who is operating in his/her professional capacity;
 - (e) members of the emergency services operating in their professional capacity; or
 - (f) healthcare or social work professionals operating in their professional capacity.
- 7.5) You must grant a police officer access to your residence for the purpose of inspecting or modifying any electronic communication device which you use or possess. You must hand over any such device to a police officer on request and must provide the police officer with any usernames, passwords, PIN codes or any other information reasonably required by the police officer in order to access, inspect or modify the device. You must allow the police officer to remove any such device from the residence in order to inspect or modify it at another place.

- 7.6) You must notify the Home Office of:
- (a) the telephone number and service provider associated with the permitted telephone line within 24 hours of the service of this TPIM notice;
 - (b) any change to the number or service provider associated with the permitted telephone line at least two working days prior to such change taking effect;
 - (c) the make, model and IMEI number of the permitted mobile and the number of the permitted SIM card within 24 hours of the service of this TPIM notice;
 - (d) the make, model and IMEI number of any replacement permitted mobile and the number of any replacement permitted SIM card within 24 hours of it coming into your possession;
 - (e) the make, model and operating system of the permitted computer no less than 2 working days in advance of obtaining the computer;
 - (f) the internet service provider, account number and username used to connect your permitted computer to the internet 5 working days in advance of obtaining the account, and thereafter any changes to the provider, account number or username 5 working days in advance of the change taking effect.
- 7.7) You must not install any software onto your permitted computer unless the Home Office has given you permission to do so.

ASSOCIATION MEASURE

- 8.1) You must not associate or communicate with any of the following persons (including at your residence or by attending any meeting or gathering) unless the Home Office has given you permission to do so:
- XXXX
- XXXX
- XXXX
- XXXX
- XXXX
- XXXX
- XXXX
- 8.2) You must not meet any other person (including by attending any meeting or gathering) unless:
- (a) you meet the person at your residence;
 - (b) (for a person) you have notified the Home Office of the name and address of the person and the time and location of the meeting at least two working days before the first time you meet them;
 - (c) (for a meeting or gathering) you have notified the Home Office of the time and location of the meeting or gathering and the name and address of any person you expect to be there at least two working days before the meeting or gathering;

(d) you meet the person by chance, but you do not continue or resume the meeting at another place or time without providing notification under 8.2(b);

(e) the person is:

- (i) your former wife, XXXX, and children;
- (ii) your and your former wife's parents;
- (iii) a child aged 13 or under;
- (iv) your legal representative (but only if you have notified the Home Office that the person is your legal representative);
- (v) a member of the emergency services or healthcare or social work professional operating in a professional capacity;
- (vi) someone accessing your residence in a professional capacity for the maintenance of the water, electricity, gas or telephone supply or because they are required to be given access under the terms of occupancy;
- (vii) someone authorised by the Home Office;
- (viii) someone providing goods or services to you without appointment as a member of the public; or
- (ix) someone you are meeting for the purpose of work or studies which you have notified to the Home Office under the Work or Studies Measure;

(f) you are attending prayers at a mosque.

8.3) You must not communicate with any person who is outside the United Kingdom unless the Home Office has given you permission to do so.

8.4) References to "associating" and "communicating" have the same meanings as in paragraph 8(3) of Schedule 1 to the TPIM Act 2011.

WORK OR STUDIES MEASURE

9.1) If you are already undertaking work or studies when this TPIM notice is served on you, you must notify the Home Office of this within five working days, providing:

- (a) the name and address of the employer or provider of studies;
- (b) the nature and location of the work or studies; and
- (c) the usual hours of the work or studies (if applicable).

9.2) If you are not undertaking any work or studies when this TPIM notice is served on you, you must notify the Home Office of this fact within five working days.

9.3) You must not undertake work or studies in the following "notified fields" unless the Home Office has given you permission to do so:

<u>Work</u>	<u>Studies</u>
Armed Forces;	Chemistry;
Chemical industry;	Biology;
Nuclear industry;	Computer science or IT security;
Communications;	Engineering;
Emergency services;	Security;

Energy industry;
Water industry;
Public transport;
Security industry;
Transport or storage of High or
Very High Consequence
Dangerous Goods

Electronics;
Transport management;
Energy management;
Facilities management

- 9.4) If you are already undertaking work or studies in a notified field when this TPIM notice is served on you, you must cease that work or studies immediately if you receive written directions to do so from the Home Office.
- 9.5) At least two working days before undertaking any new work or studies you must provide the Home Office with the following information:
- (a) the name and address of the employer or provider of studies;
 - (b) the nature and location of the work or studies; and
 - (c) if known, the date on which you expect the work or studies to start, the usual hours of the work or studies (if applicable) and the expected duration of the work or studies (if applicable).
- 9.6) If any of the details provided under 9.1 or 9.5 change, or if you cease undertaking work or studies, you must notify the Home Office within two working days, providing updated details.
- 9.7) In this measure “work” and “studies” have the meanings given in paragraph 9(3) of Schedule 1 to the TPIM Act 2011. “Undertaking” includes holding any interest in a business.

REPORTING MEASURE

- 10.1) You must report in person to a specified police station every day at times that will be notified to you in writing by the Home Office.
- 10.2) You must comply with any instructions given to you by a police officer at the specified police station in connection with this reporting.

PHOTOGRAPHY MEASURE

- 11.1) You must permit a police officer to take photographs of you at a time and place notified to in writing you by the Home Office.

MONITORING MEASURE

- 12.1) You must allow an electronic monitoring tag (“the tag”) to be fitted to you and then wear the tag at all times.
- 12.2) You must not damage or tamper with the tag and you must not damage, move or tamper with the tag monitoring equipment or the telephone provided by the monitoring company (including the associated line).
- 12.3) You must, as required by persons employed by the monitoring company or by a police officer, cooperate with procedures for the operation, inspection, fitting, installation, testing, calibration, repair or removal of the tag and the tag monitoring equipment. You must permit entry to your residence to persons employed by the

monitoring company or police officers at any time for the purpose of such procedures.

- 12.4) You must keep the tag charged using the charging equipment provided by the monitoring company. You must not remove the charging equipment from your residence without the permission of the Home Office.
- 12.5) You must not use the telephone provided by the monitoring company (including the associated line) for any purpose other than contacting the monitoring company or as directed by the Home Office.

---END OF SCHEDULE---

ANNEX 5

Home Office costs

The table below shows the costs to the Home Office of control orders and TPIMs for 2006-07 to 2011-12.

All figures have been rounded to the nearest £100.

Total cost to the Home Office of control orders⁽¹⁾	1,940,300	4,615,600	2,707,600	3,195,400	3,103,100	3,079,000
Legal costs to the Home Office ⁽²⁾	1,530,900	3,766,200	1,837,300	2,254,400	2,099,300	2,279,000
Cost to the Home Office of accommodation subsistence, council tax, telephone and utility bills for controlled persons	87,000	246,300	203,300	315,400	231,200	273,000
Staff and administrative costs to the Home Office	322,400	603,100	667,000	625,600	517,900	527,000

- (1) These figures refer to the financial years 2006-07 to 2011-12. They include: the cost of Home Office staff working on control orders; administrative costs relating to the management of control orders; legal advice and other legal costs; accommodation, subsistence, Council Tax and utility bills and telephone line rental/phone cards provided to controlled persons in the course of the administration of the control order; and the fees paid to the Independent Reviewer of the Prevention of Terrorism Act 2005. The costs for 2006-07 are based partly on estimates.
- (2) These figures represent legal costs to the Home Office and do not include legal costs associated with control orders incurred by other public authorities – for example the costs of court and judicial time or costs to the Legal Services Commission.

ANNEX 6

Legal Services Commission costs

The table below shows the costs to the Legal Services Commission of control orders and TPIMs for 2006-07 to 2011-12.

All figures have been rounded to the nearest £1000.

Total cost to the LSC of control orders and TPIMs⁽¹⁾	210,000	730,000	830,000	1,267,000	242,000	519,000

- (1) These are figures are for legal aid bills only, including any Court of Appeal, House of Lords/Supreme Court work. However, some of these could be over-turned if a case went to the Court of Appeal or Supreme Court and was won/lost later in proceedings and the court made a new costs order.
- (2) The expenditure figures are based on Control Order cases and TPIM cases that started from Apr-09 to the end of financial year 11-12, and include costs on closed cases as well as ongoing cases.
- (3) The LSC has not introduced a new reporting mechanism for TPIM's which commenced in December 2011 but have utilised prior control order proceeding codes. Therefore we cannot report on TPIM's separately at this time. We do not therefore separate the legal costs in relation to TPIM notices and Control Orders because all individuals who were subject to a control order when TPIM Act came into force were transferred onto a TPIM notice and legal costs have continue to be incurred in relation to outstanding appeals against historic control orders as well as TPIM notices. In practice, control order and TPIM litigation has been dealt with together in order to make the best use of resources.
- (4) These figures represents the costs of controlled persons' open legal representation (the Home Office pays the cost of the Special Advocates who represent controlled persons in closed court proceedings). The total costs incurred on legal representation on behalf of controlled persons in this period may be higher than shown. When solicitors apply for legal aid on behalf of their client, they receive a certificate from the LSC stating that the LSC will pay their legal costs in that case. The solicitors will then incur expenditure but will not necessarily invoice the LSC until the case is closed. Around half of the certificates issued by the LSC in relation to control orders proceedings remained live at the time the figure was prepared, therefore the figure given does not reflect the full extent of the legal costs of controlled persons' open legal representation.
- (5) It is also possible that a proportion of the LSC costs may overlap with the costs to the Home Office of control order legal proceedings. This is because Home Office costs include the amount spent on paying the legal costs of the controlled persons where this had been ordered by the court. The LSC will only usually be made aware that the Home Office has been ordered to pay all or part of the costs in a case at a later point in time when the case is closed. This timing difference means the LSC figure may include some costs already paid by the Home Office that are yet to be recouped by the LSC from the legal aid provider.

ANNEX 7

TRG Terms of Reference

TPIM Review Group (TRG) – Terms of Reference

The terms of reference of the TRG are to bring together the departments and agencies involved in making, maintaining and monitoring TPIM notices on a quarterly basis to keep all cases under frequent, formal and audited review – in particular:

- To ensure that each TPIM notice itself remains necessary as well as ensuring that each measure is necessary and proportionate. This includes consideration of whether the measures as a whole and individually:
 - are effectively preventing or restricting the subject's engagement in terrorism-related activity;
 - are still necessary to protect the public from a risk of terrorism;
 - need to be varied to address new or emerging risks; and
 - remain proportionate, taking into account any changing circumstances
- To monitor the impact of the measures on each subject (including on his/her mental health and physical well-being) and the impact on the subject's family and to consider whether the measures as a whole and individually require variation as a result.
- To keep the prospect of prosecution for an offence related to terrorism under review, with the police reporting on their ongoing review of the case (with input from the CPS as appropriate).
- To review the TPIM subject's compliance with the TPIM notice, including any action taken in respect of any breaches.
- To consider exit strategies and whether there are other options for managing or reducing the risk posed by each subject.

ANNEX 8

Charges for breaches of TPIMs, 2012

Charges for breach of TPIM notices, 2012

Case	Measure breached	Charge (s)	Date of arrest	Date of charge	Status at present
BM	Telephoning monitoring company, Police station reporting	Contravening his TPIM measures	1 February 2012 (two counts)	4 April 2012 (both counts)	Trial 8-10 October 2012. Jury found the defendant not guilty.
CF	Entering an excluded area without permission	Contravening his TPIM measures	22 May 2012	27 June 2012	The CPS decided not to pursue the prosecution on 19 September 2012.
CC	Police station reporting	Contravening his TPIM measures	29 January 2012 (six counts)	29 January 2012 (six counts)	Remanded whilst awaiting trial

Correct as of 31 December 2012



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