This note examines the changes to the control order regime brought about by the introduction of Terrorism Prevention and Investigation Measures under the Terrorism Prevention and Investigation Measures Act 2011. It considers the operation of the Act during its first two years, including its effectiveness, criticisms and proposals for change.

TPIMs aim to disrupt terrorism related activity, and to facilitate the investigation of such activity, amongst those suspected of involvement, but who it is not possible to prosecute. The TPIMA sought to liberalise the control order regime, introduced by the previous Government under the Prevention of Terrorism Act 2005, by removing the most restrictive aspects of control orders and imposing a higher threshold for the imposition of TPIMs, and a finite limit of two years.
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Background

1.1 The Control Order Regime
The Prevention of Terrorism Act 2005 (PTA) introduced a regime of “control orders” designed to restrict the behaviour of individuals suspected of involvement in terrorism who could not be prosecuted or deported. The regime was subject to a series of legal challenges relating to: the severity of restrictions placed on controlees; whether the suspects should be told at least the gist of the case against them; and the length of the orders.

In January 2011 the Government published its counter-terrorism review, including a proposal to repeal the control order regime and replace it with a less intrusive system, which would bring to an end those aspects of the regime which had proved most controversial.

The new regime included 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 limit on the restrictions that could be imposed.

The Terrorism Prevention and Investigation Measures Act 2011 (TPIMA) came into force in December 2011, and the first Terrorism Prevention and Investigation Measure (TPIM) notices were issued shortly after. These are due to expire in January 2014.

1.2 Terrorism Prevention and Investigation Measures Act 2011
The Terrorism Prevention and Investigation Measures Act 2011 abolished the control order regime, replacing them with Terrorism Prevention and Investigation Measures.

Like control orders, TPIMs are instigated by the Home Secretary with the permission of the High Court. They are granted on the basis of a reasonable belief in the subject’s involvement in terrorism. This is a higher threshold than that required for control orders, which required only reasonable suspicion.

The Home Secretary must reasonably consider that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, and with preventing or restricting the individual’s involvement in terrorism related activity, for TPIMs to be imposed on an individual.

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1 Home Office Review of Counter-terrorism and security powers: Review findings and recommendations 2011
2 Except in urgent cases where permission may be granted retrospectively.
TPIM notices require extension after a year and remain in force for up to two years, whereas control orders were renewable every 12 months, on an indefinite basis. To impose TPIMs on the same individual beyond two years would require evidence of new terrorism-related activity.

Unlike the control order regime, the TPIMA does not require annual review. The Home Secretary’s powers under the Act will expire in December 2016. They may be renewed by order for a further five year period after consultation with the Independent Reviewer, the Intelligence Services Commissioner and the Director General of MI5.

The High Court reviews each TPIM after it is made and may quash or revoke the order or direct that restrictions be replaced.

TPIMs may be imposed on the basis of closed proceedings using special advocates, from which the subject of the order and their lawyer are excluded.

Like control orders, TPIMs are made with a view to prosecution. This means that the Home Secretary must ask the chief officer of police if there is evidence for prosecution before making the order, and the police are under a duty to ensure that the investigation into the individual’s conduct, with a view to prosecution for an offence relating to terrorism, is kept under review throughout the time that the TPIM is in force.

Breach of a TPIM without reasonable excuse is a criminal offence with a maximum penalty of five years’ imprisonment.

TPIMs may include:

- overnight residence measures;
- electronic tagging;
- restrictions on communication and association;
- exclusions from particular places;
- overseas travel bans;
- restrictions on bank accounts;
- restrictions on the transfer of property
- limitations on the possession and use of electronic communication devices;
- work or studies measures, requiring permission to be obtained for specific activities, or notice to be given prior to carrying out any work or studies;
- measures requiring regular reporting to a police station;
- photography measures, requiring the individual to allow himself to be photographed;

The measures that may be imposed under TPIMA are finite, unlike those under the PTA, and are less intrusive in certain respects.

Involuntary relocation is no longer permitted. This was one of the most controversial aspects of the control order regime, and relocation requirements were struck down by the courts in
several cases. Overnight residence requirements which are permitted for TPIM subjects must be based somewhere in which the subject has a residence or connection.

Curfews of up to 16 hours are replaced by “overnight residence requirements”.

The power to confine persons to a particular area is replaced by a power to exclude them from particular specified areas or places.

The 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.

Police searches for the purpose of determining whether there is compliance with TPIMs now require a warrant from the appropriate judicial authority.

Measures to prohibit and vet visitors and meetings are relaxed.

1.3 Enhanced TPIMS

The draft Enhanced Terrorism Prevention and Investigation Measures Bill, published in September 2011, provides for more intrusive measures similar to those available under the control order regime to be used in exceptional circumstances. The draft Bill could be introduced by the Government at any time to grant the Home Secretary additional powers. The Bill would last for 12 months from approval, renewable once for a further 12 months. At the end of the initial 12 month period, Parliament would need to formally approve the extension. After 24 months, fresh primary legislation would need to be approved by Parliament.

It is the Government’s intention that these measures should be available in response to situations, such as a serious terrorist threat, which could not be managed by any other means. It is unlikely therefore that the legislation would be introduced solely in response to a change in the overall terrorism threat in the absence of other factors.3

Enhanced TPIMs (ETPIMs) differ from standard TPIMs in the following ways:

- A strengthening of the legal test to be met to “balance of probabilities”;
- Under an ETPIM, the Secretary of State could impose a curfew for up to 16 hours on an individual;
- ETPIMs allow a complete ban on electronic communication devices;
- Individuals under an ETPIM can be prohibited from entering a defined area and from associating with any individual without the Secretary of State’s prior permission; and
- The draft ETPIMs Bill would allow the Secretary of State to require an individual to reside at any residence specified by the Government.

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3 Home Office The Government Response to the Report from the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill Cm 8537 January 2013 HL Paper 70, HC Paper 495
2 Operation of the regime 2011 – 2013

2.1 TPIM subjects

TPIM subjects are usually anonymised and the Home Office release very few details as to their identity.

10 men were subject to TPIMs during 2012, all believed by the Home Secretary to have been involved in al-Qaida related terrorism. Nine of them were British citizens and had previously been subject to control orders.⁴

According to the CPS, none of the 10 could now be prosecuted because sufficient evidence probative of their guilt cannot be deployed in open criminal court. One of the reasons for this is that several of the subjects have already been prosecuted and acquitted. Another is the inadmissibility of intercept evidence, and unwillingness to use other sensitive intelligence, in criminal proceedings.

The latest Home Office report issued in accordance with section 19(1) of TPMIA,⁵ covering the period from 1 September to 30 November 2013, states that there were eight notices in force as of 30 November 2013. During the 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) as a result of which he was remanded in custody and his TPIM notice was revoked.

Another TPIM subject absconded on 1 November 2013.⁶ The Home Secretary made the following statement on 4 November 2013:⁷

The Secretary of State for the Home Department (Mrs Theresa May): With permission, Mr Speaker, I would like to make a statement on the abscond of an individual subject to a terrorism prevention and investigation measure, or TPIM. The Metropolitan police believe that on Friday 1 November, TPIM subject Mohammed Ahmed Mohamed absconded from his controls. He was last seen at 3.15 pm inside a mosque in Acton. The police counter-terrorism command immediately launched an intensive covert operation to trace Mohamed, and inquiries continue. Ports and borders were notified with his photograph, and details were circulated nationally and internationally.

Acting on police advice, on Saturday I applied to the High Court for an order protecting Mohamed’s anonymity to be lifted, in order to assist the police with their investigation. Last night, the police appealed for the public’s help in tracing him. The police have urged anyone who sees Mohamed or knows of his whereabouts not to approach him but to call 999 or contact the anti-terrorist hotline.

The police and Security Service have confirmed that they do not believe Mohamed poses a direct threat to the public in the UK. The reason he was put on a TPIM in the first place was to prevent his travelling to support terrorism overseas.

I have spoken several times over the weekend to the director general of the Security Service, Andrew Parker, and to the Metropolitan police assistant commissioner for

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⁴ Further details of the evidence against these individuals is set out in the Report of the Independent Reviewer of Terrorism, ibid.
⁵ Home Office, Terrorism Prevention and Investigation Measures (1 September to 30 November 2013), 12 December 2013
⁶ Prior to this, one other TPIM subject, Ibrahim Magag, had previously absconded, on Boxing Day 2012.
⁷ HC Deb 4 November 2013 c23
specialist operations, Cressida Dick. I received another briefing earlier today. They have told me that they believe they have all the resources and support they need to carry out the manhunt. However, I will not hesitate to provide them with any additional assistance they require.

The whole House will join me in thanking the police and the Security Service for their continued efforts to keep our country safe. Their focus is to locate and arrest Mr Mohamed. They are doing everything in their power to apprehend him as quickly as possible. The Government will provide them with all the support they need. I commend this statement to the House.

2.2 Report of the independent reviewer of terrorism legislation

The independent reviewer of terrorism legislation, David Anderson QC, published his first report on the operation of the TPIMs regime in March 2013. He made 8 specific recommendations. Each of these was considered by the Government, when it published its response to Mr Anderson’s report in May 2013. An annotated summary, taken from the Government’s response, is provided below:

1. JTAC\textsuperscript{10} 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 available report.

The Government notes this recommendation. There are currently three different threat levels in respect of: the International Counter-Terrorist (ICT) threat (set by the Joint Terrorism Analysis Centre), the Northern Irish Related Terrorism (NIRT) threat for Great Britain and the NIRT threat for Northern Ireland (both set by the Security Service). These are communicated to the public via the GOV.UK and Security Service websites. In addition, the annual report on the UK’s strategy for countering terrorism (CONTEST) contains a narrative on the threat level with detail of key operations, incidents and arrests. We do not consider that an additional open report is required at this time.

2. In the event that it should be decided to bring the ETPIM Bill\textsuperscript{11} 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.

The Government notes this recommendation. As set out in the Government’s formal response to the report from the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill\textsuperscript{12}, we have concerns that the proposal to brief the Intelligence and Security Committee on the circumstances necessitating the enactment of the Bill – should they arise – may not be feasible in certain emergency situations where Parliament may need to consider the Bill with limited time for scrutiny. The most appropriate approach to briefing Parliament is likely to be specific to the particular situation and cannot readily be anticipated, but we agree that where it is appropriate and possible, the Intelligence and Security Committee (and other parties)

\textsuperscript{8} D Anderson, Terrorism Prevention and Investigation Measures in 2012, March 2013
\textsuperscript{9} The Government Response to the Report by David Anderson Q.C. on Terrorism Prevention and Investigation Measures in 2012 Cm 8614, May 2013
\textsuperscript{10} The Joint Terrorism Analysis Centre, or JTAC, was created as the UK’s centre for the analysis and assessment of international terrorism. It was established in June 2003 and is based in the Security Service’s headquarters at Thames House in London.
\textsuperscript{11} Enhanced Terrorism Prevention and Investigation Measures Bill
\textsuperscript{12} Cm 8536, January 2013
may be able to play a role in assuring Parliament that the introduction of the Bill is necessary.

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.

The Government notes this recommendation and will continue to keep inclusion of this information under review. We do not currently believe that it is necessary to do so, and that to put such information into the public domain might risk compromising a TPIM subject’s anonymity.

4. The technical, operational and strategic lessons of BX’s recent abscond\textsuperscript{13} 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.

The Government agrees that it is important to identify and implement the technical, operational and strategic lessons from the abscond. This work is already in progress. The Government also agrees that the statutory basis for imposing both a TPIM notice and the specific measures in the notice requires the Secretary of State to believe that they are necessary and proportionate.

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.

The Government continues to keep this recommendation under review; however, we do not believe that a formal forum is required at this time. Instead, we are seeking to foster a flexible working relationship with Special Advocates and other professionals operating in this field so that they can provide their comments to Government at any time. We believe that this will allow action to be taken more quickly when a compelling case for change is made.

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.

The Government notes this recommendation. Enforcement of TPIM measures is a matter for the police, who deal with breaches robustly taking into account the full circumstances of any non-compliance. The police investigate all potential breaches and consult with the CPS regarding the viability of prosecution in each case. Where there is sufficient admissible evidence and it is deemed to be in the public interest, a prosecution for breach of the measures in a TPIM notice will usually be taken forward.

7. More work should be done on developing exit strategies from TPIMs. In particular, any related PREVENT\textsuperscript{14} 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.

\textsuperscript{13} See for example: \textit{BBC Online}, “TPIM change 'not to blame' for Ibrahim Magag abscond”, 8 January 2013

\textsuperscript{14} For more on the PREVENT programme, see: House of Commons Library, \textit{Preventing violent extremism}, Standard notes SN5993 (last updated 13 March 2013)
The Government agrees that exit strategies for individuals subject to a TPIM notice are important. Exit strategies for individuals who are subject to a TPIM notice are already considered proactively throughout their duration, including through the formal quarterly multi-agency TPIM Review Group. Exit strategies have also been examined in the high court reviews of some cases. The exit strategies for TPIM subjects are determined on a case by case basis and engagement may not be appropriate in every case. If an individual ceases to be subject to a TPIM notice, this does not prevent the police and Security Service from continuing to monitor their activities. The Government agrees that Prevent activity should be integrated into the management of TPIM cases as necessary. Prevent activity already forms part of the case management process, and we keep under review whether there are further ways in which its role can be increased. For example, we are discussing with the National Offender Management Service (NOMS) how they might appropriately be involved in the case management of TPIM subjects, noting that the TPIM Act 2011 does not provide the power to require attendance at particular meetings or other engagement with any intervention that might be delivered by Prevent or NOMS, including Probation Trusts. Exit strategies are kept under review both for each individual subject and to identify whether there are new interventions that could form part of the wider management of cases.

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.15

The Government notes this recommendation. We believe that the current legal threshold of reasonable belief of involvement in terrorism-related activity strikes the right balance between protecting the public from the risk of terrorism and ensuring that there is an appropriate safeguard for the proper use of the powers in the TPIM Act 2011. The review of counter terrorism powers concluded that the replacement for control orders should have a higher legal test as an additional safeguard, and that reasonable belief was the appropriate test. It is also consistent with the approach taken in the Terrorist Asset Freezing etc Act 2010 and we see no reason to change this.

2.3 Effectiveness of TPIMs

Mr Anderson concluded in his report that, although it is hard to assess the effect of TPIMs because of their preventative nature, there is evidence that some TPIM notices at least are likely to have been effective in disrupting terrorism. Further, in making it easier and cheaper to monitor subjects, Mr Anderson concluded that TPIMs have been effective in releasing resources for other operational needs.

However, as no TPIM subject has so far been prosecuted for terrorism related activity, it is not possible to conclude that the regime is proving effective in enabling the investigation of such activity.

3 Criticisms and calls for reform

Many critics of control orders felt that the TPIM reforms did not go far enough and failed to address the fundamental objection that terrorist suspects are dealt with outside the criminal justice system and the safeguards contained therein. They are also generally imposed without full disclosure or adversarial testing of the evidence.

15 In oral evidence to the JCHR, Mr Anderson was asked whether such a move would make a difference to any of the current cases that he examined. He observed that: “There certainly could be cases where a move to balance of probabilities would make a difference. I could not say that any of the existing 10 cases are among them.” (see: Joint Committee on Human Rights, Review of the TPIMs Regime, 19 March 2013)
Liberty have said:

TPIMs are simply a ‘control order-lite’, replicating the worst aspects of the control order regime. These new measures are still outside of the criminal justice system – potentially punishing the innocent while the truly dangerous may remain at large in the community.

[...] 

Our objections to TPIMs 

TPIMs are unsafe. Dangerous terrorists should not be in their living rooms but convicted and imprisoned. A genuine terrorist can easily remove plastic tags and disappear, as some controlees have in the past.

TPIMs are unfair. Innocent people should not be subjected to years and years of punishment without trial. TPIMs place dehumanizing sanctions on people based on suspicion rather than evidence.

TPIMs go against the British traditions of justice and liberty. They undermine the presumption of innocence and the right to a fair trial.

There are alternatives to TPIMs which better ensure public safety and respect for civil liberties. Liberty urges the government to use criminal law and the courts to lock up dangerous terrorists, and to allow the use of intercept evidence in court.16

On the other hand the Government has also been criticised for diluting the effectiveness of control orders. The regime has been described in Parliament as “weak”,17 and the Prime Minister accused of “deliberately downgrading the country’s anti-terror laws” with the result that two suspects used their “Government granted freedom to escape”.18

In a letter to Theresa May following the abscond of Mohammed Ahmed Mohamed, Yvette Cooper criticised the repeal of the control order regime and changes introduced by TPIMA. She urged the reintroduction of relocation powers and a review of the two year limit.19

The Home Secretary has responded to criticism by defending the effectiveness of the regime; pointing out that there were seven absconds in six years under the control order regime; and suggesting that control orders were unsustainable due to the number of successful legal challenges.20

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17 Diana Johnson MP, HC Deb 2 December 2013 c619.
18 Pat McFadden MP, HC Deb 6 November 2013 c 246.
20 Theresa May, HC Deb 4 November 2013 cc 23-35.