

LEGISLATIVE CONSENT MEMORANDUM

TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that the relevant provisions of the Terrorism Prevention and Investigation Measures Bill, introduced in the House of Commons on 23 May 2011, as amended, relating to powers of seizure of evidence and the use of forensic data, and the order making powers which would enable the imposition of enhanced measures in exceptional circumstances, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice, under Rule 9.B.3.1(c)(ii) of the Parliament’s standing orders. The Terrorism Prevention and Investigation Measures Bill was introduced in the House of Commons on 23 May 2011. The latest version of the Bill can be found at:

http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0091/lbill_2010-20120091_en_1.htm

Content of the Terrorism Prevention and Investigation Measures Bill

3. The Terrorism Prevention and Investigation Measures (TPIM) Bill will repeal control orders which were provided for in the Prevention of Terrorism Act 2005, and other provisions relating to control orders which were made in subsequent legislation, and replace them with a new system of Terrorism Prevention and Investigation Measures (TPIMs). TPIMs are intended to be a new form of civil preventative measure designed to protect the public from the risk posed by suspected terrorists. TPIMs will have some similarities to control orders. To date, control orders have not been used in Scotland.
4. The TPIM Bill also makes provision for the making of a temporary enhanced TPIM order in exceptional circumstances. Such an order would enable the Secretary of State to impose more stringent measures on individuals than is possible under standard TPIMs. Temporary enhanced measures could only be introduced during the period which begins with the dissolution of the UK Parliament and ends with the making of the first Queen’s Speech of the next Parliament, and could only last for a maximum of 90 days.
5. In all other circumstances, a separate Enhanced TPIM Emergency Bill would be introduced for the purpose of imposing enhanced TPIMs. Such an emergency Bill has been drafted by the Home Office and is currently subject to pre-legislative scrutiny. There are no plans for introduction. That emergency Bill is not the subject of this Legislative Consent Memorandum.

Provisions Which Relate to Scotland

6. The TPIM Bill as introduced did not require the legislative consent of the Scottish Parliament. The Scottish Parliament was dissolved for the Parliamentary elections at that time and the provisions of the Bill which would have extended to Scotland were therefore disapplied. After the election the Scottish Government discussed the Bill's provisions with the UK Government and the Scottish Ministers agreed in principle to seek the legislative consent of the Scottish Parliament for the relevant provisions. Amendments were subsequently tabled during the Commons Committee stages of the Bill. The relevant provisions fall within the legislative competence of the Scottish Parliament and extending those provisions to Scotland has made the Bill a relevant Bill under Standing Orders.

Police powers on entry, search and seizure (Schedule 5)

7. The majority of powers in the Bill relating to powers of entry, search and seizure are reserved, including powers of entry for the purpose of serving a TPIM notice, to check compliance with TPIM restrictions, to ascertain if an individual who is subject to a TPIM notice has absconded and to establish whether such an individual is in possession of anything that could be used to threaten or harm any person. Some of these powers of search and entry require a warrant to be obtained whereas others can be exercised without a warrant.

8. There are, however, further powers in the Bill for a constable to seize anything found in the course of a search of an individual or premises, for the purposes of a TPIM notice. These powers could be used if the police reasonably suspect that such items are either evidence or contain evidence in relation to an offence and it is necessary to seize them in order to prevent them from being concealed, lost, damaged, altered or destroyed. These powers of seizure apply to evidence in relation to any offence, not just terrorism offences and so includes offences falling under devolved areas.

Use of forensic data (Schedule 6)

9. Schedule 6 makes provision for the taking, retention and use of forensic data from individuals subject to a TPIM. Such forensic data must not be used other than in the interests of national security, for the purposes of a terrorist investigation, purposes related to the prevention and detection of crime, the investigation of an offence or the conduct of a prosecution, or the identification of a deceased person or of the person to whom the material relates.

10. The UK Government has decided broadly to adopt the "Scottish model" in relation to the general rules on destruction and retention of forensic data. The legislation governing the taking, retention and use of forensic data taken from suspects in Scotland is set out in the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). Provisions in the Bill relating to Scotland are generally in line with existing police procedures and legislation.

11. Further rules and time limits are also introduced in the Bill in relation to material taken from a person subject to a TPIM so that such material can be retained for a longer period if a national security determination is in place. A national security determination is made if a chief constable determines that it is necessary for the material to be retained

for the purposes of national security. The taking and retention of material for national security purposes is a reserved matter.

Temporary power for the imposition of enhanced measures (clauses 26 and 27)

12. Clause 26 makes provision for the Secretary of State to make a temporary enhanced TPIM order, in exceptional circumstances, for the issue of enhanced TPIM notices to individuals. Such notices would include enhanced preventative or investigation measures in terms of a number of issues, such as the restriction of a person's movements. The order would not automatically include any additional or more stringent measures in relation to search and seizure powers and use of data.

13. The power for UK Ministers to make a temporary enhanced TPIM includes power to make provision which is different from the TPIM Bill for enhanced TPIM purposes. Such provision may include:

- amending any enactment, including Acts of the Scottish Parliament and Scottish Statutory Instruments; and
- imposing functions on "any person", including Scottish Ministers.

14. Although unlikely to be used, particularly given the time limited nature of temporary enhanced TPIM orders, these are potentially significant powers, the use of which could potentially stray in to devolved areas. The UK Government therefore intends to bring forward an amendment to ensure that the consent of Scottish Ministers is required in cases where UK Ministers wish to include additional measures in an enhanced TPIM order, where these measures would amend any enactment or impose functions on any person and these actions could fall within the competence of the Scottish Parliament. An amendment is expected to be tabled in early November, prior to Lords Committee Report stage and in time to allow consideration by the Scottish Parliament.

Reasons for seeking a legislative consent motion

Power of seizure of evidence

15. The powers of entry and search and some of the powers of seizure in the Bill are reserved but this is not the case for the power of seizure of evidence relating to devolved offences. The police already have powers under common law to seize evidence if they believe an offence has been committed. Whilst we could continue to rely on common law, we believe that there is merit in clarifying the powers of the police when exercising TPIM powers to seize evidence in relation to both devolved and reserved offences. It makes operational sense to do so and puts these powers beyond doubt.

Use of forensic data

16. If the relevant provisions in the Bill did not extend to Scotland then any samples obtained under the provisions in the Bill could only be used in the interests of national security, or for the purposes of a terrorist investigation. Extending the provisions to Scotland will mean that the data taken from individuals who are subject to a TPIM notice will be able to be used for devolved purposes, i.e. for the identification of deceased persons and for the prevention, detection and investigation of crime. It will also mean

that this forensic data can be checked against any other forensic data (including that taken under the 1995 Act) for these purposes.

Temporary power for the imposition of enhanced measures (sections 26 and 27)

17. The order making power set out in clause 26 potentially allows the Secretary of State to make provision on devolved issues for the purposes of temporary enhanced TPIMs. The Bill, as amended, will provide for the consent of Scottish Ministers to be sought in cases where UK Ministers wish to make specific provisions for enhanced TPIM purposes if these provisions would fall within the competence of the Scottish Parliament. These powers are considered necessary in the interests of national security and public safety. It is sensible to include consent for the order making power in this Legislative Consent Motion.

Consultation

18. The powers set out in the Bill have been promoted by the Home Office following a detailed Review of Counter-Terrorism and Security Powers. The Review Findings and Recommendations were published in a Command Paper by the Home Secretary in January 2011 (CMD 8004). We have considered the issues from a Scottish perspective, and have sought the views of the Association of Chief Police Officers in Scotland (ACPOS) and the Crown Office.

Financial Implications

19. It is envisaged that there will not be additional direct costs to the Scottish Government or the Scottish Criminal Justice sector.

Conclusion

20. Extending the relevant provisions in the Bill to Scotland will put the powers of the police in Scotland, in relation to powers of seizure of evidence and the use of forensic data, beyond doubt. It will also ensure that the consent of Scottish Ministers is sought in cases where UK Ministers wish to make specific provisions for enhanced TPIM purposes, if these provisions would fall within the competence of the Scottish Parliament. It is therefore the view of the Scottish Government that it is in the interests of the Scottish people and good governance that the relevant provisions, as outlined above, which fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

Scottish Government

November 2011