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**From:** Clive Walker <C.P.Walker@leeds.ac.uk>  
**Sent:** Saturday, 26 September 2015 2:42 AM  
**To:** INSLM Submissions  
**Subject:** Control orders  
**Attachments:** MULR10.pdf

Dear INSLM

I have just received your letter of invitation to contribute to your inquiry on control orders. Alas, I see that your deadline has already passed. It seems that the era of transmitting the post between our countries by packet steamer is alive and well.

In case there might still be the possibility of taking account of submissions, I am attaching my recent article, Walker, C., 'The reshaping of control orders in the United Kingdom: Time for a fairer go, Australia!' (2013) 37 *Melbourne University Law Review* 143-188.

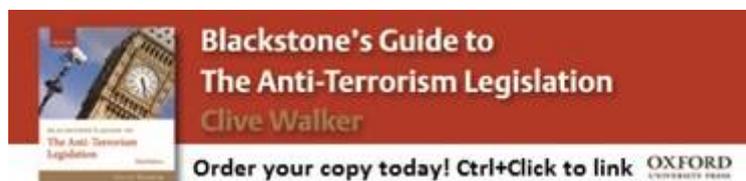
This area of counter terrorism law has been followed up in chapter 7 of my book, Walker, C.P., [The Anti-Terrorism Legislation](#) (Third edition, Oxford University Press, Oxford, 2014).

In addition, as you will be aware, in the light of advice given by David Anderson QC (Independent Reviewer of Terrorism Legislation in the UK), the Counter Terrorism and Security Act 2015, part II, has now made some important amendments to our scheme of Terrorism prevention and investigation measures (TPIMs). The most significant development is the reintroduction of a power of relocation. This 'overnight residence measure' allows relocation up to 200 miles away, subject to enhanced oversight by the Minister and the courts.

Please do not hesitate to get in touch if you require any further assistance, especially with UK provisions.

Best wishes

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# THE RESHAPING OF CONTROL ORDERS IN THE UNITED KINGDOM: TIME FOR A FAIRER GO, AUSTRALIA!

CLIVE WALKER\*

*The Australian version of control orders under div 104 of the Criminal Code (Cth) was very much hewn in the image of the United Kingdom's Prevention of Terrorism Act 2005 (UK). These orders allow severe restrictions on personal freedoms to be imposed on terrorist suspects without proof of any criminal offence. Disquiet about the legitimacy of control orders in the United Kingdom has now resulted in a reform process, the outcome of which is the Terrorism Prevention and Investigation Measures Act 2011 (UK). A critical assessment in an Australian context of these British reforms is timely because of the recently released Council of Australian Governments Review of Counter-Terrorism Legislation as well as the second annual review by the Independent National Security Legislation Monitor. This article will advocate that, despite misgivings, some variant of control should be retained in Australia and that the revisions embodied in the TPIM Act (and some beyond) are worthy of emulation.*

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## I INTRODUCTION

The common legal heritage between Australia and the United Kingdom is profound, but some aspects are more fondly savoured than others. Control orders may represent an exceptional aspect of that relationship since they entail highly negative connotations. It is a fact that the Australian version of counter-terrorism control orders under div 104 of the *Criminal Code* (Cth)<sup>1</sup> were very much hewn in the image of the United Kingdom model, which appeared in the *Prevention of Terrorism Act 2005* (UK) c 2 ('PTA 2005').<sup>2</sup> As is well-known, these orders allow severe restrictions on liberty and movement, as well as rights to communication, association, and property, to be imposed on terrorist suspects without proof of any criminal offence.<sup>3</sup> Having lured

<sup>1</sup> Inserted by *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 item 24.

<sup>2</sup> See statements of then Prime Minister John Howard in September 2005, cited in Bronwen Jaggars, 'Anti-Terrorism Control Orders in Australia and the United Kingdom: A Comparison' (Research Paper No 28, Parliamentary Library, Parliament of Australia, 29 April 2008) 10. See also Attorney-General's Department, Submission to the Council of Australian Governments, *Review of Counter-Terrorism Legislation*, October 2012, 24, which confirms that '[t]hese provisions were enacted in the aftermath of the London terrorist attacks in July 2005, and were inspired by similar sorts of provisions enacted in the UK'; Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Oxford University Commonwealth Law Journal* 159.

<sup>3</sup> For Australia, see Greg Carne, 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the *Anti-Terrorism Act (No 2) 2005* (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17; Michael McHugh, 'Constitutional Implications of Terrorism Legislation' (2007) 8 *The Judicial Review* 189; Susan Donkin, *The Evolution of Pre-Emption in Anti-*

Australia into a fine morass, the British legal system perhaps now owes some duty of care to offer a better model. Although, it must be observed that Australians are quite capable of compounding their own difficulties, such as by spreading the notion of control orders to outlaw motorcycle gangs ('bikies').<sup>4</sup> The purpose of this paper is didactic rather than evangelical. No claim is made here that United Kingdom control orders were necessarily the right product for Australia in 2005. But this paper embeds a twin thesis. First, given that the United Kingdom legislature has now replaced the *PTA 2005* with the *Terrorism Prevention and Investigation Measures Act 2011* (UK) c 23 ('*TPIM Act*'),<sup>5</sup> it is argued that the Terrorism Prevention and Investigation Measures ('TPIMs') so enacted are a better option for the United Kingdom on the basis that, overall, they demonstrate a greater deference to the rights of individuals. The second thesis is that, if some variant of control orders are to be retained in Australia, TPIMs and their reformed features are worthy of some emulation in Australia too.

It may seem almost quixotic to select this topic for examination given that only two counter-terrorism control orders have ever been issued in Australia, the subjects being Jack Thomas<sup>6</sup> and David Hicks.<sup>7</sup> However, there are four reasons why this examination is timely.

First, there is the justification of the recently released Council of Australian Governments' *Review of Counter-Terrorism Legislation* ('COAG Review')

*Terrorism Law: A Cross-Jurisdictional Examination* (PhD Thesis, Griffith University, 2011). For the UK, see Clive Walker, *Terrorism and the Law* (Oxford University Press, 2011) ch 7.

<sup>4</sup> See, eg. *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638. See also Nicola McGarrity, 'From Terrorism to "Bikies"' (2012) 37 *Alternative Law Journal* 166; Greg Martin, 'Jurisprudence of Secrecy: *Wainohu* and Beyond' (2012) 14 *Flinders Law Journal* 189; Tarsha Gavin, 'Extending the Reach of *Kable: Wainohu v New South Wales*' (2012) 34 *Sydney Law Review* 395.

<sup>5</sup> See Clive Walker and Alexander Horne, 'The Terrorism Prevention and Investigation Measures Act 2011: One Thing but Not Much the Other?' (2012) 6 *Criminal Law Review* 421.

<sup>6</sup> *Jabbour v Thomas* (2006) 165 A Crim R 32; *Jabbour v Thomas [No 3]* [2006] FMCA 1425; *Thomas v Mowbray* (2007) 233 CLR 307. See generally Jude McCulloch, 'Australia's Anti-Terrorism Legislation and the Jack Thomas Case' (2006) 18 *Current Issues in Criminal Justice* 357; Andrew Lynch, 'Maximising the Drama: "Jihad Jack", the Court of Appeal and the Australian Media' (2006) 27 *Adelaide Law Review* 311; Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105; Andrew Lynch, '*Thomas v Mowbray* — Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182; Denise Meyerson, 'Using Judges to Manage Risk: The Case of *Thomas v Mowbray*' (2008) 36 *Federal Law Review* 209.

<sup>7</sup> *Jabbour v Hicks* (2007) 215 FLR 454. See generally David Hicks, *Guantanamo: My Journey* (Random House, 2010).

chaired by the Hon Anthony Whealy QC.<sup>8</sup> Second, is the second annual review by the Independent National Security Legislation Monitor ('INSLM'),<sup>9</sup> Bret Walker SC, released on the same day.<sup>10</sup> The need for the *COAG Review* broadly arose because, in the words of former Australian Prime Minister, Julia Gillard, '[t]errorism is an ever-present threat and the review of our laws is important to ensure that our laws remain necessary and provide effective powers for our police and security agencies.'<sup>11</sup> Those words embody an important assertion which leads us to a third, broader justification.

The then Prime Minister's assertion that terrorism is 'an ever-present threat', implies that counter-terrorism laws are also going to remain 'ever-present' and, many would add, thereby present another threat to our rights and democracy. Still, the former Prime Minister's analysis should be endorsed. The tactic of terrorism has allure in a wide range of conflicted situations and for a wide range of individuals and groupings which harbour political ambitions. Fortunately, most disciples of terrorism possess neither the will nor the capacity to implement the tactic. However, even if terrorism is confined to an aberrant minority (let alone organised communities like in Northern Ireland or the Basque country) it can cause appreciable harm to persons and to democratic processes sufficient to warrant special legislation, including occasional derogations from rights. A firm response to terrorism is therefore endorsed by the jurisprudence of the European Court of Human Rights,<sup>12</sup> though it has also repeatedly adjudged that states have overstepped the bounds of permissible action.<sup>13</sup> This enduring threat of terrorism, and

<sup>8</sup> Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013).

<sup>9</sup> Bret Walker, *Independent National Security Legislation Monitor — Declassified Annual Report 20 December 2012* (2013). Annual reporting is required by *Independent National Security Legislation Monitor Act 2010* (Cth) s 29. See generally Department of the Prime Minister and Cabinet, *Independent National Security Legislation Monitor* (9 April 2013) <<http://www.dpmc.gov.au/inslm>>.

<sup>10</sup> While there are passing references to both reports included in this paper, it was prepared before their publication (though after discussions with both Bret Walker SC and the Hon Anthony Whealy QC). There is much valuable research and reflection in both reports (including comparisons with the United Kingdom regimes), and they deserve to be considered fully in a future paper.

<sup>11</sup> Office of the Prime Minister of Australia, 'COAG to Review Counter-Terrorism Legislation' (Press Release, 9 August 2012) <<http://www.pm.gov.au/press-office/coag-review-counter-terrorism-legislation>>.

<sup>12</sup> See *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A); *Klass v Germany* (1978) 28 Eur Court HR (ser A).

<sup>13</sup> See especially *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A); *Brogan v United Kingdom* (1988) 145-B Eur Court HR (ser A); *A v United Kingdom* [2009] Eur Court HR.

therefore equally enduring need for well-designed counter-terrorism legislation, has been sustained as a realistic prospect for the United Kingdom, ever since the ‘Lloyd Report’ in 1996<sup>14</sup> presaged the growth in international terrorism and formed the bedrock for the United Kingdom’s permanent *Terrorism Act 2000* (UK) c 11.<sup>15</sup>

A fourth justification for this paper might be to examine the United Kingdom’s approach to counter-terrorism laws as a jurisdiction where one of the main dynamics in favour of reform has been human rights. The contrasting emphasis in Australia on the appropriate constitutional capacities of institutions of state, rather than the rights of individuals, certainly produces different, and sometimes (to British perspectives at least) disappointingly solipsistic and positivistic forms of reasoning. Though with commendable ingenuity, the outcomes are often very similar. But this fourth justification is potentially a more far-reaching topic than the focus on executive orders and so will merely be touched on from time to time rather than taking centre stage in this article.

In outline, this article will next explain the background to the United Kingdom legislation and the contours of TPIMs in substance and process, and will then analyse whether any degree of policy transfer to Australia can be undertaken with profit.

## II BACKGROUND TO RECENT UNITED KINGDOM REFORMS

Before coming to office in May 2010, the current United Kingdom Government Coalition partners had expressed disquiet regarding the incremental authoritarianism of their predecessor New Labour Governments. Part of the correction was announced on 26 January 2011, when the Coalition Government revealed its proposals for reform of the United Kingdom’s counter-terrorism laws in its paper, *Review of Counter-Terrorism and Security Powers*,<sup>16</sup> which was published alongside Lord Macdonald’s accompanying observations.<sup>17</sup> In the Ministerial foreword, the Home Secretary, Theresa May, stated that, whilst national security was the prime duty of government:

<sup>14</sup> Lord Lloyd, *Inquiry into Legislation against Terrorism*, Cm 3420 (1996).

<sup>15</sup> Only pt VII, relating to Northern Ireland, was enacted on a temporary basis. It has since been replaced by the *Justice and Security (Northern Ireland) Act 2007* (UK) c 6.

<sup>16</sup> Home Office (UK), *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, Cm 8004 (2011).

<sup>17</sup> Lord Macdonald, *Review of Counter-Terrorism and Security Powers*, Cm 8003 (2011).

We must ... correct the imbalance that has developed between the State's security powers and civil liberties, restoring those liberties wherever possible and focusing those powers where necessary.<sup>18</sup>

This liberal tendency also affected various other policies of the outgoing New Labour administrations (especially counter-terrorism pre-charge detention, and stop and search powers), all of which have been addressed in the *Protection of Freedoms Act 2012* (UK) c 9.<sup>19</sup> That Act probably represents the high watermark of the liberal correction, for the Coalition Government has now grown somewhat resentful of troublesome judges who have imposed restraints on executive action, whether by administrative law or human rights, and whether in the London High Court<sup>20</sup> or the Strasbourg European Court of Human Rights.<sup>21</sup>

Before the novelty of liberality began to wane, one of the foremost areas of attention concerned control orders. That special executive measure against terrorism had been introduced and passed in March 2005 via the *PTA 2005* in circumstances of parliamentary crisis and rancour in response to the decision of the judicial House of Lords in *A v Secretary of State for the Home Department*,<sup>22</sup> which effectively ended detention without trial for foreign terror suspects. By contrast, the Terrorism Prevention and Investigation Measures Bill 2010–12 (UK) ('TPIM Bill') was introduced on 23 May 2011 and received the Royal Assent on 14 December 2011 after a relatively genteel and thorough review. Before returning to the didactic purpose to be served by TPIMs, an overview will be provided of the altered regime. After that survey, a judgment can be taken on whether TPIMs remain as defective as the control orders which they replaced and then whether they might offer any lessons for Australia.

<sup>18</sup> Home Office (UK), *Review of Counter-Terrorism and Security Powers*, above n 16, 3.

<sup>19</sup> The agenda also included the shelving of identity cards: *Identity Documents Act 2010* (UK) c 40, ss 1–3.

<sup>20</sup> See Ministry of Justice (UK), *Judicial Review: Proposals for Reform*, Cm 8515 (2012).

<sup>21</sup> See, eg, Council of Europe, 'High Level Conference on the Future of the European Court of Human Rights — Brighton Declaration' (19–20 April 2012).

<sup>22</sup> [2005] 2 AC 68.

### III OVERVIEW OF THE NEW UNITED KINGDOM LEGISLATIVE SCHEME

Given the focus of this paper on TPIMs, it is not intended to reflect at length on the problems generated by control orders or why they came to be repealed. In brief, control orders were imposed on 52 individuals; more than half were made against foreign nationals (including nine persons previously detained under pt 4 of the *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24).<sup>23</sup> As of 14 December 2011, there were nine control orders in force, all affecting British citizens. As of 30 November 2012, there were 10 TPIMs in force, all but one against British citizens, most of whom were subject to control orders at the time the *TPIM Act* received the Royal Assent.<sup>24</sup>

This application of the control order regime in the United Kingdom may be viewed as quantitatively restrained. Though far exceeding its Australian counterpart in usage, the forebodings of critics about the inauguration of a substantial crackdown never materialised.<sup>25</sup> However, that restraint did not shield control orders from criticism on human rights grounds,<sup>26</sup> or from many successful court challenges.<sup>27</sup> Perhaps as a result of this mixed reception and low-key application, many of the reviled features of control orders are reproduced in TPIMs. Therefore, critics say that TPIMs are no more than

<sup>23</sup> David Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (March 2012) 29–31 [3.13]–[3.18]; United Kingdom, *Parliamentary Debates*, House of Commons, 7 February 2011, vol 523, cols 28–36W. For profiles of affected individuals, see Robin Simcox, *Control Orders — Strengthening National Security* (Centre for Social Cohesion, 2010).

<sup>24</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 26 March 2012, vol 542, col 94WS (Theresa May, Home Secretary); United Kingdom, *Parliamentary Debates*, House of Commons, 19 June 2012, vol 546, col 56WS (Theresa May, Home Secretary); United Kingdom, *Parliamentary Debates*, House of Commons, 7 September 2012, vol 549, col 39WS (Theresa May, Home Secretary); United Kingdom, *Parliamentary Debates*, House of Commons, 6 December 2012, vol 554, col 80WS (Theresa May, Home Secretary).

<sup>25</sup> See Conor Gearty, ‘Human Rights in an Age of Counter-Terrorism’ (2005) 58 *Current Legal Problems* 25, 42–4.

<sup>26</sup> See, eg, Joint Committee on Human Rights (UK), *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, House of Lords Paper No 64, House of Commons Paper No 395, Session 2009–10 (2010); Lord Macdonald, *Review of Counter-Terrorism and Security Powers*, above n 17; David Anderson, *Control Orders in 2011*, above n 23.

<sup>27</sup> See especially *Secretary of State for the Home Department v JJ* [2008] 1 AC 385; *Secretary of State for the Home Department v MB* [2008] 1 AC 440; *Secretary of State for the Home Department v AF* [No 3] [2009] 3 WLR 74; *AP v Secretary of State for the Home Department* [2011] 2 AC 1.

‘control orders lite’<sup>28</sup> and fail to deal with their objectionable features — that terrorist suspects are dealt with outside the criminal law and thereby at cost to their fundamental rights. In contrast, Lord Carlile, the United Kingdom’s Independent Reviewer of Terrorism Legislation<sup>29</sup> from 2001 to 2011, considered that TPIMs reflect ‘an acceptable balance of risk against other considerations.’<sup>30</sup> One can also argue that though their primary features correspond with previous executive security orders which litter the past century of United Kingdom anti-terrorism law,<sup>31</sup> the finer features of TPIMs do bring about a ‘more focused and targeted’ regime than their predecessors.<sup>32</sup> A more studied qualitative critique of the TPIM regime should consider its asserted normative values of effectiveness and respect for individual rights<sup>33</sup> as applied to both aspects of the regime, namely its titular claim to advance both prevention and investigation.

#### IV TPIMS AS MEASURES OF PREVENTION

Within the core sphere of pre-emption or prevention as the primary goal,<sup>34</sup> the overall legal framework remains constant as between control orders and TPIMs. TPIMs are still based on the concept of ‘involvement in terrorism-related activity’<sup>35</sup> and not criminality. It follows that the devil is in the detail of the obligations which can be imposed. Thus, Lord Carlile recorded 25 types of

<sup>28</sup> Liberty, *Terrorism Protection and Investigation Measures* <<http://www.liberty-human-rights.org.uk/human-rights/terrorism/control-orders/index.php>>.

<sup>29</sup> Appointed in accordance with *Terrorism Act 2006* (UK) c 11, s 36.

<sup>30</sup> Lord Carlile, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (February 2011) 22 [52].

<sup>31</sup> See generally, David Bonner, *Executive Measures, Terrorism and National Security* (Ashgate, 2007).

<sup>32</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 5 October 2011, vol 730, col 1134 (Lord Henley, Minister of State – Home Office). For further official assessment, see Office for Security and Counter-Terrorism (UK), ‘Terrorism Prevention and Investigation Measures’ (Impact Assessment No HO 0042, Home Office, 17 May 2011); Home Office (UK), *Review of Counter-Terrorism and Security Powers: Equality Impact Assessment*, Cm 8006 (2011).

<sup>33</sup> These values are set out in Home Office (UK), *Review of Counter-Terrorism and Security Powers*, above n 16, 4.

<sup>34</sup> See generally Alan M Dershowitz, *Preemption: A Knife That Cuts Both Ways* (W W Norton, 2006); Lucia Zedner, ‘Preventive Justice or Pre-Punishment? The Case of Control Orders’ (2007) 60 *Current Legal Problems* 174; Frank Furedi, *Invitation to Terror: The Expanding Empire of the Unknown* (Continuum, 2007).

<sup>35</sup> *TPIM Act* s 4.

measures in common use under control orders,<sup>36</sup> and these variants on 16 types of statutory obligations<sup>37</sup> were only ‘in particular’, leaving open the door for further variants. Schedule 1 of the *TPIM Act* specifies only 12 types of measures and does not allow any others. It is true that several distinctions are not much more than semantic reformulations. Nevertheless, when one examines these differences in detail, one discovers some categorical modifications which are claimed to impact on the ability of suspects to lead as ‘typical a pattern of life’ as possible.<sup>38</sup> The following should be highlighted.

First, the most controversial change in potential obligations concerned the TPIM-based ‘overnight residence measure’ — an order confining the person to their own residence or, if the person has none, an ‘appropriate’ or ‘agreed locality’.<sup>39</sup> In this respect, TPIMs embody two sharp distinctions from control orders: the termination of any power of relocation, and the diminution of ‘curfew’ powers which must be confined to ‘overnight’. The latter was defined in *Secretary of State for the Home Department v BM* as meaning the hours between which most people would regard it as reasonable to think that others might be at home (which meant not beyond the hours of 21:00 to 07:00).<sup>40</sup> The termination of the relocation power provoked considerable disquiet. Six out of nine control orders extant in 2011 contained relocation clauses.<sup>41</sup> There were visions of terror suspects skulking around the Olympic Park in East London, and the police argued that the loss of relocation powers ‘will significantly increase the challenges that we have to face’.<sup>42</sup> Various attempts were made during the legislative passage to revive the relocation power,<sup>43</sup> in response to which the Government promised substantial extra finance for security surveillance.<sup>44</sup> Further reassurance arises because the list of potential

<sup>36</sup> Lord Carlile, *Sixth Report of the Independent Reviewer*, above n 30, 12 [19].

<sup>37</sup> The 16 are set out in *PTA 2005* s 1(4).

<sup>38</sup> See Lord Macdonald, *Review of Counter-Terrorism and Security Powers*, above n 17, 12 [19].

<sup>39</sup> *TPIM Act* sch 1 para 1.

<sup>40</sup> [2012] 1 WLR 2734, 2751 [52] (Collins J).

<sup>41</sup> David Anderson, *Control Orders in 2011*, above n 23, 55 [4.9].

<sup>42</sup> United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 21 June 2011, 1<sup>st</sup> sitting, col 6 (Stuart Osborne, Deputy Assistant Commissioner).

<sup>43</sup> See, eg, United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 28 June 2011, 6<sup>th</sup> sitting, col 165.

<sup>44</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 5 September 2011, vol 532, col 57 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department). Surveillance costs are not quantified for security reasons. See also Home Affairs Committee

TPIMs includes ‘exclusion’ measures. These measures allow for restrictions on individuals entering specified areas or places, or places or areas of a specified description,<sup>45</sup> such as airports, ports and international railway stations or mosques. This form of TPIM remains more limited than what was available under the control orders regime, where it was possible to impose wider geographical boundaries,<sup>46</sup> but its impact should not be disregarded.

Moving to some of the other measures allowed under the *TPIM Act* sch 1, several others further seek to lessen the degree of intrusion into the daily lives of suspects. The first relates to ‘electronic communications device’ measures.<sup>47</sup> The Secretary of State may restrict the possession or use of electronic devices and also regulate their usage by other persons in the suspect’s residence. But the suspect must be allowed to possess and use: a fixed line telephone; a computer providing access to the internet by connection to a fixed line; and, a mobile phone that does not provide access to the internet.<sup>48</sup> Consequently, there can be no total ban since that degree of restriction impinges excessively on normal life.<sup>49</sup> No doubt, suspects will remain circumspect in their communications in the expectation of ongoing snooping.

The second change of degree relates to ‘association’ measures — restrictions on association or communication with specified persons or specified descriptions of persons.<sup>50</sup> Control order obligations could restrain contact with everyone,<sup>51</sup> though in practice they were either formulated against meetings or by reference to listed persons. In contrast, TPIMs must always be defined by reference to specified persons, albeit potentially formulated in broad terms, such as ‘persons living outside the United Kingdom’.<sup>52</sup>

(UK), *Specialist Operations: Oral Evidence*, House of Commons Paper No 441-i, Session 2010–12 (2010).

<sup>45</sup> *TPIM Act* sch 1 para 3. See also sch 1 paras 2, 4 for potential restrictions on travel and movement.

<sup>46</sup> See *PTA 2005* s 1(4)(b).

<sup>47</sup> *TPIM Act* sch 1 para 7.

<sup>48</sup> *Ibid* sch 1 para 7(3).

<sup>49</sup> United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 28 June 2011, 6<sup>th</sup> sitting, col 186–7 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

<sup>50</sup> *TPIM Act* sch 1 para 8.

<sup>51</sup> *PTA 2005* s 1(4)(d).

<sup>52</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 15 November 2011, vol 732, col 618 (Lord Henley, Minister of State – Home Office).

The third significant change of degree relates to ‘financial services’ measures.<sup>53</sup> The Secretary of State can restrict the use of, or access to, specified financial services, subject now to the minimum allowance of one nominated account with a bank or building society (but not informal value transfer agents such as hawaladars).<sup>54</sup> The possibility of financial listing under the *Terrorist Asset-Freezing etc Act 2010* (UK) c 38<sup>55</sup> or under European Union or United Nations sanctions<sup>56</sup> may still apply independently.

There is not so much detectable change in the remaining armoury laid out in sch 1 of the *TPIM Act*: ‘travel’ measures;<sup>57</sup> ‘property’ measures;<sup>58</sup> ‘work or studies’ measures;<sup>59</sup> ‘reporting’ measures;<sup>60</sup> ‘photography’ measures;<sup>61</sup> and ‘monitoring’ measures.<sup>62</sup> Much of what could be imposed under the control order regime remains available under the *TPIM Act*.

By way of appraisal, TPIMs have been appreciably reduced in impact compared to control orders — they are indeed ‘control orders lite’. Since the changes do not appear to have created any unmanageable extra threat to public safety, it must surely be considered worthwhile for the United Kingdom to have reshaped its security measures into a form which more proportionately impacts on individual freedoms. What has not been achieved is any increase in the overall acceptance of special measures such as TPIMs. Thankfully, there is no disguising repression, and it engenders the same rate of legal challenges as before,<sup>63</sup> though, without having to defend relocation, the Home Office may be more able to resist complaints.

<sup>53</sup> *TPIM Act* sch 1 para 5.

<sup>54</sup> *Ibid* paras 5(3)–(4).

<sup>55</sup> See generally David Anderson, *First Report on the Operation of the Terrorist Asset-Freezing etc Act 2010* (December 2011).

<sup>56</sup> See generally Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2009) ch 1; Ben Emmerson, Special Rapporteur, *Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 67<sup>th</sup> sess, Agenda Item 69(b), UN Doc A/67/396 (26 September 2012) ch 3.

<sup>57</sup> *TPIM Act* sch 1 para 2.

<sup>58</sup> *Ibid* sch 1 para 6.

<sup>59</sup> *Ibid* sch 1 para 9.

<sup>60</sup> *Ibid* sch 1 para 10.

<sup>61</sup> *Ibid* sch 1 para 11.

<sup>62</sup> *Ibid* sch 1 para 12.

<sup>63</sup> There have been eight fully reported challenges: *Secretary of State for the Home Department v BM* [2012] 1 WLR 2734; *Secretary of State for the Home Department v BF* [2012] EWHC 1718 (Admin) (25 June 2012); *Secretary of State for the Home Department v CC* [2012] EWHC

Whether TPIMs or control orders are more effective as counter-terrorism devices is very difficult to judge. For its part, the Government claimed that '[i]n some cases control orders have successfully prevented involvement in terrorism-related activity. In others — the majority — they have restricted and disrupted that activity without entirely eliminating it.'<sup>64</sup> One might also weigh the many cases before the High Court in which control orders have been thoroughly examined on the basis of insufficiency of evidence.<sup>65</sup> In addition, each year since 2005, the Independent Reviewers of Terrorism Legislation who have been required to scrutinise these systems<sup>66</sup> have reported their approval both of the overall continuance of the system and of the sustainability of each order in force. Yet, given the secrecy of much of the factual workings of the system, it is impossible to offer a definitive assessment of effectiveness.

#### V ENHANCED TPIMs AS MEASURES OF PREVENTION

There is a codicil to this relatively benign assessment of TPIMs as preventative orders. Many of the limits adopted within TPIMs have been potentially compromised by the issuance of the Draft Enhanced Terrorism Prevention and Investigations Measures Bill 2010–12 (UK) ('Draft Enhanced TPIM Bill') in September 2011.<sup>67</sup> This draft Bill allows for 'Enhanced TPIMs' during exceptional circumstances.<sup>68</sup> The Minister was keen to emphasise that this extra device did not represent 'some sort of U-turn'.<sup>69</sup> But it is perhaps telling

1732 (Admin) (29 June 2012); *Secretary of State for the Home Department v AM* [2012] EWHC 1854 (Admin) (6 July 2012); *Secretary of State for the Home Department v AY* [2012] EWHC 2054 (Admin) (19 July 2012); *Secretary of State for the Home Department v CC* [2013] 1 WLR 2171; *Secretary of State for the Home Department v CD* [2012] EWHC 3026 (Admin) (5 November 2011); *CF v Secretary of State for the Home Department* [2013] EWHC 843 (Admin) (12 April 2013).

<sup>64</sup> Home Office (UK), *Memorandum to the Home Affairs Committee: Post-Legislative Assessment of the Prevention of Terrorism Act 2005*, Cm 7797 (2010) 12 [55].

<sup>65</sup> See Walker, *Terrorism and the Law*, above n 3, 317–24.

<sup>66</sup> *PTA 2005* s 14(3); *TPIM Act* s 20.

<sup>67</sup> Home Office (UK), *Draft Enhanced Terrorism Prevention and Investigation Measures Bill*, Cm 8166 (2011). See also *TPIM Act* ss 26–7 dealing with any period when Parliament is dissolved.

<sup>68</sup> Home Office (UK), *Draft Enhanced Terrorism Prevention and Investigation Measures Bill*, above n 67, [3].

<sup>69</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 5 September 2011, vol 532, col 133 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

that the draft was not published until 1 September 2011, a significant lapse of time after the publication of the TPIM Bill.<sup>70</sup> This timing suggests afterthought about the need for reassurance, though arguably more for the benefit of security professionals than for opposition politicians.<sup>71</sup>

An evident and unsolved problem with the Draft Enhanced TPIM Bill is that the ‘exceptional circumstances’ which trigger its invocation are not defined. The Minister ventured the following scenarios:

credible reporting could point to a series of concurrent attack plots, all of which appear imminent, or it might apply in the wake of a major terrorist attack when there is the prospect of further attacks to follow.<sup>72</sup>

But what really should be focused upon is not the threat, but the capability of agencies dealing with it and whether they are being overwhelmed. Another aspect of the official reasoning was that the *Civil Contingencies Act 2004* (UK) c 36 (‘CCA’), which already provides for a potentially vast array of special regulatory powers in circumstances of emergency (explicitly including terrorism),<sup>73</sup> was claimed to be inappropriate. The reasons included: that the CCA contains no explicit powers to issue TPIMs (but there is equally no denying that its powers are wide enough to do so); that the maximum penalty for breach of regulations issued under the CCA is just three months’ imprisonment; and that the triggers for invocation of the CCA are too restrictive.<sup>74</sup> The fundamental rationale resides in the last point. The Government has preferred to create a new form of ‘soft’ emergency alongside the ‘hard’ emergency situations set out clearly under pt II of the CCA and thereby evade the carefully constructed safeguards embodied in it.

See also Home Office (UK), *Review of Counter Terrorism and Security Powers*, above n 16, 43 [27]–[28].

<sup>70</sup> First introduced into the House of Commons on 23 May 2011.

<sup>71</sup> Cf the intention not to publish expressed by the Security Minister, Baroness Neville-Jones, on 8 February 2011: Joint Committee on Human Rights (UK), *Counter-Terrorism Review: Oral Evidence*, House of Commons Paper No 797-i, Session 2010–11 (2011) 17–18 [Q51]–[Q56].

<sup>72</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 5 September 2011, vol 532, cols 105–6 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

<sup>73</sup> *Civil Contingencies Act 2004* (UK) c 36, s 19(1)(c). See Clive Walker and Jim Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford University Press, 2006) ch 5.

<sup>74</sup> Government Response, Letter from James Brokenshire (Parliamentary Under-Secretary for Crime and Security) to Baroness Jay (Chair of House of Lords Constitution Committee), 27 October 2011, 5 in reply to House of Lords Constitution Committee (UK), *Prevention and Investigation Measures Bill Report*, House of Lords Paper No 198, Session 2010–12 (2011).

Another shortcoming that arose following the publication of the Draft Enhanced TPIM Bill was the absence of parliamentary scrutiny. Although the Government eventually expressed a desire for pre-legislative scrutiny,<sup>75</sup> no select committee found time to conduct an inquiry,<sup>76</sup> and there was no line by line consideration of the draft Bill itself. Laying a draft Bill on the table was said to be ‘deeply disorderly and shambolic’ by the Shadow Home Secretary,<sup>77</sup> perhaps forgetting that the precedent for doing so was set by her Labour predecessor, Jacqui Smith (upon defeat over the proposal for 42 day detention during the Counter-Terrorism Bill 2007–08 (UK) debates).<sup>78</sup> A draft Bill is preferable to an unveiling during the febrile atmosphere of a crisis, but the device only postpones, rather than avoids, the evil of emergency legislation.<sup>79</sup> The Government was perhaps less than convincing with its argument that: ‘We do not believe that it is necessary to have these additional measures in the TPIM Bill as we sincerely hope that they will never be required’.<sup>80</sup> The measures are evidently worth the trouble of drafting and tabling. A viable alternative was for the enhanced measures to have been incorporated into the main TPIM Bill (but not brought into force), given that the text of the main Bill was not finalised until 24 November 2011.

If the Draft Enhanced TPIM Bill is ever implemented, Enhanced TPIMs would be able to remain in force for one year (presuming they were imposed on the day the Act came into force), extendable by one year. This extension would only be possible if the Act itself were to be extended,<sup>81</sup> a process which would require consultation with the Independent Reviewer of Terrorism Legislation, the Intelligence Services Commissioner and the Director-General

<sup>75</sup> Home Office (UK), *Draft Enhanced Terrorism Prevention and Investigation Measures Bill*, above n 67, [5].

<sup>76</sup> Cf Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills 2011 (UK), *Draft Detention of Terrorist Suspects (Temporary Extension) Bills 2001 Report*, House of Lords Paper No 161, House of Commons Paper No 893, Session 2010–12 (2011).

<sup>77</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 5 September 2011, vol 532, col 135 (Yvette Cooper).

<sup>78</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 13 October 2008, vol 480, cols 624–5 (Jacqui Smith, Home Secretary). See Draft Counter-Terrorism (Temporary Provisions) Bill 2007–8 (UK) cl 1(2).

<sup>79</sup> See House of Lords Select Committee on the Constitution (UK), *Fast-Track Legislation: Constitutional Implications and Safeguards*, House of Lords Paper No 116, Session 2008–09 (2009).

<sup>80</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 5 October 2011, vol 730, col 1136 (Lord Henley, Minister of State – Home Office).

<sup>81</sup> Draft Enhanced TPIM Bill cls 9(1), 9(2)(b)(ii).

of the Security Service,<sup>82</sup> but not the police and Director of Public Prosecutions. Once triggered, an Enhanced TPIM can be more severe than a standard TPIM in several respects. Enhanced TPIMs may include: a relocation requirement;<sup>83</sup> a requirement that the individual remains in their residence for a specified period, not necessarily confined to ‘overnight’ and therefore reverting to a curfew;<sup>84</sup> a geographical boundary restriction by which the person may not leave a specified area;<sup>85</sup> a restriction or total prohibition on the possession or use of electronic communication devices;<sup>86</sup> and a restriction on association or communication with other persons or all other persons, subject to allowing the individual to associate or communicate with specified individuals, or descriptions of individuals, or in specified circumstances, without seeking permission.<sup>87</sup>

At the same time, there is no full flight back to control orders: the types of measures are not left at large as under the non-exhaustive list in the *PTA 2005*;<sup>88</sup> and there is no express provision for Enhanced TPIMs which expressly derogate from individual rights (above all, from the right to liberty).<sup>89</sup>

Subsequent to the brief debates in September and October 2011, a special select committee was established and reported in November 2012.<sup>90</sup> It concluded that there might be a legitimate need for tougher measures as a preventative tool against suspected terrorists in the ‘most extreme circumstances.’<sup>91</sup> Nonetheless, it also expressed concerns, particularly over the ability of Parliament to scrutinise the introduction of Enhanced TPIMs in a crisis and in the context of the vague trigger criteria.<sup>92</sup> It therefore recommended that vetted Parliamentarians and the Intelligence and Security Committee should receive special briefings and communicate to Parliament a recommen-

<sup>82</sup> Draft Enhanced TPIM Bill cl 9(3).

<sup>83</sup> *Ibid* sch 1 para 3. Cf *TPIM Act* sch 1 para 3.

<sup>84</sup> Draft Enhanced TPIM Bill sch 1 para 1(2)(c). Cf *TPIM Act* sch 1 para 1(2)(c).

<sup>85</sup> Draft Enhanced TPIM Bill sch 1 para 4: ‘Movement restrictions measure’.

<sup>86</sup> *Ibid* sch 1 para 8(2)(a). Cf *TPIM Act* sch 1 para 7(3).

<sup>87</sup> Draft Enhanced TPIM Bill sch 1 para 9. Cf *TPIM Act* sch 1 para 8.

<sup>88</sup> *PTA 2005* s 1(4).

<sup>89</sup> Cf *ibid* s 4.

<sup>90</sup> Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill (UK), *Report*, House of Lords Paper No 70, House of Commons Paper No 495, Session 2012–13 (2012).

<sup>91</sup> *Ibid* 3, 9 [16].

<sup>92</sup> *Ibid* 11 [23], 12 [30].

dation on any proposed introduction of the Bill.<sup>93</sup> The Committee also expressed ‘grave concerns’ over the use of emergency legislation in these circumstances and questioned why an order-making power had not been placed on the face of the main TPIM Bill, whereby fuller scrutiny would have been possible; it concluded that this draft Bill device should not be used again.<sup>94</sup>

On reflection, and returning to the didactic purpose of this paper, a process of reform can take many twists and turns, but there are occasions when government should stick to the courage of their convictions, as it managed to do with the equally controversial counter-terrorism stop and search powers.<sup>95</sup> It was Her Majesty’s Secretary of State for the Home Department, Theresa May, who stated bluntly in the second reading debate on the TPIM Bill that ‘the current control orders regime is neither perfect nor entirely effective.’<sup>96</sup> Why then seek to retain more or less that regime for the most fraught of circumstances?

## VI TPIMS AS MEASURES OF INVESTIGATION

The main weakness in the *TPIM Act* arguably resides not so much in the reformulation of its prevention objective, but in the feeble augmentation of its investigation objective. There is universal acceptance for the proposition that prosecution remains the priority for counter-terrorism, but the Government claim that ‘the Bill is based on investigation’<sup>97</sup> is unconvincing. Certainly, there was room for legislative improvement because there had been only one prosecution for a substantive terrorist offence of a person subject to a control order; most suspects under control orders were merely ‘adequately quarantined under watchful eyes’.<sup>98</sup> It seems to be admitted that ‘[a] control order or

<sup>93</sup> Ibid 14–15 [37]–[38].

<sup>94</sup> Ibid 3, 13 [32].

<sup>95</sup> See *Protection of Freedoms Act 2012* (UK) c 9, ss 59–63. See also David Anderson, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (June 2012) ch 8.

<sup>96</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 7 June 2011, vol 529, col 70.

<sup>97</sup> United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 23 June 2011, 4<sup>th</sup> sitting, col 87 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

<sup>98</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 5 October 2011, vol 730, col 1163 (Lord Macdonald).

a TPIM is a tool to be used when for the time being investigation and prosecution can go no further.<sup>99</sup>

Most of the amendments directly in favour of investigation in the *TPIM Act* are too few and too limited to be worth explaining here.<sup>100</sup> However, there is one indirect change which could give helpful impetus towards prosecution, namely, there is a new time limit on orders. They may endure for a maximum of under s 5,<sup>101</sup> though subject to the issuance of a further order based under s 3(6) on entirely ‘new terrorism-related activity’ arising during the currency of the initial order.<sup>102</sup> This represents a major change in policy since some control orders lasted longer than four years.<sup>103</sup> The Coalition Government viewed that burden as excessive: ‘the measures should not be used to warehouse people and should not be imposed indefinitely on individuals who have not been convicted of any crime.’<sup>104</sup> The rationale for the new limit is that the process of monitoring for two years will have degraded the person’s capacity as an active terrorist or else (and far less likely) will have uncovered evidence on which to prosecute.

Various schemes were advanced during legislative passage which would have produced a stronger linkage between TPIMs and criminal investigation. One leading idea was to pitch TPIMs as a variant of police bail.<sup>105</sup> A more ambitious alternative model was put forward by the Joint Committee on Human Rights (and in part by Lord Macdonald in his review)<sup>106</sup> based on the

<sup>99</sup> Ibid col 1175 (Lord Carlile).

<sup>100</sup> See, eg, *TPIM Act* s 10(5), which provides that the investigation of the individual’s conduct with a view to a prosecution must be kept under police review throughout the life of the TPIM notice.

<sup>101</sup> See Lord Carlile, *Sixth Report of the Independent Reviewer*, above n 30, 23 [55]–[56]. One year was suggested by Clive Walker: Clive Walker, ‘Keeping Control of Terrorists Without Losing Control of Constitutionalism’ (2007) 59 *Stanford Law Review* 1395, 1458.

<sup>102</sup> But an initial TPIM may be based on evidence older than two years: see, eg, *Secretary of State for the Home Department v AM* [2012] EWHC 1854 (Admin) (6 July 2012); *Secretary of State for the Home Department v AY* [2012] EWHC 2054 (Admin) (19 July 2012); *Secretary of State for the Home Department v CC* [2013] 1 WLR 2171.

<sup>103</sup> United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 5 July 2011, 9<sup>th</sup> sitting, col 271 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

<sup>104</sup> United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 28 June 2011, 6<sup>th</sup> sitting, col 203 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

<sup>105</sup> See, eg, United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 23 June 2011, 4<sup>th</sup> sitting, col 93.

<sup>106</sup> See Lord Macdonald, *Review of Counter Terrorism and Security Powers*, above n 17, 11 [16].

idea of an additional precondition for the imposition of TPIMs. The precondition was to be that the prosecuting authority is satisfied that: '(a) a criminal investigation into the individual's involvement in terrorism-related activity is justified'; and '(b) none of the specified terrorism prevention and investigation measures to be imposed on the individual will impede that investigation.'<sup>107</sup>

The reason why these schemes have not been acceptable to successive governments is that TPIMs, like their predecessors, function as special executive measures, beyond the criminal justice system, so that they can offer a level of risk management which criminal prosecution cannot. For instance, they can cope with the four individuals against whom control orders were issued following criminal acquittals.<sup>108</sup> More generally, they represent intolerance to risk, where disclosure of evidence would risk the exposure of sensitive methods or sources; where proof to a criminal standard is not attainable; or where evidence is substantial but not admissible (such as evidence from intercepts or non-compellable foreign sources).<sup>109</sup>

The realistic conclusion, as finally conceded by the Minister, is that 'prevention and investigation measures are primarily disruptive and that they are primarily preventive, but that they sit within the context of investigation.'<sup>110</sup> In this policy choice, they fail the test set by Lord Macdonald:

<sup>107</sup> Joint Committee on Human Rights (UK), *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill*, House of Lords Paper No 180, House of Commons Paper No 1432, Session 2010–12 (2011) 11 [1.24]; Home Office (UK), *The Government Reply to the Sixteenth Report from the Joint Committee on Human Rights: Session 2010–12 HL Paper 180, HC 1432*, Cm 8167 (2011) 5.

<sup>108</sup> The four individuals are AY, BF, CF and DD: see *Secretary of State for the Home Department v AY* [2012] EWHC 2054 (Admin) (19 July 2012); *Secretary of State for the Home Department v BF* [2012] EWHC 1718 (Admin) (25 June 2012); *CF v Secretary of State for the Home Department* [2013] EWHC 843 (Admin) (12 April 2013). DD was acquitted of terrorism offences in 2009 and on retrial in 2010 and placed under a TPIM notice in October 2012. He is the only non-British citizen subject to a TPIM. The allegation against him is association with the funding and promotion of terrorism in Somalia.

<sup>109</sup> United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 23 June 2011, 4<sup>th</sup> sitting, col 107 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department). See also Joint Committee on Human Rights (UK), *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)*, House of Lords Paper No 204, House of Commons Paper No 1571, Session 2010–12 (2011) 7–8 [1.13]–[1.14]; and the Government Response, Letter from James Brokenshire to Dr Hywel Francis (Chair of Joint Committee on Human Rights), 14 November 2011, 7.

<sup>110</sup> See United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 23 June 2011, 4<sup>th</sup> sitting, col 109 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

any replacement scheme for control orders should have as a primary aim to encourage and to facilitate the gathering of evidence, and to diminish any obstruction of justice, leading to prosecution and conviction.<sup>111</sup>

Yet, his report was not as categorical as it first appears, and he accepted that suspected terrorists cannot always be prosecuted, in which case

it may be appropriate for the State to apply some restrictions upon those people, so long as those restrictions are strictly proportionate and do not impede or discourage evidence gathering with a view to conventional prosecution.<sup>112</sup>

The problem of the governance of dangerousness presented by terrorism suspects is not unique, as illustrated well in Australia by the urge to apply the same measures to outlaw motorcycle gangs. There likewise exists in the United Kingdom a burgeoning array of preventative civil measures beyond national security — ranging from serious crime prevention orders, gang injunctions, football banning orders, risk of sexual harm orders, and domestic violence protection orders/notices, all the way to antisocial behaviour orders ('ASBOs').<sup>113</sup> The question for our societies is to decide whether it is fair to deal with acute risk beyond the constrained and formalised setting of the criminal justice system. The resounding answer for politicians and the public seems to be 'yes'. Given that answer, the next part of the paper will address the mechanics of TPIMs and seek to analyse whether the oversight mechanisms sufficiently ensure that individual suspects are protected despite hostile public sentiment.

## VII THE MECHANICS OF TPIMS

### *A Initial Applications*

The grounds for the application to issue a TPIM by the Secretary of State are set out in normal circumstances under s 3 of the *TPIM Act* as Conditions A to D, with Condition E applicable to urgent cases:

<sup>111</sup> Lord Macdonald, *Review of Counter Terrorism and Security Powers*, above n 17, 9–10 [5].

<sup>112</sup> *Ibid* 11 [18].

<sup>113</sup> See Joint Committee on Human Rights (UK), *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)*, above n 109, 8 [1.14]; and the Government Response, Letter from James Brokenshire to Dr Hywel Francis (Chair of Joint Committee on Human Rights), 14 November 2011, 6. In the Australian context, see Tamara Tulich, 'A View Inside the Preventive State: Reflection on a Decade of Anti-Terror Law' (2012) 21 *Griffith Law Review* 209.

- (1) Condition A is that the Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activity (the 'relevant activity').
- (2) Condition B is that some or all of the relevant activity is new terrorism-related activity.
- (3) Condition C is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual.
- (4) Condition D is that the Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity, for the specified terrorism prevention and investigation measures to be imposed on the individual.
- (5) Condition E is that
  - (a) the court gives the Secretary of State permission under section 6, or
  - (b) the Secretary of State reasonably considers that the urgency of the case requires terrorism prevention and investigation measures to be imposed without obtaining such permission.

The application immediately triggers a review as to whether permission for issuance should be granted by the High Court under s 6 (subject to urgent cases under s 7). The Court may refuse permission if the Secretary of State's decision under Conditions A, B, or C is 'obviously flawed'.<sup>114</sup> This standard of review is not demanding. There is no record of any application being rejected at that stage. If the Court finds that the decision under Condition D is obviously flawed, the Court is not required to refuse permission but may give directions as to suitable measures. The main points of contention here are: that the Home Secretary remains as the initiator of the process, and that the threshold for initiation is too low.

Several parliamentary critics argued that the order should be made initially by the High Court on application so as to put judges in charge.<sup>115</sup> A model of court issuance also applied to derogating control orders (although never invoked), as well as to various other civil risk orders, including lowly ASBOs under s 1 of the *Crime and Disorder Act 1998* (UK) c 37. There are no strong

<sup>114</sup> *TPIM Act* s 6(7).

<sup>115</sup> See, eg, United Kingdom, *Parliamentary Debates*, House of Lords, 19 October 2011, vol 731, col 291 (Lord Lloyd); Lord Macdonald, *Review of Counter Terrorism and Security Powers*, above n 17, 16.

logistical problems against court issuance since applications are normally *ex parte*. The Government claimed consistency with other national security measures such as: deportation;<sup>116</sup> financial restrictions under the *Counter-Terrorism Act 2008* (UK) c 28, sch 7 and the *Terrorist Asset-Freezing etc Act 2010* (UK); and proscription of terrorist organisations under the *Terrorism Act 2000* (UK) pt II. The Government also quoted in the TPIM Bill debates a dictum from the Court of Appeal in *Secretary of State for the Home Department v MB* to the effect that '[t]he Secretary of State is better placed than the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect'.<sup>117</sup> But that quotation must be set in the context of the words of Lord Bingham in *A v Secretary of State for the Home Department*, which distinguished the threshold factual question of whether there is an emergency (an issue which falls to be determined in the first instance by the Secretary of State) from the assessment of the measures selected to address the threat (where the test of strict proportionality, judged by the courts, must be applied).<sup>118</sup> The resolution of this argument about the appropriate decision-maker was resolved on policy grounds — TPIMs fundamentally operate as executive orders, so their emergence from an initial executive decision reflects their nature.

Yet, that functional allocation of powers is not to concede that courts would not provide a better mechanism for decision-making. The quasi-judicial role of Ministers does not have a happy recent history in the United Kingdom in security-related areas such as extradition.<sup>119</sup> It is, in constitutional principle, an issue on which more turns in Australia than the United Kingdom. The point is illustrated above all by the case of *Thomas v Mowbray*<sup>120</sup> in which a majority of the High Court of Australia upheld the constitutional validity of the equivalent executive scheme of control orders in terms of distribution of powers between the executive and the judiciary. Under that scheme (which still operates in Australia), the executive initially makes the

<sup>116</sup> *Immigration Act 1971* (UK) c 77, s 3(5).

<sup>117</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 October 2011, vol 731, col 311 (Lord Henley, Minister of State – Home Office), quoting *Secretary of State for the Home Department v MB* [2007] QB 415, 438–9 [64] (Lord Phillips).

<sup>118</sup> [2005] 2 AC 68, 102 [29], 110–11 [42].

<sup>119</sup> Following her intervention in the case of Gary McKinnon, the Secretary of State for the Home Department, Theresa May, stated that 'representations on human rights grounds should, in future, be considered by the High Court rather than the Home Secretary': United Kingdom, *Parliamentary Debates*, House of Commons, 16 October 2012, vol 551, col 166.

<sup>120</sup> (2007) 233 CLR 307.

application for a control order,<sup>121</sup> however, it is ultimately for the judiciary to determine whether it should be issued.<sup>122</sup> But, to turn the argument around, would there be any constitutional objection in the United Kingdom for courts to handle the imposition of national security requirements upon individuals?<sup>123</sup> Judges enjoy the advantages of forensic training and political independence which may result in improved decision-making and public confidence compared to the attributes of politicians. In this way, while some may bemoan the conferment of ‘a cloak of legitimacy’<sup>124</sup> on the executive’s dirty deeds, a judicial process may benefit the subject more than if there was a return to the days of *Liversidge v Anderson*<sup>125</sup> when judges vacated the field in deference to Ministers (as were then the grounds). Arguments now about the purity of legal categories appear no more progressive.

A second issue of controversy at this initial stage concerned the reform that the Secretary of State should have a ‘reasonable belief’<sup>126</sup> that ‘the individual is, or has been, involved in terrorism-related activity’ (Condition A)<sup>127</sup> before making an application to the High Court, thereby departing from the control order standard of ‘reasonable suspicion’.<sup>128</sup> The change is meant to represent a tougher standard and seeks parity with the *Terrorist Asset-Freezing etc Act 2010* (UK).<sup>129</sup> Though legally significant,<sup>130</sup> it is unlikely to make much difference in practice since the High Court already applies a reasonable belief standard, if not higher.<sup>131</sup> In any event, all sides agreed that the standard is significantly beneath the civil standard of the balance of

<sup>121</sup> *Criminal Code* (Cth) s 104.3.

<sup>122</sup> *Ibid* s 104.4.

<sup>123</sup> See Clive Walker, ‘The Judicialisation of Intelligence in Legal Process’ [2011] *Public Law* 235.

<sup>124</sup> Andrew Lynch and Alexander Reilly, ‘The Constitutional Validity of Terrorism Orders of Control and Preventative Detention’ (2007) 10 *Flinders Journal of Law Reform* 105, 138.

<sup>125</sup> [1942] AC 206.

<sup>126</sup> *TPIM Act* s 3(1).

<sup>127</sup> *Ibid*.

<sup>128</sup> *PTA 2005* s 2(1)(a).

<sup>129</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 October 2011, vol 731, col 312 (Lord Henley, Minister of State – Home Office).

<sup>130</sup> See, eg, *Eastenders Cash and Carry Plc v South Western Magistrates’ Court* [2011] EWHC 937 (Admin) (22 March 2011) [13] (Sullivan LJ); *Johnson v Whitehouse* [1984] RTR 38.

<sup>131</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 October 2011, vol 731, col 301 (Lord Carlile); Lord Carlile, *Sixth Report of the Independent Reviewer*, above n 30, 15 [29]–[30].

probabilities<sup>132</sup> and therefore further still below the criminal standard, a feature which prompted Lord Pannick to comment that:

If the security services ... cannot satisfy the judge on the balance of probabilities that the individual is involved in terrorist-related activities, there is surely no justification for taking these legal measures against that person.<sup>133</sup>

The balance of probabilities standard was also demanded for derogating control orders<sup>134</sup> and now applies under Condition A to Enhanced TPIMs (and, notably, to Australian control orders under *Criminal Code* (Cth) s 104.4). The House of Lords has even applied the criminal standard of proof to the factual enquiry on applications for ASBOs in magistrates' courts.<sup>135</sup> It is very odd that a higher standard of proof than that required for TPIMs can feasibly operate within Enhanced TPIMs and ASBOs — in other words, at times of greatest and least crisis. However, the risk-based nature of the mechanism, and perhaps a determination to distinguish criminal standards for the purposes of art 6 (right to a fair trial) of the *European Convention on Human Rights* ('ECHR'),<sup>136</sup> contended against raising the standard of proof.

### B Court Processes

As already indicated, the first step in court is to hold a permission hearing under s 6 of the *TPIM Act*,<sup>137</sup> which in practice is always conducted *ex parte*. The Secretary of State's supporting materials consist of: the proposed TPIM notice; statements from the Secretary of State and the Security Service; and an

<sup>132</sup> This point was confirmed in *Secretary of State for the Home Department v CC* [2013] 1 WLR 2171, 2181–2 [27] (Lloyd Jones LJ).

<sup>133</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 5 October 2011, vol 730, col 1169 (Lord Pannick). See also Joint Committee on Human Rights (UK), *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)*, above n 109, 7–8 [1.13]–[1.14] and compare the Government Response, Letter from James Brokenshire to Dr Hywel Francis (Chair of Joint Committee on Human Rights), 14 November 2011, 6.

<sup>134</sup> *PTA 2005* s 4(7).

<sup>135</sup> *R (on the application of McCann) v Manchester Crown Court* [2003] 1 AC 787.

<sup>136</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010).

<sup>137</sup> See also *Civil Procedure Rules 1998* (UK) pt 80 ('Proceedings under the *Terrorism Prevention and Investigation Measures Act 2011*'), inserted by *Civil Procedure (Amendment No 3) Rules 2011* (UK).

assessment of the risk posed by the individual and the need for a TPIM notice to manage that risk. The possibility of issuance without court application in urgent cases under s 7 was invoked once under the control order regime and might apply to a person imminently travelling abroad.<sup>138</sup> There is no appeal from an initial permission or urgent case decision.

The next stage is the directions hearing which deals with disclosure and the timetabling of the full review hearing.<sup>139</sup> It should take place within seven days. The subject is entitled to attend, but there may be closed hearings or closed materials on grounds of public interest.<sup>140</sup>

On the full review hearing under s 9, the court ‘must apply the principles applicable on an application for judicial review.’<sup>141</sup> This formula is the same as that found in the *PTA 2005*.<sup>142</sup> However, in practice, the courts subject decisions to a higher and more detailed level of scrutiny. In *Secretary of State for the Home Department v MB*, it was held that the High Court must apply ‘intense scrutiny’ to the Secretary of State’s decisions on the necessity for the obligations imposed under the control order.<sup>143</sup> Section 9(8) of the *TPIM Act* requires that the factual and legal considerations under Conditions A to D must be satisfied, and from reports about the open material, these seem to be judicially tested with thoroughness and limited deference.<sup>144</sup> In *Secretary of State for the Home Department v BM*, the Court of Appeal ‘read down’<sup>145</sup> the *PTA 2005* under s 3 of the *Human Rights Act 1998* (UK) c 42 with respect to art 6 of the *ECHR*, to demand that the court must consider the necessity of the order at the time of the hearing as well as at the time the Secretary of State

<sup>138</sup> United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, June 30 2011, 3<sup>rd</sup> sitting, col 215 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

<sup>139</sup> *TPIM Act* s 8.

<sup>140</sup> *Ibid* sch 4.

<sup>141</sup> *Ibid* s 9(2).

<sup>142</sup> *PTA 2005* ss 3(11) and 11(6). For criticism of this formula, see House of Commons Constitutional Affairs Committee (UK), *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, House of Commons Paper No 323-i, Session 2004–05 (2005) 32 [82], 33–34 [87], 39 [105].

<sup>143</sup> [2007] QB 415, 439 [65] (Lord Phillips CJ).

<sup>144</sup> See, eg, *Secretary of State for the Home Department v CD* [2012] EWHC 3026 (Admin) (5 November 2011).

<sup>145</sup> ‘Reading down’ is a canon of constitutional interpretation by which more general words can be narrowed in meaning so as to comply with rights requirements. See also *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, 313 [38]–[39] (Lord Nicholls).

made the decision to impose it.<sup>146</sup> This point will continue to apply under TPIMs. The Joint Committee on Human Rights called for these matters to be stated with certainty on the face of the *TPIM Act*. But the Government resisted,<sup>147</sup> as it did the call to reflect explicitly in the Act the requirement of ‘gisting’ stated in *Secretary of State for the Home Department v AF [No 3]*.<sup>148</sup> This important judgment demands that the Secretary of State for the Home Department must disclose at least the ‘gist’ of the information which forms the basis for the imposition of the executive order, meaning such information as would allow a suspect to give effective instructions to counsel. During the TPIM Bill debates, the Government endorsed the applicability of *Secretary of State for the Home Department v AF [No 3]* to TPIMs,<sup>149</sup> a concession made law by the High Court in *Secretary of State for the Home Department v BM*.<sup>150</sup> An exception to this passive stance is reflected in sch 4 para 5(1) of the *TPIM Act*:

Nothing in paragraphs 2 to 4, or in rules of court made under any of those paragraphs, is to be read as requiring the relevant court to act in a manner inconsistent with Article 6 of the Human Rights Convention.

The major focus for court review will remain human rights compatibility in the light of closed hearings and limited disclosure.<sup>151</sup> The Home Office’s

<sup>146</sup> *Secretary of State for the Home Department v BM* [2011] EWCA Civ 366 (5 April 2011) [9]–[11] (Thomas LJ), citing *Secretary of State for the Home Department v MB* [2007] QB 416.

<sup>147</sup> Joint Committee on Human Rights (UK), *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)*, above n 109, 8 [1.17]; and the Government Response, Letter from James Brokenshire to Dr Hywel Francis (Chair of Joint Committee on Human Rights), 14 November 2011, 6–7.

<sup>148</sup> [2009] 3 WLR 74. See also Joint Committee on Human Rights (UK), *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)*, above n 109, 8–9 [1.18]–[1.21]; and the Government Response, Letter from James Brokenshire to Dr Hywel Francis (Chair of Joint Committee on Human Rights), 14 November 2011, 7–9.

<sup>149</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 October 2011, vol 731, col 341 (Lord Henley, Minister of State – Home Office).

<sup>150</sup> [2012] 1 WLR 2734, 2742 [21] (Collins J). See also *Secretary of State for the Home Department v CC* [2012] EWHC 1732 (Admin) (29 June 2012) [27]–[29] (Ouseley J).

<sup>151</sup> Third parties may also complain: For example, in *Re BF* [2012] EWHC 2125 (Admin) (17 May 2012), an application by the BBC for sight of court documents (including (i) open material from the Secretary of State for the Home Department in relation to the risk posed by BF for the purposes of TPIM proceedings and (ii) reasons for order) was refused. The application had been opposed by both sides in the TPIM proceedings for reasons which emphasised the need for security and sensitivity about privacy. The court noted the different regime under *Civil Procedure Rules 1998* (UK) r 80.2.2 (distinguishing *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2012] 3 WLR 1343).

‘TPIM Bill: ECHR Memorandum’ concluded that there is compatibility in all respects because of the less stringent measures, the higher threshold for imposition, and the time-limit on orders.<sup>152</sup> But challenges to TPIMs have persisted, and the level of gisting under art 6 of the ECHR (on due process grounds) will remain a prime bone of contention, whether stated on the face of the legislation or not. Conversely, the possibility of challenge under art 5 (right to liberty and security) may have receded because the powers have moved a notch down from the ‘grey area’ referred to in *Secretary of State for the Home Department v AP*.<sup>153</sup> Finally, there will remain problems with cumulative application arising from the number of measures invoked at one time or the effect over time.<sup>154</sup>

### C Quasi-Judicial Review by Secretary of State for the Home Department

In relation to each issued TPIM order, s 11 of the TPIM Act imposes a new duty on the Home Secretary to keep under review whether Conditions C and D are still met, and the necessity for specific measures. Though new to the statute book, s 11 largely states existing duties applied under judicial interpretation.<sup>155</sup> In practice, this duty involves a formal quarterly review and ad hoc reviews as needed, with the setting being a TPIM Review Group in the Home Office.<sup>156</sup> But no undertakings were given for greater disclosure to, or rights of attendance by, the suspect.

### D Political and Independent Review

Much has been said about the activism or deference of judges in security-related litigation, as encouraged by the changes in nuances of wording in different sets of legislation. In this way, the focus has been on legal constitu-

<sup>152</sup> Home Office (UK), ‘Terrorism Prevention and Investigations Measures (TPIM) Bill: ECHR Memorandum’ (Memorandum, 2011) [2], [13]–[18].

<sup>153</sup> [2011] 2 AC 1, 5–6 [2] (Lord Brown JSC for Lord Phillips PSC, Lords Saville, Walker, Brown and Clarke JJSC).

<sup>154</sup> See, eg, *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin) (16 February 2007); *Abu Rideh v Secretary of State for the Home Department* [2007] EWHC 2237 (Admin) (4 October 2007); *AH v Secretary of State for the Home Department* [2011] EWCA Civ 787 (6 July 2011).

<sup>155</sup> *Secretary of State for the Home Department v MB* [2007] QB 415, 435 [44] (Lord Phillips CJ for Lord Phillips CJ, Sir Anthony Clarke MR and Sir Igor Judge P).

<sup>156</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 October 2011, vol 731, col 350 (Lord Henley, Minister of State – Home Office).

tionalism and the strength of judicial confidence towards a more active stance in disputes affecting political controversies. By contrast, political constitutionalism contends that constitutionalism (components of which include limited government, accountability, and democratic representation) is better achieved by political rather than legal mechanisms.<sup>157</sup> Thus, a preference for political constitutionalism would be indicated through policy formation and implementation by a strong, democratically elected executive and with a strong Parliament effectively interacting with both the executive and with the citizenry. One important lesson of the *TPIM Act* is not to be distracted by technical concessions to legal constitutionalism and thereby allow political constitutionalism to become degraded. This is what has happened with TPIMs, so those who believe in political constitutionalism may be more disappointed with the new regime than the old. The core shortcoming is that the annual parliamentary renewal mechanism under the *PTA 2005* was dropped from the *TPIM Act*. It is true that the vast majority of legislators found more interesting diversions than to debate control orders, and so annual review became 'a bit of a fiction'.<sup>158</sup> However, some Parliamentarians did oppose the dropping of annual review<sup>159</sup> and recognised that it has value to underline a presumption against executive powers, to trigger information, and to allow the ventilation of individual complaints.<sup>160</sup>

The United Kingdom Government eventually backtracked on this omission but only to a limited extent.<sup>161</sup> Section 21 of the *TPIM Act* provides for a

<sup>157</sup> See generally J A G Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1; J A G Griffith, 'The Common Law and the Political Constitution' (2001) 117 *Law Quarterly Review* 42; Adam Tomkins, *Our Republican Constitution* (Hart Publishing, 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007); Mark Tushnet, 'The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation' (2007) 3 *International Journal of Law in Context* 275; Jeremy Waldron, 'Can There Be a Democratic Jurisprudence?' (2009) 58 *Emory Law Journal* 675; Fiona De Londras and Fergal F Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *Oxford Journal of Legal Studies* 19; Graham Gee and Grégoire C N Webber, 'What is a Political Constitution?' (2010) 30 *Oxford Journal of Legal Studies* 273.

<sup>158</sup> United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 21 June 2011, 1<sup>st</sup> sitting, col 23 (Lord Carlile).

<sup>159</sup> See House of Lords Constitution Committee (UK), *Terrorism Prevention and Investigation Measures Bill Report*, House of Lords Paper No 198, Session 2010–12 (2011) 5 [13].

<sup>160</sup> See United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 5 July 2011, 9<sup>th</sup> sitting, col 278.

<sup>161</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 5 September 2011, vol 532, col 50.

legislative expiry date with the possibility of renewal by order but only after five years,<sup>162</sup> in line with the *Fixed-Term Parliaments Act 2011* (UK) c 14. The idea is that ‘each new Parliament will have the opportunity to debate [the need for the legislation] in the context of the situation at the time’.<sup>163</sup> An undertaking was given that the renewal would be preceded by another ‘considered review’.<sup>164</sup> But, in the meantime, one might expect a reduced impetus for Parliamentary Select Committees to consider the legislation. The Joint Committee on Human Rights, above all, produced many valuable reports about control orders.<sup>165</sup> Without the spur (and limelight) of an annual debate, select committees are less likely to expend limited resources on a topic which has faded from the political stage.

The dropping of the annual review could affect two other mechanisms linked to political constitutionalism. Section 19 of the *TPIM Act* continues the device of quarterly reports to Parliament by the Minister. These reports will continue to be quantitative in nature, but are said to be ‘important to inform the debate’ even though there is of course now no set opportunity for debate.<sup>166</sup> Next, s 20 continues the process of review by the Independent Reviewer of Terrorism Legislation. No time limit is set for laying the report before Parliament or giving a response, but it would be ‘foolish and inappropriate’ for the Government to sit on reports;<sup>167</sup> a public pledge represents the only potential safeguard to prevent such an occurrence. The impact of these reports without an annual renewal debate in which they may be cited may again be weakened. The detail in the Australian *Independent National Security Legislation Monitor Act 2010* (Cth), which does set timetables for reporting,<sup>168</sup> is to be admired.

Finally, the Draft Enhanced TPIM Bill represents a failure on the part of both the executive and the legislature to provide rigorous parliamentary scrutiny, as already discussed.

<sup>162</sup> A repeal by order is allowed by *TPIM Act* s 21(2).

<sup>163</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 5 September 2011, vol 532, col 54 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

<sup>164</sup> *Ibid* col 55.

<sup>165</sup> See, eg, Joint Committee on Human Rights (UK), *Counter-Terrorism Policy and Human Rights (Sixteenth Report)*, above n 26.

<sup>166</sup> United Kingdom, *Parliamentary Debates*, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 30 June 2011, 8<sup>th</sup> sitting, col 251 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

<sup>167</sup> *Ibid* col 253.

<sup>168</sup> *Independent National Security Legislation Monitor Act 2010* (Cth) s 29(5).

An unsurprising conclusion might be that legislative attention and exertion in relation to a given area of public policy bears a correlation to political interest and competition between political parties. When a topic is relegated in importance within the legislative calendar and when frontbench spokespersons have no obligation to make an appearance, political constitutionalism loses some of its force. This experience has been suffered by TPIMs, no matter that TPIMs are still able to inflict extraordinary incursions into the lives of individuals. The legislature has a greater tendency than the courts to become weary of old arguments and to crave some new dispute which promises political novelty and notoriety. By contrast, the courts are presented repeatedly with a mixture of disputes involving radical departures and fine lines, with the latter predominating. But they have little choice in the diet being fed to them by litigants, whether boring, nitpicking, repetitive or otherwise.

The other conclusion might be not to overestimate the impact of political constitutionalism. Critics of parliamentary scrutiny of this type of legislation argue that with many Bills, the clauses which are not carried are often 'carefully calibrated concessions'<sup>169</sup> to create an impression of effective parliamentary oversight 'while in fact being included in the draft with no expectation that they would ever get through scrutiny.'<sup>170</sup> The passage of the *TPIM Act* will have done little to assuage these critics. The general, principled objections to the type of executive measures contained in the TPIM Bill, or to the weak link to investigation, never looked likely to be accepted by the Government. The *PTA 2005* revealed political constitutionalism in its worst light in the worst circumstances of crisis. But the debates concerning, and the enactment of, the *TPIM Act* reveal that, even in calmer times, political constitutionalism cannot be counted upon to deliver principled or progressive results. Ironically, it was this process that was least adept at assuring the future delivery of political constitutionalism.

## VIII POLICY TRANSFER TO AUSTRALIA

### *A Validity of Comparison*

Having surveyed the British device of TPIMs and whether they might be viewed as a superior model of pre-crime executive intervention compared to

<sup>169</sup> Mark Shephard, 'Parliamentary Scrutiny and Oversight of the British "War on Terror": From Accretion of Executive Power and Evasion of Scrutiny to Embarrassment and Concessions' (2009) 15 *Journal of Legislative Studies* 191, 194.

<sup>170</sup> De Londras and Davis, above n 157, 31.

United Kingdom control orders, this paper will next consider whether any viable policy transfer to Australia can occur. This analysis must take due account of the first review by the INSLM, Bret Walker SC, who described the control order regime as in need of urgent attention not only in the light of Australian constitutional law but also based on ‘appropriateness and necessity in light of Australia’s international human rights obligations.’<sup>171</sup> However, the decision in *Thomas v Mowbray* did not sustain any fundamental objection to the control order regime in Australian constitutional law. Likewise, the United Kingdom jurisprudence shows that control orders can be designed and applied consistently with rights specifications. But acceptability and legality ultimately depend on detailed design and application, and infringements may arise in terms of process and substance because of the deliberately blurred boundaries which have been created between executive and judicial, and civil and criminal.<sup>172</sup>

It is certainly not the purpose of this paper to provide an immediate reaction to the outcome of the second annual review by the INSLM or *COAG Review*, or to gainsay what ought to be the reaction to them by the Commonwealth government. Before rushing to conclusions, any comparative policy transfer exercise must first recognise important differences in environment between Australia and the United Kingdom.

Two important variants between the two jurisdictions have been claimed.<sup>173</sup> One variant concerns the possibility of prosecution by use of preparatory-type criminal offences. The argument is that offences of this kind avert the need for pre-crime solutions to risk. In this respect, it might be suggested that the offence of ‘preparation of terrorist acts’ was not enacted in the United Kingdom until s 5 of the *Terrorism Act 2006* (UK) c 11, so one justification for the inauguration of control orders in the United Kingdom might be the absence of a viable prosecutorial basis at the time of enactment. Yet, this argument is superficial since it ignores the fact that several preparatory-type offences existed under the *Terrorism Act 2000* (UK) and were constantly invoked before and after the passage of the *Terrorism Act 2006* (UK), and at a much higher rate than executive orders. The leading contenders are the offences in the *Terrorism Act 2000* (UK) ss 57–8, which criminalise the

<sup>171</sup> Bret Walker, *Independent National Security Legislation Monitor — Annual Report 16 December 2011* (2012) 48.

<sup>172</sup> For the UK, the latter was resolved in *Secretary of State for the Home Department v MB* [2008] 1 AC 440, 473 [24] (Lord Bingham).

<sup>173</sup> See Gilbert + Tobin Centre of Public Law, Submission to the Council of Australian Governments, *Review of Counter-Terrorism Legislation*, 21 September 2012, 25.

possession of materials or information useful to terrorism and prosecutions.<sup>174</sup> From 11 September 2001 up to the end of 2005/06, there were 127 charges for offences under the terrorism legislation (an annual average of 25.4); from 2006/07 to 2011/12, there were 176 (an annual average of 29.3).<sup>175</sup> Accordingly, the enactment of the offence in s 5 of the *Terrorism Act 2006* (UK) alongside others in that Act, including the encouragement of terrorism<sup>176</sup> and training for terrorism,<sup>177</sup> have achieved some impact but not as dramatic as some would claim.<sup>178</sup> In this way, there was never any major gap in the criminal law arsenal, though further additions to it might have been marginally helpful. In reality, the enduring impetus towards executive orders relates far more to rules about admissibility of evidence, standards of proof, and procedural transparency, which are fundamental to criminal justice processes but are viewed as obstacles in the management of terrorism risk.

A second variant between the two jurisdictions relates to the admissibility of telephone intercept evidence in Australian criminal trials under the *Telecommunications (Interception and Access) Act 1979* (Cth). Law enforcement warrants can be issued on application to a judge where the interception is likely to assist in the investigation of a 'serious offence'.<sup>179</sup> Specific amendments in 2002 and 2004 ensured intercepts could be used in connection with terrorism.<sup>180</sup> These now fall under the definition of a 'serious offence' under *Criminal Code* (Cth) ss 5D(1)(d)–(e).<sup>181</sup> The intercept evidence is then admissible as evidence in 'exempt proceedings'<sup>182</sup> under ss 74(1), 77 and 143(1), which include proceedings for all crimes punishable by three years' imprisonment or more.<sup>183</sup> Disclosure of materials will be subject to the

<sup>174</sup> See Walker, *Terrorism and the Law*, above n 3, 211–21 [5.42]–[5.80].

<sup>175</sup> Home Office (UK), 'Operation of Police Powers under the *Terrorism Act 2000* and Subsequent Legislation: Arrests, Outcomes and Stops and Searches' (Home Office Statistical Bulletin No 11/12, 13 September 2012) 20 [Table 1.02].

<sup>176</sup> *Terrorism Act 2006* (UK) c 11, s 1.

<sup>177</sup> *Ibid* s 6.

<sup>178</sup> See Jessie Blackburn and Nicola McGarrity, 'Listening and Hearings: Intercept Evidence in the Courtroom' (2012) 2 *Journal of Commonwealth Criminal Law* 257.

<sup>179</sup> *Telecommunications (Interception and Access) Act 1979* (Cth) s 46.

<sup>180</sup> *Telecommunications Interception Legislation Amendment Act 2002* (Cth) sch 1 item 7; *Telecommunications (Interception) Amendment Act 2004* (Cth) sch 1 item 1.

<sup>181</sup> As amended by *Telecommunications (Interception) Amendment Act 2006* (Cth) sch 4 item 7.

<sup>182</sup> *Telecommunications (Interception and Access) Act 1979* (Cth) s 5B(1)(a). '[P]rescribed offence' is defined to include serious offences: s 5 (definition of 'prescribed offence' para (a)).

<sup>183</sup> *Ibid* s 5 (definition of 'prescribed offence' para (d)). Control order proceedings under *Criminal Code* (Cth) div 104 are also exempt: *ibid* s 5B(bb).

restrictions of the common law doctrine of public interest immunity,<sup>184</sup> the *Evidence Act 1995* (Cth),<sup>185</sup> or the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (described further below). Certainly, intercept evidence has become a prominent fixture in the few major terrorism trials which have occurred in Australia,<sup>186</sup> and its ‘critical importance’ has been underlined by the Commonwealth Government: ‘Telecommunications interception is one of the most effective, efficient and low risk counter-terrorism investigative techniques’.<sup>187</sup> In stark contrast, such intercept evidence is subject to a general statutory exclusion in the United Kingdom under s 17 of the *Regulation of Investigatory Powers Act 2000* (UK) c 23,<sup>188</sup> though specialist security procedures, including control orders and TPIMs, have been exempted from that prohibition.<sup>189</sup> Despite the danger of revealing or compromising methods of interception,<sup>190</sup> the creation of conflicting objectives as between intelligence agencies and police, and the added burdens of cataloguing and disclosure, successive United Kingdom governments have committed themselves to lifting the absolute ban, but no suitable rules have yet been devised.<sup>191</sup>

<sup>184</sup> See Australia Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004) 310–12 [8.146]–[8.156].

<sup>185</sup> The court may exclude material relating to ‘matters of state’ if the public interest in admitting it ‘is outweighed by the public interest in preserving secrecy or confidentiality’: *Evidence Act 1995* (Cth) s 130. See *Terrorism (Community Protection Act) 2003* (Vic) s 23 for the corresponding Victorian provisions.

<sup>186</sup> See *Benbrika v The Queen* (2010) 29 VR 593; *R v Elomar* (2010) 264 ALR 759.

<sup>187</sup> Australian Government, *Counter-Terrorism White Paper: Securing Australia — Protecting Our Community* (2010) 58.

<sup>188</sup> See JUSTICE, ‘Intercept Evidence: Lifting the Ban’ (Report, October 2006); John R Spencer, ‘Telephone-Tap Evidence and Administrative Detention in the UK’ in Marianne Wade and Almir Maljević (eds), *A War on Terror?: The European Stand on a New Threat, Changing Laws and Human Rights Implications* (Springer, 2010) 373; Alexander Horne, ‘The Use of Intercept Evidence in Terrorism Cases’ (Standard Note SN/HA/5249, House of Commons Library, 24 November 2011).

<sup>189</sup> *PTA 2005* sch para 9 and *TPIM Act* sch 7 para 4(2), amending s 18 (‘Exceptions to section 17’) of the *Regulation of Investigatory Powers Act 2000* (UK) c 23.

<sup>190</sup> Sir Peter Gibson, *Review of Intercepted Intelligence in Relation to the Omagh Bombing of 15 August 1998* [Extracts from Full Report] (Northern Ireland Office, 2009) 13 [26]. See also Sir Peter Gibson, *Intelligence Services Commissioner Report for 2008*, House of Commons Paper No 902, Session 2008–09, (2009) 8 [36].

<sup>191</sup> See Privy Council Review of Intercept as Evidence, *Report to the Prime Minister and the Home Secretary*, Cm 7324 (2008); Home Office (UK), *Intercept as Evidence: A Report*, Cm 7760 (2009).

This differential receptivity to intercept evidence can readily lead to the argument that resort to executive orders is more justifiable in the United Kingdom than Australia. This argument may be countered by the observation that the absence of intercept evidence was not the main ground for the retention of TPIMs, since official reviewers constantly estimate that such evidence would rarely be decisive in allowing a prosecution to supplant an executive order. This point has been voiced on several occasions in recent years, the latest being before the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill.<sup>192</sup> Thus, it is accepted, including by the Joint Committee on Human Rights and by Independent Reviewers of the Terrorism Legislation (who have read all the executive order case files), that the admissibility of intercept evidence would be a positive reform, but, in the short term, it is not a ‘silver bullet’ and would have only marginal effect in the United Kingdom on the viability of prosecutions.<sup>193</sup> One might qualify this pessimistic assessment with the observation that current executive order case files have been compiled in the context of the inadmissibility of intercept evidence; a new environment might change priorities and techniques of investigatory authorities. Therefore, those who point to this factor as a reason for greater scepticism against control orders in Australia retain some justification.

### B Comparisons in Detail

Before considering any alleged superiority of TPIMs as an executive model to Australian control orders, the countervailing recognition that Australian control orders are already preferable to United Kingdom TPIMs in several respects should be registered at the outset. These features include the stricter balance of probabilities standard required at the initial order stage.<sup>194</sup> There is

<sup>192</sup> Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill (UK), *Report*, above n 90, 29 [84]. For previous statements, see Lord Carlile, *Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (February 2007) 12–13 [34]–[35]; Home Office (UK), *The Government Reply to the Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, Cm 7624 (2009) 6; Lord Carlile, ‘Operation Pathway: Report Following Review’ (Independent Reviewer of Terrorism Legislation, October 2009) 18 [106].

<sup>193</sup> See Joint Committee on Human Rights (UK), *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill*, above n 107, 9 [1.15]; Home Office (UK), *Government Reply to the Sixteenth Report from the Joint Committee on Human Rights: Session 2010–12 HL Paper 180, HC 1432*, above n 107, 4; David Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (March 2012) 73 [6.5] n 223.

<sup>194</sup> *Criminal Code* (Cth) s 104.4(c).

also the requirement at that stage that the Commonwealth Attorney-General must be involved in bringing forward to the court any police request.<sup>195</sup> Though, in practice, this may not make much difference since the claimant in the United Kingdom is the Secretary of State for the Home Department who will act through government legal advisers and instructed counsel. Next, in some respects, Australian control orders reflect a narrower set of potential obligations<sup>196</sup> with the principal difference being that a relocation measure was never available in Australia. The Australian orders can include the possibility of compulsory rehabilitation or counselling.<sup>197</sup> This measure is an interesting initiative which may be more attractive than the unregulated system in the United Kingdom, known as Project Channel, whereby responsible citizens in Muslim communities in 12 police force areas will provide an early warning system for the identification of extremists.<sup>198</sup> Social intervention in the forms of counselling and engagement in approved activities then ensue. Though this non-criminal label is ascribed to the project, loose labelling and net-widening remain attendant dangers: ‘Which self-appointed busybodies will use what yardstick to define a “radical”, an “extremist” or “a Wahhabi?”’<sup>199</sup> A related difference is that Australian control orders are not applicable to children under 16.<sup>200</sup> No legal restraint applies in the United Kingdom; no formal order has been issued to a minor but they may have been nominated into Project Channel.<sup>201</sup> Subject to these features, TPIMs do offer some potential lessons for Australia which can be delineated in terms of substance, procedure, and oversight.

### 1 Substance

As for substance, the degree of restraint on obligations may now have shifted in favour of the United Kingdom. For instance, an Australian control order can impose a total ‘prohibition’ on the use of telecommunications or the

<sup>195</sup> Ibid ss 104.2–104.3.

<sup>196</sup> Ibid s 104.5(3). Cf *TPIM Act* sch 1 pt 1.

<sup>197</sup> *Criminal Code* (Cth) s 104.5(3)(l). But the referral cannot be compulsory: s 104.5(6).

<sup>198</sup> See HM Government (UK), ‘Channel: Supporting Individuals Vulnerable to Recruitment by Violent Extremists — A Guide for Local Partnerships’ (Home Office, March 2010).

<sup>199</sup> Haroon Siddiqui, ‘Muslim-Bashing Dilutes Our Democratic Values’, *Toronto Star* (Toronto), 11 June 2006, A17.

<sup>200</sup> *Criminal Code* (Cth) s 104.28(1). Special rules also apply to persons who are at least 16 but under 18: s 104.28(2)–(3).

<sup>201</sup> See H M Government (UK), ‘Channel: Protecting Vulnerable People from Being Drawn into Terrorism — A Guide for Local Partnerships’ (Home Office, March 2010).

internet which is not permitted for TPIMs.<sup>202</sup> A more important difference concerns time limits. Though both United Kingdom and Australian measures last for 12 months at a stretch,<sup>203</sup> the two year overall limit for TPIMs (subject to wholly new information arising)<sup>204</sup> compares favourably with the 10 year limit for the Australian control order legislation as a whole,<sup>205</sup> during which time there is nothing to prevent the imposition of successive control orders on the same person.<sup>206</sup> This important restraint on ‘warehousing’ also averts the permanent labelling of a person as a ‘potential terrorist’ and therefore always at risk of a control order.<sup>207</sup>

## 2 Procedure

As for procedure, there are tighter conditions for issuance in the United Kingdom. Under s 3(1) of the *TPIM Act*, Condition A requires that the Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activity. In Australia, it is sufficient that the order will ‘substantially assist in preventing a terrorist act’.<sup>208</sup> It is not necessary to show that the contolee has personally engaged in terrorism-related activity or is suspected to do so in the future.<sup>209</sup> However, in other ways, Australia’s issuance process could be considered stricter. First, as mentioned earlier, although the condition itself might be easier to meet in Australia, the standard of proof is higher (‘balance of probabilities’ rather than ‘reasonable belief’). Second, the court has to be satisfied on the balance of probabilities of the conditions,<sup>210</sup> independently of the person who initiates the process. This is in contrast to the initial processes in the United Kingdom, where the court only has to determine whether the application is ‘obviously flawed’.<sup>211</sup> As discussed earlier, this standard is not demanding.

<sup>202</sup> *Criminal Code* (Cth) s 104.5(3)(f). Cf *TPIM Act* sch 1 para 7(3). Total prohibition would be possible under the Enhanced TPIM scheme: Draft Enhanced TPIM Bill sch 1 para 8(2)(a).

<sup>203</sup> *Criminal Code* (Cth) s 104.5(1)(f); *TPIM Act* s 5(1)(b).

<sup>204</sup> See *TPIM Act* s 5.

<sup>205</sup> *Criminal Code* (Cth) s 105.53.

<sup>206</sup> *Ibid* s 104(5)(2).

<sup>207</sup> Law Council of Australia, Submission to the Council of Australian Governments, *Review of Counter-Terrorism Legislation*, 27 September 2012, 42 [184].

<sup>208</sup> This is the threshold for both the AFP member requesting the order (*Criminal Code* (Cth) s 104.2(2)(a)) and the court making the order (*Criminal Code* (Cth) s 104.4(1)(c)).

<sup>209</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 352 [97] (Gummow and Crennan JJ).

<sup>210</sup> *Criminal Code* (Cth) s 104.4(1)(c).

<sup>211</sup> *TPIM Act* s 6(3).

Perhaps the most acute and complex procedural issue for both jurisdictions concerns disclosure. The United Kingdom's human rights based review ensures that the issue of secrecy has been squarely faced so far as it affects the individual, with the development of the doctrine of 'gisting',<sup>212</sup> which provides a due process baseline which may not be crossed no matter how pressing the security need, and the statutory provision of special advocates who are able to represent the interests of parties in closed proceedings.<sup>213</sup> A number of submissions to the *COAG Review* call for fuller disclosure at the interim stage.<sup>214</sup> The disclosure process can be less favourable to the suspect in Australia in various ways.

The Australian Federal Police ('AFP') may withhold information from the initial request made to the Attorney-General and thence to the court to issue a control order. This suppression is allowed 'if disclosure of that information is likely to prejudice national security'.<sup>215</sup> It is true that this exemption may be less favourable to the state than the United Kingdom position in that suppressed information cannot be taken into account by the issuing court in deciding whether to make the order. However, potential prejudice to the suspect remains because sensitive information which is integral to the case may be suppressed, some of which may be viewed as exculpatory or at least so weak and watery as to detract from the state's request.

Moving on to the next stage, if the issuing court makes an interim control order, then the order must disclose a summary of the grounds on which it was made.<sup>216</sup> But the court need not include information in this summary if its disclosure is 'likely to prejudice national security'.<sup>217</sup> So, once again, the United Kingdom concept of a 'gist' is a more valuable backstop than the 'summary of the grounds' which may be given under the Australian legisla-

<sup>212</sup> See *Secretary of State for the Home Department v AF* [No 3] [2009] 3 WLR 74.

<sup>213</sup> *TPIM Act* sch 4 para 10.

<sup>214</sup> See, eg, Gilbert + Tobin Centre of Public Law, Submission to the Council of Australian Governments, *Review of Counter-Terrorism Legislation*, 21 September 2012, 30. Before the enactment of the control order regime, the Senate Legal and Constitutional Legislation Committee recommended that the issuing court provide full rather than summary reasons for its decision to grant an interim or urgent order: Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) xii [4.60].

<sup>215</sup> *Criminal Code* (Cth) s 104.2(3A). In *Criminal Code* (Cth) div 104, the phrase 'likely to prejudice national security' is defined by s 17 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

<sup>216</sup> *Criminal Code* (Cth) s 104.5(1)(h).

<sup>217</sup> *Ibid* s 104.5(2A).

tion, subject to ‘the facts and circumstances of individual cases’<sup>218</sup> and subsequent explanations as to the essential characteristics of a court (which include some level of reason-giving) in the later ‘bikie’ cases.<sup>219</sup> The United Kingdom ‘gist’ can be said to be distinct in two important respects. First, it requires in its objective ‘sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations’.<sup>220</sup> This ‘gist’ may go beyond the level of ‘a summary’; some points may be so crucial that they have to be explained more fully than others to achieve the objective. Second, there is no absolute bar to the disclosure of information which is likely to prejudice national security:

Where ... the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.<sup>221</sup>

If that kind of disclosure must be made as part of the ‘gist’, then the Secretary of State for the Home Department has the option either to withdraw the case altogether or to reshape the allegations being asserted.

At the next stage, if the AFP seek confirmation of the interim order, additional information must be served on the suspect.<sup>222</sup> But security information can again be omitted — not only information which is ‘likely to prejudice national security’,<sup>223</sup> but also information which is likely to: ‘be protected by public interest immunity’;<sup>224</sup> ‘put at risk ongoing operations by law enforcement agencies or intelligence agencies’;<sup>225</sup> or ‘put at risk the safety of the community, law enforcement officers or intelligence officers’.<sup>226</sup>

As well as the doctrine of ‘gisting’, a further potential safeguard in the United Kingdom process is the role assigned automatically to the special advocate in terms of representing the interests of the suspect in both the process and the substance of the case. Their impact is limited by several

<sup>218</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 335 [31] (Gleeson CJ).

<sup>219</sup> See *Wainohu v New South Wales* (2011) 243 CLR 181.

<sup>220</sup> *Secretary of State for the Home Department v AF [No 3]* [2009] 3 WLR 74, 98–9 [59] (Lord Phillips).

<sup>221</sup> *Ibid.*

<sup>222</sup> *Criminal Code* (Cth) s 104.12A(2).

<sup>223</sup> *Ibid* s 104.12A(3)(a).

<sup>224</sup> *Ibid* s 104.12A(3)(b).

<sup>225</sup> *Ibid* s 104.12A(3)(c).

<sup>226</sup> *Ibid* s 104.12A(3)(d).

factors aside from the degree of disclosure to the suspect: restrictions on discussion with the suspect once the secret evidence is disclosed to the special advocate;<sup>227</sup> limited practical access to independent expertise;<sup>228</sup> limited support in the absence of an instructing solicitor; and no power to call witnesses.<sup>229</sup> The device is certainly no panacea in the eyes of the courts.<sup>230</sup> At the same time, the courts have repeatedly affirmed the vigour and effectiveness of the special advocates.<sup>231</sup> For their part, the special advocates (with the exception of at least one who resigned in protest)<sup>232</sup> have persisted in their role despite any qualms they might entertain. Yet, there is no equivalent to an automatically assigned special advocate in the Australian system.<sup>233</sup> Two criminal trials have involved applications to Whealy J to appoint such an officer under inherent powers.<sup>234</sup> The applications were rejected as not warranted, but it was held that the provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('NSI Act') did not

<sup>227</sup> See Joint Committee on Human Rights (UK), *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill*, above n 107, 15 [1.41]. John Ip, 'The Rise and Spread of the Special Advocate' [2008] *Public Law* 717, 731–6; Martin Chamberlain, 'Update on Procedural Fairness in Closed Proceedings' (2009) 28 *Civil Justice Quarterly* 448; Ministry of Justice, *Justice and Security Green Paper*, Cm 8194 (2011) 25–7 [2.28]–[2.38]; Joseph Chedrawe, 'Assessing Risk, Minimizing Uncertainty, Developing Precaution and Protecting Rights: An Analysis of the Prohibition on Communication between Terrorist Suspects and Special Advocates' (2012) 12 *Oxford University Commonwealth Law Journal* 33.

<sup>228</sup> See Gus Van Harten, 'Weaknesses of Adjudication in the Face of Secret Evidence' (2009) 13 *International Journal of Evidence & Proof* 1, 26.

<sup>229</sup> See Walker, *Terrorism and the Law*, above n 3, 268 [6.56].

<sup>230</sup> See *A v United Kingdom* [2009] Eur Court HR, 81–2 [220].

<sup>231</sup> See, eg, *Secretary of State for the Home Department v AE* [2008] EWHC 132 (Admin) (1 February 2008) [40] (Silber J); *Secretary of State for the Home Department v AR* [2008] EWHC 2789 (Admin) (14 November 2008) [3] (Mitling J); *Secretary of State for the Home Department v AU* [2009] EWHC 49 (Admin) (20 January 2009) [10] (Mitling J). This assessment was also made by Lord Carlile, 'Anti-Terrorism, Crime and Security Act 2001 Part IV Section 28 — Review 2004' (2005) 29 [74].

<sup>232</sup> House of Commons Constitutional Affairs Committee (UK), *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, above n 142, 17 [41].

<sup>233</sup> There was some approval for this device by Kirby J in *Thomas v Mowbray* (2007) 233 CLR 307, 439 [377]. It is supported by Australian Lawyers for Human Rights, Submission to the Council of Australian Governments, *Review of Counter-Terrorism Legislation*, 1 October 2012, 13 [40](iv).

<sup>234</sup> *R v Lodhi* (2006) 163 A Crim R 475 (the defendant was convicted of terrorism offences arising from a plot to bomb the electricity grid and other targets); *R v Khazaal* [2006] NSWSC 1061 (25 October 2006) (convicted of compiling a document to assist in a terrorist act).

prohibit the appointment of special counsel in appropriate circumstances. Whealy J held that ‘the appointment of special counsel in a matter such as the present, that is outside the confines of the *NSI Act*, might in certain circumstances be appropriate, indeed necessary’ to meet the overriding requirement of fairness to the defendant.<sup>235</sup>

### 3 Oversight

Turning to oversight, the mode of court oversight in the United Kingdom, arguably through being based directly on individual rights, has achieved more impact than in Australia where the more abstruse notion of the separation of powers is involved. It should be emphasised that this initiative has been taken in the domestic courts — no control order has been considered by the European Court of Human Rights, though the issue was mentioned in *A v United Kingdom*.<sup>236</sup> United Kingdom litigation has asked full-square not whether the nature of the decision or the nature of the process makes the judge uncomfortably out of constitutional kilter, but what is fair and humane for the suspect. Some have claimed that this court review has made no practical difference,<sup>237</sup> but a survey of the lawyers of those affected has revealed that court decisions have impacted on lives in terms of family relationships.<sup>238</sup> In comparison, though human rights standards were mentioned by some judges in *Thomas v Mowbray*,<sup>239</sup> it has been suggested that ‘human rights concerns could not play a decisive role in *Thomas* and cannot be taken into account in deciding whether or not to make a control order.’<sup>240</sup>

Human rights parameters also curtail the imposition of TPIM obligations. For example, *Secretary of State for the Home Department v JJ* affirmed that non-derogating control orders (and the same applies to TPIMs and even Enhanced TPIMs) cannot impose 18 hour curfews because they would breach rights to liberty.<sup>241</sup> The Australian regime does not forbid control orders that amount to a deprivation of liberty and so would permit the imposition of a

<sup>235</sup> *R v Khazaal* [2006] NSWSC 1061 (25 October 2006) [51] (Whealy J).

<sup>236</sup> [2009] Eur Court HR.

<sup>237</sup> See, eg, K D Ewing and Joo-Cheong Tham, ‘The Continuing Futility of the Human Rights Act’ [2008] *Public Law* 668.

<sup>238</sup> See Walker, ‘The Judicialisation of Intelligence in Legal Process’, above n 123, 235.

<sup>239</sup> (2007) 233 CLR 307, 329 [17] (Gleeson CJ), 440 [379] (Kirby J).

<sup>240</sup> Australian Lawyers for Human Rights, above n 233, 12 [35].

<sup>241</sup> [2008] 1 AC 385.

very lengthy curfew amounting to ‘specified times each day’<sup>242</sup> though that phrase might rule out full house arrest.

Turning to other forms of oversight, the requirement for the Independent Review of the Terrorism Legislation to take a specific look at the system (and, in practice, individual orders)<sup>243</sup> has also been valuable. It enforces scrutiny into the details of the processes, the obligations, the parameters such as duration, and the effectiveness of oversight. It has been a constant pressure, unlike in Australia where the *COAG Review* amounts to a one-off review and where the Independent Monitor is not tasked to perform the same degree of constant oversight in respect of individual control orders.<sup>244</sup> Indeed, the INSLM is not *required* to review the control order regime at all.<sup>245</sup> Rather, the INSLM has discretion to review particular aspects of the broader counter-terrorism and national security legislative scheme,<sup>246</sup> which includes ch 5 of the *Criminal Code* (Cth) (containing div 104).<sup>247</sup>

### C *The Existential Issue*

Some of the submissions to the *COAG Review* questioned whether control orders should exist at all.<sup>248</sup> The *COAG Review* ultimately recommended that the regime should be retained with ‘additional safeguards and protections included’.<sup>249</sup> The INSLM also raised the existential issue in his first annual report:

The fact that these provisions have not been used since [the orders made against Jack Thomas and David Hicks] ... would not be enough to count them as unnecessary. It is certainly enough to question their necessity in times when

<sup>242</sup> *Criminal Code* (Cth) s 104.5(3)(c).

<sup>243</sup> See Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005*, above n 23, 14 [1.19].

<sup>244</sup> See Law Council of Australia, above n 207, 44 [194].

<sup>245</sup> Subject to a referral being made by the Prime Minister: *Independent National Security Legislation Monitor 2010* (Cth) ss 6(c), 7.

<sup>246</sup> *Ibid* s 6.

<sup>247</sup> *Ibid* s 4(d).

<sup>248</sup> See, eg, Gilbert + Tobin Centre of Public Law, Submission to the Council of Australian Governments, *Review of Counter-Terrorism Legislation*, 21 September 2012, 26; NSW Council for Civil Liberties, Submission to the Council of Australian Governments, *Review of Counter-Terrorism Legislation*, 17 October 2012, 25.

<sup>249</sup> *COAG Review*, above n 8, 54 [215] (Recommendation 26).

the risk of terrorism has not materially abated. If they are not being used, and the times are not unusually safe, why should these powers stay on the books?<sup>250</sup>

In his second annual report, he went further, recommending that div 104 of the *Criminal Code* (Cth) be repealed.<sup>251</sup>

Reflecting on this point, and bearing in mind the previous discussion about alleged distinctions between the underlying legal environments in Australia and the United Kingdom, the opening remarks in this paper concerning the endurance of terrorism and the limited appetite for accepting risk suggest that pre-emptive executive orders of this kind will endure.<sup>252</sup> The task is therefore to consider boundaries, designs, safeguards and accountability. In that light, the United Kingdom Government and Parliament were being realistic when seeking to reform rather than abolish control orders, and the *TPIM Act* appears set for a lengthy life. By comparison, though control orders lasted just six years,<sup>253</sup> exclusion orders under the Prevention of Terrorism (Temporary Provisions) Acts 1974–89<sup>254</sup> managed 24 years, and expulsion, registration and prohibition orders persisted for 15 years under the *Prevention of Violence (Temporary Provisions) Act 1939* (UK).<sup>255</sup> Given this propensity for executive measures to cling to the statute book, it seems likely in the United Kingdom that any future decision not to renew is more likely to arise after prolonged marginalisation rather than abolition on the basis of principle or policy.

Part of this process of marginalisation has already occurred due to the court interventions under art 6 of the *ECHR*, and part relates to the ongoing financial costs of the regime. Bold legislation can also have an impact, as has occurred with stop and search powers.<sup>256</sup> Future marginalisation might also

<sup>250</sup> Bret Walker, *INSLM Annual Report 16 December 2011*, above n 171, 48.

<sup>251</sup> Bret Walker, *INSLM Annual Report 20 December 2012*, above n 9, 44.

<sup>252</sup> Such is the conclusion for Australia in George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1138.

<sup>253</sup> See generally Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford University Press, 2<sup>nd</sup> ed, 2009) ch 7.

<sup>254</sup> *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK) c 56, pt 2; *Prevention of Terrorism (Temporary Provisions) Act 1976* (UK) c 8; *Prevention of Terrorism (Temporary Provisions) Act 1984* (UK) c 8; *Prevention of Terrorism (Temporary Provisions) Act 1989* (UK) c 4. See also Clive Walker, *The Prevention of Terrorism in British Law* (Manchester University Press, 2<sup>nd</sup> ed, 1992) ch 6.

<sup>255</sup> 2 & 3 Geo 6, c 50.

<sup>256</sup> Such has also been the remarkable fate of stop and search powers in the United Kingdom after the introduction of a more limited power. See generally Home Office (UK), 'Operation of Police Powers under the *Terrorism Act 2000* and Subsequent Legislation: Arrests, Out-

be achieved by: better working of extradition; more deportations through Memoranda of Understanding (which were recently upheld in principle by the European Court of Human Rights in the case of *Othman (Abu Qatada) v United Kingdom*,<sup>257</sup> albeit that the applicant's deportation was refused on grounds of a future denial of due process rather than the risk of torture); the strengthening of criminalisation through an extension of extra-territorial jurisdiction; and the more effective use of communications data.<sup>258</sup> But the marginalisation of the perception of terrorism risk has not advanced far, and there seems little prospect of it doing so. Moreover, as already explained, the continuance of these pre-crime executive orders cannot be fully explained by any peculiar limits in United Kingdom law which are claimed to hamstring criminal justice prosecution and which are not reflected in Australian law.

The reality is that prosecution cannot suffice as the sole antidote to terrorism risk if society's risk tolerance is lower than the acceptance of potential terrorist activity reaching a level of threat 'beyond reasonable doubt'. Prosecution cannot be a socially sufficient solution if the maintenance of secret techniques and secret informants are more valuable assets than one successful trial.<sup>259</sup> Therefore, Australia should continue to embrace the notion of a comprehensive counter-terrorism code, including a control order component, but should seek to constitutionalise it legally and politically so far as possible. The alternative is to leave a vacant field which will for sure be filled with some uglier version at the hint of a crisis. If not control orders, then something else will come along by way of executive orders,<sup>260</sup> and Enhanced TPIMs give some inkling of what can be expected.

comes and Stops and Searches' (Home Office Statistical Bulletin No 15/11, 13 October 2011) 39 [2.1]; Home Office (UK), 'Operation of Police Powers under the *Terrorism Act 2000* and Subsequent Legislation: Arrests, Outcomes and Stops and Searches' (Home Office Statistical Bulletin No 04/12, 22 March 2012) 16; David Anderson, *The Terrorism Acts in 2011*, above n 95, 96 [8.27].

<sup>257</sup> *Othman (Abu Qatada) v United Kingdom* (European Court of Human Rights, Fourth Section Chamber, Application No 8139/09, 9 May 2012). The Court of Appeal has endorsed this view: *Othman v Secretary of State for the Home Department* [2013] EWCA Civ 277 (27 March 2013).

<sup>258</sup> As well as the previously discussed issue of the admissibility of intercept evidence, note also the Home Office (UK), *Draft Communications Data Bill*, Cm 8359 (2012).

<sup>259</sup> Cf Centre of Excellence in Policing and Security, Submission to the Council of Australian Governments, *Review of Counter-Terrorism Legislation*, September 2012, 10.

<sup>260</sup> It should be noted a number of other executive order regimes exist alongside control orders in Australia. Division 105 of the *Criminal Code* (Cth) provides for 'preventative detention orders'. Australian Security Intelligence Organisation also has certain detention and questioning powers: *Australian Security Intelligence Organisation Act 1979* (Cth) pt III div 3. See generally Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Question-

Aside from this functional argument for continuance, there may be at least three other reasons which might justify continuance in Australia as well as the United Kingdom.

One is that control orders in the terrorism field are indicative of a wider trend which commenced with 'binding over' under the *Justices of the Peace Act 1361*<sup>261</sup> and has greatly accelerated in the United Kingdom during the past two decades with administrative justice devices ranging from ASBOs<sup>262</sup> to serious crime prevention orders<sup>263</sup> and violent offender orders.<sup>264</sup> Surely, terrorism is a more serious social ill than the noisy youths subjected to ASBOs, so why not use a full range of legal devices in counter-terrorism too? These variants of administrative justice are used less extensively in Australia than the United Kingdom, but they have made an appearance in several state laws in relation to outlaw motorcycle gangs whereby variants of administrative justice closely akin to terrorism control orders have been applied to this serious social ill.<sup>265</sup>

The second justification is that control orders can be formulated in terms which are consistent with international human rights obligations, as shown by the United Kingdom jurisprudence on the compatibility of control orders with the *Human Rights Act 1998* (UK).<sup>266</sup> The decision in *Thomas v Mowbray* confirms that control orders can also be consistent with Australian constitutionalism. Later litigation arising from the anti-bikie state legislation has imposed more demanding standards, requiring that the process of the courts must reflect not only 'independence, impartiality, fairness and adherence to the open-court principle'<sup>267</sup> but also '[t]he centrality, to the judicial function, of a public explanation of reasons'.<sup>268</sup> State legislative provisions which

ing and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36 *Melbourne University Law Review* 415.

<sup>261</sup> 34 Edw 3 c 1.

<sup>262</sup> *Crime and Disorder Act 1997* (UK) c 37, s 1. See also s 2: 'Sex offender orders'.

<sup>263</sup> *Serious Crime Act 2007* (UK) c 27, pt 1.

<sup>264</sup> *Criminal Justice and Immigration Act 2008* (UK) c 4, pt 7.

<sup>265</sup> *Serious and Organised Crime (Control) Act 2008* (SA) pts 3–4; *Crimes (Criminal Organisations Control) Act 2012* (NSW) pt 3; *Criminal Organisation Act 2009* (Qld) pt 3; *Serious Crime Control Act 2009* (NT) pts 4–5; *Criminal Organisations Control Act 2012* (Vic) pt 3. The *Criminal Organisations Control Act 2012* (WA) pt 3 is yet to come into force.

<sup>266</sup> See, eg, *Secretary of State for the Home Department v AF [No 3]* [2009] 3 WLR 74, 108–9 [92] (Lord Scott).

<sup>267</sup> *South Australia v Totani* (2010) 242 CLR 1, 43 [62] (French CJ): This formulation of the 'defining characteristics of courts' is 'deliberately non-exhaustive'.

<sup>268</sup> *Wainohu v New South Wales* (2011) 243 CLR 181, 213 [54] (French CJ and Kiefel J).

interfered with these characteristics were therefore struck down for constitutional invalidity by the High Court of Australia.<sup>269</sup> However, State governments have responded by passing reshaped legislation rather than scrapping the notion of control orders.<sup>270</sup> In particular, New South Wales not only passed the *Crimes (Criminal Organisations Control) Act 2012* (NSW) to replace the previously invalidated control orders but also instituted further legislation against consorting with criminals.<sup>271</sup>

The third justification for control orders in Australia might be based on an argument of non-discrimination against foreigners as well as proportionality. As established in *Al-Kateb v Godwin* ('*Al-Kateb*'),<sup>272</sup> the possibility of indefinite detention arises in Australia for stateless persons deemed to be security risks under ss 189 and 196 of the *Migration Act 1958* (Cth) ('*Migration Act*') in circumstances where their removal from Australia is not reasonably practicable at the present time and there is no real likelihood or prospect of removal in the reasonably foreseeable future. Community-based detention arrangements ('residence determinations') can then be permitted under arrangements introduced in 2005 to enable refugees to reside in the community.<sup>273</sup> The person remains administratively in immigration detention while living in the community but subject to conditions such as reporting regularly to the authorities, residing at a specified address, and observing a curfew.<sup>274</sup> Yet, even these residence conditions may not be sufficiently stringent to deal adequately with risk, especially where the person is subjected to an assessment under s 37 of the *Australian Security Intelligence Organisation Act 1979* (Cth) that they are directly or indirectly a risk to security.<sup>275</sup>

<sup>269</sup> *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

<sup>270</sup> The constitutional validity of the *Criminal Organisation Act 2009* (Qld) (as amended by the *Criminal Organisation Amendments Act 2011* (Qld)) was recently upheld by the High Court in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638.

<sup>271</sup> *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) s 9, inserting s 93X into the *Crimes Act 1900* (NSW). A person who communicates with two convicted offenders on two occasions may receive an oral warning from a police officer; if after the warning, there is any further communication with either offender, the offence of 'habitual consorting' is committed.

<sup>272</sup> (2004) 219 CLR 562.

<sup>273</sup> *Migration Amendment (Detention Arrangements) Act 2005* (Cth) sch 1 item 11, inserting div 7 pt 2 sub-div B into the *Migration Act*. Furthermore, a discharge upon habeas corpus from immigration detention may be made upon terms and conditions: *Al-Kateb* (2004) 219 CLR 562, 579–80 [27] (Gleeson CJ).

<sup>274</sup> See *Migration Act* s 197AB(2)(b).

<sup>275</sup> In addition, there may arise a Ministerial refusal under the *Migration Act* to grant a protection visa by reliance on s 36(2C) of the *Migration Act*, or arts 1F, 32, 33(2) of the *Con-*

A regulation which prevented the grant of a protection visa to a person with an adverse security assessment was held to be ultra vires in *Plaintiff M47/2012 v Director-General of Security*.<sup>276</sup> The Minister, not the Australian Security Intelligence Organisation (ASIO) through an adverse security assessment, is required to make the ultimate decision regarding a protection visa. Nevertheless, given that s 501 of the *Migration Act* allows for the refusal of protection visa applications on character grounds, whereupon an adverse ASIO assessment may be taken into account,<sup>277</sup> there are other lawful avenues still available to implementing ASIO's edicts. As a way out of the impasse of potentially indefinite detention, the availability of control orders may provide the confidence for conditional release, because the security impact of control orders is greater than for migration community detention. It seems almost counterintuitive to argue for control orders as a liberalising measure. Yet, in the case of foreigners such as Al-Kateb, it is a preferable option to indefinite detention not only on grounds of respect for liberty but also to facilitate family life and, above all, to avert mental suffering.<sup>278</sup> Control orders should therefore remain available for foreign terror suspects, just as they have been applied to Australian citizens, as a more proportionate response to enduring risk than indefinite detention.

## IX CONCLUSION

In conclusion, TPIMs may be considered a more proportionate response to terrorism risk<sup>279</sup> than the models of control orders that formerly operated in

*vention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1966, 606 UNTS 267 (entered into force 4 October 1967). But that decision is subject to review under the *Migration Act* s 500.

<sup>276</sup> (2012) 292 ALR 243. A majority of judges either declined to overrule, or found it unnecessary to reconsider *Al-Kateb*, even in respect of the applicant who was not stateless. Only Gummow J and Bell J concluded that *Al-Kateb* should not be followed.

<sup>277</sup> Provided the content of the assessment fits within the definition of 'character test': *Migration Act* s 501(6).

<sup>278</sup> The mental health impact of indefinite detention was considered in *G v Secretary of State for the Home Department* [2004] 1 WLR 1349. The Court ordered that G should be released from detention on bail subject to strict conditions (including electronic tagging and house arrest without outside communication). This order followed evidence that the respondent's mental and physical health had severely deteriorated as a consequence of the open-ended nature of his detention.

<sup>279</sup> Joint Committee on Human Rights (UK), *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill*, above n 107, 7 [1.9].

the United Kingdom and remain available in Australia, assuming that the terrorism risk is viewed as demanding more than just a criminal justice response. At the same time, most features which made control orders unpalatable to critics will continue under the TPIM regime to cause aggravation in the courts and beyond, especially given the regression creep represented by the Draft Enhanced TPIM Bill. Control orders and TPIMs should continue to be heavily scrutinised, and further reforms are needed in both. In particular, UK TPIMs should be aligned closer to investigatory purposes. In addition, the unreconstructed Australian control orders would benefit from the policy transfer of more limited impositions (such as some access to communications devices, a maximum period for curfews, no relocations, and time limits on the duration of orders) and fairer processes (especially 'gisting' and special advocates). Furthermore, the judicialisation of intelligence in terms of the scope, standards and processes for testing intelligence must be given equal endeavour and resources (including for special advocates) for the retention and reshaping of counter-terrorism laws.<sup>280</sup> In the meantime, it is heartening that societies such as Australia and the United Kingdom continue to find such measures unpalatable and to pick fault wherever possible.

<sup>280</sup> See Clive Walker, 'Intelligence and Anti-Terrorism Legislation in the United Kingdom' (2005) 44 *Crime, Law & Social Change* 387.