Justice Committee

2nd Report, 2011 (Session 4)

Legislative Consent Memorandum on the Terrorism Prevention and Investigation Measures Bill (LCM(S4) 6.1)
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Published by the Scottish Parliament on 16 November 2011
Justice Committee

Remit and membership

Remit:

To consider and report on:

a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and

b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Roderick Campbell
John Finnie
Christine Grahame (Convener)
Colin Keir
James Kelly (Deputy Convener)
John Lamont
Alison McInnes
Graeme Pearson
Humza Yousaf

Committee Clerking Team:

Peter McGrath
Joanne Clinton
Andrew Proudfoot
Christine Lambourne
The Committee reports to the Parliament as follows—

Background

The Terrorism Prevention and Investigation Measures Bill


2. The aim of the Bill is to abolish the system of control orders, established under the Prevention of Terrorism Act 2005, and replace it with a new regime designed to protect the public from terrorism, called TPIMs. In Explanatory Notes prepared by the Home Office on the Bill, TPIMs are described as—

   “a civil preventative measure intended to protect the public from the risk posed by suspected terrorists who can be neither prosecuted nor, in the case of foreign nationals, deported, by imposing restrictions intended to prevent or disrupt their engagement in terrorism-related activity. The regime would be capable of imposing less intrusive restrictions than those available under control orders, and there would be increased safeguards for the civil liberties of those subject to the measures. There would be no provision in the replacement system for derogation from the ECHR. This Bill – the TPIM Bill – makes provision for these findings and recommendations.”

References:


3. The Review of Counter-Terrorism and Security Powers also concluded that the UK Government should have, in exceptional circumstances, additional and more stringent measures than those available in the TPIM Bill in order to protect the public. These measures are contained in draft emergency legislation that the UK Government proposes to bring before the Parliament only as and when necessary. However, the TPIM Bill does include a power for the making of temporary enhanced TPIM orders in exceptional circumstances—

“Clauses 26 and 27 provide a power for the Secretary of State to introduce by order powers to impose enhanced TPIM notices. The provision that may be made by such an order would essentially correspond to that set out in the draft Enhanced Terrorism Prevention and Investigation Measures (ETPIM) Bill. This power may only be used between the dissolution of a Parliament and the first Queen’s Speech of the next Parliament when the case is urgent.”

4. On the overall merits of the Bill, the Committee recognises that the introduction of control orders was controversial, raising some civil liberties questions, and that there is a difference of views about whether and how best to replace them. This was touched on briefly in our evidence-taking on the LCM. We agree with the Cabinet Secretary that the main priority for the Scottish Government and Parliament should be to ensure that the law works well in relation to those devolved matters that the Bill touches upon.

5. It should also be placed on record that the Cabinet Secretary was keen to stress the effective working relationship that exists north and south of the border in relation to the investigation and prosecution of alleged terrorist offences.

Provisions which relate to Scotland

6. When the TPIM Bill was first introduced in the UK Parliament it did not require the legislative consent of the Scottish Parliament. However, subsequent amendments during its passage through Westminster have meant that three areas of the Bill now fall within the devolved competence of the Scottish Parliament.

Power and seizure of evidence (Schedule 5 to the Bill)

7. The proposed legislation allows for a constable to “seize anything found in the course of a search of an individual or premises, for the purposes of a TPIM notice.” The Scottish Government has explained that these powers of seizure apply to evidence in relation to any offence, not just terrorism offences and so include offences falling under devolved areas.

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5 Explanatory Notes (HL Bill 91), paragraph 33.
7 LCM(S4) 6.1, paragraph 8. Available at: http://www.scottish.parliament.uk/LegislativeConsentMemoranda/TerrorismPrevention-lcm.pdf
8 LCM(S4) 6.1, paragraph 8.
Use of forensic data (Schedule 6 to the Bill)
8. For individuals subject to a TPIM, the Bill makes provision for the taking, retention and use of their forensic data. The Scottish Government has explained that extending these provisions in full to Scotland will ensure that—

“... data taken from individuals who are subject to a TPIM notice will be able to be used for devolved purposes, i.e. for the identification of deceased persons and for the prevention, detection and investigation of crime. It will also mean that this forensic data can be checked against any other forensic data (including that taken under the Criminal Procedure (Scotland) Act 1995) for these purposes.”

Temporary power for the imposition of enhanced measures (clauses 26 and 27 of the Bill)
9. While a temporary enhanced TPIM can only be used between the dissolution of a Parliament and the first Queen’s Speech of the next Parliament, it would, whilst in existence, augment the proposed measures available to the police and prosecution in the TPIM Bill. The Scottish Government considers that such enhanced TPIMs “could potentially stray in to devolved areas” so the UK Government has recently brought forward an amendment to provide that the Secretary of State must obtain the consent of Scottish Ministers if any provision of a temporary enhanced TPIM order falls within the legislative competence of the Scottish Parliament or confers functions on Scottish Ministers.

10. For the avoidance of doubt, and as the Cabinet Secretary pointed out, this requirement to consult the Scottish Ministers applies only in respect of these enhanced TPIMs and not in respect of any “standard” TPIM imposed on a person domiciled in Scotland.

Scrutiny of the memorandum
11. The Scottish Government lodged a legislative consent memorandum on the Bill (LCM(S4) 6.1) on 1 November. The memorandum includes a draft legislative consent motion (i.e a draft motion seeking the Scottish Parliament’s consent to the provisions dealing with devolved areas). The memorandum was referred to the Justice Committee as lead committee to consider the LCM.

12. When the LCM was lodged, Scottish Government officials informed Justice Committee clerks that the final amending stage in the UK Parliament (third reading in the House of Lords) was expected to take place on Wednesday 23 November. In order for the proposed legislative consent motion to be considered by the Scottish Parliament in advance of the final amending stage, the Justice Committee was required to agree its report on the LCM at its meeting on 15 November. Accordingly, the Justice Committee has had only a limited opportunity to take evidence on it.

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9 LCM(S4) 6.1, paragraph 16.
10 LCM(S4) 6.1, paragraph 14.
12 LCM(S4) 6.1.
13. In order to help inform the report, the Convener agreed to invite the Cabinet Secretary for Justice, Kenny MacAskill MSP, to attend the Committee’s meeting on 8 November 2011 to give evidence on the memorandum.\(^{13}\)

14. At the meeting, the Cabinet Secretary was questioned mainly in relation to two aspects of the LCM, relating to seizure powers under the Bill (this leading to a discussion on cross-border police investigations) and consent to enhanced temporary TPIMs.

**Power and seizure of evidence and cross-border aspects**

15. The Cabinet Secretary was questioned on possible scenarios surrounding the power and seizure of evidence and what he would expect the response of Scottish police and prosecutors to be in such situations. In relation to the overall purpose of the provisions relating to the seizure of evidence, the Cabinet Secretary explained—

“The scenario that we envisage under the bill is that of a Scottish police officer coming across something related to terrorism in the investigation of a theft or a breach of the peace, for example. There is a good argument in law that the police officer who was investigating the matter used the common law and that it is legitimate to use it to deal with terrorism. However, highly paid lawyers who, unfortunately in some respects, have a human rights industry might challenge that. … It is important that we have clarity, so that, if Scottish police officers are dealing with an incident—even a humdrum road traffic incident, a breach of the peace or a theft—and, all of a sudden, it emerges that it is related to terrorism, we do not have a situation six months down the line in which the argument is made that we cannot use the evidence because we do not have powers in relation to terrorism under the common law.”\(^ {14}\)

16. Discussion of the LCM led into a more general discussion of the powers of police officers from outwith Scotland to investigate offences north of the border. Mr MacAskill confirmed that in any case where an offence, or combination of offences, is being investigated in Scotland, “the Scottish police would be in charge, subject to the direction of the Lord Advocate.”\(^ {15}\) Referring to the 2007 attack on Glasgow airport, he pointed out that the subsequent criminal investigation had been led by Strathclyde police under the direction of the Lord Advocate. The prosecution had ultimately taken place in England, but with the assurance that if the case had not been proceeded with there, it could have gone ahead in Scotland.

17. On a further question on whether an investigation into terrorism related offence in Scotland would be conducted by Scottish officers, the Cabinet Secretary provided assurance that the primacy of such an investigation would always rest with the Lord Advocate. He added that “the people who act on the Lord Advocate’s behalf are the Scottish police. Other agencies may be involved, but the only

\(^{13}\) The Committee also received a letter from the Law Society of Scotland indicating that they had no material comment to make on the memorandum. Available at: [http://www.scottish.parliament.uk/S4_J usticeCommittee/General%20Documents/LSS_TPIM_Bill.pdf](http://www.scottish.parliament.uk/S4_J usticeCommittee/General%20Documents/LSS_TPIM_Bill.pdf)


people with statutory powers would be members of the Scottish police service.”^{16} Nevertheless, Mr MacAskill said that he would write to the Committee to fully clarify cross-border aspects of police investigations and prosecutions.^{17} This has been annexed to this report for the Parliament’s information.

**Consent of the Scottish Ministers for a temporary enhanced TPM**

18. The Cabinet Secretary and officials were invited to provide clarification on what they understood the consent of the Scottish Ministers to a temporary enhanced TPIM would mean in practice. It was explained to the Committee that this would be a “formal” process, involving the Secretary of State approaching the Scottish Ministers for consent.^{18} This does not take the Committee much further forward in understanding exactly what would happen. However, the Committee presumes that such a process is preceded in other aspects of the Scottish Government’s working relationship with the UK Government.

19. The Cabinet Secretary was invited to note that the amendment creating the requirement to seek the consent of the Scottish Ministers to an enhanced TPIM made no mention of the Scottish Parliament. He was asked whether he envisaged the Scottish Government consulting or notifying the Parliament should such consent ever be sought.^{19}

20. The Cabinet Secretary replied that he imagined “that any minister would be obliged to make that information available” so as to preserve the Parliament’s “dignity and status”. He also pointed out that it would be highly likely that any proposal for an enhanced TPIM would, in any case, be well-publicised.^{20} As to the precise mechanism for notifying the Parliament, the Cabinet Secretary conjectured that this would be a matter of “facts and circumstances: it could be done, for instance, by a letter to the Justice Committee or by way of a statement in the Chamber. The Cabinet Secretary pointed out that it would be for the Parliamentary Bureau and not the Scottish Government to determine whether to propose time in the Parliament for a Ministerial statement, but that he imagined that the Bureau would be highly likely to do so.

**Recommendation**

21. Leaving aside individual Members’ views on the merits of the UK Bill overall, the Committee agrees that the Scottish Government has made the case that Westminster should make provision for those matters in the Bill within the legislative competence of the Scottish Parliament, in the manner provided for in the Bill. Accordingly, the Committee recommends that the Parliament agree to a legislative consent motion in the terms outlined in the memorandum.

22. In relation to enhanced temporary TPIMs, the Committee is satisfied with the provision made in the Bill requiring the UK Government to obtain the Scottish Ministers’ consent where provision is made in relation to devolved matters. The Committee also considers it important in principle that Scottish Ministers notify the

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^{19} This point was also raised in the letter from the Law Society of Scotland.
Scottish Parliament where consent has been sought and that the Scottish Parliament has the opportunity to seek further information on the request. A ministerial statement would generally appear the most appropriate vehicle to do so.
ANNEXE A: LETTER FROM THE CABINET SECRETARY FOR JUSTICE TO THE CONVENER

Thank you for the opportunity to appear before the Justice Committee on 8 November to give evidence on the Terrorism Prevention and Investigation Measures (TPIM) Bill.

I undertook to write to the Committee in response to a question about whether officers from elsewhere within the UK can conduct police searches or investigations in Scotland and also who is responsible for prosecution in cross border cases.

I should confirm that powers of entry, search and seizure under the terms of Schedule 5 to the TPIM Bill relate only to Terrorism Prevention and Investigation Measures. In Scotland, these new powers are conferred on constables of Scottish police forces and Scottish Crime and Drug Enforcement Agency police members (as well as other UK-wide forces – such as the British Transport Police – within the limits of their jurisdiction). The powers are exercisable by English and Welsh police forces in England and Wales only.

There are separate cross border enforcement powers set out in the Criminal Justice and Public Order Act 1994 which enable officers from elsewhere in the UK to execute a warrant for the arrest of a person charged with an offence. The legislation provides for search and seizure powers in specific circumstances. They are not affected by the powers in the TPIM Bill but may be relevant where, for example, a person subject to a TPIM is suspected of having committed an offence under clause 23 of the Bill.

The Lord Advocate is responsible for the prosecution of any criminal case in Scotland. In respect of terrorist offences there is UK-wide jurisdiction and where offences are committed in more than one jurisdiction, it is for prosecutors and investigators to discuss and agree where the case should be prosecuted. This depends on the specific facts of the individual case. Decisions will be taken in the overall public interest.

In cross-border cases not involving terrorist offences, as a general rule jurisdiction is established with reference to where the crime occurred. However, in certain cases there may be extra-territorial powers in statute or the common law which would enable prosecution to take place elsewhere. Again, it is for prosecutors and investigators to discuss and agree where the case should be prosecuted.

Kenny MacAskill MSP
Cabinet Secretary for Justice
9 November 2011
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