EXPLANATORY MEMORANDUM TO THE COMMUNITY LEGAL SERVICE (FINANCIAL) (AMENDMENT NO. 2) REGULATIONS 2011

2011 No. 2971

1. 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the Instrument

2.1 This instrument amends regulation 3 of the Community Legal Service (Financial) Regulations 2000 (the "2000 Regulations") to permit legal aid to be made available to a person without means testing in relation to Terrorism Prevention and Investigation Measures (TPIM) notices. TPIM notices are replacing control orders, for which legal aid was available without means testing - the policy is to make similar provision in relation to TPIM notices, given the similarly severe impact such a notice can have on the person concerned. This instrument also revokes the provisions that enable legal aid without means testing in connection with control orders, subject to savings for certain control order proceedings begun when a control order was in place, as the legislation governing control orders is being repealed.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Terrorism Prevention and Investigation Measures Act 2011 ('the Act') is expected to receive Royal Assent on 14th December 2011 and come into force the following day. This instrument will be made on the day the Act receives Royal Assent and will come into force on the following day (15th December 2011).

3.2 It is necessary for the amendments to the 2000 Regulations to come into force on the day after they are made, in order to ensure that were TPIM proceedings to be initiated immediately following the Act's commencement, legal aid would be available without means testing to a person who is, or potentially could be, subject to a TPIM notice. This course of action will breach the 21 day convention, but was considered preferable to anticipatory drafting prior to the Act receiving Royal Assent. Legal advisors from the Ministry of Justice liaised with legal advisors for the Joint Committee on Statutory Instruments to determine the best approach to making this instrument.

3.3 It is intended that this instrument will be laid before Parliament on the day that it is made. If however, the Act receives Royal Assent late in the day on 14th December 2011, it may not be possible to lay this instrument on the same day. It is therefore possible that this instrument will be laid the day after

it is made, at a time when it will already have been in force for a number of hours.

3.4 If this instrument is not laid until the day after it is made, the Secretary of State will write to the Speakers of both Houses, as required by section 4(1) of the Statutory Instruments Act 1946, to explain the reasons for laying the instrument after it has come into force.

3.5 If such letters to the Speakers of both Houses are necessary, they will explain that the instrument has been laid after it has come into force because it was not possible to lay the instrument on the day it was made, and it was necessary (for the reasons set out at 3.2 above) for this instrument to come into force on the same day as the Act, to ensure that non-means tested legal aid would be available to a person who is, or potentially could be, subject to a TPIM notice.

4. Legislative Background

4.1 The Prevention of Terrorism Act 2005 ("the 2005 Act") gives the Secretary of State the power to make a control order imposing obligations on an individual for purposes connected with protecting members of the public from a risk of terrorism. Such obligations may include, for example, a curfew, geographic boundary, and restrictions on communications and employment.

4.2 Legal aid is normally granted subject to a test both of the merits of the case and of the applicant's means. The Lord Chancellor has a power under section 7 of the Access to Justice Act 1999 to exempt legal services from the means test. Regulation 3 of the 2000 Regulations contains a list of services which are to be available without a means test. Included at regulation 3(i) of the 2000 Regulations is a provision which makes Legal Help and Legal Representation (two varieties of civil legal aid services – Legal Representation includes advocacy whereas Legal Help does not) available in relation to control orders, without a means test.

4.3 The Act replaces control orders with a similar system of TPIM notices. The Home Secretary will consider applying for permission to impose TPIM notices on individuals whom she considers meet the statutory test for imposing a TPIM notice, including those individuals currently subject to control orders.

4.4 Under the Act, the Secretary of State must seek the permission of the court to impose a TPIM notice (section 6 of the Act). In urgent cases the Secretary of State may impose a notice without the permission of the court, but must immediately refer that case to the court for consideration (Schedule 2 of the Act). Upon granting permission to impose a TPIM notice, or confirming a notice imposed without the court's permission, the court will hold a direction hearing in relation to the notice which the person subject to the notice will have the opportunity to attend (section 8 of the Act). At such a directions hearing, the court will set a date in the future for a hearing at which the notice will be reviewed (section 8(4) of the Act). A TPIM notice may be varied or revoked by notice from the Secretary of State or on the application of the

person subject to the notice (sections 12 and 13 of the Act). The person subject to the notice may also apply to the Secretary of State for permission to do something that would otherwise be prohibited by their TPIM notice (Schedule 1 to the Act).

4.5 There will be a 42 day transitional period during which control orders may remain in force to allow for orderly transition to the new system. Control orders will either be revoked during that period or will cease to have effect at the end of that period. Although the Act repeals the 2005 Act with effect from the day after Royal Assent there are savings provisions that will allow for control order proceedings after the repeal (paragraph 3 of Schedule 8 to the Act). This instrument includes savings provision to retain legal aid without means testing for certain of these saved control order proceedings.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

The Act

7.1 The Act resulted from the Government's *Review of Counter-Terrorism and Security Powers Review Findings and Recommendations (Cm 8004)*, published in January 2011[1]. This included a consideration of the control order regime contained in the 2005 Act. The review accepted that for the foreseeable future there are very likely to be a small number of people in the United Kingdom who are assessed to pose an immediate and significant terrorist threat but whom we can neither prosecute nor deport. The review findings and recommendations included a commitment to repeal the 2005 Act and introduce a new system of terrorism prevention and investigation measures. These are civil preventative measures intended to protect the public from the risk posed by such persons, by imposing restrictions intended to prevent or disrupt their engagement in terrorism-related activity. The TPIM regime, whilst containing robust measures to protect the public, contains less restrictive measures than those available under the control order regime, and greater safeguards for the individual.

[1] http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/

Non-means tested legal aid in relation to control orders and TPIM notices

7.2 The rationale for waiving the means test for persons subject to a control order is that such cases are likely to arise urgently and have a severe impact on the person concerned, who will not usually have been convicted in connection with the activity on the basis of which the control order is imposed. The TPIM notice scheme is sufficiently similar to the control order scheme that the rationale for the means test waiver applies with equal force to both.

7.3 This instrument will make Legal Help or Legal Representation available to a person without means testing where an individual becomes aware of the Secretary of State's application to seek permission to impose a TPIM notice. As with control orders, permission hearings are expected to be held routinely on an ex parte basis, but this provision provides for the waiver of the means test if circumstances arose where the individual was notified of and party to the permissions hearing. Legal Help will be available for a person who is subject to a TPIM notice, for advice in connection with that notice, in aid of an application to revoke or vary the notice, and in aid of an application for permission to do something that would otherwise be prohibited by the notice. Legal Representation will be available in relation to TPIM proceedings, including direction hearings, review hearings, and appeals against the Secretary of State's refusal to revoke or vary a TPIM notice.

7.4 The rationale for waiving the means test described at 7.2 above no longer applies when the order or notice has ceased to apply. The waiver of the means test will therefore not apply to claims for damages arising from a TPIM decision and other actions begun in respect of a TPIM notice after it has ceased to apply. Legal Help and Representation is available for such proceedings in the normal way, subject to a means test. That is in line with the current practice of the Legal Services Commission (LSC) in relation to control orders.

7.5 Current regulation 3(i) of the 2000 Regulations is being retained for certain proceedings and appeals which were started while the person was subject to a control order, but have continued after the repeal of the 2005 Act by virtue of paragraph 3 of Schedule 8 to the Act. To the extent that damages proceedings fall within current regulation 3(i), they will not fall within this savings provision, but the LSC have confirmed that there are in fact no cases of damages proceedings arising out of a control order where the claimant is in receipt of non-means tested legal aid services.

8. Consultation outcome

8.1 The TPIM system, of which these Regulations form part, is the product of the extensive government review of counter-terrorism and security powers referred to above, during which a wide variety of stakeholders were consulted

or contributed their views[2]. Independent oversight of the review was provided by Lord Macdonald of River Glaven QC.

8.2 No separate consultation was done in respect of this instrument specifically as current policy and practice in relation to control orders is being applied to the new TPIM regime.

9. Guidance

9.1 The LSC will provide any necessary guidance in relation to this amendment to the 2000 Regulations.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The Home Office have completed a Justice Impact Test for the new Act. According to that, as of 10 March 2011 there were 10 people subject to control orders and 50 people had ever been subject to a control order. They do not expect the number of persons subject to TPIM notices to change significantly from the number of persons that were subject to control orders. As the amendments in this instrument will provide in relation to TPIM notices a similar means test waiver to that currently in place in relation to control orders, no impact on the public sector is anticipated.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 There are no specific plans for monitoring this amendment to the 2000 Regulations.

12.2 More generally, section 19 of the Act provides that the Secretary of State must report to Parliament every quarter on the exercise of her powers under the Act. And under section 20 of the Act, the independent reviewer of the Act will produce an annual report on the operation of the Act, which is laid before Parliament.

12.3 Section 21 of the Act provides that the Secretary of State's TPIM powers expire after five years unless renewed by Order. Before making the renewal Order, the Secretary of State must consult the independent reviewer of the Act, the Intelligence Services Commissioner and the Director-General of the Security Service.

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[2] See the summary of responses to the consultation on the review, which can be found at http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/

12.4 The Act will also be subject to post-legislative scrutiny requirements. Under current practice this would include a memorandum providing a preliminary assessment of how the Act has worked in practice being submitted to the relevant departmental select committee (in this case the Home Affairs Select Committee) and laid before Parliament. The Select Committee then decides whether it wishes to undertake further post-legislative scrutiny of the Act.

13. Contact

13.1 Simon MacCulloch at the Ministry of Justice, telephone 020 3334 6074 or e-mail Simon.MacCulloch@justice.gsi.gov.uk, can answer any queries regarding the instrument.