

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

by

DAVID ANDERSON Q.C.

Independent Reviewer of Terrorism Legislation

JUNE 2012

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Any enquiries regarding this publication should be sent to the Independent Reviewer at independentreviewer@brickcourt.co.uk or by post to David Anderson Q.C. at Brick Court Chambers, 7-8 Essex Street, London WC2R 3LD.

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EXECUTIVE SUMMARY

- The risk posed by ***Al-Qaida related terrorism*** in the United Kingdom remains real, but should not be overstated.
 - While some plots were detected in 2011, arrests, charges and convictions for terrorist offences in Great Britain have all declined markedly since the middle of the last decade (2.5(c)).
 - The victims of the 2005 London bombings remain the only people ever to have been killed by al-Qaida related terrorism in the UK (2.5(b)).
 - According to Europol, no al-Qaida affiliated or inspired attacks were carried out in EU Member States during 2011 – though the UK was said to remain a constant target (2.7(c)).
- In ***Northern Ireland***, terrorism continued to pose a serious threat in 2011, with multiple attacks on national security targets and the killing of PSNI Constable Ronan Kerr (2.19-2.20). Northern Ireland-related terrorism however operates on a tiny scale by historic standards; and of the 49 deaths attributed to the security situation in the 10 years to March 2012, only 10 were in the second half of that period (2.16).
- The perception of a reducing terrorist threat (at least in Great Britain) has caused the ***counter-terrorism laws to be cautiously re-assessed*** in recent years, particularly since the arrival of the Coalition Government. A matching re-assessment of the structure of counter-terrorism policing (as to which, see 2.38-2.43) has been postponed until after the Olympics, but is likely to take place thereafter.
- Recalibration of the Terrorism Acts since 2010 has already brought about (in addition to the abolition of control orders and their replacement by TPIMs, discussed in my last report of March 2012):
 - reduction of the 28-day ***period of detention before charge*** to 14 days
 - repeal of the section 44 ***no-suspicion stop and search power***, which was used more than 250,000 times in the single year 2008/09, The conditions for using the replacement power are so difficult to satisfy that it was not used at all, even during major public events such as the Royal Wedding and Diamond Jubilee celebrations.
 - More stringent conditions on the ***retention of fingerprints and DNA*** (9.4).

These changes amount to a cautious rebalancing in favour of liberty. In my judgement they do not materially increase the risk from terrorism.

- I have identified other rules in relation to which I believe that a cautious rebalancing could be achieved without materially increasing the risk from terrorism. These are:
 - The rules governing the **proscription of organisations**
 - The rules governing **detention of suspected terrorists**
 - Schedule 7 **stops at ports and airports** by ports officers exercising their power to determine whether travellers are terrorists.

- This report summarises the observations I have made of the use of these powers in practice, and makes recommendations in relation to each of them. In particular, it recommends that:
 - Groups should only remain proscribed when they are currently involved in terrorism, or taking steps to become involved, and when banning them can be of real utility in protecting the public from terrorism (chapter 4, 12.7-12.12).
 - Consideration should be given to making bail available to those detained under the Terrorism Acts, so that peripheral players who pose no risk to public safety need not be kept in detention, and a charging decision would not have to be reached within 14 days (7.71-7.73, 12.15).
 - There should be a public consultation and review of the Schedule 7 power, preceded by the release of as much information as possible about its use (chapter 9, 12.18). In that context:
 - Those who oppose the power or its exercise are encouraged to lodge complaints for independent adjudication, and to contribute fully to that consultation (12.19-12.20).
 - Those seeking to justify the power in its current form are encouraged to adduce evidence as why its more controversial elements are necessary. These include the stopping and examination of travellers without specific intelligence, the compulsion to answer questions and the ability to detain for up to nine hours without special authorisation (12.21).

- My conclusions are in chapter 11, and a full list of my 22 recommendations is set out in chapter 12.

1. INTRODUCTION

Purpose of this report

- 1.1. As required by section 36 of the Terrorism Act 2006 [TA 2006], this report summarises the outcome of my review of the operation during 2011 of the provisions of the Terrorism Act 2000 [TA 2000] and Part 1 of TA 2006 [the **Terrorism Acts**]. It is my fifth report overall and my second review of the Terrorism Acts: its predecessor covered the calendar year 2010 and the resulting report was laid before Parliament in July 2011.¹ Though based to a significant extent on confidential discussions and the reading of secret material, this report is published in a single, open-source version.

Independent Reviewer

- 1.2. The functions of the Independent Reviewer are various. Since my appointment in February 2011 I have performed them on a part-time basis from my own office in central London and, when required, a secure room in the Home Office. The history, role and working practices of the Independent Reviewer are fully described on my website.
- 1.3. The uniqueness of the post lies in its combination of two factors: complete independence from Government, and access based on a high degree of security clearance to secret and sensitive national security information. I consider the Reviewer's function as being to inform the political and public debate on terrorism, rather than to participate in it. Nonetheless, where I have reached conclusions on the basis of the evidence, I have not hesitated to state them and where appropriate to make recommendations.²

Subject matter of this report

Terrorism Act 2000

- 1.4. TA 2000, which received Royal Assent on 20 July 2000, was the United Kingdom's first permanent counter-terrorism statute. Previous legislation had provided for a power to proscribe terrorist organisations, a range of specific offences connected with terrorism and a range of police powers relating to such matters as investigation, arrest, stop and search and detention. That legislation

¹ D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*; see also the Government's Response of 3 November 2011, Cm 8210. Both are freely available for download from my website <http://terrorismlegislationreviewer.independent.gov.uk>. The House of Commons library produces a useful bibliography of "*terrorism resources*", including my reports and statements of Government policy: <http://www.parliament.uk/briefing-papers/SN05866>.

² See generally D. Anderson, "The independent review of terrorism legislation" [2011] EHRLR 544.

had been designed in response to Northern Ireland related terrorism (though from 1989 some of its provisions were extended to international terrorism),³ and it was subject to annual renewal by Parliament.

- 1.5. TA 2000 reformed and extended the previous legislation, and put it on a permanent basis. It built upon the Government's consultation document *Legislation against terrorism* (Cm 4178), published in December 1998, which in turn owed much to Lord Lloyd of Berwick's *Inquiry into legislation against terrorism* (Cm 3420), published in October 1996 and the essential starting point (along with the published works of my Special Adviser, Professor Clive Walker of the University of Leeds),⁴ for anyone who seeks to understand the structure and evolution of United Kingdom counter-terrorism law.
- 1.6. After defining terrorism (Part I), TA 2000 provides for proscribed organisations (Part II) and the treatment of terrorist property (Part III). Part IV (Terrorist Investigations) contains various rules on cordoning, disclosure, searches and account monitoring. Part V contains terrorism-specific arrest, stop and search and port powers, while Part VI provides for a number of terrorist offences. Part VII (Northern Ireland) was subject to annual renewal and has now expired, save for certain historic purposes.⁵
- 1.7. TA 2000 has been amended a number of times, including by the Anti-Terrorism, Crime and Security Act 2001 [**ATCSA 2001**], TA 2006 Part 2, the Counter-Terrorism Act 2008 [**CTA 2008**] (in turn amended by the Terrorist Asset-Freezing &c. Act 2010 [**TAFA 2010**]) and the Crime and Security Act 2010 [**CSA 2010**]. There were no amendments in 2011, though the Protection of Freedoms Act 2012 [**PFA 2012**], which received Royal Assent on 1 May 2012, makes amendments relating to powers of stop and search, pre-charge detention and the retention of biometric data taken from those detained under TA 2000.

Terrorism Act 2006

- 1.8. TA 2006, which received Royal Assent on 30 March 2006, was debated in the wake of the London bombings of 7 July 2005 which constitute, to date, the only large-scale infliction of violence for al-Qaida inspired terrorism on United Kingdom soil. The then Prime Minister, Tony Blair, announced in a well-known speech delivered on 5 August 2005 that "*the rules of the game are changing*". The initial legislative reaction was TA 2006, the main purpose of which was to criminalise precursor behaviour that was caught neither by previous terrorism statutes nor by the ordinary criminal law.

³ There were repeated statements that domestic extremism was not to be dealt with in this way.

⁴ See, in particular, *Terrorism and the Law*, OUP 2011, and, for the historical picture, *The Prevention of Terrorism in British Law*, 2nd ed. 1992.

⁵ The Terrorism (Northern Ireland) Act 2006 (Transitional Provisions and Savings) Order 2007.

- 1.9. The freestanding and substantive provisions of TA 2006 are all in Part 1. That Part introduced a series of new terrorist offences: notably, encouragement of terrorism, dissemination of terrorist publications, preparation of terrorist acts, offences relating to terrorist training and offences concerning the making, possession and use of radioactive material and devices. “Convention offences”, corresponding to those mentioned in the Council of European Convention on the Prevention of Terrorism, are listed in Schedule 1. Part 1 also increased the maximum penalties for certain offences under TA 2000 and made jurisdictional and procedural provisions.
- 1.10. Part 2 of TA 2006 amended other statutes including TA 2000, and Part 3 of TA 2006 provided for this annual review and other supplemental matters.⁶
- 1.11. TA 2006 has been amended in minor respects only. There were no amendments during 2011 and have been none during 2012.
- 1.12. Of future relevance to the functions of the Independent Reviewer is section 117(3) of the Coroners and Justice Act 2009 [**CJA 2009**], which amends TA 2006 section 36 so as to provide that the annual review of the Independent Reviewer may, in particular, consider whether certain legal requirements have been complied with in the case of terrorist suspects detained for more than 48 hours under section 41 of TA 2000. This power is due to come into force shortly.

Matters not covered by this report

- 1.13. This review falls well short of covering the full range of United Kingdom terrorism laws. In particular:
 - (a) ***Asset-freezing:*** The operation of TAFE 2010, in force since December 2010, is the subject of a separate annual report, as required by section 31 of that Act. The first such report was laid before Parliament in December 2011, and all nine of its recommendations were promptly accepted by the Treasury.⁷ Other asset-freezing measures capable of application to suspected terrorists, including Part 2 of ATCSA 2001 and Schedule 7 to CTA 2008, are not currently the subject of independent review.
 - (b) ***Control orders/TPIMs:*** The use in 2011 of control orders under the Prevention of Terrorism Act 2005 [**PTA 2005**] was (as in previous years)

⁶ Review is provided for only in relation to Part 1 of TA 2006. However, there is no lacuna because Part 2 simply amended TA 2000, which is itself subject to independent review pursuant to TA 2006 section 36.

⁷ *First Report on the Operation of TAFE 2010* (December 2011); *Operation of TAFE 2010: response to the independent reviewer's first report* (February 2012, Cm 8287), both available for download from my website (fn 1).

the subject of a separate report, pursuant to section 14 of PTA 2005.⁸ Equivalent reports will be produced in future years on the operation of TPIMs under the Terrorism Prevention and Investigation Measures Act 2011 [**TPIMA 2011**].

- (c) **Northern Ireland:** This review encompasses the operation of TA 2000 and Part 1 of TA 2006 in the whole of the United Kingdom, including Northern Ireland.⁹ However certain special measures applicable only to Northern Ireland, which had their origins in Part VII of the Terrorism Act 2000 (expired) but are now contained in the Justice and Security (Northern Ireland) Act 2007 [**JS(NI)A 2007**], are the responsibility of a separate Northern Ireland reviewer, Robert Whalley C.B.¹⁰
- (d) **ATCSA 2001 and CTA 2008:** There is currently no provision for the independent review of the operation of ATCSA 2001 or CTA 2008. In her response to my last annual report, the Home Secretary asked for my thoughts on whether CTA 2008 should be the subject of independent review. As more parts of that statute enter into force, I believe that the time has come to provide for such review; that it is plainly appropriate for it to be added to the responsibilities of the Independent Reviewer; but that in view of other recent increases in the Reviewer's workload, some additional assistance is likely to be needed in order to enable this to happen. There is also a case for considering the regular independent review of ATCSA 2001. I shall be discussing the basis on which these matters might be arranged over the coming months. I return to this subject under Recommendations at 1.34, below.
- (e) **Immigration powers:** The recent publicity surrounding the cases of Abu Qatada and others have served as a reminder that immigration powers, including the power to detain pending deportation, are frequently used against terrorist suspects. Immigration powers form no part of my functions as Independent Reviewer, though they inter-relate with counter-terrorism powers in many other ways, particularly at ports.
- (f) **Justice and Security Bill:** Prefigured in a Green Paper of October 2011 and introduced to the House of Lords on 28 May 2012, this Bill proposes to extend the circumstances in which cases may be heard by closed material procedure. I have sought to inform that debate, by the written and oral

⁸ *Control Orders in 2011* (March 2012), available for download from my website (fn 1).

⁹ Save that by agreement with Robert Whalley CB, Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, the exercise of TA 2000 stop and search powers is dealt with as part of his broader review of stop and search in Northern Ireland.

¹⁰ See, most recently, his *Fourth Report: 2010-2011* (November 2011), available from www.nio.gov.uk.

evidence that I was invited to give to the Joint Committee on Human Rights [JCHR] and informally with politicians, but the overlap with the Terrorism Acts is limited to the use of closed material procedure in proscription cases, and I say no more about it here.

Approach to this review

- 1.14. I have sought to perform my statutory function by reviewing the operation of the Terrorism Acts, Part by Part, on the basis of the most up-to-date statistics available, supplemented by my own reading, observations and conversations with the widest possible range of people who enforce, study or are otherwise affected by the Terrorism Acts. Invaluable has been the regular feed of information from my Special Adviser, Professor Clive Walker of the University of Leeds, who has directed me to much material of interest and been generous with his expertise.¹¹
- 1.15. I have started each chapter by summarising the provisions under review. Such summaries featured also in my last annual report, which was structured in a similar way. I hope that this element of duplication is not too tiresome and may be considered a price worth paying for a self-contained report.
- 1.16. So far as the depth of coverage is concerned, it has inevitably been necessary to prioritise. Successive annual reports are likely to concentrate on different elements of the legislation, depending on my findings during the period under review and the likelihood that those elements will be subject to public or parliamentary debate over the year ahead. Thus:
- (a) Last year's report devoted particular attention to pre-charge detention periods and the TA 2000 section 44 no-suspicion stop and search power.¹² Each of those issues has now been debated and dealt with (in what I consider to be a broadly satisfactory manner) by PFA 2012.
 - (b) This year I have sought, in particular by an extensive series of meetings and visits, to improve my practical understanding of the proscription of organisations (chapter 4), detention (chapter 7) and port controls (chapter 9). In each case, this experience has enabled me to supplement the limited recommendations I made in 2011.
 - (c) Other topics are likely to receive fuller treatment in future reports, though some projects (e.g. the rationalisation of the multitudinous laws governing the

¹¹ I am also grateful for the assistance on specific topics of Cian Murphy and Hannah Tonkin.

¹² D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, chapters 7 and 8.

funding of terrorism) go well beyond the scope of an annual report such as this one.¹³

I hope in this way to combine the statutory requirements of my role with elements of a thematic approach, and to minimise year-on-year duplication in areas where there is little new to say.

- 1.17. Some knowledge of comparative law and practice is an important sanity check in any study of counter-terrorism legislation. The comparative approach is however full of pitfalls, even where apparently similar legal systems are concerned. Mindful of this, I have not attempted to perform significant comparative analysis of my own. In addition to my reading, however, I have been able to share experiences in London with the Canadian Security Intelligence Review Committee, representatives of the Nigerian Government, the Norwegian 22nd July Committee, Congressman Peter King, Chair of the US Homeland Security Committee and Jan Jařab, Regional Representative of the UN Commissioner for Human Rights; and to participate in training and discussions at the Scottish Police College with senior officers of the Royal Canadian Mounted Police and FBI. I am visiting the United States this summer for conferences and discussions with many of those involved in the world of counter-terrorism. In the autumn I plan to visit the EU institutions with a focus on counter-terrorism and human rights. I expect to use what I learn on those visits in subsequent reports.

The politics of terrorism

- 1.18. 2011 was a significant one in the life of counter-terrorism legislation, because it saw the implementation of the 2010 election pledges of both Coalition parties to review “*the most sensitive and controversial counter-terrorism and security powers*”, and “*consistent with protecting the public and where possible, to provide a correction in favour of liberty*”.¹⁴
- 1.19. The review findings and recommendations, together with a report by Lord Macdonald of River Glaven Q.C.¹⁵ and a summary of responses to the consultation,¹⁶ were published in January 2011. Three of the six powers selected for review fall within the ambit of this report. These were:

- (a) Detention of terrorist suspects before charge (section 41 and Schedule 8 TA 2000)

¹³ One-off reports may be commissioned or volunteered by the Reviewer, as the Home Secretary had occasion to confirm during the year under review: JCHR 17th Report of 2010-2012, HL Paper 192 HC 1483, September 2011, para 40. See, e.g., Lord Carlile’s report *The Definition of Terrorism*, Cm 7052, March 2007, available for download from my website (fn 1).

¹⁴ *Review of Counter-Terrorism and Security Powers*, Cm 8004, January 2011.

¹⁵ Cm 8003, January 2011.

¹⁶ Cm 8005, January 2011.

(b) Stop and search powers (section 44 TA 2000) and the use of terrorism legislation in relation to photography

(c) Measures to deal with organisations that promote hatred or violence (Part II TA 2000).

1.20. 2011 saw action on the first two fronts: the non-renewal of the power to detain for 28 days, and the repeal and replacement of section 44 (which had largely ceased to be applied from July 2010). No change was however introduced in relation to Part II of TA 2000, and nor was there any review of the power to examine and detain port users under Schedule 7 to TA 2000. Action in both those areas was recommended in my last annual report. I return to them in chapters 4 and 9, below.

1.21. The year was not characterised (at least in public) by polarised political debates on counter-terrorism matters, though in the context of the replacement of control orders by TPIMs, the Labour Party criticised Coalition plans, especially for ending the practice of relocation prior to the Olympic Games.¹⁷

Timing of publication

1.22. I have timed this report so as to be able to make use of certain statistics for the calendar year 2011 in Great Britain, published by the Home Office on 14 June 2012.¹⁸ I welcome the fact that it has been possible to publish these statistics some two weeks earlier than was the case in 2011.

1.23. Before they are laid before Parliament, my reports are submitted to Ministers, for the purpose of security-checking and fact-checking and in order to give Ministers a few days' notice of my observations and recommendations. When awaiting publication of my March 2011 report on Control Orders, I had cause to investigate the rules and conventions governing the period that should be allowed to elapse between submission to Ministers and publication of the Independent Reviewer's reports.

1.24. TA 2006 section 36, pursuant to which this report is submitted, states:

“On receiving a report under this section, the Secretary of State must lay a copy of it before Parliament”.

¹⁷ My findings in relation to this issue, which recognised the national security value of relocation but did not criticise the Government for ending it, are in D. Anderson, *Control Orders in 2011* (March 2012, available for download from my website (fn 1)), 3.33-3.36, 6.13-6.14 and 6.33-6.36.

¹⁸ Home Office Statistical Bulletin [**HOSB**] 7/12, 14 June 2012.

Similar wording appears in the other statutory provisions relating to independent review.¹⁹

- 1.25. In debate on the TPIM Bill in the summer of 2011, the Security Minister James Brokenshire MP gave the following undertaking:

“There is no desire to sit on reports. It would be foolish and inappropriate for Government to do so, particularly with a report from an independent reviewer. ... It is not our intention to sit on reports; that is not the practice. If it gives comfort to the Committee and to the public, reports received from the independent reviewer will be published on receipt or promptly—whatever the appropriate phrase is. That is what I expect to happen, and I would expect any successor of mine to take the same approach.”²⁰

As Hazel Blears MP had just stated in the same debate, without contradiction:

“The words ‘*on receiving*’ indicate a measure of immediacy, suggesting that on receipt of the report, it will be laid before Parliament.”

It is not controversial, therefore, that publication of the Independent Reviewer’s reports must follow promptly upon provision of the final text to the Home Secretary (or, in the case of the annual asset-freezing report, the Treasury). There should be no question of delaying publication for political or news management reasons. Nonetheless, to avoid any future misunderstandings, I return to this topic under Recommendations at 1.39, below.

Use of statistics

- 1.26. Where possible and where Great Britain is concerned, I have relied upon police and prosecutorial statistics for the calendar year 2011.²¹ A fuller set of statistics for Great Britain, compiled from a variety of sources and published by the Home Office in October 2011, cover the year to 31 March 2011 **[2010/11]**.²² I have relied upon these where more recent comprehensive statistics are not available, or for ease of comparison with the statistics for past years.
- 1.27. For Northern Ireland, I have relied on statistics for the year to 31 March 2011 published by the Northern Ireland Office **[NIO]**,²³ supplemented by the more up-

¹⁹ TAFE 2010 section 31(4); TPIMA 2011 section 20(5).

²⁰ Hansard (Public Bill Committee) vol. 532 col. 253, 30 June 2011.

²¹ HOSB 7/12, 14 June 2012.

²² *Operation of police powers under the TA 2000 and subsequent legislation: Great Britain 2010/11*, HOSB 15/11, 13 October 2011. See also *Statistics on Police Powers and Procedures*, available from Home Office Science research and statistics website.

²³ *Northern Ireland Terrorism Legislation: Annual Statistics 2010/11*.

to-date security situation statistics and stop and search statistics produced by the Police Service of Northern Ireland [PSNI].²⁴

- 1.28. All these statistics are freely available online. Accordingly, I have not reproduced them in annexes to this Report. Where unpublished figures have been supplied to me directly by police, Government departments or agencies, I have so indicated.
- 1.29. Steps have been taken in recent years to bring the collection of statistics for Northern Ireland and for Great Britain into closer conformity with each other. Thus:
- (a) Since 2009, a range of Northern Ireland statistics have been released for the year to March, as had long been the case for Great Britain, rather than for the calendar year.
 - (b) In partial response to a recommendation in my report of July 2011, the Northern Ireland Office now publishes statistics for *principal* offences charged, in keeping with the practice in Great Britain (though my real concern was the opposite one: to obtain Great Britain figures for *all* offences charged).
- 1.30. Another much-needed improvement to the statistical picture is the availability of figures for the number of port examinations and detentions under Schedule 7 (released for the first time in 2010) and for the self-defined ethnicity of those examined and detained data (collected from April 2010 and made available, for the first time, in relation to the year 2010/11).²⁵
- 1.31. Serious deficiencies in the statistical picture however remain. Those which have struck me while preparing this report (some of them referred to also in my report of July 2011) are as follows:
- (a) Any sensible evaluation of the utility or otherwise of the myriad terrorist offences on the statute book needs to take as its starting point ***the number of times those offences have been charged***. This information – though collected in Northern Ireland for many years – is not available in Great Britain, where data is collected only in relation to the *principal* offences charged. This was the subject of a recommendation in my last annual report, to which the Government said in its Response that “[f]urther consideration is

²⁴ See, most recently, *Police Recorded Security Situation Statistics 2011/12*, 10 May 2012; *PSNI Stop and Search Statistics Quarter 4, 2011/12*, 31 May 2012, both available from the PSNI website.

²⁵ This follows a Freedom of Information request from the Federation of Islamic Students in respect of the previous year’s officer-defined (and so less reliable) ethnicity data.

being given".²⁶ I repeat that recommendation, in view of its importance for the performance of my function of annual review.

- (b) Equally surprisingly, no figures have been published in Northern Ireland for the number of **convictions and acquittals on terrorism charges**. In each of the last two years I have obtained these figures from the Northern Ireland Courts Service for the purposes of this report. I understand that in response to my last year's recommendation, they are now being collated and will be published alongside the equivalent figures for Great Britain.
- (c) Figures for those **arrested under provisions other than TA 2000 section 41** for "*terrorism-related offences*" are collated in Great Britain²⁷ but not in Northern Ireland.
- (d) Conversely, the Northern Ireland statistics are more extensive and thus more useful for evaluating the operation of TA 2000 section 41. Absent from the statistics for Great Britain are figures for those detained under section 41 who requested and were refused **access to a solicitor**, and to have **someone informed of their detention** (7.49-7.50, below); numbers and success rates of **applications for warrants for further detention** (7.29, below); and **numbers charged under the Terrorism Acts** (7.31, below).
- (e) The categories used in Great Britain for the **self-definition of ethnicity** are based on those used in the 2001 Census.²⁸ The categories of "*White*", "*Mixed*", "*Asian*", "*Black*" and "*Chinese*" are each accompanied by a catch-all "*other*", but there is no subcategory referable to persons of non-black North African and Middle Eastern ethnicity. I understand that discussions are in progress about whether data can in future be collected on the basis of the 2011 Census categorisations (which move "*Chinese*" into the Asian category, and make specific reference to "*Arab*" as part of the "*other*" category). Independent review of TA 2000 would be assisted if data (whether in relation to stop and search, port examinations, arrest, charge or convictions) could define ethnicity as precisely as possible and, specifically, include a category for those who would wish to self-define as Arab.

1.32. Some of these comments are reflected in my recommendations, at 1.35-1.38 below.

²⁶ Cm 8210, available for download from my website (fn 1), p. 6. It was also said that "*accuracy of the data and the potential burden on the police (and criminal justice system more generally) of collecting more data are relevant to this consideration.*"

²⁷ See, most recently, HOSB 7/12, 14 June 2012, Table 1.01.

²⁸ Different ethnicity classifications are used in Northern Ireland.

Recommendations

- 1.33. I make the following recommendations under this chapter:
- 1.34. **The operation of CTA 2008 and perhaps also ATCSA 2001 should be subject to independent review, most conveniently by the Independent Reviewer and in the same annual report as currently covers TA 2000 and TA 2006. Some additional assistance may be necessary to enable this to happen, given the part-time nature of the Reviewer's role and other recent additions to his workload.²⁹**
- 1.35. **Statistics concerning the operation of the Terrorism Acts in Great Britain and Northern Ireland should so far as possible be compiled on a standardised, fully comparable basis, without sacrificing detailed information currently available.³⁰**
- 1.36. **Statistics should be produced both in Great Britain and in Northern Ireland recording:**
- (a) the number of charges for each offence under the Terrorism Acts (as currently in NI)**
 - (b) the number of convictions and acquittals for each such offence (as currently in GB).³¹**
- 1.37. **Statistics should be produced both in Great Britain and in Northern Ireland recording, for those detained under TA 2000 section 41 only:**
- (a) the number of requests to have someone informed of detention, and the numbers allowed immediately and delayed (as in NI, but with some indication of the length of the delay)**
 - (b) the number of requests for access to a solicitor, and the number allowed immediately / delayed (as in NI, but with some indication of the length of the delay)**
 - (c) numbers and success rates of warrants for further detention (as in NI).³²**
- 1.38. **Statistics relating to stop and search, port examinations, arrest, charge and convictions under TA 2000 in Great Britain should define ethnicity as**

²⁹ See 1.13(d), above.

³⁰ See 1.29-1.31, above.

³¹ See 1.31(a)(b), above.

³² See 1.31(d), above.

precisely as possible, and include a category for those who would wish to self-define as Arab.³³

- 1.39. **Reports of the Independent Reviewer should be published and laid before Parliament promptly on receipt of the final draft by the Home Secretary (or, in the case of reports on TAFE 2010, the Treasury).**³⁴

³³ See 1.31(e), above.

³⁴ See 1.23-1.25, above.

2. THE OPERATIONAL BACKGROUND

- 2.1. The review of terrorism laws must be more than a paper exercise. In order to say whether such laws are necessary and proportionate in their operation, one needs to have an understanding of the current nature and extent of the terrorist threat in the United Kingdom, the range of tools available to the counter-terrorism effort and the way in which those tools are used on the ground. Since United Kingdom terrorist legislation also criminalises a range of acts performed in or aimed at targets in other countries, the nature of the threat world-wide must also be kept in mind.

The terrorist threat

Terminology

- 2.2. Terrorism must be categorised, for any analysis of the operation of the counter-terrorism laws would be unrealistic if it failed to acknowledge the very different nature of the threat as it exists in different parts of the country.
- 2.3. In this report, for reasons given in my last annual report,³⁵ I use the terms:
- (a) “*al-Qaida inspired terrorism*” (terrorism perpetrated or inspired by al-Qaida, its affiliates or like-minded groups or individuals), which notwithstanding the death of Osama bin Laden in May 2011 seems preferable to using words such as “*Islamist*” or “*Jihad*” which are easily misunderstood;
 - (b) “*Northern Ireland related terrorism*” (which describes the threat, currently posed mainly by dissident Republican groups, in Northern Ireland and potentially also in Great Britain); and
 - (c) “*other forms of terrorism*” (a disparate category, ranging from far-right and animal rights inspired violence to terrorism prompted by foreign nationalist or separatist concerns).

Al-Qaida inspired terrorism

- 2.4. The conclusion last year of Lady Justice Hallett’s 7/7 inquests brought back memories of the suicide bombings that killed 52 innocent people and injured more than 700 on London tube trains and a bus on 7 July 2005, the day after the success of London’s bid to host the Olympic Games. A number of other highly ambitious plots came to light at about the same time: they failed either by good fortune (the 21/7 London bombs of 2005) or excellent intelligence work (the fertiliser bomb plot of 2004 and the airline liquid bomb plot of 2006). Those

³⁵ D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, §2.3.

convicted for their involvement in these plots, and sentenced to often very long prison terms, were overwhelmingly UK nationals, resident in the UK.

2.5. The domestic situation has improved markedly since that period in the middle of the last decade.³⁶ While plots continue to be unearthed against UK targets, some potentially deadly and some resulting in arrests and convictions, the following facts deserve to be highlighted:

(a) No one in Great Britain has been killed or injured by a terrorist since May 2010 (when Roshonara Choudhry stabbed Stephen Timms MP in his constituency surgery).

(b) The 7/7 victims (and the four suicide bombers who killed them) remain the only people ever to have been killed by al-Qaida inspired terrorism in the UK.³⁷

(c) Arrests, charges and convictions for terrorist offences in Great Britain have all declined markedly since the middle of the last decade.³⁸

2.6. There are a number of criminal proceedings ongoing in relation to alleged criminal offences committed in 2011. It is nonetheless significant that 2011 saw only one conviction in Great Britain to compare with the most serious incidents of the last decade: Rajib Karim, an IT specialist at British Airways who was sentenced to 30 years' imprisonment for a variety of terrorist offences between 2007 and 2010, including offering his assistance to Anwar al-Awlaki (as to whom, see 2.9 below) in disrupting BAs' servers and bringing down a transatlantic plane. In three other cases, five defendants received sentences of between 3 years and life for offences including dissemination and collecting information.³⁹

2.7. Though the collection of international figures for terrorism is a notoriously imprecise business, the decline in terrorist incidents and arrests in the UK over the past five years appears to be mirrored internationally. In particular:

(a) The US National Counterterrorism Center [**NCTC**], the US equivalent of JTAC, recorded **a decline in global deaths from terrorism from 23,000 to 13,000 between 2007 and 2010**. Other sources use different methodology but also record a reduction, e.g. the decline from 13,000 to 7,000 over the

³⁶ 64% of the 138 "Islamist-related terrorism offences" between 1999 and 2010 which resulted in convictions are reported as having taken place in the three-year period 2005-2007: R. Simcox, *Islamist Terrorism: the British connections* (Henry Jackson Society, 2nd edn. 2011).

³⁷ Though DC Stephen Oake was killed by Kamel Bourgass, subsequently convicted of involvement in a ricin plot, during a 2003 raid in Manchester; and Kafeel Ahmed died of his injuries in 2007 after driving a blazing propane-filled Jeep towards the terminal building of Glasgow Airport.

³⁸ See 7.17, 10.23, 10.26 and 10.32, below.

³⁹ Munir Farooqi, Matthew Newton and Israr Malik; Bilal Ahmad; Terence Brown.

same period noted by the National Consortium for the Study of Terrorism and Responses to Terrorism. Such figures tend however to be heavily influenced by the evolving situation in Iraq, and may mask regional increases, e.g. in East and West Africa during 2011.

(b) In the EU, Europol has identified a reduction in terrorist attacks from 600 to 200, and in arrests from 1000 to 500, between 2007 and 2011.⁴⁰ Furthermore, the great majority of failed, foiled and completed attacks in 2011 were said to have been the work of separatist terrorists in France or in Spain, or to have taken place in Northern Ireland. According to Europol's recent annual review, ***no al-Qaida affiliated or inspired attacks were carried out in EU Member States during 2011***, though it noted that the al-Qaida inspired threat rose during 2011 in Scandinavia and Germany, and that France, Spain and the United Kingdom "*remained constant targets and centres for radical activities*".⁴¹

2.8. Globally, 2011 will be remembered as the year when Osama bin Laden was killed by US Navy Seals in Pakistan. Repeated US drone strikes in the Federally Administered Tribal Areas [**FATA**] of Pakistan, traditional training grounds for jihadis intending attacks on the West, eliminated many of the most senior figures in the organisation (including, in August, al-Qaida's deputy commander Atiyah Abdul Rahman)⁴² and continued severely to degrade the operational capability of al-Qaida's core.

2.9. While al-Qaida's threat continued to diversify (or fragment), notably through Al-Qaida in the Arabian Peninsula [**AQAP**] in Yemen, there was no Yemen-based attack on the West to compare in seriousness to the printer cartridge bomb plot of October 2010, which could have brought down two planes headed for the US. In September a US drone despatched the most dangerous and charismatic of all global terrorists, whose direct or indirect influence was visible in a large number of recent anti-Western plots: the US-Yemeni citizen (and sometime UK resident) Anwar al-Awlaki.⁴³

⁴⁰ *TE-SAT 2012*, Figure 1.

⁴¹ *TE-SAT 2012*, chapter 5. These data can however easily mislead: for example, Europol records not a single person as having been "*arrested for religiously inspired terrorist offences*" in the UK in 2011 (*TE-SAT 2012* Figure 4). It would be surprising if none of the 167 "*terrorism arrests*" in Great Britain related to religiously-inspired offences: it is simply that the UK does not compile its data in that way (*TE-SAT 2012* Annex 2). Incredibly, Europol records only a single right-wing terrorist attack in the EU during 2011 (in Spain).

⁴² A later "*No. 2*", Abu Yahya al-Libi, was reported to have been killed by a drone in June 2012.

⁴³ Anwar al-Awlaki was a direct or indirect inspiration for each of the four major terrorist plots or incidents in 2010 that were highlighted in my last annual report (2.11-2.12), as well as for the Fort Hood shootings of November 2009, the underpants bomb of December 2009 and the Times Square bomb of May 2010.

- 2.10. The legality under international law of drone attacks, outside a conventional theatre of war, is fiercely disputed. The efficacy of some of them cannot however be doubted, at least in the short term. It remains to be seen whether the killing of al-Awlaki will leave AQAP demoralised or simply add to his mystique, and whether the drone campaign will have a radicalising effect in any way comparable to larger-scale events such as the invasion of Iraq.⁴⁴
- 2.11. Al-Qaida's influence continued to grow in Somalia (through al-Shabaab) and Nigeria (through Boko Haram). The involvement of persons trained by these groups in attacks in Europe or North America cannot be ruled out, and they undoubtedly pose a threat to Western citizens in Africa.
- 2.12. The emergence of significant nuclear, chemical, biological and cyber-terrorism, though long predicted, has not yet come to pass. Cyber-espionage, directed against both Governments and corporations, is however an established fact of life and a major policy priority in the United Kingdom and elsewhere.⁴⁵
- 2.13. It would be pleasing to believe that the apparent dilution of al-Qaida's threat to the West – reflected in the reduction in July 2011 from “severe” to “substantial” of the threat level set by the UK's Joint Terrorism Analysis Centre [JTAC] – can be traced to a waning in the attractiveness of its underlying ideology. The Arab Spring and NATO intervention in Libya have been cited as potentially influential factors. Closer to home, a Select Committee, having taken evidence for a number of people well placed to know, concluded in 2012:

“We suspect that violent radicalisation is declining within the Muslim community.”⁴⁶

History will judge whether these suspicions are correct or whether – less comfortably to the liberal mind – the reduction in al-Qaida related terrorist activity over the past five years has resulted from nothing more than the effective use against a determined and resilient adversary of military might (including targeted assassination by drone), improved intelligence and robust policing.

- 2.14. Whatever its cause, the reduction of risk in relation to al-Qaida terrorism in the United Kingdom is real and has been sustained for several years now. Ministers remain risk-averse – understandably so in view of the continued potential for

⁴⁴ The Times Square bomber Faisal Shahzad, when asked in court why he had planned an attack that would have killed random civilians, was reported as responding: “Well, the drone hits in Afghanistan and Iraq, they don't see children, they don't see anybody. They kill women, children, they kill everybody. It's a war, and in war, they kill people. They're killing all Muslims.” He also referred, more conventionally, to the invasions of Afghanistan and Iraq. See report in *The Observer*, 19 September 2010.

⁴⁵ See R. Clarke and R. Knake, *Cyber War* (CCC, 2010).

⁴⁶ Home Affairs Select Committee, *Roots of violent radicalisation* HC 1446, February 2012, Conclusions para 1.

mass casualties to be caused by suicide attacks, launched without warning and with the express purpose of killing civilians. It must be recognised however that zero risk is an unattainable goal, and that measures restrictive of liberties must be proportionate to the existing threat. Since 2010 we have already seen a modest “*correction in favour of liberty*” in the areas of pre-charge detention, stop and search, the replacement of control orders and a change to the thresholds for terrorist asset-freezing. I recommended in my last year’s reports a further rebalancing in relation to two further aspects of TA 2000: the proscription of organisations, and the power to stop and examine at ports. This debate as to the necessary scope of our counter-terrorism laws is necessary, as is the concomitant debate over security structures and organisation. It is right that those debates should recommence after the Olympics.

Northern Ireland related terrorism

- 2.15. My previous annual report (at 2.15-2.17) cited some of the figures relating to the “*Troubles*” which resulted in more than 3,500 deaths (most of them in Northern Ireland but over 90 in England) in the 30 years prior to the signing of the Belfast (“Good Friday”) Agreement in April 1998. In the early 1970s, when the temporary precursors to the current counter-terrorism legislation were first put on the statute book, over 200 people were being killed every year as a result of the security situation. There were over 50 deaths in each of 1994 and 1998, though by that stage these were exceptionally high totals.
- 2.16. The current terrorist problem in Northern Ireland is on a tiny scale by those standards. Of the 49 deaths attributed to the security situation in the 10 years to March 2012, largely attributable to dissident republican groups, only 10 were in the second half of that period. There was one terrorist murder in 2011: PC Ronan Kerr, a Catholic police officer killed in April by a booby-trap bomb placed underneath his car at his home in Omagh. As noted in an open-source report published by the Community Relations Council in Belfast and supported by the Joseph Rowntree Foundation: “*the number of security-related casualties for the whole of 2011 (1 death, 80 injuries) equates to less than two days of the violence in the peak year of 1972.*”⁴⁷
- 2.17. Though Northern Ireland dissident republicans and al-Qaida related terrorists have killed similar numbers in the UK in the past 10 years, the nature of the threats that they pose is radically different. Thus :
- (a) NIRT is directed largely towards national security targets, with a view to provoking a repressive response. It has not mounted direct attacks on mass

⁴⁷ P. Nolan, *Northern Ireland Peace Monitoring Report No. 1*, February 2012, p. 46.

transport systems and has not sought in recent years to cause multiple deaths among the general public.⁴⁸

- (b) NIRT does not involve suicide operatives: but it often gives warnings of explosions and (for that reason) is able to use the weapon of hoax.⁴⁹
- (c) NIRT is locally based: it has few international connections (other than with the Republic of Ireland), sticks mainly to well-trying bomb-making technology and is more likely to communicate by word of mouth than by the internet.
- (d) Many dissident republican terrorists are in their 40s or 50s (though some are much younger and some much older): most al-Qaida inspired terrorists tend to be in their 20s and 30s.
- (e) NIRT is not self-standing but shades into both public disorder (which is sometimes used as a cloak for terrorist activity) and organised crime (which is often the main business of the terrorist, on the republican as well as the loyalist side, and where gang rivalry results in bombings and shootings which are not politically motivated).
- (f) The intimidation created by NIRT is the product of frequent violent incidents in particular areas, rather than the background threat of a major spectacular such as 9/11 or 7/7.

Dissident republicans are currently focused on Northern Ireland: the last attack in Great Britain was in 2001.

- 2.18. In his detailed review of the year to 31 July 2011, Robert Whalley CB, the Independent Reviewer of JS(NI)A 2007, noted that “[o]verall there was no lessening of the security threat” and that “in the view of some people it got worse”. He added that the formal assessment of the threat by MI5 was at “Severe”, the second highest in the tiered level of threats: that still remains the case.⁵⁰ Mr Whalley’s extensive contacts in Northern Ireland are detailed in his Fourth Report, and I have benefited from conducting a number of visits alongside him.⁵¹

⁴⁸ Tactics seem to have changed after the Omagh car bomb of 1998, which killed 29 people and injured more than 200 in a crowded shopping street, and for which its perpetrators the Real IRA were condemned by all sides.

⁴⁹ E.g. at the time of the Queen’s visit to Ireland in May 2011, when a hoax call succeeded in closing the Mall in London.

⁵⁰ Robert Whalley CB, *Report of the Independent Reviewer, Justice and Security (Northern Ireland) Act 2007, Fourth Report 2010-2011*, November 2011, paras 76-77.

⁵¹ In particular, visits in 2011 to the Justice Minister and Police Ombudsman, and in 2012 to the PSNI and Northern Ireland Policing Board [NIPB].

2.19. The latest security statistics show that in some respects (in particular bombing incidents, persons injured and detections of firearms and explosives), the situation in 2011/12 improved by comparison with the previous year.⁵²

	2010/11	2011/12
Persons killed	1	1
Shooting incidents	72	67
Bombing incidents	99	56
Paramilitary shooting casualties (all republican)	33	33
Paramilitary assault casualties (2/3 loyalist, 1/3 republican)	50	46
Firearms finds	86	176
Explosives finds (kg)	3	44

2.20. Classic dissident republican attacks, focused principally on police, remained widespread. The 26 attacks on national security targets⁵³ in 2011, all of them by dissident republicans, included not only the under-vehicle improvised explosive device [IED] that killed PSNI Constable Ronan Kerr but:

- (a) IEDs carried in vehicles and thrown at police officers;
- (b) devices left in or by a bank, police stations, a political party HQ and the City of Culture office in Derry/Londonderry;
- (c) pipe bombs and grenades thrown at police stations and police officers; and
- (d) shots fired at PSNI officers and at police vehicles.

One device was left at the home address of a doctor who works with the PSNI, and others at the home address of former and serving PSNI officers. Significant

⁵² Source: PSNI *Police Recorded Security Situation Statistics 2011/12*, 10 May 2012, Figure 1, Figure 2, Table 1, Table 2.

⁵³ A national security attack is one which, in the assessment of MI5, is designed to undermine the ability of the devolved administration, the judiciary and the security forces to maintain law and order and effective government in Northern Ireland: see further *Report of the Independent Reviewer, Justice and Security (Northern Ireland) Act 2007, Fourth Report 2010-11*, November 2011, para 153.

use was made of booby traps: police responding to a Belfast hoax call in April discovered a victim-operated IED in the immediate area, while two officers were injured by a device thrown at them when responding to an alarm call at business premises in Newtownabbey in September. Criticism of the speed of PSNI response to incidents likely to affect the public has to be seen against this background.⁵⁴

- 2.21. The current threat comes not from any unified organisation but from a variety of dissident republican terrorist groupings opposed to the political process. Most are affiliated to the Real Irish Republican Army [**RIRA**], the Continuity Irish Republican Army [**CIRA**] or Óglaigh na hÉireann [**ONH**] (Soldiers of Ireland). None has mainstream support in any part of the island for its objective of achieving a united Ireland outside the current political process, though that objective retains its allure for some, and no doubt always will. Other, unaffiliated individuals have been engaged in or have supported attacks.
- 2.22. It is encouraging that in 2011 the security forces were able to contain within its previous limits and even modestly to reduce the impact of the terrorist threat in Northern Ireland. That threat remains high by Western standards, however, and nobody I have spoken to on my five visits to Northern Ireland in 2011/12 believes that it is likely to diminish of its own accord. The community policing model championed by the Chief Constable may have helped improve popular perceptions of the PSNI: but the dissident republicans who perpetrate the great majority of the terrorist violence remain quick to exploit any weakness or inattention on the part of the devolved authorities (including the PSNI) and MI5.
- 2.23. One significant change to have taken place in 2011 was the winding up of the Independent Monitoring Commission [**IMC**], which since 2004 had produced the most detailed open-source accounts of the security situation in Northern Ireland. Though in compensation Ministers pledged to update Parliament every six months on the security situation, the first such update (of 27 February 2012) was brief. Valuable though the new annual reports of the Community Relations Council are,⁵⁵ they are not compiled on the basis of access to classified material.
- 2.24. In the context of recent political interest in national security arrangements and their governance, it is for consideration whether there is now a gap in relation to authoritative public commentary on the security situation, and if so how it should be filled.

⁵⁴ *Report of the Independent Reviewer, Justice and Security (Northern Ireland) Act 2007, Fourth Report 2010-11*, November 2011, para 66.

⁵⁵ P. Nolan, *Northern Ireland Peace Monitoring Report No. 1*, February 2012.

Other terrorism

- 2.25. The only other type of terrorism that in 2011 posed a credible risk to human life in the United Kingdom is far-right extremist terrorism. While there were no convictions for life-threatening incidents as there were in 2010,⁵⁶ and while it remains the case that those involved in extreme right-wing terrorism tend to be less organised and less ambitious than other types of terrorist,⁵⁷ the case of Anders Breivik in Norway, who claimed contact with and inspiration from extremists in England, demonstrates the potential for even a so-called “*lone wolf*” to cause very substantial numbers of deaths.
- 2.26. Some Muslims believe that there is a greater readiness on the part of press, politicians, police and law enforcement officers to characterise attacks by Muslims as “*terrorism*” than attacks by far-right extremists. This, they say, results in discriminatory sentencing and cements popular perceptions of terrorism, at least in Great Britain, as crime perpetrated overwhelmingly by Muslims.
- 2.27. I have not found evidence of such discrimination: and it would not be easy to devise a methodology that could detect it. However, the extreme breadth of the definition of “*terrorism*” in UK law, and its possible overlap with other crimes ranging from offences against the person to the stirring up of racial hatred, point up the need for vigilance in this area. Crimes may be associated with the “*T-word*” for no other reason than the organisational arrangements of the law enforcement bodies concerned.⁵⁸ Conversely, it may not always be evident why a crime was not treated as terrorism.
- 2.28. I intend to keep this issue under careful review over the year ahead.

Terrorism in context

- 2.29. It is often said that the threat from terrorism is over-estimated, and the resources devoted to countering it excessive. Thus:

⁵⁶ D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, 2.21-2.24.

⁵⁷ Though as I reported last year, Ian and Nicky Davison, members of the Aryan Strike Force, were convicted in 2010 and imprisoned for 10 and two years respectively for acts of terrorism and making a chemical weapon (ricin) capable of killing nine people, contrary to the Chemical Weapons Act 1996: *The Times* 15 May 2010, p. 31.

⁵⁸ Thus, of the nine cases highlighted on the Crown Prosecution Service [CPS] website under the rubric “*The Counter-Terrorism Division of the CPS – cases concluded in 2011*”, four did not concern terrorism at all, but religiously motivated offences against the person or incitement of racial hatred. Though the association of these cases with “*counter-terrorism*” may be considered inaccurate, it does not in itself constitute evidence of discrimination on the part of the CPS: the defendants to only one of the four cases (the attacks on religious studies teacher Gary Smith) was Muslim.

- (a) During the 21st century, terrorism has been an insignificant cause of mortality in the United Kingdom. The annualised average of five deaths caused by terrorism in England and Wales over this period compares with total accidental deaths in 2010 of 17,201, including 123 cyclists killed in traffic accidents, 102 personnel killed in Afghanistan, 29 people drowned in the bathtub and five killed by stings from hornets, wasps and bees.⁵⁹
- (b) It is also true that terrorism ranks much lower than it did among most people's list of worries: only 6% of UK citizens mentioned it in 2009 as one of the two most important issues facing the country at the moment, as against 34% when the same question was asked in 2005, the year of the London bombings.⁶⁰

On the other hand, in June 2011, only 64% of UK citizens believed that the country was doing enough to fight terrorism; and 57% thought that terrorism would increase as a threat to the internal security of the EU over the next three years, as opposed to only 8% who thought it would decrease.⁶¹

2.30. The threat of terrorism is, no doubt, sometimes exaggerated for political or commercial purposes. It is certainly a powerful rallying-cry for the flourishing security and surveillance industries.⁶² But the continued destruction wrought by terrorism around the world,⁶³ the type of conduct that continues to be exposed in the criminal courts⁶⁴ and the constant struggle against what remains of violent republicanism in Northern Ireland warn against complacency. It is sensible to acknowledge that even within the UK, terrorists if permitted to do so could inflict death, injury and fear on a much larger scale than they have succeeded in doing in recent years.

The counter-terrorism machine

2.31. The Government's strategy for protecting the United Kingdom and its interests overseas from al-Qaida inspired terrorism has since 2003 been CONTEST.

⁵⁹ Office for National Statistics, *Deaths registered in England and Wales in 2010, by cause*. It has been noted, in similar vein, that the average American is as likely to be crushed to death by household furniture as to be killed by a terrorist: M. Zenko and M. Cohen, *Clear and Present Safety: the United States is more secure than Washington thinks*, Foreign Affairs, March/April 2012.

⁶⁰ Eurobarometer surveys 64, 72. Other options included the economic situation, unemployment and the state of the public finances, as well as immigration and crime, though the bulk of the decline predated the credit crunch of 2008. The figure has not been published in recent years.

⁶¹ Special Eurobarometer 371 *Internal Security*, November 2011, QC 5b.2 and QC 4.2

⁶² See for example www.counterterroexpo.com, a London conference attended in 2012 by 400 exhibitors and more than 8,500 delegates, and featuring workshops whose subject matter ranged from CCTV and facilities protection to surveillance, thermal imaging and IED disposal.

⁶³ Numbers of terrorist-inflicted deaths and woundings by country and by region, as logged by "the US Government's knowledge bank on international terrorism", are listed in the annual terrorism reports of the NCTC: www.nctc.gov.

⁶⁴ As to 2011, see 10.27, below.

CONTEST has four strands: *Pursue* (to stop terrorist attacks); *Prevent* (to stop people from becoming terrorists or supporting violent extremism); *Protect* (to strengthen protection against terrorist attack) and *Prepare* (where an attack cannot be stopped, to mitigate its impact). That categorisation functions well. It has survived three revisions of CONTEST (the third published on 12 July 2011),⁶⁵ and inspired the equivalent EU strategy.⁶⁶ The Prevent strand was itself reviewed in June 2011. The subject-matter of this and my other reviews falls very largely within the Pursue strand, though in certain respects (e.g. the impact on communities of stop and search, and detention at ports and borders) it impacts also upon Prevent and Protect.

- 2.32. The United Kingdom's counter-terrorism resources have been transformed in scale and in organisational nature, not just since 2001 but in particular since 2005, when the 7/7 bombings and the failed attacks of 21/7 made it plain that United Kingdom targets were threatened at least as much by home-grown terrorists as by those from abroad; and that those home-grown terrorists were by no means confined to London.
- 2.33. At the heart of the Government's counter-terrorism effort is the Office for Security and Counter-Terrorism [**OSCT**], an executive directorate of the Home Office, which has direct responsibility for some aspects of counter-terrorist strategy and co-ordinates the activities of many Government Departments and agencies. OSCT was formed in 2007 to replace the Counter-Terrorism and Intelligence Directorate. Its staff of around 500 include a number with a background in the Foreign Office and security services.
- 2.34. Of the three security and intelligence agencies – the Security Service [**MI5**], Secret Intelligence Service [**MI6**] and the Government Communications Headquarters [**GCHQ**] – it is MI5 which is most directly responsible for protecting the United Kingdom from threats to national security, including terrorism.⁶⁷ Several hundred leads to terrorism and violent extremism relevant to the United Kingdom are received at Thames House, its London headquarters, every month. Those leads come from a variety of sources including the police, MI6, GCHQ, MI5 telephone intercepts, covert human intelligence sources [**CHIS**], members of the public and other countries. Those leads are prioritised, and the higher priority leads investigated using the capabilities of MI5, the police and other agencies.

⁶⁵ *CONTEST – The United Kingdom's Strategy for Countering Terrorism* Cm 8123, July 2011.

⁶⁶ The 2005 EU Counter-Terrorism Strategy is built around the same four strands, though with Respond substituted for Prepare.

⁶⁷ The "Tier One" risks to UK national security, taking account of both likelihood and impact, have been identified in the National Security Strategy as terrorism, cyber attacks, major accident or natural hazard (e.g. coastal flooding) and an international military crisis between States: Cm 7953, October 2010.

- 2.35. The Joint Terrorism Analysis Centre [**JTAC**], based in Thames House, is the United Kingdom's centre for the analysis and assessment of international terrorism. It sets threat levels for international terrorism, independently of Ministers, and produces more in-depth reports on terrorist networks and capabilities. Since it was first published in August 2006, the threat level for international terrorism has generally stood at SEVERE (meaning that JTAC judged a terrorist attack to be highly likely). It was raised to CRITICAL, meaning that an attack was considered imminent, for periods of a few days in 2006 and 2007, immediately following the arrests in Operation Overt (the airline liquid bomb plot) and Operation Seagram (the London/Glasgow bomb plot).
- 2.36. The threat level was reduced to SUBSTANTIAL in June 2009, meaning that an attack is a strong possibility, before being raised again to SEVERE on 22 January 2010. There it remained until 11 July 2011, when it was once again reduced to SUBSTANTIAL.
- 2.37. Threat levels from Northern Ireland related terrorism, set by MI5, were published for the first time in September 2010. These threat levels were, and have remained, SEVERE for Northern Ireland and SUBSTANTIAL for Great Britain.
- 2.38. Most counter-terrorism policing in England and Wales is coordinated on a national basis, led by the Metropolitan Police Service [**MPS**], which historically had national responsibilities in this area. Within the MPS, counter-terrorism is the responsibility of SO15 Counter Terrorism Command, based at Scotland Yard and led by Assistant Commissioner Cressida Dick. Created in 2006, SO15 took over the roles of the former SO12 Special Branch and SO13 Anti-Terrorist Branch.
- 2.39. Subsequently, four regional counter-terrorism units [**CTUs**] were set up in the North East, North West, West Midlands and South East. These units accommodate detectives, community contact teams, financial investigators, intelligence analysts, hi-tech investigators ports officers and officers working closely with MI5. Each is run by a lead force (e.g. West Yorkshire Police in the North East) but is considered a regional and national asset. Counter-Terrorism Intelligence Units [**CTIUs**] are located in the other five Association of Chief Police Officers [**ACPO**] regions – Northern Ireland, Wales, South West, East Midlands and East of England – as well as in Scotland. These are also substantial operations, but focussed on intelligence rather than on the investigation of offences.
- 2.40. Collectively, SO15 and the CTUs and CTIUs in England and Wales are known as the Police National Counter-Terrorism Network – or “*the CT Network*”. The CT network is intended to be fully integrated and mutually supporting. Assets are moved around the country in support of the highest priority operations, as

directed by the Senior National Coordinator (Deputy Assistant Commissioner Stuart Osborne, an officer of the MPS). Close liaison is maintained with police forces in Scotland and with the PSNI, which are wholly responsible for counter-terrorism policing in Scotland and Northern Ireland respectively.

- 2.41. The increase in the United Kingdom's counter-terrorism capacity in recent years, at least in Great Britain, has been huge.
- 2.42. So far as policing is concerned, taking the figures supplied to me for England and Wales together with those for Scotland:
- (a) At the end of March 2012 there was a budgeted strength of some 8,500 personnel within the CT network, 6,500 of them police officers and 2,000 civilian members of staff. In addition, some 800 locally-funded Special Branch personnel assist in protecting national security and are in some areas managed and tasked by the regional CTU.
- (b) Government funding for counter-terrorism policing was around £582 million in 2011/12, very similar to 2010/11.
- 2.43. Though police numbers in Northern Ireland remain large by British standards (7,158 regular officers, as of April 2012),⁶⁸ this compares with some 13,000 when the PSNI was founded in 2001. Those involved in counter-terrorism work are not separately classified in the same way as in Great Britain. Policing (though not national security) was devolved in 2010: but the increase in terrorist activity since 2007, the drawdown in the military presence and the resources now being devoted to "*policing the past*" (including via 30 pending "*legacy inquests*" concerning 51 deaths), continue to place heavy demands on the PSNI.
- 2.44. So far as MI5, MI6 and GCHQ are concerned:⁶⁹
- (a) The consolidated Security and Intelligence Agencies budget is currently £2.1 billion: the division of that budget between agencies is not public information.
- (b) MI5 allocated 72% of its resources to "*International Counter-Terrorism*" [ICT] during 2010/11; a further 15% was and remains allocated to Northern Ireland.

⁶⁸ Source: NIO. Early in 2012 there was said to be one officer per 250 head of population in Northern Ireland, as against one per 300 in Scotland, one per 380 in England and one per 414 in Wales: P. Nolan, *Northern Ireland Peace Monitoring Report No. 1*, p. 57.

⁶⁹ See, generally, the Intelligence and Security Committee Annual Report 2010/11, section 4, updated where appropriate on instructions from the Agencies. Those curious to know more about the history of the intelligence agencies are referred to three informative books published in 2010: C. Andrew, *The Defence of the Realm: The Authorised History of MI5* (Penguin); R. Aldrich, *GCHQ* (Harper Press) and K. Jeffery, *MI6: The History of the Secret Intelligence Service, 1909-1949* (Bloomsbury).

- (c) MI6 allocated 36% of its resources to ICT in 2009/10, the latest period for which figures are publicly available, while GCHQ devoted about one third of its overall effort to counter-terrorism.
- (d) MI5 alone employed in 2011 some 3,800 people (up from below 2,000 in 2001), with the aim to increase this to just over 4,000 people in 2012/13. GCHQ employed some 5,700 permanent staff in 2011, and SIS some 2,700.
- 2.45. These figures of course take no account of the cost of counter-terrorism measures adopted by other public sector bodies or by the private sector.
- 2.46. The perception of a reducing terrorist threat (at least in Great Britain) has caused the reach of the counter-terrorism laws to be cautiously re-assessed in recent years, particularly since the arrival of the Coalition Government. A matching re-assessment of the structure of counter-terrorism policing has been postponed until after the Olympics, but is likely to take place at some time thereafter. A central issue will be whether counter-terrorism policing should remain as a central/regional hybrid, with the MPS co-ordinating the efforts of CTUs and CTIUs across the country, or whether it should be taken into the new National Crime Agency, mooted (in a well-worn phrase) as a “*British FBI*”.
- 2.47. Important considerations in that debate are likely to include:
- (a) the need for efficient allocation of counter-terrorism resources, both geographically and in terms of the potential for officers trained in counter-terrorism to be deployed where necessary to other policing activities; and
 - (b) the continuing need for police officers involved in counter-terrorism enforcement – whether it be a raid on an East London house or a Schedule 7 stop at Birmingham Airport – to understand the implications of their actions for the communities most affected.

Though these issues fall outside my remit as Independent Reviewer, I shall watch the debate, and its outcome, with interest.

The Olympic Games

- 2.48. While there has been some legislative activity in preparation for the Olympic and Paralympic Games,⁷⁰ there has been no attempt to supplement the already formidable battery of counter-terrorism powers. The police, intelligence agencies and the Olympic Security Directorate in the Home Office have made extensive preparations, on which I have been briefed from time to time, for a possible

⁷⁰ In particular, the creation of a Prohibited Zone and a Restricted Zone over London’s airspace, the extension of Portland Harbour and a Legislative Reform Order to allow a Muster, Briefing and Deployment Centre to be built on Wanstead Flats.

terrorist attack during the Games. These include what the Director General of MI5 and the Chief of MI6 have described, respectively, as “*a large diversion of resource from other things into the Olympics*” and “*a surge on [counter-terrorism work] in the six to nine months running up to the Olympics*”.⁷¹

- 2.49. Policing priorities may legitimately change as the Games approach, particularly if the anticipated increase in intelligence leads materialises. Whatever the operational pressures, however, it is not acceptable for counter-terrorism powers to be used for purposes other than those for which they are granted. I warned against this possibility in my first report as Independent Reviewer, concerning the supposed plot to kill the Pope during his visit to London in 2010,⁷² and will if necessary investigate further specific incidents in future annual or “*snapshot*” reports.

⁷¹ Oral evidence reported in the Intelligence Services Committee Annual Report 2010-2011, paras 95 and 115. The high level of demand on police and MI5 resources in the period leading up to the Olympic Games was even adduced as a reason for refusing bail in the case of Abu Qatada: *Mohammed Othman v SSHD*, SIAC (Mitling J), 28 May 2012 at [11].

⁷² D. Anderson, *Operation GIRD – report following review*, May 2011.

3. THE DEFINITION OF TERRORISM (TA 2000 PART I)

Law

- 3.1. Section 1 of TA 2000, as amended by TA 2006 and CTA 2008, defines terrorism. That definition is of central importance. It contributes to the definition of a number of offences, and forms the trigger for a number of powers including proscription, stop and search, arrest, the freezing of assets and TPIMs. The definition of terrorism was the subject of a detailed report by Lord Carlile in 2007.⁷³
- 3.2. The TA 2000 definition is far more complex than its predecessor,⁷⁴ and notable for its breadth. Thus:
- (a) The use or threat of action may constitute terrorism when it involves not only serious violence against a person or the endangering of human life, but the creation of a serious risk to health and safety, or serious damage to property.
 - (b) Where firearms or explosives are used or threatened, the only mental element required for terrorism is that the use or threat of use be made for the purposes of advancing a political, religious, racial or ideological cause.
 - (c) In other cases, a further mental element is also required: that the use of threat be designed to *influence* the government (or an international governmental organisation), or to *intimidate* the public or a section of the public.
 - (d) An action or threat of action may constitute terrorism even if it is taken outside the United Kingdom, directed to non-UK targets and designed to influence a foreign government (including a non-democratic government)⁷⁵ or intimidate the public in another country.
 - (e) Actions may constitute terrorism even when they might otherwise constitute lawful hostilities under international humanitarian law (e.g. acts of violent rebellion against oppressive governments, even where targeting only military objectives and minimising civilian casualties).⁷⁶

⁷³ *The Definition of Terrorism*, Cm 7052, March 2007. That report was preceded by a public call for papers and a week-long travelling seminar with sessions in Belfast, Cardiff, Glasgow, Nottingham and London.

⁷⁴ Terrorism was defined in the Prevention of Terrorism (Temporary Provisions) Act 1989 as “... *the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public into fear*”.

⁷⁵ *R v F* [2007] QB 960.

⁷⁶ As recently confirmed by the Court of Appeal in *R v Mohammed Gul* [2012] EWCA Crim 280.

3.3. While this is not the place for a full comparative analysis, the UK's definition is at least broadly in line with international norms as expressed in:

- (a) the EU definition of 2002,⁷⁷ as to which it has been held that "*The common ground between the two instruments is far greater than the differences*,"⁷⁸
- (b) the working definition of terrorism set out in UN Security Council Resolution 1566 (2004);⁷⁹
- (c) the model definition of terrorism suggested in 2010 by Martin Scheinin, UN Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism.⁸⁰

3.4. In the words of the Special Immigration Appeal Tribunal:

"[W]e doubt that any international organisation or reputable commentator would disagree with a definition of terrorism which had at its heart the use or threat of serious or life threatening violence against the person and/or serious violence against property, including economic infrastructure, with the aim of intimidating a population or influencing a government, except when carried out as a lawful act of war."⁸¹

The UK definition is broader than each of those in that it can catch conduct intended to *influence* (as opposed to *intimidate*) Governments;⁸² but it is potentially narrower in that save where firearms and explosives are concerned, there is an additional requirement of political, religious, racial or ideological cause.⁸³

3.5. The most striking feature of the TA 2000 definition is the fact that terrorist action is "*equally criminal whether it is intended to take place in the UK or elsewhere*".⁸⁴ This far exceeds the limited extraterritorial effect required by the EU Framework

⁷⁷ Council Framework Decision of 13 June 2002, 2002/475/JHA, OJ L164/3, 22.6.2002.

⁷⁸ *SS v SSHD* (SC/56/2009, 30 July 2010, SIAC (Mitling J), para 15). This has not prevented the EU Commission from suggesting that the UK failed properly to implement the Framework Decision: Second Evaluation Report COM (2007) 681 final. For the status of a Framework Decision in UK law, see now *Assange v Swedish Prosecution Authority* [2012] UKSC 22, per Lord Mance at [201]-[218].

⁷⁹ Resolution 1373(2001) directed states to criminalise terrorism, without defining it. Resolution 1566 provides useful guidance, but does not oblige states to conform their anti-terrorism legislation to its definition.

⁸⁰ Human Rights Council, 16th session, A/HRC/16/51, 22 December 2010.

⁸¹ *S v SSHD* (SC/56/2009), per Mitling J at [16]. The exception for lawful acts of war is however not to be considered part of UK law: see 3.9-3.13, below.

⁸² Lord Carlile's recommendation that this should be changed (*The Definition of Terrorism* (2007), para 86(11)) was not taken up.

⁸³ The Australian Security Legislation Amendment (Terrorism) Act 2002 is to similar effect. "*Racial*" was added to the list on the recommendation of Lord Carlile: *ibid.*, para 86(12).

⁸⁴ Government reply to Lord Carlile's Report on the Definition of Terrorism, June 2007, Cm 7058, para 13.

Decision,⁸⁵ and by the 16 international conventions and protocols that were concluded between 1963 and 2005 to address specific activities linked to terrorism.⁸⁶ The effect is to extend the label of terrorism to violent actions directed against any regime in the world, however unsavoury or opposed to UK interests that regime may be, and however praiseworthy the objective of the “terrorists” may appear.

Practice

3.6. It is hard to disagree with the words of Lord Lloyd, echoed by Lord Carlile, that “*there are great difficulties in finding a satisfactory definition*” and that “*I suspect none of us will succeed.*”⁸⁷ When Parliament eventually revisits the definition of terrorism, it will no doubt do so in the light of evolving state practice in relation to the definition of terrorism and of the international crime of terrorism (or the crime of international terrorism),⁸⁸ as well as experience with the operation of the TA 2000 definition.

3.7. So far as that experience is concerned, I would offer the following remarks based on the operation of the Terrorism Acts which it is my statutory function to observe:

(a) The broad definition of terrorism in TA 2000 leaves very considerable discretion to the police. For example:

- The power to arrest under TA 2000 section 41 and to hold for extended periods of detention prior to charge can in principle be used against anyone who, it is suspected, is or has been concerned in the commission, preparation or instigation of acts of terrorism, without geographical limitation and whether before or after the passing of TA

⁸⁵ Article 9 of the Framework Decision requires EU Member States to establish jurisdiction over offences committed in their territory or on board their vessels or aircraft, by their nationals or residents, for the benefit of a legal person established in their territory or against the institutions or people of that state or the EU.

⁸⁶ These instruments require states to suppress various activities including terrorist financing, aircraft hijacking, hostage taking, unlawful acts against the safety of maritime navigation and civil aviation, the theft of nuclear material, the use of plastic explosives, attacks on diplomats, nuclear terrorism and terrorist bombings. For an overview of the 16 instruments, see <http://www.un.org/en/sc/ctc/laws.html>. For the scope of mandatory and discretionary extraterritorial effect under these instruments, see, e.g., International Convention for the Suppression of Terrorist Bombings 1998, Article 6.

⁸⁷ Lord Carlile, *The Definition of Terrorism* (2007), para 10, citing Lord Lloyd in the debate on what became the Terrorism Act 2000.

⁸⁸ As the Court of Appeal noted in *R v Mohammed Gul* [2012] EWCA Crim 280 at [33], this was given a clear exposition in the judgment of the Appeals Chamber of the Special Tribunal for Lebanon: *Interlocutory Decision on the Applicable Law: Terrorism, Homicide, Conspiracy, Perpetration, Cumulative Charging* (16 February 2011).

2000. Legitimately elected political figures across the world (and in the UK) could quite lawfully be arrested under this power.⁸⁹

- The power to stop, question and detain at ports and airports under Schedule 7 para 2, similarly, may be exercised in order to determine whether a traveller has ever been a “*terrorist*” in any country in the world. This renders the power in effect universal in its scope.
- (b) The broad definition of terrorism leaves an equally large discretion to prosecutors, mitigated only by the requirement of the Attorney General’s consent to a prosecution of an offence committed outside the UK, or for a purpose wholly or partly connected with the affairs of a country outside the UK,⁹⁰ and by the apparent unwillingness of juries to convict those whom they perceive as freedom-fighters against distant and unsavoury regimes.
- (c) It affords a large discretion also to the Home Secretary and to the Treasury, in determining which organisations in the world should be proscribed under TA 2000 Part II, and which individuals and organisations in the world should have their assets frozen under TFA 2010.⁹¹
- (d) There is always a risk that strong powers could be used for purposes other than the suppression of terrorism as it is generally understood. The obvious example, remarked upon in my last annual report, would be the proscribing of an obscure separatist organisation as an act of friendship to a friendly but repressive foreign government. More generally, the broad scope of the counter-terrorism legislation may serve to encourage police in the belief, and public in the acceptance, that it can be used against anyone and at any time.

Possible changes

- 3.8. I see no justification for **expanding the definition of terrorism**. The decision of the Government’s Counter-Terrorism and Security Powers Review in January 2011 not to expand the definition of terrorism so as to secure the proscription of organisations which are not involved in terrorism but which incite hatred or violence not falling with the current definition of terrorism⁹² is one with which I unhesitatingly agree. To categorise the incitement of religious hatred as “*terrorism*”, and to visit it with the full weight of sanctions applicable to terrorist crimes (stop and search powers, extended detention, financial sanctions, control

⁸⁹ Subject to Police Reform and Social Responsibility Act 2011 section 153.

⁹⁰ Section 117(2A) TA 2000, expanded in response to a recommendation of Lord Carlile. Consent was given under this section for three prosecutions in 2011, together with 19 under TA 2006.

⁹¹ The temptation is more obvious where proscription is concerned, there being no statutory “*necessity test*” to satisfy: see chapter 4, below.

⁹² *Review of Counter-Terrorism and Security Powers* Cm 8004, January 2011, p. 31.

orders/TPIMs) would have been heavy-handed and almost certainly counter-productive as a solution to the problem.

- 3.9. In one specific respect at least, there may be a case **for shrinking the definition of terrorism**. As presently drafted, the definition is so broad as to criminalise certain acts carried out overseas that constitute lawful hostilities under international humanitarian law. Examples include UN-sanctioned use of force and acts of violent rebellion against oppressive governments, even where such acts target only military objectives and minimise civilian casualties. The broad criminalisation could have implications also for extradition, given that by UNSCR 1373 (2001) para 3(g), claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists.
- 3.10. The issue of whether combatants in an armed conflict are also terrorists arose recently in *R v Mohammed Gul*.⁹³ The defendant, then a law student, had posted videos on YouTube showing attacks on military targets, including allied forces in Iraq and Afghanistan. The jury asked whether “*an explosives attack on Coalition forces in Iraq is a terrorist attack*”. The defendant contended, on the basis of apparently helpful comments made in immigration cases, that military action directed against the armed forces of a government does not constitute terrorism.⁹⁴ The Court of Appeal after full argument disagreed, holding at [60] that:
- “Those who attacked the military forces of a government or the Coalition forces in Afghanistan or Iraq with the requisite intention set out in the Act are terrorists. There is nothing in international law which either compels or persuades us to read down the clear terms of the 2000 Act to exempt such persons from the definition in the Act.”
- 3.11. The Government might be reluctant to surrender the right to treat its opponents in foreign theatres of war (or even students who post videos of their exploits) as terrorists. The issue is however of broader relevance, since the current law allows members of any nationalist or separatist group to be turned into terrorists by virtue of their participation in a lawful armed conflict, however great the provocation and however odious the regime which they have attacked.⁹⁵
- 3.12. As is apparent from the judgment in *R v Mohammed Gul*, other definitions of terrorism choose to exclude activities sanctioned by international law from the reach of terrorist activity. The Canadian Criminal Code, for example, states that terrorist activity

⁹³ [2012] EWCA Crim 280.

⁹⁴ *KJ (Sri Lanka) v SSHD* [2009] EWCA Civ 292, per Stanley Burnton LJ at [34]; *SSHD v D* [2010] EWCA Civ 1407, per Pill LJ at [55]: “*it is difficult to hold that every act of violence in a civil war, the aim of which will usually be to overthrow a legitimate government, is an act of terrorism within the 2000 Act.*”

⁹⁵ See 4.50, below.

“does not include an act or omission that is permitted during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict.”⁹⁶

There is a similar provision in South African law,⁹⁷ though not in Australian law.⁹⁸

- 3.13. These are deep legal waters, and I express no view on the question of policy. The Supreme Court has given the defence permission to appeal on the following point of law of general public importance:

“Does the definition of terrorism in section 1 of the Terrorism Act 2000 operate so as to include within its scope any or all military attacks by a non-state armed group against any or all state or inter-governmental organisation (“IGO”) armed forces in the context of a non-international armed conflict?”

I shall follow the case with interest, and keep the issue under review.

⁹⁶ See *Khawaja* [2010] ONCA 862, cited in *R v Mohammed Gul* [39(3)].

⁹⁷ Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004, cited in *R v Mohammed Gul* [39(4)].

⁹⁸ Australian Criminal Code Act 1995, cited in *R v Mohammed Gul* [40(1)].

4. PROSCRIBED ORGANISATIONS (TA 2000 PART II)

Law

- 4.1. The Secretary of State may proscribe an organisation under TA 2000 section 3 if she believes that it is “*concerned in terrorism*”, a phrase that by section 3(5) encompasses not only the commission of or participation in terrorist acts, but preparation for terrorism and the promotion or encouragement of terrorism. Subsections inserted by the TA 2006 add that promotion and encouragement is to include glorification, though only if such glorification is unlawful in the sense that it encourages emulation of the conduct or type of conduct that is being praised or celebrated. Proscription is effected by an order laid before Parliament, without any requirement of prior or indeed subsequent judicial involvement.
- 4.2. Proscription is one of a trio of executive powers in the counter-terrorism field, the others being asset-freezing under TAFE 2010 and Terrorist Prevention and Investigation Measures under TPIMA 2011.⁹⁹ Executive powers require particularly careful scrutiny, since they allow the Government to restrict the freedoms of the individual either directly (as with TPIMs) or indirectly (as with the proscription of groups) without the substantive intervention of an independent court. In the case of TPIMs subsequent legal scrutiny is automatic, if not always prompt.¹⁰⁰ In contrast, legal challenge is not automatic in the case of asset-freezing and proscription measures. Challenges are rarely brought in asset-freezing cases (save in the minority of cases in which the target of the freeze is at liberty in the UK) and almost never in proscription cases.
- 4.3. The conditions that the executive must satisfy before proscribing an organisation are more easily satisfied in some respects than is the case for either asset-freezing or TPIMs. Thus:
- (a) Only a single statutory threshold must be surmounted before an organisation may be proscribed: belief by the Secretary of State that an organisation *is concerned* in terrorism (TA 2000 section 3(4)). This contrasts with the double threshold under both TAFE 2010 and TPIMA 2011, by which the Secretary of State must believe that the person concerned *is or has been* involved in terrorist activity (a lesser hurdle, because past involvement will be sufficient to satisfy it) but also that the measure is *necessary* for purposes

⁹⁹ These orders were the subject of my last two detailed reports, published in December 2011 and March 2012 respectively and available for download from my website (fn 1).

¹⁰⁰ D. Anderson, *Control Orders in 2011*, March 2012, 3.78-3.81.

connected with protecting the public from terrorism.¹⁰¹ The second statutory threshold has no equivalent where proscription is concerned.

- (b) Proscription, once imposed, lasts indefinitely. There is no two-year limit (as in the case of TPIMs), nor even an obligation to renew proscriptions annually (as in the case of asset-freezing) or every two years (as is the case with the equivalent Australian and Canadian proscription laws).¹⁰²

4.4. The consequence is to leave an extraordinarily wide discretion with the Home Secretary. Any group anywhere in the world that is believed to be concerned in terrorism is in principle liable to be proscribed. That is so, regardless of whether:

- (a) the regime is friendly or otherwise;
- (b) the organisation poses a serious threat to life or limb;
- (c) there is any risk to UK nationals, at home or abroad;
- (d) proscription is likely to be effective in reducing the threat;
- (e) a less restrictive measure might have been equally effective.

4.5. The phrase “*concerned in terrorism*” is defined in TA 2000 section 3(5)-(5C), as interpreted by the Court of Appeal in the *PMOI* case. To commit or participate in acts of terrorism, prepare for terrorism or promote or encourage terrorism, including by glorification (sections 3(5)(a)-(c)), “*current, active steps*” are required.¹⁰³ To be “*otherwise concerned in terrorism*” (section 3(5)(d)), an organisation may be currently inactive but must retain its military capacity for the purpose of carrying out terrorist activity.¹⁰⁴ Thus:

“.. an organisation that has no capacity to carry on terrorist activities and is taking no steps to acquire such capacity or otherwise to promote or encourage terrorist activities cannot be said to be ‘*concerned in terrorism*’ simply because its leaders have the contingent intention to resort to terrorism in the future.”¹⁰⁵

¹⁰¹ TAFE 2010 sections 2 and 6; TPIMA 2011 section 3(3)(4).

¹⁰² These and other comparisons are discussed by C. Walker, *Terrorism and the Law* (OUP 2011) at 8.50-8.75, and in Professor Walker’s evidence to the Home Affairs Select Committee (Roots of violent radicalisation, HC 1446, February 2012).

¹⁰³ *SSHD v Lord Alton of Liverpool* [2008] EWCA Civ 443, [31] (citing POAC at [124]), [35].

¹⁰⁴ Compare the equivalent US test, which requires that the organisation must “*engage in terrorist activity*” or “*retain the capability and intent to engage in terrorist activity or terrorism*”: <http://www.state.gov/j/ct/rls/crt/2010/170264.htm>.

¹⁰⁵ *SSHD v Lord Alton of Liverpool* [2008] EWCA Civ 443, [36]-[37].

The legislation “*is aimed against organisations that are carrying on activities connected with terrorism*”.¹⁰⁶

- 4.6. In cases where the statutory test is satisfied, the Secretary of State exercises her discretion over whether or not to proscribe by reference to five factors. Those are:
- (a) the nature and scale of the organisation’s activities;
 - (b) the specific threat that it poses to the United Kingdom;
 - (c) the specific threat that it poses to British nationals overseas;
 - (d) the extent of the organisation’s presence in the United Kingdom; and
 - (e) the need to support other members of the international community in the global fight against terrorism.¹⁰⁷
- 4.7. The presence of the adjective “*specific*” as part of the second and third discretionary factors is important. It suggests that those factors are not engaged by, e.g., a generalised threat to western targets, or a risk that passing British nationals might be caught up incidentally in an attack on a foreign government target.
- 4.8. Professor Clive Walker, in his written evidence to the Home Affairs Select Committee in 2011, suggested that these factors could be refined by:
- (a) requiring the threats referred to in 4.6(b) and (c) to be active as well as specific;
 - (b) referring under 4.6(d) to the organisation’s cohesion and capabilities as well as its presence; and
 - (c) recasting 4.6(e) in terms of the need for direct practical support.

I return to this subject under Recommendations at 4.64, below.

- 4.9. Proscribed organisations are listed at Schedule 2 to TA 2000. The appearance of an organisation on that list is a trigger for certain criminal offences under sections 11-13 TA 2000, notably support for a proscribed organisation, which carries a maximum sentence of 10 years, active membership (2 years) and uniform offences (6 months). The financial resources of the organisation become terrorist property for the purposes, of Part III TA 2000, and an investigation of those resources is a terrorist investigation for the purposes of Part IV. Proscription by the United Kingdom may also form the basis for listing by the EU.

¹⁰⁶ *Ibid*, para 38.

¹⁰⁷ Hansard HL vol. 613 col. 252 (16 May 2000), Lord Bassam.

- 4.10. The great majority of terrorism offences, and of counter-terrorism powers, may however be triggered without the need to prove any connection to a proscribed organisation. This reflects the difficulties in proving membership of proscribed organisations and – more fundamentally – the fact that terrorist cells and “*lone wolves*” alike can and do operate without being members of any defined organisation, let alone one which has been identified and proscribed under TA 2000.¹⁰⁸
- 4.11. Where a proscribed organisation operates under a name other than that specified in Schedule 2, the Secretary of State may order under TA 2000 section 3(6) that the name be treated as another name for the listed organisation. Even where this has not happened, liability may be established by proof that a differently-named organisation is the same as an organisation listed in Schedule 2.¹⁰⁹
- 4.12. Proscription issues are considered by the Proscription Review and Recommendation Group [**PPRG**] and the Proscription Working Group [**PWG**]. I attended meetings of both groups during 2011. Each is chaired by OSCT. The PPRG is attended principally by representatives from the Home Office, Foreign Office and JTAC. It reviews the status of the proscribed groups, on the basis of a review produced by JTAC, ensuring that each group is reviewed at least once in each year. It also ensures that the necessary evidence exists for the proscription of new groups to be considered. The PWG is a more senior group, attended in addition by representatives from police, the security and intelligence agencies, Cabinet Office and a range of Government departments. It makes recommendations to the Home Secretary as to which groups should be proscribed or deproscribed.
- 4.13. Parliament must agree to the proscription of any new organisation by approving the affirmative order adding the organisation to the list of proscribed organisations. Parliament does not have access to the classified material relied upon by JTAC, and has never withheld its approval.
- 4.14. A proscribed organisation, or any person affected by its proscription, may apply to the Secretary of State for deproscription.¹¹⁰ If the application is rejected, an appeal may be brought to the Proscribed Organisations Appeal Commission [**POAC**], a superior court of record whose chair must hold, or have held, high judicial office.¹¹¹ POAC is tasked with determining appeals in accordance with judicial review

¹⁰⁸ An analysis of the 133 individuals who were convicted for “*Islamism-related terrorism offences*” in the UK between 1999 and 2010 concluded that 66% of the offenders had no direct link to any organisations currently proscribed by the UK Government: Robin Simcox, Hannah Stuart and Houriya Ahmed, *Islamist Terrorism – the British Connections*, 2nd edn 2011.

¹⁰⁹ TA 2000 section 3(9):

¹¹⁰ TA 2000 section 4; The Proscribed Organisations (Applications for Deproscription) Regulations 2001, SI 2001 No. 107.

¹¹¹ TA 2000, section 5 and Schedule 3.

principles, though in practice it conducts “*intense and detailed scrutiny*” of the facts.¹¹² It can sit in closed session and appoint special advocates for the purposes of dealing with secret evidence. From POAC, a further appeal on questions of law lies, by permission, to the Court of Appeal or Court of Session.¹¹³

Practice

Proscription

- 4.15. The process of proscription is a convenient one for the executive. Subject only to the assent of Parliament and to consideration of the five discretionary factors set out at 4.6 above, the Secretary of State may proscribe an organisation on the basis of nothing more than a belief that it is, in the broadest possible sense, concerned in terrorism. Neither before nor after the addition of an organisation to Schedule 2 is she required to satisfy a court that it *is* concerned in terrorism. The only legal constraint she faces is the possibility that a proscribed organisation may subsequently seek to discharge the burden of persuading POAC that her decision was flawed on public law grounds.
- 4.16. 61 terrorist organisations were proscribed under TA 2000 at the end of 2011 – a list which has so far remained unchanged in 2012. Of those:
- (a) 14 are terrorist organisations connected to Northern Ireland: their proscription is the responsibility of the Secretary of State for Northern Ireland. Each of those groups was originally proscribed under legislation predating TA 2000. The list of proscribed organisations connected to Northern Ireland, which includes the Irish Republican Army, Irish National Liberation Army, Ulster Volunteer Force and Ulster Defence Association, has not changed since TA 2000 came into force. That list is significantly longer than the comparable list of “*specified organisations*”, whose members are not eligible for early release from prison because the organisations are concerned in terrorism connected with the affairs of Northern Ireland and have not entered into a ceasefire.¹¹⁴
 - (b) 47 are international terrorist organisations. 40 were placed on Schedule 2 between 2001 and 2005. Eight have been added since, including one in 2010 and one in 2011. One organisation (PMOI, the People’s Mujahideen of Iran) was deproscribed in 2008 after appeal to POAC.

¹¹² *SSHD v Lord Alton of Liverpool* [2008] EWCA Civ 443, [43].

¹¹³ TA 2000, section 6.

¹¹⁴ The Northern Ireland (Sentences) Act (Specified Organisations) Order 2008, SI 2008 No. 1975, lists only six such organisations. While the list was designed for a different purpose (*R v Z (A-G for NI’s Reference)* [2005] 2 AC 645, per Lord Bingham at [22]), the discrepancy is striking.

- (c) None are concerned with other forms of terrorism, for example domestic far-right extremist terrorism. I believe this to be the result not of oversight but of careful consideration: but the issue is a sensitive one in Muslim communities, and I echo the concern of the Home Affairs Select Committee¹¹⁵ that the proscription of such groups should be actively considered, if they meet the statutory threshold. It is important – particularly after the proscription of domestic Islamist groups such as al-Muhajiroun and its other appellations – that the law in this area should not be applied or seen to be applied in a discriminatory manner. I return to this under Recommendations at 4.62, below.

4.17. There were two developments in 2011 on the proscription front:

- (a) Tehrik-e-Taliban Pakistan, which has carried out a large number of mass casualty attacks in Pakistan and Afghanistan since 2007, was proscribed in January 2011.¹¹⁶
- (b) Muslims against Crusades was ordered in November 2011 to be considered an alternative name for al-Ghurabaa and the Saved Sect, each of which had been proscribed in 2006. This followed similar orders in January 2010 in respect of Al-Muhajiroun (the original organisation founded in the United Kingdom by Omar Bakri Mohammed, whose re-founding was announced by Anjem Choudhary in 2009), Islam4UK and three other appellations.

4.18. In both cases (as is the invariable practice where new organisations or appellations are proposed for proscription), counsel's advice was taken on whether the statutory threshold is met and on which of the discretionary factors are satisfied. No attempt has been made by either group to apply for deproscription.

4.19. The Home Affairs Select Committee considered the issue of proscription as part of its report of January 2012 on the roots of violent radicalisation.¹¹⁷ Having taken evidence in relation to Hizb ut-Tahrir in particular, it endorsed the Government's decision in its Review of Counter-Terrorism and Security Powers not to amend the law on proscription in a way which would allow groups currently operating within the law to be banned.¹¹⁸

¹¹⁵ *Roots of violent radicalisation* HC 1446, February 2012, para 88.

¹¹⁶ For the parliamentary debates, see Hansard (HL) 19 January 2011 col. 603ff; Hansard (HC) 20 January 2011 HC col. 963ff.

¹¹⁷ *Roots of violent radicalisation*, HC 1446, February 2012.

¹¹⁸ Report, para 87. I expressed the same conclusion in my last annual report: *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, paras 4.20-4.21.

Prosecutions

- 4.20. The full extent to which TA 2000 sections 11-13 are used in Great Britain is regrettably unknown, since statistics are kept only in relation to the “*principal offence*” charged.¹¹⁹ In Great Britain, offences under these sections were charged as the principal offence in 30 cases between March 2001 and March 2011, with 15 convictions.¹²⁰ It is not known how often they were charged as subsidiary offences. They were not charged as a principal offence in the three years to March 2011. In December 2011, 24 people were arrested for proscription offences following a demonstration outside the US Embassy by Muslims against the Crusades. No charges followed.
- 4.21. The Crown has had difficulty in obtaining convictions in cases brought against members of nationalist separatist groups who pose no significant threat to the UK or UK interests, and who can be convincing in characterising their “*terrorism*” as a freedom struggle against violent and repressive regimes. Their evidence often wins the sympathy of juries and even – where convictions are entered and sentences are necessary – of judges.¹²¹
- 4.22. In Northern Ireland, offences under TA 2000 sections 11-13 were charged 101 times in the 10 years to March 2011 (whether as principal or subsidiary offences), some 30% of all charges under the Terrorism Acts.¹²² Three such charges were brought in 2010/11. More than 80% of such charges in Northern Ireland were for membership of a proscribed organisation.

Deproscription

- 4.23. TA 2000 makes no specific provision for deproscription, save on application by the organisation concerned or any “*person affected*” – a category accepted in the PMOI case to be broad enough to include parliamentary well-wishers. In addition, and implicit in the annual review of each organisation, is the possibility that deproscription might be ordered on the Government’s own initiative.
- 4.24. The treatment of deproscription applications has improved since the Court of Appeal recorded in the PMOI case that:

¹¹⁹ See 1.31(a), above.

¹²⁰ HOSB 15/11, 13 October 2011, tables 1.03(a); 1.11(a), citing a figure of 16 convictions since revised down.

¹²¹ See, e.g., various acquittals of Baluch and Tamil defendants, and the sentencing remarks of Saunders J in *R v Arunchalam Chrisanthakumar*, 12 June 2009 (Old Bailey). Describing his sentencing problem as “*one of the most difficult that I have ever had to face*” and the defendant as “*a thoroughly decent man, who deliberately broke the law in support of a cause he fervently believes in*”, he passed “*the very shortest [sentence] that I can*”, and expressed the hope that on release “*you can resume the humanitarian work that you undoubtedly do for Tamils in this country*”.

¹²² Northern Ireland Terrorism Legislation: Annual Statistics 20010/11, table 5a.

“the decision-making process in this case has signally fallen short of the standards which our public law sets and which those affected by public decisions have come to expect”.¹²³

I recorded my satisfaction with the handling of the most recent deproscription applications in my report of July 2011, while emphasising that this administrative procedure is no substitute for the independent scrutiny that can, if necessary, be brought to bear by POAC.¹²⁴

4.25. The essential facts about deproscription are that:

- (a) **No application for deproscription has ever been successful.** Eleven applications for deproscription were received between 2001 and 2011, the most recent in 2009. All were rejected, though one of those was appealed, successfully, to POAC in 2007.¹²⁵
- (b) **No organisation has yet been deproscribed on the initiative of the Government.** Own-initiative deproscription would no doubt carry political risks. However the caution of the Home Office may be compared to the willingness of the Treasury – assisted no doubt by the fact that asset freezes expire automatically every year unless renewed – not to renew restrictions on a number of well-known Northern Ireland and other organisations.¹²⁶

Accordingly, and notwithstanding the regular Government reviews of each organisation, the reality remains that the impetus for deproscription must come from the organisation itself (if still active), or its supporters; and that short of a full-dress appeal to POAC, a positive result is unlikely to be achieved.

The review process

4.26. I have been welcomed to meetings of both PPRG and PWG, in which new candidates for proscription are considered and existing proscriptions are subject to review. The most recent meeting I attended was of the PWG (the senior group) in April 2012. As an observer at those meetings I have witnessed deliberations of an extremely confidential nature and been shown all the documents provided to the participants, including the secret JTAC reports on the organisations in question. All

¹²³ *SSHD v Lord Alton of Liverpool* [2008] EWCA Civ 443, [57].

¹²⁴ D. Anderson, *Report on the operation in 2010 of TA 2001 and Part 1 of TA 2006*, July 2011, para 4.12.

¹²⁵ The case brought by Lord Alton of Liverpool and others on behalf of the People's Mujahideen Organisation of Iran, which POAC resolved in a 144-page open determination on 30 November 2007, available through <http://www.justice.gov.uk>. Permission to appeal was refused in a reasoned judgment of the Court of Appeal: [2008] EWCA Civ 443.

¹²⁶ D. Anderson, *First Report on the operation of TAFE 2010*, December 2011, paras 5.11, 5.27(a) and 6.14. 19 designations were allowed to lapse in March 2011, four of them because they were judged no longer to satisfy the statutory tests, and two in March 2012.

concerned have been frank and forthcoming in explaining the process and answering my questions.

- 4.27. The continued proscription of each group is revisited by both PPRG and PWG at least annually. Where circumstances are fluid (e.g. in the case of groups active in countries which are undergoing regime change as a consequence off the Arab Spring), review may be more frequent.
- 4.28. In contrast to the position where a new proscription is proposed, counsel's advice is not routinely taken in relation to the question of whether an organisation *continues* to satisfy the statutory test, or in relation to issues of discretion.
- 4.29. It is not my function to comment on the conclusions that were reached in individual cases. However, some general observations about the review process may be in order.

The statutory threshold

- 4.30. The first such observation relates to the statutory threshold: belief that an organisation is "*concerned in terrorism*". As to that:
- (a) Evidence is meticulously presented (and referenced to intelligence documents) on each of the ways in which that criterion may be made out: participation, preparation, promotion, encouragement and so on.
 - (b) In the great majority of cases, there is recent evidence from which it is not difficult to conclude that the statutory threshold has been met.
 - (c) In other cases, however, this is not so. There are some organisations on the list in respect of which no evidence exists of involvement in terrorism over at least five years, and in respect of which it is not possible to say that the capacity to carry on terrorist activities has been retained or is being sought.
 - (d) Such organisations are in practice not recommended for deproscription. Instead, they are classed as "*difficult cases*". The expectation appears to be that a solution will be found to such cases once options for change – including the modest recommendations in my own report of July 2011 – have been considered and decided upon.
- 4.31. The current practice regarding "*difficult cases*" is unsatisfactory. Some of them might better be described as "*easy cases*", for if it is concluded during the review process that the statutory threshold is no longer met, it is difficult to see how proscription can properly be maintained. I return to this issue under Recommendations at 4.63, below.

The discretionary factors

- 4.32. My second observation relates to the weighing of the discretionary factors. The meetings of PPRG and PWG that I have attended addressed themselves carefully and conscientiously to the existence or otherwise of the five discretionary factors set out at 4.6, above. I do not suggest that their recommendations, or the decisions of the Secretary of State, were improper or unlawful in any way. I do however consider it worth underlining what I consider the true legal significance of the discretionary factors to be, when performing an exercise such as this.
- 4.33. Where the discretionary factors are concerned, it should not (as I believe is well understood) be a question of ticking one or more of the five boxes and then declaring that the “*discretionary test*” is satisfied. That phrase is indeed best avoided, as liable to confuse.
- 4.34. The proper approach, as it seems to me, is a threefold one – with the second and third questions being reached only if the first has been answered in the affirmative. The questions are:
- (1) Is the statutory threshold (“*concerned in terrorism*”) met?
 - (2) Which of the five discretionary factors (nature and scale, threat to UK, threat to UK nationals overseas, presence in UK, need to support other members of the international community) are present, and to what degree?
 - (3) Bearing the whole picture in mind, including the discretionary factors that are *not* satisfied and the likely consequences of proscription for members of affected communities both inside and outside the UK, should the discretion be exercised in favour of proscription?
- 4.35. The third question is of vital importance. As my formulation of it suggests, decision-makers should have regard not only to the discretionary factors that *are* present but to those which are *not*.
- 4.36. They should have regard also to the likely effect on the rights and freedoms of those who may be affected by a decision to proscribe (or to maintain proscription in force). Consideration of such effects is already axiomatic in the case of those subject to TPIMs. The Treasury has accepted my recommendation that it should take place also in all asset-freezing cases.¹²⁷ I address this issue under Recommendations at 4.65, below.

¹²⁷ The Treasury’s Policy Statement on Designation, published in its response to my first report on the operation of TFA 2010 (Cm 8287, available for download from my website (fn 1)) states:

4.37. In most cases, proscription is likely to have less extreme effects on personal liberty than TPIMs or asset freezes. Where a group has at best tenuous connections with the UK, it is tempting to suppose that proscription will have few effects, save for the benefits that may flow from pleasing a foreign government that is more directly troubled by the group's activities. I have however been persuaded by contacts I have had over the course of the past 12 months that its effects may nonetheless be marked. I address this point at 4.41-4.47, below.

The fifth discretionary factor

4.38. My third observation relates to the fifth discretionary factor: "*solidarity with international partners in the global fight against terrorism*". My impression from PPRG and PWG meetings is that there is a fair number of cases in which this factor is decisive, or at least extremely influential. By no means all the proscribed organisations have attacked UK nationals or UK territory, or aspire to do so. Many are limited in their geographical range,¹²⁸ others are dormant or even possibly defunct.¹²⁹ Sometimes, the proscribing of such organisations is justified chiefly as a useful and inexpensive tool of foreign policy. It may be aimed at securing influence with the government of a country in which the organisation is active, or at demonstrating UK solidarity with an important ally. Conversely, it is sometimes feared that to *deproscribe* such an organisation might cause offence to a friendly country whose territory or whose nationals have been threatened by it in the past.

4.39. It is right (and unavoidable, given the very broad definition of terrorism in TA 2000) that groups in the latter category should in principle be liable to proscription. It is also right that "*the need to support the international community in the global fight against terrorism*" should be one of the factors to be considered in the decision whether to proscribe. There are however dangers in relying exclusively or mainly upon that factor. Proscribing a group for no other reason than to please the government of a country where it operates – or indeed to show solidarity with an important ally in the global war (or fight) against terrorism – may be a cheap and straightforward way of achieving foreign policy objectives. As shown by the examples given at 4.41-4.47 below, however, it may strengthen the ability of those governments to deal violently with separatist nationalist movements bearing little

"If both parts of the statutory test are met, the Treasury also considers whether an asset freeze is proportionate in each case, taking account of the impact on the person's business or private life, other restrictions that may be in place upon the person and whether any other counter-terrorism measure offers the same protection to the public as an asset freeze, balanced against the legislative objective of protecting members of the public from terrorism."

¹²⁸ E.g. the Abu Saayaf Group, which operates only in the southern Philippines, and the Basque Homeland Party (ETA).

¹²⁹ The US State Department's website does not record the Abu Nidal Organisation being suspected of having carried out any attack since 1991, or any attack on the west since the late 1980s.

relation to international terrorism as it is conventionally understood; and it may tend to criminalise not only the proscribed organisation but UK members of the community which it purports to represent.

- 4.40. These dangers could be reduced if the fifth discretionary factor were recast as suggested by Professor Clive Walker and in my Recommendations at 4.64, below.

The consequences of proscription

- 4.41. It is well established in law that the proscription of an organisation may impinge upon the freedoms of its members: in particular, the freedom of expression and of association that are guaranteed by the common law and by Articles 10 and 11 respectively of the ECHR.

- 4.42. Where the intentions of the organisation and its members are malign, there will normally be no difficulty in establishing a security case for proscription – even if it is based on the protection of some far distant population rather than the interests of the UK or UK nationals. What has however been suggested to me, in the particular context of ethnic separatist groups from communities with members in the UK, is that:

(a) proscription can cause ***collateral damage***, impinging upon the everyday life of persons who are not members of the proscribed organisation, but merely of the ethnic community from which the organisation derives its support, and hindering the collective life of that community; and that

(b) condemnation by the UK as a terrorist organisation can be of useful ***propaganda value***, both domestically and internationally, to governments which seek to repress the organisation in question or the population that it claims to represent, perhaps by violent and unsavoury means of their own.

- 4.43. Through the Campaign against the Criminalisation of Communities (CAMPACC), I have had the opportunity to discuss their experiences in detail with a range of representatives from London's Kurdish, Baluch and Tamil communities, in those communities or in my own office. They spoke to me about the effects on their lives and their communities of the proscription of three separatist groups without a record of violent activity in the United Kingdom: the PKK-Kongra Gel, the Baluchistan Liberation Army and the LTTE (Tamil Tigers).

- 4.44. I am well aware of the allegations of politically-motivated violence that have been levelled against those groups, some of them undoubtedly well-founded, and do not suggest that any of them is wrongly proscribed. It is not the function of the Independent Reviewer to second-guess the decisions of the Secretary of State on specific cases. The relevance of the conversations I have had was, rather, to

explain the effects of the proscription of ethnically-based separatist groups on the lives of individuals and communities who share the ethnicity and the political aspirations (though not the violent methods) of such groups.

4.45. So far as **collateral damage** is concerned, all three communities were keen to impress upon me the “*chilling effect*” that proscription has had on lawful political discussion and organisation. Many of my interlocutors are politically engaged: indeed in some cases they were given asylum in the UK precisely because their resistance to the regime in their state of origin had placed them in danger. They point to reputable Council of Europe and UN reports documenting extreme state violence against their communities in Turkey and Sri Lanka. As representatives of those communities in the West, they feel a special responsibility to publicise these matters and to press for a political solution.

4.46. By doing so, however, they come under suspicion of inviting support for proscribed organisations. This, said one Tamil, “*shapes what it is possible to say*”, “*silences those who take up one position, and emboldens those on the other side*”. Concrete and credible examples were pressed upon me. Thus:

(a) Tamils find that public meetings are difficult to organise, because the police are unwilling to confirm to the owners of venues that the community group in question is a legitimate organisation.

(b) Natural aversion to risk, on the part of both activists and the police, ensures that even flags and symbols associated with the community rather than with the proscribed group are in practice not used at demonstrations or pictured in community newspapers, because the police have refused to clear their use in advance.¹³⁰

(c) Kurds gave me extensively-documented examples of overt surveillance; evening visits at home from the police, taxi “*customers*” who make a booking and then reveal themselves as intelligence agents; persistent use of Schedule 7 powers to stop, examine and search; and intense suspicion, disruption and police activity concerning the rebuilding of a Kurdish community centre in London.

Such measures may be justified, and I make no criticism of the authorities for taking them. It is easy to understand however how their extensive use may inhibit even political moderates from attending community events or taking part in

¹³⁰ As the Parades Commission would be empowered to do in Northern Ireland.

community organisation; and why it is felt by some that proscription criminalises not just illegal organisations, but whole communities.¹³¹

4.47. The ***propaganda value*** of proscription to repressive regimes was pressed on me with particular force by the Baluch community. The UK is said to be the only country in the world that proscribes the Baluchistan Liberation Army. I am told, but have not been able independently to verify, that the fact of UK proscription has been referred to by the Pakistan Government to justify military action or reprisals taken against Baluch “*terrorists*”.

Conclusion and recommendations

The utility of proscription

4.48. The objectives of proscription, whether in relation to international or Northern Ireland groups, may be characterised as:

- to deter terrorist organisations from operating in the United Kingdom, and to disrupt their ability to do so, and
- to support other countries in disrupting terrorist activity, and to send out a strong signal across the world that such organisations, and their claims to legitimacy, are rejected.

4.49. There will be few who disagree with the proposition that (to take the clearest example) al-Qaida should be a proscribed organisation. There is also widespread support, including in Northern Ireland, for the proscription of active groups which continue to visit violence on military, police and civilian targets.

4.50. More difficult to justify is the proscription of:

- (a) groups which appear not to satisfy the statutory test;
- (b) groups as to which there is no convincing evidence of recent involvement in terrorism; and
- (c) ethnic/separatist groups whose activities are not directed to the UK or UK interests, or which have no record of recruitment or fund-raising here, or

¹³¹ I am conscious of the limited value of my own inevitably selective experiences, but note the existence of academic literature, some of it empirically based, concerning what is sometimes called the “*suspect community thesis*”: see, e.g., C. Pantazis and S. Pemberton, “From the ‘old’ to the ‘new’ suspect community: examining the impacts of recent UK counter-terrorist legislation” (2009) 49 *British Journal of Criminology* 646-666; the response by S. Greer (2010) 50(6) *British Journal of Criminology* 1171-1190 and rejoinder at (2011) 51(6) *British Journal of Criminology* 1054-1062; M. Hickman and others, “Social cohesion and the notion of ‘suspect communities’: a study of the experiences and impacts of being ‘suspect’ for Irish communities and Muslim communities in Britain (2012) 5(1) *Critical Studies in Terrorism*, 89-106.

whose “*terrorist*” acts, performed in the context of war, are lawful under international humanitarian law.¹³² That is so particularly when proscription risks affecting innocent members of the communities concerned.

Improving the procedure for deproscription

- 4.51. Proscription has become a one-way street. As Professor Conor Gearty has encapsulated the problem: “*once banned it would take almost eccentric courage on the part of a mainstream political leader to take the risks inherent in making a deproscription order*”.¹³³
- 4.52. In order to make it easier for the Government to contemplate deproscription in appropriate cases (without of course removing the final option of appeal to POAC), I recommended in my last annual report that all new and existing proscriptions should lapse automatically after a given period of time (perhaps two years), unless the Secretary of State is prepared to make a case for renewal in an order to be laid before and debated in Parliament. As is currently the position with new proscriptions, I would generally expect the Secretary of State to take the advice of independent counsel before seeking the renewal of an order, and not to depart from that advice without good reason. A way might be found of giving some parliamentarians (perhaps members of the Intelligence and Security Committee) access to secret information not capable of being disclosed to Parliament as a whole.¹³⁴ Furthermore, in order to give the maximum flexibility to Parliament, it should have the ability to vote down a single renewal if so advised, without it being necessary to vote down others whose renewal is sought at the same time.
- 4.53. I am encouraged by asset-freezing precedents in the UK¹³⁵ and by at least some indications from other jurisdictions¹³⁶ to believe that this modest suggestion could make it easier for Ministers to allow unnecessary proscriptions – whether of Northern Ireland-related or international organisations – to lapse without the

¹³² As to the last point, see 3.9-3.13, above.

¹³³ C. Gearty, *Civil Liberties* (OUP 2007), p. 158.

¹³⁴ As in Australia: A. Lynch, N. McGarrity and G. Williams, “The proscription of terrorist organisations in Australia” (2009) 37 *Federal Law Review* 1-40.

¹³⁵ The designation of six Northern Ireland based entities – Continuity IRA, Loyalist Volunteer Force, Orange Volunteers, Real IRA, Red Hand Defenders and Ulster Defence Association – Was allowed to lapse with effect from 31 August 2010, with little publicity or fuss: D. Anderson, *First report on the operation of TAFAs* 2010, December 2011 (available for download from my website (fn 1)), 5.27(a).

¹³⁶ Professor Clive Walker referred in his written evidence to the Home Affairs Select Committee on the roots of violent radicalisation (HC 1446, February 2012) to the view of the Australian Parliamentary Joint Committee on Intelligence and Security that “[t]he automatic cessation of a listing has been effective in institutionalising the review and ensuring that any changes in circumstances have been taken into account, for example, the renouncement of violence, entry into a peace process, and so forth.”

expense and difficulty of an appeal.¹³⁷ Accordingly I repeat my recommendation, which I understand still to be under active consideration by departments and agencies, for the reasons given in my report of July 2011 at 4.28 – 4.35. It would be sensible also to consider (in the light of comparative experience from Australia and elsewhere) possible ways in which parliamentary scrutiny of secret material could be brought to bear on the process.

- 4.54. A possible supplement to this recommendation (advanced by my Special Adviser, Professor Clive Walker) is an automatic judicial process, analogous to that which operated with control orders and operates with TPIMs, whereby a court would need to be satisfied of the lawfulness of a proscription every time it was made or renewed. I referred to that option in my report of July 2011,¹³⁸ and would certainly contemplate it if my own suggested solution were not to be successful in enabling redundant proscriptions to be lifted. It would however have the effect of producing a great deal of litigation where currently there is none: for a court would need to be satisfied that the statutory thresholds had been met, even if no one came forward to argue the contrary on behalf of the group.¹³⁹ For the time being at least, I would recommend a solution in which Parliament acts as the initial check on the executive, with the “*intense and detailed*” judicial scrutiny of POAC being a remedy of last rather than first resort.

Changing the test for proscription?

- 4.55. I have given some thought over the year since my last report to the possibility of recommending a change to the statutory threshold for proscription.

Two-part statutory test

- 4.56. The sole statutory requirement under the current law – belief that an organisation “*is concerned in terrorism*” – contrasts with the two-part threshold that applies in relation to the other executive orders (asset-freezing and TPIMs).¹⁴⁰ If such a dual

¹³⁷ In Northern Ireland, the question is linked to broader issues concerning the process of normalisation.

¹³⁸ At 4.23-4.24: see also my rejection of the possibility that there be a requirement to consult an organisation prior to proscription. I dissociated myself from the idea of an automatic judicial process also in the context of asset-freezing: D. Anderson, *First report on the operation of TAFE 2010*, December 2011, 10.5.

¹³⁹ PMOI’s contested appeal to POAC – in which the main issue was whether an organisation that had not engaged in violence for five years continued to be involved in terrorism – cost hundreds of thousands of pounds and required the formulation of written pleadings, the production of voluminous evidence, the attendance of witnesses from abroad for cross-examination, the instruction of seven barristers, including two special advocates to deal with secret material, a seven-day hearing and a judgment of almost 150 pages. It then went to the Court of Appeal. Even in a case that is not opposed, intelligence will need to be converted into convincing evidence if the statutory threshold is to be met.

¹⁴⁰ TAFE 2010, sections 2 and 6; TPIMA 2011, section 3: see 4.3(a), above.

test were to be adopted, an organisation could be proscribed where the Secretary of State considers that:

(a) it *is or has been* concerned in terrorism; and that

(b) proscription is *necessary* for purposes connected with the protection of the public from the threat of terrorism.

- 4.57. The first of those changes (from “*is involved*” to “*is or has been involved*”) would allow groups with no current capacity for terrorist activity to be proscribed. This could be of possible value in relation to obscure and fissiparous groups in respect of which intelligence coverage may be patchy but whose continued proscription may be considered strongly in the public interest.
- 4.58. The second change would seek to balance the first by the introduction of a necessity test similar to those which operate in relation to TPIMs and asset freezes. Proscription would be confined to cases in which it could realistically be said to have a useful effect, and the exercise of discretion would focus not only on the five factors that might favour proscription, but on the infringements of human rights that it tends to involve, and the crucial question of whether proscription is in all the circumstances proportionate.
- 4.59. Though the idea merits debate, I stop short of recommending it at this stage. An “*is concerned in terrorism*” test is always likely to be more easily justiciable than a necessity test, because it is essentially a matter of fact. If that test could be satisfied even by past involvement in terrorism, much weight would attach to the necessity test whose application would, however, be less easily reviewable. The consequence of such change might therefore be to render deproscription more rather than less difficult in the case of an organisation such as PMOI which had been concerned in terrorism in the past.

Balance of probabilities

- 4.60. A further possible change, which I have already flagged in relation to asset-freezing and TPIMs, would be to require that involvement in terrorism must be established on the balance of probabilities, rather than simply on the basis of belief on the part of the Secretary of State. The difference relates not so much to the standard for decision-making (since the Secretary of State will not believe something unless she thinks it is probably so) as to the approach taken by the POAC on appeal. Instead of its task being,

“to conduct an intense and detailed scrutiny of both open and closed material in order to decide whether this amounted to reasonable grounds for the belief that the [group] was concerned in terrorism”,¹⁴¹

its task would be to conduct the same intense and detailed scrutiny, but with a view to deciding, on the balance of probabilities, whether the organisation was involved in terrorism.

- 4.61. Once again, I encourage debate but make no recommendation on this point at this stage. The same point arises in relation to the other executive orders, as I have already identified,¹⁴² and I expect to return to it in future.

Recommendations

- 4.62. **If there are far-right terrorist organisations in the UK that can be said to meet the statutory requirement for proscription, their possible proscription should be considered according to the same discretionary criteria as have been applied to UK organisations concerned in al-Qaida related terrorism.**¹⁴³

- 4.63. **Any organisation which cannot be said to be “concerned in terrorism”, because there is insufficient evidence to assert that it is taking current, active steps to commit, participate in, prepare for, promote or encourage terrorism, or that it has or is taking steps to acquire the capacity to carry on terrorist activity, fails the statutory test for proscription as interpreted in the *PMOI* case. It should not be proscribed and, if already proscribed, should be promptly deproscribed, if necessary on the initiative of the Secretary of State.**¹⁴⁴

- 4.64. **The five criteria identified at 4.6 above should be revised, in accordance with the views expressed by Professor Clive Walker, to read as follows:**

(a) The nature and scale of an organisation’s activities

(b) The specific and active threat that it poses to the United Kingdom

(c) The specific and active threat that it poses to British nationals overseas

¹⁴¹ [2008] EWCA 443, para 43.

¹⁴² D. Anderson, *First report on the operation of TAFA 2010*, December 2011, 10.4(b); D. Anderson, *Control Orders in 2011*, March 2012, 5.13-5.15, both available for download from my website (fn 1).

¹⁴³ See 4.16(c), above.

¹⁴⁴ See 4.30-4.31, above.

(d) The extent of the organisation's presence, cohesion and capabilities in the United Kingdom

(e) The need for the United Kingdom jurisdiction to give direct practical support to counter-terrorism in other countries.¹⁴⁵

- 4.65. **Where the statutory test is satisfied, discretion should be exercised on the basis of all material factors, including each of the five criteria identified above but also any existing or potential negative effects of proscription, including on the rights and interests of persons within and outside the UK who are not themselves concerned in terrorism. Proscription should only be ordered (or maintained) when it will be of real utility in protecting the public, whether in the UK or elsewhere, from terrorism, and when it is proportionate in all the circumstances.¹⁴⁶**
- 4.66. **All proscriptions should expire after a set period, perhaps of two years. The onus would then be on the Secretary of State, after taking the advice of independent counsel, to seek the assent of Parliament if she wishes to re-proscribe and to demonstrate that the statutory test is satisfied and that conditions for renewed proscription are made out. Consideration should be given to ways in which parliamentary scrutiny of secret material could be brought to bear on the process. Parliament should have the ability to vote down a single renewal if so advised, without it being necessary to vote down others whose renewal is sought at the same time.¹⁴⁷**
- 4.67. **The possibility of moving to a two-stage statutory test modelled on those used in TAFE 2010 and TPIMA 2011, and of substituting a balance of probabilities test for the standard of reasonable belief, should be kept under review.¹⁴⁸**

¹⁴⁵ See 4.8 and 4.40, above.

¹⁴⁶ See 4.32-4.40, above.

¹⁴⁷ See 4.51-4.54, above.

¹⁴⁸ See 4.55-4.61, above.

5. TERRORIST PROPERTY (TA 2000 PART III)

Law

- 5.1. Laws against the funding of terrorism have been on the statute book since 1989, and are demanded by the 1999 UN Convention for the Suppression of the Financing of Terrorism as well as by the Special Recommendations on Terrorist Financing of the G8's Financial Action Task Force [**FATF**], most recently revised in February 2012. TA 2000 Part III, as significantly amended in particular by SI 2007/3398¹⁴⁹ and by CTA 2008, gives effect to those demands and in some respects goes beyond them.
- 5.2. Terrorist property is broadly defined in TA 2000 section 14 as money or other property which is likely to be used for the purposes of terrorism (including any resources of a proscribed organisation), proceeds of the commission of acts of terrorism and proceeds of acts carried out for the purposes of terrorism.
- 5.3. Sections 15-18 contain the principal offences under Part III. They catch all stages of the financing of terrorism – in summary:
 - (a) fundraising and the provision of money or property for the purposes of terrorism (section 15),
 - (b) use and possession of money or property for the purposes of terrorism (section 16),
 - (c) participation in arrangements for the funding of terrorism (section 17), and
 - (d) laundering of terrorist property (section 18).

The required mental element for those offences is knowledge (or intention) that the money should be used, or reasonable cause to suspect that it may be used, for the purposes of terrorism: though under section 18, the onus is on the defendant to prove that he did *not* have this mental element.
- 5.4. By section 63, these offences may be committed outside the United Kingdom. By section 22, each offence is punishable by up to 14 years in prison. By sections 21 and 21ZA-21ZC, a person does not commit an offence under sections 15-18 if he discloses what he knows to the police or to the Serious Organised Crime Agency [**SOCA**] in good time, or has the consent of SOCA to become involved.
- 5.5. Sections 19 and 21A-22A concern a complex series of provisions concerning the disclosure of information. In summary:

¹⁴⁹ The Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007.

- (a) Section 19 imposes a far-reaching duty on those who believe or suspect the commission of an offence under sections 15-18, based on information that has come to their attention in the course of their trade, profession, business or employment, to disclose that belief or suspicion as soon as reasonably practicable, together with the information on which it is based, to the police, SOCA or his employer. Legal professional privilege overrides the duty to disclose: but subject to that, by section 20, disclosure is permitted notwithstanding what would otherwise be a legal bar. Failure to disclose, without reasonable excuse, is an offence punishable by up to five years in prison.
 - (b) Sections 21A and 21B make provision comparable to section 19 for disclosure by persons who come by their information when working in the regulated sector as defined in Schedule 3A (e.g. bankers, insurance intermediaries, accountants, insolvency practitioners and estate agents). The maximum penalty is again five years in prison. The duty is however stricter even than section 19, in that reasonable grounds for knowledge or suspicion are enough to ground the offence: actual knowledge or suspicion is not required. The distinction is said to be justified by greater awareness and higher standards of reporting in the financial sector.¹⁵⁰
 - (c) Section 21C requires the police to pass on any information disclosed under Part III to SOCA.
 - (d) Section 21D creates an offence, punishable by up to five years in prison, of “*tipping off*” another person (with the exception of persons specified in sections 21E-G) that a Part III disclosure has been made or is being investigated, with the likely result of prejudice to any consequent investigation.
- 5.6. Sections 23-23B provide for the court before which a person is convicted of a range of terrorist offences, not limited to offences under Part III, to order the forfeiture of money or other property used or intended to be used for the purposes of terrorism. Schedule 4 makes extensive further provision for forfeiture orders.¹⁵¹
- 5.7. By section 23B, a court in ordering forfeiture shall have regard to the value of the property and the likely financial and other effects on the convicted person. Such effects can be great, and may extend to the family and more generally to the community of the convicted person, as may be seen from a case drawn to my attention by the Home Office, as yet unresolved, in which the CPS applied for the

¹⁵⁰ Home Office, *Regulatory Impact Assessment: Terrorist Property* (2001), para 8.

¹⁵¹ See further Clive Walker, *Terrorism and the Law* (OUP 2011), 9.24-9.25.

forfeiture of a family home that had been “used” for the purpose of radicalising others.

- 5.8. Figures are not available for the numbers or amounts of forfeiture orders made in 2011.
- 5.9. The power to seize cash, formerly in sections 24 to 31 of TA 2000, is now contained in section 1 of and Schedule 1 to ATCSA 2001 – which falls outside the scope of this report. The power of seizure enables the forfeiture of “terrorist cash” in civil proceedings before a magistrates’ court or sheriff, whether or not any criminal proceedings have been brought.¹⁵²

Practice

- 5.10. Limitations in the published statistics make it difficult to judge how frequently the fundraising offences are used in Great Britain, because of:
- (a) the practice of publishing only statistics relating to cases in which fundraising was charged as a principal offence; and
 - (b) the absence of any distinction in the published statistics between the different fundraising offences.

The relative utility of these provisions, and the extent to which they are used, are thus impossible accurately to assess.

- 5.11. It can however be said that in Great Britain, over the 10-year period culminating in March 2011:
- (a) 37 persons were arrested and then charged with fundraising offences as the principal offence, 34 of them prior to April 2008.¹⁵³
 - (b) 11 defendants were convicted for fundraising offences as the principal offence, all of them prior to April 2009.¹⁵⁴ There were no convictions for fundraising as a principal offence in the two years to March 2011.

The figures for Great Britain thus indicate limited and diminishing use being made of the fundraising offences, at least as a principal charge on the indictment. It may be that the figures would not be markedly greater, even if they included all charges for fundraising offences. I am told by the CPS that funding tends to form part of an overall “plot”, and may be subsumed within a charge of, for example, conspiracy or acts preparatory to terrorism (TA 2006 section 5).

¹⁵² *Ibid.*, 9.46-9.65.

¹⁵³ HOSB 15/11, 13 October 2011, Table 1.03(a).

¹⁵⁴ *Ibid.*, Table 1.11(a).

- 5.12. No figures are published for charges or convictions under section 21A (disclosure by those working in the regulated sector) or section 21D (tipping off), though these are said to be rare. Neither offence was charged at all in Great Britain during the period under review.
- 5.13. 50 offences under sections 15-19 were charged in Northern Ireland in the 10 years to 31 March 2011, 41 of them relating to fund-raising, none to money laundering and one to failure to disclose under section 19.¹⁵⁵ Of these, only one was charged in 2010/11.

Conclusions

Utility of the law

- 5.14. Following the UN Convention for the Suppression of the Financing of Terrorism in 1999, and the costly attacks of 9/11,¹⁵⁶ striking at the funding of terrorism was widely viewed as the key to combating al-Qaida related terrorism. UN Security Council Resolution 1373/2001 of 28 September 2001 required all countries to

“criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.”¹⁵⁷

The FATF published nine Special Recommendations on Terrorist Financing, last revised in February 2012.

- 5.15. More recently, the importance of financial measures in reducing the incidence of terrorism has been less confidently asserted. That is partly because of evidence that potentially devastating atrocities can be planned at relatively low cost,¹⁵⁸ and partly because of a growing realisation that

“trying to starve terrorists of money is like trying to catch one kind of fish by draining the ocean”,¹⁵⁹

with the result that

¹⁵⁵ NIO Annual Statistics 2010/11, Table 5(a). The Great Britain and Northern Ireland figures are not directly comparable, as explained in 1.31, above.

¹⁵⁶ The 9/11 Commission estimated the total cost of planning and conducting the 9/11 attacks as between \$400,000 and \$500,000: National Commission on Terrorist Attacks upon the United States, *Final Report* (2004), p. 172.

¹⁵⁷ UN Security Council Resolution 1373 (2001), Article 1(b).

¹⁵⁸ The total cost of preparing (in Yemen) and mailing two highly professional printer cartridge bombs which, had they not been intercepted in Dubai and the UK's East Midlands Airport respectively in October 2010, could have exploded in mid-air over the United States was itemised by AQAP in its on-line magazine INSPIRE as \$4,200.

¹⁵⁹ National Commission on Terrorist Attacks upon the United States, *9/11 Report*, para 12.3.

“financing may become decreasingly relevant to efforts to contain the threat”.¹⁶⁰

These statements echoed the conclusions of Lord Lloyd, who considered in 1996 that the UK legislation on terrorist finance appeared to have had no more than a marginal effect in depriving Northern Ireland terrorists of funds, and that much of the difficulty lay in tracing the money and assembling the necessary evidence to bring a prosecution.¹⁶¹

- 5.16. Accordingly, while a panoply of financial measures remains in force (and is indeed required by international law), the trend in the UK at least has been towards using them less. The total quantity of assets frozen in accounts designated by the Treasury under TAFA 2010 was a mere £33,000 at the end of 2011.¹⁶² The infrequent and declining use of prosecution for terrorist funding offences under TA 2000 Part III, as would appear to be the case from the figures available, follows the same pattern.

Conclusions

- 5.17. This year as last year, I have received no representations of substance on the operation in the period under review of TA 2000 Part III, and have no specific recommendations to make in respect of it.
- 5.18. While not recommending that terrorist financing be entirely subsumed within the similar and in some respects further-reaching Proceeds of Crime Act 2002 [**POCA 2002**] regime – an idea also considered and rejected by Lord Lloyd¹⁶³ – Professor Clive Walker has expressed the view that POCA “offers a blueprint for thorough revision and some simplification”.¹⁶⁴ Such revision and simplification would indeed be desirable: though given the complexity of the existing law on terrorist financing, and its distribution through a large number of separate statutes, such an exercise would be a major undertaking.

¹⁶⁰ R. Barrett (co-ordinator since 2004 of the UN 1267 monitoring team), “Time to re-examine regulation designed to counter the financing of terrorism”, (2009) Case Western Reserve Journal of International Law 7, p. 11.

¹⁶¹ The Rt Hon Lord Lloyd of Berwick, *Inquiry into legislation against terrorism*, 1996, Cm 3420, vol. 1, 13.5. Lord Lloyd nonetheless recommended that the forerunner sections of TA 2000 Part III be retained as part of any counter-terrorism legislation and applied to foreign as well as domestic terrorist organisations: 13.20.

¹⁶² Written Ministerial Statement, *Operation of the UK’s Counter-Terrorist Asset-Freezing Regime: 1 October 2011 to 31 December 2011* (available from Treasury website).

¹⁶³ In the context of POCA 1995: The Rt Hon Lord Lloyd of Berwick, *Inquiry into legislation against terrorism*, 1996, Cm 3420, vol. 1, 13.23.

¹⁶⁴ *Terrorism and the Law* (OUP, 2011), 9.124.

6. TERRORIST INVESTIGATIONS (TA 2000 PART IV)

Law

Terrorist investigations

- 6.1. A terrorist investigation is broadly defined by section 32 TA 2000. It includes investigations of the commission, preparation or instigation of acts of terrorism or of other terrorist offences, and investigations of acts which appear to have been done for the purposes of terrorism. It also includes investigations of the resources of a proscribed organisation, and investigations of the possibility of making an order proscribing an organisation.

Cordons

- 6.2. Sections 33 to 36 TA 2000 confer upon police officers (who save in cases of urgency must be of at least the rank of superintendent) the power to cordon an area if they consider it expedient to do so for the purposes of a terrorist investigation. A police officer may order persons and drivers to leave cordoned areas, and prohibit pedestrian or vehicle access. Cordons may not exceed 14 days in duration, but may be extended for up to 28 days in total, without the need for any judicial authorisation. Refusal to comply with an order is punishable by up to three months in prison.¹⁶⁵
- 6.3. This statutory power to cordon supplements the common law power for the police to set up cordons for the protection of the public, and to maintain them for as long as is reasonably required in the circumstances.¹⁶⁶ Breach of such a cordon, or not complying with properly made police requests to move, may constitute the offence of wilfully obstructing a constable in the course of his duty (Police Act 1996 section 89(2)), which is punishable by up to one month in prison.

Powers to obtain information

- 6.4. Sections 37 to 38A TA 2000 give effect to three Schedules which give police powers to obtain information in terrorist investigations.
- 6.5. Schedule 5 empowers the police (in Scotland, the procurator fiscal) to apply to court for a warrant to search premises and to seize and retain material which the police have reasonable grounds for believing is likely to be of substantial value to a terrorist investigation or which must be seized in order to prevent it from being concealed, lost, damaged, altered or destroyed. Application may be made in

¹⁶⁵ A statutory amendment that would increase the maximum sentence to 51 weeks (Criminal Justice Act 2003, Schedule 26, para 55(2)) has not yet been commenced.

¹⁶⁶ *DPP v Morrison* [2003] EWHC Admin 683.

Northern Ireland, alternatively, to the Northern Ireland Office. A warrant may either specify particular premises or, in the case of an “*all premises warrant*”, extend to all premises occupied or controlled by a specified person. There are protections for “*excepted material*” (excluded material, items subject to legal privilege and special procedure material) in similar terms to those applicable under the Police and Criminal Evidence Act 1984 [PACE].

- 6.6. Schedule 6 empowers a senior police officer (in Scotland, the procurator fiscal) to apply to court for an order requiring one or more financial institutions to provide customer information as defined in para 7 for the purposes of a terrorist investigation. Before making an order, the court must be satisfied that the tracing of terrorist property is desirable for the purposes of the investigation, and that the order will enhance the effectiveness of the investigation. Failure to comply with an order may expose officers of the financial institution to up to six months in prison. Customer information provided under Schedule 6 is not admissible evidence in criminal proceedings against the institution or any of its officers or employees.
- 6.7. Schedule 6A empowers a police officer (in Scotland, the procurator fiscal) to apply *ex parte* to a court for an account monitoring order of up to 90 days’ duration. For the making of an order, similar criteria must be satisfied as in the case of an order under Schedule 6. The order will typically require a bank or other financial institution to provide the police with specified information concerning one or more accounts.

Offences of non-disclosure and tipping off

- 6.8. Part IV concludes with two important and far-reaching duties on the general public of disclosure, which resemble but go further than section 19 (above).
- 6.9. Section 38B, inserted by ATCSA 2001, requires all persons with information which they know or believe might be of material assistance in preventing the commission by another person of an act of terrorism, or in securing the apprehension, prosecution or conviction of another person, to disclose that information as soon as reasonably practicable to the police. There is a defence of reasonable excuse. The offence is punishable by up to five years in prison.
- 6.10. The requirement in section 38B to inform the police about terrorism is notably broad. It is not restricted – as is its section 19 equivalent – to people who gain their information through their work. The section was used for convicting family members and associates of the 21/7 bombers and of Kafeel Ahmed, who died following the Glasgow Airport bombing of 2007. Difficult legal issues would arise were it attempted to use the section against professionals, or against those who may be suspected of other crimes. Those issues include the interrelationship of section 38B with the subject’s privilege against self-incrimination, lawyer-client

privilege, a journalist's duty to protect his sources and the laws allowing inferences to be drawn from silence in response to police questioning.¹⁶⁷

- 6.11. Sections 39(2) and 39(4) criminalise tipping off which is likely either to prejudice a terrorist investigation or to result in interference with material relevant to that investigation. To commit those offences, which are punishable by up to five years in prison, the tipper-off must know or have reasonable cause to suspect either that an investigation is being or will be conducted (section 39(1)), or that a disclosure under sections 19 to 21B or 38B has been or will be made (section 39(3)).

Practice

Cordons

- 6.12. Cordons are typically set up to investigate a suspected package or to deal with the consequences of an explosion or series of arrests.
- 6.13. In Great Britain 41 cordons were imposed in 2010/11 under TA 2000 section 33, 35 of them in London and the remainder in Nottinghamshire and Greater Manchester. The figures are similar to the previous year (43 cordons, all but one in London).¹⁶⁸
- 6.14. In Northern Ireland 120 cordons were imposed in 2010/11 under section 33 TA, a similar figure to the previous year (128) but a much higher number than in the period 2005-2008.¹⁶⁹
- 6.15. The greater use of cordoning in Northern Ireland reflects not only the far greater number of "live" incidents in Northern Ireland, but also the fact that dissident republican groups, unlike al-Qaida inspired terrorists, often give warnings – a habit which allows them to use the disruptive technique of the hoax call. An area near Buckingham Palace was cordoned off in May 2011, on the eve of the Queen's visit to the Republic of Ireland, after such a call was received.

Powers to obtain information

- 6.16. In Northern Ireland, a total of 127 premises were searched under warrant pursuant to Schedule 5 during 2010/11, the highest number since 2007 but well down on the 416 that were searched in 2004.¹⁷⁰ Equivalent figures for Great Britain are not collected.
- 6.17. No concerns have been expressed to me about the operation of Schedules 5, 6 or 6A during the year under review.

¹⁶⁷ These and other section 38B issues are given extended treatment in Clive Walker, *The Law of Terrorism* (OUP, 2011), 3.07-3.55.

¹⁶⁸ HOSB 15/11, 13 October 2011, Table 2.05.

¹⁶⁹ *Northern Ireland Terrorism Legislation: Annual Statistics 2010/11*, NIO, Table 1.

¹⁷⁰ NIO Northern Ireland Terrorism Legislation: Annual Statistics 2010/11, Table 2.

Offences of non-disclosure and tipping off

- 6.18. Nobody in Great Britain was charged or convicted of a “*principal offence*” under either section 38B or section 39 in the two years leading up to March 2011,¹⁷¹ though there has been one charge under section 38B since that time. Nor was anybody charged under these sections in Northern Ireland.¹⁷²

Conclusions

- 6.19. I drew attention in my last report to the wide scope of section 38B, and to the detailed comparative and historical analysis of the section by Professor Clive Walker, culminating in some modest suggestions for reform.¹⁷³ Since the section was not used between 2009 and 2011, I have been unable to monitor its operation in either of my last two reports. Furthermore, where it has been used, it has been against friends and families: there has been no attempt to use it against journalists or doctors, so the need for codes and guidance in these areas cannot be considered pressing. Nonetheless, there is no doubt that some journalists have the availability of section 38B well in mind: whether it has a chilling effect on their activities is something that would repay study.
- 6.20. In other respects the powers provided for in Part IV has a clear function, and appear relatively uncontroversial. I make no recommendations in respect of any of them.

¹⁷¹ HOSB 15/11, 13 October 2011, Tables 1.03(a) (charge) and 1.11(a) (conviction).

¹⁷² NIO Northern Ireland Terrorism Legislation: Annual Statistics 2009/10, Table 5a.

¹⁷³ *Terrorism and the Law* (OUP, 2011), 3.07-3.55.

7. ARREST AND DETENTION (TA 2000 PART V)

Law

Arrest

- 7.1. Section 41 TA 2000 empowers a police officer to arrest without warrant a person whom he reasonably suspects to be a terrorist.
- 7.2. It is a notably wide power of arrest, in particular because the arresting officer need have no specific offence in mind. It is enough, under section 40(1)(b), for there to be a reasonable suspicion that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism. The acts need not have been identified at the time of arrest.
- 7.3. The power is wide also in that it may lawfully be used in respect of people who, though suspected of terrorism, will never be charged under terrorist legislation. Every year a significant proportion of those arrested under section 41 are charged with offences under the ordinary criminal law, ranging from conspiracy to murder to possession of knives.
- 7.4. In other respects, however, section 41 is surprisingly selective. It may be used for arresting persons suspected of committing certain terrorist offences (e.g. membership and support of proscribed organisations, terrorist funding, direction, possession under TA 2000) but not others (e.g. publication and dissemination under TA 2006). The somewhat arbitrary nature of the list in TA 2000 section 40(1)(a) is evident from the fact that a section 41 arrest may be made on suspicion of weapons training (TA 2000 section 54) but not the similar offence of training for terrorism (TA 2006 section 6).
- 7.5. Section 42 TA 2000 permits a justice of the peace or sheriff to issue a warrant for the search of premises if he is satisfied that there are reasonable grounds for suspecting that a person whom the constable reasonably suspects to be a terrorist is to be found there.

Detention

- 7.6. A person arrested under section 41 may be detained for 48 hours without the intervention of a court.¹⁷⁴ A review officer must review detentions every 12 hours and may authorise continued detention only on specified grounds, including where

¹⁷⁴ Though subject to the common law principle that “*where the police have reached the conclusion that prima facie proof of the arrested person’s guilt is unlikely to be discovered by further inquiries of him or of other potential witnesses, it is their duty to release him from custody unconditionally*”: *Holgate-Mohammed v Duke* [1984] 1 AC 437, 443 G-H.

it is necessary to obtain or preserve relevant evidence, or where it is necessary pending a decision whether the detained person should be charged with an offence.¹⁷⁵

- 7.7. The maximum period of detention under TA 2000 stood at seven days until January 2004, 14 days until July 2006 and 28 days until 25 January 2011.¹⁷⁶ Attempts by the last Government in 2005 and 2008 to extend pre-charge detention limits further, first to 90 days and then to 42 days, were withdrawn after defeats in Parliament. Since 25 January 2011, the maximum period of detention has stood at 14 days. This compares to a maximum detention period of 96 hours under other legislation. In contrast to the position under PACE, there is no power to release on police bail.¹⁷⁷
- 7.8. Part III of Schedule 8 to TA 2000 governs the extension of detention beyond 48 hours, by means of time-limited warrants of further detention which may be granted by a judicial authority¹⁷⁸ on application by a prosecutor or senior police officer. Such applications are on notice, with the detainee represented before the court (often by remote video link). Extensions may only be granted for limited purposes: to obtain relevant evidence, to preserve relevant evidence or pending the result of the examination of relevant evidence. In addition, the judicial authority must be satisfied that the investigation is being conducted both diligently and expeditiously.
- 7.9. All powers of detention must be exercised consistently with Article 5 of the European Convention of Human Rights, given effect in the United Kingdom by the Human Rights Act 1998 [**HRA 1998**]. Among the requirements of Article 5 are an obligation to give a detained person sufficient information for him to understand why he has been arrested, and a right to have the lawfulness of his detention decided speedily by a court.¹⁷⁹

Treatment of detainees

- 7.10. The treatment of detainees under TA 2000 is governed by Part I of Schedule 8 to the Act. This governs such matters as the designation of detention places, identification and the taking of samples, recording of interviews, the right to have a named person informed of the detention (otherwise known as the right not to be held incommunicado), the right to consult a solicitor and the circumstances in which a senior officer may authorise a delay in the exercise of those rights.

¹⁷⁵ TA Schedule 8, Part II.

¹⁷⁶ The power to detain for 28 days lapsed at that point because no affirmative order to extend the power was made under section 25 TA 2006.

¹⁷⁷ PACE Code H, para 1.6.

¹⁷⁸ A District Judge (Magistrates Courts) in England and Wales, sheriff in Scotland and county court judge or designated resident magistrate in Northern Ireland.

¹⁷⁹ Articles 5.2 and 5.4: see *Fox, Campbell and Hartley v United Kingdom* [1991] 13 EHRR 157; *Bank Mellat v HM Treasury* [2010] 3 WLR 1090.

7.11. PACE Code H is the code of practice applicable to detention, treatment and questioning by police officers under s41 TA 2000 and Schedule 8. It contains detailed provisions relating to custody records, initial action, detainees' property, the right not to be held incommunicado, the right to legal advice, conditions of detention, care and treatment, cautions, interviews, reviews and extensions of detention and charging. Annexes deal with specific matters, including delays in notifying arrest or allowing access to legal advice and fitness to be interviewed.

Changes to the law

7.12. The Review of Counter-Terrorism and Security Powers, which reported on 26 January 2011, concluded that 28-day detention was not routinely required, that a detention limit set at 14 days "*should at present be the norm*", and that this limit should be reflected on the face of primary legislation. It also concluded that there might be rare cases where a longer period of pre-charge detention might be necessary, and that a contingency power was required to allow for this. Various options for providing this power were considered. The option preferred by the Review was to prepare an emergency Bill, which if passed would enable applications to be made to a High Court judge for a warrant for further detention for periods of up to 28 days, and which could be placed before Parliament if it were deemed necessary to extend the maximum period.

7.13. Such emergency primary legislation was published and subjected to pre-legislative scrutiny by a Joint Committee chaired by Lord Armstrong of Ilminster. The Committee took evidence from a wide range of people, of whom I was one, and published its conclusions on 23 June 2011.¹⁸⁰

7.14. The Joint Committee accepted that it would be irresponsible not to provide for a power to extend the maximum period beyond 14 days in truly exceptional circumstances. It did not agree however that the contingency power to extend the maximum period available for pre-charge detention should be provided by emergency primary legislation, citing in this regard (in accordance with my own evidence and that of others) the difficulties in responding with the necessary speed when Parliament was in recess or dissolved, and the difficulty in having a meaningful Parliamentary debate without risking prejudice to a future trial.

7.15. Instead, the Joint Committee proposed:

- (a) A new order-making arrangement whereby the maximum period available for pre-charge detention will remain at 14 days unless the Secretary of State makes an executive order, under annually renewable powers conferred by

¹⁸⁰ *Draft Detention of Terrorist Suspects (Temporary Extension) Bills*, Session 2010-2012 HL Paper 161, HC Paper 893. The evidence is at <http://www.parliament.uk/documents/joint-committees/detention-terrorists-suspects-bills/DTSoralwrittenev.pdf>.

primary legislation, that the maximum period be exceptionally extended to 28 days for a 3-month period. The safeguards proposed by the Joint Committee included a requirement of the Attorney General's consent, and provision for any detention of more than 14 days to be subject to review by the Independent Reviewer (or a person appointed by the Independent Reviewer to conduct the review on his behalf).

- (b) The addition of further criteria (in addition to those in TA 2000, Schedule 8, para 32) that must be satisfied before a High Court judge may issue a warrant for detention beyond 14 days.

7.16. The Secretary of State responded to the Committee's report by letter of 3 October 2011. The salient points of her response were as follows:

- (a) While she hoped that a period of detention in excess of 14 days would never be used, she welcomed the Committee's agreement that it was sensible to introduce some form of contingency to extend the maximum period from 14 days to 28 days.
- (b) She remained of the view that emergency primary legislation, rather than use of the Civil Contingencies Act 2004 or of a new order-making power, constituted the most appropriate method of effecting this – even if it required Parliament to be recalled for the purpose during a recess.
- (c) Acknowledging the force of a point made by the Independent Reviewer and the Joint Committee, she however agreed to allow for an urgent order-making power for any period when Parliament is dissolved and before the Queen's Speech.
- (d) She did not agree to any statutory limitation on that order-making power (as the Independent Reviewer and Joint Committee had recommended), but identified "*three broad scenarios*" in which she anticipated that a period of pre-charge detention in excess of 14 days might be necessary:
 - a. in response to a fundamental change in the threat environment which means that the police and CPS anticipated that multiple complex and simultaneous investigations would necessitate 28 days;
 - b. during an investigation or series of investigations, but before arrests, which was so complex or significant that 14 days was not considered significant; and
 - c. during an investigation but after arrests had taken place.

- (e) She accepted that it was desirable that legislation should reflect the requirements of the ECHR as fully as possible. With this in mind, she proposed to revisit the possibility of change to Schedule 8 once the *Duffy* case had been determined by the Supreme Court. (This occurred a few weeks later, when the Supreme Court refused permission to appeal on 14 November 2011.)
- (f) She accepted that, as the Committee had recommended, applications for warrants of further detention beyond 14 days should only be made by, or with the consent of, the Director of Public Prosecutions or his Scottish or Northern Ireland equivalent.
- (g) She accepted also that there should be a report on any detention in excess of 14 days, to be carried out by the Independent Reviewer of Terrorism Legislation or a person acting on his behalf.

The matters summarised at (c), (f) and (g) above were introduced by way of amendments to the Protection of Freedoms Bill, tabled on 22 September 2011. The Bill having received Royal Assent on 1 May 2012, they are now enshrined in amendments to the Terrorism Acts contained in PFA 2012, sections 57 and 58.

Practice

Great Britain - statistics

Terrorism arrests

- 7.17. In Great Britain there were 121 “*terrorism arrests*” in the year to March 2011, 50 of them under TA 2000 section 41 and the remainder under other legislation (mostly PACE section 1). This was by far the lowest figure since 2001/02, and compares with an annual average of 217 terrorism arrests over the period April 2002 – March 2010.¹⁸¹ In the calendar year 2011 there were 167 terrorism arrests,¹⁸² 54 of them under TA 2000 section 41.
- 7.18. Those figures compare with a total number of arrests for recorded crime in England and Wales alone of almost 1.4 million in 2010/11, including some 431,000 for offences of violence against the person, 37,000 for sexual offences, 34,000 for robbery and 93,000 for burglary.¹⁸³

¹⁸¹ HOSB 15/11, 13 October 2011, Table 1.01.

¹⁸² HOSB 7/12, 14 June 2012, Table 1.1. The jump is partly attributable to the 24 non-TA 2000 arrests made in December 2011 at a demonstration organised by Muslims against the Crusades outside the US Embassy.

¹⁸³ *Police powers and procedures England and Wales 2010/11*, Home Office website, Table A.02.

7.19. Also of interest is that for the second year in a row, arrests under section 41 TA 2000 constituted a *minority* of all terrorism arrests (44% in 2009/10; 41% in 2010/11). In the calendar year 2011, only 32% of terrorist arrests were under section 41.¹⁸⁴ These percentages compare with figures of above 90% throughout the period 2003-2007, and reflect the fact that the section 41 power of arrest is not available in respect of some terrorist offences, including offences under TA 2006.

Period of detention

7.20. The power to detain for more than 14 days, with judicial permission, existed for four and a half years, between July 2006 and January 2011. In that time, 11 people were held for between 14 and 28 days, all in 2006-07.¹⁸⁵

7.21. In the year under review, no one was detained for a period even approaching the reduced limit of 14 days. Of the 54 people arrested under section 41 in 2011, in Great Britain:¹⁸⁶

(a) 22 (40%) were charged and 30 (56%) released.¹⁸⁷

(b) Only three people were detained for longer than six days prior to a charging decision being made, each of them for between 10 and 12 days.

(c) 28 (52%) were however detained for more than 48 hours, 18 of them (33%) for more than the 96 hours available under PACE.

Gender, age, ethnicity

7.22. As to the gender, age and ethnicity of the 1221 persons arrested for terrorism and the 256 charged with terrorism-related offences, over the period April 2005 to March 2011:

(a) 94% (of those arrested) and 95% (of those charged) have been male.¹⁸⁸

(b) 11% (both categories) have been under 21, with 45% of those arrested and 36% of those charged being over 30.¹⁸⁹

¹⁸⁴ HOSB 7/12, 14 June 2012, Table 1.01.

¹⁸⁵ Nine of these related to Operation Overt, the 2006 transatlantic liquid bomb plot. The other two were granted, respectively, in Operation Gingerbread (a Manchester arrest in 2006) and Operation Seagram (the London Haymarket and Glasgow airport attacks in 2007). All the applications for detention beyond 14 days were granted by the High Court, though not always for as long as was requested.

¹⁸⁶ HOSB 7/12, 14 June 2011, Table 1.03.

¹⁸⁷ The other five fell into the "other" category which includes persons cautioned, bailed to return, transferred to the Police Service of Northern Ireland or the UK Border Agency, and those detained under mental health legislation.

¹⁸⁸ HOSB 15/11, 13 October 2011, Table 1.04.

¹⁸⁹ *Ibid.*, Table 1.05.

- (c) 41% (of those arrested) and 44% (of those charged) defined themselves as Asian, 26% and 22% as white and 12% and 21% as black.¹⁹⁰

Charging rates

- 7.23. In 2011, 36 persons were charged with terrorism-related offences, up from 20 in 2010.¹⁹¹ Of the 167 people arrested for terrorism-related offences, 47 (28%) were charged, comparable to the charging rate of about a third for arrests generally.¹⁹² Of those 47, 38 (23% of the 167 arrested) faced terrorism related charges, 30 of them under the Terrorism Acts and eight under other legislation. The equivalent figure for 2010 is 50%.¹⁹³
- 7.24. Of the 54 persons arrested under TA 2000 section 41 during 2011, 22 (41%) were charged and 30 released.¹⁹⁴

Northern Ireland - statistics

Terrorism arrests

- 7.25. In Northern Ireland:
- (a) 195 people were arrested under section 41 in 2010/11.¹⁹⁵ This was the highest number of section 41 arrests for six years, and almost four times the total for Great Britain of 50 over the same period.
 - (b) 159 people were arrested under section 41 in 2011/12.¹⁹⁶ This was the lowest number of section 41 arrests for four years.
- 7.26. Adjusting for population sizes, section 41 was used some 130 times more frequently in Northern Ireland than it was in Great Britain during 2010/11,¹⁹⁷ reflecting the higher threat level and the far greater volume of attacks in Northern Ireland.
- 7.27. No figures are collected in Northern Ireland for arrests for terrorism-related offences under legislation other than TA 2000 section 41. The majority of “*terrorism arrests*” in Great Britain have recently been made under other powers.

¹⁹⁰ *Ibid.*, Table 1.06. 20% and 13% defined themselves as “*Chinese or other*”, a category which is likely to have been used by persons of non-black North African and Middle Eastern ethnicity (there being no specific category for Arabs): see 1.31(e), above.

¹⁹¹ HOSB 7/12, 14 June 2012, Table 1.04.

¹⁹² *Ibid.*, Table 1.02.

¹⁹³ HOSB 14/11, 30 June 2011, Table 1.2.

¹⁹⁴ HOSB 7/12, 14 June 2012, Table 1.03.

¹⁹⁵ NI Annual Statistics 2009/10, Table 3.

¹⁹⁶ PSNI, *Police Recorded Security Situation Statistics*, May 2012, section 6.

¹⁹⁷ The population of Northern Ireland in mid-2009 was estimated at 1.8 million and the population of the United Kingdom (including Northern Ireland) as 61.8 million: Office for National Statistics.

While it would be interesting to have the equivalent Northern Ireland figures, the difficulties in disentangling “terrorism” from organised crime and public order offences in the Northern Ireland context cause me to doubt whether the utility of such an exercise would outweigh the effort required to perform it.

Period of detention

- 7.28. Of the 195 persons arrested under section 41 in 2010/11, 17 (9%) were detained for more than 48 hours, and 11 (6%) for more than 96 hours. These percentages are higher than in 2009/10, but considerably lower than their GB equivalents (7.21(c), above). In Northern Ireland, nobody was detained for longer than a week.¹⁹⁸
- 7.29. All 18 applications for extensions of detention beyond 48 hours were granted in 2010/11. Indeed of the 183 applications made between 2001 and March 2010, only one (in 2001) has ever been refused.¹⁹⁹

Gender, age, ethnicity

- 7.30. Statistics for the gender, age and ethnicity of terrorism suspects are not published in Northern Ireland.

Charging rates

- 7.31. Of the 195 persons detained under section 41 in Northern Ireland during 2010/11:
- (a) 41 (21%) were charged (with a total of 110 offences) and the remainder released.²⁰⁰
 - (b) Of those, 19 –10% of those detained – faced charges under TA 2000, including three under section 11 (membership), eight under section 57 (possession) and six under section 58 (collection).
 - (c) As in 2009/10, none were charged under TA 2006 or CTA 2008²⁰¹ - though I have been told that in 2011/12, a number of charges were brought under TA 2006 section 5 (acts preparatory to terrorism), the utility of which in the Northern Ireland context is now beginning to be appreciated.

¹⁹⁸ Northern Ireland Terrorism Legislation: Annual Statistics 2010/11, Table 7a.

¹⁹⁹ *Ibid.*, Table 3.

²⁰⁰ *Ibid.*, Tables 4 and 6. The charging rate climbed to 25% in 2011/12: PSNI, *Police Recorded Security Situation Statistics*, May 2012, section 6. This was the highest since 2007/08, but still lower than the charging rates of between 30% and 40% that prevailed in the earlier part of the decade.

²⁰¹ *Ibid.*, Tables 5a and 5b.

- 7.32. Of the 110 offences charged otherwise than under the terrorism legislation, 45 were for explosives offences and 17 were for firearms offences.²⁰²

Comparison with Great Britain

- 7.33. The figures do not always allow for a comparison between Great Britain and Northern Ireland to be made: but to the extent that they do, the differences are considerable. The most significant differences seem to me as follows:

- (a) The TA 2000 arrest power is used far more extensively in Northern Ireland than in Great Britain, particularly when adjustment is made for population size.²⁰³
- (b) On the other hand, and despite the almost invariable willingness of the Northern Ireland courts to grant warrants for further detention in cases where they are asked to do so, a far smaller proportion of TA 2000 detainees than in Great Britain was held (1) for longer than 48 hours, and (2) for longer than the 96-hour maximum applicable to non-terrorist arrests.
- (c) Those detained in Northern Ireland under the TA 2000 are less likely than in Great Britain to be charged, and relatively few of those charges are for terrorist offences.

- 7.34. Those facts confirm the observation in my last annual report that:

- (a) Section 41 arrests are sparingly used in Great Britain, but are more likely to result in lengthy periods of detention and charges for terrorist offences; whereas
- (b) In Northern Ireland, the section 41 arrest power is frequently used but lengthy periods of detention, and charges for terrorist offences, are relatively rare.

It is fair to note, however, that section 41 arrests in Northern Ireland declined by 18% in 2011/12, and that the charging rate increased also, albeit not to GB levels or indeed to the levels that Northern Ireland has experienced in the fairly recent past.

Case law

- 7.35. The compatibility of TA 2000 Schedule 8 with the European Convention on Human Rights was considered by the Court of Appeal of Northern Ireland in a judicial

²⁰² *Ibid.*, Tables 4 and 5a.

²⁰³ The disparity was unusually great in 2009/10, but it is common for the NI total to exceed the GB total for the closest equivalent year: HOSB 18/10, 28 October 2010, Table 1.1; NI Annual Statistics 2009/10, Table 3.

review brought by Colin Duffy,²⁰⁴ a prominent dissident republican who was subsequently acquitted in January 2012 of killing two soldiers at the Massereene Barracks in 2009.

- 7.36. In *Duffy*, a three-judge court in Northern Ireland rejected a wide-ranging challenge to the compatibility of Schedule 8 with Article 5 of the ECHR. It rejected a number of criticisms including the supposed inability of the courts to consider the proportionality of and justification for continued detention, the absence of statutory provision for bail, the requirement for information to be disclosed and the contention that Article 5 requires a person to be charged well before the expiry of 28 days.²⁰⁵ The Supreme Court refused permission to appeal in November 2011.

Conditions of detention

- 7.37. I have visited each of the specialist terrorist detention centres in the United Kingdom: Paddington Green, Govan, Leeds, Antrim and the new facility in Manchester, which opened in early 2012. I was able to speak to custody officers and other staff, and closely to observe the facilities and conditions of detention in each. My visits to Paddington Green and Govan coincided with the presence there of terrorist suspects. In my report on Operation GIRD,²⁰⁶ I gave a detailed account of the nature and conditions of detention in Paddington Green, based on my review of all relevant written records, interview transcripts and conversations with police officers, defence solicitors and detainees. The admission of solicitors to detention places and the taping of interviews have rendered them unrecognisable from the facilities of a generation ago, in which the potential for abuse was rife.
- 7.38. With the exception of the Antrim Serious Crime Suite and Paddington Green (which is shortly to be replaced as the front-line terrorist detention centre in London by a purpose-built facility in Southwark), these specialist terrorist detention centres have been used little, and in some cases not at all, for the purposes for which they were designed. This is a function of the low number of section 41 arrests in recent years, and can only be welcomed.
- 7.39. The relative rarity of terrorist detainees in some centres does however have consequences for the speed with which they can be processed. For example, terrorism suspects are thought to require fingerprinting of the most thorough kind (involving multiple copies of prints from the side and back of the hand as well as from the fingers, all performed manually). Officers and staff at Antrim and at Paddington Green, with their relatively high throughput of terrorist suspects, are

²⁰⁴ *In the matter of an application for judicial review by Colin Duffy and others (No. 2)* [2011] NIQB 16. This followed the case of *Sultan Sher v Chief Constable of the Greater Manchester Police* [2010] EWHC 1859 (Admin), referred to in my report of July 2011 at 7.37.

²⁰⁵ [2011] NIQB 16, paras 30-31, 35-36.

²⁰⁶ D. Anderson, *Operation Gird: Report following Review*, May 2011, available for download from my website (fn 1).

adept at performing this task. I was however told by officers working in one facility that fingerprinting had taken them up to four hours in one case – with the result that once the detainee had been booked in, lawyer summoned and consulted, medical examination performed, fingerprints taken and time allowed for meals, prayer and sleep, it was not possible even to commence interview until more than 24 hours after detention had begun (and less than 24 hours, therefore, before any warrant for further detention would have to be obtained from a court). In another centre, I was told that to produce three perfect sets of fingerprints could take between three and seven hours. This is unsatisfactory for suspect and police alike, since it extends the period of time that detention may be necessary prior to the charging decision.

- 7.40. This is not a plea for short cuts or for reduced protection. The historical reputation of terrorist detention centres, particularly in Northern Ireland, is such as to require the highest standard of protection to be in force at all times. However to the extent that requirements can be loosened without reducing the suspect's rights (for example, by consideration of whether fingerprints need be taken from all terrorist suspects in such a potentially time-consuming manner), it is right that they should be.

Forensic medical examination

- 7.41. I have had the benefit of conversations with Dr. Neil Frazer, undoubtedly the most experienced forensic medical examiner [FME] of terrorist suspects in London, Dr. Peter Green of Cameron Forensic Medical Sciences at Barts and the London Medical School and a senior FME in Northern Ireland. They were able to inform me about the special demands of attending on terrorist suspects, which include:

- (a) the unusually long time for which they can be detained in solitary confinement (up to 14 days prior to charge): this may be particularly difficult for detainees who are children and thus more vulnerable,²⁰⁷
- (b) the underlying mental conditions from which some terrorist suspects suffer;
- (c) the ability of a small minority of terrorist suspects to mimic the symptoms of psychological distress consistent with those caused by a confinement syndrome, and thus to deceive doctors into believing that they are not fit to be interviewed;
- (d) the degree of authority that a medical practitioner needs, in a highly pressurised and time-sensitive terrorist investigation, to stand up for a patient

²⁰⁷ One of the detainees I observed at Paddington Green, subsequently released without charge, was only 17 years old.

– for example, by informing the Senior Investigating Officer that a subject is not fit to be interviewed for a period of time.

7.42. They also expressed to me their concern about changes that have taken place in the Metropolitan Police Area in relation to the provision of medical cover, and further changes that may in future be under negotiation. I have had the benefit of constructive discussion also with the Medical Director of the MPS, Meng Aw-Yong, who also expressed concerns about the decrease in standards of recruitment of forensic physicians nationally due to outsourcing, and stated that the MPS is currently one of the very few forces adhering to many of the standards set by the Faculty of Forensic and Legal Medicine.

7.43. Code H requires only that detainees held for more than 96 hours should be visited by an appropriate “*healthcare professional*” at least once every 24 hours (para 9.1),²⁰⁸ and that they should obtain “*appropriate clinical attention*” (para 9.6). Those words are broad enough to encompass nurse practitioners as well as doctors, where appropriate. It does seem to me of the highest importance, however, that any medical practitioner who is assigned to terrorist suspects while they are detained prior to the charging decision should be able

- (a) to ensure that genuine mental illness detected, and distinguished from attempts to deceive medics into declaring them unfit for interview; and
- (b) to insist if necessary, notwithstanding the strong contrary view of investigating officers, that a suspect is not fit for interview.

These qualities can only realistically be ensured if the medical practitioner attending at the detention facility is both *experienced* and *independent*. The FMEs used by the MPS in terrorist detentions are fully trained in mental health evaluations, and have a breadth of knowledge and expertise that is not matched by custody nurses. Furthermore, as self-employed persons not dependent upon the MPS for their livelihood, they are nothing to inhibit them from asserting their patients’ rights in what may be an extremely pressurised situation. These qualities in a FME are to the potential advantage not only of the detainee but of the police, because they may assist in rebutting unjustified allegations made at trial or elsewhere. It would be a cause for considerable concern if the only medical attention available to a detainee on a given day were to be from a practitioner who lacks either the necessary expertise or (because employed by the police) the necessary institutional independence. I return to this under Recommendations at 7.79, below.

²⁰⁸ “*Healthcare professional*” is defined in para 9A as a clinically qualified person working within the scope of practice as determined by their relevant professional body.

Monitoring compliance with Schedule 8 and Code H

- 7.44. CJA 2009 section 117(2) 2009 amends TA 2006 section 36 so as to permit the Independent Reviewer, as part of his annual review of the Terrorism Acts, to consider whether the requirements of TA Schedule 8 and of Code H have been complied with in relation to persons detained under TA 2000 section 41 pursuant to a warrant for further detention (i.e., for periods in excess of 48 hours).²⁰⁹ Section 117 also requires independent custody visitors to submit a copy of their reports on suspected terrorist detainees to the Independent Reviewer, and gives them a right to inspect recordings of police interviews.
- 7.45. The Independent Reviewer's new function arose in the context of the then Government's rejection of an amendment by Lord Lloyd which would have created the full-time post of Independent Commissioner for Terrorist Suspects.²¹⁰ Such a person would have not only monitored the detention and treatment of suspects under TA 2000 section 41, but acted as "*the eyes and ears of the judge*" when applications were made for warrants for further detention.
- 7.46. Whilst my new function is expressed as a power rather than a duty, and is (necessarily, given the part-time nature of my post and the range of my other responsibilities) far more limited than was envisaged by Lord Lloyd, it seems important, if effect is to be given to the intentions of Parliament, that:
- (a) I should review at least a sample of those who are detained for more than 48 hours under TA 2000, and that
 - (b) in respect of those on whom I cannot attend in person, I should read and if necessary follow up on the reports that the independent custody visitors will provide for me pursuant to their own duties, and/or the custody records that are produced in relation to each person in detention.

The first of those courses of action will be possible only once the provisions of section 117 relating to custody visitors have been brought into force. I have however agreed to the parts of section 117 concerning the Independent Reviewer coming into force in the near future, on the basis that the parts concerning the custody visitors will follow shortly thereafter.

- 7.47. I have consulted with Home Office, police and the Independent Custody Visitors Association in order to establish appropriate protocols for warning me of cases

²⁰⁹ Perhaps surprisingly, there is a statutory prohibition on police reviews of a person's detention after a warrant for further detention has been obtained: TA 2000 Schedule 8 para 21(4).

²¹⁰ For the background to this proposal, see House of Commons Library Standard Note SN/HA/5129, 14 July 2009. Compare the tasks of the of Independent Commissioner for Detained Terrorist Suspects in Northern Ireland, performed with distinction by Louis Blom-Cooper QC from 1992 to 1999 and by the psychiatrist Dr. Norris from 2002 to 2006.

which may result in more than 48 hours' detention, for the prompt transmission to me of custody visitors' reports and for the secure transmission to my room in the Home Office of custody records and other relevant documents. I will report on the initial operation of this new power in my next annual report, in the summer of 2013.

Right not to be held incommunicado

- 7.48. TA Schedule 8 para 6 provides terrorist suspects with a right to have someone informed of their detention, exercisable save where a senior officer has reasonable grounds for believing that its exercise *will* lead to consequences including tampering with evidence, physical injury or the alerting of suspects. I described that right in my report on Operation GIRD as

“of cardinal importance, serving as it does (along with the right to legal advice) to differentiate the practices of a civilised society from the unexplained ‘disappearances’ characteristic of a police state.”²¹¹

I also drew attention to the fact that the MPS had on that occasion not adhered to the precise requirements of the law. Scrupulous adherence to those requirements is something to which I shall seek to hold the police when exercising the new function introduced by CJA 2009.

- 7.49. Only in Northern Ireland are figures collected in relation to refusals to allow this right to persons detained under TA 2000 section 41. It seems that only one third of those detained ask to have someone informed of their detention, perhaps because they were with others when arrested.²¹² Of the requests that were made, however, all but two were granted immediately. The records suggest that there was delay in granting a total of only 13 requests in the 10 years prior to 31 March 2011. The length of those delays is not recorded.

Right of access to a solicitor

- 7.50. TA 2000 Schedule 8 para 7 provides terrorist suspects with a right of access to a solicitor, again with tightly-drawn exceptions. Again, figures are available only in relation to Northern Ireland. All 187 requests for such access in 2010/11 were granted immediately, as has been so in all but five cases since 2001.
- 7.51. The right to consult a solicitor is the right to consult privately. TA 2000 Schedule 8 para 9 allows a police officer to sit in on a legal consultation only if an officer with the rank of Assistant Chief Constable has reasonable grounds for belief that a specified consequence would otherwise follow: for example, that the solicitor would otherwise alert another terrorist suspect to what is going on. In that eventuality, the

²¹¹ D. Anderson, *Operation GIRD – report following review*, May 2011, para 118.

²¹² 69 of the 195 detained under section 41 made such a request: *Northern Ireland Terrorism Legislation: Annual Statistics 2010/11*, Table 8.

presence of the officer should at least allow detainee and solicitor alike to know that their conversation is being listened to.

7.52. A further inroad into the right to consult in privacy is made by the broad power under the Regulation of Investigatory Powers Act 2000 [RIPA] to conduct covert surveillance of lawyer-client consultations. That is the consequence of the majority decision of the judicial House of Lords in *McE v Prison Service of Northern Ireland*,²¹³ a case in which men detained at Antrim under TA 2000 were held not to have been entitled to the assurances sought on their behalf that no covert surveillance of their legal consultations would take place. It may be inferred from the judgment that the capacity to conduct surveillance of legal interviews exists in the Antrim Serious Crime Suite. The Secretary of State was criticised only for his failure to classify such surveillance as “intrusive” under RIPA – a deficiency that has now been remedied.²¹⁴

7.53. As was pointed out in that case:

“Covert surveillance is of no value if those subject to it suspect that it may be taking place. If it is to take place in respect of consultations between solicitors and their clients in prison or the police station, it will be of no value unless this is such a rare occurrence that its possibility will not inhibit the frankness with which those in custody speak with their lawyers.”²¹⁵

It is not open to me to comment on how often, if at all, the covert surveillance power has been used, whether at Antrim or elsewhere. I have however been given assurances which make it clear to me that these words have been taken firmly to heart in Northern Ireland.

Conclusions and Recommendations

Proper purpose of the section 41 power

7.54. Section 41 is different from other arrest powers, in particular for the ability that it affords to arrest without suspicion of a particular offence, and the potential for detaining persons arrested under it, without the possibility of bail, for periods greatly in excess of the normal four days. As I remarked in my last annual report (7.41), the logic of extending that power to all those (but only those) suspected of certain types of terrorist activity is somewhat approximate. The extended periods of detention available under Schedule 8 may be needed when a large and complex plot is being unravelled; but it does not follow that it they are needed in other

²¹³ [2009] UKHL 15; [2009] 1 AC 908. Lord Phillips dissented on this point, as had Girvan LJ in the Court of Appeal.

²¹⁴ The Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010, in force since 26 February 2010.

²¹⁵ per Lord Phillips at [51], with whom Lord Neuberger at [118] agreed. It was also strongly indicated, without being decided, that information obtained in this manner could not fairly be used against the detainee in evidence at his trial, per Lord Hope at [66].

circumstances, simply by virtue of the fact that one element of the criminal behaviour under investigation may be capable of characterisation as a TA 2000 offence.

- 7.55. Great vigilance is required in its exercise, therefore. After a detailed review, published in May 2011, of the arrest and detention of six suspects during the Pope's visit to London (Operation GIRD), I recommended:

“that the s41 requirement for reasonable suspicion in relation to each person arrested be kept firmly in mind by all forces during future operations, as it was in this case, particularly in view of the security pressures that are likely to attend the forthcoming London Olympics”.

As I recalled in that report, while section 41 arrest may present a tempting opportunity to disrupt, to gather intelligence or simply to clear the streets, none of these purposes is a sufficient basis for its exercise. In particular, multiple precautionary arrests, made on no basis other than association with persons suspected of terrorism, will not be tolerated by the courts. I have seen no evidence that section 41 was used in this way during 2011: but I repeat that warning here.

Use of the section 41 power

- 7.56. I drew attention in my last report to two particular distinguishing factors between the practice in Northern Ireland and Great Britain, which I suggested might be linked. These were:

- (a) The lower charging rate in Northern Ireland after section 41 arrest, particularly as regards the Terrorism Acts under which only 5% of detainees were charged in 2009/10; and
- (b) the earlier and more extensive involvement of the CPS in England, by comparison with the Public Prosecution Service [PPS] in Northern Ireland, as seen for example by the fact that it is the PSNI rather than the PPS which makes applications for warrants for further detention, and which is responsible for the charging decision.²¹⁶

In that connection I asked whether section 41 was being overused in Northern Ireland, and whether the earlier involvement of the PPS in Northern Ireland might assist in reducing the number of section 41 arrests in cases which end either in

²¹⁶ Early co-operation between CPS and police, before arrest if possible, was strongly recommended by Lord Carlile in *Operation Pathway – Report following Review*, 2009 (available for download from my website (fn 1)), paras 86-90.

acquittal or in the bringing of charges under provisions other than the terrorism legislation.²¹⁷

7.57. In its annual report for 2011, the Human Rights Committee of the NIPB endorsed my observations and reported that it would continue to monitor the situation.²¹⁸ It issued the following Recommendation:

“The PSNI should review its policy and practice in respect of arrests under section 41 of the Terrorism Act 2000 to ensure that police officers do not revert to section 41 in cases where it is anticipated that the suspect is more likely to be charged under non-terrorist legislation. The PSNI should thereafter provide reassurance to the Human Rights and Professional Standards Committee that relevant safeguards have been put in place.”²¹⁹

7.58. The PSNI do not consider that there is a problem here. Thus:

- (a) They have emphasised to me the practical difficulty in identifying whether terrorist charges are likely to be brought in circumstances where political motivation for a crime is thought to be present, but may be difficult to prove.
- (b) They point out that many of those arrested under section 41 are charged with offences under the explosives and firearms legislation, “*which are capable of constituting terrorist offences*”.
- (c) They have pointed to what they consider to be some advantages of section 41 arrest over PACE arrest from the suspect’s point of view: for example, the practice in Northern Ireland of providing a medical inspection before each interview.
- (d) They told me that in practice, co-operation with the PPS often does begin well before arrest, and that while it is the police who take the charging decision, it is difficult for them to do so without the full knowledge and co-operation of the PPS.

The new Director of Public Prosecutions for Northern Ireland, Barra McGrory QC, also told me that he is broadly content with the current working relationship between PPS and police, pointing to the resource implications that would flow from earlier PPS involvement and to the importance of prosecutors retaining their reputation for impartiality.

²¹⁷ D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, p. 6 and 7.33-7.35.

²¹⁸ NIPB, *Human Rights Annual Report 2011*, p. 104.

²¹⁹ *Ibid.*, Recommendation 15.

7.59. There is force in all these points. The most recent figures available for comparison (2010/11), though still showing a disparity, also reveal a narrowing in the gap between charging practice in Great Britain and Northern Ireland:²²⁰

2010/11	Great Britain	Northern Ireland
Detained under s41	50	195
Of which charged	22 (44%)	41 (21%)
Charged under TAs	≤ 13 (26%)	19 (10%)

7.60. The power to arrest may only be used, as I emphasised in my report on Operation GIRD, where there is a reasonable suspicion that a person has committed a specified terrorist offence or has been concerned in the commission, preparation or instigation of acts of terrorism.

7.61. I respectfully endorse the approach of the NIPB in relation to this issue, and look forward to seeing the response of the PSNI in relation to the safeguards that the Human Rights Committee of the NIPB has requested.

Length of pre-charge detention

7.62. The maximum period of pre-charge detention is now fixed by statute at 14 days. I consider both the reduction to 14 days, and the precaution of keeping a reserve power for use in the event that an exceptional series of events renders it insufficient, to be soundly evidence-based.²²¹ Though (like the Joint Committee) I expressed reservations about the practicability of the chosen mechanism for invoking the reserve power, my principal concern has been addressed by PFA section 58, which allows the Secretary of State to proceed by order, subsequently debated, if Parliament is dissolved when an urgent need arises for a longer period of detention.

Schedule 8 para 32

7.63. I recommended in my report of July 2011 (7.50, 7.55) that consideration should be given to the amendment of TA 2000 Schedule 8, para 32, so as to ensure that it reflects on its face the requirements of Article 5 ECHR as they have been declared

²²⁰ Source: HOSB 15/11, 13 October 2011, Tables 1.01 and 1.02 (the 13/26% figure is a maximum, since in the absence of sufficiently specific GB data it is possible that some of those charged under the Terrorism Acts were detained under provisions other than TA 2000 section 41); *Northern Ireland terrorism legislation: annual statistics 2010/11*, Tables 4 and 6.

²²¹ D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, 7.48.

by the United Kingdom courts: but that the need for and extent of such amendments should be considered only once the Supreme Court had concluded its consideration of the *Duffy* case. It has now done so, by refusing permission to appeal.

7.64. Currently, the criteria governing the adjudication of an application for a warrant for further detention relate to the questions of:

- (a) whether further detention is necessary for relevant evidence to be obtained, preserved or analysed (paras 32(1)(a) and 32(1A)), and
- (b) whether prosecutors and police have acted with reasonable diligence and expedition (para 32(1)(b)).

7.65. It was complained in *Duffy* that under Schedule 8 a person could be detained under Schedule 8 “*without any consideration of the proportionality or justification for such a detention*”.²²² The Court of Appeal disagreed, stating that the requirement of necessity “*imports the requirement of proportionality*” and adding:

“There is, of course, a continuing need to demonstrate reasonable suspicion. Issues of proportionality and justification are, therefore, fundamental aspects of the review process.”

7.66. It was also held in the *Operation Pathway* case that:

- (a) the court should be satisfied of “*the real prospect of evidence emerging*” (this being described as “*not binding [but] a marker*”); and that
- (b) “*continued detention would be likely to become unlawful if the suspects were not told clearly the offences they were suspected of committing and the reasons for the suspicions leading to their arrests*”.²²³

Lord Carlile reported his surprise that the police did not anticipate in that case that they would be required to clarify the evidential basis for the arrests before a judge during the period of detention, and doubted that continued detention could be proportionate where there is “*no reasonable basis for expecting material evidence to emerge during the extended period of custody applied for*”.

7.67. It is, finally, axiomatic that continued detention can only be justified if the arrest itself was lawful.

²²² *In the matter of an application for judicial review by Colin Duffy and others* [2011] NIQB 16, [30].

²²³ Judgment of Blake J, as reported by Lord Carlile in *Operation Pathway – Report following review* (2009), paras 80 and 85.

7.68. It would be possible to amend Schedule 8 para 32 in order to require the judicial authority to be satisfied that (in addition to the matters currently stated in para 32(1):

- (a) the person to whom the application relates was lawfully arrested;
- (b) that person was told with sufficient clarity the offences he was suspected of committing and the reasons for the suspicions leading to his arrest;
- (c) there is a sufficient prospect of evidence emerging during the period for which further detention is sought; and
- (d) the continued detention is proportionate in all the circumstances.

The suggested references to “*sufficient clarity*” in (b) and “*sufficient prospect*” in (c) are intended to reflect the fact that Blake J in Operation Pathway held back from stating the relevant requirements in absolute terms, and to afford the court the necessary flexibility.

7.69. Lord Carlile suggested during the year under review that to amend Schedule 8 so as to read Article 5 requirements into it would be “*stating the obvious in legislation*”. I agree that any diligent advocate should be able to unearth the relevant principles (though the judgment of Blake J being unreported, this will not be entirely straightforward), and that those principles may indeed be obvious in the sense of being uncontroversial. The fact that the police misunderstood what was required of them in Operation Pathway, as Lord Carlile himself found, does however provide a counter-argument for spelling out the necessary protections in the words of the Schedule.²²⁴

7.70. I return to this subject under Recommendations at 7.76, below.

Bail

7.71. Police bail is currently unavailable for persons arrested under TA 2000 section 41.²²⁵ While the exclusion of bail has been held to be compliant with HRA 1998,²²⁶ it is hard to see a principled basis on which an absolute exclusion can be justified.

- (a) There can be no objection in principle to the availability of bail for those suspected of being terrorists. After all:

²²⁴ As was remarked by the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, June 2011, HL 161 / HC 893, paras 156-159, citing the JCHR report of March 2010, HL 86 / HC 111, para 73.

²²⁵ As confirmed by PACE Code H, para 1.6.

²²⁶ *R (I) v City of Westminster Magistrates Court* [2008] EWHC 2146 (Admin).

- it is available under PACE to those arrested on suspicion of offences under TA 2006;
- it is available from the Special Immigration Appeal Commission [**SIAC**] in immigration cases, even when the person whom it is wished to deport is a terrorist suspect; and
- it was available prior to TA 2000 from a High Court Judge in Northern Ireland in a terrorist case.²²⁷

(b) There are of course terrorist suspects for whom the grant of bail would be unthinkable: but the same is true of many suspects arrested under PACE. Suspected murderers and rapists enjoy the presumption of bail, even if they are not likely in practice to be granted it. The need to place suspected terrorists in a separate category is not evident.

(c) There are other terrorist suspects, arrested under section 41, whose suspected criminality may be of an altogether lesser order, and who could realistically be considered for bail. The grant of bail might indeed in some cases be advantageous to the police as well as to such suspects, for it would stop the clock on the period of detention²²⁸ and enable interviews to be postponed until other evidence had been retrieved, translated and assessed.²²⁹

7.72. The introduction of bail has been recommended a number of times in the past. Thus:

(a) The JCHR has twice expressed the view that bail ought in principle to be available in relation to terrorism offences, and that the Government should hold a full consultation on the issue.²³⁰

(b) Lord Carlile made a similar recommendation in his report of 2009 into Operation Pathway.²³¹

(c) Professor Clive Walker has commented that it would be helpful to make a power of police bail available, given that the range of offences of terrorism now encompass peripheral involvement.²³²

²²⁷ As noted by Lord Carlile in his *Operation Pathway* report, 2009 (available for download from my website (fn 1)), para 93.

²²⁸ As confirmed in the context of PACE by the Police (Detention and Bail) Act 2011.

²²⁹ A point made by Sue Hemming of the CPS: *Counter-Terrorism Policy and Human Rights: Counter-Terrorism Bill* HL Paper 108 HC 554, May 2008, para 53.

²³⁰ *Counter-Terrorism Policy and Human Rights: Counter-Terrorism Bill* HL Paper 108 HC 554, May 2008, chapter 4; *Counter-Terrorism Policy and Human Rights: Bringing Human Rights Back In* HL Paper 86 HC 111, March 2010, paras 84-89.

²³¹ Para 94.

- (d) In *Duffy*, the Northern Ireland Court of Appeal noted the absence of any provision for conditional release on bail under the statutory scheme, but specifically rejected the Crown's submission that "*persons arrested under this legislation would be likely to interfere with evidence or witnesses, fail to attend trial, obstruct the course of justice or commit offences while on bail*".²³³ The Lord Chief Justice went on to say at [31], emphasis added:

"We do not consider that such generalisations are appropriate. Persons arrested under this legislation may be peripheral to any alleged serious terrorist activity or may be vulnerable. For a variety of reasons the continuation of questioning or the pending results of an examination or analysis of relevant evidence may not make it necessary to continue the detention of a person arrested. In some cases the imposition of conditions might deal with any relevant and sufficient reasons which would otherwise justify detention. We have set out the background to the applications in this case and the issue did not arise but *if a person detained could be released on conditions which would deal with any relevant and sufficient reasons for his detention it may well be that his continued detention would not be judged necessary*. This is, therefore, a fact specific issue which will need to be addressed in any case in which it arises but does not lead to any risk of incompatibility."

The passage contains stick as well as carrot: it may be read not only as encouragement to make bail available in section 41 detentions, but (in the italicised words) as a warning that there may be cases in which the courts will not consider continued detention to be "*necessary*" within the meaning of Schedule 8 para 32 if such detention could have been avoided by the grant (had it been available) of conditional bail.

- 7.73. In his response to the Operation Pathway report, the then Home Secretary (Alan Johnson) stated that having consulted the police and others, he had concluded that "*bail should not be available for terrorist suspects because of the risks to public safety that might be involved*". The reasoning is difficult to understand: the risk that further offences will be committed is one of the grounds on which bail may be refused. The unscientific sample of senior police officers with whom I have spoken about the subject are not opposed to the principle of bail being made available in appropriate cases. This seems to me an idea that it is well worth reconsidering, and I address it under Recommendations at 7.77, below.
- 7.74. A further anomaly, that could be addressed at the same time, arises from the lack of any power under TA 2000 to "*suspend the detention clock*" when a person is in hospital, as is possible under PACE section 41(6). The case for assimilating the position under TA 2000 to that under PACE has been made by Professor

²³² C. Walker, *Terrorism and the Law* (OUP 2011), 4.74.

²³³ *In the matter of an application for judicial review by Colin Duffy and others (No. 2)*, [2011] NIQB 16 (Morgan LCJ, Higgins LJ, Coghlin J), [31].

Walker.²³⁴ It seems to me unanswerable I return to it under Recommendations at 7.78, below.

Recommendations

- 7.75. **Police should avoid recourse to section 41 arrest and detention in cases when the suspect is always likely to be charged, if at all, under laws other than the Terrorist Acts.²³⁵**
- 7.76. **The amendment of TA 2000 Schedule 8 para 32 should be considered, with a view to providing that a warrant for further detention should only be issued if the court is satisfied that the person to whom the application relates was lawfully arrested; that the person was told with sufficient clarity the offences he was suspected of committing and the reasons for the suspicions leading to his arrest; that there is a real prospect of evidence emerging during the period for which further detention is sought; and that the continued detention is proportionate in all the circumstances.²³⁶**
- 7.77. **Consideration should be giving to changing the law so as to allow persons arrested under TA 2000 section 41 to apply to a court for bail.²³⁷**
- 7.78. **Consideration should be given to changing the law so as to allow the detention clock to be suspended in the case of detainees who are admitted to hospital.²³⁸**
- 7.79. **Medical examinations of terrorist suspects should be conducted by professionals who are fully trained in mental health evaluations and in the care of TA 2000 detainees, who are qualified in forensic medicine and whose independence is guaranteed by the fact that they are not employed by the police.²³⁹**

²³⁴ *Ibid.*, 4.76.

²³⁵ See 7.54-7.61, above.

²³⁶ See 7.63-7.70, above.

²³⁷ See 7.71-7.73, above.

²³⁸ See 7.74, above.

²³⁹ See 7.41-7.43, above.

8. STOP AND SEARCH (TA 2000, PART V)

Law

- 8.1. Powers of stop and search under TA 2000 underwent significant changes during the year under review, prompted by the January 2010 judgment of the European Court of Human Rights in *Gillan and Quinton v United Kingdom* and by the Coalition Government's pledge to effect what it described as "*a correction in favour of liberty*".
- 8.2. The effect of those changes has been seen not only in the statute book but on the streets and the rail network. A no-suspicion stop and search power, used extensively between 2001 and 2010 (indeed more than 250,000 times in 2008/09 alone), has been replaced by a power the conditions for whose use are so stringent that in the period of well over a year in which it has been available, it has not been used once.

Section 43

- 8.3. Section 43 TA 2000 is an orthodox stop and search power,²⁴⁰ which may be used to search a person who is reasonably suspected to be a terrorist to discover whether he has anything which may constitute evidence that he is a terrorist, and to seize and retain anything which he reasonably suspects may constitute such evidence.
- 8.4. It has not in the past extended to the search of vehicles: thus, it has been of considerably more practical use in an urban area than, for example, in rural parts of Northern Ireland where most travel is in vehicles. PFA 2012 section 60(3) introduces a new TA 2000 section 43A, extending its use to include searches of vehicles. That was an uncontroversial and sensible extension, given the effective dismantling of the no-suspicion power to stop and search under section 44.
- 8.5. PFA 2012 section 60(1) repeals the requirement in TA 2000 section 43(3) that searches of persons be carried out by someone of the same sex, thus bringing it into line with other stop and search powers, the reason being that it is not always practicable to summon an officer of the appropriate gender in a reasonable time.

Section 44

- 8.6. Section 44 was one of the most contested provisions of TA 2000. Its very wide use, particularly in London and on the rail network, caused resentment among

²⁴⁰ Compare PACE section 1 (which however permits search of *any* person or vehicle for stolen or prohibited articles, whereas section 43 permits the search only of persons reasonably suspected of being a terrorist, and does not extend to the search of vehicles).

minority communities and was repeatedly deprecated by my predecessor, Lord Carlile – understandably so, since the power produced not even one successful prosecution for a terrorist offence in Great Britain. In an action sponsored by Liberty the powers were eventually condemned by the European Court of Human Rights, under Article 8 ECHR, as “*neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse*”.²⁴¹ While making no finding under Article 5, the Court also expressed the view that the element of coercion inherent in the search was indicative of a deprivation of liberty.²⁴²

8.7. Section 44 was barely used during the period under review, and is no longer in force. It however remained on the statute book until March 2011, and forms the background for what has happened since. In brief:

- (a) A senior police officer could, if he considered it “*expedient for the prevention of acts of terrorism*”, specify an area in which uniformed officers are authorised to stop and search vehicles and pedestrians: section 44.
- (b) That power could be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, but could be exercised “*whether or not the constable has grounds for suspecting the presence of articles of that kind*”: section 45.
- (c) Authorisations had to be confirmed by the Secretary of State and could take effect for up to 28 days: section 46.

Interim replacement of section 44

8.8. When the Coalition Government took power, the Home Secretary announced in July 2010 that she would curb the continued use of section 44. Interim guidance on its continued use, limited to stops of vehicles on reasonable suspicion, was published on the website of the National Policing Improvement Agency, and in early March 2011 a revised Code of Practice under PACE reflected this guidance.

8.9. Meanwhile, the Review of Counter-Terrorism and Security Powers, whose findings were announced on 26 January 2011, concluded that the stop and search powers under TA 2000 sections 44 to 47 should be repealed and replaced with a much more limited power. The proposed new power, as contained in the Protection of Freedoms Bill, introduced to Parliament in February 2011, was to be exercisable without reasonable suspicion but in much more tightly defined circumstances than section 44.

²⁴¹ *Gillan and Quinton v United Kingdom*, Judgment of 12 January 2010, para 87. Compare now *Colon v Netherlands*, 5 June 2012.

²⁴² *Ibid.*, para 57.

- 8.10. On 17 March 2011, the Home Secretary – believing there to be an operational gap in the stop and search powers available to the police – laid before Parliament a remedial order under HRA 1998 section 10.²⁴³
- 8.11. Section 10 is a “*Henry VIII clause*” which, where there are compelling reasons for doing so, allows primary legislation to be amended by order for the purposes of removing an incompatibility with the European Convention of Human Rights that has been demonstrated by the Strasbourg Court. The Order deprived sections 44 to 47 of the TA 2000 of effect and replaced them until the Bill was passed with a new section 47A-C and Schedule 6B, taken from the Bill and supplemented by a new Code of Practice.²⁴⁴
- 8.12. Under the new TA 2000 section 47A, an authorisation for the use of the stop and search power can only be given where the senior police officer giving it “*reasonably suspects that an act of terrorism will take place*” and reasonably considers that the authorisation “*is necessary to prevent such an act*”. The authorisation can last for no longer and cover no greater an area than he reasonably considers necessary to prevent such an act. These are very high thresholds, reflected in the fact that in 16 months since its provisional introduction in March 2011, no authorisation has been made under section 47A in any part of the United Kingdom. If made, an authorisation ceases to have effect after 48 hours unless it has been confirmed by the Secretary of State.
- 8.13. The Code of Practice provided that an authorisation under section 47A may only be made by an officer of ACPO or ACPOS rank (i.e. at least an Assistant Chief Constable, or Commander in the MPS or City of London Police).
- 8.14. So far as the decision to authorise was concerned:
- (a) A general high threat from terrorism, and the vulnerability of a particular site or event, could be taken into account but could not form the sole basis of a decision to authorise.
 - (b) The Code expressly prohibited the giving of an authorisation on the basis that the use of the powers would provide public reassurance, or that the powers would be a useful deterrent or intelligence-gathering tool.
 - (c) The geographical extent of the power could take into account the fact that terrorist methods or targets may be changed, but had to set out the necessity for each area included and the length of time for which the authorisation was given in each such area.

²⁴³ Terrorism Act 2000 (Remedial Order) 2011, SI 2011/631.

²⁴⁴ *Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47A of Schedule 6B to the Terrorism Act 2000*, March 2011.

- (d) Authorisations had to be for a maximum period of 14 days, with renewals permitted only on the basis of a fresh intelligence assessment.

Authorisations had to be submitted on a standard form and contain, among other things, “*a detailed account of the intelligence*” which has given rise to reasonable suspicion, with any classified material annexed.

8.15. Also covered by the Code of Practice were the criteria, post-authorisation, for deciding whether to use section 43 or section 47A and for deciding whom to stop and search. Officers were to have regard to behaviour, clothing and carried items; they must avoid racial or religious profiling but may focus searches on people matching the description of particular suspects. It was said that random stops could be appropriate (though the circumstances were not indicated). Caution was advised where searches of photographers are concerned: but a section 43(1) search or arrest should be considered when it is reasonably suspected that photographs or film are being taken as part of hostile terrorist reconnaissance

8.16. Section 47A (and the initial Code of Practice produced in March 2011) was not without its critics. Thus:

- (a) The JCHR identified what it considered to be inadequacies in the procedure for authorisation, and made some suggestions including an amendment to the statutory test so that reasonable belief would be required as to the necessity of an authorisation for the purposes of preventing an act of terrorism, and the introduction of a requirement of prior judicial consent for authorisations.²⁴⁵

- (b) In my last annual report, I addressed a different aspect of the power: the criteria on which the power is exercised by individual officers once an authorisation has been given. I took issue with the draft NPIA Guidance, which exhorted officers to “*remember at all times that the search is random*”, and recommended that the Code of Practice on section 47A be revised so as to introduce full and proper guidance on the exercise of the officer’s discretion to stop and search, so minimising the risk that the discretion will be used in an arbitrary manner. I also recommended that if it was wished to retain random search as an option, notwithstanding the discouragement expressed judicially in *Gillan and Quinton*, the circumstances in which it was appropriate would have to be carefully defined, and strong reasons advanced for why it could be preferable in those circumstances to searches based on

²⁴⁵ 14th Report of 2010-12; HL Paper 155, HC 1141, June 2011.

suspicion, intelligence, risk factors or intuition.²⁴⁶ Those recommendations were supported in a further report of the JCHR.²⁴⁷

Permanent replacement: section 47A

- 8.17. POFA 2012 section 61, due to come into force on 10 July 2012, will permanently replaced the stop and search powers under TA section 44 with new powers under TA 2000 section 47A-47AE and Schedule 6B.

New code of practice

- 8.18. Consultation on the draft codes of practice for section 47A, Schedule 6B and sections 43 and 43A began on 6 February 2012 and ended on 1 April 2012. The revised Codes were presented to Parliament in May 2012.²⁴⁸
- 8.19. In relation to section 47A, the code of practice was amended from the version that accompanied the remedial order so as to address the concerns raised in my last report, echoed by the JCHR, regarding “*random*” searches,²⁴⁹ and so as to reflect comments from the police and from the Royal Photographic Society.

Practice

Section 43 searches

- 8.20. The MPS carried out 1052 stops and searches under section 43 in 2011, up from 998 in 2010. 3% of those searched (32 persons) were arrested, though it is not recorded how many of these arrests were for terrorism offences.²⁵⁰ No figures specific to section 43 are available for other parts of the United Kingdom.
- 8.21. It is possible that the 5% increase in the use of section 43 in London was a reaction to the ending of the section 44 stop and search power. The numbers were tiny, however, compared to the tens of thousands of people that were routinely searched quarterly under section 44, and the increase may be explicable by a former practice of using section 44 as the basis for search even in some cases where there were grounds for reasonable suspicion.
- 8.22. In 2011, an increased number and a substantially increased proportion of section 43 stop and searches by the MPS were of people defining themselves as Asian (or

²⁴⁶ D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, paras 8.33-8.39.

²⁴⁷ 17th Report of 2010-2012; HL Paper 192, HC 1483, September 2011, paras 29-35.

²⁴⁸ Code of Practice (England, Wales and Scotland) for the exercise of stop and search powers under sections 43 and 43A of the Terrorism Act 2000 &c., May 2012; see also the Northern Ireland equivalent.

²⁴⁹ *Ibid.*, 4.2.7 and 4.9.1-4.9.4.

²⁵⁰ HOSB 15/12, 14 June 2012, Table 2b.

Asian British). The figures are as follows (numbers stopped, by self-defined ethnicity, and percentage of stops comprised by each ethnic group):²⁵¹

	White	Asian	Black	Chinese/ other	Mixed/not stated	Total
2010	427 43%	301 30%	109 11%	71 7%	90 9%	998 100%
2011	368 35%	391 37%	91 9%	85 8%	117 8%	1052 100%

The total numbers are not large, and there can of course be no expectation that stops based on suspicion will equate to the ethnic make-up of the population in the area concerned. Nonetheless 2011 saw more self-defined Asian / British Asian people stopped under section 43 than self-defined white people: I shall be alert to future changes in the years ahead.²⁵²

Section 44 searches

- 8.23. In Great Britain, only 11 persons were stopped and searched under section 44 in the first quarter of 2011, all in London. The power was not exercised at all in the remainder of the year.²⁵³
- 8.24. The section 44 stop and search power was not used at all in Northern Ireland during 2011.²⁵⁴

Use of other search powers

- 8.25. The removal of the section 44 power appears in Northern Ireland to have coincided with a very large increase in the use of another no-suspicion stop and search power, not available in Great Britain: JS(NI)A 2007 section 24.²⁵⁵ A power used 1,163 times in 2009/10 was used 16,023 times in 2010/11: an increase of more than twelve times. The Independent Reviewer of JS(NI)A 2007, Robert Whalley CB, will no doubt comment further on this in his Fifth Report when it is published later this year.
- 8.26. On the same principle, it occurred to me to check the frequency of use in Great Britain of the power to stop and search in anticipation of violence under Criminal Justice and Public Order Act 1994 section 60. Home Office figures record just

²⁵¹ Taken from HOSB 7/12, 14 June 2012, Table 2.03. As explained at 1.31(e), above, the “other” category may be selected by people of North African or Middle Eastern ethnicity.

²⁵² See also the more detailed discussion of ethnicity at 9.20-9.27, below.

²⁵³ HOSB 7/12, 14 June 2012, Tables 2.01, 2.02.

²⁵⁴ Northern Ireland Statistics and Research Agency, *Stop and Search Statistics – Quarter 4 2011/12*, May 2012, p. 3.

²⁵⁵ *Report of the Independent Reviewer, Justice and Security (Northern Ireland) Act 2007, Fourth Report: 2010-2011*, November 2011, paras 209-212.

under 61,000 uses of section 60 in 2010/11, a 49% decrease compared to 2009/10.²⁵⁶ Stop and search under PACE 1984 section 1 on the other hand increased by 4% over the same period (to some 1,222,000). There are many possible explanations of these changes: the most that can be said is that there is no immediately obvious displacement effect from the repeal of TA 2000 section 44.

Section 47A

- 8.27. No authorisation has been issued under section 47A in the four months that it has been in (provisional) force. There is therefore nothing about its operation to report.

Conclusions

- 8.28. The TA 2000 section 44 no-suspicion stop and search power was used many hundreds of thousands of times over the decade it was in force. Of the various provisions of counter-terrorism legislation, it was the single greatest focus of resentment among Muslims. Yet it produced only a modest enforcement dividend, including not a single terrorism conviction in Great Britain. I have been struck by the very limited nostalgia for section 44 that appears to exist within the ranks of the police themselves, at least in Great Britain. Its demise will certainly not be lamented by me.
- 8.29. It may be pointed out that section 44 had design faults from the start; that it was over-used in some places for several years; and that it was only cut down after the Government's hand was forced by the European Court of Human Rights. There is truth in all those points: but the fact remains that there is always a political risk in scaling back powers designed to protect the public. By taking that step, the Coalition Government is to be congratulated for delivering on its rhetoric and making a genuine "*correction in favour of liberty*".²⁵⁷
- 8.30. Section 44 was replaced by a power the conditions for whose use are so hard to satisfy that it has been used not once in the 15 months that it has been available. The effects have been tangible: not a single person stopped without suspicion under the counter-terrorism laws, in London or on the rail network, even during such high-profile terrorist target events as the Royal Wedding of April 2011, President Obama's visit of May 2011 and the Diamond Jubilee celebrations of June 2012. Nor, as at the time of writing, has it been judged necessary to secure an authorisation to use the power in the build-up to the Olympic and Paralympic Games.

²⁵⁶ *Police Powers and Procedures Statistics*, Home Office website.

²⁵⁷ *Review of counter-terrorism and security powers*, January 2011, pp. 17-19.

8.31. It of course remains possible to imagine circumstances, in Northern Ireland and even in Great Britain, in which an authorisation to use a no-suspicion power will be deemed necessary. I shall report on any use of section 47A in the years ahead.

9. PORT AND BORDER CONTROLS (TA 2000 SCHEDULE 7)

Law

- 9.1. TA 2000 Schedule 7, given effect by section 53, has existed in one form or another since 1974. It empowers police, immigration officers and designated customs officers to stop and question travellers at ports, airports or hoverports (collectively referred to as “ports”).²⁵⁸ No prior authorisation is required for the use of Schedule 7, and the power to stop and question may be exercised without suspicion of involvement in terrorism.²⁵⁹ Questioning must be for the purpose of determining whether the person appears to be concerned or to have been concerned in the commission, preparation or instigation of acts of terrorism.²⁶⁰ Persons, luggage and vehicles may be searched for the same purpose, and freight may be examined to determine whether goods have been used for terrorism.²⁶¹ Property searched or examined may be retained for seven days for examination.²⁶²
- 9.2. Any person questioned is obliged, on request, to hand over ID and any information in his possession.²⁶³ He may be required to complete a standard form card (known as “carding”).²⁶⁴ He may also be detained for a period of up to nine hours beginning with the time when his examination begins.²⁶⁵ When a person is detained, Part I of TA 2000 Schedule 8 comes into play: the detained person acquires rights which he did not have prior to detention (e.g. to have a named person informed, and to consult a solicitor)²⁶⁶ but also obligations (e.g. to give fingerprints, non-intimate and intimate DNA samples). Owners or agents of ships or aircraft may be required to provide specified information.²⁶⁷ Reasonable force may be used to effect searches,²⁶⁸ and failure to comply with a duty under the Schedule, including the obstruction of a search or examination, is an offence punishable by up to three months’ imprisonment.²⁶⁹

²⁵⁸ Schedule 7, paras 2, 6. Schedule 7 powers may also be exercised near the land border with Ireland and in the Channel Tunnel system.

²⁵⁹ *Ibid.*, para 2(4).

²⁶⁰ *Ibid.*, para 2(1).

²⁶¹ *Ibid.*, paras 7-9.

²⁶² *Ibid.*, para 11.

²⁶³ *Ibid.*, para 5.

²⁶⁴ *Ibid.*, para 16. Carding tends to be used, in practice, at only a limited number of ports.

²⁶⁵ *Ibid.*, para 6.

²⁶⁶ “*Albeit Schedule 8 para 7 limits the right [of access to a solicitor] to detention in a police station, it will continue to be permitted wherever the detention is taking place*”: *CC v MPC and SSHD* [2011] EWHC 3316 Admin, [38].

²⁶⁷ *Ibid.*, para 17.

²⁶⁸ Schedule 14, para 3.

²⁶⁹ *Ibid.*, para 18.

- 9.3. Taken together, these powers are formidable indeed. They bear close comparison with the powers exercisable (against foreign nationals only, and with extensive limitations where EU nationals are concerned) under the Immigration Act 1971, Schedule 2. They are among the strongest of all police powers.
- 9.4. The only recent statutory amendment material to Schedule 7 is in PFA 2012. Schedule 1 to that Act, when brought into force, will place a 6-month limit on the retention of fingerprints and DNA samples and profiles taken from persons detained under TA 2000 Schedule 7. There will be exceptions for those convicted of a recordable offence (where such information will be held indefinitely) and where retention is necessary for the purposes of national security (where material can be held for up to 2 years at a time, subject to independent oversight by the Biometrics Commissioner).

Code of Practice and Practice Advice

- 9.5. The current Code of Practice²⁷⁰ (required by TA 2000 Schedule 14) was issued in 2009 after a review of Schedule 7. That review, conducted against a backdrop of increasing counter-terrorism powers, did not result in any amendment to the Schedule itself. The Code of Practice is supplemented by Practice Advice from the National Policing Improvement Agency [NPIA].²⁷¹
- 9.6. The Code of Practice covers such matters as:
- (a) who should perform Schedule 7 stops (police officers, save in exceptional circumstances)
 - (b) how to select persons for stops (selection should be based on the threat posed by the various terrorist groups active in and outside the United Kingdom, on the basis of informed considerations and not solely based on perceived ethnic background or religion)
 - (c) when the examination is deemed to begin (only after screening questions have been asked, or a person has been directed to another place for examination)
 - (d) procedures to be observed after one hour's examination, and again on detention (in particular, the service of specified forms and the giving of information).

The NPIA Practice Advice is slightly fuller, but to similar effect.

²⁷⁰ *Examining Officers under the Terrorism Act 2000 Code of Practice*, Home Office, 2009.
²⁷¹ *Practice Advice on Schedule 7 of the Terrorism Act*, NPIA 2009.

Schedule 7 review

- 9.7. At the beginning of 2011, the Coalition Government stated that as a result of feedback given by community groups and in the context of its commitment to strengthen border security arrangements,

“the Government is ... considering how the border security powers contained in Schedule 7 of the Terrorism Act 2000 are used.”²⁷²

In my last annual report, taking as my starting point work already done internally, I recommended that there should be a careful review of the extent and conditions of exercise of the Schedule 7 power, including the widest possible consultation with police, carriers, port users and public. I set out 14 specific questions that I said should be covered by the consultation and review.²⁷³ Most of those questions concerned the necessity or otherwise for various aspects of the existing very extensive powers. Some enquired whether existing powers needed strengthening, in relation to areas such as advance passenger and freight information and the interception of unaccompanied packets.

- 9.8. In her response of 25 October 2011 to my last annual report, the Home Secretary replied that work done by the Government had identified many of the issues I had raised in my detailed recommendations, and that she was considering the best way to take this work forward.
- 9.9. I have structured this chapter of my report on the assumption that a review and public consultation on Schedule 7 may yet take place. If that does happen, I express the particular hope that the representatives of the communities who are proportionately most affected by Schedule 7 will be clearly heard. Some (e.g. FOSIS, Humza Yousaf MSP and StopWatch) already have a strong and constructive campaigning record in this area. The issue of port stops is always raised with me when I meet with community groups in Great Britain (though its profile is low in Northern Ireland). However, whether out of mistrust or ignorance, the number of complaints about Schedule 7 is remarkably small.²⁷⁴ I urge those unhappy with the operation of Schedule 7 to take full advantage of the opportunity that the consultation will afford to put their views and experiences across, in as specific a manner as possible.
- 9.10. I do not attempt in this annual report to make substantive recommendations in relation to Schedule 7. Instead, I summarise the impression of Schedule 7 that I have gained from numerous visits and conversations in 2011/12, in the hope that

²⁷² *Review of counter-terrorism and security powers*, Cm 8004, January 2011, p. 6.

²⁷³ D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, paras 9.24-9.33.

²⁷⁴ See 9.30-9.34, below.

my observations might serve to inform any future consultation and those who may respond to it.

Practice

My experience of Schedule 7

- 9.11. In my first 15 months as Independent Reviewer I observed the operation of Schedule 7 powers, and spoke with the ports officers who exercise them, at London Heathrow, Manchester, Birmingham, Edinburgh and Belfast City Airports, at the seaports of Dover, Stranraer, Belfast and Felixstowe and at St Pancras International rail terminal. I have travelled to Calais and Coquelles to observe the operation of dual controls, including the use of Schedule 7 on French territory, and participated in a desktop training exercise for ports officers. Attendance at a small ports conference organised by Devon and Cornwall Constabulary enabled me to question and listen to ports officers from all over the country. I have also spoken to MI5 and to MI6 about the value to them of intelligence from port stops, addressed two conferences for London-based ports officers organised by the MPS, and attended the National Ports Conference at Bramshill Police College in May 2012.
- 9.12. In addition I have spoken with a number of groups and individuals about the impact of Schedule 7 examinations on their communities. These include the Muslim Council of Britain, Cageprisoners, the Federation of Student Islamic Societies [**FOSIS**], representatives of the London Kurdish, Baluch and Tamil communities and Humza Yousaf MSP, who has himself been stopped on a number of occasions at airports and who has been active in Scotland in organising discussions of Schedule 7. I have had the benefit of a submission from StopWatch, a coalition of concerned organisations including Open Society Justice Initiative, Muslim Safety Forum, Coalition for Racial Justice, academics from King's College London and the London School of Economics, Release, Turning Point, Newham Monitoring Project and three firms of solicitors closely involved with Schedule 7. I raised the operation of Schedule 7 with a variety of NGOs and lawyers in Northern Ireland at a conference organised by the Committee on the Administration of Justice in Belfast. Of the London-based NGOs with an interest in Schedule 7 I have spoken in particular to the EHRC and Liberty. I have also spoken to a solicitor with a great deal of experience in the field and to academics and graduate students with an interest in the subject, attended the East London Mosque, addressed community leaders there and listened to their concerns about the use of Schedule 7. Similar concerns about over-use of Schedule 7 have been voiced to me, albeit for different reasons, by port operators, airlines and ferry companies. In that regard I have benefited in

particular from conversations with representatives of the Manchester Airport Group plc.

- 9.13. Finally, I have visited the National Borders Targeting Centre in Manchester and spoken to senior officers at SO15, the PSNI and in various CTUs and CTIUs around the country, to officials at the Home Office, MI5 and MI6 and to Ministers and MPs. I have been briefed by the Independent Police Complaints Commission [**IPCC**], which since July 2011 has received all complaints concerning the use of Schedule 7 powers, and viewed examples of the intelligence reports that convey the results of examination into the counter-terrorism network.

Frequency of use

- 9.14. In the year to 31 March 2011, over the UK as a whole:²⁷⁵
- (a) There was a total of 85,423 Schedule 7 examinations, 20% down on 2009/10.
 - (b) 73,909 of those examinations were on people, and 11,514 on unaccompanied freight.
 - (c) 2,291 people (3% of those examined - a similar percentage to 2009/10) were kept for over an hour.
 - (d) 915 people were detained after examination (1% of those examined, up from 486 in 2009/10).
 - (e) 769 people had biometric samples taken.
 - (f) There were 31 counter-terrorism or national security-related arrests. However 25 of those were in a single force area, reflecting that force's policy (since amended) as regards the action they take for those withholding or giving of false information during an examination.
 - (g) 101 cash seizures by the police thought to relate to counter-terrorism were made, amounting in total to £844,709, mostly at airports.²⁷⁶

These figures have to be set against the numbers of passengers travelling through UK airports (213 million), UK seaports (22 million) and UK international

²⁷⁵ These figures are taken from HOSB 15/11, 13 October 2011 (GB only), supplemented by Northern Ireland figures and analysis prepared for ACPO.

²⁷⁶ These figures include cash seizures made under ATCSA 2001 and POCA 2002. Figures were collated when the cash was detained following the initial Magistrates Court hearing, when a possible link to terrorism was still being investigated.

rail ports (9.5 million) during the year. In total, only 0.03% of passengers were examined under Schedule 7 in 2010/11.

- 9.15. The figures for 2011/12 have not yet been finalised and will not be released until October. I am told however that they will reveal a reduction of the order of 2-3% in examinations (both under the hour and over the hour), together with a larger reduction (of the order of 23-26%) in both detentions and the taking of biometric samples. This however follows large increases in detentions and biometrics between 2009/10 and 2010/11. I have explored the reasons for these fluctuations with the ACPO. They seem to be the consequence, at least in part, of different emphases during officer training. They point up the need for a clear and consistent policy on when examination ends and detention begins.
- 9.16. Not reflected in these figures is the substantial number of people who are asked only “*screening questions*” (in what were known prior to 2009 as “*short stops*”). In the words of the NPIA Practice Advice:

“There is no requirement for examining officers to make a record of ... an encounter if it does not progress beyond initial screening questions. Initial screening questions may include, but not be limited to, those that seek to establish the identity, destination and provenance of the subject, details of their method of travel and the purpose of their travel.

To avoid passenger or traffic congestion, a person or vehicle may be directed to another nearby place for screening questions. This does not constitute the beginning of an examination.”

Initial screening questions take between a few seconds and a few minutes. No record is made of their numbers, and their frequency varies from port to port.²⁷⁷ My overall impression however (confirmed by conversations with experienced ports officers) is that screening questions will tend to be asked of several people for every one who is subject to examination. While one cannot be certain, it may well be that over half a million persons are spoken to in this way at UK ports every year – though most of them for no more than a few minutes.

- 9.17. It occurs to me that it could be useful to have sample figures from a range of ports for examinations occupying less than an hour, which might demonstrate what proportion of sub-one hour examinations last, say, for more than 15 or 30 minutes. It has been suggested to me that these proportions are relatively small.

²⁷⁷ Thus, where ports officers operate in close proximity to UKBA, it will often be possible to take the decision whether to examine on the basis of answers given to UKBA, without it being necessary to ask specific screening questions. Port operators such as Manchester Airport were keen to impress upon me what they saw as the potential for time-consuming duplication between the activities of immigration officials and ports officers.

- 9.18. It may be seen from the figures above that biometrics (fingerprints and non-intimate DNA samples) were taken from fewer than 800 people over the year. While some will maintain that biometrics should never be taken save after caution or arrest, it should be noted that PFA 2012 introduces a significant change to the law by permitting their retention (save in the circumstance summarised at 9.4, above) for only six months. There are no centrally compiled figures for strip searches or for the taking of intimate DNA samples, though I have been given to understand that both are extremely rare.
- 9.19. It would be useful to have figures for numbers of people detained for between three and six hours and between six and nine hours. Figures published for 2009/10 were 340 and 40 respectively, in Great Britain only. I am told that the equivalent figures are not readily available for 2010/11, and that even if produced they may not be robust and thus could only be indicative. However, since the necessity for long detentions is likely to be a live question in any future review of Schedule 7, it seems to me highly desirable that such figures should be produced. I return to this subject under Recommendations at 9.75, below.

Ethnic origin

- 9.20. Only since 1 April 2010 has the collection of ethnicity data for Schedule 7 stops been carried out on the self-definition basis used for other police powers. The first data collected on that basis relate to 2010/11 and were published in autumn 2011. Data for the previous year, officer-defined and so considered insufficiently reliable for publication in the Home Office Statistical Bulletin, were reproduced with appropriate caveats in my last annual report.²⁷⁸
- 9.21. The UK-wide data may be summarised in tabular form as follows:²⁷⁹

2010/11	White	Black	Asian	Other	Mixed or not stated
Examined < 1 hour	46%	8%	26%	16%	4%
Examined >1 hour	14%	15%	45%	20%	6%
Detained	8%	21%	45%	21%	5%
Biometrics	7%	21%	46%	20%	6%

²⁷⁸ D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, para 9.15.
²⁷⁹ Figures supplied by ACPO. Some figures for GB only are available in HOSB 15/11, 13 October 2011, Table 2.04.

It will be recalled that of all those examined, only 3% were examined for more than an hour, and only 1% were detained.

9.22. Self-defined members of minority ethnic communities thus constituted:

- (a) a majority of those examined under Schedule 7; and
- (b) 92% of those detained under Schedule 7 in 2010.

Though inherently less reliable, the officer-defined ethnicity figures given in my last annual report for 2009/10 are to similar effect.²⁸⁰

9.23. No ethnicity data are collected for port travellers generally. It may well be that the proportion of ethnic minorities among those using UK ports and airports for travel is higher than the proportion in the UK population as a whole. It is most unlikely however that white people are in a minority among travellers. Detentions (plainly) and examinations (almost certainly) are thus imposed on members of minority ethnic communities – particularly those of Asian and “other” (including North African) ethnicity – to a greater extent than their presence in the travelling population would seem to warrant.

9.24. That fact alone does not mean that examinations and detentions are misdirected. As I argued in my last annual report (paras 9.14-9.21), Schedule 7 should not be used (as section 44 stop and search was from time to time used) in order to produce a racial balance in the statistics: that would be the antithesis of intelligence-led policing. The proportionate application of Schedule 7 is achieved by matching its application to the terrorist threat, rather than to the population as a whole.

9.25. There is however no room for complacency. The ethnic breakdown of the terrorist threat is hard to pin down: but one proxy for it is the following categorisation of the 1221 persons arrested and 256 charged with terrorism-related offences in Great Britain between April 2005 and March 2011.²⁸¹

2005-2011	White	Black	Asian	Other	Not known
Arrested	26%	12%	41%	20%	1%
Charged	22%	21%	44%	13%	0%

²⁸⁰ D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, para 9.17.

²⁸¹ HOSB 15/11, 13 October 2011, Table 1.06. “Other” includes those of North African and Middle Eastern ethnicity.

Even in Great Britain, therefore, white people constitute approximately a quarter of those arrested and charged with terrorist offences – a proportion that would no doubt rise considerably if Northern Ireland data were included.²⁸² The figures given at 9.21 above must be viewed against this background.

9.26. The ethnicity figures provide, in themselves, no basis for criticism of the police. They do however underline the need for vigilance, particularly when some minority communities are understandably sensitive about the application of Schedule 7. It is important for all involved with the application of Schedule 7 to remember that:

- (a) perceived ethnic background or religion should not be used, alone or in combination with each other, as the sole reason for selecting a person for examination;²⁸³
- (b) UK terrorists are of all colours: a substantial proportion of them (even outside Northern Ireland) are white; and that
- (c) apparently innocuous decisions (for example, to check the plane from Pakistan rather than the plane from Canada) may reflect unconscious racial bias.

9.27. I shall continue to monitor ethnicity figures as they become available in future years, and continue to discuss these issues in my interactions with police. I am aware however of no evidence that Schedule 7 is currently exercised in a racially discriminatory way.

Complaints and community reaction

9.28. Schedule 7 is a long-established power which has not traditionally been the subject of campaigning or press interest, in the manner of the former section 44 no-suspicion stop and search power. It is only recently that figures have been produced demonstrating the large number of people who are examined under the power. FOSIS published a report in 2010, acknowledging the utility of

²⁸² Though no ethnic data are kept for those arrested for and charged with terrorist offences in Northern Ireland, the overwhelming majority of the 1,282 people arrested under TA 2000 section 41 between 2005 and March 2011 (*Northern Ireland Terrorism Legislation, Annual Statistics 2010/11*, Table 3) may be assumed to be white. It should be added however that NIRT is highly localised in nature, its networks relying far less on air and sea travel (even to Great Britain) than do those of Al-Qaida inspired terrorism. While NIRT is of course the subject of intelligence-based stops at Northern Ireland ports and airports, international terrorists taking advantage of the common travel area to pass from Dublin to Great Britain are at least as important a concern.

²⁸³ As underlined in the Schedule 7 Code of Practice, para 10, and in the NPIA Practice Advice on Schedule 7, para 3.1.3. Cf. *R (Gillan and Quinton) v Commissioner of Police for the Metropolis* [2006] UKHL 12, per Lord Hope at para 46.

Schedule 7 for disrupting terrorism while contending for limitations on its use.²⁸⁴

The release of ethnicity figures under freedom of information legislation in May 2011 gave rise to critical comment from a number of NGOs and led Lord Ahmed, the Labour peer, to call for an independent review of the use of Schedule 7.

- 9.29. One of the few studies to touch on the specific impact of Schedule 7 on Muslim communities is the report produced in June 2011 for the EHRC by researchers from Durham University.²⁸⁵ They reported that “[f]or some Muslims, these stops have become a routine part of their travel experience”, and that “this power is silently eroding Muslim communities’ trust and confidence in policing”. Most of the Muslims participating in focus groups were said to feel:

“that they were being targeted as Muslims, and that the questions were being used to build up profiles of them and to gather information in general about Muslim communities”.

Negative experiences included repeated stops of the same individuals; the stress caused to the person stopped and to those travelling with them, as they worry about missing flights or losing baggage; the seizure of mobile phones and credit cards; intrusive and maladroit questions about religious beliefs and community activities. My own contacts with Muslim organisations and individuals suggest that feelings of being singled out on religious grounds may be strongly felt even by those who are never asked more than screening questions. Some Muslims even choose to travel from distant airports so as to avoid what is thought to be the greater risk of being stopped at the local airport.

- 9.30. Very little of this dissatisfaction however feeds through into formal complaints. The “TACT 1” form handed to all those examined for upwards of an hour state clearly that:

“Complaints about the conduct of officers or your treatment during your examination/detention should be directed to the Chief Constable of the force responsible for the port/airport where you have been examined/detained.”²⁸⁶

- 9.31. Since July 2011, all complaints arising from the use of Schedule 7 have been referred to the IPCC. Yet between 1 July 2011 and 23 May 2012, only 20 complaints were received.

²⁸⁴ Policy Document on Schedule 7 (Port and Borders Control) of the UK’s TA 2000, FOSIS 2010.

²⁸⁵ T. Choudhury and H. Fenwick, *The impact of counter-terrorism measures on Muslim communities* (EHRC Research report, June 2011), pp. 22-29. The conclusion that Schedule 7 was “generating animosity” in Muslim communities was recently endorsed, after a review of related literature and a series of focused Schedule 7 research interviews, in an unpublished dissertation submitted to St. Andrew’s University in May 2012 by Mike Redmond, a Ports Officer at Gatwick Airport working also in community engagement.

²⁸⁶ Reproduced as Annex A to the Schedule 7 Code of Practice issued pursuant to Schedule 7 para 6(1).

- 9.32. Complaints about the use of Schedule 7 over this period concerned the perception that stops are based on appearance and perceived ethnicity, repeated stops, the conduct of officers during the initial interaction with the person being stopped, unhappiness that this initial encounter often takes place in public view, failure of the officers carrying out the stop to provide information about why the stop was taking place, the refusal of officers to identify themselves or show identification, unhappiness about the probing or personal nature of questions, the perception that Schedule 7 is being used to gather intelligence rather than directly to prevent acts of terrorism, failure to provide a written record of the stop and failure to help if flights etc. are missed as a consequence of an examination (though in other cases, it was reported to me that examining officers use the promise of help with travel arrangements as an inducement to cooperation).
- 9.33. It should not be assumed that all these allegations are justified: some of the 20 complaints have been withdrawn, while after investigation, no evidence has been found by the IPCC to support others. More fundamentally, the number of complaints is so low that it seems difficult to draw any general conclusions from them. The IPCC has suggested to me that the low number of complaints may be attributable to low levels of awareness of and confidence in the complaints system, an unwillingness to continue contact with the officers involved in the stop, or simply the fact that people who are stopped are tired, stressed and concerned only to get on with their lives.
- 9.34. It is important that the opportunity of complaining about the exercise of Schedule 7 powers should be well understood. To this end, it seems important that the possibility of making such a complaint, and having it considered by the IPCC, should be as widely publicised as possible – including for the great majority who are not examined for long enough to be given a TACT 1 form. Ultimately, however, as I have sought to emphasise in dialogue with community groups and in a recent interview with Muslim News, it is for those who believe that they have been unjustly or unfairly treated to take the initiative and complain. The anecdotal evidence that has been presented to me by a variety of groups and individuals is useful for identifying areas of concern, but is neither quantifiable nor (usually) verifiable. A sounder basis for identifying the nature and gravity of the problems with Schedule 7 would be a substantial body of formal complaints, impartially investigated and concluded.

Lawfulness of Schedule 7

- 9.35. I commented in my last annual report (para 9.28) on the possible implications of the *Gillan* judgment for Schedule 7. One possibly arguable distinction is that travel through a port is voluntary in the way that travel through a city is not.

However, since the exercise of Schedule 7 powers is likely to engage rights protected under the ECHR,²⁸⁷ the onus is on the authorities to justify those powers as necessary in the interests of national security, proportionate in their application, “sufficiently circumscribed” and “subject to adequate legal safeguards against abuse”.²⁸⁸ Each element of the power must be justified: thus, the necessity of a power exercisable without suspicion, a power to detain for up to nine hours and a power to conduct strip searches may in an appropriate case be separately considered.

9.36. During the year under review, two judgments of the High Court relating to the lawfulness of Schedule 7 examinations were handed down on the same day (20th December 2011), both by Mr. Justice Collins.

9.37. In *R (K) v SSHD*,²⁸⁹ a claimant sought permission to apply for judicial review in relation to a Schedule 7 examination, prompted by a perceived irregularity in his passport. The examination was said to have caused him to miss his flight. It was challenged on the basis both of incompatibility with HRA 1998 and of discrimination. The judge refused permission to apply for judicial review, stating robustly that:

“The ability to stop and examine would-be passengers at ports is an essential tool in the protection of the inhabitants of this country from terrorism. This legislation or its predecessor has been in existence since 1974. Its effectiveness and the need for its existence has been confirmed by the annual reports of Lord Carlile. I do not doubt that the claimant feels that he has been wrongly and unfairly treated since it is clear that he did not in the result appear to be a terrorist. But the power is necessary in a democratic society and, quite apart from the delay in seeking to challenge it, the contrary is not arguable.”

The claim for permission was subsequently listed for an oral permission hearing, which was however not proceeded with.

9.38. The second case, *CC v MPC and SSHD*,²⁹⁰ ended in victory for the claimant on highly unusual facts. Acting on a suggestion from MI5, the police used their Schedule 7 powers to search and question the claimant at Heathrow, on his return from several years in Somalia. A control order had already been made against him, in anticipation of his return, meaning that the Secretary of State must be taken already to have had reasonable grounds for suspecting that he was or had been involved in terrorism-related activity. In those circumstances, questions that the court considered to be aimed at getting information that would

²⁸⁷ The rights most likely to be affected are Article 8 (right to respect for private life) and Article 5 (right to liberty).

²⁸⁸ It was their failure to meet the latter requirements that caused the TA 2000 section 44 and 45 powers to violate Article 8 of the Convention: *Gillan and Quinton v UK* at [87].

²⁸⁹ CO 10027/2011.

²⁹⁰ [2011] EWHC 3316 (Admin).

not be tainted by torture allegations, or at confirming the propriety of the control order, were held to be improper uses of Schedule 7.

9.39. The court also indicated that “*any lengthy need to examine*” would class as a detention²⁹¹ (with the concomitant right to free legal advice, whether the detention was at a police station or not).²⁹² This appears to invalidate the practice in some ports of detaining a person only if he or she becomes uncooperative, thereby delaying both the rights and the obligations that come with detention under Schedule 8.

9.40. In a number of other respects, however, the judgment was helpful to the Government. Thus, Collins J commented that:

(a) officers were free to act on an intuitive basis, even if no prior information existed;

(b) a person may be examined even if he is already suspected of being a terrorist, for the purpose of ascertaining “*the way in which or the act by which he so appears*”,²⁹³

(c) an examination could continue even after the examining officer had ascertained that the person examined did not appear to be or to have been concerned in the commission, preparation or instigation of acts of terrorism;²⁹⁴ and that

(d) an examining officer could lawfully supply information to the security services.²⁹⁵

9.41. Furthermore, by remarking that

“It is incidentally difficult to see what contribution a solicitor could usefully make since there is an obligation to answer questions put and to submit to searches and the taking of samples can occur in the circumstances set out”,

Collins J implicitly endorsed the absence of any right to silence when information is requested by the examining officer (Schedule 7, para 5).²⁹⁶

²⁹¹ Judgment [13].

²⁹² Judgment [38], criticising in that respect the TACT notices (since corrected).

²⁹³ Judgment [16].

²⁹⁴ On the basis that continued examination of the person or his possessions might cause the examining officer to take a different view, and that a different officer might not share his view. The Code of Practice was criticised for this reason: Judgment, para 18.

²⁹⁵ Judgment [21].

²⁹⁶ It seems at least highly probable that the absence of such a right will render statements given under Schedule 7 examination inadmissible in court: conscious of the potential intelligence dividend, however, this is a price that the police seem willing to pay.

- 9.42. Although they lost on the facts of the case, neither the Government nor the MPS chose to appeal what they are likely to have considered overall to be a favourable judgment.

Utility of Schedule 7

- 9.43. As the Code of Practice correctly emphasises:

“The purpose of questioning and associated powers is to determine whether a person appears to be someone who is or has been concerned in the commission, preparation or instigation of acts of terrorism. The powers, which are additional to the powers of arrest under the Act, should not be used for any other purpose.”²⁹⁷

It makes sense therefore to start by asking how effective Schedule 7 has been in achieving its purpose of identifying terrorists.

- 9.44. Schedule 7 examinations have certainly been instrumental, first of all, in ***securing evidence which assists in the conviction of terrorists***. That evidence does not take the form of answers given in interview (which because of the compulsion to answer would almost certainly be inadmissible in any criminal trial) but rather consists of physical possessions or the contents of mobile phones, laptops and pen drives.
- 9.45. In my last annual report I gave four specific examples of this over the period 2007-10, culminating in prison sentences of between 2 and 12 years.²⁹⁸ A further, more recent example, followed the stopping of two Germans, Christian Edme and Richard Baume, at the Port of Dover in July 2011. Material found on their computers led to their imprisonment, after guilty pleas to charges under TA 2000 section 58, for periods of 16 and 12 months respectively.
- 9.46. It is fair to say that the majority of examinations which have led to convictions were intelligence-led rather than based simply on risk factors, intuition or the “*copper’s nose*”. Indeed, despite having made the necessary enquiries, I have not been able to identify from the police any case of a Schedule 7 examination leading directly to arrest followed by conviction in which the initial stop was not prompted by intelligence of some kind.
- 9.47. It is also fair to point out that the annual numbers of terrorism arrests made at the ports after Schedule 7 searches is relatively modest. Leaving aside the 25 arrests for “*carding*” offences,²⁹⁹ there were only six such arrests in 2010/11.

²⁹⁷ *Examining Officers under TA 2000 – Code of Practice (2009)*, para 9.

²⁹⁸ D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, para 9.24.

²⁹⁹ i.e. falsely filling in details on the cards handed out at some ports pursuant to Schedule 7 para 16. This was the former practice in one police force area.

Set however against a total of 121 arrests for terrorism in Great Britain over the same period (50 of them under TA 2000 section 41), this may be considered not insignificant, particularly bearing in mind the value of information produced by Schedule 7 examinations in securing further, subsequent arrests.

- 9.48. Secondly, Schedule 7 examinations have been useful in yielding **intelligence about the terrorist threat**. Sometimes words spoken in interview, though not themselves admissible as evidence, may start a train of enquiry that leads to a prosecution. Of great importance, however, is intelligence of a more indirect kind – which may come from intelligence-led stops or from stops on the basis of risk factors. Schedule 7 examinations are perhaps most prized by the police and security services for their ability to contribute to a “*rich picture*” of the terrorist threat to the United Kingdom and UK interests abroad. In 2010/11 as in previous years, a significant proportion of examinations result in the production of an intelligence report. The intelligence services have left me in no doubt as to the importance of this rich picture, or as to the significance of Schedule 7 in putting it together. I have seen for myself the manner in which information gleaned from Schedule 7 examinations and searches can be used to build up a picture of travel patterns, or the location of centres of violent extremism in other countries.
- 9.49. I have been briefed confidentially on a small number of investigations into al-Qaida related terrorism that were conducted in the UK during 2011. Schedule 7 stops, as it happened, made no contribution to those specific investigations. Though there are no statistics of which I am aware, it was however suggested to me by the head of SO15 that most such investigations do rely to at least to some extent on port intelligence.
- 9.50. Thirdly, Schedule 7 examinations may assist **disruption or deterrence**. Young, nervous or peripheral members of terrorist networks can sometimes be dissuaded from plans e.g. to travel abroad for training by the realisation – communicated by a port stop – that the police have an idea of who they are and what they are about. There are methods, similarly, of indicating to freight transporters that ports officers are aware of their activities. The practice of stops not based on intelligence may help inhibit the use by terrorist groups of “*clean skins*” not previously known to police or to the security and intelligence services.
- 9.51. Finally, a Schedule 7 examination – once it has been completed, and this has been made clear to the person examined³⁰⁰ – may serve as an opportunity for the identification of those who may agree to be **recruited as informants**. This was accurately described by a senior counter-terrorism officer as “*an important*

³⁰⁰ Code of Practice, para 10.

by-product of the stops".³⁰¹ I do not underestimate the value to national security of informants (not only in the counter-terrorism context); and I accept that the neutral environment of a port or airport may indeed be a propitious place for such an approach. The word "*by-product*" is however important, for it must be strongly emphasised that Schedule 7 does not permit a person to be stopped or examined for the purpose of recruitment as an informant. If such a power is thought necessary, it should be legislated for.

9.52. For all these reasons, I can confirm that as I said in my last annual report (at para 9.25), the utility of the Schedule 7 power is scarcely in doubt. It stands in stark contrast to the old TA 2000 section 44, the no-suspicion stop and search power criticised in *Gillan* which, despite being used over quarter of a million times in one year alone, and many hundreds of thousands of times altogether, resulted in only a small handful of charges and not a single conviction for a terrorist offence in Great Britain.³⁰²

9.53. It is important however that the considerable attractions of Schedule 7 by-products (including both contributions to the intelligence "*big picture*" and opportunities to recruit an informant) should not distract ports officers from the fact that the power may only be used with the genuine intention of determining whether someone appears to be or to have been concerned in the commission, preparation or instigation of acts of terrorism.

Exercise of the power

9.54. Stops of individuals are either targeted (often at the suggestion of the CT Network or one of the intelligence agencies) or based on intuition. Those categories are however not watertight, and the difference between them is less than might appear.

9.55. Intuitive stops are not simply a matter of the "*copper's nose*": they may be based on referrals from others within the airport (UKBA, airline staff, airport security staff), on behavioural observation or on advance passenger information.³⁰³ The ability to take such matters into account depends however on the circumstances: thus, there is far less scope for prior analysis or for behavioural assessment in

³⁰¹ T. Choudhury and H. Fenwick, *The impact of counter-terrorism measures on Muslim communities* (EHRC, 2011), p. 21.

³⁰² D. Anderson, *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, paras 8.17-8.21. Other differences are that section 44 searches were not restricted to ports, and were not on the whole performed by officers trained in the intelligence background.

³⁰³ Those who oppose the disclosure of advance passenger information on privacy or free movement grounds face a dilemma: for such information is a useful way of targeting stops on those most likely to pose a threat. I was told by several ports officers that if they had more accurate passenger information further in advance, they could greatly reduce the number of Schedule 7 stops. Better advance passenger information could also reduce or remove the need for carding, at those ports where it is practised.

the case of a car driving off a ferry whose passenger manifest has not been supplied than there is in the case of an individual whose flight details will be known and whom there has already been an opportunity to observe in the airport.

- 9.56. The Code of Practice does not countenance random searches, but lists six illustrative considerations³⁰⁴ before stating (at p. 8) that

“selections for examination should be based on informed considerations such as those outlined above and must be in connection with the threat posed by the various terrorist groups active in and outside the United Kingdom”.

Though my observations were necessarily limited, I did not see the Code of Practice being misapplied. Though one constable on duty at a seaport did initially tell me that he was stopping cars “*at random*”, further questioning revealed that he was in fact doing his best to apply risk factors of the approved kind.

- 9.57. I am conscious that what police may see as benign and effective law enforcement can easily be viewed by others as misdirected paternalism or even as state-sponsored victimisation. It must be clearly understood that perceived ethnic or religious background, unaccompanied by the risk factors listed in the Code of Practice, is not a sufficient basis for stopping, questioning or examining any port user. The fact that it is largely intelligence-based stops which have been directly responsible for arrests and convictions points up the need for the proportionate use of stops based purely on risk factors. I welcome the considerable reduction in Schedule 7 examinations between 2009/10 and 2010/11. People should not be stopped, let alone examined, simply because officers are present and have nothing better to do.

- 9.58. All this said, that I have been struck by the light touch and by the professionalism displayed by nearly all the ports officers whom I have observed doing their job. They are conscious that the great majority of people stopped will be entirely innocent of any involvement in terrorism, and they behave accordingly. As a senior officer explained to me at Birmingham Airport, “*we try to have them leave with a smile on their face*”. Strange as it may sound, this objective appears – in the case of those subjected only to screening questions, who represent the large majority of those stopped – generally to be achieved.

³⁰⁴ “Known and suspected sources of terrorism; Individuals or groups whose current or past involvement in acts or threats of terrorism is known or suspected and supporters of sponsors of such activity who are known or suspected; Any information on the origins and/or location of terrorist groups; Possible current, emerging and future terrorist activity; The means of travel (and documentation) that a group or individuals involved in terrorist activity could use; Emerging local trends or patterns of travel through specific ports or in the wider vicinity that may be linked to terrorist activity.”

- 9.59. Many ports officers (assisted e.g. at Edinburgh Airport by an exemplary daily Special Branch port briefing) are eager to inform themselves of the current intelligence background; the training that I have witnessed with Kent Police is impressive; and while some questioning is still perceived as insulting, over-personal and irrelevant (particularly questions about religious observance and views on foreign policy), my impression is that the standard of questioning has improved in recent years.
- 9.60. The willingness with which most people submit to screening questions may be encouraged by a general expectation that one may be searched or questioned when passing through a port, and by the fact that people are not always aware at first what powers are being exercised, or what their own obligations are. Cars approaching the ferry at Dover see passport graphics, followed by a large “UK CUSTOMS” sign: they are given no clue that the officers seated in the drive-by booth (and to whom many of them proffer passports as though it were an obligation) are there principally in order to determine whether they appear to be terrorists. Similarly, the small wooden lecterns behind which officers stand at airports will often bear the legend “Police Control” in large writing, fair eyesight being required to pick out the reference to TA 2000. I do not criticise the police or the ports for this: questions are courteously answered; TA 2000 is referred to at the beginning of an examination;³⁰⁵ and there is much to be said anyway for exercising the initial powers in a low-key way. It may however go some way towards explaining the remarkable docility with which passengers for the most part submit to police questioning.
- 9.61. Examinations (some of which I witnessed remotely) have little of the formality of the PACE interview, under caution and recorded on tape or on video with sound. It must be frightening for any passenger, innocent or otherwise, to be taken to a police examination room: but the examinations that I saw were non-confrontational, considerate of the situation of the passenger and no longer than necessary. The mood may no doubt be different in cases where detention is required, either because of non-co-operation or because of the length of time that the examination has gone on.³⁰⁶
- 9.62. Where freight is concerned, the sheer volume of cargo, poor quality descriptions on manifests and the logistical difficulties in emptying a container of its contents require a proactive approach and ruthless prioritisation on the basis of intelligence. Close co-ordination between police and UKBA, including a Special Branch presence in the UKBA targeting office, is obviously beneficial and has proved its worth particularly at Felixstowe. In smaller ports such as Belfast, a

³⁰⁵ Code of Practice, para 11.

³⁰⁶ As suggested in *CC v MPC and SSHD* [2011] EWHC 3316 (Admin), [13].

few ports officers with good knowledge of the hauliers regularly using the ferry can be a remarkably effective way of picking up suspicious irregularities.

Safeguards during examination / detention

Legal advice

- 9.63. Access to legal advice is considerably more restricted in the Schedule 7 context than it is under PACE. Thus:
- (a) There is no right to legal advice for as long as a person is under examination: access to a solicitor is at the discretion of the police.
 - (b) Even in the case of detention at a port, where there is a right to legal advice, such advice is available at public expense only on a means-tested basis.
 - (c) Interviews tend to proceed when a solicitor has been requested but is not yet in attendance, with the result that they may be concluded or almost concluded by the time the solicitor arrives.
- 9.64. These reduced rights of access to legal advice are commonly explained by the fact that the person being questioned is obliged to give the examining officer any information in his possession that the officer may request (Schedule 7, para 5(a)). From that compulsion to answer questions, two consequences follow:
- (a) A no-comment interview will generally be unlawful.³⁰⁷
 - (b) It is practically inconceivable that anything said in interview would be admissible as evidence in a criminal trial.
- 9.65. This does not mean, however, that a solicitor has no role to play in a Schedule 7 examination. The answers that are given in such an examination will not be usable in a criminal trial; but they may still have very significant consequences for the person examined or for others. To give two practical examples:
- (a) A person returning from a country in which people are tortured may be extremely unwilling to disclose the names of those he has visited there in case the information gets back to the police in that country.
 - (b) The intelligence report that is prepared after an examination may be adduced in support of an executive order such as a TPIM or asset freeze.

There may thus be circumstances in which a client may seek advice not only on whether he is obliged to answer a particular question, but on the legal

³⁰⁷ As noted by Collins J in *CC v SSHD* [2011] EWHC (Admin), [39].

consequences of refusing to do so. A solicitor may also be useful in persuading the examining officer that – as in the example given at (a) above – a particular line of questioning is unnecessary or inappropriate.

- 9.66. It seems strange to acknowledge the right to a solicitor but at the same time to proceed with questioning when the solicitor has not yet arrived. That is not what normally happens under PACE. The subject may be willing to proceed in that way (perhaps because he is concerned about missing a flight): but if he wishes to wait for a solicitor before being interviewed, it is difficult to understand why questioning should not be delayed until the solicitor arrives.

Recording of interviews

- 9.67. The recording of Schedule 7 interviews is required only in the case of those who are detained at a police station.³⁰⁸
- 9.68. One solicitor acting for those subject to Schedule 7 examination has suggested to me that video or at least audio recording should be extended more widely. This is partly on the basis, referred to above, that the notes taken by the officers conducting the interview will sometimes find their way into intelligence reports and, from there, to the assessments upon which the Secretary of State relies in deciding to impose or maintain an executive order such as a TPIM or asset freeze. Were recordings available, they would represent a definitive account of the interview, disclosable to the interview subject and capable of examination by a court.
- 9.69. The potential for interview notes to be used in support of executive orders, albeit not in criminal proceedings, raises the question of whether the recording of all interviews in Schedule 7 examinations and detentions should be required. Against this background, reasons advanced by the police for not recording interviews will need to be carefully scrutinised.

Obstacles to effective performance

- 9.70. Everywhere I went, I asked ports officers what the chief obstacles were to the effective performance of their functions under Schedule 7. A remarkably consistent set of answers came back:
- (a) the need for better advance information, whether in the form of passenger manifests on intra-EU flights, passenger manifests on Irish Sea ferries or better quality freight manifests and airway bills;³⁰⁹

³⁰⁸ See the Draft Code of Practice for the video recording with sound of interviews of persons detained under TA 2000 section 41 and Schedule 7, May 2012.

- (b) inadequate cleansing of the Home Office Warning Index and supporting documents, resulting in unjustified repeat stops which can be particularly damaging to community relations;³¹⁰
- (c) concerns regarding Enhanced Remote Transport sheds falling outside the boundaries of the port; and
- (d) clarity as to the legal powers to intercept unaccompanied post and parcels.³¹¹

I make no formal recommendations as to these matters, which I believe are already the subject of careful consideration, but trust that they will remain under close review.

Conclusions and recommendations

- 9.71. If the public consultation recommended in my last annual report is launched, as I still believe it should be, I will contribute in relation to it as seems most appropriate.
- 9.72. Bearing in mind the very few complaints that are formally registered against the use of Schedule 7, it is important that those objecting to Schedule 7 in its current form should explain as fully as possible what it is that they find most objectionable about the powers, and why.
- 9.73. By the same token, police forces and others supportive of the Schedule 7 powers are encouraged to use evidence and real-life examples, wherever possible, in their arguments in favour of those elements of the power that they consider it important to defend. I attach importance to this, in view of the legal principle that it is for the public authorities to demonstrate the proportionality of the powers that it exercises, at least where those powers impinge upon the liberties of others, and in view of the suspicion and resentment that is engendered by the operation of Schedule 7 in certain communities.
- 9.74. The goal must be to ensure that the power which emerges from any consultation will be suitable for its task, proportionate and fully legally defensible.

³⁰⁹ I do not suggest that any of these issues is simple: each is touched on in my last annual report at 9.26.

³¹⁰ I am told that this problem should now have been resolved by new procedures devised by ACPO and in force since January 2012.

³¹¹ As referred to repeatedly by Lord Carlile, and in my last annual report at fn 184.

Recommendations

- 9.75. Any future review of Schedule 7 should be accompanied or preceded by the release of as much relevant data as can be provided, including, if possible:
- (a) UK-wide data for 2011/12
 - (b) Sample data indicating the average length of sub-one hour examinations
 - (c) figures for detentions in excess of three and in excess of six hours.³¹²
- 9.76. All reasonable efforts should be made to alert those subject to Schedule 7 examinations to the availability of a complaints mechanism, including those whose examination is terminated without service on them of the TACT 1 form on which this information is contained.³¹³
- 9.77. Those adversely affected by the operation of Schedule 7 powers are encouraged to lodge complaints when it is misused, and to contribute detailed evidence of their experiences to any future consultation.³¹⁴
- 9.78. Those entrusted with the operation of Schedule 7, or seeking to justify its current scope, should consider what they can do, within the constraints of national security, to adduce hard evidence in the context of any future consultation relating to its more controversial elements, including:
- (a) the stopping and examination of travellers without specific intelligence to the effect that they may be a terrorist
 - (b) the wide range of persons currently entitled to conduct Schedule 7 examinations, without training or accreditation
 - (c) the ability to detain for up to nine hours from the start of examination, without the need for special authorisation
 - (d) the compulsion to provide the examining officer with any information that he requests (bearing in mind the possibility that information so provided may be used e.g. in support of an executive order such as a TPIM or asset freeze)
 - (e) the practice of not taping examinations or detentions, save when they are conducted at police stations
 - (f) the starting of examinations before a solicitor has been able to attend

³¹² See 9.15, 9.17 and 9.19, above.

³¹³ See 9.34, above.

³¹⁴ See 9.34, above.

- (g) the length of time for which a person may be examined without being detained**
- (h) the ability to conduct strip searches and take intimate DNA samples without the need for suspicion or special authorisation.³¹⁵**

9.79. Irrespective of the outcome of any future review, the Code of Practice should in due course be amended so as to ensure that it properly reflects the law as declared by the High Court in the case of *CC v MPC and SSHD* [2011] EWHC 3316 (Admin).³¹⁶

³¹⁵ See 9.63-9.69 and chapter 9, generally.

³¹⁶ See 9.39 and 9.40(c), above.

10. TERRORIST OFFENCES (TA 2000 PART VI, TA 2006 PART I)

Law

- 10.1. Terrorists, even of the most serious and high profile variety, tend so far as possible to be put on trial for ordinary criminal offences. Thus:
- (a) The defendants in Operation Overt, the airline liquid bomb plot, were convicted between 2008 and 2010 of offences including conspiracy to murder and conspiracy to cause explosions.
 - (b) Roshonara Choudhry, the King's College student who admitted attacking Stephen Timms MP for political and religious reasons, was convicted in 2010 of attempted murder and possession of an offensive weapon.
- 10.2. There should be nothing surprising about this. Terrorists are first and foremost criminals. Where possible and as a general rule, they should be prosecuted under the ordinary criminal law, to underline the fact that no special laws are necessary for the purpose and to prevent them from glamorising or politicising their offences by concentrating their defence on such matters as whether the definition of terrorism is satisfied, and whether there was a "*reasonable excuse*" for their acts.³¹⁷ When defendants are convicted of specified offences falling outside the terrorism legislation, CTA 2008 sections 30-32 allow the courts in Great Britain to reflect any "*terrorist connection*" (as found by the judge, if necessary after a Newton hearing) in their sentences.

Specific terrorism offences

- 10.3. There is, however, widespread agreement that there should be a place in the statute book for certain specific terrorism offences. Some of those offences are required by international law.³¹⁸ Additional justification for special terrorist offences has been found in "*the singular sense of horror and revulsion created by terrorist crime*" and the fact that "*terrorist crime is seen as an attack on society as a whole, and our democratic institutions*".³¹⁹ More pragmatically, and perhaps

³¹⁷ A course taken in a number of TA 2000 section 58 prosecutions: *R v F* [2007] EWCA Crim 243 (Libya); *R v Rowe* [2007] EWCA Crim 635 (Croatia, Chechnya); *R v AY* [2010] EWCA Crim 762 (Somalia).

³¹⁸ The EU Framework Decision on combating terrorism 2002/475/JHA, as amended in the light of the 2005 Council of Europe Convention on the Prevention of Terrorism by 2008/919/JHA, requires all Member States to have offences of directing / participating in a terrorist group (cf TA sections 11-13, 56), public provocation to commit a terrorist offence (cf TA 2006 section 1), recruitment for terrorism (TA 2000 section 54) and training for terrorism (cf TA 2006 sections 6 and 8), as well as offences of aiding, abetting, inciting and attempt. See also UN Security Council Resolution 1373(2001).

³¹⁹ Rt. Hon. Lord Lloyd of Berwick, *Inquiry into legislation against terrorism* (Cm 3420, 1996), p. xi para 29.

more persuasively, it is to be found in the particular operational demands of counter-terrorism policing. Those demands include the need to intervene before the public is in danger,³²⁰ particularly in the case of al-Qaida inspired terrorism where warnings are rare and civilian targets the norm. This may mean intervention at a stage before the orthodox criminal offences of incitement, conspiracy or attempt can be made out.

10.4. In a 2011 judgment of an experienced terrorism judge and former DPP, the intention of Parliament in creating offences under TA 2000 and TA 2006, reflected also in the Council of Europe Convention on the Prevention of Terrorism, was said to be:

(a) “to prevent, so far as possible, the commission of terrorist offences either here or abroad” and

(b) “to prevent or at least drastically reduce the number of young men and women who would be ‘radicalised’ by propaganda of various kinds to believe that the commission of such offences is desirable and from there to begin to plan to carry out or to help others to carry out such acts”.³²¹

10.5. Most of the specific terrorism offences in TA 2000 Part VI and TA 2006 Part I may be characterised as “precursor crimes”.³²² Their effect is to extend the reach of the criminal law to behaviour which is or may be preparatory to acts of terrorism. Some have the additional or alternative effect of “net-widening”, in the sense of catching persons whose connection with terrorist acts is at best indirect.³²³

10.6. A number of the special terrorism offences were highly controversial when proposed, but were then toned down either in the course of parliamentary debate or through the intervention of the courts. Thus:

(a) The controversial concept of “glorifying terrorism” survives in TA 2006 sections 1(3) and 2(4): but the fear that it would criminalise the writing of history has been addressed at least to some extent by the insertion during

³²⁰ *Ibid.*, para 30.

³²¹ *R v Ahmed Faraz*, ruling of 27 May 2011, Calvert-Smith J at transcript p. 14. Examples given of offences with the first objective were TA 2000 sections 15-18, 38B, 39 and 56 and TA 2006 section 5. The second objective was said to lie behind sections 11-13, 54 and 57-58 of TA 2000 and sections 1-2 and 6-8 of TA 2006.

³²² E.g. the offences of encouragement (TA 2006 section 1), dissemination (TA 2006 section 2), training (TA 2006 section 6), possession for terrorist purposes (TA 2000 sections 57-58) and preparation (TA 2006 section 5).

³²³ E.g. the offences of presence at a place used for training (TA 2006 section 8) and non-disclosure (TA 2000 sections 19, 38B). The italicised phrases, come from Professor Clive Walker’s *Terrorism and the Law* (OUP 2011).

the parliamentary process of a condition ensuring that it is applied only when the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

- (b) Many of the “*reverse burdens*” in TA 2000 and TA 2006, which appear to require the defence to prove important elements of their case rather than the prosecution to disprove them, have either been circumscribed in statute as being evidential only – requiring the defence to produce an explanation which it is for the prosecution to disprove)³²⁴ – or have been so interpreted by the courts, in conformity with HRA 1998.³²⁵ The CPS does not contend that any of the reverse burdens to be found in the specific terrorist offences are to be interpreted as legal burdens (i.e. a requiring the defendant to prove the ingredients of the defence).

- 10.7. The principal offences are briefly summarised below.³²⁶

Incitement offences

- 10.8. TA 2006 section 1 penalises with up to seven years’ imprisonment the publication of statements likely to be understood as a direct or indirect encouragement or inducement to the commission, preparation or instigation of terrorism. The defendant must either intend to encourage or induce, or be reckless as to whether members of the public will be encouraged or induced. It is not however necessary to show either that specific acts of terrorism are being encouraged, or that the encouragement was effective. Indirect encouragement includes glorification, but only where members of the public could reasonably be expected to infer that they should emulate the conduct being glorified. Praise for past terrorist violence will thus only be an offence if it carries with it the message that such violence should be emulated in the future.
- 10.9. TA 2006 section 2 focuses not on the original publisher but on those who pass the publication on. It penalises (again with seven years’ imprisonment) the dissemination of terrorist publications, for example through internet forums, either with the intention that they should directly or indirectly encourage acts of terrorism, or recklessly as to whether they will do so. In cases of recklessness only, it is a defence to show that the publication did not express the defendant’s views and was not endorsed by him. The value of section 2 to the prosecutor is in catching disseminators of terrorist materials who did not go so far as to incite

³²⁴ TA 2000 section 118.

³²⁵ *Sheldrake v DPP: AG’s Reference (No. 4 of 2002)* [2004] UKHL 43.

³²⁶ See also TA 2006 sections 9-11, concerning radioactive devices and material, which have never been charged.

any terrorist offence. Breaches of section 2 are likely to be less serious than breaches of TA 2000 sections 57 and 58 (below).³²⁷

- 10.10. Non-compliance with an internet “take-down notice” under TA 2006 sections 3-4 disqualifies defendants from arguing in section 1 or 2 proceedings that a statement did not have their endorsement. Non-compliance with such a notice is however not an offence in its own right. The question of whether to issue a notice is referred to the CPS: the procedure is little used, and police generally prefer to seek the co-operation of internet service providers via the Counter-Terrorism Internet Referral Unit [CTIRU].

Training offences

- 10.11. TA 2000 section 54, originating in legislation applicable to Northern Ireland and punishable with up to 10 years in prison, provides for the offences of providing, receiving or inviting another to receive training in the making or use of firearms, radioactive material, explosives or chemical, biological or nuclear weapons. Underlining the terrorism-specific nature of these offences, it is a defence to prove that one’s action or involvement was wholly for a purpose other than assisting, preparing for or participating in terrorism.
- 10.12. More frequently used, both in Great Britain and Northern Ireland, are TA 2006 sections 6 and 8, which carry the same maximum penalty. They penalise respectively training for terrorism and attendance at a place (whether in the United Kingdom or abroad) used for terrorist training. There is no requirement that training under these sections be with weaponry.

Possession for terrorist purposes

- 10.13. TA 2000 section 57, frequently used and (like section 58) derived from legislation applicable to Northern Ireland, punishes with up to 15 years’ imprisonment possession of an article in circumstances which give rise to a reasonable suspicion that possession is for a purpose directly connected with the commission, preparation or instigation of acts of terrorism. Other statutes apply to possession of firearms and explosives; section 57 may catch even such articles as cars, which are not designed for terrorism. It is however a defence to section 57 if a non-terrorist related excuse is provided which the prosecution is unable to rebut beyond reasonable doubt.³²⁸
- 10.14. TA 2000 section 58 imposes the lesser maximum of 10 years’ imprisonment for the collection or possession of information (including downloads) “of a kind likely

³²⁷ *R v Rahman, R v Mohammed* [2008] EWCA Crim 1465, para 41.

³²⁸ Section 57(2), as interpreted in *R v G and J* [2009] UKHL 13, paras 63-68.

to be useful to a person committing or preparing an act of terrorism". Remarkably, and in distinction to section 57, there is no requirement on the prosecution to show that the defendant had a terrorist purpose. The information however "*must, of its very nature, be designed to provide practical assistance*";³²⁹ and it is a defence to the charge for the defendant to advance a reasonable excuse which the prosecution is unable to rebut. The CPS does not take the view that mere curiosity will always be a reasonable excuse: the curious must thus place their faith in the restrained exercise of prosecutorial discretion. The issue of whether acts of terrorism (including by way of self-defence) against a tyrannical regime can constitute a reasonable excuse has arisen in a number of cases including *R v AY*.³³⁰ A claim that section 58 violated ECHR Articles 7 and 10 was declared inadmissible (as manifestly ill-founded) by the European Court of Human Rights in 2011.³³¹

Eliciting information

- 10.15. TA 2000 section 58A criminalises the eliciting, publication or communication of information about the military, intelligence services or police, when that information is of a kind likely to be useful to a person committing or preparing an act of terrorism. There is a reasonable excuse defence and a maximum penalty of 10 years in prison. Section 58A overlaps with section 58, but is considered important especially in Northern Ireland, where attacks targeted on members of the security forces are much more common than in Great Britain.
- 10.16. Section 58A is principally controversial because of fears that it may be used, on its own or in conjunction with the section 44 stop and search power, in order to prevent photography of the police in public places (for example, on marches or at demonstrations). Since Home Office guidance,³³² and the discontinuance of the section 44 power in July 2010, much of the heat appears to have gone out of the issue. In its Review of Counter-Terrorism and Security Powers, the Government recommended that section 58A be kept under close review but not repealed, and that guidance be improved.³³³ The May 2012 statutory code of practice for terrorism stop and search powers makes specific reference to photography issues, and there has been extensive engagement between OSCT and concerned photography and other groups (including the industry umbrella group for security guards, which has provided guidance to its members).

³²⁹ *R v G and J* [2009] UKHL 13, [2010] 1 AC 43, para 43.

³³⁰ [2010] EWCA Crim 762.

³³¹ *Jobe v United Kingdom*, 14 June 2011, (2011) 53 EHRR SE17.

³³² *Photography and Counter-Terrorism Legislation*, Home Office Circular 012/2009.

³³³ *Review of Counter-Terrorism and Security Powers*, Cm 8004, January 2011, p. 24. That conclusion was supported by Lord Macdonald, the independent overseer of the review: Cm 8003, p. 5.

Acts preparatory

- 10.17. TA 2006 section 5 makes it an offence to engage, with the intention of committing or assisting the commission of acts of terrorism, in conduct in preparation for giving effect to that intention. The maximum penalty is life imprisonment. Preparatory conduct is a broad concept, which will often require more than mere possession of the type caught by sections 57 and 58.³³⁴ However a submission that the concept of preparation was unlawfully imprecise was rejected by the Court of Appeal in 2010.³³⁵ Section 5 has been applied to such matters as the assembly of bomb-making ingredients, the preparation for a beheading and the sending of equipment to terrorists fighting abroad.

Directing a terrorist organisation

- 10.18. TA 2000 section 56, also punishable with non-mandatory life imprisonment and again with Northern Ireland origins, penalises directing “*at any level*” the activities of an organisation which is concerned in the commission of acts of terrorism.

Offences committed outside the United Kingdom

- 10.19. Many terrorist offences may in principle be prosecuted in the United Kingdom notwithstanding the fact that they may have been committed outside its borders, by persons unconnected with the United Kingdom, and directed towards foreign governments.³³⁶

- 10.20. Relevant in this respect are:

- (a) TA 2000 sections 59-61, which render it an offence in the United Kingdom to incite people inside or outside the United Kingdom to commit certain acts of terrorism abroad
- (b) TA 2000 section 62, which criminalises terrorist bombing outside the United Kingdom
- (c) TA 2000 section 63, which criminalises terrorist financing outside the United Kingdom
- (d) TA 2006 section 17, which criminalises the commission abroad of offences under TA 2006 sections 1-6 and 8-11 and TA 2000 section 54, and extends worldwide certain offences under the Explosive Substances Act 1883.

³³⁴ *R v Roddis* [2009] EWCA 585, para 9.

³³⁵ *R v A* [2010] EWCA Crim 1958.

³³⁶ The fact that a server is in another country will not prevent internet offences being prosecuted in the United Kingdom when a substantial measure of the activities constituting the crime took place there: *R v Sheppard and Whittle* [2010] EWCA Crim 65.

(e) TA 2000 sections 63A to 63E, which criminalise offences under TA 2000 sections 54 to 61 and a wide range of offences against the person and property, from murder to criminal damage, when committed abroad, as an act of terrorism or for the purposes of terrorism, by or against a United Kingdom national or resident.

10.21. Viewed in the round, these provisions constitute a remarkable extension of United Kingdom jurisdiction, exceeding that which is required by international treaty. Some moderating influence is however supplied by the requirement in section 117(2A) TA 2000 of consent for prosecution. This is considered to apply not only to obvious plots against foreign countries, but to persons who have shown interest in violent jihad generally. If it is considered possible that this might involve travel to fight abroad, it potentially concerns the affairs of a country other than the United Kingdom and therefore requires consent: consent was granted three times in 2011 under TA 2000 and 19 times under TA 2006.³³⁷

Practice – Great Britain

Outcome of arrests in 2011

10.22. Of the 167 people arrested for terrorism-related offences during 2011:

(a) 36 were charged with “*terrorism-related offences*”.³³⁸

(b) Of those, 26 were charged under TA 2000, ATCSA 2001, PTA 2005 (control order breaches) or TA 2006.³³⁹

10.23. The figure of 36 is an increase on the equivalent figures for 2010, when there was a total of only 20 terrorism-related charges. But it is still well down on the annual average of more than 50 terrorism-related charges during the peak period of 2005-2009.³⁴⁰

10.24. By mid-June 2012, 15 of those arrested in 2011 had been prosecuted on the basis principally of a terrorism-related offence, with six not proceeded against and 15 awaiting prosecution. 13 had been convicted and two found not guilty. However, only four of those convictions were for principal offences under TA 2000, ATCSA 2001, PTA 2005 or TA 2006.³⁴¹

³³⁷ Figure supplied to me by Attorney General's Office.

³³⁸ Not counting two charged for offences under Schedule 7.

³³⁹ HOSB 7/12, 14 June 2012, Table 1.02.

³⁴⁰ HOSB 15/11, 13 October 2011, Table 1.02, again excluding Schedule 7 offences.

³⁴¹ HOSB 7/12, 14 June 2012, Table 1.04.

Outcome of trials in 2011

- 10.25. Of the 13 people put on trial in 2011 for a principal offence which was terrorism-related, eight were convicted and four acquitted.
- 10.26. The totals were smaller than in 2010, when 18 were convicted and five acquitted.³⁴² Once again, however, the number of convictions was much higher during the peak period of terrorist activity and detection. There was an average of over 30 such convictions annually over the period 2005-09 (many of them for possession and collection, preparation, training, membership and fundraising).³⁴³
- 10.27. No statistics are available for the calendar year as regards the specific provisions of TA 2000 and TA 2006 that resulted in convictions. The major convictions in 2011 were however as follows:³⁴⁴:
- (a) the conviction in February of the British Airways IT expert Rajib Karim under TA 2006 section 5 and (after guilty pleas) TA 2000 sections 15 and 58;
 - (b) the conviction in March of Terence Brown, who sold CD-ROMs through the anarchist cookbook website, under offences including TA 2000 section 58 and TA 2006 section 2,³⁴⁵
 - (c) the conviction in June of Bilal Ahmad, who solicited the murder of MPs who had voted for the Iraq war, for offences including TA 2000 section 58;
 - (d) the conviction in September of Munir Farooqi, Matthew Newton and Israr Malik, who sought to persuade undercover officers to perform jihad abroad, for offences including TA 2006 sections 2 and 5; and
 - (e) the conviction in December of bookseller Ahmed Faraz under TA 2000 sections 2 and 58.

Sections 2, 5 and 58, which predominated in 2011, are each examples of the “*precursor offences*” which enable the planners and promoters of terrorism to be prosecuted before a specific plot has been hatched.

³⁴² *Ibid.*, Table 1.05.

³⁴³ *Ibid.*, Tables 1.11(a) and (b).

³⁴⁴ Some, but not all, are in the summary of cases concluded by the CPS Counter-Terrorism Division in 2011, available from the CPS website

³⁴⁵ A wide-ranging appeal, on grounds including Article 10 ECHR, was rejected: *R v Terence Roy Brown* [2011] EWCA Crim 2751.

Sentences

10.28. Eight people were sentenced for terrorism-related offences in 2011, including one to life imprisonment, one to an indeterminate sentence for public protection and two for determinate periods of more than 10 years.³⁴⁶ Only two pleaded guilty, though there have been some major guilty pleas already in 2012.³⁴⁷

Prison

10.29. As of 31 December 2011 there were 123 persons in prison for terrorist/extremist or related offences in Great Britain, including those on remand awaiting trial. This was exactly the same number as were in prison a year earlier. 17 of the 123 were classified as domestic extremists or separatists.³⁴⁸

10.30. Of the 119 terrorist/extremist prisoners in Great Britain as of 31 March 2011:

(a) 83 (70%) were UK nationals, the remainder being spread between 18 nationalities with the next highest being Bangladeshi (7) and Somali (4).

(b) 81 (68%) classified themselves as Muslim.³⁴⁹

10.31. 26 terrorist/extremist prisoners were released in 2011. None of them had been sentenced to life or to indeterminate sentences for public protection, though 19 had been sentenced to four years or more.³⁵⁰

Summary

10.32. There were a handful of very serious terrorist convictions in 2011. Overall however, by comparison with the position five years ago, the trend in Great Britain has been towards fewer arrests, fewer charges, fewer convictions and the prosecution of precursor offences rather than active plots.

³⁴⁶ HOSB 7/12, 14 June 2012, Table 1.06.

³⁴⁷ Notably in the Operation GUAVA case, sentenced in February 2012, concerning nine men in their 20s from London, Cardiff and Stoke whose targets were said to include the London Stock Exchange. Eight pleaded guilty to charges under TA 2006 section 5, and one to a charge under TA 2000 section 57.

³⁴⁸ *Ibid.*, Table 1.07.

³⁴⁹ HOSB 15/11, 13 October 2011, Tables 1.17-1.18. The seven domestic extremist/separatists (out of 22) who associated themselves with Christian denominations were outnumbered by the nine who claimed no religion. Four declared as Buddhists, and one as a Pagan.

³⁵⁰ *Ibid.*, Table 1.08.

Practice – Northern Ireland

Charges under TA 2000 and TA 2006

- 10.33. In 2010/11, 19 individuals were charged in Northern Ireland with 20 offences under TA 2000. These numbers are slightly below the average since 2001. As has been usual throughout the currency of TA 2000, the bulk of the charges were for possession (section 57), collection (section 58), membership (section 11) and fundraising (section 15).³⁵¹ As in the previous year, nobody was charged under TA 2006.
- 10.34. The low number of charges under TA 2000 corresponds to the low number of offences under anti-terrorism legislation that are recorded in Northern Ireland: just seven in 2009/10 and 19 in 2010/11, out of a total of 1488 / 1243 “*offences against the state*” recorded over the same periods.³⁵² Charges are more likely to be brought under firearms or explosives legislation than for specific terrorist offences.

Convictions under TA 2000 and TA 2006

- 10.35. Five defendants were dealt with by the Northern Ireland courts in 2011 who were charged with at least one offence under TA 2000. Of those:
- (a) Two were acquitted of the TA 2000 offence(s), and three were convicted of at least such offence.
 - (b) Both acquittals concerned TA section 57 (possession of an article for a purpose connected with terrorism).
 - (c) One person was convicted of two counts under section 57: the other convictions related to membership of a proscribed organisation and to the provision of money or property for the purpose of terrorism.³⁵³

Conclusion

- 10.36. The arsenal of terrorist offences remains amply stocked. As was the case last year, neither police nor prosecutors (nor, for that matter, those entrusted with security preparations for the Olympic and Paralympic Games) suggested to me

³⁵¹ Northern Ireland Terrorism Legislation: Annual Statistics 2010/11, Table 5a.

³⁵² PSNI, *Police Recorded Crime in Northern Ireland 2010/11*, 12 May 2011, Table 2. Also recorded, over the periods 2009/10 and 2010/11, were 56 / 52 petrol bombing offences, 23 / 55 explosives offences, 114 / 110 attempted murders and 2,223 / 2,324 threats or conspiracies to murder.

³⁵³ Figures supplied to me by Courts and Tribunals Service of Northern Ireland.

that further powers were needed in order to combat the existing or any foreseeable terrorist threat.

- 10.37. Relatively little use was made of that arsenal in 2011. The ordinary criminal law – quite rightly – remains the first and often the only necessary resort where acts that could be characterised as terrorism are concerned, particularly in Northern Ireland.³⁵⁴ This led me to describe the Terrorism Acts, in my last annual report, as “*useful extensions of the ordinary law rather than staple ingredients of the fight against terrorism*”. But it would be difficult to make the case that the offences which they have created are redundant. Sections concerning (for example) nuclear terrorism have never been used, but it would be foolish to assert that they will never need to be. The precursor offences proved their worth in 2011 when they convicted a BA computer expert who was well placed to help explode a transatlantic airliner, and assisted in the conviction of a group of men who sought to turn vulnerable people in Manchester into violent jihadis.
- 10.38. Serious questions arise as to the possible chilling effect of other provisions, including section 58 (under which, famously, a university student and staff member were arrested and detained in 2008, though not charged, for downloading a document freely available from US Government websites).³⁵⁵ Though I have been made aware of no similar incidents during the period under review, one graduate student has expressed concerns to me about the possible application of section 58 to innocent academic research.
- 10.39. I am not at this stage persuaded to recommend changes to the criminal law, for essentially the same reasons as I gave last year. In particular:
- (a) The responsible exercise of its powers by the CPS, coupled with the resourcefulness of counsel and the courts, particularly when armed with the strong interpretative duty in HRA 1998 section 3, have combined to produce a workable code of terrorist offences, albeit with some rough edges.
 - (b) Any inclination to criticise that code for over-breadth needs to be balanced by a realisation that criminal prosecution will always be preferable to the application of executive sanctions such as TPIMs, and that it therefore has the potential to remove or at least reduce the need for such sanctions. The inability to prosecute some cases in the criminal courts, and the consequent recourse to less judicialised means of disruption, is arguably a much greater problem than the possible overbreadth of some criminal offences.

³⁵⁴ Though there are signs, particularly in the emerging use of TA 2006 section 5, that the Northern Ireland authorities may be beginning to see the utility of that most versatile of precursor offences.

³⁵⁵ The student, Rizwaan Sabir, was awarded £20,000 in damages from Nottinghamshire Police in 2011.

I will however keep the issue under review, and may return to it in more detail in future reports.

11. CONCLUSION

- 11.1. Untypically for a counter-terrorism law (one thinks of the Explosive Substances Act 1883, which amid fear of Fenian bombs received all three of its parliamentary readings in a single night), the proposals which became TA 2000 were conceived after extensive research by the very finest of independent minds, and debated with the considerable care their importance deserved. Even TA 2006, taken through Parliament in the months following the London bombs, was conceived in part prior to 7/7, and was inspired in at least some respects by international obligations.
- 11.2. The almost incessant legislative activity of the past 12 years has dispelled any notion that TA 2000 – or even TA 2000 and TA 2006 together – could function as a self-contained counter-terrorism code. The Terrorism Acts have been supplemented not only by the dedicated statutes passed in 2001, 2005, 2008, 2010 and 2011, but by a host of additional amendments including, most recently, those contained in PFA 2012. Counter-terrorism law in the UK is bitty, messy and hard for even its practitioners to comprehend as a whole. Consolidation would aid comprehension all round, not least in other countries which are sometimes urged to follow the United Kingdom's legislative example.
- 11.3. Untidiness is not the only vice of United Kingdom counter-terrorism law. It at times gives excessive weight to the idea that "*terrorism is different*", losing sight of the principle that terrorism is above all crime, and that special laws to deal with it need to be justified by the peculiar nature of the crime. Elements of it have been conceived and applied with excessive enthusiasm.
- 11.4. But it could have been much worse. The enactment of arbitrary and unreviewable powers has been avoided. The use of prosecutorial discretion has generally been wise. The executive has shown more restraint than many people anticipated, for example in the use of control orders. Parliament has been an effective check at times – voting down Government proposals to extend pre-charge detention first to 90 and then to 42 days, labouring effectively to improve Bills such as TFA 2010 and TPIMA 2011, and conducting valuable scrutiny through the work of its increasingly influential and independent Committees.
- 11.5. The courts both in London and in Strasbourg have made some crucial interventions of their own, notably in helping to end the old systems of detention without trial under ATCSA 2001 and stop and search under TA 2000 section 44, and in improving the operation of the closed material procedures that were used in control order cases. These judgments have in a number of respects affirmed the importance of liberty and due process, without, so far as I can judge, causing

an unacceptable increase in risk. In countless lesser judgments, courts and tribunals have smoothed the rough edges of legislation and enabled it to be applied consistently with commonly accepted standards of fairness.

- 11.6. Recent improvements in the security situation on both sides of the Irish Sea are not irreversible, and plots, sometimes of a very serious nature, are from time to time disrupted without them coming to public attention. However the most recent programme of changes to the law affecting terrorism – 28-day detention reduced to 14, indefinite control orders transmuted into two-year TPIMs, a stop and search power destined for only sparing use, a more benign asset-freezing regime, more controls on the retention of DNA – are a logical reaction to levels of risk that in Great Britain particularly have reduced significantly in recent years.
- 11.7. While most counter-terrorist powers seem set to persist for some time, it remains the position that these are extreme measures which are therefore deserving of searching inquiry and review. The values of a liberal democracy deserve support from laws against terrorism, but the same values require that those laws be subject to strict scrutiny.
- 11.8. Just as there are some specific areas where protections could be improved (for example, those to which I have been alerted by ports officers: 9.70, above), so I have concluded there is more that can be done to reduce the intrusions of the law without endangering public safety. The recommendations listed in the next chapter focus in particular on three areas which reform has so far largely passed by: proscription of organisations, terrorist detention and the power to stop and examine travellers at ports.
- 11.9. I am grateful to all those who have taken the time and made the effort to discuss these difficult issues with me, and urge anyone else with experience relevant to the exercise of my functions to make contact. Once the unprecedented counter-terrorism challenge posed by the London Olympics is over, I look forward to further discussions concerning the desirability and feasibility of change.

12. RECOMMENDATIONS

Chapter 1 - introduction

- 12.1. The operation of CTA 2008 and perhaps also ATCSA 2001 should be subject to independent review, most conveniently by the Independent Reviewer and in the same annual report as currently covers TA 2000 and TA 2006. Some additional assistance may be necessary to enable this to happen, given the part-time nature of the Reviewer's role and other recent additions to his workload.³⁵⁶
- 12.2. Statistics concerning the operation of the Terrorism Acts in Great Britain and Northern Ireland should so far as possible be compiled on a standardised, fully comparable basis, without sacrificing detailed information currently available.³⁵⁷
- 12.3. Statistics should be produced both in Great Britain and in Northern Ireland recording:
- (a) the number of charges for each offence under the Terrorism Acts (as currently in NI)
 - (b) the number of convictions and acquittals for each such offence (as currently in GB).³⁵⁸
- 12.4. Statistics should be produced both in Great Britain and in Northern Ireland recording, for those detained under TA 2000 section 41 only:
- (a) the number of requests to have someone informed of detention, and the numbers allowed immediately and delayed (as in NI, but with some indication of the length of the delay)
 - (b) the number of requests for access to a solicitor, and the number allowed immediately / delayed (as in NI, but with some indication of the length of the delay)
 - (c) numbers and success rates of warrants for further detention (as in NI).³⁵⁹

³⁵⁶ See 1.13(d), above.

³⁵⁷ See 1.29-1.31, above.

³⁵⁸ See 1.31(a)(b), above.

³⁵⁹ See 1.31(d), above.

- 12.5. **Statistics relating to stop and search, port examinations, arrest, charge and convictions under TA 2000 should define ethnicity as precisely as possible, and include a category for those who would wish to self-define as Arab.**³⁶⁰
- 12.6. **Reports of the Independent Reviewer should be published and laid before Parliament promptly on receipt of the final draft by the Home Secretary (or, in the case of reports on TAFE 2010, the Treasury).**³⁶¹

Chapter 4 – proscribed organisations

- 12.7. **If there are far-right terrorist organisations in the UK that meet the statutory requirement for proscription, their possible proscription should be considered according to the same discretionary criteria as have been applied to UK organisations concerned in al-Qaida related terrorism.**³⁶²
- 12.8. **Any organisation which cannot be said to be “concerned in terrorism”, because there is insufficient evidence to assert that it is taking current, active steps to commit, participate in, prepare for, promote or encourage terrorism, or that it has or is taking steps to acquire the capacity to carry on terrorist activity, fails the statutory test for proscription as interpreted in the *PMOI* case. It should not be proscribed and, if already proscribed, should be promptly deproscribed, if necessary on the initiative of the Secretary of State.**³⁶³
- 12.9. **The five criteria identified at 4.6 above should be revised, in accordance with the views expressed by Professor Clive Walker, to read as follows:**
- (a) the nature and scale of an organisation’s activities**
 - (b) The specific and active threat that it poses to the United Kingdom**
 - (c) The specific and active threat that it poses to British nationals overseas**
 - (d) The extent of the organisation’s presence, cohesion and capabilities in the United Kingdom**

³⁶⁰ See 1.31(e), above.

³⁶¹ See 1.23-1.25, above.

³⁶² See 4.16(c), above.

³⁶³ See 4.30-4.31, above.

(e) The need for the United Kingdom jurisdiction to give direct practical support to counter-terrorism in other countries.³⁶⁴

- 12.10. Where the statutory test is satisfied, discretion should be exercised on the basis of all material factors, including each of the five criteria identified above but also any existing or potential negative effects of proscription, including on the rights and interests of persons within and outside the UK who are not themselves concerned in terrorism. Proscription should only be ordered (or maintained) when it will be of real utility in protecting the public, whether in the UK or elsewhere, from terrorism, and when it is proportionate in all the circumstances.³⁶⁵**
- 12.11. All proscriptions should expire after a set period, perhaps of two years. The onus would then be on the Secretary of State, after taking the advice of independent counsel, to seek the assent of Parliament if she wishes to re-proscribe and to demonstrate that the statutory test is satisfied and that conditions for renewed proscription are made out. Consideration should be given to ways in which parliamentary scrutiny of secret material could be brought to bear on the process. Parliament should have the ability to vote down a single renewal if so advised, without it being necessary to vote down others whose renewal is sought at the same time.³⁶⁶**
- 12.12. The possibility of moving to a two-stage statutory test modelled on those used in TAFE 2010 and TPIMA 2011, and of substituting a balance of probabilities test for the standard of reasonable belief, should be kept under review.³⁶⁷**

Chapter 7 – arrest and detention

- 12.13. Police should avoid recourse to section 41 arrest and detention in cases when the suspect is always likely to be charged, if at all, under laws other than the Terrorist Acts.³⁶⁸**
- 12.14. The amendment of TA 2000 Schedule 8 para 32 should be considered, with a view to providing that a warrant for further detention should only be issued if the court is satisfied that the person to whom the application relates was lawfully arrested; that the person was told with sufficient clarity the offences he was suspected of committing and the reasons for the suspicions leading to his arrest; that there is a real prospect of evidence emerging during the**

³⁶⁴ See 4.8 and 4.40, above.

³⁶⁵ See 4.32-4.40, above.

³⁶⁶ See 4.51-4.54, above.

³⁶⁷ See 4.55-4.61, above.

³⁶⁸ See 7.54-7.61, above.

period for which further detention is sought; and that the continued detention is proportionate in all the circumstances.³⁶⁹

- 12.15. Consideration should be giving to changing the law so as to allow persons arrested under TA 2000 section 41 to apply to a court for bail.³⁷⁰
- 12.16. Consideration should be given to changing the law so as to allow the detention clock to be suspended in the case of detainees who are admitted to hospital.³⁷¹
- 12.17. Medical examinations of terrorist suspects should be conducted by professionals who are fully trained in mental health evaluations, and whose independence is guaranteed by the fact that they are not employed by the police.³⁷²

Chapter 9 – port and border controls

- 12.18. Any future review of Schedule 7 should be accompanied or preceded by the release of as much relevant data as can be provided, including, if possible:
 - (d) UK-wide data for 2011/12
 - (e) Sample data indicating the average length of sub-one hour examinations
 - (f) figures for detentions in excess of three and in excess of six hours.³⁷³
- 12.19. All reasonable efforts should be made to alert those subject to Schedule 7 examinations to the availability of a complaints mechanism, including those whose examination is terminated without service on them of the TACT 1 form on which this information is contained.³⁷⁴
- 12.20. Those adversely affected by the operation of Schedule 7 powers are encouraged to lodge complaints when it is misused, and to contribute detailed evidence of their experiences to any future consultation.³⁷⁵
- 12.21. Those entrusted with the operation of Schedule 7, or seeking to justify its current scope, should consider what they can do, within the constraints of national security, to adduce hard evidence in the context of any future consultation relating to its more controversial elements, including:

³⁶⁹ See 7.63-7.70, above.

³⁷⁰ See 7.71-7.73, above.

³⁷¹ See 7.74, above.

³⁷² See 7.41-7.43, above.

³⁷³ See 9.15, 9.17 and 9.19, above.

³⁷⁴ See 9.34, above.

³⁷⁵ See 9.34, above.

- (a) the stopping and examination of travellers without specific intelligence to the effect that they may be a terrorist
- (b) the wide range of persons currently entitled to conduct Schedule 7 examinations, without training or accreditation
- (c) the ability to detain for up to nine hours from the start of examination, without the need for special authorisation
- (d) the compulsion to provide the examining officer with any information that he requests (bearing in mind the possibility that information so provided may be used e.g. in support of an executive order such as a TPIM or asset freeze)
- (e) the practice of not taping examinations or detentions, save when they are conducted at police stations
- (f) the starting of examinations before a solicitor has been able to attend
- (g) the length of time for which a person may be examined without being detained
- (h) the ability to conduct strip searches and take intimate DNA samples without the need for suspicion or special authorisation.³⁷⁶

12.22. Irrespective of the outcome of any future review, the Code of Practice should in due course be amended so as to ensure that it properly reflects the law as declared by the High Court in the case of *CC v MPC and SSHD* [2011] EWHC 3316 (Admin).³⁷⁷

³⁷⁶ See 9.63-9.69 and chapter 9, generally.

³⁷⁷ See 9.39 and 9.40(c), above.

ACRONYMS USED IN THE REPORT**Acts of Parliament**

ATCSA 2001	Anti-Terrorism, Crime and Security Act 2001
CJA 2009	Coroners and Justice Act 2009
CTA 2008	Counter-Terrorism Act 2008
CSA 2010	Crime and Security Act 2010
HRA 1998	Human Rights Act 1998
JS(NI)A 2007	Justice and Security (Northern Ireland) Act 2007
PACE	Police and Criminal Evidence Act 1984
PFA 2012	Protection of Freedoms Act 2012
POCA 2002	Proceeds of Crime Act 2002
PTA 2005	Prevention of Terrorism Act 2005
RIPA	Regulation of Investigatory Powers Act 2000
TA 2000	Terrorism Act 2000
TA 2006	Terrorism Act 2006
TAFA 2010	Terrorist Asset-Freezing &c. Act 2010
TPIMA 2011	Terrorism Prevention and Investigation Measures Act 2010

Other

ACPO	Association of Chief Police Officers
CIRA	Continuity Irish Republican Army
CPS	Crown Prosecution Service
CTIRU	Counter-Terrorism Internet Referral Unit
CTU	Counter-Terrorism Unit
CTIU	Counter-Terrorism Intelligence Unit
FATA	Federally Administered Tribal Areas
FATF	Financial Action Task Force (G8)
FOSIS	Federation of Student Islamic Societies
FME	Forensic Medical Examiner
GCHQ	Government Communications Headquarters
HOSB	Home Office Statistical Bulletin
IED	Improvised explosive device
IMC	Independent Monitoring Commission
IPCC	Independent Police Complaints Commission
JCHR	Joint Committee on Human Rights
JTAC	Joint Terrorism Analysis Centre

MI5	Security Service
MI6	Secret Intelligence Service
MPS	Metropolitan Police Service
NCTC	National Counter-Terrorism Center (USA)
NIPB	Northern Ireland Policing Board
NPIA	National Policing Improvement Agency
NIO	Northern Ireland Office
ONH	Óglaigh na hÉireann (Soldiers of Ireland)
OSCT	Office for Security and Counter-Terrorism
POAC	Proscribed Organisations Appeal Commission
PMOI	People's Mujahideen of Iran
PPRG	Proscription Review and Recommendation Group
PPS	Public Prosecution Service (Northern Ireland)
PWG	Proscription Working Group
PSNI	Police Service of Northern Ireland
RIRA	Real Irish Republican Army
SIAC	Special Immigration Appeals Commission
SO15	Counter-Terrorism Command, Scotland Yard
SOCA	Serious Organised Crime Agency



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