

# **THE TERRORISM ACTS IN 2013**

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**

JULY 2014

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**Presented to Parliament  
pursuant to  
Section 36(5) of the  
Terrorism Act 2006**

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This publication is available at <http://terrorismlegislationreviewer.independent.gov.uk> and [www.gov.uk/government/publications](http://www.gov.uk/government/publications)

Print ISBN 9781474109277

Web ISBN 9781474109284

Printed in the UK by the Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office

ID 090701401      07/14

Printed on paper containing 75% recycled fibre content minimum.

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## 1. INTRODUCTION

### Purpose of this report

- 1.1 I am required by section 36 of the Terrorism Act 2006 [TA 2006] to review the operation during each calendar year of the Terrorism Act 2000 [TA 2000] and Part 1 of TA 2006 [the Terrorism Acts], and to report.<sup>1</sup> This is my fourth annual report on the Terrorism Acts, and the eleventh report I have produced in all since taking up appointment as Independent Reviewer in February 2011. My previous reports, together with the Government's responses to them and much other material, are freely downloadable from my website.<sup>2</sup>
- 1.2 Public-facing independent review is of particular benefit where potential conflicts between state powers and civil liberties are acute, but information is tightly rationed.<sup>3</sup> The function of the Independent Reviewer, as it was explained when reviews were first placed on an annual basis, is to “*look at the use made of the statutory powers relating to terrorism*”, and “*consider whether, for example, any change in the pattern of their use needed to be drawn to the attention of Parliament*”.<sup>4</sup> For more than 35 years, successive Independent Reviewers have used their reports to ask whether special powers continue to be necessary for fighting terrorism, and to make recommendations for reform.<sup>5</sup>
- 1.3 The essence of independent review lies in the combination of three concepts not often seen together: complete independence from Government; unrestricted access to classified documents and national security personnel; and a statutory obligation on Government promptly to lay the Independent Reviewer's reports before Parliament. Successive Independent Reviewers have aimed neither to torment the Government nor to defend it. The purpose of our reports has been, rather, to inform – so far as is possible within the necessary constraints of secrecy – the public and parliamentary debate over anti-terrorism powers in the UK.

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<sup>1</sup> All acronyms used in this report are explained at [Annex 1](#).

<sup>2</sup> <https://terrorismlegislationreviewer.independent.gov.uk>. See in particular *The Terrorism Acts in 2012* (July 2013), *The Terrorism Acts in 2011* (June 2012) and *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006* (July 2011).

<sup>3</sup> These factors similarly explain the existence of the Intelligence Commissioners.

<sup>4</sup> Lord Elton, Hansard HL 8 March 1984, vol 449 cols 405-406. He added, perhaps quaintly to modern ears, that the Independent Reviewer, though not a judge, was to be “*a person whose reputation would lend authority to his conclusions, because some of the information which led him to his conclusions would not be published*”.

<sup>5</sup> For a short history of independent review, see D. Anderson, “The independent review of terrorism laws” [2014] Public Law 403-420. A working paper entitled “The independent review of terrorism laws: searchlight or veil?” can be freely accessed through my website, as (from a site established by Mitch Hanley at Harvard, <http://www.schedule7.org.uk/independent-reviewer-of-terrorism-legislation>) can nearly all past reviews going back to 1978.

## Scheme of this report

- 1.4 My three previous annual reports into the Terrorism Acts, shorn of their annexes, occupied more than 370 pages of text. I sought in each of them to explain the operation of the Acts from first principles and on the basis of first-hand observation. I attempted also to avoid repetition – an increasingly difficult task.
- 1.5 Those reports continue to serve as what I hope is a useful introduction to the scheme and current operation of the Terrorism Acts. They describe the changes – many of them in a liberalising direction – that characterised the first three years of the Parliament, and make 33 further recommendations. Because the need or otherwise for terrorism laws can only be judged against some knowledge of the threat, last year's report also contains a thorough account of the terrorist threat to the UK and its nationals, closely informed by classified materials and with particular reference to the period 2010-2013.<sup>6</sup>
- 1.6 As the 2010-2015 Parliament draws to a close and my second three-year mandate begins, I have opted this year for a different approach. Students seeking a comprehensive account of the Terrorism Acts and how they function are referred to my previous reports. My aim has been to bring the reader up to date with the year's developments,<sup>7</sup> to highlight two particular issues (the definition of terrorism and the role of the Independent Reviewer), and to refresh and recall some past recommendations. By taking this course I hope to discharge my statutory responsibility to review the Acts as a whole, while keeping the report to a manageable size.

## Statistics

- 1.7 Statistics on the operation of the Terrorism Acts are to be found in three principal publications:
- a) The Home Office's annual and quarterly releases, which report on the operation of police powers under TA 2000 and TA 2006 in Great Britain.<sup>8</sup>
  - b) The bulletin produced for the same purpose by the Northern Ireland Office [NIO];<sup>9</sup> and

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<sup>6</sup> *The Terrorism Acts in 2012*, July 2013, chapter 2.

<sup>7</sup> Omitting the customary chapters on Parts III and IV of TA 2000, on which there is little of significance to report.

<sup>8</sup> See, most recently, "Operation of police powers under the Terrorism Act 2000 and subsequent legislation: arrests, outcomes and stops and searches, quarterly update to 31<sup>st</sup> December 2013", 5 June 2014. Fuller details than previously are now available on a quarterly basis (rather than just on a year-to-end-of-March basis), facilitating the process of calendar year review.

c) The Police Recorded Security Situation Statistics, published by the Police Service of Northern Ireland [PSNI] on an annual basis, with monthly updates.<sup>10</sup>

1.8 As noted above, this year has seen a significant improvement in relation to Home Office statistics. The most comprehensive annual figures have previously been published only on a year-to-March basis, which did not mesh well with my statutory obligation to report on a calendar year basis. For the first time in 2014, the figures published in June now give the same degree of detail for the previous calendar year. In this report, a wider range of statistics has thus been given on a calendar year basis.

1.9 Work is in progress which should eventually lead to the publication of data regarding warrants for further detention and refusals of access to solicitors in Great Britain, as I have recommended.<sup>11</sup> On a less happy note, ACPO (citing significant implications in terms of training and information technology) has not yet endorsed the collection of ethnicity data based on the 2011 Census categories.<sup>12</sup>

## Independent Reviewer

### *Working methods*

1.10 Like my predecessors, I believe that effective review requires the perusal of secret and unrestricted material from the civil service, intelligence agencies and the police; interviews with key personnel; and time spent observing, among other things, police procedures and operational meetings concerning executive measures such as proscription. For confidential reading and interviews, I am provided with a room in the Home Office which I use for about a day a week. My diary is kept by my clerks in Chambers, which remains my principal base and from which I continue to practise at the Bar.

1.11 I do not hold formal evidence sessions, but benefit from large numbers of informal meetings and conversations. My interlocutors range from senior judges, intelligence chiefs, civil servants, watchdogs, prosecutors and police officers of all ranks to people who have been stopped at ports, arrested on suspicion of terrorism, imprisoned, placed in immigration detention or subjected to asset

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<sup>9</sup> See most recently *Northern Ireland Terrorism Legislation: Annual Statistics 2012/13* (undated).  
<sup>10</sup> *Police Recorded Security Situation Statistics, Annual Report covering the period 1<sup>st</sup> April 2013 – 31<sup>st</sup> March 2014*, 8 May 2014. See also PSNI, *Stop and Search Statistics, Financial year 2013/14*, 4 June 2014.

<sup>11</sup> *The Terrorism Acts in 2012*, July 2013, 1.30(c).

<sup>12</sup> *Ibid.*, 1.30(d).



freezes, control orders and similar measures. I communicate with NGOs, academics, human rights organisations and lawyers, both in person and via material that they share on twitter. I listen to mosque and community groups, forensic medical examiners and Prevent co-ordinators; and address security conferences and (in my own time) universities and schools. I attend, and contribute to, the training of police and independent custody visitors. When requested, I brief journalists by referring them to my own reports or other open-source materials, and give occasional interviews to mainstream and minority media outlets in the interests of informing the public debate.

1.12 The work takes me to all parts of the United Kingdom. I visited during the period under review police counter-terrorism units, detention centres, community groups, ports (including, for the first time, Holyhead) and specialist facilities such as the National Ports Analysis Centre in Liverpool and the National Borders Targeting Centre in Manchester. Trips to Northern Ireland, some in conjunction with my counterpart under the Justice and Security (Northern Ireland) Act 2007,<sup>13</sup> allow me to be briefed by the security forces, prosecutors, the judiciary and monitoring bodies, to observe police patrols, to talk to detainees at the Antrim Serious Crime Suite, to hear the concerns of civil society organisations and lawyers, and to give evidence to the Northern Ireland Policing Board. I made a fact-finding trip during the year under review to Israel and the Occupied Palestinian Territories, identifying matters of mutual concern (ranging from the treatment of secret evidence to the impact of UK anti-terrorism law on terrorist funding and charitable work) and discussing them with UN agencies, British and EU officials, NGOs, academics and the authorities in Tel Aviv and in Ramallah.

1.13 I have discussed issues relating to terrorism with a wide range of MPs at Westminster, and with Justice Ministers in Scotland and Northern Ireland. I have private meetings with Government Ministers (including the Home Secretary, Security Minister, Secretary of State for Northern Ireland and Law Officers) and, when requested, with their opposition shadows. I gave evidence in Parliament during the period under review to the Home Affairs Select Committee, the Joint Committee on Human Rights and the House of Lords EU Affairs Committee.

### ***Appointment and Renewal***

1.14 My initial three-year term of office, to which I was appointed by an old-fashioned tap on the shoulder, was renewed for a further three-year period with effect from February 2014. Though without any personal or political affiliation to the

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<sup>13</sup> Robert Whalley CB was replaced in this role, with effect from February 2014, by the former Home Office Legal Adviser, David Seymour CB.

Ministers who appointed me, I did not believe this opaque method of appointment was ideal and have consistently recommended that it be changed.

- 1.15 The post of Independent Reviewer of Terrorism Legislation was reclassified in 2013 as a public appointment.<sup>14</sup> Next time the post falls vacant, candidates will be identified via a fair, open and merit-based process. Ministers will then be able to choose from a list of candidates assessed by a selection panel as being appointable to the role. Whether to re-appoint an Independent Reviewer at the end of their term of office will remain a decision for Government alone, subject to a 10-year limit on tenure.<sup>15</sup> This seems to me broadly acceptable: I do not believe that the uncertainties of reappointment are likely significantly to threaten the Reviewer's independence, at least for as long as the chief source of his livelihood lies elsewhere.<sup>16</sup>

### ***Suggestions for change***

- 1.16 The Independent Reviewer of Terrorism Legislation has the potential to influence the evolution of anti-terrorism law and practice, both directly by making recommendations to the authorities and more indirectly through Parliament and the courts. I have recently attempted to explain some of the ways in which this may happen in practice.<sup>17</sup>
- 1.17 Nonetheless I believe that the time has come to look broadly at the functions of the Independent Reviewer, to see whether they could be directed in a more effective manner than the current statutory regime allows. I have shared my thoughts with the Government, which very recently made a proposal of its own. This theme is developed at chapter 11, below.

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<sup>14</sup> Public Appointments Order in Council, 9 April 2013.

<sup>15</sup> Code of Practice for Ministerial Appointments to Public Bodies, April 2012.

<sup>16</sup> Though the contrary view is possible: the former Independent National Security Legislation Monitor [INSLM] in Australia, a distinguished senior counsel, has expressed the opinion that there should be no possibility of re-appointment to his (analogous) post, so as to remove both fear of the Executive and hope of preferment from it: Fourth Report of 28 March 2014, I.4. He would prefer to see a single, longer term, while acknowledging that this could "*reduce the pool of willing appointees considerably*".

<sup>17</sup> D. Anderson, "The independent review of terrorism laws [2014] Public Law 403-420. A working paper entitled "The independent review of terrorism laws: searchlight or veil?" can be freely accessed through my website.

## **RECENT DEVELOPMENTS**

### **SUMMARY**

- In 2013 (and to date) the official assessment of the threat to the UK:
  - from international terrorism was substantial
  - from Northern Ireland-related terrorism was severe in Northern Ireland and moderate in Great Britain
  - from far-right and domestic extremist groups was low (Chapter 2).
- Two cases argued in 2013 (*Gul* and *Miranda*) highlighted the extraordinarily broad definition of terrorism under UK law, and the heavy reliance that is placed on the wise exercise of discretions by Ministers, prosecutors and police (Chapter 4).
- Two new organisations were proscribed in 2013, and two name-change orders made. Procedures for deproscription remain unsatisfactory (Chapter 5).
- The first authorisation was made (in Northern Ireland, and in unusual circumstances) for use of the TA 2000 section 47A suspicionless stop and search power. Fewer people were stopped under the TA 2000 section 43 reasonable suspicion power, at least in London and in Northern Ireland (Chapter 6).
- The decline in the use of TA 2000 Schedule 7 port powers continued, and the conditions for its use were tightened by statute. Further aspects of the power need attention, and may receive it in cases pending before a number of senior courts (Chapter 7).
- Arrests and detentions under TA 2000 were roughly in line with practice in recent years. The charging rate fell in Northern Ireland. The European Court of Human Rights is to revisit issues including the non-availability of police bail, the covert surveillance of detained persons and the procedure for extending detention (Chapter 8).
- England and Wales in particular saw a high conviction rate, with a number of guilty pleas to significant plots. Apparent differences in sentencing policy, and difficulties said to be caused by UK anti-terrorism law for the delivery of humanitarian and peacebuilding efforts by international NGOs, are topics worthy of further consideration (Chapter 9).

## 2. THE THREAT PICTURE

### Introduction

2.1 I concluded last year that:

“.. the threat from terrorism remains a substantial one, amply justifying the existence of some terrorism-specific laws”.<sup>18</sup>

2.2 That conclusion was based on an extended summary of the nature and extent of the terrorist threat to the United Kingdom and its nationals, as it had evolved since 2000 and as it stood in 2013.<sup>19</sup> That account of the threat was in turn informed by detailed classified briefings from the Joint Terrorism Analysis Centre [JTAC], from MI5 in Northern Ireland and by the National Domestic Extremism Unit [NDEU] (now the National Domestic Extremism and Disorder Intelligence Unit [NDEDIU]) , as well as by other conversations and open-source material.

2.3 I have received similar briefings this year, both orally and in writing. Rather than replicate last summer’s detailed treatment of the issue, however, this report supplements it by reference to specific events and developments during 2013.

2.4 Whilst the precise nature of the threat fluctuated and developed over the year, overall threat levels were constant. Thus:

- a) The threat to the UK from **international terrorism** (largely al-Qaida related) officially remained at SUBSTANTIAL throughout the period under review, meaning that an attack is a strong possibility.
- b) The threat from **Northern Ireland-related terrorism** remained at SEVERE in Northern Ireland (meaning that an attack is highly likely) and MODERATE in Great Britain (meaning that an attack is possible, but not likely).
- c) The threat to the UK from **far right and domestic extremist groups** is currently assessed at LOW (meaning that an attack is unlikely), though it is acknowledged that the threat from lone actors is harder to assess.

For international terrorism JTAC produces (but does not publish) more focussed threat levels for specific sectors (e.g. passenger aviation, energy) and regions of the world. These threat assessments are reflected in the travel advice issued by the Foreign Office and published on its website.

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<sup>18</sup> *The Terrorism Acts in 2012*, July 2013, 12.3.

<sup>19</sup> *Ibid.*, 2.1-2.88.

## Al-Qaida related terrorism<sup>20</sup> in 2013

### *Global picture*

- 2.5 Just as violent action by Islamist groups is by far the most deadly form of non-State terrorism worldwide, so Muslims are overwhelmingly the victims of it. I was impressed on recent visits to Muslim-majority countries (Jordan, Algeria) by the contempt in which the vast majority of people hold the “*extremists*” or “*terrorists*” who claim inspiration from al-Qaida. Generally high levels of hostility towards well-known extremist groups, and decreasing (though still appreciable) levels of support for suicide bombings against civilian targets in order to defend Islam from its enemies, are revealed by a detailed recent survey conducted in 14 countries with significant Muslim populations.<sup>21</sup>
- 2.6 According to data prepared for the US State Department:
- a) 2013 saw 9,707 terrorist attacks, 17,891 deaths, 32,577 woundings and 2,990 persons kidnapped or taken hostage across the world.
  - b) The 10 countries that experienced the most terrorist attacks were the same in 2013 as in 2012. In descending order, their 2013 ranking was Iraq, Pakistan, Afghanistan, India, Philippines, Thailand, Nigeria, Yemen, Syria and Somalia.
  - c) More than half of all attacks, two thirds of fatalities and nearly three quarters of all injuries occurred in Iraq, Pakistan and Afghanistan.
  - d) Iraq alone saw a quarter of the terrorist attacks, a third of the deaths and almost half of the woundings.<sup>22</sup>
- 2.7 The waning influence of “AQ Core” in Afghanistan and Pakistan continued to be widely noted. It was evident during 2013 in the failure of al-Qaida leader Ayman

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<sup>20</sup> As in previous reports, I use this term in the broad sense of terrorism perpetrated or inspired by al-Qaida, its affiliates or like-minded groups. Like the alternative terms (Islamic, Islamist, jihadist) it is imperfect: in particular, it is important to remember that in places such as Mali, Nigeria and even Yemen, there are tribal, cultural and other political causes of conflict which existed long before al-Qaida appeared on the scene.

<sup>21</sup> Pew Research Global Attitudes Project, *Concerns about Islamic Extremism on the Rise in Middle East*, 1 July 2014, a survey conducted before the ISIS takeover of parts of Iraq. Suicide bombings against civilian targets were still considered to be often or sometimes justified in defence of Islam by 15% or more of the population in 11 of the 14 countries surveyed, though there have been marked declines over the past 12 years in Jordan (from 43% to 15%) and Pakistan (from 33% to 3%).

<sup>22</sup> National Consortium for the Study of Terrorism and Responses to Terrorism [START], *Country Reports on Terrorism 2013*, April 2014, Annex of Statistical Information. Violent acts targeted at combatants (and so governed by international humanitarian law) are excluded from these figures.

al-Zawahiri to mediate a dispute among al-Qaida affiliates operating in Syria, in the consequent disaffiliation of Islamic State in Iraq and Syria **[ISIS/ISIL]**, and in widespread disobedience by al-Qaida affiliates to Zawahiri's guidance to avoid civilian damage. The decline in AQ Core should however not be exaggerated. Several of those convicted in 2013 of terrorist plots in the UK had visited or trained in the Federally Administered Tribal Areas **[FATA]** of Pakistan; and as late as October 2013, al-Qaida and its affiliates in South Asia and the Arabian Peninsula were still said by MI5 to present the most direct and immediate threats to the UK.<sup>23</sup> The effects of western military withdrawal from Afghanistan remain to be seen.

- 2.8 The threat continues to diversify, as violent Islamist groupings use revolution, conflict and weakened governance to gain footholds in North Africa, East Africa, West Africa and the Middle East. The most significant al-Qaida affiliates are Al-Qaida in the Arabian Peninsula **[AQAP]**, the al-Nusrah Front **[ANF]** in Syria and Iraq, Al-Qaida in the Islamic Maghreb **[AQIM]** and Al-Shabaab in Somalia. Other groups have less developed links to al-Qaida but have adopted elements of its ideology, most notably Boko Haram and Ansaru, Nigerian groups linked to AQIM. No longer an al-Qaida affiliate (and subject to criticism even by Abu Qatada, in impromptu press conferences given during his trial in Jordan), ISIS claimed global headlines in 2014 for its atrocities in Syria, incursions into large parts of Iraq and declaration of a transnational Caliphate, prefaced by meticulous planning and sophisticated use of social media.
- 2.9 A detailed account of these groups and their activities is beyond the scope of this report. Some groups threaten only local targets, whereas some aspire also to kidnap westerners for ransom or speak of taking the fight to western countries. Some align themselves with al-Qaida; others are rejected by it and have even found themselves in conflict with its affiliates. Each is capable of posing a threat to foreign interests and travellers, including from the UK, in the areas where it operates.
- 2.10 Syria, which recently emerged as the location of the primary terrorist threat to the UK, requires special mention. The brutal civil war there has been a magnet for many thousands of foreign fighters from North Africa, the Middle East and Europe – including, to the knowledge of the authorities, more than 400 Britons who find the Syrian battlefields more accessible than those of Afghanistan and

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<sup>23</sup> Andrew Parker, Director General of MI5, speech to Royal United Services Institute **[RUSI]**, 8 October 2013, para 25. By mid-2014, Syria and Iraq were being openly spoken of as higher priorities.

Somalia.<sup>24</sup> This pool of potential recruits is in turn attractive not only to those fighting against President Assad, but to international terrorist groups who have not always found it easy to locate operatives with the right skills and access.

2.11 Most probably, few of the Muslims who leave Europe to fight in Syria intend at that stage to practise terrorism on their return. They are typically males in their 20s: some are disaffected and rootless, but others are articulate and highly-educated. Few have any prior connection to Syria. Lured there by social media reports or (increasingly) by returning fighters, they may be motivated by a wish to help fellow-Muslims whose lives are threatened, by an idealistic desire to live fully in accordance with Islam, by warlike bravado or by notions of martyrdom. In many cases they lack firm plans, language skills or local knowledge.

2.12 Exposure to the horrific environment of the Syrian civil war affects people in different ways. If not killed (as at least 20 British fighters are believed to have been) or rapidly disillusioned, expatriate fighters can learn technical skills and aspire to further violence.<sup>25</sup> As was the case with fighters returning from other theatres of jihad (Bosnia, Afghanistan, Iraq), a minority of returning Syrian fighters may be tasked or may seek of their own initiative to mount terrorist attacks at home.<sup>26</sup> There is already some evidence of terrorist activity by Syrian fighters who have returned to France, Belgium and the UK (as distinct from prosecutions for activities in Syria),<sup>27</sup> though a causal link is hard to prove.

### **Attacks in the West**

2.13 The recent rarity of successful al-Qaida related terrorist attacks in the West has led to the perception of a diminished threat. In 2014, only 2% of EU citizens (3%

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<sup>24</sup> At least 12,000 foreigners are estimated to have fought in Syria over the first three years of the war, more than half of them from Saudi Arabia, Tunisia and Morocco and 2,000 or more from Member States of the EU. That compares to an estimate of some 10,000 foreign fighters for the whole 10-year period of the Afghan jihad against Soviet occupation, plus the period of Taliban rule from 1996-2001: R. Barrett, *Foreign Fighters in Syria*, Soufan Group, June 2014.

<sup>25</sup> Informative recent studies of Syrian foreign fighters are J. Carter, S. Maher and P. Neumann, *Greenbirds: Measuring importance and influence in Syrian Foreign Fighter Networks*, ICSR, April 2014, and R. Barrett, *Foreign Fighters in Syria*, Soufan Group, June 2014. For a Europe-wide perspective, see E. Bakker, C. Paulussen and E. Entemann, *Dealing with European Foreign Fighters in Syria: governance challenges and legal implications*, ICCT, December 2013.

<sup>26</sup> Influential in this respect has been the research of Thomas Hegghammer, who observed that 107 foreign fighters from North America, Western Europe and Australia during the period 1990-2010 were involved in terrorist plots on their return, and concluded that "*ihadists prefer foreign fighting, but a minority attacks at home after being radicalized, most often through foreign fighting or contact with a veteran*": "Should I stay or should I go? Explaining variation in Western jihadists' choice between domestic and foreign fighting" (2013) *American Political Science Review* 1-15.

<sup>27</sup> In the latter category falls *R v Mashudur Choudhury*, *The Times* 21 May 2014, p. 7.

in the UK) considered terrorism to be one of the two most serious problems facing their country.<sup>28</sup> That figure has declined consistently since 2004, the year of the Madrid train bombings, when it stood at 16% in the EU as a whole and 28% in the UK.<sup>29</sup>

- 2.14 Shock and revulsion were therefore all the greater when, in the spring of 2013:
- a) three people were killed, and over 200 wounded, by two IEDs detonated by the Tsarnaev brothers on the finish line of the Boston Marathon; and
  - b) the soldier Lee Rigby, off-duty in London's Woolwich, was killed by two Muslim converts with previous links to proscribed organisations in the UK, one of whom had attempted to travel to Somalia to join a jihadi movement.
- 2.15 As those incidents underline, large numbers of deaths are not necessary for terrorism to make an impact on hungry media and on populations long accustomed to peace and security. The Tsarnaev brothers in Boston, and the Woolwich killers in London who were filmed speaking of their bloody crime while awaiting arrest, are classic examples of self-organised terrorists for whom it was enough to have, in the old aphorism, "*a lot of people watching, not a lot of people dead*". That mentality is well understood by al-Qaida propagandists, who over the year under review used online periodicals (notably, *Inspire* and *Azan*), videos (notably the al-Shabaab product, *Woolwich – an eye for an eye*) and social media to promote do-it-yourself jihad aimed in particular at US, UK and French targets.<sup>30</sup> The avowed objective is to promote fear among the public and over-reaction by the authorities. Frenzied media coverage, and attempts without parallel in other types of crime to ensure "*zero risk*", play neatly into that agenda.<sup>31</sup>
- 2.16 Against that background, it is important to note that the killing of Lee Rigby was the sole death attributed to "*religiously-inspired terrorism*" in Europe during 2013, just as the April murder of Mohammed Saleem in Small Heath, Birmingham was the sole death attributed to "*right-wing terrorism*". However the 216 arrests for

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<sup>28</sup> "*Europeans in 2014*", Special Eurobarometer 415, March 2014, QA4.

<sup>29</sup> See Eurobarometer surveys 62, 64, 66, 68, 70, 72, 75. In 2005, the year of the London bombings, the UK figure reached 34%.

<sup>30</sup> Targets recently suggested in the UK (*Inspire*, 12<sup>th</sup> edition of March 2014) include Premier League and FA Cup matches, tennis tournaments, the horse racing venues Cheltenham and Epsom and the Savoy Hotel in London. Among the proposed French targets are the Dordogne Valley, on the basis that the presence of British holidaymakers there would enable two birds to be killed with one stone.

<sup>31</sup> On the power of terrorism to distort priorities, see D. Anderson, "Shielding the compass: how to fight terrorism without defeating the law" [2013] 3 EHRLR 233-246, available for free as an SSRN working paper through my website.



religiously-inspired terrorism in Europe marked a substantial increase on previous years, and – unusually – exceeded the 180 arrests/charges for offences relating to “*ethno-nationalist and separatist terrorism*”, most of them in Spain, France and Northern Ireland.<sup>32</sup>

**Attacks on British citizens abroad**

2.17 More British citizens were killed overseas by Islamist extremist terrorists in 2013 than in any year since 2005. The principal causes of death were the attacks on the Amenas gas plant in Algeria in January and on the Westgate shopping mall in Nairobi in September.

2.18 A complete list of overseas deaths of Britons as a consequence of international terrorism since 2005, supplied to me by JTAC, is as follows:

<b>Year</b>	<b>UK fatalities</b>	<b>Details</b>
2005	12	Eleven in Sharm-el-Sheikh attacks; one in a car bombing in Qatar
2006	0	
2007	0	
2008	1	One British-Cypriot in Mumbai attacks
2009	4	One hostage killed in Mali; three hostages killed in Iraq
2010	2	One in an attack on a mosque in Pakistan; one hostage killed in Afghanistan
2011	4	One in Domodedovo airport attack, Russia; one in a car bombing in Aden, Yemen; one in a car bombing in Jerusalem; one in a bombing in Marrakesh, Morocco
2012	2 (+1)	One hostage killed in Nigeria; one hostage killed in Iraq; a third hostage killed in Pakistan was never confirmed as terrorism-related
2013	13	Six in the In Amenas attack, Algeria; six in the Westgate attack, Kenya; one British hostage killed in Nigeria

**Attacks in the United Kingdom**

2.19 For almost eight years after the 7/7 attacks of July 2005, which saw the deaths of four suicide bombers and 52 innocent users of London Transport, Islamist

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<sup>32</sup> *EU Terrorism Situation and Trend Report: TE-SAT 2014*, 28 May 2014. The UK figures are for charges, the closest equivalent of “arrests” as understood in most other EU countries. There were also 49 arrests for “*left-wing and anarchist terrorism*”, mostly in Greece and Spain.

terrorism claimed no victims in the United Kingdom.<sup>33</sup> This was not for want of trying: some plots (e.g. the intended 21/7 bombings of two weeks later) failed for technical reasons, whilst others (notably the airline liquid bomb plot of 2006, which credibly aimed at the simultaneous destruction of several transatlantic airliners) were foiled by skilful intelligence and police work.

2.20 This proud record ended on 22 May 2013, when Private Lee Rigby was hit by a car then stabbed and hacked to death on a Woolwich street. His killers, Muslim converts Michael Adebolajo and Michael Adebolawe, were convicted of his murder in December 2013.<sup>34</sup>

2.21 A sequence of 18 convictions earlier in 2013, nearly all following guilty pleas, had already served as a reminder that while deaths from terrorism in Great Britain are fortunately rare, credible plots – sometimes successfully detected, and sometimes failing only by chance – remain a reality. In particular:

- a) 11 Birmingham-based men, arrested in 2011, were sentenced in April 2013 to periods of imprisonment of up to 23 years. They intended to use a series of improvised explosive devices [IEDs] in up to eight separate rucksacks, in an attack on unknown targets that was intended to be bigger than 7/7. The group was also involved in terrorist fundraising, fraudulently collecting on behalf of a legitimate charity.
- b) Four Luton-based men, arrested in 2012, were sentenced in April 2013 to periods of imprisonment of up to 16 years and three months. They had downloaded Inspire magazine, undertaken survival training and collected funds for terrorist purposes. They had discussed using a remote control car to deliver an IED into a local army base.
- c) Richard Dart, Janangir Alom and Imran Mahmood were arrested in 2012. While not so far advanced with attack planning as the plotters mentioned above, evidence recovered from a computer showed that they had considered targeting the town of Royal Wootton Bassett due to its association with British soldiers returning from Afghanistan. They received sentences of up to 14 years and nine months.
- d) Six Birmingham-based men were arrested in 2012 after they planned to attack an EDL demonstration in Dewsbury, South Yorkshire. Police impounded a vehicle during a routine traffic stop for driving without

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<sup>33</sup> Excluding Kafeel Ahmed, who died of his injuries in 2007 after driving a blazing propane-filled Jeep towards the terminal building of Glasgow Airport.

<sup>34</sup> <http://www.judiciary.gov.uk/judgments/r-v-adebolajo-and-adebolawe/>

insurance, and subsequently found a homemade IED, two sawn-off shotguns, knives and a written message claiming responsibility for an attack against the EDL. All six men pleaded guilty to terrorist charges in April 2013, and were punished by sentences of up to 19 years and six months.

- 2.22 Some of these plots were further advanced than others, but none were the product of FBI-style “*sting*” operations, or featured conduct that could have been characterised as entrapment. They support the words of incoming MI5 Director General Andrew Parker, who said of al-Qaida related terrorism in October 2013:

“Since 2000 we have seen serious attempts at major acts of terrorism in this country typically once or twice per year.”

- 2.23 The principal plots of 2000-2012, to the extent that they are publicly known, were listed in my last annual report. I have been made aware of other operations, often aimed at the disruption of threatening patterns of behaviour before they crystallise into a specific plot.

### ***Future threats***

- 2.24 Jonathan Evans, Director General of MI5 from 2007 until April 2013, embedded in a rare public address the following astute (and restrained) comment on the prediction game:

“Those of us who are paid to think about the future from a security perspective tend to conclude that future threats are getting more complex, unpredictable and alarming. After a long career in the Security Service, I have concluded that this is rarely in fact the case. The truth is that the future always looks unpredictable and complex because it hasn’t happened yet. We don’t feel the force of the uncertainties felt by our predecessors. And the process of natural selection has left us, as a species, with a highly developed capacity to identify threats but a less developed one to see opportunity. This helps explain the old saying that when intelligence folk smell roses they look for the funeral.”<sup>35</sup>

He added, in the same speech:

“At least some of the areas of concern that I have highlighted tonight may turn out to be dogs that don’t bark. ... On the other hand, the dog you haven’t seen may turn out to be the one that bites you.”<sup>36</sup>

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<sup>35</sup> Lord Mayor’s Annual Defence and Security Lecture, Mansion House, June 2012, para 6.

<sup>36</sup> *Ibid.*, para 33.

- 2.25 A number of dogs have defied predictions by not barking in recent years. Notable among them are cyber-terrorism and the terrorist use of chemical, biological, radioactive or nuclear weapons.
- 2.26 The widening spread of al-Qaida inspired terrorist groups, and the incontrovertible evidence that is provided by successful attacks and successful prosecutions, however tells its own story. Islamist terrorism has never been a major cause of mortality in the UK or in other western countries; but it maintains the capacity to spread fear and alarm. Disturbing numbers of people subscribe to its essential narrative, and plots at least in the UK are not uncommon.<sup>37</sup> Strong laws against terrorism can help diminish both the *risk* of mass casualty attacks and the *fear* that such attacks will take place, thus frustrating two principal aims of terrorist activity.
- 2.27 The same threat background is obviously relevant to the debate over the extent of electronic surveillance, which ignited after Edward Snowden absconded in 2013 with documents stolen from the NSA, but to which my statutory role does not extend.

### **Northern Ireland-related terrorism in 2013**

- 2.28 A detailed and reliable open-source account of the security situation in Northern Ireland during 2013 is given in the annual Peace Monitoring Report, published by the Community Relations Council.<sup>38</sup> This is a document of unrivalled scope and insight, strongly recommended to anybody with an interest in Northern Ireland's uncertain progress towards a post-conflict society. Also to be welcomed is the increasing level of detail contained in the twice-yearly written ministerial statements on the security situation.<sup>39</sup>
- 2.29 My own understanding has been further illuminated by the work of the outgoing reviewer under the Justice and Security (Northern Ireland) Act 2007, Robert

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<sup>37</sup> Giving evidence to the Intelligence and Security Committee on 7 November 2013, Andrew Parker, Director General of MI5, was widely reported as stating that 34 terrorist plots had been foiled since the 7/7 London bombings of 2005. The counting of plots is a subjective business, and it is acknowledged by MI5 that it may be safer to stick to the Director-General's previous statement that one or two serious plots are typically seen each year. There have been four wholly or partially successful plots since 9/11: the 7/7 bombings in 2005, the plot which covered both the attack on Glasgow Airport and the bomb intended to detonate at the Tiger Tiger nightclub in 2007, the stabbing of Stephen Timms MP in 2010 and the murder of Lee Rigby in 2013.

<sup>38</sup> P. Nolan, *Northern Ireland Peace Monitoring Report, No. 3*, March 2014.

<sup>39</sup> NIO, Written Ministerial Statements on the Northern Ireland Security Situation of 17 July 2013 and 29 January 2014.

Whalley CB,<sup>40</sup> and by visits to Northern Ireland, particularly over four days in November in which I toured the crime suites where terrorist suspects are detained in Antrim and Belfast, accompanied an armoured police patrol in Derry-Londonderry and spoke to a wide variety of people ranging from security service, police, prosecutors and judiciary to the Northern Ireland Policing Board [NIPB], NGOs, lawyers, a detainee and the Justice Minister David Ford MLA.

2.30 Northern Ireland hosted two global events in 2013: the G8 Summit in Fermanagh in June and the World Police and Fire Games, which brought 7000 athletes to Belfast in August. Derry-Londonderry's year as the UK City of Culture saw relaxed crowds in the streets, attracted by the Turner Prize, the Tall Ships Race and the all-island Fleadh Cheoil. Rates of crime and imprisonment in Northern Ireland remained very low by UK standards, and confidence in the police held up.<sup>41</sup> The security situation remained less grave than during the Troubles: as the Peace Monitoring Report records, no police officer was killed in 2013; there were no sectarian attacks in which a Catholic was killed by a Protestant or a Protestant by a Catholic; and nobody was killed in a bomb explosion. Though the so-called "New IRA", the alliance of three factions referred to in my last annual report,<sup>42</sup> remained in place, there were some high-profile arrests towards the end of the year. Once again, there was no incident of Northern Ireland-related terrorism in Great Britain.

2.31 However by standards other than those of Northern Ireland's own violent past, normality still seemed a long way off. Thus:

a) Violent republican activity, though well down on 1997-2002, continued at levels comparable to those experienced since devolution in 2007.<sup>43</sup> Dissident republicans were responsible for the bulk of the 73 bombings and 48 shootings that occurred in 2013, as well as for the murder of Kevin Kearney in Belfast in October. Pipe bombs, mortars and under-vehicle IEDs were all used; targets for terrorist attack included police officers, police stations, churches, community centres and private houses.<sup>44</sup>

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<sup>40</sup> Mr Whalley's sixth and final report was published in December 2013: <https://www.gov.uk/government/news/6th-annual-report-of-independent-reviewer-of-justice-security-launched>. He was succeeded with effect from February 2014 by David Seymour CB, former Home Office Legal Adviser.

<sup>41</sup> See NIPB, *Public perceptions of the police, PCSPs and the Northern Ireland Policing Board*, May 2014.

<sup>42</sup> D. Anderson, *The Terrorism Acts in 2012*, July 2013, 2.69.

<sup>43</sup> P. Nolan, *Northern Ireland Peace Monitoring Report*, No. 3, March 2014, Chart 30.

<sup>44</sup> R. Whalley, 6<sup>th</sup> annual report of the independent reviewer of the Justice and Security (Northern Ireland) Act 2007, December 2013, paras 301-302, 666, 668.

- b) On the loyalist side of the divide, the flags protest which began in December 2012 brought large-scale rioting to East and North Belfast and increased the prominence of the two principal paramilitary organisations, the Ulster Defence Association **[UDA]** and the Ulster Volunteer Force **[UVF]**. The majority of the 43 paramilitary assaults during 2013 were attributed to Loyalists. Parades, marches and the cost of policing them (both financial and physical) continued to rise.<sup>45</sup>
- 2.32 I have been briefed in detail on police operations which averted significant terrorist attacks during 2013. Other attacks (e.g. the mortars aimed at Strand Road police station in Derry-Londonderry in October) demonstrated the attackers' technical deficiencies. I have seen for myself how officers of the PSNI must live, both on and off duty, under the scrutiny of those who could turn into their killers. Their courage, and their service to the peaceful citizens of Northern Ireland, should never be under-estimated.
- 2.33 There remains no significant public support for those who claim a political or sectarian justification for their attempts to kill, maim and destroy. But the stagnant and polarised political environment in Northern Ireland seems ill-adapted to curing the underlying resentments, as illustrated during 2013 by the failure of the multi-party process led by Dr Richard Haass to agree even a procedural solution to the contentious issues of flags, parades and the past. As last year, it is necessary to conclude that the terrorist threat in Northern Ireland, though much diminished, remains real and ever-present; and that it would have been substantially greater without the efforts of the PSNI, assisted by some laws designed specifically for use against terrorism.

### **Other terrorism in 2013**

- 2.34 The extreme right wing **[XRW]** in the United Kingdom remains fragmented, with no unifying ideology or set of principles. Its roots are in racial prejudice, street violence, football hooliganism and music networks; political views are often overlaid by mental health issues, personality disorder and social isolation. Acts of serious violence with a broader political or ideological motive are rarely planned, and still more rarely executed. There is no equivalent of the international terrorist

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<sup>45</sup> The "*marching season*" is said to have required £18.5 million in additional policing costs in 2013, compared with £4.1 million in 2012. The Chief Constable reported to the NIPB in September 2013 that 689 officers (some 10% of the PSNI total) were hurt between July 2012 and August 2013, 51 of them requiring hospital treatment.

networks, the sophisticated plots or the technical expertise that have characterised al-Qaida related terrorism.<sup>46</sup>

- 2.35 It follows that by no recognised measure can the gravity of the threat to UK citizens as a whole from right-wing extremism groups be equated to the threat posed by Islamist or Northern Ireland-related terrorism. This is reflected in the threat level of LOW applied by NDEIU, in the fact that the Government's strategy for preventing terrorism, though it extends to the XRW threat, remains "focused" on al-Qaida-related terrorism,<sup>47</sup> and in the relatively weak emphasis on the XRW threat that characterises the first report of the Government's post-Woolwich task force on radicalisation and extremism.<sup>48</sup>
- 2.36 This does not mean, however, that the threat can safely be ignored or downplayed. Anders Breivik, who killed 77 people in Norway on a single day in July 2011, demonstrates the destructive potential of a lone operator whose world view had been influenced by many others.<sup>49</sup> Community organisations (notably TellMama UK) reported an increase in mosque attacks and in anti-Muslim hate speech in the wake of the murder of Lee Rigby in May 2013. The Metropolitan Police Service [MPS] reported a 29.5% increase in Islamophobic crime from the year before May 2013 to the year after it, as against a much smaller 8% increase for racist and religious hate crime as a whole.<sup>50</sup> Reactions among targeted communities include fear, apprehension and a sense of grievance that violent attacks on Muslims, even if racially, religiously or ideologically motivated, attract only a fraction of the publicity devoted to Islamist terrorism.<sup>51</sup>
- 2.37 There is an unfortunate and damaging tendency in parts of the media to be less than even-handed (and where suspicion falls upon Muslims, frankly alarmist) in

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<sup>46</sup> A European perspective on far-right extremism and responses to it is given by V. Ramalingam, *Old Threat, New Approach: tackling the far right across Europe* (Institute for Strategic Dialogue, 2014).

<sup>47</sup> *Prevent Strategy*, June 2011, Cm 8092, 6.10-6.12.

<sup>48</sup> *Tackling extremism in the UK: report from the Prime Minister's task force on tackling radicalisation and extremism*, December 2013.

<sup>49</sup> As is evident from the 1500-page manifesto he distributed before the attacks, 2083: *A European Declaration of Independence*.

<sup>50</sup> <http://www.met.police.uk/crimefigures/>. Antisemitic crime also rose sharply, by 29.6% over the same period.

<sup>51</sup> A contrast frequently drawn to my attention is between the respective coverage in the mainstream media of the killings of Mohammed Saleem in April 2013 and Lee Rigby in May 2013. The comparison is striking, but not entirely apt: those responsible for Rigby's gruesome murder provided irresistible media bait by loitering at the scene and being filmed ranting with blood on their hands, whereas Saleem's killer slipped away without (at that stage) being detected or revealing his wider agenda. All three proved to be terrorists, but Adebolajo and Adebolawe were more adept than Lapshyn in using the media to promote their intimidatory objective.

their approach.<sup>52</sup> That charge is however more difficult to level against Government. The threat posed by far-right groups and by other domestic extremist groups (e.g. anarchists and animal rights extremists) is monitored by the NDEDIU, and analysed by police and security service according to the same criteria as those that are applied to Islamist groups active in the UK. The question of whether particular extreme right-wing or domestic extremist groups meet the threshold for proscription as a terrorist organisation under TA 2000 is dispassionately discussed, on the basis of the evidence, in meetings which I am entitled to attend and have attended as an observer. Though no such group has so far been judged to meet the threshold, anti-Islamic campaigners have been excluded from the UK by decision of the Home Secretary.<sup>53</sup>

2.38 While the activities of XRW groups and individuals are generally policed and prosecuted under public order, hate crime or general legislation, as are those of other domestic extremists,<sup>54</sup> there is no reason in law or in principle why intimidatory violence or threats of violence, directed at Muslims or members of other religious groups, should not in an appropriate case be investigated and prosecuted with the powers appropriate to terrorism.

2.39 At least one such case arose in 2013.<sup>55</sup> The detonation of three increasingly sophisticated bombs outside mosques in the West Midlands was eventually linked to the religiously-motivated murder of Mohammed Saleem, and the investigation taken over by the West Midlands Counter-Terrorism Unit [CTU]. Pavlo Lapshyn, a Ukrainian national who had arrived in the UK only a few days before the murder, was convicted of all four offences in October 2013 and imprisoned for a minimum of 40 years.<sup>56</sup> The police are to be commended not only for their successful investigation, on which I have been thoroughly briefed, but for the very significant effort that was made to dispense reassurance and practical advice to the leadership of mosques and other Islamic institutions in the West Midlands.

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<sup>52</sup> I gave some examples from the time of the Pope's visit to London in *Operation Gird: report following review*, May 2011, para 86-88.

<sup>53</sup> E.g. Pamela Geller and Robert Spence, of the anti-Islamic group American Freedom Defense Initiative, banned from entry after lobbying by the group Hope not Hate: *The Independent*, 27 June 2013, p. 7.

<sup>54</sup> See e.g. *R v Debbie Ann Vincent* (Winchester Crown Court, 16 April 2014). The defendant was convicted of conspiracy to blackmail Huntingdon Life Sciences: the names of suppliers and customers had been published, knowing they would be targeted by activists. One victim was the Swiss Chairman of Novartis, whose house was burned down and whose mother's remains were dug up.

<sup>55</sup> See also *R v Ian Charles Forman* (Kingston-upon-Thames Crown Court, 1 May 2014, convicted of conduct preparatory to terrorist attacks under TA 2006 section 5). An admirer of Hitler, Mr Forman had been conducting research with a view to blowing up two mosques on Merseyside with home-made IEDs.

<sup>56</sup> <http://www.judiciary.gov.uk/judgments/pavlo-lapshyn-sentencing-remarks-25102013/>



### 3. THE COUNTER-TERRORISM MACHINE

#### Introduction

- 3.1 The Government's counter-terrorism (CONTEST) strategy was summarised last year, as was the organisation of the intelligence agencies and counter-terrorism policing.<sup>57</sup>
- 3.2 There were few changes to either policy or organisation in the period under review. In particular, no decision has yet been taken as to whether the National Crime Agency [**NCA**], which replaces the Serious and Organised Crime Agency [**SOCA**], should in future have a counter-terrorism role.<sup>58</sup>
- 3.3 The killing of Private Lee Rigby in May 2013 did however prompt the formation of the Prime Minister's Extremism Task Force, which reported in December 2013. The process was tightly controlled and involved relatively little consultation. Though the report was extremely brief, a number of possible developments were mooted including:
- a) considering if there is a case for new types of order to ban groups which seek to undermine democracy or use hate speech, when necessary to protect the public or prevent crime and disorder; and
  - b) considering if there is a case for new civil powers, akin to the new anti-social behaviour powers, to target the types of behaviour extremists use to radicalise others.<sup>59</sup>

#### Personnel and resources

- 3.4 So far as policing was concerned:
- a) At the end of March 2014 there was a budgeted strength of some 8,200 personnel within the CT network, 6,200 of them police officers and 2,000 civilian members of staff. Officer numbers were down by some 300 on the previous year, while civilian staff numbers remained constant. In addition, as last year, some 850 locally-funded Special Branch personnel assist in protecting national security and are in some areas managed and tasked by the regional CTU.

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<sup>57</sup> *The Terrorism Acts in 2012*, July 2013, chapter 3.

<sup>58</sup> Though the Home Affairs Select Committee has recommended (by a majority) that the NCA should take over responsibility for counter-terrorism: *Counter-Terrorism*, 17<sup>th</sup> report of 2013-14, April 2014, paras 136-141 and vote at p. 104.

<sup>59</sup> *Tackling extremism in the UK: Report from the Prime Minister's Task Force on Tackling Radicalisation and Extremism*, December 2013.

- b) Government funding for counter-terrorism policing was around £570 million in 2013/14, down from £573 million in 2012/13 and £582 million in 2011/12.
- 3.5 Regular police officers in Northern Ireland numbered 6,798 in April 2014, down on the previous year and little more than half the 13,000 employed when the PSNI was founded in 2001.<sup>60</sup>
- 3.6 So far as the security and intelligence agencies are concerned:
- 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 69% of its resources to “*International Counter-Terrorism*” [ICT] during 2012/13; a further 16% was allocated to Northern Ireland.
- 3.7 MI5 employed some 3,800 permanent staff in 2013 (up from below 2,000 in 2001). Full-time equivalent staff numbers for the security and intelligence agencies as a whole were 12,190 in 2013/14, a figure which has changed little since 2010/11,<sup>61</sup> with GCHQ the single biggest employer.

### Co-operation in Europe

- 3.8 I said in last year’s report that I would continue to monitor the operational implications for counter-terrorism of the United Kingdom’s proposed opt-out (under Protocol 36 to the Lisbon Treaty) from some 130 EU police and criminal justice measures which were adopted before the entry into force of the Lisbon Treaty in December 2009.<sup>62</sup> The UK notified the Council on 24 July 2013 that it would make use of the block opt-out option.
- 3.9 My concern was not with the politics of this proposal but rather with its effects on the operational efficacy of the counter-terrorism effort. As I said last year:

“[I]t seems axiomatic that as criminals operate with increasing ease across internal frontiers, so law enforcement needs to improve its ability to do the same.”

In that connection I referred to the view of the police, expressed privately to me and in public evidence to parliamentary committees, that efficacy is enhanced by such measures as the European Arrest Warrant (which secured the rapid return of Hussain Osman, one of the 21/7 bombers) and by systems for the sharing of

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<sup>60</sup> Detailed information about the PSNI is available in P. Nolan, *Northern Ireland Peace Monitoring Report, No. 3*, March 2014.

<sup>61</sup> Security and intelligence agencies financial statement 2013 to 2014, June 2014, Table 4.

<sup>62</sup> *Ibid.*, 3.17-3.23.

information across borders. I referred also to the extent to which the United Kingdom is viewed within the EU as a leader in terms of how to address terrorism.

- 3.10 It was eventually agreed to submit an application to opt back into 35 of the disputed measures, including practically all those that the police considered essential.<sup>63</sup> From an operational point of view, this was welcome. At the time of going to press, the UK's application was the subject of negotiation with EU partners. Those negotiations will need to be concluded before 1 December 2014, when the opt-out decision will take effect.<sup>64</sup>

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<sup>63</sup> Though the House of Lords EU Committee concluded that the Government had given insufficient consideration to the possible substantive and reputational damage of not seeking to opt back into a small number of further measures, including the European Judicial Network and implementing measures related to Europol's continued operation: *Follow-up report on EU police and criminal justice measures: the UK's 2014 opt-out decision*, 31 October 2013.

<sup>64</sup> An account of the process, with references to the multiple reports of parliamentary committees on this subject, is contained in House of Commons Standard Note SN/IA/6930 of 3 July 2014, *The UK block opt-out in police and judicial cooperation in criminal matters: recent developments*.

## 4. CASES ON THE DEFINITION OF TERRORISM

### Introduction

- 4.1 Some provisional thoughts on the definition of terrorism were set out in last year's report.<sup>65</sup> My conclusions and recommendations in this issue are in chapter 10, below.
- 4.2 Legal issues relating to the definition of terrorism do not arise with much frequency in the courts. However, two English cases of the highest importance were argued in 2013.

### *R v Gul*<sup>66</sup>

- 4.3 The Supreme Court made its first substantial comments on the UK's definition of terrorism in the case of Mohammed Gul, a law student convicted for uploading videos onto the internet. They showed attacks by insurgents on coalition forces in Iraq and Afghanistan, and excerpts from martyrdom videos accompanied by commentaries praising the attackers' bravery and encouraging others to emulate them. Mr Gul was convicted of disseminating terrorist publications with intent to encourage the commission of acts of terrorism, contrary to TA 2006 section 2, and sentenced to five years' imprisonment. He appealed first to the Court of Appeal<sup>67</sup> and then to the Supreme Court.
- 4.4 Though both appeals were unsuccessful, a unanimous seven-member Supreme Court (in a judgment written by its President, Lord Neuberger, and the ex-Lord Chief Justice, Lord Judge, and concurred in by Baroness Hale, Lord Mance, Lord Kerr, Lord Reed and Lord Hope), made some remarks of considerable general significance.

### Overlap between terrorism and armed conflict

- 4.5 Most of the judgment was devoted to answering a question which the Court of Appeal had certified to be a point of general public importance, namely:

“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 armed forces in the context of a non-international armed conflict?”

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<sup>65</sup> *The Terrorism Acts in 2012*, July 2013, chapter 4.

<sup>66</sup> *R v Gul* [2013] UKSC 64, [2013] 3 WLR 1207.

<sup>67</sup> *R v Gul* [2012] EWCA Crim 280; [2012] 1 WLR 3432.

- 4.6 Should this question ever be answered in the negative, some very significant consequences would follow. In particular:
- a) Violent action or the threat of action by individuals or groups, engaged in armed conflict overseas (e.g. separatist/nationalist struggles, armed resistance or civil wars), would no longer constitute terrorism. Specific acts (e.g. the targeting of civilians) would continue to be prohibited by international humanitarian law and could be prosecuted as war crimes, though such prosecutions are highly unusual.
  - b) Individual participants in such conflicts could not be prosecuted for terrorist offences in the UK.
  - c) Groups could not be proscribed (or remain proscribed) on the basis of their participation in such conflicts. The harassment currently experienced by communities whose members are suspected of taking up arms in such conflicts,<sup>68</sup> should diminish or cease. There could be no more prosecutions for membership or financing of such groups, or for offences connected to encouragement of their activities.
  - d) Special terrorism powers (e.g. TA 2000 sections 41, 43 and Schedule 7) could not be used in order to search or arrest those who are suspected of having fought in such conflicts, or to stop international travellers in order to determine whether they had fought or associated with groups that fought.

Those who would lose the appellation of terrorist would include not only those who fought NATO forces in Afghanistan and Iraq (as on the facts of *Gul*) but also those engaged in recent conflicts in Sri Lanka, Turkey, Libya and Syria.

- 4.7 The Supreme Court answered the question in the affirmative, thus preserving the status quo. There was no requirement of international law, or even any general understanding, to the effect that terrorism did not extend to acts of insurgents or freedom fighters against governments in non-international armed conflicts.<sup>69</sup> Accordingly, it was “*difficult to see how the natural very wide, meaning of the [TA 2000] definition can properly be cut down by the court*”.<sup>70</sup> That definition “*would appear to extend to military or quasi-military activity aimed at bringing down a foreign government, even where that activity is approved (officially or unofficially)*”

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<sup>68</sup> Detailed in *The Terrorism Acts in 2011*, June 2012, 4.41-4.47.

<sup>69</sup> *Ibid.* paras 44-51.

<sup>70</sup> *Ibid.*, para 38.

by the UK Government” and even when perpetrated by “the victims of oppression abroad”.<sup>71</sup>

- 4.8 The Court (as befits its function as a judicial rather than a policy-making body) did not express a view on whether the legislature *should* exclude such acts from a definition that it described as “very far-reaching indeed”.<sup>72</sup> As I noted last year, such acts do not constitute terrorism in the laws of some other commonwealth and European countries, and a carve-out has been recommended also (though so far without governmental reaction) in two Australian reports.<sup>73</sup> I return to this issue at 10.64-10.70, below.

#### Comments on the definition of terrorism

- 4.9 In a series of trenchant but non-binding dicta, the Supreme Court offered some more general comments on the TA 2000 definition of terrorism. In particular:
- a) The Court described my discussion of the definition in *The Terrorism Acts in 2012* as “very instructive”, highlighting my reference to the definition as “remarkably broad – absurdly so in some cases”. It recorded its view that “the concerns and suggestions about the width of the statutory definition of terrorism which Mr Anderson has identified .. merit serious consideration”.<sup>74</sup>
  - b) The statutory requirement for the Director of Public Prosecutions [DPP] or Attorney General to consent to terrorism prosecutions – intended as a safeguard against the excessive use of the terrorism law – was described as “unattractive” because it involves “Parliament abdicating a significant part of its legislative function”, leaves citizens unclear as to whether or not their actions are liable to be treated as criminal, and “risks undermining the rule of law”.<sup>75</sup>
  - c) The Court accordingly stated that “Any legislative narrowing of the definition of ‘terrorism’, with its concomitant reduction in the need for the exercise of discretion under section 117 of the 2000 Act, is to be welcomed, provided that it is consistent with the public protection to which the legislation is directed”.<sup>76</sup>

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<sup>71</sup> *Ibid.*, paras 28-29.

<sup>72</sup> *Ibid.*, para 29.

<sup>73</sup> See *The Terrorism Acts in 2012*, July 2013, 4.7-4.9.

<sup>74</sup> [2013] UKSC 64, paras 33-34, 62.

<sup>75</sup> *Ibid.*, paras 35-36.

<sup>76</sup> *Ibid.*, para 62.

d) It was noted that a further consequence of the broad definition of terrorism is

“to grant unusually wide discretions to all those concerned with the application of the counter-terrorism law, from Ministers exercising their power to impose executive orders to police officers deciding whom to arrest or to stop at a port and prosecutors deciding whom to charge”.<sup>77</sup>

The “*substantial intrusive powers*” granted to police, in combination with the wide definition of terrorism, were said to be “*probably of even more concern than the prosecutorial powers to which the Acts give rise*”.<sup>78</sup> The Court referred in particular to the port powers under TA 2000 Schedule 7, remarking that detention of the kind there provided for “*represents the possibility of serious invasions of personal liberty*”.<sup>79</sup>

4.10 The Supreme Court did not specify precisely those elements of the definition of terrorism that it considered excessive. But it did firmly express the view that the breadth of the definition of terrorism, together with the consequent heavy reliance on the wise exercise of discretions by Ministers, prosecutors and police, is capable of threatening both civil liberties and the rule of law.

#### ***R (Miranda) v SSHD and MPC***<sup>80</sup>

4.11 On 18 August 2013, David Miranda – the spouse of Glenn Greenwald, who was the journalist first contacted by Edward Snowden – was stopped, questioned and detained for almost nine hours under TA 2000 Schedule 7 by counter-terrorism police at Heathrow Airport. The purpose of the Schedule 7 powers is to determine whether a traveller through a port (including an airport) appears to be concerned or to have been concerned in the commission, preparation or instigation of acts of terrorism.

4.12 MI5 had asked the police to use their Schedule 7 powers, two days earlier, on the basis that:

“Intelligence indicates that MIRANDA is likely to be involved in espionage activity which has the potential to act against the interests of UK national security.”<sup>81</sup>

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<sup>77</sup> *Ibid.*, para 34.

<sup>78</sup> *Ibid.*, para 63.

<sup>79</sup> *Ibid.*, para 64.

<sup>80</sup> *David Miranda v SSHD and MPC* [2014] EWHC 255 (Admin): Laws LJ, Ouseley and Openshaw JJ.

<sup>81</sup> Judgment, para 9.

Mr Miranda was thought to be carrying items that would assist in the release of stolen NSA and GCHQ material.<sup>82</sup> As the terms of the request indicated, this certainly had the flavor of espionage rather than terrorism.

- 4.13 The police correctly responded that the request from MI5 did not give sufficient assurance that there was a lawful basis for the use of Schedule 7. MI5 accordingly reformulated its request in a manner that consciously tracked the statutory definition of terrorism:

“We assess that MIRANDA is knowingly carrying material, the release of which would endanger people’s lives. Additionally the disclosure, or threat of disclosure, is designed to influence a government, and is made for the purpose of promoting a political or ideological cause. This therefore falls within the definition of terrorism and as such we request that the subject is examined under Schedule 7.”

- 4.14 It was common ground that use of the Schedule 7 powers will only be lawful if its purpose is to determine whether the subject appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism.<sup>83</sup> The court held that this vital condition was satisfied, on essentially the basis set out by MI5 in their later request.<sup>84</sup> Argument then moved on to whether use of the powers was proportionate, which it was held to be.

- 4.15 The true issue is not whether the police ought to have the power to stop someone on the basis of the sort of intelligence they were given on Mr Miranda (which surely they should, and arguably do), but whether it was lawful to use counter-terrorism law for that purpose.<sup>85</sup> By validating that course, on the basis of orthodox principles of construction,<sup>86</sup> the Divisional Court highlighted the remarkable (and some would say alarming) breadth of the UK’s current definition of terrorism.

- 4.16 The basic ingredient of terrorism is the use or threat of “*action*” which involves, in particular, serious violence against a person, serious damage to property, the

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<sup>82</sup> Judgment, para 11.

<sup>83</sup> Judgment, para 41.

<sup>84</sup> Judgment, para 36.

<sup>85</sup> Or as it was put at the time by the columnist Matthew Parris: “*One doubts whether anyone really thought Mr Miranda was a terrorist ... But if no law exists that allows the State to stop, question and search individuals who may be unlawfully carrying information whose publication could seriously compromise British security, and to confiscate the information, then such a law is needed*”: “The Left hides its fire behind a smokescreen”, The Times, 24 August 2013.

<sup>86</sup> Though not, perhaps, the principle that statutory definitions should be applied bearing in mind the common meaning of the word defined: *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, per Lord Scott at paras 82-83, resisting the literal application of the statutory definition of “*town or village green*” because this would have meant applying it to “*land that no one would recognise as a town or village green*”.



endangering of a person's life or the creation of a serious risk to public health or safety.<sup>87</sup> Bombings, shootings, hostage-takings and punishment beatings are classic and familiar types of "action". What the *Miranda* judgment reveals is that ***the publication (or threatened publication) of words may equally constitute terrorist action***. It seems that the writing of a book, an article or a blog may therefore amount to terrorism if publication is "*for the purpose of advancing a political, religious, racial or ideological cause*", "*designed to influence the government*" and liable to endanger life or create a serious risk to health or safety.<sup>88</sup>

4.17 That conclusion might seem just about palatable on the facts of the *Miranda* case. The Divisional Court accepted (at paragraph 33) the Government's submission that the section 1 definition is:

"capable of covering the publication or threatened publication .. of stolen classified information which, if published, would reveal personal details of members of the armed forces or security and intelligence agencies, thereby endangering their lives ..".

4.18 But under the statutory definition, publication may be a terrorist action regardless of whether the material published was stolen, or classified. Nor, even, does the material published need to endanger lives: it is enough that – whether the publisher intends it or not<sup>89</sup> – it "*creates a serious risk to the health or safety of the public or a section of the public*".

4.19 The consequences of publication as a terrorist action stretch well beyond the national security sphere. Take an article or blog that argues (on religious or political grounds) against the vaccination of children for certain diseases. If it were judged to create a serious risk to public health, and if it was designed to influence government policy, its publication would be classed by the law as a terrorist action.

4.20 Nor does the potential for exorbitant application of the terrorism laws end there. The vast penumbra of ancillary offences and powers has the potential greatly to

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<sup>87</sup> TA 2000 sections 1(1)(a) and 1(2).

<sup>88</sup> TA 2000 sections 1(1)(b)(c) and 1(2)(c)(d). Of course, the publication and dissemination of statements can be terrorist offences under TA 2006 sections 1 and 2. But prosecutions under those sections have been limited to the circulation of materials which encourage or induce the commission, preparation or instigation of what are conventionally understood as "*acts of terrorism*": for example, the IED and suicide attacks that Mohammed Gul was said to have been encouraging. The significance of *Miranda* is to demonstrate that the publication of facts and opinions may *itself* be an act of terrorism, on no other basis than that it is politically motivated and is considered to endanger life or create a serious risk to public health or safety.

<sup>89</sup> Judgment, para 29.

magnify the “*chilling effect*” of the broad definition. Take the example of a newspaper article, politically motivated and aimed at influencing the Government,<sup>90</sup> whose publication is said to endanger lives (or public health or safety). It would follow from the “*terrorist*” nature of the publication that:

- a) The ***possession of any article for a purpose connected with the publication***, or of any ***document likely to be useful*** to persons publishing material of that kind, would be punishable by up to 15 years or 10 years in prison (TA 2000 sections 57, 58).
- b) ***Acts preparatory to publication*** would be punishable by life imprisonment (TA 2006 section 5).
- c) Anyone who ***encouraged the writing of similar articles***, or ***circulated such encouragement to others***, could be imprisoned for up to seven years (TA 2006, sections 1 and 2).

4.21 More remarkably still:

- a) The ***newspaper in question could be proscribed*** (with the consent of Parliament) as an organisation concerned in terrorism (TA 2000 section 3), rendering it a criminal offence to be employed by it or to fund it.
- b) Both the newspaper and its journalists could be ***designated under the asset-freezing legislation***, rendering it a criminal offence to make funds, financial services or economic resources available to them without a licence, if the Treasury judged this necessary to protect the public from similar “*terrorist*” activities (Terrorist Asset-Freezing &c. Act 2010).
- c) Restrictive ***TPIMs*** could be imposed, by leave of the court, not only upon the journalist in question but on any other person judged to be involved in “*terrorism-related activity*” – a concept so broadly defined as to include the giving of support or assistance to persons who are themselves facilitating or encouraging the involvement of others in the commission, preparation or instigation of acts of “*terrorism*”.

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<sup>90</sup> Or, indeed, any government in the world: TA 2000, section 1(4)(d).

4.22 There is under current conditions practically no chance that measures of this extreme kind would actually be approved or taken against someone seeking to publish such material – whether concerning surveillance techniques or vaccination. But that is hardly the point. Rather:

- a) To afford over-broad discretions to Ministers, prosecutors and police is undesirable in itself. As the Supreme Court maintained in *R v Gul*,<sup>91</sup> it leaves citizens in the dark and risks undermining the rule of law.
- b) To render people subject to the terrorism laws whom no sensible person would think of as terrorists risks destroying the trust upon which these special powers depend for their acceptance by the public.
- c) To bring activities such as journalism and blogging within the ambit of “terrorism” (even if only when they are practised irresponsibly) encourages the “chilling effect” that can deter even legitimate enquiry and expression in related fields.

4.23 Mr Miranda’s case is currently before the Court of Appeal. I express no view as to whether it was rightly decided. But by illuminating the extraordinary breadth of the definition of terrorism, it has already performed an important service.

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<sup>91</sup> 4.9(b), above.

## 5. PROSCRIBED ORGANISATIONS

- 5.1 In each of the past three years I have reported in detail on the arrangements for proscribing and deproscribing organisations, and made recommendations.
- 5.2 The applicable procedures were fully described in my 2012 report, as supplemented by my report of last summer.<sup>92</sup>

### Recent developments: proscription

- 5.3 The following organisations were proscribed in 2013:
- a) Minbar Ansar Deen (also known as Ansar Al Sharia UK) and Boko Haram, in force from 12 July 2013;<sup>93</sup> and
  - b) Imarat Kavkaz, in force from 13 December 2013.<sup>94</sup>
- 5.4 In addition, name-change orders were made:
- a) to recognise the al Nusrah front as an alias of the group already proscribed as Al Qaida, in force from 19 July 2013; and
  - b) to recognise Ahle Sunnat wal Jamaat as an alias of the group already proscribed as Sipah-e Shaba Pakistan (SSP) and Lashkar-e Jhangvi (LeJ), in force from 29 October 2013.

There were no parliamentary debates on the name-change orders, which are subject to the negative resolution procedure.<sup>95</sup>

- 5.5 Those wishing to know which groups are currently proscribed are referred to the Home Office document entitled “Proscribed terror groups or organisations”.<sup>96</sup> 2014 has already proved a busy year for new proscriptions, as I shall report in due course.

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<sup>92</sup> *The Terrorism Acts in 2011*, June 2012, chapter 4; *The Terrorism Acts in 2012*, July 2013, chapter 5.

<sup>93</sup> See Hansard HC 10 July 2013 cols 455-468 and HL 11 July 2013 cols 489-495.

<sup>94</sup> See Hansard HC 10 December 2013 cols 203-207 and HL 12 December 2013 cols 1000-1004.

<sup>95</sup> It has been suggested to me that a procedure allowing for debate would be preferable, given the importance of the issues and the desirability of publicity.

<sup>96</sup> <https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2>

## Recent developments: deproscription

- 5.6 For three years I have drawn attention to the inadequacies of the deproscription process, and made recommendations for change.<sup>97</sup> If accepted, these would have brought the practical operation of the deproscription system into line with the legal requirements, or alternatively (if those consequences were deemed unpalatable) changed the law so as to allow the continued proscription of groups that do not satisfy the current statutory test. The HASC has also noted that “*it is too difficult for some groups to obtain de-proscription, a move which might encourage some groups in their move away from active support for terrorism*”.<sup>98</sup>
- 5.7 My recommendations were extensively discussed across Government, and I was able to report last year that the Home Secretary (though not the Northern Ireland Secretary) had agreed to a process for deproscribing groups which no longer meet the statutory test. A timetable was set which was to result in the deproscription of up to 14 groups during the first part of 2014.<sup>99</sup> Though I did not consider this an adequate structural solution to the problem, it did at least promise practical results within a reasonable timescale.
- 5.8 Sadly, as I reported on my website in February,<sup>100</sup> the political will to achieve this desirable result was not maintained. No group was in the event deproscribed; the deproscription process that I described has been definitively halted; and even the system for annual review of each proscribed group has been discontinued. As has now been made clear, “*the Home Secretary will consider deproscription on application only*”.<sup>101</sup>
- 5.9 Accordingly, the Home Office now functions in the same way as the Northern Ireland Office. No evidence is collected for the purpose of determining whether a proscribed group remains “*concerned in terrorism*”, thus saving Ministers from the embarrassment of maintaining the proscription of groups which do not satisfy the statutory test. Groups seeking deproscription, or sympathetic figures prepared to act on their behalf, must themselves take the initiative to request it.

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<sup>97</sup> See, in particular, *The Terrorism Acts in 2011*, June 2012, chapter 4, June 2012, chapter 4.

<sup>98</sup> HASC, *Roots of violent radicalisation*, HC 1446, February 2012, para 87.

<sup>99</sup> *The Terrorism Acts in 2012*, June 2013, 5.36.

<sup>100</sup> <https://terrorismlegislationreviewer.independent.gov.uk/deproscription-courage-required/>  
<sup>101</sup> Home Office, *Proscribed Terrorist Organisations*, first published on 17 February 2014, p.2. This fact is said to have been “*indicated to Parliament*” by the Security Minister on 10 December 2013, though it would have taken an attentive and well-informed listener to have discerned such an important change in policy from the words used in that debate. Remarkably, the decision to discontinue annual review, taken in February 2014, was not announced at all.

- 5.10 This outcome is understandable in political terms: it bears out the observation that “*almost eccentric courage*” would be required of a Minister seeking to deproscribe an organisation of her own initiative.<sup>102</sup> From a legal point of view, however, it is depressing, particularly bearing in mind the 2007 comment of the Proscribed Organisations Appeal Commission [**POAC**], chaired by a High Court Judge, that annual review was “*certainly a practice that the Secretary of State should continue to adopt*” and “*a proper reflection of the Secretary of State’s statutory duty*”.<sup>103</sup>
- 5.11 One application for deproscription was made in 2014 – the first since 2009 – and rejected by the Home Secretary in June 2014. I have agreed not to release the name of the organisation concerned, since the applicant for deproscription has not so far chosen to do so.
- 5.12 It remains to be seen whether any application for deproscription will be successful – none has ever succeeded to date – and whether any unsuccessful group will have the commitment and resources to take a case to POAC. That remains the only route by which deproscription has ever been obtained, underlining the particular importance of an accessible and independent judicial remedy in an area where the pressures on Ministers to maintain proscription, including international political pressures, can be very strong.
- 5.13 **I maintain the recommendations I have previously made in relation to proscription**, though with little hope of seeing them implemented, at least in the short term.

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<sup>102</sup> C. Gearty, *Civil Liberties* (OUP, 2007), p.158.

<sup>103</sup> PC/02/2006 *Lord Alton of Liverpool and others* (PMOI), 30 November 2007, para 73.

## 6. STOP AND SEARCH

### Introduction

- 6.1 After several years of change, the stop and search powers under TA 2000 remain as they were described in my report of last year.<sup>104</sup>
- 6.2 Previous reports have noted the significance of the ending of no-suspicion stop and search under TA 2000 section 44. Though heavily used (more than 255,000 times in Great Britain alone during 2008/09), the power caused resentment in some minority ethnic communities, without producing any convictions. The replacement no-suspicion power, TA 2000 section 47A, is subject to stringent conditions and has still not been used in Great Britain since it was first introduced in March 2011.<sup>105</sup>
- 6.3 The impetus for repeal came from the European Court of Human Rights, which condemned section 44 in January 2010 as “*neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse*”.<sup>106</sup> Though the case had been stoutly contested by the Government, there has been little resistance to the change, which indeed prefigured a more general review of stop and search powers.<sup>107</sup> The Home Secretary told Parliament in July 2013 that the replacement of section 44 had had “*no effect on public safety*”.<sup>108</sup>
- 6.4 The suspicion-based stop and search power in TA 2000 sections 43 and 43A remains in place, but its usage in London continued to decline during 2013.

### Section 43

- 6.5 As in previous years, figures for the use of section 43 are published in Great Britain only for the Metropolitan Police Service **[MPS]** area.<sup>109</sup> They show a continued decline, to less than half the 2011 level, and a modest increase in the arrest rate.

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<sup>104</sup> *The Terrorism Acts in 2012*, July 2013, chapter 9.

<sup>105</sup> The full story of the repeal and replacement is told in *The Terrorism Acts in 2011*, June 2012, 8.6-8.19.

<sup>106</sup> *Gillan and Quinton v United Kingdom*, judgment of 12 January 2010, para 87; see also *Colon v Netherlands*, judgment of 5 June 2012.

<sup>107</sup> My blog post of 12 July 2013 “*One law for the street, one for the arrivals hall?*” linked to various developments during 2013 including a critical HMIC report and a consultation launched by the Home Secretary: <https://terrorismlegislationreviewer.independent.gov.uk/one-law-for-the-street-one-for-the-arrivals-hall/>.

<sup>108</sup> Hansard HC 2 July 2013, col 774.

<sup>109</sup> Source: Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, 5 June 2014, table S.01, and equivalent tables from previous years, corrected following private correspondence from the Home Office.

Year	Searches (MPS)	Arrests
2010	999	n/a
2011	1051	32 (3%)
2012	614	35 (6%)
2013	491	34 (7%)

6.6 In Northern Ireland, 70 people were stopped and searched under section 43 in 2013-14, as against 101 in 2012-13. A further 10 were stopped under section 43A, as against 1 in the previous year.<sup>110</sup>

6.7 The self-defined ethnicity breakdown of those stopped under section 43 in London is as follows:<sup>111</sup>

Year	White	Asian	Black	Chinese/Other	Mixed/not stated	Total
2010	43%	30%	11%	7%	9%	999
2011	35%	37%	9%	8%	11%	1051
2012	39%	31%	12%	7%	11%	614
2013	34%	32%	14%	9%	10%	491

It is unfortunate that separate figures for the use of sections 43 and 43A are not produced for areas other than London and Northern Ireland. I am told that this is a matter which needs to be taken up with the individual forces concerned: no small matter, given that there are still 43 territorial police forces in England and Wales (although now only one in Scotland). I do however invite individual forces through this report to consider what they could do to make this information publicly available.

## Section 47A

6.8 Once again, no authorisations were issued in Great Britain for use of the no-suspicion stop and search power under TA 2000 section 47A. Authorisations can only be issued when a senior police officer “*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 no longer and cover no greater an area than is reasonably considered necessary to prevent such an act.

<sup>110</sup> PSNI, *Stop and Search Statistics, Financial year 2013/14*, June 2014, Table 1.

<sup>111</sup> Source: Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, 5 June 2014, table S.02, and equivalent tables from previous years, corrected following private correspondence from the Home Office.



- 6.9 There was one authorisation under section 47A in Northern Ireland during the period under review, made in unusual circumstances. The Court of Appeal held on 9 May 2013 (a few weeks before the G8 Summit was due to start in Northern Ireland) that the widely used stop and search powers under sections 21 and 24 of the Justice and Security (Northern Ireland) Act 2007 were not properly exercisable, since adequate safeguards to prevent their arbitrary use, in the form of a Code of Practice, were not in place.<sup>112</sup> Considering that the statutory conditions for a section 47A authorisation were present, an Assistant Chief Constable of the PSNI issued an authorisation that day, covering parts of Northern Ireland. That authorisation was confirmed by the Secretary of State on 10 May, and remained in place until a Code of Practice was introduced on 15 May.
- 6.10 I inspected that authorisation on a visit to Belfast in September, at the request of the PSNI which was concerned to ensure that it had been correctly made. It was also inspected, on another occasion, by the Human Rights Advisor of the NIPB.
- 6.11 70 persons were stopped pursuant to the section 47A authorisation.<sup>113</sup> To this day, they remain the only persons ever stopped in any part of the United Kingdom under TA 2000 section 47A, a power which has been in force since March 2011.

#### **The NIPB's thematic review**

- 6.12 During the period under review, the NIPB conducted a thematic review of the use by the PSNI of its stop and search powers under TA 2000 and the Justice and Security (Northern Ireland) Act 2007.<sup>114</sup> The review was a timely one, given the significant levels of public concern, particularly among Catholics, over such issues as repeated stops of particular individuals under powers which do not require the officer concerned to suspect the commission of a criminal offence. Such concerns have recently been reflected in hard-fought litigation.<sup>115</sup>
- 6.13 The NIPB's report contained some highly pertinent observations about the proper exercise of the TA 2000 stop and search powers in the Northern Irish context. It also made 11 specific recommendations, which I understand from a

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<sup>112</sup> *Fox McNulty and Canning* [2013] NICA 19. I have previously noted that the removal of the old no-suspicion search power under TA 2000 section 44 coincided with a very large increase in the use of the section 24 power in Northern Ireland: *The Terrorism Acts in 2011*, June 2012, 8.25.

<sup>113</sup> PSNI, *Stop and Search Statistics, Financial year 2013/14*, June 2014, Section 1 Table 1.

<sup>114</sup> *Human rights thematic review on the use of police powers to stop and search and stop and question under TA 2000 and JS(NI)A 2007*, October 2013.

<sup>115</sup> *Fox, McNulty and Canning* [2013] NICA 19; *Steven Ramsey* [2014] NIQB 59; *Emmet McAreavy* [2014] NIQB 62.

visit to the NIPB on 19 June 2014 are being addressed by the PSNI in a constructive manner. Among other things, those recommendations are intended to ensure that stop and search powers are used lawfully, sensitively and in accordance with a clear policy framework.

- 6.14 Many more stops and searches are performed under the JS(NI)A 2007, which is the responsibility of the Independent Reviewer under that Act, David Seymour CB, than under TA 2000. Save as to the one issue addressed below, there is in any event nothing that I would wish to add at this stage to the thorough and impressive analysis of the thematic review. I look forward to hearing how its recommendations are to be implemented in practice.

### **Community background**

- 6.15 Giving evidence to the NIPB in June 2014, I was repeatedly asked whether I thought the “*community background*” (which I understood to mean, in essence, Catholic or Protestant affiliation) should be recorded of all persons stopped and searched in Northern Ireland under TA 2000.<sup>116</sup> The NIPB’s thematic review made a recommendation to this effect in October 2013.<sup>117</sup> It might be inferred that not even the considerable progress towards achieving a religiously-balanced PSNI<sup>118</sup> has entirely banished fears in certain quarters that its powers may from time to time be exercised in a discriminatory manner.
- 6.16 I make no criticism of Recommendation 7: transparency in policing is in principle to be welcomed, and it may be hoped that the recording of community background will, if it is to be introduced, improve levels of trust in the police without being perceived as unnecessarily intrusive. I would however sound two warnings, based on experience with the recording of ethnicity data in Great Britain.
- 6.17 The first warning is against misuse of the data to inflame inter-community tensions. It is a common fallacy that the exercise of a no-suspicion stop and search power should be expected to match the religious (or ethnic) make-up of the background population. I address that fallacy later in this report, when discussing TA 2000 Schedule 7.<sup>119</sup> In brief, stops and searches should be performed not on a random basis but for a reason: and if at a particular time and

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<sup>116</sup> The question extended also to powers under the Justice and Security (NI) Act 2007, whose review is the responsibility of David Seymour CB.

<sup>117</sup> NIPB, *Human rights thematic review on the use of police powers to stop and search and stop and question under TA 2000 and JS(NI)A 2007*, October 2013, Recommendation 7.

<sup>118</sup> The proportion of Catholic officers in 2013 stood at just over 30%, following a 50/50 intake over the period 2001-2011: P. Nolan, *Northern Ireland Peace Monitoring Report*, March 2014, 5.2.

<sup>119</sup> 7.7-7.15, below.

place a greater threat is judged to emanate from one community than from another, one should expect more members of the first community to be searched. If this point is either not understood or wilfully ignored for political advantage, there is a risk that a measure intended to bring enlightenment will be used instead to foment grievance and create discord.

- 6.18 The second warning relates to the police. If they are accused of searching too many members of one community, they may be tempted to respond not by searching fewer members of that community but by searching more of the other, thus making up the numbers and avoiding criticism. Lord Carlile observed precisely this phenomenon in relation to the searching of white people under the old TA 2000 section 44, and rightly condemned it.
- 6.19 Neither of these warnings are intended to question the NIPB's recommendation. They do however underline that if information on community background is to bring the hoped-for benefits, it must be responsibly interpreted and acted upon by all concerned. Approached in the wrong spirit, the proposed change could rapidly become counter-productive.

## 7. PORT AND BORDER CONTROLS

### Introduction

- 7.1 Having attracted little attention for the first 38 years of its life,<sup>120</sup> the power now contained in TA 2000 Schedule 7 was thrust firmly into the limelight in 2012 and remained there during the period under review.
- 7.2 As explained in detail in my previous reports, Schedule 7 empowers ports officers to question and detain travellers at ports for the purpose of determining whether they appear to be concerned in the commission, preparation or instigation of acts of terrorism.<sup>121</sup> There is an obligation to answer questions directed to that end; and ancillary powers that are asserted include the removal and downloading of the contents of mobile phones.
- 7.3 Use of the power continued its welcome decline of recent years. Both legislative change and litigation however continued, each at their own pace. The power was amended by statute, but important issues remain to be resolved.

### Statistical analysis

#### *Frequency of use*

- 7.4 The UK-wide figures for the past five years, provided to me by ACPO, are as follows:

	2009/10	2010/11	2011/12	2012/13	2013/14
<b>People examined</b>	87,218	73,909	69,109	61,145	47,350
<b>Examined &gt;1 hour</b>	2,695	2,291	2,254	2,277	1,889
<b>Detained</b>	486	915	681	670	517
<b>Biometrics</b>	not available	769	592	547	353

- 7.5 Figures for Great Britain (not including Northern Ireland) are published on a quarterly basis by the Home Office.<sup>122</sup>

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<sup>120</sup> Though there were cases in Strasbourg, notably Applications 8022, 8025 and 8027/77 *McVeigh, O'Neill and Evans v UK*, DR 25 p. 15 (1981).

<sup>121</sup> TA 2000 section 40(1)(b) and Schedule 7 para 2(1); see in particular *The Terrorism Acts in 2011*, June 2012, chapter 9.

<sup>122</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, 5 June 2014, table S/04 (figures to 31 December 2013).

7.6 I would comment as follows on the UK figures at 7.4, above:

- a) These figures show an **accelerated reduction in the numbers of people examined** under Schedule 7. The 2013/14 total was 23% down on the previous year, and 46% down on 2009/10.
- b) The figures for examination have to be set against the **number of travellers** through UK airports, seaports and international rail terminals. The Home Office estimates that only 0.02% of such passengers (who numbered some 245 million) were examined under Schedule 7 in 2013.
- c) The figures for examination do not however reflect the substantial number of people who are asked only “**screening questions**” (in what were known prior to 2009 as “*short stops*”). As I recorded last year, screening questions take between a few seconds and a few minutes. No record is made of their numbers (though several persons tend to be asked screening questions for every one who is subject to an examination), and their frequency varies from port to port.<sup>123</sup>
- d) Less than 4% of those examined were **examined for over an hour**. The number examined for over an hour fell after 2009/10 and has been stable since: this contrasts with the sustained year-on-year increases observed in every year from 2004 to 2009.<sup>124</sup> I published figures last year indicating that:
  - a. 76% of over-1 hour examinations lasted for less than three hours, and 98% for less than six hours; and that
  - b. 63% of sub-1 hour examinations by a sample of forces lasted for less than 15 minutes, and 88% for less than 30 minutes.<sup>125</sup>
- e) Only 1% or so of those examined were subject to **detention**, and less than that to the taking of **biometric samples** (normally fingerprints).

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<sup>123</sup> *The Terrorism Acts in 2011*, June 2012, 9.16. In response to requests for greater clarity regarding screening questions in the public consultation, the new Code of Practice introduces a requirement, in relation to screening that lasts significantly longer than a few minutes and results in selection for examination, that the examining officer record the time screening began and the reason for the extended screening period.

<sup>124</sup> *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, 9.11, citing calendar year figures of 1190 in 2004 and 2473 in 2008.

<sup>125</sup> *The Terrorism Acts in 2012*, July 2013, 10.9 – 10.10. Those data were produced to inform the consultation process that took place during 2013, and have not been updated.

### ***Examinations by ethnicity***

7.7 The collection of ethnicity data for Schedule 7 stops has been carried out on a self-definition basis since April 2010. The UK-wide figures provided to me by ACPO are set out below:

#### Examined less than 1 hour

	<b>2010/11</b>	<b>2011/12</b>	<b>2012/13</b>	<b>2013/14</b>
<b>White</b>	46%	46%	42%	47%
<b>Black</b>	8%	8%	8%	8%
<b>Asian</b>	26%	25%	22%	20%
<b>Other</b>	16%	16%	17%	14%
<b>Mixed/not stated</b>	4%	5%	11%	12%

#### Examined more than 1 hour

	<b>2010/11</b>	<b>2011/12</b>	<b>2012/13</b>	<b>2013/14</b>
<b>White</b>	14%	12%	14%	11%
<b>Black</b>	15%	14%	14%	19%
<b>Asian</b>	45%	36%	33%	32%
<b>Other</b>	20%	24%	25%	25%
<b>Mixed/not stated</b>	6%	14%	15%	13%

#### Detained

	<b>2010/11</b>	<b>2011/12</b>	<b>2012/13</b>	<b>2013/14</b>
<b>White</b>	8%	12%	9%	11%
<b>Black</b>	21%	14%	22%	18%
<b>Asian</b>	45%	36%	31%	35%
<b>Other</b>	21%	24%	22%	22%
<b>Mixed/not stated</b>	5%	14%	16%	14%

#### Biometrics

	<b>2010/11</b>	<b>2011/12</b>	<b>2012/13</b>	<b>2013/14</b>
<b>White</b>	7%	6%	9%	10%
<b>Black</b>	21%	23%	22%	19%
<b>Asian</b>	46%	35%	31%	31%
<b>Other</b>	20%	23%	22%	22%
<b>Mixed/not stated</b>	6%	11%	16%	17%

7.8 To collect these figures is one thing; to know what to make of them is another. I remarked last year that:

- a) Self-defined members of minority ethnic communities continue to constitute a majority of those examined under Schedule 7, and a very large majority of those detained and fingerprinted.
- b) It is overwhelmingly likely that examinations, and especially detentions, are imposed on members of some minority ethnic communities – particularly those of Asian and “*other*” (including North African) origin – to a greater extent than would be indicated by their numerical presence in the travelling population.
- c) This contributes to ill-feeling in these communities, and to a sense that their members are being singled out for police attention at the border.<sup>126</sup>

I added, however, that these statistics did not constitute evidence that Schedule 7 powers were being used in a racially discriminatory manner. Having experienced some controversy when I made this point in a recent interview on al-Jazeera TV, I revert to the subject in the hope of clearing it up.

7.9 The figures to 2012/13 were used by the Equalities and Human Rights Commission [EHRC] to examine whether there was “*race disproportionality*” among those who were examined and detained.<sup>127</sup> As I have previously remarked, such exercises have been hampered in the past by the absence of data on the racial composition of the public travelling through ports and airports in the UK. The EHRC sought to remedy that gap, at least in part, by using ethnic group data on international air passengers from the Civil Aviation Authority’s Passenger Survey of selected UK airports. Among its conclusions were that, overall:

- a) a higher percentage of international air passengers than residents of England and Wales were white (90.5% and 85.9% respectively); and that
- b) a lower percentage of international air passengers than residents of England and Wales were “*Asian or other*” (6.8% and 8.5% respectively).<sup>128</sup>

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<sup>126</sup> *The Terrorism Acts in 2012*, July 2013, 10.12-10.14.

<sup>127</sup> K. Hurrell, *An experimental analysis of examinations and detentions under Schedule 7 of the Terrorism Act 2000*, EHRC, December 2013.

<sup>128</sup> The same was true of black people (1.8% and 3.3% respectively).

On that basis, there would indeed (as I assumed last year) appear to be a considerable “*disproportionality*” between the ethnic classification of those examined and detained under Schedule 7 and the ethnic classification of the port-using (or airport-using) public. Furthermore, that “*disproportionality*” increases as more Schedule 7 powers are used. Thus, while people of Asian appearance make up barely a quarter of those examined for less than an hour, they make up almost half of the much smaller number who are detained or asked to give fingerprints.

- 7.10 If Schedule 7 powers were supposed to be exercised on a random basis, these figures would be troubling indeed. Random stops should, as numbers increase, produce ethnicity figures close to those applicable to the travelling population as a whole.
- 7.11 It is important however to appreciate that Schedule 7 is not intended to be exercised on a random basis – a point not acknowledged in the EHRC report, which through no fault of its author focused on the statistical exercise it set out to perform rather than on the wider relevance of that exercise. A substantial proportion of examinations are based on specific intelligence. Even where that is not the case, an officer’s decision to select a person for examination “*must be informed by the threat from terrorism to the United Kingdom and its interests posed by the various terrorist groups, networks and individual active in, and outside the United Kingdom*”.<sup>129</sup> If Schedule 7 is being skilfully used, therefore, one would expect its exercise to be ethnically “*proportionate*” not to the UK population, nor even to the airport-using population, but rather to the *terrorist population* that travels through UK ports.
- 7.12 Nobody knows the ethnic breakdown of terrorists who travel through UK ports. We do however know the ethnic breakdown of those who have been arrested, charged and convicted in connection with terrorism-related offences. The figures for Great Britain since 2001 are as follows:

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<sup>129</sup> Code of practice for examining officers and review officers under Schedule 7 to TA 2000, June 2014, para 19. Seven specific factors are then listed as relating to the threat of terrorism. Vitally, a person’s ethnic background or religion “*must not be used alone or in combination with each other as the sole reason for selecting the person for examination*”: a point which as I have seen for myself is firmly drummed into ports officers during their training.



Ethnic appearance of persons arrested, charged and convicted for terrorism-related offences, September 2001 – December 2013<sup>130</sup>

	<b>Arrested (total 2586)</b>	<b>Charged (total 604)</b>	<b>Convicted (total 391)</b>
<b>White</b>	30%	35%	31%
<b>Black</b>	12%	13%	14%
<b>Asian</b>	37%	37%	40%
<b>Other</b>	20%	15%	13%

- 7.13 It would be fanciful to suggest that the various Schedule 7 powers should each be exercised in strict accordance with those or any other figures. The nature of the threat can change rapidly (as Syria rather than East Africa becomes the destination of choice for foreign fighters, or if there were to be intelligence of a dissident Republican bombing campaign in Great Britain). Ports officers need to react to this in terms of the routes on which they concentrate their efforts, and the individuals they select for questioning. They may however only use Schedule 7 in order to determine whether somebody appears to be or to have been a terrorist; and although people of any ethnic group can be terrorists, it is an unfortunate but obvious truth that terrorists are not, at any one moment in time, evenly distributed across the various ethnic groups.
- 7.14 To conclude, as in previous years, I have no reason to believe that Schedule 7 powers are exercised in a racially discriminatory manner. The so-called “*disproportionality*” identified by the EHRC is not evidence (and not suggested to be evidence) of this. What matters is that Schedule 7 should be operated responsively to the terrorist threat. The ethnicity figures are not indicative of a failure to do this.
- 7.15 Of course, the *perception* of prejudice can be quite as damaging to community relations as the reality. It remains imperative that police should exercise their considerable powers in a sensitive, well-informed and unbiased manner, and that if they fail to do so, complaints should be made and concerns raised in the appropriate quarters. Discrimination and prejudice are however not established by these figures; and it would be unfortunate if they were to be used in such a way as to evoke a misplaced sense of grievance.

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<sup>130</sup> Home Office, *Operation of police powers under the Terrorism Acts*, June 2014, Table A.11. The equivalent figures for Northern Ireland are not broken down by ethnicity, though nearly all are likely to be white. Some further figures for comparison are given in the tables at 8.15 below, and (section 43 stop and searches and charges from 2005-2011) in *The Terrorism Acts in 2012*, July 2013, para 10.16.

## Amendment to Schedule 7

- 7.16 I reported last year on the public consultation on Schedule 7 that took place in 2012, and welcomed the six liberalising changes that were contained in the Anti-Social Behaviour Crime and Policing Bill, introduced to Parliament in May 2013.<sup>131</sup>
- 7.17 Those changes became law in section 148 of and Schedule 9 to the Anti-Social Behaviour Crime and Policing Act 2014 **[ASBCPA 2014]**.
- 7.18 The most significant of those changes concerns ***time limits on examination and detention***.<sup>132</sup> In a marked change from the previous position, under which a person could be examined for up to nine hours without being accorded the rights enjoyed by detained persons under TA 2000 Schedule 8 (principally, the right to have a person informed of his detention and the right to consult a solicitor):
- a) If it is wished to question (i.e. examine) a person for longer than *one hour*, he must be taken into detention.
  - b) All detained persons must be released after not more than *six hours* from the time when their examinations commenced.
- 7.19 The reduction from nine hours to six gives effect to a recommendation first made by Lord Lloyd in 1996. A sense for how this legislation has evolved over the years is given by the fact that prior to the 1978 report of the first Independent Reviewer, Lord Shackleton, the police had sole discretion to detain at the port for up to seven days, with further periods obtainable on application to the Secretary of State.<sup>133</sup>
- 7.20 The other changes relate to:
- a) the training and designation of examining officers;<sup>134</sup>
  - b) removal of the intimate search power, and new limits on strip searches;<sup>135</sup>
  - c) the extension to persons detained at ports of the rights to have someone informed and to consult a solicitor;<sup>136</sup>

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<sup>131</sup> *The Terrorism Acts in 2012*, July 2013, 10.32-10.47.

<sup>132</sup> ASBCPA 2014, Schedule 9 para 2, amending TA 2000 Schedule 7 para 6 and adding para 6A.

<sup>133</sup> Rt Hon Lord Shackleton KG OBE, *Review of the operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976*, Cmnd 7324, August 1978, paras 93-106 and 151-155.

<sup>134</sup> ASBCPA 2014 Schedule 9 para 1, providing for a code of practice.

<sup>135</sup> TA 2000 Schedule 7 paras 8(4)-(7), inserted by ASBCPA 2014 Schedule 9 para 3.

- d) removal of the power to take *intimate biometric samples* (e.g. blood, urine);<sup>137</sup> and
- e) a new requirement for *review of detention* at specified intervals.<sup>138</sup>

7.21 In each respect, those changes conform very largely to what was proposed in the Bill and outlined in my last annual report. They all came into force in July 2014, save for the statutory review of detention, which will be commenced in April 2015 so as to allow sufficient time to develop, accredit and train all examining and review officers.

7.22 Three statutory changes not initially contained in the Bill but in respect of which I had previously made enquiries or recommendations are:

- a) the introduction of an express power to make and retain copies, intended at least in part for electronic devices;<sup>139</sup>
- b) an acceptance (by late amendment to the Bill) that questioning of a subject should not begin until the solicitor requested by the subject had arrived, unless to postpone questioning would be likely to prejudice determination of the relevant matters;<sup>140</sup> and
- c) the enshrining in statute (rather than, as initially proposed, in the Code of Practice) of the intervals at which a person's detention under Schedule 7 must be periodically reviewed by a review officer.<sup>141</sup>

7.23 In addition, as flagged last year, consultations have been proceeding with police as regards the introduction of audio recordings, at least in the major ports. With effect from 1 April 2015, interviews with detained persons at a port must be recorded when suitable audio recording facilities are available, unless the person

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<sup>136</sup> ASBCPA 2014 Schedule 9 para 5, amending TA 2000 Schedule 8 and inserting a new para 7A.

<sup>137</sup> ASBCPA 2014 Schedule 9 para 6, amending TA 2000 Schedule 8 para 10.

<sup>138</sup> Part 1A of TA Schedule 8, inserted by ASBCPA 2014 Schedule 9.

<sup>139</sup> TA 2000 Schedule 7 para 11A, inserted by ASBCPA 2014 Schedule 9 para 4. I had previously questioned the basis of the power to download, as recorded in *The Terrorism Acts in 2012*, July 2013, paras 10.70 and 10.72-10.73.

<sup>140</sup> TA Schedule 8 para 7A, inserted by ASBCPA 2014 Schedule 9 para 5(6) following judgment in *Elosta v MPC* [2013] EWHC 3397 (QB); see also Home Office Circular 015/2013. That judgment, the appeal against which was not pursued, cited in support of its conclusions my remarks in *The Terrorism Acts in 2011*, June 2012, 9.63-9.66.

<sup>141</sup> TA 2000 Schedule 8 para 20K(2)(3), inserted by ASBCPA 2014 Schedule 9 para 7. Following the JCHR, I recommended this in my written evidence to HASC of 20 November 2013 (Annex 1 to this Report), para 41 and Recommendation 6.

expresses the wish not to have it recorded. Such audio recordings will not be evidential, but for use e.g. in the case of a complaint.<sup>142</sup>

7.24 In June 2014 a revised Code of Practice was published, having been put out to consultation. The Code of Practice will be issued to front-line officers at the end of July 2014, to coincide with the entry into force of the first tranche of amendments to the primary legislation. The importance of a Code of Practice as a vehicle for clear and detailed rules in the analogous context of stop and search has recently been emphasised in a number of Northern Irish cases.<sup>143</sup> I shall be discussing the implementation of the new Code of Practice with police and others, and welcome any comments from whatever source in relation to it.

### Outstanding issues

7.25 While welcoming the consultation and subsequent Bill, I pointed out last July that they had ducked some important issues that I had suggested should be addressed. These included, in particular:

- a) the fact that ***no suspicion is required*** for the exercise of most Schedule 7 powers, including the power to detain and to download the contents of a phone or laptop;<sup>144</sup>
- b) the fact that answers given under compulsion are not expressly rendered inadmissible in criminal proceedings;<sup>145</sup> and
- c) the need for clear and proportionate rules governing the data taken from electronic devices.<sup>146</sup>

7.26 Parliament's Joint Committee on Human Rights [**JCHR**] considered my observations carefully. It expressed concerns on these points, along with some others, in a critical pre-legislative scrutiny report of October 2013.<sup>147</sup> The Government responded on 11 November.<sup>148</sup>

7.27 As part of its enquiry into counter-terrorism, the Home Affairs Select Committee [**HASC**] also became interested in Schedule 7 – particularly after the arrest of David Miranda in August 2013 propelled the power into the public eye. I gave

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<sup>142</sup> Code of Practice, June 2014, paras 66-68.

<sup>143</sup> *Fox, McNulty and Canning* [2013] NICA 19; *Steven Ramsey* [2014] NIQB 59; *Emmet McAreavy* [2014] NIQB 62.

<sup>144</sup> *Ibid.*, 10.50-10.62.

<sup>145</sup> *Ibid.*, 10.63-10.64.

<sup>146</sup> *Ibid.*, 10.65-10.80.

<sup>147</sup> JCHR, *Legislative Scrutiny: Anti-Social Behaviour, Crime and Punishment Bill*, October 2013, HL Paper 56 HC 713, chapter 4 (paras 90-139).

<sup>148</sup> Letter of Norman Baker MP to the Chair of the JCHR, p. 11-17.

oral evidence to HASC on 12 November, which I supplemented with a written note on 20 November. With the public encouragement of several parliamentarians (including Damian Green MP, a Home Office Minister), I set out in that note my recommendations for further change, in time (as I hoped) for them to be considered during the further progress of the Bill. The note, which sets out the background to my thinking, is at Annex 1 to this report.

7.28 The first (by default) and sixth of the recommendations in my 20 November note were given effect in ASBCPA 2014. The fourth was addressed in part (so far as legally privileged material is concerned) in the revised Code of Practice. Still outstanding however are the following:

### **Threshold for detention**

**I recommend that:**

- a) Detention be permitted only when a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person falling within section 40(1)(b) and that detention is necessary in order to assist in determining whether he is such a person.**
- b) On periodic review, a detention may be extended only when a senior officer remains satisfied that there continue to be grounds for suspecting that the person appears to be a person falling within section 40(1)(b), and that detention continues to be necessary in order to assist in determining whether he is such a person.**

### **Threshold for copying data from personal electronic devices**

**I recommend that the power under the proposed paragraph 11A to make and retain copies of things detained pursuant to paragraphs 5, 8 and 9, should apply to personal electronic devices and to the data stored on them only if a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person falling within section 40(1)(b).**

### Safeguards for legally privileged &c. material

I recommend that the Government indicate how adequate safeguards are to be provided in respect of legally privileged material, excluded material and special procedure material.<sup>149</sup>

### Retention of private electronic data

I recommend that the Government indicate how it will ensure that private electronic data gathered under Schedule 7 is subject to proper safeguards governing its retention and use.

### Use of evidence obtained by compulsion

I recommend that a statutory bar be introduced to the introduction of Schedule 7 admissions in a subsequent criminal trial.

- 7.29 In particular, the recommendation concerning the threshold for copying data should be considered a bare minimum, and may need to be reviewed as the law develops. I set out my concerns last summer.<sup>150</sup> Since then, unanimous decisions of the Canadian<sup>151</sup> and US<sup>152</sup> Supreme Courts have acknowledged the special privacy interests that are at stake when the authorities wish to search computers and cellphones. There are clear analogies also in the post-Snowden case law on digital surveillance and privacy rights.<sup>153</sup> Against that, there is recent authority to the effect that a higher degree of intrusiveness will be acceptable at the border.<sup>154</sup> But the magic of the port has its limits: the fact that a computer or

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<sup>149</sup> The Minister undertook to revisit this issue in the light of the judgment in *Miranda*. Judgment having now been given, the issue remains at large. The only material change introduced in the June 2014 Code of Practice (para 40) is a requirement that examining officers should not copy information which they have reasonable grounds for believing is subject to legal privilege, as defined in PACE 1984 section 10.

<sup>150</sup> *The Terrorism Acts in 2012*, July 2013, 10.74-10.80.

<sup>151</sup> *R v Vu* 2013 SCC 60 (ordinary search warrants cannot impliedly empower the seizure of computers and cellphones because “they contain an almost unlimited universe of information that users cannot control, that they may not even be aware of, may have tried to erase and which may not be, in any meaningful sense, located in the place of search”).

<sup>152</sup> *Riley v California*, 25 June 2014 (warrant required to search cell phones on arrest: heightened privacy interests are at stake because phone-owners “keep on their person a digital record of nearly every aspect of their lives”).

<sup>153</sup> Notably the judgment of the Grand Chamber of the European Court of Justice in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, 8 April 2014, which declared the Data Protection Directive invalid, citing the “general absence of limits” on the scope of the data subject to it, the absence of “substantive and procedural conditions relating to the access of the competent national authorities to the data and to their subsequent use” and the lack of sufficient criteria aimed at ensuring that the data were retained no longer than was necessary: paras 56-64.

<sup>154</sup> *Beghal v CPS* [2013] EWHC 2573 (Admin) (currently before the Supreme Court); Application 26291/06 *Gahramanov v Azerbaijan*, ECtHR 15 October 2013, paras 39-40. The power to conduct suspicionless searches of laptops and cellphones at border checkpoints was upheld by a US federal court in *Abidor v Napolitano*, EDNY, 31 December 2013.

phone is obtained under port powers (rather than, say, after a street stop or on arrest) is unlikely to be enough to induce the courts to waive altogether the normally applicable requirements for intrusive searches: in particular clear, accessible and foreseeable powers, used only to the extent that may be considered strictly necessary.

7.30 I do not believe that anything in my recommendations would reduce the efficacy of the Schedule 7 powers, or expose the public to additional risk from terrorism. Indeed as noted below, a substantial body of opinion, represented by the JCHR, would say that in certain respects I have not gone far enough. I believe however that my recommendations would improve the fairness with which the powers are exercised, and the accountability of those responsible for doing so.

7.31 Both the JCHR and the HASC produced subsequent reports:

- a) The JCHR in its supplementary report of 6 January 2014 expressed its agreement with my recommendations, save as to the thresholds for detention and for copying data, which it continued to advise should require reasonable suspicion.<sup>155</sup> The Government responded unenthusiastically by letter of 23 January 2014. My reasons for departing from the views of the JCHR on this finely-balanced issue were set out in my note of 20 November (Annex 2 to this report) at paras 24-29 and 35.<sup>156</sup>
- b) The HASC in its report of 9 May 2014, expressed the view that a number of the issues I had raised – specifically, the introduction of a suspicion test for the ancillary powers, the use of answers given under compulsion in a criminal court and the treatment of legally privileged material, excluded material and special procedure material – should be subject to further review in the light of this Report.<sup>157</sup>

7.32 By letter dated 23 June 2014 (Annex 3 to this Report), the Security Minister responded to my recommendations of 20 November. He correctly pointed out that one of them had been implemented by statute,<sup>158</sup> and another (in part) by

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<sup>155</sup> Ninth Report – Anti-Social Behaviour Crime and Policing Bill (second report) HL Paper 108 HC 951, chapter 3.

<sup>156</sup> The “*subjective suspicion*” test that I proposed coincides with current Schedule 7 best practice, helping to explain why I did not encounter fundamental objections from the police to the proposals in Annex 2. I derived some implicit support for its viability as a test from comments of Lord Bingham and of the ECtHR in *Gillan and Quinton*: Annex 2, para 27(b). The Government eventually rejected it because of the risk that the courts would construe it as equivalent to a reasonable suspicion requirement: letter at Annex 3, p.2.

<sup>157</sup> *Counter-Terrorism*, 17<sup>th</sup> report of Session 2013-14, HC 231, 9 May 2014, para 93.

<sup>158</sup> Annex 2, Recommendation 6: the specification of intervals for review of detention.

Code of Practice.<sup>159</sup> I also look forward to seeing, by the end of July, the promised national guidance for police on the use and retention of data,<sup>160</sup> and to verifying whether it addresses the defects in the arrangements for management of police information [MOPI] that have been identified in the courts.<sup>161</sup>

7.33 In other respects, however, my recommendations (like those of the JCHR, and the recommendation of the Divisional Court in *Beghal* that there be a statutory bar to the introduction of Schedule 7 admissions in a subsequent criminal trial)<sup>162</sup> have been rejected.

7.34 Attention will now shift to the cases currently pending before the Court of Appeal, Supreme Court and European Court of Human Rights.<sup>163</sup>

### Goods

7.35 In my reports of 2011 and 2012 I raised two issues concerning Schedule 7 and goods: the question of whether a power is needed to intercept unaccompanied post and parcels; and concerns regarding Enhanced Remote Transport Sheds falling outside the boundaries of the port.

7.36 I am informed that both issues are being considered by the Home Office and police in order to assess current practice, whether further powers might be required and whether further clarification might be included in the Code of Practice. These issues have been on the table for a while, and I hope it will be possible to resolve them to a reasonable timescale.

### Litigation update

7.37 Since my last annual report, there have been four judgments of significance for TA 2000 Schedule 7.<sup>164</sup>

7.38 In chronological order:

a) August 2013 saw judgment from the Divisional Court in the case of ***Beghal v Crown Prosecution Service***,<sup>165</sup> argued in March 2013. Extensive reference

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<sup>159</sup> Annex 2, Recommendation 4: treatment of legally privileged material.

<sup>160</sup> In response to Annex 2, Recommendation 5.

<sup>161</sup> I referred last year to two cases in particular: *R(C) v Commissioner of the Police of the Metropolis* [2012] 1 WLR 3007 (Divisional Court), and Application no. 24029/07 *M v UK*, judgment of 13 November 2012 (ECtHR), the first of which was cited by the Government as a reason for reviewing the MOPI Code: *The Terrorism Acts in 2012*, July 2013, 10.74.

<sup>162</sup> Annex 2, paras 42-44.

<sup>163</sup> 7.39, below.

<sup>164</sup> For the position as it stood then, see *The Terrorism Acts in 2012*, July 2013, 10.81-10.88.

<sup>165</sup> [2013] EWHC 2573 (Admin): Gross LJ, Swift and Foskett JJ.



was made to my first three annual reports.<sup>166</sup> The court found in favour of the Government on all points, dismissing arguments that a woman who had pleaded guilty to a charge of wilfully failing to answer questions under Schedule 7 had suffered a violation of her rights under Articles 5, 6 and 8 of the ECHR. It did however urge (as both the JCHR and I have done) “*the introduction of a statutory bar to the introduction of Schedule 7 admissions in a subsequent criminal trial*”.<sup>167</sup> The Government disagrees.<sup>168</sup>

- b) October 2013 saw judgment from the Supreme Court in the case of ***R v Gul***, discussed at 4.3-4.10, above. Though the case had no connection with Schedule 7 and detailed submissions on it were not heard, a unanimous seven-judge court referred to the “*unusual discretions*” and “*substantial intrusive powers*” granted to police, which it described as “*probably of even more concern than the prosecutorial powers to which the Acts give rise*”. It further commented that Schedule 7 detention “*represents the possibility of serious invasions of personal liberty*”.
- c) November 2013 saw the grant of a declaration by the High Court in the case of ***R (Elosta) v Metropolitan Police Commissioner***, to the effect that it was unlawful for police officers to refuse to await the arrival of solicitors requested by a person detained under Schedule 7 before putting questions to him.<sup>169</sup> Though an appeal was initially lodged, it was subsequently dropped and the Government amended the Anti-Social Behaviour Crime and Punishment Bill in order to give effect to the ruling.
- d) February 2014 saw judgment from the Divisional Court in the case of ***R (Miranda) v SSHD and MPC***.<sup>170</sup> The detention of David Miranda for nine hours was held to be a lawful and proportionate use of Schedule 7, notwithstanding his journalistic associations. The judgment is summarised more fully at 4.11-4.23, above.

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<sup>166</sup> *Ibid.*, paras 53-67, 96, 147-151.

<sup>167</sup> *Ibid.*, para 146.

<sup>168</sup> Government Response to the annual report on the operation of the Terrorism Acts by the Independent Reviewer of Terrorism Legislation (Cm 8745, November 2013), p. 9; Hansard (HL) vol 750 col 801, 11 December 2013; Annex 3, penultimate paragraph.

<sup>169</sup> [2013] EWHC 3397 (Admin): Bean J. Observations made in *Terrorism Acts in 2011*, June 2012, 9.66, appear to have been influential on the result.

<sup>170</sup> *David Miranda v SSHD and MPC* [2014] EWHC 255 (Admin): Laws LJ, Ouseley and Openshaw JJ.

7.39 These cases are far from representing the final word on Schedule 7. At the time of writing:

- a) The case of ***Beghal*** awaits its hearing before the Supreme Court, which has given its permission to appeal from the August 2013 ruling of the Divisional Court and set the case down for argument on 12-13 November 2014. The Supreme Court's dicta in *R v Gul* referred to at 7.38(b) above, together with the fact that ***Malik*** (below) has been declared admissible, indicate that the debate is likely to be an interesting one.
- b) The case of ***Miranda*** awaits argument before the Court of Appeal, which in May gave its permission to appeal from the February 2014 ruling of the Divisional Court. The Government has asked for the case to be heard after the Supreme Court's judgment in *Beghal*.
- c) The case of ***Sabure Malik v UK***, introduced in 2011 and declared admissible by a unanimous section of the European Court of Human Rights in May 2013, remained to be determined by that court. The case was brought by Liberty on behalf of a British national who was examined and detained at Heathrow for several hours on his return from a pilgrimage to Mecca, and alleges violations of Articles 5 and 8 of the ECHR. On application by the Government, the European Court has agreed to stay the case until judgment in *Beghal* is available.

7.40 In addition, the Independent Police Complaints Commission [**IPCC**] was granted permission on 28 March 2014 to apply for judicial review of the MPS in relation to the handling of Schedule 7 complaints. The issue in dispute is the extent to which the IPCC may be apprised of the reasons for a stop.

## **Conclusion**

7.41 Schedule 7 is a textbook example of the various interconnected routes by which change can be effected in the United Kingdom's complex democracy. Those routes are not always either short or direct, their various twists and turns having been described in this and my three previous annual reports.

7.42 The legislative channel appears to have come to an end, at least for the time being, in ASBCPA 2014. The judicial channel is still in vigorous flow, with important cases pending before the Court of Appeal, Supreme Court and European Court of Human Rights. NGOs, Parliamentary committees, the media (particularly after the arrest of Mr Miranda in August 2013) and my own reports have had a degree of influence, and one judgment at least (*Elosta v MPC*) appears to have prompted an amendment to statute. A more detailed account of

these processes, and the interactions between them, is given in a recent article.<sup>171</sup>

- 7.43 It is to be hoped that some at least of the pending judgments, starting with that of the Supreme Court, will have been given by the time of next year's report. Meanwhile, I look forward to observing at first hand the transition to the revised regime and new Code of Practice, and to monitoring how effectively the police share best practice and respond to community concerns. As always, I welcome comments from anybody who – in whatever capacity – is concerned with the exercise of the Schedule 7 powers.

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<sup>171</sup> D. Anderson, "The independent review of terrorism laws" [2014] Public Law 403-420. A working paper entitled "The independent review of terrorism legislation: searchlight or veil?" is available for free from SSRN through my website.

## 8. ARREST AND DETENTION

### Introduction

- 8.1 Whilst arrest and detention are in most circumstances governed by the Police and Criminal Evidence Act 1984 [**PACE**], there are three respects in which the rules applicable to terrorism suspects are different:
- a) A special **power of arrest** is provided for by TA 2000 section 41, for use in relation to certain terrorist offences only. Unusually, the arresting officer need have no specific offence in mind: it is enough, by 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.
  - b) A maximum period of **pre-charge detention**, in excess of the 96 hours allowed under PACE, applies in relation to persons arrested under section 41. Having fluctuated between 7 and 28 days over the currency of the Act, the maximum period (which is only rarely approached in practice) has stood at 14 days since January 2011.<sup>172</sup> Detention must be reviewed at 12-hour intervals during the first 48 hours; beyond that time, warrants for further detention must be obtained from a court.
  - c) The **treatment of detainees** is governed by special rules contained in Part I of TA 2000 Schedule 8 and (save in Scotland) by PACE Code H.

### Arrests in 2013

- 8.2 In **Great Britain** there were 40 arrests under TA section 41, down from 50 in 2012 and 54 in 2011.
- 8.3 A more eye-catching figure, often quoted by Ministers, is for “*terrorism-related arrests*”. 222 of these were recorded in 2013 (as against 258 in 2012 and 170 in 2011), closely in line with the average since 2001.<sup>173</sup> As I noted last year,<sup>174</sup> considerable caution is required in relation to such figures. In particular, once again:
- a) The great majority of such arrests (82% in 2013) were made under PACE powers, in sharp contrast to the period 2003-2007, in which over 90% of such arrests were under the TA 2000.

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<sup>172</sup> As explained in *The Terrorism Acts in 2011*, June 2012, 7.12-7.16.

<sup>173</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, 5 June 2014, Table A.01. There were 2586 “*terrorism-related arrests*” in Great Britain between 11 September 2001 and December 2013.

<sup>174</sup> *The Terrorism Acts in 2012*, July 2013, 8.3-8.7.

- b) Of the charges that follow “*terrorism-related arrests*”, less than half are for terrorism-related offences.<sup>175</sup>

My quibble is not with the use of PACE, which is to be encouraged where possible, but with the possibly subjective basis on which the adjective “*terrorism-related*” is used.

- 8.4 In **Northern Ireland**, figures are compiled on the more straightforward basis of persons arrested under TA 2000 section 41. The numbers of arrests in 2012/13 and 2013/14 were 157 and 168 respectively, close to the average over the past eight years.<sup>176</sup>

### Periods of detention in 2013

- 8.5 In **Great Britain**, of the 40 arrested in 2013 under TA 2000 section 41:
- a) 16 (40%) were held in pre-charge detention for less than 48 hours, 13 of them for less than a day;
  - b) 38 (95%) were held for less than a week; and
  - c) The remaining two were held for less than eight days.

Of the 24 held longer than 48 hours, 15 were charged and 8 released. The two held longer than a week were both subsequently charged.<sup>177</sup>

- 8.6 These pre-charge detention times (as generally in recent years) compare favourably with the past. Between September 2001 and December 2013, almost 10% of those arrested under TA 2000 section 41 were detained for more than a week prior to the charging decision being taken, in a few cases up to the 28 days that was permitted between July 2006 and January 2011.<sup>178</sup> This improvement is in part a reflection of the fact that the highly complex, internationally-directed plots associated with the period 2003-2007 have not been so much in evidence recently.

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<sup>175</sup> *Ibid*, Tables A.04-A.05C. From the 222 arrests in which the police suspected involvement in terrorism came 39 charges under (principally) terrorist legislation, 16 under (principally) non-terrorist legislation where the offence was considered terrorism-related (e.g. the murder of Lee Rigby) and 59 (principally) under a variety of non-terrorism-related offences, ranging from public order offences to fraud, drugs and road traffic offences.

<sup>176</sup> PSNI, *Police Recorded Security Situation Statistics*, May 2014, Table 3.

<sup>177</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, 5 June 2014, Table A.02.

<sup>178</sup> 160 out of 1672: *ibid*.

- 8.7 In **Northern Ireland**, of the 157 persons arrested under TA 2000 section 41 in 2012/13:
- a) 143 (91%) were held in pre-charge detention for less than 48 hours, 65 of them for less than a day.
  - b) All 157 (100%) were held for less than a week.
  - c) Of the 107 (68%) that were released without charge, none was kept longer than three days.<sup>179</sup>
- 8.8 As in previous years, therefore:
- a) the TA 2000 section 41 arrest power was much more frequently used in Northern Ireland than in Great Britain; but
  - b) a far higher proportion of those held in Great Britain were detained for longer than 48 hours, though few are held for longer than a week.

### **Numbers charged in 2013**

- 8.9 In **Great Britain** 55 people were charged with terrorism-related offences in 2013. This was similar to the 54 charged in 2012 and the average of 50 charged annually between 2002 and 2013.<sup>180</sup> The 2012 and 2013 figures do however represent an increase on the 20 charges in 2010 and the 36 in 2011.
- 8.10 Of those 55, 31 were charged under the Terrorism Acts, 8 under TA 2000 Schedule 7 for failure to comply with border controls, and 16 under other legislation.<sup>181</sup>
- 8.11 51% of those subject to “*terrorism-related arrests*” were charged, considerably higher than the charging rate of around one third that has prevailed in recent years.
- 8.12 In **Northern Ireland**, 50 of the 157 persons arrested under TA 2000 in 2012/13 (32%) were subsequently charged. However, only 32 of the 168 arrested under TA 2000 in 2013/14 (19%) were subsequently charged. This is:
- a) the lowest number of charges after TA 2000 arrests for 10 years, and
  - b) the lowest percentage of charges after such arrests for 10 years.<sup>182</sup>

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<sup>179</sup> NIO, *Northern Ireland Terrorism Legislation: Annual Statistics 2012/13*, Table 7.

<sup>180</sup> *Ibid.*, Table A.04.

<sup>181</sup> *Ibid.*, Table A.03.

The low charging rate during 2013/14 is, on the face of it, disappointing. I have previously emphasised the need for reasonable suspicion in relation to each person arrested under section 41.<sup>183</sup> I expect to discuss the issue with the PSNI and PPS during my next extended visit to Northern Ireland in September.

**Gender, age, ethnicity and nationality**

8.13 The Home Office has published detailed figures for the gender, age and ethnicity of those subject to terrorism-related arrest and charge and conviction in 2013.<sup>184</sup> No such figures are published in Northern Ireland.

8.14 As to **gender** and **age**, in Great Britain:

a) Males made up 90% of those subject to terrorism-related arrest, 87% of those charged with a terrorism-related offence and 86% of those convicted of a terrorism-related offence in 2013.<sup>185</sup>

b) As in previous years, arrests, charges and convictions were evenly distributed between those under and over 30 years of age.

c) The two-year period 2012-2013 has seen 17 under-18s arrested, five charged and four convicted: small numbers, but well in excess of the average since 2001.<sup>186</sup>

8.15 As to **ethnic appearance**, the figures (based on officer-defined data) are as follows for Great Britain:<sup>187</sup>

<b>2013</b>	<b>White</b>	<b>Black</b>	<b>Asian</b>	<b>Other</b>	<b>N/K</b>
<b>% terrorism-related arrests</b>	27%	18%	41%	6%	0%
<b>% terrorism-related charges</b>	49%	15%	33%	4%	0%
<b>%terrorism-related convictions</b>	55%	23%	18%	5%	0%

<sup>182</sup> PSNI, *Security Situation Statistics*, May 2014, Table 3.

<sup>183</sup> *Report on the operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*, July 2011, 7.43-7.47 and 12.5.

<sup>184</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation*, 5 June 2014, Tables A.09-A.12c.

<sup>185</sup> *Ibid.*, Table A.09. The equivalent figures over the whole period September 2001 to December 2013 are 93%, 94% and 94%.

<sup>186</sup> *Ibid.*, Table A.10.

<sup>187</sup> *Ibid.*, Table A.11.

They compare to the following figures for the period 2005-2012, also based on police perceptions:<sup>188</sup>

<b>2005-2012</b>	<b>White</b>	<b>Black</b>	<b>Asian</b>	<b>Other</b>	<b>N/K</b>
<b>% terrorism-related arrests</b>	25%	14%	44%	16%	2%
<b>% terrorism-related charges</b>	24%	17%	46%	11%	2%
<b>% terrorism-related convictions</b>	26%	16%	47%	8%	3%

8.16 As to (self-defined) **nationality**, British citizens comprised 69% of those arrested for terrorism-related offences, 65% of those charged with and 59% of those convicted of such offences in 2013. The equivalent figures for the period September 2001 - December 2013 are 50%, 64% and 63%.

8.17 6% the 391 persons convicted of terrorism-related offences in Great Britain between September 2001 and December 2013 have been Algerian; no other countries' nationals have exceeded 3% of the total.

### **Conditions of detention**

8.18 I set out last year the arrangements by which I exercise my new power to visit detention centres in order to verify whether the requirements of TA 2000 Schedule 8 and of PACE Code H have been complied with in relation to persons detained under TA 2000 section 41 under a warrant for further detention (i.e. for more than 48 hours).<sup>189</sup>

8.19 Since that power came into effect in August 2012, I have visited 14 persons detained at Southwark Police Station in London, and one who happened to be detained in the Antrim Serious Crime Suite when I was visiting. I would comment as follows:

- a) The protocols notifying me of cases when warrants for further detention have been granted are working well.
- b) The reports of Independent Custody Visitors [**ICVs**], on which I tend to rely when deciding whether to visit, are generally provided in a timely fashion. This is not invariably the case, however: when Gerry Adams was detained at Antrim in April 2014, I had to request the ICVs' report for myself.
- c) Progress has been frustratingly slow in obtaining remote access, on my own secure terminal in the Home Office, to the custody records of detained

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<sup>188</sup> Figures provided to me in personal communication from the Home Office.

<sup>189</sup> *The Terrorism Acts in 2012*, July 2013, 8.24-8.34.



persons. Such access would give me detailed information about the detention which would help me discharge my statutory function conscientiously, in most cases without needing to plan a visit.

- 8.20 I would add that there are real practical difficulties in visiting detainees outside London. To do so would require long journeys at short notice, with no guarantee that the detainee would wish to see me when I got there. Accordingly, in relation to non-London detainees I rely particularly heavily on the ICV reports (and on the ability to speak to ICVs in case of particular concerns).<sup>190</sup> I also try to inspect the detention facilities and speak to officers, staff and any detainees who might be present when I visit CTUs or make extended trips to Northern Ireland.
- 8.21 That may be considered sufficient for as long as there are no serious problems in terrorist detention centres. From my contacts with forensic medical examiners and defendants' solicitors, from my reading of ICV reports and from my own visits, I do not believe that endemic problems currently exist. Anyone who knows otherwise is requested to tell me. One must always however be alert to the unexpected. A detainee at Southwark expressed satisfaction about his conditions until I asked him how he had been sleeping. It transpired that he had been woken every hour during the night by a police officer who had been noisily opening the sliding gate in the door to make a visual check on him.<sup>191</sup> No harm was intended by anyone, and greater care was used subsequently: but the cumulative effect of frequently interrupted sleep over a period of several days could have been very damaging.
- 8.22 New PACE Codes H and H(NI) implemented, with effect from 2 June 2014, Directive 2013/13/EU which relates to information to be given to detainees. Lawyers have the right to inspect not only custody records but records about arrest and detention decisions. Detainees are given clearly-worded notices setting out their rights.
- 8.23 In recent months I have discussed custody visiting with representatives of the International Committee of the Red Cross, and attended and addressed a conference of the Faculty of Forensic and Legal Medicine. I have also initiated discussions with HM Chief Inspector of Prisons about the possible inclusion of the Independent Reviewer in the National Preventative Mechanism **[NPM]** that is required of signatories to the Optional Protocol to the Convention against Torture

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<sup>190</sup> As to ICV access, see the Home Office *Code of Practice on Independent Custody Visiting* (March 2013), in particular paras 43-46 (preserving the principle that "ICVs can visit a detainee whenever they wish", though there may be delays when detainees are being booked in) and 66-67 (access to recordings of interviews)

<sup>191</sup> It should have been possible to view the detainee without disturbance through a peephole, but the design of the cell was such that parts of the bed were out of sight.

[OPCAT]. The UK's NPM currently consists of up to 20 bodies which visit and inspect places of detention, including the ICVA, and it would be logical and perhaps beneficial for the Independent Reviewer to be part of it.<sup>192</sup>

### Right not to be held incommunicado and to access a solicitor

8.24 In Northern Ireland, which is the only place where figures are kept, every person who requested to have someone informed of their detention under section 41, and every person who requested access to a solicitor, was allowed their request immediately in 2012/13.<sup>193</sup>

8.25 That record is admirable. I look forward to seeing the equivalent figures, at least where access to a solicitor is concerned, for Great Britain.<sup>194</sup>

### Litigation

I noted in last year's report three cases before the Strasbourg court:<sup>195</sup>

a) Application 29062/12 *Duffy and Magee v UK* and Application 29891/12 *Magee v UK*, communicated to the Government in September and November 2012 respectively. The cases raise issues regarding the non-availability of police bail to those arrested under TA 2000, and the process for obtaining warrants for further detention, both of which have previously been subject to recommendations from me.

b) Application 62498/11 *RE v UK*, communicated to the Government in April 2013 and concerning the covert surveillance of persons in detention.

No judgment is yet available in any of those cases.

8.26 One further Strasbourg case, also as yet undecided, should be mentioned: *Sher, Sharif and Farooq v United Kingdom*. The applicants, three Pakistani nationals, were arrested with nine others in the North West of England under TA 2000 section 41 on 8 April 2009, suspected of being part of an organised cell involved in planning an imminent terrorist bomb attack. They were detained under warrants for further detention until 21 April when they were released without charge into the custody of the Home Office. Deportation orders were

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<sup>192</sup> HM Inspectorate of Prisons made an unannounced inspection of police custody suites in Southwark in November 2013: <http://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2014/05/2013-Southwark-police-final-report.pdf>.

<sup>193</sup> NIO, *Northern Ireland Terrorism Legislation: Annual Statistics 2012/13*, Tables 8 and 9.

<sup>194</sup> See 1.9, above.

<sup>195</sup> *The Terrorism Acts in 2012*, July 2013, 8.50-8.55.

made and appealed; all three applicants eventually left voluntarily for Pakistan. The full story is told in Lord Carlile's illuminating report on Operation Pathway.<sup>196</sup>

8.27 A claim for judicial review having been unsuccessful,<sup>197</sup> the application was lodged in the European Court of Human Rights in January 2011. The applicants complained that their arrests, detention under police authorisation and continuing detention under warrants issued by the Magistrates' Court violated their rights under Articles 5(2) and 5(4) of the ECHR,<sup>198</sup> and that the repeated searches of their premises over many days violated their rights under Article 8.<sup>199</sup>

8.28 In relation to Article 5, the applicants cited:

- a) the fact that section 41 arrests can be made without requiring any specific allegation of terrorist activity;
- b) the failure to put substantive allegations to the detainees until the ninth day of detention; and
- c) the fact that warrants for further detention were obtained after evidence was given in closed session and without special advocates instructed on the applicants' behalf;

They relied on various reports of the JCHR and on the *Operation Pathway* report, which was also cited by the European Court in its statement of facts and questions.

8.29 The case was communicated to the United Kingdom Government in October 2013, and has since been the subject of written submissions.

8.30 A case on a similar theme was **Robert McAuley** [2014] NIQB 31, in which it was held by a three-judge court in Northern Ireland that the judge had properly exercised his power under TA 2000 Schedule 8 para 33 to exclude the applicant from part of the hearing when ordering a four-day warrant for further detention in late 2012.

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<sup>196</sup> Lord Carlile QC, *Operation Pathway – report following review*, 2010, available through my website.

<sup>197</sup> *Sher, Farooq and Sharif v Chief Constable of Greater Manchester Police and others* [2010] EWHC 1859 (Admin).

<sup>198</sup> Article 5(2) requires everyone who is arrested to be informed promptly of the reasons for his arrest; Article 5(4) entitles arrested and detained persons to be entitled to take proceedings by which the lawfulness of their detention shall be decided speedily by a court.

<sup>199</sup> Article 8 guarantees the right to respect for private and family life, home and correspondence.

## Response to past recommendations

- 8.31 One effect of the Strasbourg litigation, particularly where bail and warrants for further detention are concerned, has been to place in the deep freeze the various recommendations that I made on this theme in my reports of 2011 and 2012.<sup>200</sup> Things have not moved on since I reviewed progress on these recommendations last year.<sup>201</sup>
- 8.32 I **maintain those recommendations** and look forward to revisiting them once the judgments still pending in the European Court of Human Rights have been handed down.

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<sup>200</sup> *Report on the operation in 2010 of TA 2000 and Part 1 of TA 2006*, July 2011, 7.50 and 12.8  
*The Terrorism Acts in 2011*, June 2012, 7.63-7.74 and 12.14-12.16.

<sup>201</sup> *The Terrorism Acts in 2012*, July 2013, 8.43-8.47.

## 9. CRIMINAL PROCEEDINGS

### Precursor offences

- 9.1 While the perpetrators of the most serious acts of terrorism are almost always charged with offences under the ordinary criminal law, the Terrorism Acts contain a variety of “*precursor offences*”, criminalising conduct which does not amount to attempt or conspiracy. I have referred in the past to the justifications commonly advanced for such offences, the controversy attending them and the tendency of the courts (including the European Court of Human Rights) to accept them.<sup>202</sup> An illuminating discussion of the subject, particularly interesting for its historical perspectives, was published during the period under review.<sup>203</sup>
- 9.2 These “*precursor offences*” were applied during the period under review not only domestically but to the actions of those suspected of training or fighting abroad, particularly in Syria. Considered with particular frequency in relation to those travelling to Syria have been TA 2006 section 5 (acts preparatory to terrorism), TA 2006 sections 6 to 8 (terrorist training), TA 2000 sections 15 to 18 (funding) and TA 2000 sections 57 and 58 (possession or articles and collection of information for terrorist purposes).

### Statistics – Great Britain

- 9.3 Abundant statistics are now published by the Home Office on a quarterly basis, accompanied by a helpful commentary.<sup>204</sup> I seek here to give no more than some headline figures.

#### ***Outcome of charges in 2013***

- 9.4 I have already noted that 55 persons were charged with terrorism-related offences in 2013.<sup>205</sup> Of these:
- a) 39 persons were charged under the terrorism legislation. As of June 2014, 11 had been convicted, 1 acquitted and the majority still awaited prosecution.
  - b) A further 16 persons were charged with terrorism-related offences under non-terrorism legislation. As of June 2014, 11 had been convicted and none acquitted; the other five still awaited prosecution.

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<sup>202</sup> *The Terrorism Acts in 2012*, July 2013, paras 11.1-11.5.

<sup>203</sup> A. Ashworth and L. Zedner, *Preventive Justice* (Oxford, 2013).

<sup>204</sup> Home Office, *Operation of police powers under TA 2000 and subsequent legislation: arrests, outcomes and stops and searches, quarterly update to 31 December 2013*, 5 June 2014, Tables A, C and P series.

<sup>205</sup> 8.9, above.

### **Nature of convictions in 2013**

- 9.5 Of the 44 persons put on trial in 2013 for an offence which was terrorism-related, a high number by recent standards, 37 (84%) were convicted and 7 acquitted.
- 9.6 The four principal plots are summarised at 2.21 above, and are described in more detail on the CPS website. A total of 23 persons were convicted of preparation of terrorist acts, contrary to TA 2006 section 5. Convictions were also entered under TA 2000 section 58 (typically for possession of Inspire magazine), TA 2000 section 17 (funding) and TA 2000 section 38B (failure to provide information).<sup>206</sup> In addition, Khalid Baqa was sentenced for 2 years for possession of several hundred discs which justified, glorified and encouraged violent jihadist activity with a view to their dissemination, contrary to TA 2006 section 2.
- 9.7 The great majority of the convictions, as in 2012, followed guilty pleas. Though discounted to reflect this, many of the sentences as is evident from the summary at 2.21 above were in excess of 10 years.<sup>207</sup>

### **Prison**

- 9.8 At the end of 2013, exactly 100 persons were in prison for terrorism-related offences, of whom 78 had been convicted. There were also 47 “*domestic extremist/separatist*” prisoners (including a Ukrainian, presumably Pavlo Lapshyn), of whom 30 had been convicted.

### **Statistics – Northern Ireland**

- 9.9 Statistics for Northern Ireland are available for the year to March 2013.<sup>208</sup>

### **Outcome of charges in 2013**

- 9.10 33 persons were charged with 36 offences under TA 2000 during the year 2012/13, principally section 57 (possession for terrorist purposes), section 58 (collection of information) section 11 (membership) and section 12 (support).
- 9.11 19 persons were charged with 19 offences under TA 2006 during the same year, 15 of them under section 5 (preparation of terrorist acts).
- 9.12 No use was made of the post-charge questioning power under CTA 2008.

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<sup>206</sup> *Ibid.*, Table C.03.

<sup>207</sup> For a full breakdown, see *ibid.*, Tables C.04 and C.05.

<sup>208</sup> NIO, *Northern Ireland Terrorism Legislation: Annual Statistics 2012/13*.

### **Convictions in 2013**

- 9.13 17 defendants appeared before the Crown Court on a total of 26 charges under TA 2000 or TA 2006 during 2013. 15 defendants were convicted on at least one charge and two defendants were acquitted on all charges.
- 9.14 A further 32 defendants appeared in the Magistrates Court on 43 charges during 2013. One defendant was found guilty on at least one charge, while 31 were acquitted on all charges.<sup>209</sup>

### **Attorney General's consent**

- 9.15 Under both Terrorism Acts, the permission of the Attorney General is required before prosecutions may be brought in respect of offences said to have been committed outside the UK or for a purpose wholly or partly connected with the affairs of a country other than the UK.<sup>210</sup>
- 9.16 In 2013, the Attorney General's permission was sought for the prosecution of 10 suspects. In each case, permission was granted under TA 2006. In one of the cases, permission was granted also under TA 2000.
- 9.17 There has been a recent increase in the number of cases. In the first half of 2014, the Attorney General's permission was sought for the prosecution of 16 suspects, and granted in 15 cases. Of those 15, seven concerned offences only under TA 2000, six concerned offences only under TA 2006 and two concerned offences under both Terrorism Acts.

### **Discrimination in charging and sentencing**

- 9.18 I referred last year to the fact that in response to my previous report, OSCT Counter Terrorism Research and Analysis [**CTRA**] was tasked with conducting an analysis of whether, since 2001, there has been systematic bias against Muslims at the stage either of charge or of sentencing. CTRA looked at all those who had been arrested on suspicion of terrorism-related offences between September 2001 and August 2012, and asked:
- a) as to **charging**, whether a higher proportion of Muslims than of non-Muslims was charged with terrorism-related offences; and

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<sup>209</sup> Source: NIO.

<sup>210</sup> TA 2000 section 117(2A); TA 2006 section 19(2).

- b) as to **sentence**, whether Muslims convicted of terrorism-related offences received longer average sentence lengths than non-Muslims (before and after taking account of the severity of the offence).
- 9.19 That analysis concluded that though there were factors that could not be taken into account in the analysis, there were statistically no significant differences in the proportions charged, sentence length or seriousness of offence between Muslim offenders and offender of other or no religion. The analysis was published in September 2013.<sup>211</sup>
- 9.20 In June 2014, the Court of Appeal heard an appeal against sentence by two men who had been sentenced in June 2013 for periods of up to 19 years in prison, having pleaded guilty to engaging in conduct in preparation of terrorist acts (TA 2006 section 5) against an English Defence League demonstration in Dewsbury, West Yorkshire. The basis of their appeal was reported to be the discriminatory nature of their sentence, by comparison with sentences imposed in XRW cases. The sentences were upheld: as this report was finalised, no judgment was available.
- 9.21 I also mentioned last year that it had been suggested to me that terrorist offences in Great Britain are more heavily sentenced than equivalent offences in Northern Ireland. Those suggestions were repeated to me on several occasions during the year under review, in particular by officers of the PSNI who point to the difficulties associated with what are perceived in some quarters as low sentences being passed for incidents of terrorist violence.
- 9.22 Though the maximum sentences for terrorist offences are the same across the United Kingdom, it is for the judiciaries of England and Wales, Scotland and Northern Ireland to sentence for such offences (as for offences more generally) in accordance with their own guidelines and in the light of factors prevailing in their own jurisdictions. It would not be surprising if those factors were in some respects different as between those jurisdictions.
- 9.23 Nonetheless, if detailed examination of the evidence should suggest that major disparities in sentencing practice for terrorism-related offences do exist, it is sensible that notes should be compared so that the reasons for those disparities can be explored, and best practice shared and discussed.

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<sup>211</sup> *Terrorism arrests – analysis of charging and sentencing outcomes by religion*: <https://www.gov.uk/government/publications/terrorism-arrests-analysis-of-charging-and-sentencing-outcomes-by-religion>



9.24 I have not myself conducted such a detailed examination. I am however aware that this issue is currently being looked at in two different fora, one governmental and one academic in nature. Accordingly I say no more about it here, but intend to keep the subject under review.

### **Impact of terrorism offences on the work of international NGOs**

9.25 I referred in December 2013 to an issue of which I was first made aware on a visit to Israel and the occupied Palestinian territories, and have since pursued with a number of NGOs based in the UK: the actual or perceived constraints placed by the counter-terrorism laws of various western countries, including the UK, on the activities of NGOs or others who seek to provide aid or assistance (including humanitarian aid, capacity-building and peacebuilding) to territories which are under the *de facto* control of designated or proscribed groups, or in which such groups are active on the ground.<sup>212</sup>

9.26 Areas where entities designated or proscribed under UK law operate include Afghanistan, Somalia, Pakistan, Gaza, Lebanon, Yemen, Philippines, Colombia, Syria, Nigeria, Sri Lanka, Mali and East Africa. Many such areas experience humanitarian problems; and international NGOs are important for the delivery of stabilisation, peace and reconciliation programmes.<sup>213</sup>

9.27 NGOs acting only from the highest of motives could have to interact with designated or proscribed groups in a number of circumstances. For example:

- a) Policies of “*community acceptance*” or “*constructive engagement*” with groups which exert effective political and military control over an area may assist NGOs to protect staff, mitigate loss of assets and ensure aid is delivered to communities in need.
- b) Incidental payments (e.g. for operating licences, or by way of registration fees) are sometimes demanded by governments or by those in effective control of an area as a condition of consent to operate in that area.
- c) Designated groups who are party to a conflict may behave in a manner hostile to NGOs and their staff if the NGO refuses to work in areas controlled by the group where there is need, but chooses instead to work elsewhere because of concerns about the status of the group.

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<sup>212</sup> *Third report on the operation of the Terrorist Asset Freezing, &c. Act 2010*, December 2013, 4.19-4.22.

<sup>213</sup> Some of the issues were explored through a series of interviews in the BBC Radio 4 File on Four programme “A deadly dilemma”, first broadcast on 1 July 2014 and available through BBC iPlayer.

- d) The distribution of life-saving aid may carry a risk that some of those receiving aid include individuals who have been designated as terrorists, or who have links to designated individuals or groups.
- e) For organisations promoting peace and reconciliation, engagement with designated groups and their constituencies can be a necessary part of exploring and encouraging alternatives to violence, and strengthening moderate elements with a group.

9.28 I do not suggest that these issues are simple. Aid diversion is a real and present danger; not everyone would find it acceptable, for example, that NGOs should pay fees of any kind to proscribed or designated organisations as the price of operating in territory controlled by them. The issues do however need to be aired, in security as well as aid circles. Trusted international NGOs are understandably and rightly concerned to ensure that they are able to continue working in some of the most dangerous part of the world without fear of breaching anti-terrorism legislation.

9.29 The debate tends to be dominated by the impact of US prohibitions on “*material support*” for terrorism, and on the well-publicised conviction in 2008 of an Islamic charity (the Holy Land Foundation) and five individuals, followed by sentences of up to 65 years’ imprisonment, on charges which included conspiracy to provide material support to Hamas.

9.30 It has been suggested to me, however, that there are criminal offences under UK anti-terrorism legislation which are also capable of impeding the legitimate activities of international NGOs in conflict areas. Among those which may need particular consideration in this respect are:

- a) TA 2000 section 12: see in particular sections 12(2)(b) and 12(3), which criminalise the arranging and addressing of meetings to “*further the activities*” of proscribed organisations,<sup>214</sup>
- b) TA 2000 sections 14-18, which create general offences relating to the provision of funds or other property to individuals who use them for the purposes of terrorism.

Also of potential relevance are prohibitions under TFA 2010 (sections 12-15) and other measures including the Al Qaida (Asset Freezing) Regulations 2011.

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<sup>214</sup> Under section 12(2)(c) it is an offence to arrange a meeting which will be addressed by a person who belongs or professes to belong to a proscribed organisation: the scope of the defence in section 12(4) may not always in practical terms be clear.

9.31 I have not as yet discussed these concerns in detail within Government, and express no opinion on the extent to which they may be justified. What is clear, however, is that uncertainty can itself be damaging. In particular:

- a) It is not sufficient to rely on the restrained exercise of very wide discretions by prosecutors (or by the Attorney General) in circumstances where trustees need to be satisfied that NGOs are not exposed to the risk of criminal liability. A prudent approach to such risks may thus result in NGOs discontinuing or not embarking upon necessary or useful work, even in circumstances where prosecutions are unlikely.
- b) There are acute concerns within the charitable sector regarding banks withdrawing or curtailing services to NGOs, resulting in delays or obstacles to the transfer of funds. The abuse of charitable status for the funding of terrorism is a serious and important issue.<sup>215</sup> But the wider the net of terrorism is cast, the greater the chance that financial impediments will be placed in the way of positive and worthwhile NGO activity.<sup>216</sup>

9.32 I look forward to further discussions on this issue over the months ahead. There is a risk that necessary anti-terrorism laws will be given a bad name if they result in avoidable restrictions on the ability of NGOs to conduct vital humanitarian and peacebuilding operations in parts of the world from which terrorism emanates. It is not within the capacity of my office to find or to broker a solution. But as a problem caused by the operation both of the Terrorism Acts and of TFA 2010, it is my duty to bring it to the attention of all concerned.

9.33 **I recommend that a dialogue be initiated between international NGOs and policy makers, including in the Home Office and Treasury, with a view to exploring how the objectives of anti-terrorism law can be met without unnecessarily prejudicing the ability of NGOs to deliver humanitarian aid, capacity-building and peace-building in parts of the world where designated and proscribed groups are active.**

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<sup>215</sup> As noted by HASC, *Counter-terrorism*, 17<sup>th</sup> report of 2013-14, HC 231, May 2014, paras 130-135. HASC recommended (at para 135) that I investigate the scale of abuse of charitable status to support terrorist actions: I shall consider what I can usefully do, alone or in conjunction with others, but am mindful that this is a wide-ranging issue, extending beyond my statutory remit, which other bodies may be better placed to investigate.

<sup>216</sup> See, in that respect, the September 2013 written evidence of the Charity Finance Group to HASC (CTE 0019), outlining how counter-terrorism legislation has made it “*increasingly challenging for UK charities to transfer funds through formal banking channels to support operations abroad*”, and identifying problems which include the use of less formal transfer mechanisms, more vulnerable to abuse by terrorists.

## RECOMMENDATIONS

### SUMMARY

- The UK's definition of terrorism is in significant respects broader than those of other comparable countries. The consequent very wide discretions accorded to those who enforce the law are in principle undesirable, even though in practice they are usually exercised responsibly.
- It is important that the definition remains wide enough to cover the evolving threat. But a definition so wide as to catch activity falling well outside the ordinary understanding of terrorism jeopardises public acceptance of the need for anti-terrorism laws.
- Short of a root-and-branch review, the situation could be materially improved by:
  - reserving the terrorist label for actions aimed at coercing or undermining the Government, not for those (including acts of publication thought to jeopardise life, health or safety) which aim only to influence it for political reasons
  - repealing the anomaly by which the ideologically motivated use or threat of firearms or explosives need not even satisfy the "*influence*" test
  - narrowing the very broad definitions of "*terrorist activity*" and "*terrorism-related activity*" in two recent statutes.
- No reduction of the universal geographic application of UK anti-terrorism law, and no exemption for acts performed in the course of armed conflict, are recommended. But there is room for debate as to the criteria by which foreign fighters should be criminalised.
- The Independent Reviewer of Terrorism Legislation (or any replacement body) should be tasked with reviewing the operation of a wider range of powers to a more flexible timescale than is currently the case. Thought should be given to making further statutory provision for various matters relating to the post, and to the provision of adequate resources.
- Further recommendations are made or maintained concerning proscription, detention and the activities of NGOs.

## 10. DEFINITION OF TERRORISM

### The absence of consensus

- 10.1 For most people alive today, the Twin Towers attacks of 9/11 express the essence of what we mean by terrorism. An organised group perpetrated a deadly mass attack on innocent civilians, claiming political or religious inspiration and seeking both to command attention and to instil fear. In every respect it conformed to what Lord Lloyd, author of the report that prompted the Terrorism Act 2000, had described five years earlier as “*the chief distinguishing characteristics of terrorism*”.<sup>217</sup>
- 10.2 To describe the classic instance of terrorism is one thing; to define the limits of the phenomenon is quite another. The debate is vigorous, multidisciplinary and wide-ranging. Can terrorism be perpetrated by a “*lone wolf*”, without the aid of a group? Is violence still terrorism if directed not towards civilians but towards representatives of the State, within or outside an armed conflict? Can a state, or agents of the state, or state-sponsored groups, commit acts of terrorism? Must there be a desire to undermine the institutions of governance, or to induce terror in the populace? Do attacks on property or infrastructure count as terrorism, or must death or injury at least be threatened?
- 10.3 The intractability of some of these questions has induced a degree of defeatism among those seeking to define terrorism. At international level, attempts since 1996 to draft a comprehensive Convention on Terrorism have foundered on whether to acknowledge “*state terrorism*” and whether national separatist movements should be exempt from the definition. The Special Tribunal for Lebanon identified in 2011 what it considered to be a customary international law crime of transnational terrorism, but its conclusions have been highly controversial. There is no consistency of approach, in particular as regards the issue of armed conflict exemption, as between the various specific anti-terrorism Conventions of the UN and the Council of Europe. Such factors recently led the Supreme Court to conclude that there is as yet no internationally agreed

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<sup>217</sup> Rt Hon Lord Lloyd of Berwick, *Inquiry into terrorism*, Cm 3420, October 1996, vol 1, 5.11. His list was as follows: (i) terrorist violence is typically directed towards members of the public or a section of the public, indiscriminately or at random; (ii) it frequently involves the use of lethal force, and is capable of causing extensive casualties among the civilian population; (iii) consequently, it creates fear among the public, which is precisely what it is designed to do; (iv) its purpose is to secure political or ideological objectives by violence, or threat of violence. It therefore aims to subvert the democratic process; (v) it is frequently perpetrated by well-trained, well-equipped and highly committed individuals acting on behalf of sophisticated and well-resourced organisations, often based overseas.”

definition of terrorism, and no comprehensive international Convention binding states to take action against it.<sup>218</sup>

10.4 Even at the national level, few would claim that an adequate definition has been found. Lord Lloyd went so far as to state in Parliament:

“We must obviously do our best with the definition. However, having spent many hours looking at many different definitions, I can only agree with what was said by both the noble Lord, Lord Goodhart and the noble Lord, Lord Cope; namely, that there are great difficulties in finding a satisfactory definition. Indeed, I was unable to do so and I suspect that none of us will succeed. As I say, we must do our best but I hope that we will not spend too much time on the definition.”<sup>219</sup>

10.5 That conclusion was echoed by my predecessor Lord Carlile, whose report on the definition of terrorism was commissioned by Government in response to further anxieties expressed during the passage of TA 2006.<sup>220</sup>

### The UK definition

10.6 The UK definition was summarised in my last annual report as follows:<sup>221</sup>

“There are three cumulative elements to the UK’s current definition:

- a) the **actions** (or threats of actions) that constitute terrorism, which encompass serious violence against a person; serious damage to property; and actions which endanger life, create a serious risk to health or safety, or are designed seriously to interfere with or seriously to disrupt an electronic system;<sup>222</sup>
- b) the **target** to which those acts must be directed: they must be designed to *influence* a government or international organisation, or to *intimidate* the public or a section of the public,<sup>223</sup> and
- c) the  **motive** that must be present: advancing a political, religious, racial or ideological cause.<sup>224</sup>

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<sup>218</sup> *R v Gul* [2013] UKSC 64, paras 44-51.

<sup>219</sup> Hansard HL 6 April 2000, col 1444.

<sup>220</sup> Lord Carlile, *The Definition of Terrorism* (2007), available through my website.

<sup>221</sup> *The Terrorism Acts in 2012*, July 2013, 4.2.

<sup>222</sup> TA 2000 sections 1(1)(a), 1(2).

<sup>223</sup> TA 2000 section 1(1)(b).

<sup>224</sup> TA 2000 section 1(1)(c).

The second of those elements (the target requirement) is a less effective filter than it might appear: “*the government*” means the government of any country in the world;<sup>225</sup> and the target requirement need not be made out at all when the use or threat of action involves the use of firearms or explosives.<sup>226</sup>”

- 10.7 That definition has considerable merits. It is comprehensive, and many of its elements have been imitated elsewhere.<sup>227</sup> Lord Carlile pronounced it “*consistent with international comparators and treaties*” and “*useful and broadly fit for purpose*”. Nobody suggests that it is insufficiently broad for the purposes of combating terrorism<sup>228</sup> – though the removal of the motive test, counselled by some for reasons of religious sensitivity – would have the incidental effect of broadening it further.<sup>229</sup>
- 10.8 Thoughtful people have consistently pointed to the dangers of over-breadth. In the parliamentary debates that led to TA 2000, TA 2006 and CTA 2008, parliamentarians were concerned to mark the seriousness of a phenomenon “*so dangerous and held in such abhorrence that it requires special powers to meet the threat*”.<sup>230</sup> At the same time, however, they were conscious of the dangers of over-inclusiveness, and the inadvisability of trusting only to the wise exercise of executive discretion. In those pre-9/11 days, al-Qaida scarcely received a mention. But MPs and members of the House of Lords expressed repeated unease that over-broad terrorism laws might criminalise domestic protesters,<sup>231</sup> strikers,<sup>232</sup> “*attacks against the corporate state*”<sup>233</sup>, hunt saboteurs,<sup>234</sup> attacks on empty buildings,<sup>235</sup> those who threatened the destruction of GM crops,<sup>236</sup> asylum-seekers<sup>237</sup> and international solidarity groups.<sup>238</sup>

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<sup>225</sup> TA 2000 section 1(4).

<sup>226</sup> TA 2000 section 1(3).

<sup>227</sup> *The Terrorism Acts in 2012*, July 2013, fnn 62 and 63.

<sup>228</sup> I have previously endorsed 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 within the current definition: *The Terrorism Acts in 2011*, June 2012, 3.8.

<sup>229</sup> I discussed that finely-balanced question, coming down against it in current circumstances, in *The Terrorism Acts in 2012*, July 2013, 4.10-4.18.

<sup>230</sup> Lord Lloyd, Hansard HL 6 April 2000, col 1443.

<sup>231</sup> Baroness Miller, Hansard HL 6 April 2000, col 1452.

<sup>232</sup> Mr Simpson, Hansard HC 15 March 2000, col 393 (public service workers); Mr Winnick, Hansard HC 15 March 2000, col 412 (miners).

<sup>233</sup> Mr Hogg, Hansard HC 14 December 1999, col 211.

<sup>234</sup> Mr Hogg, Hansard HC 15 March 2000, cols 397-8.

<sup>235</sup> Mr Hughes, Hansard HC 15 March 2000, col 389.

<sup>236</sup> Mr Fisher, Hansard HC 15 March 2000, col 398.

<sup>237</sup> Mr Hogg, Hansard HC 14 December 1999, col 213.

- 10.9 The 7/7 attacks of 2005 were closely followed by the Bill which became TA 2006. This contained additional offences (including, most controversially, the offence of encouraging acts of terrorism), and significantly widened the extra-territorial application of the law. The tone of the criticisms became more urgent: parliamentarians referred to “*criminalising the whole framework of social protest and resistance within our own society*”<sup>239</sup> and to the creation of “*a worldwide jurisdiction with the capacity to criminalise anyone in the world for making a comment that falls within the UK definition of terrorism*”.<sup>240</sup> Also criticised was the asymmetry in a law which made it criminal to encourage Chechen rebels whilst imposing no bar on “*urging the Russian Government to kill more Chechens*”.<sup>241</sup> Underlying the Bill, it was said, was belief in “*a new and universal world order, in which any form or manifestation of terrorism or violence against [any] State would be eradicated*”.<sup>242</sup>
- 10.10 A subsequent report of the Parliament’s Joint Committee on Human Rights [JCHR] noted that the definition “*includes any action designed to influence the policy of any government, anywhere in the world, including by, for example, damage to property*”, and continued:

“The main problem to which this gives rise is that the counter-terrorism measures are capable of application to speech or actions concerning resistance to an oppressive regime overseas. For example, the creation of the offence of encouragement of ‘*terrorism*’ in s.1 of the Terrorism Act is to criminalise any expression of a view that armed resistance to a brutal or repressive anti-democratic regime might in certain circumstances be justifiable, even where such resistance consists of campaigns of sabotage against property, and specifically directed away from human casualties. The Home Secretary does not deny that this is the effect of the offence but defends its scope on the basis that there is nowhere in the world today where violence can be justified as a means of bringing about political change.”<sup>243</sup>

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<sup>238</sup> Mr Hughes, Hansard HC 14 December 1999, col 191. I have written myself about the impact on “*suspect communities*” in the UK, including refugees, of the designation of groups that fight against the regimes from which they have fled: *The Terrorism Acts in 2011*, June 2012, 4.41-4.47.

<sup>239</sup> Mr Simpson, Hansard HC 2 November 2005, col 855.

<sup>240</sup> Mr Grieve, Hansard HC 2 November 2005, col 841.

<sup>241</sup> Mr Denham, Hansard HC 2 November 2005, col 863.

<sup>242</sup> Mr Grieve, Hansard HC 3 November 2005, col 1046. The speaker, in his capacity as Attorney General between 2010 and 2014, ironically became, the gatekeeper for terrorism prosecutions with a non-UK dimension by virtue of TA 2000 section 117 and TA 2006 section 19.

<sup>243</sup> JCHR, *Counter-terrorism policy and human rights: Terrorism Bill and related matters*, third report of session 2005-06, HL Paper 75, HC 561, December 2005, para 12.



- 10.11 The political controversy was defused by the Home Secretary inviting Lord Carlile to review the definition of terrorism – a development welcomed by the JCHR.<sup>244</sup> His report of 2007 made one recommendation in particular that, if adopted, could have taken some of the sting out of the problems identified in Parliament. It was however rejected by the then Home Secretary. I come to that issue at 10.35-10.43, below.
- 10.12 Judicial commentary has displayed acute awareness of the breadth of the definition. In 2007, the Court of Appeal referred to it as “*striking*”, noting that TA 2000 “*does not exempt, nor make an exception, nor create a defence for, nor exculpate what some would describe as ‘terrorism in a just cause’*”.<sup>245</sup> Three years later, the Court of Appeal found it “*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*”, whilst acknowledging that serious violence against members of government forces “*would normally be designed to influence the government and be used for the purpose of advancing a political, religious or ideological cause, within the meaning of those words in section 1 of the 2000 Act*”.<sup>246</sup>
- 10.13 The story is brought up to date by the judgment of a unanimous Supreme Court in the *R v Gul* judgment of 2013.<sup>247</sup> While recognising the importance of public protection, the Court was uneasy about a definition which it described as “*very far-reaching indeed*”. The breadth of that definition, and the consequent heavy dependence on the wise exercise of discretions by Ministers, prosecutors and police, were said to be capable of threatening both civil liberties and the rule of law.

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<sup>244</sup> *Ibid.*, para 13.

<sup>245</sup> *R v F* [2007] QB 960, per Sir Igor Judge P at para 27. As was noted in *SSHD v DD* [2010] EWCA Civ 1407, para 55, those remarks were made in the context of “*indiscriminate*” terrorism rather than participation in an armed insurrection, a distinction that had been made for the purposes of refugee law in *KJ (Sri Lanka) v SSHD* [2009] EWCA Civ 292. The definition of terrorism in TA 2000 is however significantly wider than in Article 1F(c) of the 1951 Geneva Convention relating to the Status of Refugees: *Al-Sirri v SSHD* [2013] AC 745, paras 36-39.

<sup>246</sup> *SSHD v DD* [2010] EWCA Civ 1407, per Pill LJ at para 55.

<sup>247</sup> [2013] UKSC 64, discussed in more detail at 4.3–4.10, above.

- 10.14 A few months later, the breadth of the UK definition was graphically illustrated in a domestic context by the *Miranda* judgment.<sup>248</sup> Many would unhesitatingly agree that a person thought to be carrying stolen secrets through a British airport – whether on behalf of a journalist or otherwise – should be liable (with appropriate safeguards) to be stopped, searched, questioned and detained. What is more difficult to accept is those steps could be legitimately taken under powers designed to deal with terrorism. The consequences of the court’s ruling went far beyond the circumstances of Mr Miranda’s case. By holding (with faultless logic) that the politically-motivated publication of material endangering life or seriously endangering public health or safety can constitute terrorism, the court admitted the possibility that journalists, bloggers and those associated with them could, as a consequence of their writing, be branded as terrorists and subjected to a wide range of penal and executive constraints.<sup>249</sup>
- 10.15 I do not mean to suggest that this is actually likely to happen. The full limits of the statutory definition are rarely explored by the police, who generally operate from day to day on the basis of more conventional understandings of what is meant by terrorism. Prosecutors know that the juries who decide terrorism cases will not be impressed by unlikely-sounding interpretations of everyday words – illustrating the classic description of the jury as “*the lamp that shows that freedom lives*”.<sup>250</sup> Ministers have imposed executive constraints such as asset freezes, control orders and TPIMs in only a tiny fraction of the cases in which their widely-drawn statutory powers would allow it.
- 10.16 It remains the case, however, that alarming prospects such as those outlined at 4.20-4.21, above (the criminalisation of acts preparatory to publication, the proscription of newspapers and so on), are prevented from becoming reality only by the wise exercise of multiple discretions. Those discretions fall to be exercised not only by Ministers, Law Officers and prosecutors, but by police constables up and down the country and in particular at the ports.<sup>251</sup> I have previously noted, and continue to take the view, that those wide discretions “*appear for the most part to be responsibly exercised*”.<sup>252</sup> However, a unanimous Supreme Court in *R v Gul* has stated that this situation constitutes an abdication of parliamentary responsibility and a risk to the rule of law.<sup>253</sup> In addition, even if the strong anti-terrorism powers are never used up to their limits, uncertainty as

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<sup>248</sup> *David Miranda v SSHD and MPC* [2014] EWHC 255 (Admin), discussed in detail at 4.11-4.23, above.

<sup>249</sup> See 4. 20-4.21, above.

<sup>250</sup> Lord Devlin, *Trial by Jury* (Hamlyn Lectures, 8<sup>th</sup> series), 1956, p. 164.

<sup>251</sup> The repeal of the widely-used stop and search power in TA 2000 section 44 has reduced the need for the discretion to be exercised on the street, though sections 43, 43A and 47A remain.

<sup>252</sup> *The Terrorism Acts in 2012*, July 2013, 4.3.

<sup>253</sup> See 4.9(b), above.

to where those limits lie, coupled with understandable fearfulness of being branded a terrorist, could deter people even from activity falling outside their range. When those people are journalists, bloggers or simply outspoken citizens, the consequence is to chill the free expression of political opinion – the lifeblood of a free society.

- 10.17 The incompetent exercise of very broad discretions can lead to blatant instances of injustice, which though not numerous tend to be notorious and so capable of doing great damage to public trust in anti-terrorism law.<sup>254</sup> But vague and complex definitions may equally be troublesome where attitudes to entire categories of crime are concerned. An instinctive reluctance on the part of police and others to define terrorism as broadly as the law permits may encourage a tendency – itself potentially discriminatory – to reserve the word for the categories of perpetrators with which it is stereotypically associated. Thus, in Northern Ireland, some point to a historical tendency to look on republican violence as terrorism, and on unionist violence through the lens of public order or ordinary criminality.<sup>255</sup> In Great Britain, there may also have been a tendency to categorise Islamist-inspired violence as terrorism more readily than what is still often referred to as “*domestic extremism*”, though minds have been concentrated not least by the Breivik murders in Norway, and the record is improving.<sup>256</sup>
- 10.18 I do not mean by this to endorse those who promote a false equivalence between the threats currently posed by republican and loyalist violence in Northern Ireland, or between the threats posed by violent Islamists and far-right extremists: in each case and for the present at least, there is no doubt that the former threat is graver and more deadly. It is important however that a spade is called a spade, whoever may be using it. There are virtues in simple definitions. A statutory definition so broad that the enforcement authorities resort to their own rules of thumb in order to make sense of it is unhelpful.

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<sup>254</sup> The case of Walter Wolfgang, the 82-year-old peace activist who was expelled from the 2005 Labour Party Conference and denied readmission for shouting “*nonsense*” during a speech by the Foreign Secretary about Iraq, reportedly by a police officer who cited the Terrorism Act, remains part of the folklore of state excesses almost 10 years on. See also the case of Rizwaan Sabir, arrested and detained under TA 2000 for downloading a document available on US Government websites: *The Terrorism Acts in 2011*, June 2012, 10.38.

<sup>255</sup> Though there have been recent instances of loyalist violence being prosecuted as terrorism.

<sup>256</sup> As instanced by the successful terrorism investigation mounted during 2013 into the West Midlands mosque attacks, the consideration of right-wing groups for proscription on the same basis as Islamist groups, as I recommended in 2012, and the increasing use of the Prevent programme in relation to right-wing groups: see 2.37-2.39, above.

## Last year's report

- 10.19 In July 2013 I repeated earlier comments to the effect that I would welcome a root-and-branch review of the whole edifice of terrorism law.<sup>257</sup> Noting however that this was a task going well beyond the scope of my annual reports, I took the current UK definition as my starting point, and focused my remarks on possible amendments to it.
- 10.20 I rejected (at least provisionally) some proposed amendments. In particular:
- a) As regards the action requirement, I did not recommend raising either the threshold of “*serious violence against a person*” or the threshold of “*serious damage to property*”.<sup>258</sup>
  - b) I counselled against removing the motive requirement without further alterations to the law, on the simple basis that to do so would “*substantially, unnecessarily and undesirably broaden the category of cases that can be characterised as terrorism*”.<sup>259</sup>
- 10.21 A number of other amendments seemed however to be worth considering. I mooted:
- a) applying the target requirement in all cases, including actions or threats involving the use of firearms or explosives,<sup>260</sup>
  - b) strengthening the target requirement so as to require more than that the use or threat of action be designed to “*influence*” a government;<sup>261</sup> and
  - c) trimming the motive requirement, so that only a “*political*” motive was required,<sup>262</sup> or in the context of other changes, removing it altogether.<sup>263</sup>
- 10.22 I also drew attention to a tendency to broaden already broad discretions by allowing expansionary phrases such as “*terrorism-related*” and “*terrorist or extremist*” on to the statute book or into the statistics.<sup>264</sup>

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<sup>257</sup> *The Terrorism Acts in 2012*, July 2013, 4.4-4.5.

<sup>258</sup> *Ibid.*, 4.19(a)(b).

<sup>259</sup> *Ibid.*, 4.10-4.18.

<sup>260</sup> *Ibid.*, 4.19(d).

<sup>261</sup> *Ibid.*, 4.19(c).

<sup>262</sup> As recommended by the former Independent National Security Legislation Monitor in Australia and by Professor Clive Walker, my special adviser: *The Terrorism Acts in 2012*, June 2013, 4.14.

<sup>263</sup> *The Terrorism Acts in 2012*, July 2013, 4.10-4.18.

<sup>264</sup> *The Terrorism Acts in 2012*, July 2013, 4.3(d).

- 10.23 Finally, I noted the issue of whether the UK's definition of terrorism does (as in Canada and South Africa) or should contain an exemption for acts carried out overseas and constituting lawful hostilities under international humanitarian law.
- 10.24 Because the latter point was still before the Supreme Court in *R v Gul*, and because more generally I had identified no urgent need for change, I made no specific recommendations for amendment but invited comments and indicated that I would look further at the point this year.
- 10.25 This year, as promised, I expand my thinking on these points and make some definitive recommendations.

### The purpose of defining terrorism

- 10.26 "*What do we mean by terrorism?*" is a necessary question for the lexicographer, and an interesting one for the student of history or social science. For lawmakers, however, it is a dangerous starting point. As I wrote recently:

Many advanced countries managed until recently without special terrorism laws of any kind. The terror label – evocative as it is – risks distorting anything to which it is attached by its sheer emotional power."<sup>265</sup>

- 10.27 The idea that terrorism is a unique form of criminality is supported by an unlikely alliance of opposites, comprising on the one hand those who possess the unique expertise judged necessary to fight it, and on the other hand civil libertarians who reluctantly accept the existence of special anti-terrorism powers but hope to prevent them from seeping into other areas of the law. Terrorist crime does of course have certain special features.<sup>266</sup> But as Lord Lloyd set out in his 1996 review, acts of terrorism should so far as possible be subject to ordinary criminal laws and procedures.<sup>267</sup> The concept of terrorism needs to be defined with a close eye on the specific purposes for which definition is required. Legal definitions should in other words respond to specific operational need, rather than forming the basis for a code which sets terrorism *a priori* apart from other sorts of crime.<sup>268</sup> An added advantage of this approach is that the more specific

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<sup>265</sup> D. Anderson, "Shielding the compass: how to fight terrorism without defeating the law" [2013] 3 EHRLR 233-246, available for free as an SSRN working paper through my website.

<sup>266</sup> I suggested that the two principal distinguishing features, which underlie most if not all of the special powers associated with terrorist crime, are the need to *intervene earlier* and to *rely on evidence that cannot be fully disclosed: ibid.*

<sup>267</sup> Rt. Hon. Lord Lloyd of Berwick, *Inquiry into legislation against terrorism*, Cm 3420, October 1996, 3.1. I endorsed his principles in *Report on the operation of TA 2000 and Part 1 of TA 2006*, July 2011, 11.8.

<sup>268</sup> I have given a number of examples in my reports of circumstances in which special rules have been devised for dealing with "terrorism" without obvious justification, e.g. as regards cordoning, police bail and stopping the clock after arrest.

the purposes for which a definition is needed, the easier it may prove to arrive at a satisfactory one.

### Root and branch review

10.28 My last report observed, in a passage since cited with apparent approval by the Supreme Court, that:

“to revisit from first principles the definition of terrorism would require a root-and-branch review of the entire edifice of anti-terrorism law, based on a clear-headed assessment of why and to what extent it is operationally necessary to supplement established laws and procedures”.<sup>269</sup>

I added that such an exercise would be a “*formidable undertaking*”, going well beyond the scope of an annual report such as this one.

10.29 What I have in mind is a process that would start with the ordinary substance and procedures of the criminal law,<sup>270</sup> and ask “How, and for what reasons, do considerations of national security make it operationally necessary to provide for more?”

10.30 It is generally and rightly accepted that there are criminal acts so serious in their consequences, and/or so complex to investigate, that special powers may be required to deal with them. But the category of “*acts justifying the use of special powers*” is not co-extensive with “*acts of terrorism*” – however that word is defined. Without seeking to predict the findings of such a review, it might for example consider whether:

- a) ***Some special powers are not justified in all cases currently associated with “terrorism”***. Most people are likely to accept that there are cases in which it is necessary to intervene at an earlier stage than the ordinary criminal law might allow in order to prevent a catastrophic terrorist attack. But as was recently argued in this context by a pair of eminent academics:

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<sup>269</sup> *The Terrorism Acts in 2012*, July 2013, 4.5; cited in *R v Gul* [2013] UKSC 64, para 34. My reasons for suggesting that the extent of terrorism powers should be dictated by operational considerations rather than by high-flown generalisations about the “*special*” or “*unique*” nature of terrorist crime are set out in my article “Shielding the compass: how to fight terrorism without defeating the law” [2013] 3 EHRLR 233-246, available for free as an SSRN working paper through my website.

<sup>270</sup> For example, stop and search only on reasonable suspicion; arrest only on suspicion of a specific criminal offence; 24-hour pre-charge detention, extendable to a maximum of 96 hours; no deprivation of liberty outside the criminal/immigration process; precursor offences limited to conspiracy, attempt and incitement.

“The focus on the worst-case scenario should not obscure the fact that terrorism is so ill-defined and the law is so broadly cast that less or even non-harmful activity may come within its remit.”<sup>271</sup>

It might be questioned, on that basis, whether the precursor offences, or the power to detain for up to 14 days prior to charge, are justified in the whole range of circumstances in which they are currently available, or whether some narrower definition of applicability would be appropriate.

- b) **Some special powers are justified in non-“terrorism” cases.** A balanced review might also conclude, if sufficiently strong supporting evidence were presented to it, that certain special powers should be extended to non-terrorist cases. For example, espionage and nuclear proliferation have, quite as much as terrorism, the potential to damage national security. If no-suspicion port powers are needed in order to identify terrorists, it might at least be relevant to ask whether they are needed also to identify the student who might be engaged in espionage, or the engineer seeking nuclear secrets.<sup>272</sup> The effect of such changes would be to extend the range of special powers, but also perhaps to inhibit the need (implicit in *Miranda*) to attribute to terrorism a meaning remote from that which it enjoys in normal discourse.<sup>273</sup>

10.31 It is not to be expected that such a review would vindicate the “*case against special legislation*” that was rejected by Lord Lloyd in 1996,<sup>274</sup> a case now overtaken not least by international developments. Nor, even, would it be likely to recommend the removal of the word “*terrorism*” from the statute book (though since terrorists aim principally to catch the eye, and since the word is a gift to sensation-seeking journalists, something less eye-catching – “*politically-motivated violent crime*”, perhaps – might have been preferable). The review would however aim to ensure that the extent of any special powers is properly matched to operational need, whether or not that need coincides with the boundaries of the current definition of terrorism.

10.32 **I recommend a thorough review of the criminal law in areas related to national security, focussed on the question of to what extent it is necessary to supplement ordinary rules and procedures.**

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<sup>271</sup> A. Ashworth and L. Zedner, *Preventive Justice* (OUP, 2014), p.255.

<sup>272</sup> It will be recalled that Schedule 7 was invoked against David Miranda to deal with what was originally described by MI5 as a case of suspected espionage: 4.12, above.

<sup>273</sup> See 4.15, above.

<sup>274</sup> Rt Hon Lord Lloyd of Berwick, *Inquiry into legislation against terrorism*, Cm 3420, October 1996, 5.6-5.9.

## Amendments to the existing definition

- 10.33 On the assumption that such a review is not imminent, I provisionally suggested in my last report some more limited changes to the current statutory definition of terrorism, and indicated that I would proceed to make some firm recommendations in this report.<sup>275</sup>
- 10.34 I continue to believe that the two principal changes identified last year would be worthwhile. Indeed the *Gul* and (particularly) *Miranda* cases, both decided since last year's report was published, have strengthened my view that they are strongly desirable. Both changes relate to what I have described as the target element of the test.<sup>276</sup> I believe the case for them to be all but unanswerable. If they are to be made, other changes might also be usefully contemplated.

### ***Amendment of “designed to influence a government”***

- 10.35 It is currently sufficient to meet the definition of terrorism that a relevant action be designed either to *intimidate* the public or a section of the public, or to *influence* a government or international organisation.
- 10.36 The second part of that test sets the bar remarkably low. Equivalent definitions from UN conventions and resolutions, the EU and Council of Europe, Commonwealth countries and the USA<sup>277</sup> almost invariably set it higher, using phrases such as:
- a) “where the purpose is .. to **compel** a government or an international organisation to do or abstain from doing any act;”<sup>278</sup>
  - b) “with the aim of **unduly compelling** a Government or international organisation to perform or abstain from performing any act;”<sup>279</sup>
  - c) “to .. **unduly compel** a government or an international organisation to perform or abstain from performing any act;”<sup>280</sup>

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<sup>275</sup> *The Terrorism Acts in 2012*, July 2013, 4.19-4.24.

<sup>276</sup> TA 2000 section 1(1)(b): the condition that “*the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public*”.

<sup>277</sup> Most of these definitions are taken from K. Hardy and G. Williams, “What is terrorism? Assessing domestic legal definitions” (2011) 16 *UCLA Intl L and For Aff* 77-162.

<sup>278</sup> UN Terrorism Financing Convention, 1999, Art 2(1)(b); UNSCR 1566/2004; UN draft Comprehensive Convention on International Terrorism, Article 2(c).

<sup>279</sup> EU Council Framework Decision on combating terrorism, 2002/475/JHA, Art. 1(1).

<sup>280</sup> Council of Europe Convention against Terrorism 2005, preamble.



- d) “with the intention of .. **compelling** .. a government or a domestic or an international organization to do or refrain from doing any act ...”,<sup>281</sup>
- e) “with the intention of **coercing, or influencing by intimidation**, the government of the Commonwealth or a State, Territory or foreign country, or part of a State, Territory or foreign country”,<sup>282</sup>
- f) “to **unduly compel** or to **force** a government or an international organisation to do or abstain from doing any act”,<sup>283</sup> and
- g) “to influence the policy of a government **by intimidation or coercion**”.<sup>284</sup>

The UK appears to be almost unique in allowing mere influence to suffice.<sup>285</sup>

10.37 It is not surprising, therefore, that two comprehensive international studies have respectively concluded that for a domestic definition of terrorism to be consistent with the implicit international consensus on how to define terrorism, it must proscribe certain actions taken, *inter alia*, to

- a) “**coerce** a government or international organization”,<sup>286</sup> and
- b) “**unduly compel** a government or an international organization to do or to abstain from doing any act”.<sup>287</sup>

10.38 The UK’s definition is not only unusual in its breadth: it is **unduly restrictive of political expression**. Influencing governments, whether at home or abroad, is the legitimate aim of all political activity including demonstrations, marches, writing and speech. It is unsafe to allow politically-motivated actions to be classed as terrorism merely on the basis that someone in authority considers them liable to endanger life or create a serious risk to the health or safety of the public. Such a broad definition assists nobody, save the true terrorists whose constituency of sympathisers is swelled by a law which can be easily portrayed as excessive.

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<sup>281</sup> Canadian Criminal Code, section 83.01.

<sup>282</sup> Australian Criminal Code, section 100.1.

<sup>283</sup> New Zealand: Terrorism Suppression Act 2002, section 5.

<sup>284</sup> United States Code, Title 18 §2331.

<sup>285</sup> The only equivalent to which Hardy and Williams refer is the Organisation of African Unity Convention on the Prevention and Combating of Terrorism 1999, Art 1(3)(a)(i), which refers to acts intended to “**induce**” any government, and which in turn influenced the formulation in South Africa’s Protection of Constitutional Democracy Act 2004, section 1(1)(xxv) (“**unduly compel, intimidate, force, coerce, induce or cause ..**”).

<sup>286</sup> R. Young, *Defining terrorism: the evolution of terrorism as a legal concept in international law and its influence on definitions in domestic legislation* (2006) 29 BC Intl and Comp L Rev 23.

<sup>287</sup> B. Saul, *Defining Terrorism in International Law* (2006), p. 66.

- 10.39 Once words such as “*intimidate*” or “*coerce*” are substituted for “*influence*”, these troubling consequences recede. To take two examples already considered, neither the publication by journalists of national security secrets nor the writing of an article discouraging vaccination could conceivably constitute terrorism if a desire to *coerce* (rather than simply influence) the Government is required for the test to be satisfied.
- 10.40 I have seen no convincing case for describing actions as terrorism when they were designed only to ***influence*** the Government (or any foreign government). Indeed, on the contrary:
- a) Lord Lloyd’s suggested test, based on the FBI’s working definition, set the bar higher: “to ***intimidate*** or ***coerce*** a government”.<sup>288</sup>
  - b) Lord Carlile, reporting on the definition of terrorism in 2007, specifically recommended that:
 

“The existing law should be amended so that actions cease to fall within the definition of terrorism if intended only to *influence* the target audience; for terrorism to arise there should be the intention to *intimidate* the target audience.”<sup>289</sup>

I would not insist on the word “*intimidate*”, when others such as “*coerce*”, “*compel*”, “*force*” or indeed “*undermine*” are also available. But in all essentials, both Independent Reviewers agree on the point.
  - c) In his reply to Lord Carlile of June 2007, the Home Secretary (John Reid) advanced no defence of the existing law, stating merely that he did not consider the bar to be set too low by the use of the word “*influence*”. It may be however that his resistance to change was prompted at least in part by a semantic objection to Lord Carlile’s suggestion of the word “*intimidate*”, for he went on to say: “*We consider that there may be problems in terms of using the work intimidate in relation to governments and inter-governmental organisations but this is an issue we will explore further with Parliamentary Counsel*”. The results of those explorations are nowhere recorded.

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<sup>288</sup> Rt Hon Lord Lloyd of Berwick, *Inquiry into legislation against terrorism*, Cm 3420, 1996, 5.23.

<sup>289</sup> *The Definition of Terrorism*, 2007, available through my website, paras 58-59 and recommendation 11.

d) The Government has not sought, either in its formal response to my report or otherwise, to dissuade me from the provisional view on this issue that I expressed clearly in my last annual report.<sup>290</sup>

10.41 It was put to me, in a submission received from a retired senior civil servant in response to my last report, that:

“[T]he use of ‘*influence*’ removes the need to argue over whether a government – or some governments – can be intimidated by the actions or threats. And suppose terrorists take hostages and will trade them for the release of imprisoned colleagues. If the government accepts the deal, that is because considerations of humanity (however ill-advised) have influenced it, not because it was intimidated.”

That submission leaves me unconvinced. There will be scope for argument wherever the threshold is placed: and it is healthier for it not to be placed where it can interfere with (or deter the exercise of) legitimate political activity and expression. The hostage point, together, presumably, with the semantic point raised by the then Home Secretary in response to Lord Carlile, could be dealt with by the use of less subjective words than “*intimidate*” such as “*compel*” or “*coerce*” (as in several of the comparative examples given above).

10.42 A useful addition would be to include the word “***undermine***” in the definition. That conforms to a general understanding of the nature of terrorism,<sup>291</sup> and meets the point that a political assassination (not necessarily amounting to compulsion, coercion or even intimidation) should fall within the definition of terrorism.

10.43 **I therefore recommend that the phrase “*designed to influence the government or an international organisation*” in TA section 1(1)(b) be replaced by the phrase “*designed to compel, coerce or undermine the government or an international organisation*”.**

#### ***Exclusion for firearms and explosives***

10.44 A unique and eccentric feature of the UK definition is TA 2000 section 1(3), which provides that the use or threat of firearms or explosives is terrorism, irrespective of whether the target requirement is satisfied. The motive

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<sup>290</sup> Though its response of November 2013, Cm 8745 (available through my website), did welcome my “*continued focus*” on the “*important issue*” of the definition of terrorism.

<sup>291</sup> In moving the second reading of the Bill that became TA 2000, the then Home Secretary Jack Straw stated that: “*terrorism differs from crime motivated solely by greed in that it is directed at undermining the foundations of government*”: Hansard HC 14 December 1999, col 152.

requirement, presumably, must still be met.<sup>292</sup> Shootings and bombings for the purpose of advancing a political, religious, racial or ideological cause will thus always constitute terrorism, irrespective of whether they are intended to influence a government or intimidate the public or a section of the public.

- 10.45 The provision was not recommended by Lord Lloyd. It runs directly counter to the avowed intention of the proponent of the Bill, the then Home Secretary Jack Straw, of identifying an act as terrorism only when it “*aims to create a climate of extreme fear*”, “*is aimed at influencing a wider target than its immediate victims*” or “*is directed at undermining the foundations of government*”.<sup>293</sup> Though not judged objectionable by Lord Carlile,<sup>294</sup> section 1(3) has no parallel so far as I am aware in other jurisdictions.
- 10.46 During the passage of the Terrorism Bill in 2000, the provision that became section 1(3) was explained by the then Home Secretary, Charles Clarke, on the following basis:

“That is to cover, for instance, an assassination in which the terrorist’s motive might be less to put the public in fear, or to influence the Government, than to ‘*take out*’ the individual. Examples might include religious leaders, or scientists involved in controversial research. Although we accept that such circumstances are likely to occur rarely, we think it important for the Bill to be framed in such a way that the police are in no doubt that the special powers it provides are available to them in such circumstances.”<sup>295</sup>

That justification appears weak. Assassinations of non-governmental figures are murders: it is not clear why they should also need to be characterised as terrorism. In any event, the subsection is not apt to achieve the stated aim, since it would apply only to assassination by shooting or bombing, and not for example to stabbing or poisoning.

- 10.47 Section 1(3) is not as damaging to civil liberties as the “*influence the government*” criterion already discussed, because threats to bomb or to shoot are reprehensible in a sense that will not always be true of ill-advised political and journalistic activity, and because ideologically-motivated bombers and shooters will often tend to intimidate a section of the public, thus reducing the significance of section 1(3).

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<sup>292</sup> I explain what I mean by the target and motive requirements at 10.6, above.

<sup>293</sup> Jack Straw, introducing the second reading debate: Hansard HC 14 December 1999, col 152.

<sup>294</sup> *The Definition of Terrorism*, 2007, paras 73-74.

<sup>295</sup> Hansard HC, 10 July 2000, col 643.

- 10.48 The provision is however distinctly unhelpful, both because it needlessly complicates an already complex definition and because it unduly stretches the definition of terrorism. It makes a terrorist of the boy who threatens to shoot his teacher on a fascist website, and of the racist who throws a pipe bomb at his neighbour's wall, in each case intending only to harm (or alarm) their immediate victims. The criminality of such people is obvious, and serious; but the terrorist label is inappropriate.<sup>296</sup>
- 10.49 In addition, as noted at 10.46 above, the special treatment for shooters and bombers is illogical. If the ideologically or politically-motivated use of firearms can be terrorism without any broader intention to influence, intimidate or coerce, why should the same not be true of the use of a car to run someone down, or a machete to sever his head? Is a crude pipe bomb (perhaps converted from a firework) more deserving of the “*terrorism*” label than a sarin attack, or a flaming rag through the letterbox? These questions answer themselves. The special treatment for explosives and firearms offences lacks rhyme or reason.
- 10.50 **I accordingly recommend that TA 2000 section 1(3) should be repealed.**

***Other possible changes***

- 10.51 Should an amendment of TA 2000 section 1 be embarked upon, at least two other issues would bear consideration as part of the process. While stopping short of a formal recommendation, I briefly address them here.
- 10.52 The first of those is ***an express exemption for advocacy, protest, dissent and industrial action*** that is not intended to have the consequences characteristic of a terrorist act. Enshrined in Australian law<sup>297</sup> where it has been described by the former Independent National Security Legislation Monitor in Australia [INSLM] as “*world best*” and as “*a commendable effort to remove legitimate political dissent from the definition of terrorist act*”,<sup>298</sup> such an express exemption might also be of value in the United Kingdom. For as long as the statutory guarantees of freedom of expression and freedom of assembly remain part of our law,<sup>299</sup> however, it could be argued that the courts already have the necessary tools to safeguard those freedoms.

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<sup>296</sup> As Simon Hughes MP asked the then Home Secretary in debate on the Terrorism Bill: “[D]oes he honestly believe that the act of one person with one firearm endangering one person’s life from some ideological motive – albeit that that is a criminal, undesirable act that would deserve to be severely punished – should be classed not as an ordinary crime but as an act of terrorism, with all the implications that that has?” Hansard HC, 10 July 2000 col 641.

<sup>297</sup> Australian Criminal Code, section 100.1(3).

<sup>298</sup> INSLM, second Annual Report of December 2012, VI.10, p. 103.

<sup>299</sup> Human Rights Act 1998, giving effect to Articles 10 and 11 of the ECHR.

10.53 The second issue is **the possible repeal of the motive requirement**. I described the argument last year as finely-balanced, noting what I referred to as “*the likely irrelevance of motive to the operational requirements which are the best and perhaps the only justification for terrorism-specific laws and procedures*” but coming down against repeal on the basis that “*it would substantially, unnecessary and undesirably broaden the category of cases that could be characterised as terrorism*”.<sup>300</sup> That objection continues to weigh heavily with me,<sup>301</sup> though if my recommendations on the target requirement are accepted, its force would diminish<sup>302</sup> and it might be considered desirable to look at the issue again.

### The penumbra of terrorism

10.54 The excessive reach of anti-terrorism law (at least in some of its aspects) stems not only from the way in which terrorism is defined, but from the manner in which that definition is extended – sometimes very significantly – in the provisions that define the scope of certain powers.

10.55 This is a relatively recent tendency. Some special anti-terrorism powers are designed, quite properly, to deal only with terrorists. For example:

- a) The TA 2000 **arrest power** requires suspicion that a person be a terrorist, defined as someone who has committed an offence under specified sections of the Act, or who has been concerned in the commission, preparation or instigation of acts of terrorism [**CPI**].<sup>303</sup>
- b) The TA 2000 Schedule 7 **port powers** may be used only for the purposes of determining whether a person travelling through the port appears to be or to have been concerned in CPI.<sup>304</sup>
- c) The power to **proscribe organisations** may be exercised only in respect of groups which *are* concerned in terrorism.<sup>305</sup> Though “*concerned in terrorism*” extends a little beyond CPI,<sup>306</sup> the limitation to the present tense makes (or

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<sup>300</sup> *The Terrorism Acts in 2012*, July 2013, 4.11 and 4.15-4.16.

<sup>301</sup> For example, repeal of the motive requirement would still (undesirably) render a gangland stabbing terrorism, even if my other recommendations are accepted: *The Terrorism Acts in 2012*, July 2013, 4.16(a).

<sup>302</sup> Thus, the repeal of section 1(3) would at least prevent the shooting of a spouse or the threatening of a burglar with a gun from being characterised as terrorism – even if the motive requirement were removed from the law: *ibid.*, 4.16(b).

<sup>303</sup> TA 2000 sections 40-41.

<sup>304</sup> TA 2000 section 40(1)(b) and Schedule 7 para 2.

<sup>305</sup> TA 2000 section 3(4).

<sup>306</sup> TA 2000 section 3(5), as interpreted by POAC and by the Court of Appeal in the PMOI case, *SSH D v Lord Alton of Liverpool* [2008] EWCA Civ 443, paras 35-38.

would make, if the law were properly applied) it impossible to maintain the proscription of organisations whose involvement in terrorism cannot be shown to persist.<sup>307</sup>

10.56 Two powers of more recent vintage have however been endowed with a very much wider application. Each is the subject of a separate annual report: but for the sake of a coherent account they are mentioned here:

- a) The power to designate individuals or organisations under the Terrorist Asset-Freezing &c. Act 2010 [**TAFA 2010**] may be exercised on the basis of “*involvement in terrorist activity*”: a concept embracing not only CPI but conduct facilitating CPI and even support or assistance for someone facilitating CPI.<sup>308</sup>
- b) The power to subject individuals to a measure under the Terrorism Prevention and Investigation Measure Act 2011 [**TPIMA 2011**] may be exercised on the basis of “*involvement in terrorism-related activity*”, a concept still more broadly defined as encompassing CPI, conduct which facilitates or encourages CPI or is intended to do so, and conduct which gives support or assistance to individuals who are known or believed to be engaging in CPI, facilitation or encouragement.<sup>309</sup>

10.57 The reach of these more recent powers is extraordinary – particularly as they are the most extreme of all the anti-terrorism powers in their effect. As I said earlier this year:

“It is for consideration whether measures as strong as TPIMs need or ought to be available for use against a person whose connection with an act of terrorism could be as remote as the giving of *support* to someone who gives *encouragement* to someone who *prepares* an act of terrorism.”<sup>310</sup>

10.58 A number of options could be envisaged. For example:

- a) The application of the asset-freezing and TPIM powers could be limited to those whom the Home Secretary reasonably believed<sup>311</sup> to have committed an offence under the Terrorism Acts. So broad is the range of preparatory

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<sup>307</sup> See 5.6-5.13, above.

<sup>308</sup> TAFA 2010 section 2.

<sup>309</sup> TPIMA 2011 sections 3(1) and 4.

<sup>310</sup> *TPIMs in 2013*, March 2014, 6.14.

<sup>311</sup> Or could show on the balance of probabilities to have done so: *Terrorism Prevention and Investigation Measures in 2013*, March 2014, paras 6.16-6.18 and Recommendation 3; *First report on the operation of the Terrorist Asset-Freezing &c. Act 2010*, December 2011, 3.30 and 10.4(b).

and ancillary activity to have been criminalised that the powers would remain comprehensive in their reach. They could still be used when the criminal law could not, because the criminal standard of proof would not be applied, and because it would remain open to the Home Secretary to have regard to the full range of available intelligence, regardless of whether it could be deployed in a public court.

- b) Less radically, the concept of “*terrorism-related activity*” in TPIMA 2011 could be cut down so as to correspond to the slightly less broad concept of “*terrorist activity*” in TAFE 2010.

10.59 **I recommend that the very broad definitions of “*terrorist activity*” and “*terrorism-related activity*” in TAFE 2010 and TPIMA 2011 be revisited, with a view to narrowing them.**<sup>312</sup>

### **Geographical universality**

10.60 A striking feature of the UK’s definition of terrorism is its geographical universality. In the words of the Court of Appeal:

“Section 1 does not specify that the ambit of its protection is limited to countries abroad of any particular type or possessed of what we, with our fortunate traditions, would regard as the desirable characteristics of representative government. There is no list or Schedule or statutory instrument which identifies the countries whose governments are included within section 1(4)(d) or excluded from the application of the Act. Finally, the Act does not exempt, nor make an exception, nor create a defence for, nor exculpate, what some would describe as terrorism in a just cause. Such a concept is foreign to the Act. Terrorism is terrorism, whatever the motive of the perpetrators.”<sup>313</sup>

10.61 The alternatives do not seem practical. Thus:

- a) To distinguish between deserving and undeserving targets of terrorism would require the maintenance of a constantly-changing list of “*good*” and “*bad*” governments, in the form either of the statutory instrument envisaged by the Court of Appeal or a system of ministerial certificates. That idea is fraught with diplomatic and practical difficulties, and has not previously been considered workable.

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<sup>312</sup> Cf. *ibid.*, Recommendation 2.

<sup>313</sup> *R v F* [2007] EWCA Crim 2; [2007] QB 963, per Sir Igor Judge P at para 27.



- b) To confine the definition of terrorism, in the overseas context, to actions against civilians<sup>314</sup> would also be problematic. There is merit in the idea that whilst attacks on civilians are never justifiable, attacks on Governments may sometimes be. But the suggested remedy is too strong a medicine. If terrorist attacks against all foreign governments were excluded from the UK's definition, mass hostage-takings aimed at coercing the government of a friendly nation (for example, the USA or an EU Member State) would not qualify as terrorism under UK law. Even if this were consistent with international law, it would be hard to imagine anything less calculated to help the standing of the UK as a reliable partner in the fight against global terrorism.

10.62 It may even be argued that there is virtue in geographical universality. True, to criminalise armed resistance against tyranny or invasion anywhere in the world is to set the law against conduct that many right-thinking people would consider justified and even heroic. But on the other hand:

- a) No member of the public should have to suffer terrorism. As the Court of Appeal has stated, "*We can see no reason why, given the random impact of terrorist activities, the citizens of Libya should not be protected from such activities by those resident in this country in the same way as the inhabitants of Belgium or the Netherlands or the Republic of Ireland*".<sup>315</sup>
- b) Even violence against a malign government may cause damage to the civilian population. As the Court of Appeal also said, "*even under the yoke of tyranny, not all the inhabitants would welcome terrorist violence*".<sup>316</sup>
- c) The pill is to some extent sweetened by statutory requirements that the Attorney General must consent to prosecution in relation to terrorist offences committed outside the UK or for a purpose wholly or partly connected with the affairs of such a country.<sup>317</sup> Such wide discretions are dangerous in principle, as the Supreme Court recently pointed out in *R v Gul*. But the dangers may be less acute when foreign affairs, traditionally the prerogative of the executive, are in play. Where the public interest in prosecution depends heavily on considerations of foreign policy, some degree of political involvement in the prosecutorial decision as to whether a prosecution is in

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<sup>314</sup> This was the thrust of amendments to the Bill which became TA 2006, laid by John Denham and Douglas Hogg: Hansard HC 3 November 2005, cols 1062-1065 and 1070.

<sup>315</sup> *Ibid.*, para 26.

<sup>316</sup> *Ibid.*, para 30.

<sup>317</sup> TA 2000 section 117(2A); TA 2006 section 19(2). The figures for such consents are given at 9.15-9.17, above.

the public interest may be justified – particularly if it is feasible to provide guidance that could make the prosecution process more predictable.<sup>318</sup>

- d) There are evident difficulties in making terrorists of those who are fighting for similar objectives to British forces, as for example in Libya in 2011. But warfare often throws up paradoxes of this kind. Indeed the swirling and dangerous politics of the Middle East and North Africa may argue in favour of maintaining the current broad discretions, on the basis that decision-makers need to be able to respond swiftly to changing events.
- e) There remains a risk that political reasons might drive the use of prosecutorial powers as a favour to friendly (but oppressive) foreign regimes. Similar dangers are inherent in the system of proscription, as I have previously remarked.<sup>319</sup> A partial further safeguard (albeit of a last-ditch nature) is however provided by the jury system: juries are generally reluctant to convict those who can portray themselves as freedom-fighters and whose threat to the UK or its nationals is not evident.<sup>320</sup>

10.63 I do not recommend that the universal geographical application of UK anti-terrorism law be reduced, not least because I can see no practical way of doing so. One aspect of the subject however requires specific consideration: the question of whether anti-terrorism law should acknowledge an exemption for those engaged in non-international armed conflict against a foreign State.

### **Armed conflict exemption**

10.64 The Supreme Court held in *R v Gul* that the definition of terrorism in TA 2000 section 1 currently includes within its scope military attacks by a non-state armed group against the armed forces of a state or inter-governmental organisation in the course of a non-international armed conflict.<sup>321</sup> It noted:

- a) that there is no requirement of an exclusion for such attacks in international law, or even any consistent practice to be derived from international counter-terrorism conventions or from UN Security Council resolutions;<sup>322</sup>

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<sup>318</sup> Cf. *Fox, Canning and McNulty* [2013] NICA 19 (need for guidance on the use of domestic stop and search power).

<sup>319</sup> *The Terrorism Acts in 2011*, June 2012, 4.38-4.40 and Recommendation 12.9.

<sup>320</sup> *Ibid.*, 4.21.

<sup>321</sup> A non-international armed conflict, broadly speaking, is a conflict within the territory of a single state to which at least one of the parties is non-governmental in nature, and which amounts to more than a riot or an isolated sporadic act of violence. In common parlance, it may be referred to as a rebellion, an insurgency or a civil war.

<sup>322</sup> [2013] UKSC 64, paras 48-49.

- b) that participants in non-international armed conflict do not enjoy combatant immunity under international humanitarian law;<sup>323</sup> and that
  - c) state practice is varied, with 28 out of a sample of 42 states not excluding such attacks from their definitions of terrorism.<sup>324</sup>
- 10.65 The Supreme Court did not however answer (or even suggest a view on) the policy question of whether there *should* be such an exemption.<sup>325</sup>
- 10.66 Central to the debate is the fact that violent methods of war are already regulated by international humanitarian law [IHL], also known as the law of armed conflict. Operations directed against military objectives are not war crimes under IHL, whereas direct and deliberate attacks on civilians (whether by states or by armed groups) do constitute war crimes and are subject to prosecution in the territorial state, the state of nationality of the perpetrator and sometimes in third states as well.
- 10.67 The application of UK anti-terrorism law to UK nationals engaged in non-international armed conflicts abroad imposes an additional (and in some respects contradictory) set of prohibitions on activity which is already governed by IHL. That has been argued to bring a number of potentially undesirable effects, including the following:
- a) By criminalising a wider range of actions than does IHL, it is said to **destroy the incentive of armed groups and individuals to comply with IHL**. If liable to be prosecuted as terrorists, they have no reason to avoid contravening IHL, for example by confining themselves to military targets.
  - b) Extended forms of criminal responsibility for terrorism (such as providing material support for terrorism, or associating with terrorists) may **criminalise beneficial action** by humanitarian groups, aid agencies and conflict resolution groups, impeding their work and aggravating human suffering.
  - c) It is liable to **apply asymmetrically**, exposing anti-government fighters but not pro-government fighters to prosecution for terrorism offences.

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<sup>323</sup> *Ibid.*, para 50.

<sup>324</sup> *Ibid.*, para 51. As I noted last year, Canada, South Africa, Austria and Belgium do however include such exemptions in their law; and two recent reports (not so far responded to by the Government) have recommended that Australia too should incorporate one.

<sup>325</sup> For a lucid and erudite introduction to this subject, see J. Pejic, "Armed conflict and terrorism: there is a (big) difference" in Salinas de Frías, Samuel and White eds., *Counter-Terrorism: international law and practice* (Oxford, 2012), chapter 7. In seeking to come to grips with this subject I have benefited also from the assistance of three kind and distinguished professors: Robert McCorquodale, Ben Saul and Clive Walker.

10.68 There is certainly force in those arguments, though confidence in the first would be improved by the presentation of empirical evidence, and there may be other ways, which I have begun to discuss with NGOs, of making progress on the second. But as young Britons travel in unprecedented numbers to train and fight in war zones, recruiting others through social media and raising fears that some will perpetrate acts of terrorism on their return, it is unrealistic to suppose that the Government might simply exempt the activities of foreign fighters from the scope of anti-terrorism law. If this were to happen, compensatory changes would have to be considered to other parts of the law. There is a real debate to be had about how the law should treat foreign fighters: but it will not be resolved by mere definitional tweaking.

10.69 Accordingly, I do not at this stage recommend that an exemption for actions committed in the course of armed conflict should be built into the UK definition of terrorism. Though some of the underlying issues can be framed in those terms, their implications go well beyond it. Before specific recommendations can be made, a legally-informed policy debate is needed on such wide-ranging issues as:

- a) whether UK citizens should in principle be prohibited not only from committing war crimes but from fighting or supporting those fighting in some or all non-international armed conflicts abroad;<sup>326</sup>
- b) whether any prohibition should relate to fighting on both sides, or merely to fighting against foreign governments;<sup>327</sup>
- c) whether any prohibition should be reflected in anti-terrorism law and if so, on what basis (the inherently “*terroristic*” nature of participating in foreign conflicts, or the risk that terrorist behaviour will be repeated in the UK on their return) and in what terms;<sup>328</sup>

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<sup>326</sup> Some, citing the example of British fighters in the Spanish Civil War, believe strongly that they should not. It is legitimate to ask why UK citizens should be required to abstain from supporting those who are forcibly resisting massacre by their own governments, in circumstances where the international community has been unable or unwilling to intervene.

<sup>327</sup> This is a topical issue in Australia, from where Muslims are reported to be travelling to fight for pro-Assad as well as for anti-Assad forces in Syria.

<sup>328</sup> For example, should an exemption extend to all acts of violence governed by IHL, or just to acts of violence consistent with or in conformity with IHL (thus allowing attacks on civilians, though not on military targets, to be prosecuted as terrorist offences as well as war crimes)?

- d) whether, if so, the applicability in armed conflict of defences to specific terrorist crimes such as self-defence and reasonable excuse should be clarified or extended;<sup>329</sup>
- e) whether any exclusion of or exemption from anti-terrorism law should benefit those who (like Mr Gul) are accused in the UK of offences ancillary to conflicts abroad;<sup>330</sup>
- f) whether, conversely, the lawfulness of fighting abroad should be regulated by a measure distinct from both anti-terrorism law and IHL, and directed specifically to that issue;<sup>331</sup>
- g) what if any mechanism should exist, under such a scheme, for determining which conflicts it is legitimate to fight in;<sup>332</sup> and
- h) what protections should be afforded to humanitarian, aid-giving and conflict resolution agencies.<sup>333</sup>

10.70 The legal treatment of foreign fighters would be well suited to detailed examination from both a comparative legal and a policy perspective. Such a task, however, seems broader than would be appropriate for an Independent Reviewer whose statutory functions are limited to reviewing the operation of specified anti-terrorism laws.

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<sup>329</sup> See *R v AY* [2010] 1 WLR 2644. [2010] EWCA Crim 762.

<sup>330</sup> See the Canadian case *R v Khawaja* (2012) SCC 69, 14 December 2012.

<sup>331</sup> The Foreign Enlistment Act 1870, passed at the time of the Franco-Prussian war but little used since, makes it a criminal offence to enlist in the military or naval service of a state at war with a foreign state at peace with the United Kingdom. Australia's Crimes (Foreign Recruitment and Incursions) Act 1978 makes it an offence to enter a foreign state with intent to engage there in a hostile activity, and to engage in such an activity in a foreign State (though not, *inter alia*, if serving with the armed forces of a foreign government): see the discussion in the INLSM's s fourth annual report of 28 March 2014, chapter III.

<sup>332</sup> The Australian offences just referred to do not apply to service with a non-governmental armed force for which the Attorney General has declared that recruitment in Australia is "*in the interests of the defence or international relations of Australia*": *ibid*. Professor Saul has suggested that the presumption of unlawfulness should be reversed, at least for dual nationals.

<sup>333</sup> A cautious note was sounded by the INSLM, who recently wrote that there were "*strong policy reasons for limiting humanitarian exceptions to those involved in activities on behalf of dedicated agencies of humanitarian aid which, by virtue of their nature and standing, are most unlikely ever to fall foul of Australia's counter-terrorism laws*": 4<sup>th</sup> annual report of 28 March 2014, III.7, citing the single example of Médecins sans Frontières.

## 11. INDEPENDENT REVIEW

### The value of independent review

- 11.1 In a healthy parliamentary democracy it is Parliament and the courts which should be primarily responsible for reviewing the operation of the law.
- 11.2 More is however required in the national security field, where potential conflicts between state power and civil liberties are acute, and yet information is tightly rationed. The courts are confined to issues of lawfulness and to the cases that are brought to them, while few parliamentarians will be privy to the national security information that could enable them to make a fully-informed judgement on matters of policy.
- 11.3 In those circumstances, there is a place for respected independent persons who see the classified information to which Ministers, police and others are privy, and report openly on the operation of the law. That place is occupied in the field of intelligence supervision by the Intelligence Commissioners, and in the field of counter-terrorism law by the Independent Reviewer of Terrorism Legislation. Successive Independent Reviewers have for over 35 years influenced policy and the operation of the laws within their remit, both directly (by formal or informal recommendations) or via parliamentary and court processes.<sup>334</sup> They have also been a source of reassurance to a wary public.

### Topics for debate

- 11.4 It is generally acknowledged that the office of Independent Reviewer is a useful one. But it does not follow that the current system, as it has rather haphazardly developed over the years, is optimal. The following topics require consideration:
- a) Status of the Independent Reviewer
  - b) Scope and frequency of independent review
  - c) Powers and functions of the Independent Reviewer.

My thoughts on each of those topics are set out below.

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<sup>334</sup> Examples of each form of influence, with much more detail on the history and current functions of the Independent Reviewer, are given in my recent article "The independent review of terrorism laws" [2014] Public Law 403-420. A working paper on which the article is based, entitled "Independent review of terrorism legislation: searchlight or veil?", is freely available through my website.

## Status of the Independent Reviewer

- 11.5 It has been suggested at various times since 1984 that the Independent Reviewer should be either a committee of persons with different expertise or at least an individual working full-time. As his workload rose after the 7/7 attacks, Lord Carlile was offered (and declined) the opportunity to do the job on a full-time basis.
- 11.6 My own preference is that the Independent Reviewer should continue to be an individual operating on a part-time basis, albeit with additional support. I would make the following points:
- a) All four holders of the post since 1986 have been QCs, and whilst that could not be described as an essential requirement, it is an indicator of the core qualities that have (I would say rightly) been sought in the past. Self-employed lawyers of the best quality may be attracted by a part-time post; but they are most unlikely to leave their profession for a full-time appointment of several years' duration. Some might be tempted by a place on a committee or quango; but without sole responsibility for its output, there is a strong risk that they will focus their efforts elsewhere and leave much of the work to be done by the secretariat or by others.
  - b) A single occupant of the post has the chance to build personal relations with parliamentarians, media and others; and is accountable for every word written or spoken. This drives up the quality of the work, and lends immediacy and recognition to a post which could be faceless if performed by a committee.
  - c) The particular value of the Reviewer's post comes from the remarkable degree of access that trusted individuals have since 1978 been given to secret Government papers and discussions. If the work were to be done by a committee, the same access would have to be given to each of its members, backed by watertight statutory guarantees and full institutional cooperation of agencies. Should either of these not be forthcoming, the effectiveness of review could be severely diminished.
  - d) Continued participation in professional life is the surest guarantee of independence. A Reviewer whose livelihood depended on re-appointment (or on appointment to another post within the gift of Ministers) would be difficult to describe as fully independent.
- 11.7 I therefore recommend no change to the status of the Independent Reviewer. If further capacity is required, it should be provided by the services of a security-

cleared assistant or junior, rather than by making the post full-time or replacing it by a committee.

- 11.8 I must record however that on 15 July 2014, after this Report had been submitted and very shortly before it went to press, the Government proposed that the Independent Reviewer be replaced by a committee, to be known as the Independent Privacy and Civil Liberties Board **[IPCLB]**.<sup>335</sup> My rather equivocal thoughts on that proposal were published the following day on my website.<sup>336</sup> In short, such a Board if properly constituted could bring advantages: but the wrong decisions could substantially diminish the value that is offered by the current arrangements, particularly if there were any reluctance to share classified information with a larger and more varied group. If the proposal is progressed, I would suggest that it requires the most careful scrutiny.
- 11.9 **I recommend that the Government's proposal to replace the Independent Reviewer of Terrorism Legislation by an Independent Privacy and Civil Liberties Board be subject to the widest possible consultation, including with the parliamentary Committees which are among the principal users of the Independent Reviewer's reports.**

## Scope and frequency of independent review

### *Current functions*

- 11.10 The three principal statutory functions of the Independent Reviewer are to review the operation on an annual basis of **TPIMA 2011**, the **Terrorism Acts** and **TAFA 2010**. Those three annual reports are substantial documents, time-consuming to produce and normally published in March, July and December. The asset-freezing function was new in 2011;<sup>337</sup> and the power to visit TA 2000 detainees nationwide with a view to considering whether relevant requirements had been complied with came into force in August 2012.<sup>338</sup>
- 11.11 **One-off reports** may also be commissioned by the Home Secretary. Some of these have been major undertakings, notably Lord Carlile's 2007 report on the definition of terrorism and my own pending report on deportation with assurances, due by the end of 2014.

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<sup>335</sup> Its proposed terms of reference are here: <https://www.gov.uk/government/publications/the-data-retention-and-investigatory-powers-bill>. If such a body is to be established, I would suggest that a name such as "Independent Counter-Terrorism Oversight Panel" would better reflect its functions as set out in the terms of reference.

<sup>336</sup> <https://terrorismlegislationreviewer.independent.gov.uk/whirligig/> .

<sup>337</sup> TAFE 2010 section 31.

<sup>338</sup> TA 2006 section 36, inserted by Coroners and Justice Act 2009 section 117(1)-(3).



- 11.12 It is well established that the Independent Reviewer may conduct reviews of his own initiative.<sup>339</sup> Generally these have been **snapshot reports** into specific police operations (Operation Pathway 2009; Operation Gird 2011). It is conceivable that the Independent Reviewer might choose to review distinct policy areas, but the limits of this own-initiative power have not so far been tested.
- 11.13 The Independent Reviewer also needs from time to time to be acquainted with **other topical subjects**. For example, significant time in 2011-12 was occupied by the “secret evidence” proposals which led to the Justice and Security Act 2013, a debate to which I contributed at the invitation first of the Cabinet Office and then in repeated written and oral evidence to the JCHR.<sup>340</sup> Appearances before parliamentary committees and media interviews tend to range widely, making it prudent to acquire at least basic knowledge of subjects not directly with the Independent Reviewer’s remit, such as the Prevent programme and issues relating to surveillance.
- 11.14 Even without the additional functions mooted below, the commitment of time is currently running at some 15 days per month: close to the limit of what can be managed within the constraints even of a much slimmed-down legal practice.

### **Suggested additional functions**

- 11.15 Some additional functions are contingent on future developments. For example, the Independent Reviewer will have to report (or commission a report) on any person who is detained for more than 14 days, should the draft Bill permitting this ever be passed into law.<sup>341</sup>
- 11.16 Further functions are suggested from time to time. In recent months:
- a) Provision has been made in the Immigration Act 2014 for the periodic review of the new power to deprive naturalised British citizens of their citizenship, even when to do so would render them stateless.<sup>342</sup> The Security Minister stated that “*it may be appropriate to appoint the Independent Reviewer to*

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<sup>339</sup> The Home Secretary acknowledged the Independent Reviewer’s power to issue *ad hoc* reports in a statement recorded in Hansard HC 18 July 2011, col 85WS: see JCHR 17<sup>th</sup> Report of Session 2010-2012, HL Paper 192 HC 1483, para 40. Accordingly, when in August 2013 I proposed to produce a separate report on David Miranda’s arrest (subsequently overtaken by litigation and by this Report), I notified the Home Secretary of the fact rather than requesting her permission.

<sup>340</sup> An account of my part in that debate is given in “The independent review of terrorism laws” [2014] Public Law 203-220; a free working paper is also available through my website.

<sup>341</sup> TA 2006 section 36(4)(4B), inserted by Protection of Freedoms Act 2012, section 58.

<sup>342</sup> British Nationality Act 1981 section 40B, inserted by Immigration Act 2014, section 66(3).

*take on this task*", so long as it was "*not detrimental to his capacity to meet his existing important statutory reviews*".<sup>343</sup>

- b) The HASC recommended, also in May 2014, that the Independent Reviewer should conduct two further reviews, of:
  - a. the policy of withdrawing passport facilities pursuant to the royal prerogative,<sup>344</sup> and of
  - b. the abuse of charitable status to support terrorist actions.<sup>345</sup>

The Independent Reviewer has also been suggested, including by members of the JCHR, as an appropriate person to conduct the 5-year review of closed material procedures that is provided for by the Justice and Security Act 2013.

- c) The Home Secretary announced in Parliament on 10 July 2014 that the Independent Reviewer had been asked to conduct, by May 2015, a report into the interception and communications data powers that are needed, and the way in which those powers and capabilities are regulated. She undertook that he would have the necessary resources and support for this task.<sup>346</sup>

### ***Omissions from the scope of independent review***

- 11.17 The intention of independent review was always that it should extend to all anti-terrorism laws. That was the case from the beginning in 1977 until 2001.
- 11.18 As laws have proliferated since that date, significant omissions from the statutory remit have arisen. These include, in particular, the Anti-Terrorism Crime and Security Act 2001 and the Counter-Terrorism Act 2008, now largely in force. There is no regular review of the Prevent programme, though Lord Carlile was invited to review it in 2010. Nor (save when invited to do so, as in the case of deportation with assurances) does the Independent Reviewer look at immigration law as an aspect of counter-terrorism policy.
- 11.19 Somewhat patchy coverage has resulted. Thus, for example:
  - a) Terrorist asset-freezing and sanctions must be reviewed annually, to the extent that they fall within TFA 2010: but there is no coverage of the

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<sup>343</sup> Hansard HC 7 May 2014, vol 580 col 199.

<sup>344</sup> HASC, *Counter-Terrorism* (17<sup>th</sup> Report of Session 2013-14, HC 231), para 96. Judicial review of this function is available; broader independent review might help allay the suspicions of those who claim that the transfer of controversial powers from settings where they are reviewed to settings where they are not is designed to mask their misuse.

<sup>345</sup> *Ibid.*, para 135.

<sup>346</sup> Hansard HC, 10 July 2014, cols 456, 462, 466.

regimes in Part II of ATCSA 2001, the Regulations which implement UNSCR 1267 or part 5 and Schedule 7 of the Counter-Terrorism Act 2008. An overall appraisal of the Government's approach to terrorist financing is therefore not possible, at least within the constraints of the Independent Reviewer's statutory powers, let alone a broader review such as that recommended by the HASC concerning the misuse of charitable status.

- b) TPIMs are subject to annual review, whereas measures liable to have some similar effects – notably, the use of the royal prerogative to withdraw passport facilities – are not.
- c) There is no review at all of such important matters as post-charge questioning, notification requirements and the use of Diplock courts.

I do not suggest that matters which are currently unreviewed would require review on an annual basis. It is anomalous however that they are not reviewed at all.

11.20 The Home Secretary stated in March 2013, responding to my report of June 2012, that “*the scope of the Independent Reviewer's responsibilities should keep pace with changes to primary legislation*”, and accepted in principle my recommendation that the 2001 and 2008 Acts “*should be examined with a view to extending your statutory functions to include the review of relevant sections of those Acts*”. This was to be considered as part of the post-legislative scrutiny of the 2008 Act, which is now complete.<sup>347</sup>

11.21 This principle was given effect when the Government announced its intention of establishing an IPCLB, as noted below.

### ***The problem***

11.22 The problem, in summary, is threefold.

11.23 First, ***significant parts of the law as it relates to counter-terrorism are going unreviewed***. This is unsatisfactory, not least because it makes it difficult for the Independent Reviewer to assure Parliament or the public that all is as it should be. More than one person of a suspicious cast of mind has suggested to me that the unreviewed powers (for example, the use of the Royal Prerogative to withdraw passport facilities) are likely to be used for the purposes of doing the Government's “*dirty work*”.

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<sup>347</sup> Home Office Memorandum to HASC, *Post-legislative scrutiny of the Counter-Terrorism Act 2008*, Cm 8834, March 2014.

- 11.24 Secondly, ***the remaining powers must be reviewed to an inflexible annual schedule***. This is the legacy of the days, now gone, when anti-terrorism legislation was subject to annual parliamentary renewal, and a report was called for to inform the renewal debate.<sup>348</sup> In some cases (for example the initial two years of the TPIM regime), annual review may be entirely appropriate. In others, it might be considered unnecessary and excessive, or at any rate a relatively low priority.<sup>349</sup>
- 11.25 ***Thirdly***, and partly as a consequence of the second point, ***the Independent Reviewer is currently operating at the limit of his capacity***. Yet it has been acknowledged that his statutory functions should in principle be extended to the 2001 and/or 2008 Acts; other provisions are deserving of review; further reports are from time to time requested by Ministers or parliamentary committees; and a measure of flexibility is needed to deal with one-off requests, own-initiative reviews and the unexpected.

### ***The solution***

- 11.26 Something needs to change. For the reasons given above, I suggest that to make the job full-time, or to replace it by a committee, is not the best answer.
- 11.27 I do however make two recommendations, the first of which (like the Government's alternative proposal for an IPCLB) would require statutory change.
- 11.28 **First, I recommend that the current system (fixed annual review of four statutes, with the remainder left unreviewed save in the event of a one-off request) be replaced by a more flexible arrangement whereby the Reviewer or reviewing body, having consulted the relevant Ministers and Parliamentary committees, sets out an annual work programme which will allow him to cover those aspects of the law relating to terrorism that he considers most in need of review.**
- 11.29 Analogies for this way of working are:
- a) the Independent Chief Inspector of Borders and Immigration (UK Borders Act 2007, section 51); and

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<sup>348</sup> The last anti-terrorism statute requiring annual renewal was the Protection of Terrorism Act 2005, repealed in 2011.

<sup>349</sup> The TAFE 2010 regime was very fully reviewed in 2011, and all my recommendations accepted. Since then it has been little used, and I would question whether annual reports have been a major priority, particularly bearing in mind the very full information that is now released by the Treasury (following my recommendation) on a quarterly basis.

b) the INSLM in Australia, a post modelled on that of the Independent Reviewer, who has worked methodically through the entirety of his statutory remit in his four reports of 2011-2014.

11.30 It is for consideration how the category of reviewable laws and the nature of review should be expressed. A useful starting point would be the statutory remit of the INSLM, which requires the Monitor to review the operation, effectiveness and implications of counter-terrorism and national security legislation, and any other law to the extent that it relates to counter-terrorism and national security legislation; and to consider whether such legislation contains appropriate safeguards, is proportionate and remains necessary.<sup>350</sup>

11.31 The proposed terms of reference of the IPCLB make some progress in this direction, in that they specify a wider range of anti-terrorism statutes for review. The flexibility conferred by the Australian statute still seems to me preferable, however. If mirrored in the UK, it would be clear that the power of review extended for example to immigration law or the royal prerogative, when used for the purposes of countering terrorism.

11.32 **Secondly, if the office of Independent Reviewer is retained, I recommend that the Reviewer be enabled to appoint an assistant or junior.** This would be in addition to the invaluable research and advice work that since 2011 has been performed by my special adviser, Professor Clive Walker. I would expect to take the decision as to who should be appointed,<sup>351</sup> on the basis of an open competition. Possible candidates might be a lawyer already cleared as a special advocate, an academic or a civil servant, though I would not wish to appoint anyone who was associated with the machine that it is my duty to review. An additional skilled pair of hands (even if only on a part-time basis) would increase the range and flexibility of the Independent Reviewer and could even pay for itself if a trusted assistant were able substantially to reduce the time spent on the job by the Independent Reviewer.

### **Powers and functions of the Independent Reviewer**

11.33 There have been few practical difficulties in securing access to classified information or personnel; such problems as Lord Carlile and I have experienced have been relatively simply resolved. The excision of national security sensitive information from our respective reports, where that is really necessary, has been achieved by sensible negotiation between the Independent Reviewer and departments or agencies. Reports have also been laid before Parliament, as a

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<sup>350</sup> INSLM Act 2010, section 6(1).

<sup>351</sup> See Report on Draft Modern Slavery Bill HL Paper 166 HC 1019, April 2014, §§147, 155.

rule, with reasonable promptness; though on one occasion it was necessary to refer to an undertaking given in Parliament for this result to be achieved.<sup>352</sup> All that said, there would be advantages in an express delineation of the powers as well as the duties of the Independent Reviewer, and of the duties of the Secretary of State particularly as regards the prompt publication of his reports.

**11.34 I recommend that consideration should be given to making express statutory provision for:**

- a) **access to classified information;**
- b) **information gathering powers;**<sup>353</sup>
- c) **the exclusion of sensitive information from reports;**<sup>354</sup> **and**
- d) **the time limit within which the report must be laid before Parliament.**<sup>355</sup>

**Statutory guarantees will be of particular importance if plans go forward to replace the Independent Reviewer by an IPCLB.**

## **Conclusion**

11.35 I have floated these ideas in summary form on my website (attracting some supportive comments), and on a fuller basis with the Home Office and also with the HASC, JCHR, the Security Minister and other parliamentarians. The recommendations are aimed at improving the usefulness and cost-effectiveness of the Independent Reviewer's work, and for that reason I attach great importance to them.

11.36 Some of my ideas are reflected in the proposal for the replacement of the Independent Reviewer by an IPCLB. Should that proposal go ahead, others will assume even greater importance, as reflected in my recommendations.

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<sup>352</sup> *The Terrorism Acts in 2011*, June 2012, 1.20-1.25.

<sup>353</sup> Cf. INSLM Act 2010 sections 21-28.

<sup>354</sup> *Ibid.*, sections 29-30. The INSLM appears to have the final word: contrast clause 7 of the Data Retention and Investigatory Powers Bill 2014, clause 7 (pending in Parliament as this went to press).

<sup>355</sup> *Ibid.*, section 29(5).

## 12. RECOMMENDATIONS

### Definition of terrorism

- 12.1 I recommend a thorough review of the criminal law in areas related to national security, focussed on the question of to what extent it is necessary to supplement ordinary rules and procedures.<sup>356</sup>
- 12.2 I recommend that the phrase “*designed to influence the government or an international organisation*” in TA section 1(1)(b) be replaced by the phrase “*designed to compel, coerce or undermine the government or an international organisation*”.<sup>357</sup>
- 12.3 I recommend that TA 2000 section 1(3) should be repealed.<sup>358</sup>
- 12.4 I recommend that the very broad definitions of “*terrorist activity*” and “*terrorism-related activity*” in TFA 2010 and TPIMA 2011 be revisited, with a view to narrowing them.<sup>359</sup>

### Independent Review of Terrorism Legislation

- 12.1 I recommend that the Government’s recent proposal to replace the Independent Reviewer of Terrorism Legislation by an Independent Privacy and Civil Liberties Board be subject to the widest possible consultation, including with the parliamentary Committees which are among the principal users of the Independent Reviewer’s reports.<sup>360</sup>
- 12.2 I recommend that the current system (fixed annual review of four statutes, with the remainder left unreviewed save in the event of a one-off request) be replaced by a more flexible arrangement whereby the Independent Reviewer or reviewing body, having consulted the relevant Ministers and Parliamentary committees, sets out an annual work programme which will allow him to cover those aspects of the law relating to terrorism that he considers most in need of review.<sup>361</sup>

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<sup>356</sup> 10.32, above.

<sup>357</sup> 10.43, above.

<sup>358</sup> 10.50, above.

<sup>359</sup> 10.59, above.

<sup>360</sup> 11.9, above.

<sup>361</sup> 11.28, above.

12.3 **Should the office of Independent Reviewer be retained, I recommend that the Reviewer be enabled to appoint an assistant or junior.**<sup>362</sup>

12.4 **I recommend that consideration should be given to making express statutory provision for:**

- a) **access to classified information;**
- b) **information gathering powers;**
- c) **the exclusion of sensitive information; and**
- d) **the time limit within which the report must be laid before Parliament.**

**Such statutory guarantees will be particularly important if plans go forward to replace the Independent Reviewer by an IPCLB.**<sup>363</sup>

#### **Port and border controls**

12.5 **I repeat the five recommendations set out at 7.28 above, first made in the memorandum to the HASC at Annex 2 to this Report, whilst recognising that for the most part they have been rejected by the Government.**

#### **Other recommendations**

12.6 **I maintain the recommendations that I have previously made concerning:**

- a) **proscription;**<sup>364</sup> **and**
- b) **detention.**<sup>365</sup>

12.7 **I also recommend that a dialogue be initiated between international NGOs and policy makers, including in the Home Office and Treasury, with a view to exploring how the objectives of anti-terrorism law can be met without unnecessarily prejudicing the ability of NGOs to deliver humanitarian aid, capacity-building and peace-building in parts of the world where designated and proscribed groups are active.**<sup>366</sup>

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<sup>362</sup> 11.32, above.

<sup>363</sup> 11.34, above.

<sup>364</sup> *The Terrorism Acts in 2011*, June 2012, 12.8-12.12; 5.13, above.

<sup>365</sup> *The Terrorism Acts in 2011*, June 2012, 12.14-12.16; 8.43, above.

<sup>366</sup> 9.33, above.



## ACRONYMS USED IN THE REPORT

### Legislation

ASBCPA 2014	Anti-Social Behaviour, Crime and Policing Act 2014
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
JSA 2013	Justice and Security Act 2013
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
SOCPA 2005	Serious and Organised Crime and Police Act 2005
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
ACTCC	ACPO Counter-Terrorism Co-ordination Centre
AQAP	Al-Qaida in the Arabian Peninsula
AQI	Al-Qaida in Iraq
AQIM	Al-Qaida in the Maghreb
CIRA	Continuity Irish Republican Army
COAG	Council of Australian Governments
CPI	Commission, preparation or instigation [of terrorism]
CPS	Crown Prosecution Service
CTIRU	Counter-Terrorism Internet Referral Unit
CT Network	Police Counter-Terrorism Network

CTU	Counter-Terrorism Unit
CTIU	Counter-Terrorism Intelligence Unit
CTRA	Counter-Terrorism Research and Analysis (OSCT)
ECHR	European Convention of Human Rights
EDL	English Defence League
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
HET	Historical Enquiries Team (Northern Ireland)
HMIC	Her Majesty's Inspectorate of Constabulary
HOSB	Home Office Statistical Bulletin
ICT	International Counter-Terrorism
ICVs	Independent Custody Visitors
IPCLB	Independent Privacy and Civil Liberties Board
IED	Improvised explosive device
IMC	Independent Monitoring Commission (Northern Ireland)
INSLM	Independent National Security Legislation Monitor (Australia)
IPCC	Independent Police Complaints Commission
ISIL	Islamic State in Iraq and the Levant (same as ISIS)
ISIS	Islamic State in Iraq and Syria (or al-Sham), same as ISIL
JCHR	Joint Committee on Human Rights
JTAC	Joint Terrorism Analysis Centre
MI5	Security Service
MI6	Secret Intelligence Service
MPS	Metropolitan Police Service
NCA	National Crime Agency
NCTC	National Counter-Terrorism Center (USA)
NDEDIU	National Domestic Extremism and Disorder Intelligence Unit
NDEU	National Domestic Extremist Unit
NIPB	Northern Ireland Policing Board
NIO	Northern Ireland Office
NPM	National Preventive Mechanism
ONH	Óglaigh na hÉireann (Soldiers of Ireland)
OPCAT	Optional Protocol to the Convention against Torture

OSCT	Office for Security and Counter-Terrorism
PIRA	Provisional Irish Republican Army
PNR	Passenger Name Records
POAC	Proscribed Organisations Appeal Commission
PMOI	People's Mujahideen of Iran
PRG	Proscription Review Group
PRRG	Proscription Review and Recommendation Group
PPS	Public Prosecution Service (Northern Ireland)
PSNI	Police Service of Northern Ireland
PWG	Proscription Working Group
RAAD	Republican Action Against Drugs
RIRA	Real Irish Republican Army
RPG	Rocket-propelled grenade
SIAC	Special Immigration Appeals Commission
SO15	Counter-Terrorism Command, Scotland Yard
SOCA	Serious Organised Crime Agency
TE-SAT	Terrorism Situation and Trend Report (Europol)
TFTP	Terrorist Finance Tracking Provisions
TPIMs	Terrorism Prevention and Investigation Measures
TRA	Terrorism-related activity
XRW	Extreme Right Wing

**MEMORANDUM TO HOME AFFAIRS SELECT COMMITTEE**  
**20 NOVEMBER 2013**

Supplementary written evidence submitted by David Anderson Q.C. [CT 11a]

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**RECOMMENDATIONS OF THE INDEPENDENT  
 REVIEWER ON SCHEDULE 7 TO THE TERRORISM ACT  
 2000**

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## INTRODUCTION

1. Giving evidence to the Committee on 12 November 2013, I was asked (Q80) to spell out what changes to the port powers contained in Schedule 7 to the Terrorism Act 2000, other than the welcome amendments which have already been proposed by the Government in the Anti-Social Behaviour Crime and Policing Bill 2013, I considered desirable.
2. During the Report stage debate in the House of Commons on 15 October 2013, Rt Hon Damian Green MP had already indicated that he expected the Independent Reviewer to make recommendations, and that the Government would wish to examine them carefully.<sup>367</sup> At second reading in the House of Lords two weeks later, Lord Avebury, citing the Deputy Prime Minister, expressed the hope that my recommendations would be available “*while it may still be of assistance to your Lordships in the passage of this Bill*”.<sup>368</sup>
3. My observations on the operation of Schedule 7, based on site visits (to 12 airports and seaports in England, Scotland, Wales and Northern Ireland, St Pancras International Rail Terminal, Calais, Coquelles, the National Ports Analysis Centre and the National Border Targeting Centre) and discussions (with police, MI5, civil servants, affected communities and individuals and NGOs), are recorded in my three annual reports on the operation of Schedule 7.<sup>369</sup> In each of those reports I noted the considerable utility of the Schedule 7 power in the fight against terrorism, while indicating certain areas where it seemed to me that amendment should at least be considered.<sup>370</sup> Some but not all of those issues were addressed in the public consultation and in the Bill. Three which regrettably were not – the thresholds for exercise of the Schedule 7 powers, the treatment of electronic data and the use made of answers given under compulsion – are considered in this note.

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<sup>367</sup> Hansard 15 Oct 2013 HC col 634.

<sup>368</sup> Hansard 29 Oct 2013 HL col 1524.

<sup>369</sup> D. Anderson, *The Terrorism Acts in 2012*, July 2013, chapter 10; *The Terrorism Acts in 2011*, June 2012, chapter 9; *Report on the operation of the Terrorism Acts in 2010*, July 2011, chapter 9: all freely available on my website [www.terrorism-legislation-reviewer.independent.gov.uk](http://www.terrorism-legislation-reviewer.independent.gov.uk).

<sup>370</sup> See, most recently, my report of July 2013 at 10.48-10.80.

4. A full set of recommendations would ideally have awaited the final outcome of the numerous legal cases referred to at paragraph 7 below – in particular the imminent judgment in the judicial review proceedings arising out of the detention of David Miranda at Heathrow Airport in August 2013. I am conscious also that as Independent Reviewer, my primary function is to inform (rather than participate in) the political and public debate on the scope of anti-terrorism law. It seems likely however that amendment to Schedule 7 will reach Committee stage in the House of Lords within the next two weeks. In the circumstances, and bearing in mind the comments cited at paragraphs 1 and 2 above, I take this opportunity to expand upon the answer to Q80 that I gave orally on 12 November.
5. My recommendations are given at paragraphs 19, 30, 36, 39, 40, 41 and 43 below, and set out together on the last page of this note.
6. I announced in August my intention of publishing a report into the detention of Mr Miranda. It soon became clear that much of the relevant ground would be authoritatively covered in his judicial review proceedings, which have been expeditiously handled on all sides and in which argument was heard on 6 and 7 November. Once judgment is handed down, I propose to decide what more I can usefully add, including by way of any additional recommendations relating to Schedule 7.

#### DEVELOPMENTS SINCE JULY 2013

7. The four months since my last report have been the most eventful in the long history of Schedule 7.<sup>371</sup> In addition to the progress of the Bill through Parliament, they have seen:
  - a) the publication in July of the Government's response to the public consultation on Schedule 7 which I had recommended in my 2011 report and which was conducted in late 2012, attracting 395 responses;<sup>372</sup>
  - b) the detention in August of David Miranda under Schedule 7 at Heathrow, giving rise to a storm of media controversy and a claim for judicial review, not yet decided, which raised a number of issues including the scope of the Schedule 7 power and its use in relation to what is said by Mr Miranda to be journalistic material;
  - c) the rejection in August by the Divisional Court of a claim by a French national, examined at Heathrow, that the application of Schedule 7 contravened Articles 5, 6 and 8 of the ECHR and EU free movement rules;<sup>373</sup>
  - d) a Liberal Democrat conference motion in October, calling for further safeguards;<sup>374</sup>

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<sup>371</sup> As was noted in *Beghal v DPP*, Schedule 7 was introduced in 2000 but derived from a temporary power introduced in 1974, at the height of the Troubles: [2013] EWHC 2573 (Admin), [36].

<sup>372</sup> *Review of the Operation of Schedule 7: A Public Consultation*, Home Office, July 2013.

<sup>373</sup> *Beghal v DPP* [2013] EWHC 2573 (Admin) (Gross LJ, Swift and Foskett JJ). The court is understood to have certified points for a possible appeal to the Supreme Court.

- e) the publication in October of an “*illustrative*” draft revised Code of Practice for examining officers;<sup>375</sup>
  - f) a report in October by the Joint Committee of Human Rights, making a number of recommendations for the further reform of Schedule 7;<sup>376</sup>
  - g) a Supreme Court *dictum* in October, in a judgment written by its President and the recently-retired Lord Chief Justice and concurred in by five other Justices, expressing concern about the breadth of the powers given to ports officers by Schedule 7;<sup>377</sup>
  - h) the grant in November of a declaration that the refusal of police officers to await the arrival of a solicitor requested by a person detained under Schedule 7 before putting further questions to him was unlawful;<sup>378</sup> and
  - i) a ministerial response of 11 November 2013 to the JCHR’s report on the Bill, pp.11-17 of which respond to the Committee’s recommendations on Schedule 7.
8. The blizzard of litigation has not yet abated. As well as possible appeals in *Beghal* and *Elosta*, judgment is currently awaited both from the Divisional Court in *Miranda* and from the European Court of Human Rights in an application (*Malik*), sponsored by Liberty, which claims that the exercise of Schedule 7 powers violated Articles 5(1) and 8 of the ECHR.<sup>379</sup> Other cases have also been brought.<sup>380</sup> It is plain that the passage of the Bill cannot await the final word from the courts in all these matters.

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<sup>374</sup> Quoted in *Schedule 7 of the Terrorism Act 2000*, House of Commons Library Standard Note SN/HA/6742 (Joanna Dawson), 11 October 2013.

<sup>375</sup> *Draft Code of Practice for examining officers under Schedule 7 to the Terrorism Act 2000*, Home Office October 2013.

<sup>376</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Anti-Social Behaviour, Crime and Policing Bill*, Fourth Report of Session 2013-2014, HL Paper 56 HC 713, 11 October 2013, chapter 4.

<sup>377</sup> *R v Gul* [2013] UKSC 64, (Lords Neuberger, Lady Hale, Lord Hope, Lord Mance, Lord Judge, Lord Kerr, Lord Reed), [63]-[64]. Having remarked on the broad prosecutorial discretion where terrorist offences are concerned, the Supreme Court continued: “*While the need to bestow wide, even intrusive powers on the police and other officers in connection with terrorism is understandable, the fact that the powers are so unrestricted and the definition of ‘terrorism’ is so wide means that such powers are probably of even more concern than the prosecutorial powers to which the Acts give rise. Thus, under Schedule 7 to the 2000 Act, the power to stop, question and detain in port and at borders is left to the examining officer. The power is not subject to any controls. Indeed, the officer is not even required to have grounds for suspecting that the person concerned falls within section 40(1) of the 2000 Act (ie that he has ‘committed an offence’ or he ‘is or has been concerned in the commission, preparation or instigation of acts of terrorism’), or even that any offence has been or may be committed, before commencing an examination to see whether the person falls within that subsection. On this appeal we are not, of course, directly concerned with that issue in this case. But detention of the kind provided for in the Schedule represents the possibility of serious invasions of personal liberty.*”

<sup>378</sup> *R (Elosta) v MPC* [2013] EWHC 3397 (Admin): Bean J. I had expressed my own concerns on this point in *The Terrorism Acts in 2011* (June 2012), 9.66.

<sup>379</sup> Application no. 32968/11 *Malik v United Kingdom*, declared admissible on 28 May 2013.

<sup>380</sup> e.g. *Fiaz v GMP and SSHD*, a damages claim alleging discrimination in the application of Schedule 7.

## THRESHOLDS FOR THE USE OF SCHEDULE 7 POWERS

### Legal background

9. The no-suspicion basis on which the Schedule 7 powers can be used was recently highlighted by the Supreme Court in *R v Gul* as a potential matter for concern.<sup>381</sup> It was also one of the factors which led the European Court of Human Rights to hold that the no-suspicion stop and search power under sections 44-45 of the Terrorism Act 2000 was “neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse”.<sup>382</sup>
10. As against that, both the Strasbourg institutions and the English courts have shown themselves willing, on occasion, to extend a wider margin of tolerance to the exercise of policing powers at the frontier than elsewhere.<sup>383</sup>
11. The purpose of this note is not to offer legal advice, or to predict the outcome of pending or future litigation before the senior courts of the UK or the Council of Europe. It seems fair to assume however that in any assessment of the Schedule 7 powers against the principles of the ECHR, the extent of the discretion given to examining officers will form an important part of the assessment of whether those powers are sufficiently circumscribed, necessary and proportionate.

### The Schedule 7 powers

12. The central powers contained in Schedule 7 are the power to question (or examine) a person believed to be travelling through a port,<sup>384</sup> and an accompanying power of search.<sup>385</sup> For the purposes of exercising the power to question, an officer can stop a person or vehicle or detain a person.<sup>386</sup> Under the proposals in the Bill, a person will have to be detained if it is wished to question him for longer than an hour. Detention triggers the provisions of Part I of Schedule 8, which include both rights (to have a named person informed and to consult a solicitor)<sup>387</sup> and obligations (to submit in specified circumstances to the taking of fingerprints or samples).<sup>388</sup>
13. I drew attention in my annual reports to the practice of downloading the contents of mobile phones and other electronic devices (and of requiring the passwords to be handed over on request), and questioned its legal basis. The Government asserted that the necessary legal powers already existed under Schedule 7, but has also proposed a new paragraph 11A for Schedule 7, entitled “*Power to make and retain copies*”, which would permit copies to be made of “*anything*” obtained pursuant to paragraphs 5, 8 or 9, and would permit those copies to be retained for so long as is necessary for the purpose of determining whether a person falls within section

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<sup>381</sup> *R v Gul* [2013] UKSC 64, [63]-[64].

<sup>382</sup> *Gillan and Quinton v UK* (2010) EHRR 45

<sup>383</sup> *McVeigh v UK* (1981) 5 EHRR 71 (ECommHR); *Beghal v DPP* [2013] EWHC 2573 (Admin), [89]-[91]; Application 26291/06 *Gahramanov v Azerbaijan*, ECtHR 15 October 2013, [39]-[40].

<sup>384</sup> Schedule 7, paras 2-3, 5.

<sup>385</sup> Schedule 7, paras 7-9. The Bill proposes to prohibit intimate searches.

<sup>386</sup> Schedule 7, para 6.

<sup>387</sup> Schedule 8, paras 6-9.

<sup>388</sup> Schedule 8, paras 10-14. The Bill proposes to remove the power to take an intimate sample.

40(1)(b), or while the examining officer believes that it may be needed for use as evidence in criminal proceedings or in connection with a deportation decision.<sup>389</sup>

### The current thresholds

14. The **power to question** (or examine) a person may only be exercised “*for the purpose of determining whether he appears to be a person falling within section 40(1)(b)*”: in other words, a person who “*is or has been concerned in the commission, preparation or instigation of acts of terrorism*”.<sup>390</sup> The courts may declare an examination to have been unlawful if this condition was not satisfied.<sup>391</sup> The examining officer may however exercise this power “*whether or not he has grounds for suspecting that a person falls within section 40(1)(b)*.”
15. The **powers to stop and detain** may be used for the purposes of exercising the power to question, and are likewise subject to no requirement of suspicion.<sup>392</sup> A person who is examined can be compelled to provide any information in his possession, and to give the examining officer identity or other documents, again without any requirement of suspicion.
16. The **power of search** may also be used only for the purpose of determining whether a person who is questioned appears to be or to have been concerned in the commission, preparation or investigation of acts of terrorism.<sup>393</sup> No suspicion is required for the exercise of this power, save in the case of a strip search for which (under a proposal in the Bill) reasonable suspicion would be required, together with the authority of a supervising officer.
17. No requirement of suspicion attaches to the **power to copy or download** that would be created (or confirmed) by the proposed new paragraph 11A.
18. The **power to take DNA samples** may be used only if an officer of at least the rank of superintendent is satisfied that it is “*necessary in order to assist in determining whether [a person] falls within section 40(1)(b)*”.<sup>394</sup> The **power to take fingerprints** may additionally be used if that officer has reasonable grounds for suspecting that a person is not who he claims to be.<sup>395</sup>

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<sup>389</sup> On this issue see D. Anderson, *The Terrorism Acts in 2012*, July 2013, 10.65-10.73.

<sup>390</sup> Schedule 7, para 2(1); section 40(1)(b).

<sup>391</sup> As in *CC v MPS and SSHD* [2011] EWHC 3316 (Admin), [34].

<sup>392</sup> Schedule 7, para 6(1)

<sup>393</sup> Schedule 7, para 8.

<sup>394</sup> Schedule 8, para 10(6)(b).

<sup>395</sup> Schedule 8, para 6A(b).



## Powers to stop, question and search

19. **I recommend that no change be made to the existing threshold for the exercise of the powers to stop, question and search, save for the amendment proposed in the Bill where strip search is concerned.** My reasons for taking this position, which were based in part on confidential briefings and evidence from MI5, are set out in my 2013 report and remain valid.<sup>396</sup> A recent briefing on rules-based targeting at the National Border Targeting Centre has strongly confirmed me in this opinion.<sup>397</sup>
20. The JCHR is largely of the same mind. It took the position, in its report of October, that “*the Government has clearly made out a case for a without suspicion power to stop, question and search travellers at ports and airports, given the current nature of the threat from terrorism, the significance of international travel in the overall threat picture, and the evidence seen by the Independent Reviewer demonstrating the utility of no-suspicion stops at ports in protecting national security*”.<sup>398</sup>
21. This does not mean, of course, that the powers to stop, question or search may be used randomly or capriciously. The draft Code of Practice sets out a number of factors of the sort which examining officers need to have in mind when deciding whether to use their powers, before emphasising that:

*“Schedule 7 powers are to be used solely for the purpose of allowing for the determination of whether the person examined appears to be, or to have been, concerned in the commission, preparation or instigation of acts of terrorism. The powers must not be used to stop and question persons for any other purpose.”*<sup>399</sup>

The courts will no doubt continue, if necessary, to declare an examination unlawful on the basis that it was not used for the statutory purpose.<sup>400</sup>

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<sup>396</sup> D. Anderson, *The Terrorism Acts in 2012*, 10.50-10.62. The reasons given at 10.58 include the need to preserve a deterrent against the use by terrorists of “*clean skins*”, the need not to alert a traveller to the fact that he is under surveillance and the need to question the unknown companion of a known terrorist. I also gave (at 10.59) examples of positive results which have been derived from untargeted no-suspicion stops.

<sup>397</sup> Rules based targeting involves the “washing” of carrier data against intelligence-led indicators (or rules), so as to flag those passengers most closely matching the chosen rules. A rule might, for example, be used in the counter-terrorism context to identify travellers with a profile similar to those of known terrorists travelling on routes of concern. Such targeting will not be enough to engender suspicion of each individual who is targeted: but it provides an entirely rational and potentially very useful way of identifying persons whom it may be appropriate to question, and if necessary to search, in order to determine whether they are concerned in the commission, preparation or instigation of acts of terrorism. See further John Vine QPM, “*Exporting the border? An inspection of e-borders October 2012-March 2013*”.

<sup>398</sup> JCHR report, fn 10 above, para 110. The JCHR did however recommend a reasonable suspicion requirement before information on personal electronic devices could be accessed or searched: para 122.

<sup>399</sup> Home Office, *Draft Code of Practice for examining officers under Schedule 7 to the Terrorism Act 2000*, October 2013, para 19. The passage cited should however be moved above the sub-heading “*Examination period*”, since it belongs under the previous sub-heading “*Exercise of Examination Powers and Selection Criteria*”.

<sup>400</sup> As in the case of *CC v MPS and SSHD* [2011] EWHC 3316 (Admin).

## Power to detain

22. Despite currently being the subject of no higher threshold than the power to question, the power to detain is in general sparingly and responsibly used. Of the 61,145 persons examined under Schedule 7 in 2012/13, only 670 (1.1%) were detained. The majority of those, 547, had biometrics (fingerprints and/or DNA) taken, under the Schedule 8 power that is triggered by detention.<sup>401</sup>
23. The fact that a discretion may in general be responsibly used is however no safeguard against abuse, and no reason not to restrict its use to cases where it is strictly necessary. There may indeed be pressure to detain greater numbers once the Bill has become law, as detention will then be the only lawful way to question a person for longer than an hour. In 2012/13, 2,277 (3.7%) of those questioned were examined for over an hour.
24. The JCHR recommended that the power to detain should be exercised only if the examining officer reasonably suspects that the person is or has been involved in terrorism.<sup>402</sup>
25. I agree with the JCHR that an additional threshold or thresholds should have to be crossed before a person is detained under Schedule 7. Detention is a significant step, as may be seen from the fact that it carries with it the automatic right to legal advice as well as the potential obligation to give fingerprints and DNA samples. To be kept for up to six hours, particularly at the start of an outbound journey, can also be highly disruptive to international travel. It is hard to think of any other circumstances in which such a strong power may be exercised on a no-suspicion basis.
26. Three possible thresholds occur to me. In ascending order of significance, they are:
  - a) The examining officer considering (or a senior officer being satisfied) that detention is **necessary in order to assist in determining** whether a person appears to be a person falling within section 40(1)(b) [i.e. a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism;]
  - b) The examining officer considering (or a senior officer being satisfied) that there are **grounds for suspecting** that the person appears to be a person falling within section 40(1)(b); or
  - c) The examining officer considering (or a senior officer being satisfied) that there are **reasonable grounds for suspecting** that the person appears to be a person falling within section 40(1)(b).

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<sup>401</sup> D. Anderson, *The Terrorism Acts in 2012*, June 2013, 10.7. For context, it may be recalled that some 245 million passengers travel through UK airports, seaports and international rail terminals in 2010/11: *ibid.*, 10.8(b).

<sup>402</sup> JCHR report, fn 10 above, paras 112-114

27. As to those options:

- a) The first (“*necessary in order to assist in determining*”) is little more than a statement of the obligation that rests upon any officer whose decision is liable to infringe the Article 8 (or Article 5) rights of another person. It is based on the existing threshold for the taking of fingerprints or a DNA sample,<sup>403</sup> which the Government does not propose to amend, and resembles the “*necessity*” threshold that the Bill proposes to introduce for authorisation by the review officer of *continued* detention after a so far unspecified period.<sup>404</sup>
- a) The second (“*grounds for suspecting*”) would echo the subjective belief standards already present in paragraphs 2(2)(b) and 2(4) of Schedule 7. It would require the officer to have formed a suspicion, whether on the basis of information supplied by others, behavioural assessment or even just intuition. It would however ensure that (in the words of Lord Bingham, in the context of a stop and search power) a ports officer is not deterred from detaining “*a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion*”.<sup>405</sup>
- b) The third (“*reasonable grounds for suspecting*”) is the default threshold for most stop and search powers, and was the solution favoured by the JCHR in relation to the detention power. It is related to (though not identical to) the proposal in the Bill that strip searches should be conducted only where the examining officer has “*reasonable grounds to suspect that the person is concealing something which may be evidence that the person falls within section 40(1)(b)*”.<sup>406</sup>

28. My exposure at a variety of ports to the operational constraints under which ports officers operate inclines me, on balance, towards rejecting the reasonable suspicion standard as a condition for detention.<sup>407</sup> In particular:

- a) Terrorists pose risks on a different scale to most other criminals: they have shown themselves capable of causing death and destruction on a massive scale.

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<sup>403</sup> Schedule 8 to the Terrorism Act 2000, para 10(6)(b)

<sup>404</sup> Schedule 8 to the Bill, para 7(3). The necessity is there linked to “*exercising a power under paragraph 2 or 3 of that Schedule*”: I prefer the more direct formulation suggested here

<sup>405</sup> *Gillan and Quinton* [2006] UKHL 12, para 35. It appears that a requirement of subjective suspicion in section 44 might have gone part of the way at least to satisfying the European Court of Human Rights which stated of section 44 in the same case, *Gillan and Quinton v UK* [2010] ECHR 45: “*Not only is it unnecessary for [the officer] to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched*”.

<sup>406</sup> Schedule 8 to the Bill, para 3(3) at 5(b).

<sup>407</sup> I am conscious that the courts were historically “*loath to subject to any searching analysis the basis of police claims that they had reasonable suspicion*”: D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2<sup>nd</sup> edn. 2002, p. 334. But it would be unsatisfactory to rely on the courts adopting an over-permissive interpretation of the reasonable suspicion standard. As the same author acknowledges, ECtHR case law, given domestic effect by the Human Rights Act 1998, “*makes it clear that the reasonableness of a constable’s suspicion must be carefully assessed*”.

- b) Active terrorists are not numerous, and not easily identified as such. Factors such as location, demeanour or evasive behaviour in the street may well give rise to a reasonable suspicion that a person is carrying stolen or prohibited articles.<sup>408</sup> In the neutral port environment, an experienced officer's suspicion of involvement in something as specific as the commission, preparation or instigation of acts of terrorism may however be harder to substantiate objectively in the absence of specific intelligence, if only because such involvement is relatively speaking so unusual.
- c) The opportunity to test the validity of an officer's subjective suspicion in the hour allotted for examination may in practice be very limited, particularly when suspicion attaches to a large number of persons travelling together, and when time is lost by language difficulties or the use of false identities.
- d) Detention sometimes has to be imposed at the outset of the examination, because the person refuses to cooperate. Such behaviour from a person confronted with the exercise of counter-terrorism powers might awaken suspicion: but it could be hard to characterise it as reasonable suspicion of involvement in terrorism. Effectively to require in such cases that reasonable suspicion be shown immediately after the stop would also be contrary to my recommendation and that of the JCHR.

29. These reasons lead me to the view that the operational needs of the police can best be reconciled with the necessary safeguards on detention by selecting the first and second of the options set out above. For consistency, the same test should be applied by the reviewing officer at the periodic review provided for by the Bill.

30. **I therefore recommend that:**

- a) **Detention be permitted only when a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person falling within section 40(1)(b) and that detention is necessary in order to assist in determining whether he is such a person.**
- b) **On periodic review, a detention may be extended only when a senior officer remains satisfied that there continue to be grounds for suspecting that the person appears to be a person falling within section 40(1)(b), and that detention continues to be necessary in order to assist in determining whether he is such a person.**<sup>409</sup>

**Copying and retention of electronic data**

31. As I have recorded in successive reports, data taken from mobile phones, laptops and pen drives at ports has been instrumental in convicting terrorists and has also been extremely useful in piecing together terrorist networks.<sup>410</sup>

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<sup>408</sup> Under the reasonable suspicion power in section 1 of the Police and Criminal Evidence Act 1984.

<sup>409</sup> Replacing the test in Schedule 8 to the Bill, para 7(3) at (3).

<sup>410</sup> See most recently, D. Anderson, *The Terrorism Acts in 2012*, July 2013, 10.59-10.60 and 10.65-10.80.

32. Such data are however treated in just the same way as any other thing that may be the subject of a search under Schedule 7. There is no legal threshold either for the search or for the downloading (or copying) of data from an electronic device, other than the basic requirements that a search must be for the purposes of determining whether a person falls within section 40(1)(b),<sup>411</sup> and that the examination of goods must be for the purpose of determining whether they have been used in the commission, preparation or instigation of acts of terrorism.
33. Measured against the privacy that is liable to attach to the contents of (for example) a mobile phone, these powers are strong ones indeed. Neither the current law nor the proposed new paragraph 11A places any limitations on the categories of data (address book, call log, texts, emails, photographs) that can be copied, or any threshold that must be satisfied before this takes place. This is despite the fact that, outside the port, a warrant would be required for such inspections. Furthermore, the Code of Practice asserts that the information which an officer may expect a person to produce for examination or inspection includes passwords to electronic devices. This contrasts, as the JCHR pointed out, with the regime under RIPA section 49 for requiring the disclosure of the key to electronic data that has come into the possession of any person by means of the exercise of a statutory power.
34. It is perhaps possible to equate the initial search and examination of an electronic device<sup>412</sup> to the powers that police, customs and airport security have to rummage through hand luggage – a search power which neither the JCHR nor I has recommended should be subject to any new threshold. While the search of an electronic device undoubtedly has the capacity to impact upon private life, it does not do so to a markedly greater extent than other types of search, and may help shorten the examination of a person whose device confirms the innocent story he tells in interview. Notwithstanding the absence of any procedure equivalent to RIPA section 49 – an uncomfortable discrepancy – it might even be considered acceptable to require the production of a password for this purpose, though I can well understand that this is an issue that the Government or indeed Parliament may wish to consider further.
35. It is otherwise, however, where the wholesale copying of personal data is concerned. Of the possible thresholds set out at paragraph 26 and discussed at paragraph 27, above, I consider that the second is once again the most appropriate. The first is not required, because the purposes for which copies may be retained are already set out in the proposed paragraph 11A(3):<sup>413</sup> but see further paragraph 37(c), below.
36. **I therefore recommend that the power under the proposed paragraph 11A to make and retain copies of things detained pursuant to paragraphs 5, 8 and 9, should apply to personal electronic devices and to the data stored on them only if a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person falling within section 40(1)(b).**

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<sup>411</sup> Schedule 7, para 8(1).

<sup>412</sup> Schedule 7 paras 8, 9.

<sup>413</sup> This would allow a copy to be retained for as long as is necessary for the purpose of determining whether a person falls within section 40(1)(b), or while the examining officer believes that it may be needed for use as evidence in criminal proceedings or in connection with a decision by the Secretary of State whether to make a deportation order under the Immigration Act 1971.

## FURTHER SAFEGUARDS

37. The Schedule 7 regime appears anomalous in relation to the absence of other safeguards that appear in comparable legislative regimes. Thus:
- a) Property may be detained for seven days, even in the absence of any belief that it may be needed for use as evidence in criminal proceedings or in connection with a deportation decision. This contrasts with a period of 48 hours for the retention of documents obtained under reasonable suspicion powers such as section 43 of and Schedule 5 to the Terrorism Act 2000, subject to a single extension of up to a further 48 hours if an officer of at least the rank of chief inspector is satisfied that the examination is being carried out expeditiously, and that it is necessary to continue the examination to ascertain whether the document is one that may be seized.<sup>414</sup>
  - b) Schedule 7 contains, as the JCHR has pointed out, no express system of safeguards for categories of material such as legally privileged material, excluded material and special procedure material (including “*journalistic material*”).<sup>415</sup>
  - c) The retention of electronic data is liable to be held for very long periods under the MOPI regime, which as I reported in July 2013 has been recently criticised in the courts.<sup>416</sup> The system is in marked contrast to the rules and guidance that exist under the Protection of Freedoms Act 2012 concerning the retention and use of material (including biometric material gathered from Schedule 7 detainees) for the purposes of national security.
38. It is difficult to say more about some of these issues before judgment has been given in the *Miranda* case. I note however that the Minister has undertaken in his response to the JCHR to revisit the issue of safeguards in the light of the judgment in *Miranda*, once it is available, and of any subsequent comments of the Independent Reviewer.
39. **I recommend that the Government indicate how adequate safeguards are to be provided in respect of legally privileged material, excluded material and special procedure material, and will comment further on this issue as seems appropriate after the *Miranda* judgment.**
40. **I recommend that the Government indicate how it will ensure that private electronic data gathered under Schedule 7 is subject to proper safeguards governing its retention and use.**
41. The JCHR also recommended that the Bill be amended so as to specify the intervals for the review of detention, rather than leaving them to be specified in the Code of Practice. I agree, and was pleased to note that the Government in its response of 11 November offered to reflect on this point. **I recommend that the intervals for review of detention be specified in Schedule 7, not simply in the Code of Practice.**

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<sup>414</sup> Counter-Terrorism Act 2008, section 5.

<sup>415</sup> JCHR report, fn 10 above, para 125. These concepts are defined in the Police and Criminal Evidence Act 1984, sections 10-14.

<sup>416</sup> D. Anderson, *The Terrorism Acts in 2012*, 10.74-10.80.

## USE OF EVIDENCE GIVEN UNDER COMPULSION

42. In its decision of August 2013 in *Beghal v DPP*, the Administrative Court (Gross LJ, Swift and Foskett JJ) commented as follows:

“It is one thing to conclude that the Schedule 7 powers of examination neither engage nor violate a defendant’s Art. 6 rights; it is another to conclude that there is no room for improvement. For our part, we would urge those concerned to consider a legislative amendment, introducing a statutory bar to the introduction of Schedule 7 admissions in a subsequent criminal trial. The terms of any such legislation would require careful reflection, having regard to the legitimate interests of all parties but, given the sensitivities to which the Schedule 7 powers give rise, there would be at least apparent attraction in clarifying legislation putting the matter beyond doubt.”

43. The issue was adverted to in my July 2013 report, in which I said that it was essential that answers given under compulsion should not be used in proceedings where they could incriminate the person who gave them, and stated my belief that it is generally accepted that answers given under compulsion in Schedule 7 interviews could never be used in a criminal trial.<sup>417</sup>
44. I have no doubt that Ministers and Parliament will wish to give the most careful consideration to the recommendation of the court. For what it may be worth, I add my voice to it and **recommend that a statutory bar be introduced to the introduction of Schedule 7 admissions in a subsequent criminal trial.** As the Court in *Beghal* recognised by its reference to “*sensitivities*”, the point of this change would be not merely to confirm the position as it is already assumed to be, but to give those subject to Schedule 7 an assurance that whilst they are obliged to answer questions, their answers could not be used against them in criminal proceedings. The Code of Practice would need to provide that persons questioned under Schedule 7 are given that assurance.

## CONCLUSION

45. In formulating these recommendations, I have sought to ensure that those subject to Schedule 7 examinations are given the maximum safeguards consistent with the continued productive operation of these vital powers. Properly operated, I do not believe that anything in them will reduce the efficacy of those powers, or expose the public to additional risk from terrorism.
46. Each of my recommendations goes further than anything so far proposed or agreed to by the Government. I recognise however that the proposed new thresholds will be considered over-cautious by those who take the view, as did the JCHR, that nothing short of reasonable suspicion should be required for the exercise of the more intrusive Schedule 7 powers. The issue is a difficult one, and I have sought to explain my caution at paragraph 28, above.

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<sup>417</sup> D. Anderson, *The Terrorism Acts in 2012*, July 2013, 10.63-10.64.

47. I have taken the opportunity in recent days to discuss my recommendations on a preliminary basis with senior police officers, who have not informed me of fundamental objections to any of them. If these proposals are translated into law, ports officers will need to be provided with all possible clarity by the new Code of Practice.

**DAVID ANDERSON Q.C.**  
**Independent Reviewer of Terrorism Legislation**

20 November 2013



**RESPONSE FROM THE SECURITY MINISTER**  
**TO THE RECOMMENDATIONS IN ANNEX 2**  
**23 JUNE 2014**



James Brokenshire MP  
 Immigration and Security Minister

2 Marsham Street,  
 London SW1P 4DF  
[www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)

David Anderson Q.C  
 Independent Reviewer of Terrorism Legislation  
 7-8 Essex Street,  
 London,  
 WC2R 3LD

23 JUN 2014

*Dear David,*

When we met on 3 June we touched upon your recommendations about Schedule 7 to the Terrorism Act, which you made to the Home Affairs Select Committee (HASC) on 20 November 2013. We were grateful for sight of the recommendations and I wanted to take the opportunity to formally respond. We did not provide a formal response at the time as we did not wish to prejudice any recommendations you might make in the report you indicated you would produce on Miranda.

As you know, the Anti-social Behaviour, Crime and Policing Act 2014 made amendments to Schedule 7 to the Terrorism Act 2000. The Government's intention was to reduce the potential for the power to be operated in a way that might interfere with individuals' rights unnecessarily or disproportionately, whilst still retaining the operational effectiveness of the provisions to protect the public from terrorism. In the context of the legislative process, the Government carefully considered the recommendations you made to HASC. We are very grateful for your public support on the no-suspicion element of Schedule 7. Additionally, we have implemented one of your recommendations to include intervals for review of detention in the primary legislation and the Code of Practice.

I will now address your other recommendations:

*Detention be permitted only when a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person falling within section 40(1)(b) and that detention is necessary in order to assist in determining whether he is such a person.*

*On periodic review, a detention may be extended only when a senior officer remains satisfied that there continue to be grounds for suspecting that the person appears to be a person falling within section 40(1)(b), and that detention continues to be necessary in order to assist in determining whether he is such a person.*

We remain concerned that introducing a requirement for reasonable suspicion or grounds for suspecting a person is involved in terrorism for the exercise of the power of detention under Schedule 7 may undermine the capability of the police to determine whether or not individuals passing through ports, airports and international rail stations appear to be involved in terrorism. As Home Office policy officials have discussed with you, we have received legal advice that a 'grounds for suspecting' test has not been previously been applied in analogous circumstances. We take the view that there is a significant risk that the Courts would consider that the police, as an emanation of the state, must have a reasonable basis for holding grounds to suspect the person of being concerned in terrorism. If so then the police would in practice need to have reasonable grounds to suspect an individual of being concerned in terrorism before that person could be detained. This would significantly undermine the operational effectiveness of this power in combating terrorism.

*I recommend that the power under the proposed paragraph 11A to make and retain copies of things detained pursuant to paragraphs 5, 8 and 9, should apply to personal electronic devices and to the data stored on them only if a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person falling within section 40(1)(b).*

We do not consider that a threshold test should be applied before copies can be made and retained from electronic devices. The power to copy and retain anything that is found during a port or border examination without the need for reasonable suspicion or grounds for suspecting is necessary to detect persons who are or have been involved in terrorism and who may be travelling for the purposes of involvement in terrorism, and to obtain information about individuals who are or have been involved in terrorism.

*I recommend that the Government indicate how it will ensure that private electronic data gathered under Schedule 7 is subject to proper safeguards governing its retention and use.*

We, alongside the Information Commissioner's Office have supported the Association of Chief Police Officers to produce national guidance for forces on the use and retention of data. This guidance will be issued by the end of July and will complement the statutory Code of Practice and the Management of Police Information (MOPI) [issued under Sections 39 and 39A of the Police Act 1996] and the Data Protection Act 1998 (DPA).

*I recommend that the Government indicate how adequate safeguards are to be provided in respect of legally privileged material, excluded material and special procedure material, and will comment further on this issue as seems appropriate after the Miranda judgment.*

The question of the protection afforded to items subject to legal privilege, excluded material and special procedure material arose in the exercise of the powers under Schedule 7 from the examination of David Miranda. The judgment of the Court in the Judicial Review of David Miranda's examination did not comment on this issue. Nonetheless, we have included a safeguard for legally privileged material in the

revised draft Code of Practice (which is being put before parliament) specifying that examining officers and review officers should take care not to copy material that is, or may be, subject to legal professional privilege.

*A statutory bar be introduced to the introduction of Schedule 7 admissions in a subsequent criminal trial.*

After exploring the concept of a statutory bar, we believe this is unnecessary. There is already a legal safeguard concerning admissions in any subsequent criminal trial. Courts have the discretion to exclude such evidence under section 78 of the Police and Criminal Evidence Act 1984 if the Court believes that, having regard to all the circumstances (including the circumstances in which it was obtained), admitting the evidence would have such an adverse effect on the fairness of proceedings that it should not be admitted.

We continue to be grateful for your input into the public debate on Schedule 7 and look forward to receiving your annual report, which we will carefully consider.

*Yours sincerely,*

A handwritten signature in black ink, appearing to read 'James Brokenshire', written in a cursive style.

**James Brokenshire**

ISBN 978-1-4741-0927-7



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