

THE TERRORISM ACTS IN 2018

REPORT OF THE INDEPENDENT REVIEWER OF TERRORISM
LEGISLATION ON THE OPERATION OF THE TERRORISM
ACTS 2000 AND 2006

By

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EXECUTIVE SUMMARY

- There was ***no repeat*** in 2018 of the fatal terrorist attacks in London and Manchester of 2017, but the ***threat level remained severe*** through the year and the Novichok poisoning by hostile state actors in ***Salisbury*** in March 2018 complicated the threat picture (Chapter 2).
- The dog that did not bark was the return of ***Foreign Terrorist Fighters***. For those individuals who have returned from Da'esh controlled areas, prosecutions remain the exception (Chapter 7). The Government needs to be match fit to deal with this threat by the use of non-criminal powers where needed (Chapter 8)
- In England and Wales ***violent Islamist extremism*** remains the principal source of threat, whilst ***Right Wing terrorism*** is continuing to have an impact (Chapter 2).
- The threat from ***Dissident Republican groups in Northern Ireland*** creates a different scale of threat, and what is described as paramilitary violence is an enduring feature (Chapter 9). Comparisons with Great Britain show significant differences in terrorist trials and sentencing.
- The list of proscribed terrorist groups is ***still not up to date*** (Chapter 3). This longstanding problem can only be remedied by reforming the law to keep the focus on groups which are actually involved in terrorism.
- The use of ***police powers at ports***, whilst declining, continue to have the widest direct impact on the public. This useful power is hampered by the lack of advance information on certain routes into the United Kingdom. Attention needs to be paid to the capture of large amounts of ***electronic data*** (Chapter 6).
- Care must be taken that the UK, a world leader in ***humanitarian aid***, is not tripped up by own laws on terrorism overseas (Chapter 3)
- ***Stop and search*** (Chapter 4), ***arrests***, and ***charges*** (Chapter 5) are down on 2017, a record year.
- The ***ethnicity of those convicted*** of terrorism offences is changing – more persons of White and Black and fewer of Asian ethnic appearance were convicted in 2018 (Chapter 5)
- Recent reforms mean increased measures for those released from ***sentences of imprisonment*** (Chapter 7)

1. INTRODUCTION

Terrorism Legislation

- 1.1. All laws have unique features, but legislation directed against terrorism is in a special category because it confers unusually strong powers on officials who are required to exercise those powers in exceptionally testing circumstances: often at speed, usually acting on incomplete information, and generally fearing the worst. Counter-terrorism legislation will often modify ordinary expectations as to how law enforcement officials, and the courts, will treat individuals¹.
- 1.2. Lord Anderson QC, the Independent Reviewer from 2011 to 2017, has observed that the principal operational justifications for special terrorism laws are firstly the need to intervene earlier, sometimes referred to as ‘defending further up the field’, and secondly the need to rely on intelligence that cannot be disclosed². The inclination to defend further up the field can hardly be greater following the attacks of 2017, but the task is made harder when the means of attack include everyday items such as knives and vans, and where, as one former very senior police officer noted to me shortly after my appointment, attackers are “ordinary members of the public, that’s why they are so dangerous”³. The inexorable rise of the internet as a source of radicalisation, means of (increasingly encrypted) communication, and hub of terrorist methodology, makes these challenging times.
- 1.3. Completed acts of terrorism are nonetheless rare in the United Kingdom, more so in England, Wales, and Scotland than in Northern Ireland. In the same way, counter-terrorism laws ought to intrude as little as possible into people’s lives. The aim is to identify law that is effective, fair, and limited. But the notion that counter-terrorism legislation should be temporary, or even worse rushed in as part of an emergency response, is not realistic. Permanent but evolving terrorism legislation, as the United Kingdom has had since the Terrorism Act 2000, allows for improvements to be made,

¹ For example, by conferring a power on police to conduct suspicion-less examinations and detentions at ports under Schedule 7 Terrorism Act 2000, or by keeping certain evidence secret under the Terrorism Prevention and Investigation Measures Act 2011.

² Lord Anderson QC, “Shielding the Compass: How to Fight Terrorism Without Defeating the Law” [2013] 3 E.H.R.L.R. 233.

³ A point explored in Walker, C., ““Know Thine Enemy as Thyself”: Discerning Friend from Foe under Anti-Terrorism Laws” (2008) 32 *Melbourne University Law Review* 275-301.

and for the laws to be well understood by Parliament and by the general public. Enhancing that understanding is the purpose of this Report.

The Counter-Terrorism Machine

- 1.4. The public face of the United Kingdom's counter-terrorism response is the police. Much of the legislation that I review contains powers exercised by, and offences investigated by, police officers. Unlike most other police matters, the response to terrorism is in reality national rather than one based on individual forces. Around the United Kingdom there are eleven regional counter terrorism units and intelligence units⁴. These units are staffed by police officers and civilians with specialisms such as investigations, forensics, digital exploitation, financial inquiries, community liaison, and communications. At the centre of the network sits the National Counter Terrorism Policing Headquarters, which devises policy and strategy, coordinates national projects and programmes, and provides a single national Counter Terrorism Policing voice.
- 1.5. The formal position is that in England and Wales, collaboration agreements⁵ between the forces, their Police and Crime Commissioners, and the National Police Chiefs' Council allow the Metropolitan Police Service's Assistant Commissioner for Specialist Operations and the Senior National Coordinator for Counterterrorism Policing to act with authority in other force areas⁶. However, for Northern Ireland related terrorism, the general approach is that if it does not affect the rest of the United Kingdom the Police Service of Northern Ireland retains control⁷. The overall structure was described to me by a former Senior National Coordinator as a "classic British fudge". But it works with admirable slickness⁸.
- 1.6. Counter-terrorism Police have a relationship with MI5 and the other intelligence agencies of unparalleled closeness. The 2017 attacks propelled them into an ever-closer relationship, one involving more joint working and greater information-sharing than ever before. Since 2018, MI5 has assumed responsibility for extreme right-wing

⁴ Reforms made in the wake of the July 2005 attacks in London.

⁵ Under section 22A Police Act 1996.

⁶ An example of such an agreement is at <https://www.npcc.police.uk/documents/National%20CT%20Collaboration%20Agreement%20s22a%20Feb%2017%20v1.pdf>.

⁷ Or "What stays in Northern Ireland, stays in Northern Ireland".

⁸ One area where this arrangement has led to problems is the governance of specialist terrorism suites described in Chapter 5.

terrorism, alongside its traditional diet of Islamist terrorism and Northern Ireland-related terrorism. For Government, the Office for Security and Counter-Terrorism is responsible for counter-terrorism policy and legislation, and its officials advise the Home Secretary on executive counter-terrorism powers. The Office of Financial Sanctions Implementation is part of HM Treasury and responsible for the implementation of counter-terrorism financial sanctions in the United Kingdom, including domestic counter-terrorism designations imposed under the Terrorist Asset Freezing etc Act 2010. Counter-terrorism is inseparable from international cooperation, and the Foreign and Commonwealth Office, MI6, and the Department for International Development are key government players.

The Counter-Terrorism Toolkit

1.7. The United Kingdom's general response to terrorism is found within its counter-terrorism strategy, known as CONTEST, whose most recent iteration was published in June 2018⁹. It has four strands: *Pursue* (to stop terrorist attacks); *Prevent* (to stop people from becoming terrorists or supporting violent extremism); *Protect* (to strengthen protection against terrorist attack) and *Prepare* (where an attack cannot be stopped, to mitigate its impact). Some of the response is covert: the secret gathering of intelligence about and investigation of individuals of concern. The overt or 'disruptive' response to an individual assessed to be a threat is selected from what officials like to refer to as the 'toolkit'¹⁰. Officials frequently point out the utility of having 'another tool in the toolkit', but for all its homeliness, perhaps precisely because of its homeliness, there is reason to be wary of the phrase. It obscures the question of whether an additional disruptive power is justified.

1.8. Examples of disruptive **police** powers are the special power to arrest and detain suspected terrorists under section 41 Terrorism Act 2000, considered in Chapter 5, the power to stop and examine travellers at ports and borders under Schedule 7 Terrorism Act 2000, the subject of Chapter 6, and the power to seize travel documents under Schedule 1 Counter-Terrorism and Security Act 2015, which I report on in Chapter 8.

⁹ Considered further at 2.4.

¹⁰ Some of these powers are listed in HM Government Transparency Report 2018, Cm 9609. The list does not include the use of lethal force against overseas individuals by UK armed forces, <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>.

1.9. Police disruptions may lead to criminal proceedings. On conviction, there are additional disruptive features of the terrorist sentencing regime: not just length of sentence but post-release measures such as the duty to keep the police up to date with personal details. I consider these in Chapter 7.

1.10. Some, but not all, of the disruptive powers belonging to the **Home Secretary** are reviewed in this Report. These are the power to ban or 'proscribe' terrorist groups (see Chapter 3), the power to designate areas overseas as no-go areas for British nationals and residents (see Chapter 7), the power to make Terrorism Prevention and Investigation Measures (see Chapter 8), and the power to make Temporary Exclusion Orders (see Chapter 8).

1.11. Other frequently used disruptive powers belonging to the Home Secretary are not within the remit of the Independent Reviewer. These are deportation of foreign national terrorists¹¹, exclusion of foreign terrorists from the United Kingdom, the power to deprive dual nationals of their British citizenship¹², refusing to issue passports, withdrawing passports, and extradition¹³. These powers are based on statute and on the Royal Prerogative.

1.12. Domestic financial measure for which Her Majesty's Treasury is responsible are reviewable by the Independent Reviewer¹⁴ but are not the subject of this Report. Her Majesty's Treasury is also responsible for the implementation of United Nations, and European Union financial measures against individuals and groups in the UK. Post-Brexit such measures will fall under a new statute, the Sanctions and Anti-Money

¹¹ Lord Anderson QC with Professor Clive Walker QC was asked to carry out a review of deportation with assurances, published in July 2017:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/630809/59541_Cm_9462_Accessible.pdf.

¹² A special but hitherto unused power to deprive a person of British nationality even where it leads to statelessness, under section 40(4A) British Nationality Act 1981 must be independently and periodically reviewed. The first review was conducted by Lord Anderson QC in April 2016,
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/518120/David_Anderson_QC_-_CITIZENSHIP_REMOVAL__web_.pdf.

¹³ Save where extradition is to or from another European Member State by European Arrest Warrant under the EU Framework Decision and Part 1 Extradition Act 2003.

¹⁴ Those made under Part 1 Terrorist Asset-Freezing etc. Act 2010 are reviewable by the Independent Reviewer under section 31 of that Act. Freezing Orders (in cases where a use or threat of the action referred to in section 4(2) of that Act would constitute terrorism) made under Part 2 of the Anti-Terrorism Crime and Security Act 2001 are reviewable by the Independent Reviewer under section 44(2)(b) Counter-Terrorism and Security Act 2015. Directions made under Schedule 7 Counter-Terrorism Act 2008 are reviewable under section 44(2)(c) Counter-Terrorism and Security Act 2015.

Laundering Act 2018, which provides in due course for a person to be appointed to review the operation of non-UN sanctions regulations whose purpose relates to counter-terrorism¹⁵. If appointed, I envisage making a separate Report on these measures in due course.

Limits to the Role of the Independent Reviewer

1.13. In his final report, Lord Anderson QC recommended that the Independent Reviewer should be given statutory authority to review (a) the exercise of the Royal Prerogative power to cancel or refuse to issue a British passport; and (b) any other law or power to the extent that it is used in relation to counter-terrorism¹⁶. The then Home Secretary declined to support this, arguing that this would inject a looseness and lack of clarity into the Independent Reviewer's role, risk overlap with other oversight bodies, and create an unhelpful precedent in relation to non-statutory (i.e. Prerogative) powers generally¹⁷.

1.14. On taking up my new role, the Home Office has been unstinting in providing me briefings across the counter-terrorism field, both proactively and at my own request (including on deprivation). This is necessary to understand the value and operation of those laws within my remit, and I have received no indication to date that I am treading on forbidden ground. But receiving briefings is not the same as generating an independent review based on statistics, analysis of documents, and access to decision-makers, to inform Parliament and the public about such matters. There is a mismatch: the same officials will consider whether the appropriate response to a suspected dual-national terrorist overseas is a Temporary Exclusion Order (a power I review), or a deprivation order (a power I do not).

1.15. The power to deprive a dual national of their British citizenship was used 104 times in 2017¹⁸ but there does not appear to be any sufficient form of independent

¹⁵ I.e. under the Counter-Terrorism (Sanctions) (EU Exit) Regulations 2019 (S.I. 2019/577) but not under the Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019 (S.I. 2019/573).

¹⁶ *Terrorism Acts in 2015 Report* at paragraph 10.4.

¹⁷ July 2017, Cm9489, p4

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/630771/60502_Cm_9489_Accessible.pdf.

¹⁸ Transparency Report 2018: Disruptive and Investigatory Powers, July 2018, Cm.9609 at section 5.9, page 27. The figures are 14 for 2016 and 21 for 2018. It is possible some of these figures may include persons deprived of nationality for reasons other than terrorism:

review of its use for suspected terrorists. In his 2018 Report on the review and removal of immigration, refugee, and citizenship status, the Chief Inspector of Borders and Immigration reported that the effectiveness of deprivation for national security purposes was “hard to assess and a question for the Home Secretary and [Security and Intelligence Agencies] to answer rather than this report”¹⁹. Judicial oversight by the Special Immigration Appeals Commission, and internal checks and balances, whilst essential are no substitute for a reviewer who can poke around and ask awkward questions.

1.16. The identity of the reviewer is immaterial. The person carrying out any review must have access to any sensitive material and a knowledge of the counter-terrorism landscape. A statutory *duty* placed on the Independent Reviewer of Terrorism Legislation to review all powers used in relation to counter-terrorism would be too much for one individual. But statutory *authority* for the Independent Reviewer to review any other power, if he or she considers it appropriate, remains the best option. To date, Parliament has decided to create a very limited requirement for this type of independent review in the area where immigration law and national security intersect²⁰. Given the importance of these other powers to the UK counter-terrorism response, and their impact on individual rights, I reiterate Lord Anderson's views and **recommend** that, in the absence of any other person, the Independent Reviewer be given statutory authority to review any immigration power used by the Home Secretary to the extent that it is used in counter-terrorism.

My Approach

1.17. This is my first Report as Independent Reviewer of Terrorism Legislation. Some readers may have only a broad idea of UK counter-terrorist laws, but a strong and correct sense that special powers must be subject to constant and critical scrutiny. Other readers may be parliamentarians, police officers, officials, lawyers or campaigners who are highly familiar with the counter-terrorism machine, perhaps,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727961/CCS207_CCS0418538240-1_Transparency_Report_2018_Web_Accessible.pdf.

¹⁹ At paragraph 3.14,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/677535/An_inspection_of_the_review_and_removal_of_immigration_refugee_and_citizenship_status_.pdf.

²⁰ Section 40B British Nationality Act 1981; see footnote 11 above. The new border regime to counteract hostile state activity, under Schedule 3 Counter-Terrorism and Border Security Act 2019, is subject to review by the Investigatory Powers Commissioner.

more likely, some of the counter-terrorism machine. My aim is to inform so far as possible an understanding of terrorism legislation, how it fits together and, where I feel able to do so, to make recommendations for change.

1.18. I have also tried to bring as much transparency as possible to this Report. Complete openness is impossible because terrorists would use that information to avoid detection and carry out their plans unhindered. Explanations can help to dispel misunderstanding and ensure that these special powers continue to be used with the consent of the public.

1.19. My position is a fully independent one. I am a barrister and Queen's Counsel in private practice, operating from chambers in London. I have three special advisers (a distinguished academic and two independent barristers) but no staff and my diary is managed by my clerks. My special advisers are Professor Emeritus Clive Walker QC (Senior Special Adviser), Alyson Kilpatrick DL (in Northern Ireland), and Karl Laird (in London). I am indebted to them for their support.

1.20. With no set agenda, other than to write this Report, I have had the freedom to move between and interrogate different parts of the counter-terrorism machine - police headquarters in London and Belfast, MI5, regional police units, local counter terrorist teams at airports and seaports in England, Scotland, Northern Ireland and Wales - and to invite non-governmental organisations, charities, pressure groups and individuals to meet me to discuss their experiences and their views. I have found this freedom invaluable. There are still people I want to meet.

1.21. Before my appointment on 23 May 2019 most of my practice consisted of acting as a barrister representing public bodies. I was often instructed to argue, and advise on, national security cases for government and the police, including some major cases on the lawfulness of counter-terrorist powers²¹: I no longer do any work of this nature. After 20 years of observing and arguing about official decisions, I can say that the decisions entrusted to counter-terrorism police and the Home Secretary (on the advice of officials) are among the most difficult, particularly when they have to be exercised in the heat of the moment.

²¹ Notably, *Beghal v Director of Public Prosecutions* [2015] UKSC 49 in the Supreme Court, and *Beghal v United Kingdom* (App. no.4755/16, 28 February 2019) before the European Court of Human Rights, on the operation of Schedule 7 Terrorism Act 2000.

1.22. One difference in this Report, from those of my immediate predecessors, is a separate chapter on Northern Ireland, Chapter 9. Modern United Kingdom counter-terrorism law originated in laws designed to address Northern Irish-related terrorism. Despite all the achievements of normalising policing since 1998, the security picture in Northern Ireland is quite unlike anything in Great Britain. Comparisons can and must be drawn between different parts of the United Kingdom as to how successful, or not, United Kingdom terrorism legislation has been in those different parts²². Successful means not just countering the risk of terrorism but dealing fairly and proportionately with people who are affected by it.

1.23. Being fully independent includes being independent of my immediate predecessors, Lord Carlile QC, Lord Anderson QC, and Max Hill QC. But unsurprisingly I have found their reports and insights an essential starting point for my own analysis. So that their most recent outstanding recommendations do not go unaddressed, I have set these out separately in the Annex to this Report, and have considered whether the government's response is fully adequate, whether I adopt those recommendations (and if so can say anything further useful in support) or do not adopt them perhaps for some other reason.

1.24. Like my predecessors, I have benefited from an open-handed approach from police and officials, and the unfettered access to sensitive information on which this role depends. Although occasionally I have had to cajole, the only information whose absence I still regret is data and research which either exists and is hard to extract, or has not yet been gathered. As I set out in the report from time to time, more data, more statistics, more analysis can only be beneficial in ensuring that terrorism laws are up to scratch.

1.25. But unlike for my immediate predecessor, Max Hill QC, my appointment has not been immediately impacted by multiple terrorist attacks in Great Britain. 2018 was a quieter year than 2017. Yet this should not disguise the important reforms which are still happening to police and MI5 after the 2017 attacks. Now is also a useful time to consider how some of the more recent major changes to legislation²³ have bedded down, and to look in more detail at the extraction of data and biometrics at borders.

²² The Terrorism Acts apply in Northern Ireland but as I explain in Chapter 9, the Police Service of Northern Ireland have additional counter-terrorism powers under the Justice and Security (Northern Ireland) Act 2007.

²³ Brought in by the Anti-Social Behaviour, Crime and Policing Act 2014, Schedule 9.

- 1.26. The first part of this Report is a retrospective of 2018. I have unashamedly used my experiences as Independent Reviewer in 2019 to inform my understanding of the developments in 2018. Unless stated otherwise, the description of how terrorism legislation operates is current. This Report does not address events of 2019²⁴.
- 1.27. I have used the same structure as in the Reports of my immediate predecessors, with the addition of a chapter on Northern Ireland. To be as complete as possible I have identified powers even if there are no statistics as to their use or, as is the case with some powers, they have never been used. I aim to draw attention to underused or perhaps simply unnecessary powers. This may also serve to lay the groundwork for future reports when, perhaps, more information is available and to put down a marker for future examination.
- 1.28. As a general observation, the law is always changing. It is inevitable that some parts of this Report will be qualified by later events by the time it is published. At the time of writing it is unclear what the precise relationship between the United Kingdom and the European Union is destined to be. Counter-Terrorism officials like stability, and some impact is inevitable if the United Kingdom leaves the European Union in the context of Northern Ireland-related terrorism, information sharing, extradition, and ports and borders²⁵.

Statistics

- 1.29. Publicly available statistics on the operation of the statutory powers under review can be found in four principal publications.
1. The Home Office's quarterly releases, which report on the operation of the police powers under the Terrorism Acts in Great Britain.
 2. The annual bulletin produced for the same purpose by the Northern Ireland Office.

²⁴ It follows that the attack by Usman Khan on London Bridge on 29 November 2019 will be addressed in my next annual Report.

²⁵ See further paragraph 9.17.

3. The Transparency Report, which is published annually by the Home Office and which details the frequency with which a range of disruptive and investigatory powers are used.
4. The Police Recorded Security Situation Statistics, published by the Police Service of Northern Ireland on an annual basis, with monthly updates.

1.30. Preparing this annual report has brought home a point made repeatedly by my predecessors, namely the **inconsistencies** in how these statistics are published. For example, the annual statistics for Great Britain are published on the basis of calendar year, whereas statistics in Northern Ireland tend to be on the basis of financial year. This does not make it straightforward to draw comparisons in how the powers in the Terrorism Acts are exercised in Great Britain when compared to Northern Ireland (and vice versa). Also problematic when compiling a report into the previous year is the fact that the document which is published by the Northern Ireland Office is not published until November.

1.31. As I will examine in more detail in Chapter 9, the powers in the Terrorism Acts co-exist in **Northern Ireland** with the powers in the Justice and Security (Northern Ireland Act) 2007. Scrutinising the exercise of these powers falls to the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, a post currently held by David Seymour CB.

1.32. Mr Seymour's reports contain valuable analysis of the frequency with which the powers in the Justice and Security (Northern Ireland) Act 2007 are used by the PSNI. Section 40(2) of the Justice and Security (Northern Ireland) Act 2007 provides that the Independent Reviewer must report by 31 July each year. For this reason the statistics on the frequency with which the powers in the Justice and Security (Northern Ireland) Act 2007 are used are collected and published on this basis. By contrast, the Independent Reviewer of Terrorism Legislation has always reported on a calendar year basis, which makes direct comparison with the use of counter-terrorism powers more difficult. I have, however, been able to obtain statistics on the frequency with which the powers in the Justice and Security (Northern Ireland) Act 2007 have been used on a calendar year basis directly from the Police Service of Northern Ireland. It would be helpful if the statistics could be made more readily available on the basis of calendar year.

- 1.33. There is also internal inconsistency within some of the statistics. For example, whilst the majority of annual statistics for Great Britain are published on the basis of calendar year, the statistics on the number of cordons are based on the financial year. There is no explanation for this difference.
- 1.34. There are also notable lacunae in what is publicly available. Although I have been able to obtain them directly from the National Counter-Terrorism Policing Headquarters, the statistics on the number of successful applications for warrants of further detention are not included in the Home Office's quarterly releases. This omission was remarked upon repeatedly by Lord Anderson QC, including in his final Annual Report²⁶.
- 1.35. Lord Anderson QC also deprecated the fact that the number of refusals of access to solicitors and the length of any delays are not published in Great Britain²⁷. They are, however, published in Northern Ireland. Given the way in which data is now collected across CT Policing in England and Wales, I can see no justifiable reason for why these statistics are available for one part of the United Kingdom, but not another.
- 1.36. Most problematic of all is the fact that the statistics on the exercise of the powers in the Terrorism Acts contain no subcategory to refer to persons of non-black North African and Middle Eastern ethnicity. Instead, the catch-all category "*Chinese or other*" is used. This stands in contrast to the 2011 Census categorisations (which move "*Chinese*" into the Asian category, and make specific reference to "*Arab*" as part of the "*other*" category). In 2018, there were further refinements to the ethnicity categories used by government. There are now 18 ethnic groups the Office for National Statistics recommends should be used by government when it asks for someone's ethnicity. Two new categories, "*Gypsy or Irish traveller*" and "*Arab*", have been added²⁸. These most recent changes mean that the statistics on the frequency with which the powers in the Terrorism Acts are used are even more out of step with how statistics on self-defined ethnicity are gathered across government generally.
- 1.37. As has been repeatedly pointed out, independent review of the Terrorism Acts would be assisted if data (whether it relates to stop and search, port examinations, arrest, charge, or convictions) defined ethnicity as precisely as possible and,

²⁶ *Terrorism Acts in 2015 Report* at 1.11.

²⁷ *Ibid.*

²⁸ List of Ethnic Groups, <https://www.ethnicity-facts-figures.service.gov.uk/ethnic-groups>.

specifically, includes a category for those who would wish to self-define as Arab. Although the immediate consequence of any change would be to make it more difficult to compare statistics across a number of years, if the statistics as they currently stand do not provide sufficiently nuanced insight into the impact that counter-terrorism powers have on people of different ethnicities, then it is a change worth making.

1.38. Most strikingly of all, ethnicity data is not published in Northern Ireland. I have, however, obtained ethnicity data on the exercise of Schedule 7 to the Terrorism Act 2000 directly from the Police Service of Northern Ireland. This does not change the fact that it is striking that ethnicity data is not published in Northern Ireland, whereas it is published for the rest of the United Kingdom. The question of whether data can, and should, be obtained on the community background of individuals stopped and searched in Northern Ireland (specifically, whether they are from a Nationalist or Unionist background) is a matter of ongoing debate. Simply from the point of view of carrying out an effective review, more data is to be encouraged.

1.39. I therefore **recommend** that more precise and consistent data is collected and published on the use of counter-terrorism powers to address these points.

Conventions Used

1.40. When I refer to previous Reports of the Independent Reviewer of Terrorism Legislation I do so consistently in the following way. The *Terrorism Acts in 2015 Report* is Lord Anderson QC's report about the year 2015. Although it was published in 2016, I have found it confusing to refer to this date. Earlier reports sometimes refer to "the 2016 Report" to refer to the report *published* in 2016 but about 2015.

1.41. Because readers are likely to go to individual parts of this Report rather than reading sequentially, I have avoided acronyms. But I use the phrase CT Police to refer to Counter-Terrorism Police, and PSNI to refer to the Police Service of Northern Ireland.

1.42. In most cases I have included hyperlinks where available.

2. REVIEW OF 2018

A Year of Self-Reflection

- 2.1. Compared to the previous year, the impact of terrorism on the general public in 2018 was greatly reduced in Great Britain. The 2017 attacks, at Westminster Bridge, at the Manchester Arena, on London Bridge and Borough Market, at Finsbury Park Islamic Centre, and in Parsons Green, had no counterpart in 2018. This distinction between 2017 and 2018 was matched across Europe. Europol reports that in 2018 all 13 fatalities from terrorism were the result of what it terms “jihadist attacks”¹. An additional 46 people were injured. The figure for 2018 represents a considerable decrease in comparison to the preceding year, when ten attacks killed 62 people.
- 2.2. The most widely-reported attack in 2018 in the United Kingdom was a **non-terrorist event**. The Novichok poisoning in Salisbury of Sergei and Yulia Skripal in March 2018, leading to the death of Dawn Sturgess and hospital treatment for three others, including two police officers, added a new dimension to the threat picture. These poisonings were treated as the work of hostile state actors not as acts of terrorism², and no counter-terrorism powers were used³. But around 250 detectives from the CT Policing network were deployed in investigating the incident.
- 2.3. From an official perspective, 2018 was a year of **self-reflection, and implementation** of reforms which had already been identified as necessary. The Operational Improvement Review was formally presented to the Home Secretary in November 2017. With an emphasis on even greater cooperation between MI5 and CT Police, it is series of nine reports, extending to some 1150 pages, described by Lord Anderson QC in his subsequent "Implementation Stocktake"⁴ as one of the most detailed

¹ Europol, Terrorism Situation and Trend Report, 2019, page 8. There were however more attacks in Northern Ireland than any other jurisdiction in Europe in 2019, *ibid*, pages 11-2.

² Statement of the Prime Minister 5 September 2018, <https://www.gov.uk/government/speeches/pm-statement-on-the-salisbury-investigation-5-september-2018>. As to why hostile state activity is not treated as terrorism, the governmental view has been that ‘[d]iplomatic immunity is a vital means of maintaining government relations, including in periods of difficulty and armed conflict’, Government Reply to the Report by Lord Carlile of Berriew Q.C., Independent Reviewer of Terrorism Legislation, *The Definition of Terrorism* (Cm 7058, London, 2007) paragraph 16. Lord Anderson QC considered this topic in his *Terrorism Acts in 2013 Report* at 10.2, but did not make any specific recommendations.

³ Source: briefing by National Counter Terrorism Policing Headquarters.

⁴ June 2019,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807911/2017_terrorist_attacks_reviews_implementation_stock_take.pdf amounting.

examinations ever conducted of the United Kingdom's counter-terrorism machine; and a blueprint for its operational reform. There are seven exhaustive post-attack reviews which draw lessons from the way in which intelligence was handled prior to the Westminster, Manchester Arena, London Bridge and Finsbury Park attacks.

2.4. In June 2018, the latest version of the Government's counter-terrorism strategy, **CONTEST 3.0**, was published⁵. It addresses all forms of terrorism that affect the UK and its interests overseas, with the exception of Northern Ireland related terrorism in Northern Ireland. The previous version was published in July 2011⁶, in what feels like a different era, shortly before the London Olympics and in the earliest stages of the conflict in Syria. The new version of CONTEST falls within the narrative arc of Da'esh's rise to prominence and the military attempts to suppress it, the enduring threat from Al Qa'ida and Northern Ireland related terrorism, the increasing threat from Right Wing terrorism, and a threat described as "multifaceted, diverse and evolving"⁷.

2.5. Further reflections on the 2017 attacks came from the inquests into the Westminster Bridge attack. The Chief Coroner published his Report on Action to Prevent Future deaths on 19 December 2018⁸. Pre-Inquest review hearings were held into the London Bridge attacks in February and July 2018⁹, and the Manchester Arena attack in October 2018¹⁰. The greater detail provided by MI5 about its investigative methods than disclosed in earlier inquests is striking¹¹.

2.6. My predecessor, Max Hill QC's *Terrorism Acts in 2017 Report* was published in October 2018. The Intelligence and Security Committee published its report into the 2017 attacks in November 2018¹². It contains over 100 recommendations. The first annual report of the Investigatory Powers Commissioner 2017 was sent to the Prime Minister in December 2018.

⁵ Cm.9608.

⁶ Cm.8123.

⁷ Foreword by Home Secretary, page 5.

⁸ Under Regulation 28 Coroners (Inquests) Rules 2013. See <https://westminsterbridgeinquests.independent.gov.uk/wp-content/uploads/2018/12/PFD-Report-with-attachments.pdf>.

⁹ The Coroner's Report on Action to Prevent Future deaths was published on 1 November 2019, <https://www.judiciary.uk/wp-content/uploads/2019/11/London-Bridge-Borough-Market-Terror-Attack-2019-0332.pdf>. I will consider this in my next annual Report.

¹⁰ The Inquest into the death of Makram Ali, murdered by Darren Osbourne at Finsbury Park, was opened in 2017. There were no deaths at Parsons Green.

¹¹ For example, compared to the Inquest into the London bombings of 7 July 2005.

¹² 'The 2017 Attacks: What Needs to Change?', HC 1694.

Islamist Terrorism

- 2.7. The 2017 attacks were not perceived as a temporary escalation in the threat, but as a **sustained shift** in the nature of the risk from Islamist terrorism. The UK threat level remained at “severe” - meaning an attack is highly likely - throughout the year. This had been the case since August 2014, other than the two occasions in 2017 when the level was raised briefly to “critical”¹³.
- 2.8. Most Islamist terrorism in the UK was assessed in 2018 to be connected to Da'esh¹⁴, but Al Qa'ida continued to attempt to inspire United Kingdom nationals to act in support of its global agenda. The prominence of Da'esh is reflected internationally. Of all the terrorist plots thwarted by the United Kingdom and its Western allies in 2018, 80% were planned by people inspired by the ideology of Da'esh, but who have never actually been in contact with the group¹⁵. In 2018, European Union Member States reported 16 thwarted jihadist terrorist plots, whilst across the European Union 1,056 people were arrested on suspicion of committing terrorism-related offences, with the highest number of arrestees in France (310) and the United Kingdom (273)¹⁶. This figure is slightly lower than the one for 2017 but remained close to the average of recent years.
- 2.9. The situation in Europe with regard to Islamist terrorism continued to be influenced by external developments. Ungoverned spaces in conflict areas, including Afghanistan, Libya, the Sahel region, Syria and Yemen provided opportunities for jihadist groups to establish control over territories that can later turn into safe havens. The year 2018 did, however, see a decrease in the activities of Da'esh affiliates in a number of regions. Europol's assessment was that Daesh's diminishing territorial control was

¹³ Meaning an attack is expected imminently. This was for a period of 48 hours following the Manchester Arena attack, and for the same period following the discovery of a partially-detonated explosive device on an Underground train at Parsons Green.

¹⁴ CONTEST, at paragraph 54.

¹⁵ Home Secretary speech, May 2019, <https://www.gov.uk/government/speeches/home-secretary-speech-on-keeping-our-country-safe>.

¹⁶ Europol Situation and Trend Report, pages 8, 15. The figure for United Kingdom arrests for 2018 has since been revised upwards to 283, see Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, quarterly update to December 2018 and table A.05a and quarterly update to September 2019, table Q – A01*.

likely to be replaced by increased efforts on the part of Al Qa'ida to reclaim power and influence in the region¹⁷.

2.10. The dog that did not bark in 2018 was the return of Foreign Terrorist Fighters from battlefields in Syria. The Government noted in June 2018 that only a "very small number" of travellers had returned in the previous two years and most of these had been women with young children¹⁸. It was considered that many of the most dangerous individuals remain overseas¹⁹. Nonetheless, the apprehension in 2018 of the remaining two 'Beatles' (the executioner group within Da'esh) brought "immediate political reality and urgency" to the question of where such individuals should be brought to justice²⁰.

2.11. Compared to previous years, the number of European Union citizens travelling to the Iraq and Syria conflict zone was very low in 2018. Europol estimates that at the end of 2018, fewer than 2000 European Union citizens remained in the region, with France and the UK having the highest numbers, approximately 710 and 345 respectively²¹.

2.12. The following events, which include convictions for plots disrupted in 2017, illustrated the Islamist terrorist threat in the United Kingdom:

- In April 2018 Lewis Ludlow, who was planning a "*spectacular multi-victim attack*"²² in London was arrested. Ludlow had sworn an oath of allegiance to Da'esh and was planning to hire a vehicle and drive it into crowds of shoppers on Oxford Street before detonating an explosive device. Ludlow was already being monitored by officers from CT Policing and had previously attempted to travel to the Philippines, where he had been sending money for terrorist purposes. After being stopped when trying to leave the country and having his passport confiscated, he progressed plans to launch an attack in the UK. He was convicted in March 2019, and was sentenced to life with a minimum term of 15 years.

¹⁷ Ibid, page 8.

¹⁸ CONTEST at paragraph 172.

¹⁹ Ibid, at paragraph 168.

²⁰ *R. (on the application of El Gizouli) v Secretary of State for the Home Department* [2019] 1 W.L.R. 3463 at paragraph 10. I refer to the criminal justice challenges relating to Foreign Terrorist Fighters at Chapter 7.

²¹ Europol Situation and Trend Report, page 40.

²² Sentencing remarks reported at <https://www.bbc.co.uk/news/uk-england-kent-47466625>.

- In August 2018, Safaa Boular, who was part of the UK's first all-female terrorist cell, was found guilty of planning a terrorist attack in Central London. She had been trying to reach Syria in order to marry a Da'esh fighter, but when her attempt was foiled by police, she turned to plotting a suicide bomb and gun attack on the British Museum. Her sister, Rizlaine Boular, and mother, Mina Dich, were also convicted²³.
- Also in August 2018, Naa'imur Rahman was convicted of planning to detonate a bomb in the vicinity of Downing Street in 2017. Rahman planned to use the ensuing chaos to gain access to Downing Street so that he could assassinate the Prime Minister. Unbeknown to Rahman, as he was putting his plans together, he was confiding with a network of online role-players from the Metropolitan Police, MI5 and the FBI who, in turn, introduced him to undercover CT Police Officers. Rahman went on to meet these officers on a number of occasions, culminating in his arrest in November 2017; shortly after Rahman collected what he believed to be a homemade bomb but which was in fact a harmless replica²⁴.
- On 31 December 2018 Mahdi Mohamud, a paranoid schizophrenic with an interest in violent Islamist extremism which pre-dated the onset of his mental illness attacked two members of the public and a police officer with a knife at Manchester Victoria Station and was arrested. He subsequently pleaded guilty in 2019 to three counts of attempted murder and one count of possessing a terrorist manual.

Right-Wing Terrorism

2.13. In January 2018, 6 members of the Right-Wing terrorist group, National Action, were arrested. This led to the **first convictions** in December 2018 for membership of a proscribed Far Right organisation²⁵, coinciding with the implementation of a more explicitly ideology-neutral approach to terrorism²⁶ and with MI5 taking responsibility for some Right-Wing terrorism as part of its counter-terrorist brief.

²³ <https://www.bbc.co.uk/news/uk-45062647>.

²⁴ <https://www.bbc.co.uk/news/uk-44872883>.

²⁵ <https://www.cps.gov.uk/cps/news/members-banned-british-neo-nazi-group-jailed>.

²⁶ <https://homeofficemedia.blog.gov.uk/2018/11/12/national-action-cases-statement-and-factsheet/>.

2.14. In February 2018, the Finsbury Park Mosque attacker, Darren Osborne was jailed for life (with a minimum recommendation of 43 years) for murder and attempted murder. The judge observed that Osborne's use of Twitter had exposed him to racists and anti-Islamic ideology and had been "rapidly radicalised over the internet" into committing terrorist murder²⁷.

2.15. In 2017, in response to a recommendation made by Lord Anderson QC and echoed by Max Hill QC, the Government announced that the Joint Terrorism Analysis Centre would become responsible for assessing the threat posed by Right-Wing terrorism. The Joint Terrorism Analysis Centre began assessing the threat from all forms of terrorism in November 2018²⁸.

2.16. The threat posed by Right-Wing terrorism has **evolved** in recent years and is growing. This point was made in the foreword to the relaunched CONTEST Strategy in 2018, in which the Prime Minister stated that, since 2017, four extreme Right-Wing plots have been thwarted. However, the space devoted in CONTEST to extreme Right-Wing terrorism does not extend beyond four paragraphs. The following general observations can be made:

- The tempo of extreme Right-Wing violence shows no sign of abating, and some of its distinctive aspects²⁹ beg the question whether the tools and practices used to disrupt Islamist terrorism can be transposed into the context of extreme Right-Wing violence.
- Its rise offers the prospect of different national or ethnic or social groups within the United Kingdom feeling the impact of counter-terrorism powers; given the imperative towards early intervention, and the fragmentary nature of intelligence, many of those who do feel the impact will not be terrorists or aspiring terrorists.
- The demonstrable broadening of the threat, and the deployment of the counter-terrorism machine against the extreme right, has provided some mordant relief

²⁷ Sentencing remarks, 2 February 2018, <https://www.judiciary.uk/wp-content/uploads/2018/02/r-v-osborne-sentencing-remarks.pdf>.

²⁸ <https://www.gov.uk/government/news/threat-level-system-updated-to-include-all-forms-of-terrorism>.

²⁹ Such as the use made by violent extremists of particular encrypted internet platforms and the online streaming of attacks, for example of the Christ Church mosque shootings in New Zealand, and the Halle Synagogue attack Germany, both in 2019.

amongst senior officials who for years have shouldered the accusation that terrorism powers in Great Britain were exclusively used against Muslims³⁰.

2.17. It is also notable that the rise of the Right-Wing terrorism has coincided with a rise in xenophobic and racist attacks in the UK, with race hate crime far outnumbering other categories, including disability, religion, and sexual orientation hate crime³¹. In 2018 Tell MAMA, an independent third-party hate crime reporting service for those who have experienced anti-Muslim hate incidents and crimes, received 1,282 anti-Muslim or Islamophobic reports, of which 1,072 were verified³². This represented a small decrease from the previous year. Tell MAMA reports that there was a notable spike as a result of the “*Punish a Muslim Day*” letters sent to Muslim homes, institutions, and places of work in March 2018, followed by heightened tensions, fears, and anxieties around the proposed day in April, and the second wave of letters (*‘Punish a Muslim Day 2’*) received in May³³.

2.18. The Community Security Trust recorded 1,652 antisemitic incidents in 2018, the highest annual total CST has ever recorded in a single calendar year. This represented an increase of 16% from the antisemitic incidents recorded in 2017. CST recorded over 100 antisemitic incidents in every month of 2018, the first time this had happened in a calendar year. 2018 was also the third consecutive year in which the CST had seen a record number of antisemitic incidents. Almost three-quarters of the 1,652 antisemitic incidents recorded in 2018 took place in Greater London and Greater Manchester, the two largest Jewish communities in the UK³⁴.

2.19. As Europol notes³⁵, although the majority of Right-Wing extremist groups across the EU, including those operating in the UK, have not resorted to violence, they nevertheless help entrench a climate of fear and animosity against minority

³⁰ In Northern Ireland, there is little or no recognisable Islamist terrorist threat and terrorism powers have always been used against Northern Ireland related terrorist individuals.

³¹ <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8537>.

³² Normalising Hatred, https://tellmamauk.org/wp-content/uploads/2019/09/Tell%20MAMA%20Annual%20Report%202018%20_%20Normalising%20Hate.pdf.

³³ In total, Tell MAMA received reports of 37 offline incidents which directly referenced “*Punish a Muslim Day*”. David Parnham, who described himself white supremacist, was convicted in 2019 for sending such letters.

³⁴ Annual Review 2018, <https://cst.org.uk/data/file/2/c/Annual%20Review%202018%20-%20ER%20edit%20web.1550505710.pdf>.

³⁵ Europol Situation and Trend Report, page 60.

groups. Such a climate, built on xenophobic, antisemitic, Islamophobic and anti-immigration sentiments, may lower the threshold for some radicalised individuals to use violence against persons and property of minority groups.

2.20. The CONTEST Strategy identifies that, beyond the Right-Wing terrorist threat, there are other groups and individuals that carry out criminal acts to achieve political goals. The Government states that they may be motivated by animal rights or welfare, the extreme left-wing, or environmental issues. CONTEST did not describe these groups and individuals as posing "a national security threat"³⁶, but the Government stated that the situation could change and that "a counter-terrorism response could be required".

Northern Ireland-related Terrorism

2.21. The threat from Northern Ireland-related terrorism in Northern Ireland remains at "severe" (meaning that an attack is highly likely). As the following statistics demonstrate, it cannot be said that this is an exaggerated assessment:

- In 2018 two civilians were killed as the result of deaths attributable to the security situation³⁷. There were 39 shooting incidents and 17 bombing incidents in which 20 bombing devices were used³⁸. The PSNI recovered 39 firearms, 1.26 kg of explosives and 3,290 rounds of ammunition³⁹.
- There was one national security attack, against PSNI officers, using firearms⁴⁰. This compares to five in 2017, four in 2016, and 16 in 2015⁴¹.
- Of the 60 security incidents reported by the United Kingdom to Europol in 2018, 56 were acts of security-related incidents in Northern Ireland⁴².

³⁶ At paragraph 63.

³⁷ PSNI, Security Situation Statistics, information up to and including March 2019, table 3.

³⁸ Ibid table 5.

³⁹ Ibid table 6.

⁴⁰ <https://www.gov.uk/government/news/londonderry-attack>.

⁴¹ <https://www.gov.uk/government/speeches/security-situation-in-northern-ireland>.

⁴² <https://www.europol.europa.eu/activities-services/main-reports/terrorism-situation-and-trend-report-2019-te-sat>, page 68, footnote 37.

- There was a total of 68 casualties as a result of paramilitary style attacks. There were 17 shootings (2 perpetrated by Loyalist groups and 15 by Republican groups) and 51 paramilitary style assaults (40 perpetrated by Loyalist groups and 11 by Republican groups)⁴³.

2.22. The threat from dissident Republican groups emanates mainly from the New IRA, the Continuity IRA, Arm na Poblachta (ANP, Army of the Republic), Óglaigh na hÉireann (ONH, Warriors of Ireland), and the Irish Republican Movement (IRM). The IRM was formed in late 2017 when, following a period of infighting in ONH, the group split into two rival factions, the ONH and the IRM. In January 2018, ONH declared a cessation of attacks against the British State⁴⁴ but it remains engaged in other paramilitary activity including carrying out paramilitary style attacks against those suspected of involvement in anti-social behaviour and drug dealing in the community. All these groups, with the apparent exception of ONH, remain opposed to the peace process and are committed to using violence to achieve their goals⁴⁵.

2.23. In 2018, these dissident Republican groups maintained their access to a range of firearms and explosives to plan and execute attacks, albeit with hampered capability compared with previous years. Despite good cooperation between the PSNI and An Garda Síochána, terrorists (who frequently engage in other unlawful activity such as smuggling) can move with relative freedom across the border with the Republic of Ireland. The attacks that were carried out in 2018 involved the use of firearms or improvised explosive devices, such as pipe bombs⁴⁶. The use of larger and more destructive devices was not observed in 2018. PSNI officers, prison officers, and members of the Armed Forces remain the primary targets.

2.24. In terms of developments amongst Loyalist paramilitaries, in April 2018 a statement was published entitled “A Loyalist Declaration of Transformation from the Red Hand Commando, Ulster Defence Association and the Ulster Volunteer Force”. This statement included language condemning all forms of criminality and restating the commitment of these organisations to the peace process⁴⁷.

⁴³ PSNI, Security Situation Statistics, information up to and including March 2019, table 4.

⁴⁴ <https://www.psni.police.uk/news/Latest-News/230118-onh-ceasefire/>.

⁴⁵ <https://www.europol.europa.eu/activities-services/main-reports/terrorism-situation-and-trend-report-2019-te-saT>, page 53.

⁴⁶ Europol Situation and Trend Report, page 53.

⁴⁷ https://cain.ulster.ac.uk/events/peace/docs/2018-04-09_loyalist-declaration.htm.

- 2.25. There were a number of other notable events which took place in 2018. Rioting took place in Londonderry between 8 and 13 July. The PSNI attributed the violence to the New IRA and stated that the intent of this group was to kill police officers. The PSNI used attenuating energy projectiles (commonly called plastic baton rounds) and at least 70 petrol bombs were thrown at the police⁴⁸.
- 2.26. On 13 July a homemade bomb was thrown at the West Belfast home of Gerry Adams, former leader of Sinn Féin and later that day another bomb exploded at the nearby home of a Sinn Féin official⁴⁹.
- 2.27. On 11 July there were localised public disorder and security incidents connected to two loyalist bonfires in East Belfast⁵⁰. Police came under attack from petrol bombs and other projectiles. This violence was confined largely to East Belfast and outlying areas and failed to gain wider traction in other loyalist areas. Earlier in the year there were outbreaks of minor localised disorder during unlawful republican Easter Rising parades in Lurgan (on 31 March)⁵¹ and Derry (on 2 April)⁵².
- 2.28. Significantly, in March 2018 the threat from Northern Ireland related terrorism in Great Britain was lowered from “*substantial*” (an attack is a strong possibility) to “*moderate*” (an attack is possible but not likely)⁵³. This was perhaps a reflection of the fact that the most recent dissident Republican attacks in Great Britain took place in April 2014, when a series of improvised explosive devices were posted to various targets⁵⁴.

⁴⁸ <https://www.psni.police.uk/news/Latest-News/130718-chief-constable-says-new-ira-orchestrating-derrylondonderry-violence/>.

⁴⁹ <https://www.bbc.com/news/uk-northern-ireland-44830392?>

⁵⁰ <https://www.bbc.co.uk/news/uk-northern-ireland-44790903>.

⁵¹ <https://www.bbc.co.uk/news/uk-northern-ireland-43604937>.

⁵² <https://www.irishtimes.com/news/crime-and-law/police-attacked-with-petrol-bombs-at-dissident-parade-in-derry-1.3448262>.

⁵³ <https://www.mi5.gov.uk/threat-levels>.

⁵⁴ <https://www.bbc.co.uk/news/uk-26229321>. However, in March 2019 improvised explosive devices were posted to Waterloo Station, buildings near Heathrow and London City Airport and the University of Glasgow. The New IRA took responsibility for posting these devices. This will be covered in next year's report.

Emerging Themes

2.29. There are a number of themes which emerge from the current threat picture. The use of social media and encryption remains a prominent feature of many terrorism investigations and convictions. The CONTEST Strategy has highlighted the challenges created by developments in **technology** more generally:

“Evolving technology creates new challenges, risks and opportunities in fighting terrorism. Terrorists use new technologies, like digital communications and unmanned aerial vehicles, to plan and execute attacks, and tend to adopt them at the same pace as society as a whole. For terror groups, the internet is now firmly established as a key medium for the distribution of propaganda, radicalisation of sympathisers and preparation of attacks.

Evolving technology, including more widespread use of the internet and ever-more internet-connected devices, stronger encryption and cryptocurrencies, will continue to create challenges in fighting terrorism. Data will be more dispersed, localised and anonymised, and increasingly accessible from anywhere globally.”

2.30. Modern technology calls into question legislation written in an earlier era, and terrorism legislation is no exception. Interrogating a phone can reveal more data than searching a house; information is electronic, and accessed, rather than physical, and seized; contact is encrypted and routed around the world; worldwide publication is open to every person with a smartphone. I highlight the role played by technology at various points throughout this Report.

2.31. The second theme that emerges from the current threat picture is the use of **unsophisticated and readily available tools** to carry out attacks. For example, most of the attacks which were carried out in the UK in 2017 involved the use of a vehicle as a weapon. This mirrors a trend which has been seen across Europe. In December 2018, the Department of Transport and CT Police launched a voluntary Rental Vehicle Security Scheme⁵⁵. I have been told that the Department of Transport is close to finalising an agreement with the British Vehicle Rental & Leasing Association to

⁵⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/834499/rvss-code-practice-guidance.pdf.

incorporate membership of the Rental Vehicle Security Scheme into their terms and conditions of membership. Of course, none of this deals with the ubiquity of knives.

2.32. The third theme is **diversification**. The nature of the threat is unpredictable, even within subcategories. Acts of Islamist terrorism comprise not just the spectacular attack involving careful plotting but the low-tech assault of the self-radicalized loner. Extreme right-wing violence is unpredictable and atomised - less reliant on self-identifying groups but on waves of ideological inspiration. The paths to extremism where the bar is lowered to acts of violence are harder to predict. There are other hate-filled ideologies which could lead to violence.

2.33. For all its imperfections⁵⁶, the definition of terrorism in the Terrorism Act 2000 is able to embrace these different variations. It is both ideology and threat neutral. The use of 'international counter-terrorism' to refer to Islamist-inspired terrorism failed to recognise the home-grown threat. That term, and 'domestic extremism', are in the process of being discarded. But an overenthusiastic adoption of the language of threat-neutrality carries risk. The treatment of new or existing types of behaviour as terrorism can have unforeseen consequences

2.34. When the Terrorism Act 2000 was in contemplation, the Government of the day correctly observed that there was no difference,

"...in the fear, pain or despair felt by the victims or their families whether the bomb or incendiary which affects them is planted by a republican or loyalist paramilitary, an international terrorist or an animal rights activist"

and drew attention, by way of example, to the possibility that violent anti-abortion activity seen in the United States could one day migrate to the United Kingdom⁵⁷. It was noted however that successive Governments had sought to ensure that the "exceptional powers" of counter-terrorism legislation were used only as and when the "security situation" warranted it, and that the Government had no intention of suggesting that matters that could properly be dealt with under normal public order powers should in future be dealt with under counter-terrorist legislation⁵⁸.

⁵⁶ Lord Anderson QC's *Terrorism Acts in 2011 Report* at Chapter 3.

⁵⁷ Cm1478 (1998) at paragraphs 3.6, 3.12.

⁵⁸ *Ibid*, at paragraphs 3.7, 3.18.

2.35. This recognition that threats, even those capable of meeting the broad definition of terrorism *in law*⁵⁹, needed to reach a level of scale before being treated as terrorism *in fact*, remains relevant in the new threat-neutral world of counter-terrorism.

New Legislation in 2018

Primary Legislation.

2.36. There were two very significant legislative introductions during 2018.

2.37. On 23 May 2018, the Sanctions and Anti-Money Laundering Act 2018 gained royal assent. Its stated purpose is to put the current regime of sanctions, including counter-terrorism sanctions, on a firm footing after Brexit. As matters stand, the Government intends to repeal the Terrorist Asset-Freezing etc. Act 2010, replacing its prohibitions by regulations made under the new Act⁶⁰.

2.38. In June 2018 the Counter-Terrorism and Border Security Act 2019 was presented to Parliament. Some of its provisions proved controversial and debates continued into January 2019. Royal assent was granted on 12 February 2019 and the Act is now largely in force.

2.39. This is a major piece of updating legislation, amending both Terrorism Acts, inspired in the immediate aftermath of the London Bridge attack⁶¹. It is of major relevance to this Report and will be to future Reports, and I summarise its effects below although I also consider its effect further in Chapter 7.

- Firstly, the Act provides that an offence of expressing an opinion or belief that is supportive of a proscribed organisation, contrary to section 12 Terrorism Act 2000, may be committed recklessly (section 1)⁶². It adds a new aspect to

⁵⁹ Lord Anderson QC describes it as “overbroad” in *Terrorism Acts in 2015 Report* at 4.6; also recently *HMT v Begg* [2017] EWHC 3329 (Admin) at paragraphs 20-22.

⁶⁰ SI 2019/ 573 and 2019/577 have been made but are not yet in force. See 1.12 above.

⁶¹ Explanatory Notes, paragraph 5.

⁶² In response to restrictive dicta in *R v Choudary and Rahman* [2016] EWCA Crim 61; see Explanatory Notes paragraph 25.

the flags and uniforms offence under section 13 Terrorism Act 2000 to include images, so that publishing an image amounts to an offence where to do so arouses reasonable suspicion that the defendant is a member or supporter of a proscribed organisation⁶³. A power of seizure is created so that police are not dependent on carrying out an arrest first (section 2).

- Secondly, the Act broadens the ambit of the collection of useful terrorist information offence under section 58 Terrorism Act 2000 so that it applies to streaming from the internet and clarifies the defence of reasonable excuse (section 3).
- Thirdly, it creates a new designated area offence by inserting new sections 58B and 58C into the Terrorism Act 2000 (section 4).
- Fourthly, it removes the possibility that a person charged with encouraging terrorism under section 1 Terrorism Act 2006 will be able to argue that his audience (for example a child or vulnerable adult)⁶⁴ did not understand what was being said by substituting a reasonable person test. The same change is made in relation to the dissemination of terrorist publications under section 2 Terrorism Act 2006 (section 5).
- Fifthly, it extends the extraterritorial reach and penalty of various offences under the Terrorism Acts 2000 and 2006 (sections 6 and 7). Strikingly, it increases the penalty for encouraging terrorism or disseminating terrorist publications from 7 to 15 years.
- Sixthly, it requires judges to consider whether certain specified offences have a terrorist connection, which imports a notification requirement, and extends the notification scheme to Northern Ireland (section 8). Additional notification requirements are imposed (section 12 and Schedule 1), with a power to enter premises with a warrant to assess the risks posed by a registered terrorist

⁶³ According to examples in the Home Office Circular 004/2019, this second limb will prevent journalists or academics who publish images from being punished, see para 20, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/797555/Home_Office_Circular_-_CTBS_Act_2019_-_v1.0.pdf.

⁶⁴ *R v Gary Staples* concerned an individual convicted of encouraging terrorism contrary to section 1(2). It emerged in court that the defendant had been previously convicted of child cruelty in 2016 after showing a young child a video of jihadist beheadings: <https://www.cps.gov.uk/cps-london-north-london-south/news/man-convicted-encouraging-others-take-break-come-jihad>, 24 January 2018.

offender (section 13). It extends two classes of sentences (extended determinate sentences, and sentences for offences of particular concern) to certain specified terrorist offences in England and Wales and makes similar provision in Scotland and Northern Ireland (sections 9-11). It brings certain terrorism offences into scope for the purpose of making Serious Crime Prevention Orders (section 14). I consider these provisions in Chapter 7.

- Seventhly, it makes various miscellaneous but important amendments to police powers. As well as changing traffic regulation for counter-terrorism purposes (section 15), it suspends the detention clock for those arrested under section 41 Terrorism Act 2000 where they are admitted to hospital (section 18)⁶⁵ and amends the legislative regime governing the retention of fingerprints and DNA samples for counter-terrorism purposes (section 19 and Schedule 2), including by extending the retention periods for biometrics (subject to review by the Biometrics Commissioner). Biometrics are considered in Chapter 6.
- Eighthly, it adds safeguards. The Act inserts an evidential bar against adducing answers given to examining officers under Schedule 7 Terrorism Act 2000 (section 16)⁶⁶. It strengthens the rights of those detained by examining officers under Schedule 7 so that they must be informed of their right to notify a named person, and to a solicitor, when first detained. The anti-abuse provisions are also modified: rather than permitting the police to listen in to a legal consultation where there is a risk of tipping-off, a senior officer is empowered to require the detained person to consult a different solicitor (section 17). It limits the power to specify persons to whom information acquired under Schedule 7 may be supplied to those exercising public functions (whether or not in the United Kingdom) (Schedule 3, para 60).

⁶⁵ Implementing a recommendation of Lord Anderson QC in his *Terrorism Acts in 2015 Report* at 8.51(b).

⁶⁶ Implementing another recommendation made by Lord Anderson QC at 7.23(d) and endorsed by the Supreme Court in *Beghal v Director of Public Prosecutions* [2015] UKSC 49 (at paragraph 67 of the judgment). There are limited exceptions to this evidential bar, such as in prosecutions for failing to comply with a duty imposed by Schedule 7: see Notice of Detention, Home Office Circular 008/2019.

2.40. Beyond counter-terrorism, the Act provides for the appointment of an independent reviewer of the Prevent programme, which is the cross-government response aimed at preventing individuals becoming drawn into terrorism (section 20)⁶⁷, and establishes a new ports and borders regime to enable police officers to examine individuals who may be engaged in "hostile activity", largely based on Schedule 7 Terrorism Act 2000⁶⁸.

Secondary legislation

2.41. A number of relevant statutory instruments came into force in 2018:

- i. The Terrorism Act 2000 (Enforcement in Different Parts of the United Kingdom) Order 2018 SI 521. This Order makes provision for orders made under the Terrorism Act 2000 in one part of the United Kingdom to be enforced in another part of the United Kingdom.
- ii. The Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes C, E, F and H) Order 2018 SI 829 brought into force the revised CODE H Code of Practice in connection with the detention, treatment and questioning by Police Officers of persons in police detention under section 41 of, and Schedule 8 to, the Terrorism Act 2000, and of detained persons in respect of whom an authorisation to question after charge has been given under section 22 of the Counter-Terrorism Act 2008.
- iii. The Terrorism Act 2000 (Code of Practice for Authorised Officers) Order 2018 SI 81: this brings into force a new Code under Schedule 14 to take account of the recent amendments to forfeiture powers under the Anti-Terrorism Crime and Security Act 2001, Schedule 1.
- iv. The Money Laundering and Terrorist Financing (Miscellaneous Amendments) Regulations 2018 SI 1337: these Regulations amend the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 SI 692 ("the MLRs"); the Oversight of Professional Body Anti-Money Laundering and Counter Terrorist Financing Supervision Regulations 2017 SI 1301 ("the Oversight Regulations"); and the Solicitors (Scotland) Act 1980.
- v. Poisons Act 1972 (Explosives Precursors) (Amendment) Regulations 2018 SI 451.

⁶⁷ Lord Carlile QC, a previous Independent Reviewer of Terrorism Legislation, was appointed in 2019.

⁶⁸ Schedule 3 Counter-Terrorism and Border Security Act 2019.

TERRORIST GROUPS

Proscription: Introduction

- 3.1. Part II of the Terrorism Act 2000 gives the Home Secretary power to proscribe any organisation that he believes “is concerned in terrorism”. The test is “is concerned” not “is or has been concerned”.⁶⁹ The scope for proscription encompasses terrorist groups, who are actually and directly involved in terrorist violence such as Da'esh (section 3(5)(a) and (b)); groups that are not directly involved in violence but who expressly promote and encourage it (section 3(5)(c)); and groups who deploy more subtle language to “glorify” terrorism such as Al Muhajiroun (section 3(5A)).⁷⁰ A full account of the proscription process, and assessments of its utility, is given by Lord Anderson QC in his *Terrorism Acts in 2011 Report*, Chapter 4.
- 3.2. Once a group has been proscribed membership is immediately an offence, as is other conduct relating to meetings, flags, uniforms, inviting support and funding. Ordinarily criminal offences address conduct, irrespective of the *identity* of those involved. The power to create criminal offences relating to particular groups of individuals is therefore highly unusual. The fundamental impact of proscription is to permit the Home Secretary to amend the criminal law, thereby criminalising a range of otherwise legitimate activities.
- 3.3. In this respect, proscription is a pre-emptive mechanism which addresses structures and capabilities rather than waiting for harms to be caused.⁷¹
- 3.4. If but only if the statutory criteria are satisfied⁷² the Secretary of State has a discretion whether or not to proscribe. Factors which have been publicly identified as relevant to that discretion include:

- i. the nature and scale of the organisation’s activities;

⁶⁹ Section 3(4) Terrorism Act 2000, a point made by Lord Anderson QC, *Terrorism Acts in 2011 Report*, at paragraph 4.56.

⁷⁰ M. Kenney, *The Islamic State in Britain* (2018, Cambridge) is a fascinating study of Al Muhajiroun and its members during the period of its proscription.

⁷¹ C. Walker “They haven’t gone away you know”. The Persistence of Proscription and the Problems of Deproscription”, (2018) 30:2 *Terrorism and Political Violence*, pages 236-258.

⁷² Section 3(4) provides “The Secretary of State may exercise his power [to proscribe] in respect of an organisation *only* if he believes that it is concerned in terrorism” (emphasis added).

- ii. the specific threat that it poses to the United Kingdom;
- iii. the specific threat that it poses to British nationals overseas;
- iv. the extent of the organisation's presence in the United Kingdom; and
- v. the need to support other members of the international community in the global fight against terrorism.⁷³

3.5 The penultimate factor "presence in the United Kingdom" raises difficult questions when a group has no physical presence in the United Kingdom, but has impact, potentially very harmful impact, as a result of its online presence. Meanwhile, the significance of the final factor should not be overlooked. Countries lobby one another. The proscription of a terrorist group which is conducting a violent campaign within the territory of an ally may be an unobjectionable means of signalling support, and a means to restrict that group's operations, however limited, on United Kingdom soil. But the subtlety of diplomatic relations as a factor emphasizes the importance of ensuring the fundamental statutory criterion, "is concerned in terrorism" is met.

3.6 Proscription is done by statutory instrument. Parliament must positively agree to the proscription of any new organisation by approving the order adding the organisation to the list of proscribed organisations. The same is true of deproscription, that is removing an organisation from the list, which I consider further below. The published basis for proscription is contained in an Explanatory Memorandum, but the recommendation to Government is made on the basis of a more detailed sensitive assessment prepared by the Joint Terrorism Analysis Centre.

3.7 There is an additional power to proscribe groups which are materially identical to groups that have already been proscribed, but which are operating under aliases or alternative names.⁷⁴ Some variants of existing names are inherently encompassed. In *R v Z*⁷⁵, the House of Lords accepted that "Irish Republican Army" covered the Provisional IRA, Official IRA, Real IRA and Continuity IRA. Unlike proscription or deproscription, proscription of an alias is immediately effective unless Parliament disagrees.⁷⁶

⁷³ Lord Anderson QC, *Terrorism Acts in 2011 Report*, at paragraph 4.6.

⁷⁴ Section 3(6) Terrorism Act 2000.

⁷⁵ [2005] UKHL 35.

⁷⁶ Sub-sections 123(2) and (4) of the Terrorism Act 2000.

3.8 Examples in practice are the orders of January 2010 and November 2011, which provided that “Al Muhajiroun”, “Islam4UK”, “Call to Submission”, “Islamic Path”, “London School of Sharia” and “Muslims Against Crusades” should be treated as alternative names for the organisation which is already proscribed under the names Al Ghurabaa and The Saved Sect⁷⁷.

3.9 This power arises where the Secretary of State believes that a scheduled organisations is operating “wholly or partly under a name that is not specified” in the schedule, or where an organisation whose name is not listed “is otherwise for all practical purposes the same” as one that is listed⁷⁸. For this purpose, the Government has stated that there must be credible evidence to suggest that:

- i. the ideology, aims and methods of each of the groups are essentially the same in all material respects;
- ii. the leaders or key individuals involved in each group are either the same people or are materially the same group of people; and
- iii. those who are members of each group are also members of the other group (or at the least, that generally speaking is the position).⁷⁹

3.10 A final power is given to the Secretary of State to amend the list, or Schedule, of proscribed groups “in some other way”. This rarely used power might be used in the following circumstances. Firstly, where the military wing of a group is currently proscribed but it is now decided to proscribe the entire organisation.⁸⁰ Secondly, if it is considered that a currently proscribed group is no longer to be considered as a separate organisation but is in reality a “front” for another group.⁸¹ Any order under this catch-all provision is subject to agreement by both Houses of Parliament.⁸²

⁷⁷ Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2006, SI 2006/2016, Proscribed Organisations (Name Changes) Order 2010, SI 2010/34, Proscribed Organisations (Name Changes) Order 2011, SI 2011/2688; Proscribed Organisations (Name Changes) Order 2014, SI 2014/1612.

⁷⁸ Section 3(6) Terrorism Act 2000.

⁷⁹ Explanatory memorandum to the Proscribed Organisations (Name Change) Order 2017/615, http://www.legislation.gov.uk/ukxi/2017/615/pdfs/ukxiem_20170615_en.pdf, proscribing an alias name for Al Qa’ida; Explanatory memorandum to the Proscribed Organisations (Name Change) (No.2) Order 2017/944, http://www.legislation.gov.uk/ukxi/2017/944/pdfs/ukxiem_20170944_en.pdf, proscribing alias names for National Action.

⁸⁰ As with Hizballah, whose External Security Organisation alone was initially proscribed: Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2019, SI 2019/406.

⁸¹ The power to proscribe an alias name under section 3(6) of the Terrorism Act 2000 only applies where the name is not currently on the Schedule.

⁸² Section 123(4) of the Terrorism Act 2000.

The current list

- 3.11. An up to date list of proscribed organisations, and an indication of the Government's overall policy on proscribed groups, is contained in the Home Office's Guide, *Proscribed Terrorist Organisations*.⁸³ In preparing my Report, I attended a Proscription Review Group meeting in September 2019 at which a name change and a new proscription were considered.
- 3.12. A significant development in December 2016 was the proscription of the first Right-Wing terrorist group, National Action⁸⁴. In September 2017, Scottish Dawn and National Socialist Anti-Capitalist Action were proscribed as aliases of National Action⁸⁵.
- 3.13. In December 2017 there were the following four additions: Hasam and Liwa al-Thawra, both violent extremist group operating against the Egyptian authorities since 2016; and the al-Ashtar Brigades and al-Mukhtar Brigades, Shia militant extremist organisations established during 2013 whose principal aim is to overthrow the Bahraini al-Khalifa ruling family by violent means.⁸⁶ None of these groups appears to have any United Kingdom presence or United Kingdom focus, although the al-Ashtar Brigades have promoted violent activity against the British, American and Saudi Arabian Governments on social media.⁸⁷
- 3.14. At the same time the group Hezb-e Islami Gulbuddin was removed from the list. Following an application for deproscription the Home Secretary had decided that there was insufficient information to conclude that it remained concerned in terrorism.⁸⁸ This group was an Afghan militia and had been proscribed in October 2005.⁸⁹ It subsequently signed a peace deal with the Afghan authorities and was delisted by the United Nations in February 2017.

⁸³ The most recent version is at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/849493/20191101_Proscription__SG_.pdf.

⁸⁴ Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 3) Order 2016, SI 2016/1238.

⁸⁵ Proscribed Organisations (Name Change) (No. 2) Order 2017, SI 2017/944.

⁸⁶ Explanatory Memorandum to the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2017 No.1325.

⁸⁷ Ibid at paragraph 7.6.

⁸⁸ Ibid at paragraph 7.10.

⁸⁹ Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2005 (S.I. 2005/2892).

3.15. By the end of 2018 this brought to three the total number of groups that had been deproscribed during the lifetime of the Terrorism Act 2000. The others are (i) the Mujaheddin e Khalq (MeK) also known as the People’s Mujaheddin of Iran, which was removed from the list of proscribed groups in June 2008 as a result of judgments of the Proscribed Organisations Appeals Commission and the Court of Appeal⁹⁰; and (ii) the International Sikh Youth Federation, which was removed from the list of proscribed groups in March 2016 following receipt of an application to deproscribe the organisation.

3.16. There were no additions or removals of proscribed groups in 2018.

Footprint

3.17. Terrorism law is a series of interlocking legal instruments and practices. This leads to the question, what is the legal and practical impact of a group being proscribed on its members and associates and on the general public? I describe this as the proscription footprint. As can be seen, exercise of the power to proscribe a group as a terrorist organisation has a potential impact in law far wider than the descriptive bite of the word “terrorist”.

3.18. It is because of this wider impact that proscription is such a powerful tool, often, and justly, described as blunt. Where the Secretary of State identifies that a group is causing significant harm, proscription provides an effective means of disrupting its activities. But it is a measure that requires careful handling.

Principal criminal offences

3.19. The first tier of criminal liability is found in the offences of being or professing to be a member of a proscribed group (section 11); inviting or expressing support for, or organising meetings in support of, a proscribed group (sections 12(1), (1A) (2) and (3); wearing or carrying or displaying articles which arouses suspicion of support for or membership of a proscribed group (section 13). I refer to potential flag offences in Northern Ireland in Chapter 9.

⁹⁰ *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443.

3.20. The number of individuals charged with proscription offences in Great Britain increased significantly in 2018, as the following table shows.⁹¹

| Year | Number of persons charged with an offence in sections 11 - 13 of the Terrorism Act 2000 |
|-------------|--|
| 2012 | 0 |
| 2013 | 0 |
| 2014 | 6 |
| 2015 | 8 |
| 2016 | 3 |
| 2017 | 8 |
| 2018 | 21 |

3.21. For Northern Ireland, I have been provided with statistics from the Public Prosecution Service for the period 2012 to 2018⁹².

| Year | Decisions to charge issued in respect of offences under sections 11 - 13 of the Terrorism Act 2000 |
|-------------|---|
| 2012 | 3 |
| 2013 | 4 |
| 2014 | 7 |
| 2015 | 7 |

⁹¹ Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, quarterly update to December 2018 and table A.05a and quarterly update to September 2019, table Q – A05a.*

⁹² The data for Great Britain and Northern Ireland is not directly comparable because in Great Britain a charge is recorded against the date of arrest of that person, rather than the date of the decision to charge. The figures for 2017 and 2018 are within the range expressed.

| | |
|------|------------------------|
| 2016 | 25 |
| 2017 | 7-9 (see footnote 25) |
| 2018 | 9-11 (see footnote 25) |

3.22. Whether or not a person is charged with an offence, the very fact of proscription is likely to interfere with individual rights, such as freedom of religion, freedom of expression and freedom of association.⁹³ Where a mixed political and military group such as Hizballah is proscribed, the impact of proscription may be particularly wide because speakers will need to be vigilant that political debate does not stray into encouragement to support.⁹⁴

Funding Offences

3.23. The next tier concerns the finances of proscribed groups. Two legal definitions underpin criminal liability:

- Firstly, “terrorist property” is defined to include any resources of a proscribed organisation, which in turn means any money or other property which is applied or made available, or is to be applied or made available, for use by the organisation.⁹⁵
- Secondly, any action taken “for the benefit of a proscribed organisation” is an action taken “for the purposes of terrorism”. It follows that collecting funds for the benefit of a terrorist group equates to collecting funds for the purposes of terrorism.⁹⁶

⁹³ As recognised by the Government in a recent debate on the deproscription of Libyan Islamic Fighting Group, Hansard, (House of Lords) Vol 799 Col.1640, Baroness Williams, 1 October 2019. In *R v Alamgir, Bashir, Khan* [2018] EWCA Crim 1553 which concerned encouraging support for a proscribed organisation, the Court of Appeal held that the appellants’ rights under Articles 9 and 10 of the European Convention on Human Rights had been adequately safeguarded during the prosecution.

⁹⁴ The entirety of Hizballah has been proscribed since February 2019 by the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2019 no.406.

⁹⁵ Sub-sections 1 4(1), (2) Terrorism Act 2000.

⁹⁶ Section 1(5) of the Terrorism Act 2000.

3.24. It is therefore an offence to invite, receive or provide money, with reasonable suspicion that it may be used for the benefit a proscribed organisation (section 15(1); to use or possess money where it may be used for the benefit of a proscribed group (section 16); to enter into funding-arrangements with that suspicion (section 17); as an insurance company, to cover losses incurred by making payments to a proscribed group (section 17A); or to enter into an arrangement relating to another's terrorist property (section 18). The advantage of the proscription-based approach was to overcome difficulties under earlier legislation in tying the funds in question to any particular terrorist acts.⁹⁷

3.25. In 2018, the Supreme Court confirmed that the *mens rea* - reasonable cause to suspect - was an objective test for the funding offences under section 17 of the Terrorism Act 2000. The Appellants were the parents of a dual British/Canadian citizen who had travelled to Syria to fight alongside Da'esh. Both parents were subsequently convicted in 2019 at the Central Criminal Court of sending £223 to their son.⁹⁸ It follows that a person may commit the offence even if they do not intend the funds to end up with a proscribed organisation, and where they do not themselves suspect that it will end up with a proscribed organisation. .

3.26. It is also an offence to fail to disclose a belief or suspicion held that a person is committing a funding or money-laundering offence if the belief or suspicion came in the course of a trade profession business or employment (section 19), and, in the regulated sector,⁹⁹ to fail to make a disclosure where there are reasonable grounds for having such a belief or suspicion (section 21A). These offences apply just as much to handling the resources of proscribed groups as other sorts of terrorist funds. I refer to the disclosure regime in more detail in Chapter 4.¹⁰⁰

3.27. Unlike the terrorist sanctions regime there is no regime for obtaining licences to deal with terrorist groups.¹⁰¹ I discuss the impact of this on overseas aid agencies below.

⁹⁷ *Legislation against Terrorism*, Consultation Paper 1998, CM4178 at paragraph 6.17.

⁹⁸ *R v Lane and Letts* [2018] UKSC 36.

⁹⁹ For example, banks and building societies.

¹⁰⁰ See paragraphs 4.36 – 4.37.

¹⁰¹ Currently, Terrorism Asset-Freezing Etc Act 2010 and ISIL (Da'esh) and Al-Qaida Regulations 2011/2742; post-Brexit, the Sanctions and Anti-Money Laundering Act 2018.

Communication, Planning and Training Offences

3.28. The next set of offences are offences under the Terrorism Act 2006.

3.29. Section 20(2) provides that for the purposes of the Act, "act of terrorism" includes anything constituting an action taken for the purposes of terrorism, within the meaning of the Terrorism Act 2000, with reference to section 1(5) of that Act. It follows that anything done "for the benefit of" a proscribed group constitutes an "act of terrorism" under the Terrorism Act 2006. This wider definition is capable of affecting the following categories of offences:

1. Communication offences: direct or indirect encouragement of acts of terrorism (section 1) and dissemination of terrorist publications (section 2), which includes encouragement of the commission, preparation or instigation of acts of terrorism. In each case, for "acts of terrorism" this must be understood to include "anything done for the benefit of a proscribed organisation"¹⁰².
2. Preparation of an "act of terrorism" (section 5). In principle, this offence, carrying a maximum sentence of life imprisonment, does not require proof that the defendant is preparing for violent acts; it is enough that the preparation relates to something that will benefit a proscribed organisation. This draws otherwise innocent acts, such as arranging transport, if done for the benefit of a proscribed group, into a pool which contains more obvious acts of terrorism such as firing weapons.¹⁰³

¹⁰² In *R v Ali* [2018] EWCA Crim 547, the Court of Appeal dismissed an appeal against a terrorist publication offence under section 2 of the Terrorism Act 2006 on the basis that the offence was lawful proportionate and necessary and did not either in principle or on the facts of the case amount to an unlawful interference with free speech. At paragraph 17 the Court observed that "...The terms of section 2 do not prevent a person such as the appellant from holding offensive views or personally supporting a terrorist cause or communicating the fact that he supports such a cause. What section 2 prohibits is the intentional or reckless dissemination of a terrorist publication where the effect of an offender's conduct is a direct or indirect encouragement to the commission, preparation or instigation of acts of terrorism."

¹⁰³ There is no appellate authority on this point. Anecdotally, I understand that prosecutors are relying on section 20(2) in section 5 cases. When clause 5 was introduced, Paul Goggins, the Home Office Minister, denied that mere donation would be enough to constitute a section 5 offence: Parliamentary debate Hansard (House of Commons) Vol 438 Cols 1000-1, 3 November 2005. Professor Walker QC suggests the words "engages in any conduct" in section 5 may require proof of activity on behalf of the defendant which goes beyond mere contributions to a group: *The Anti-Terrorism Legislation* (3rd ed, Oxford) at paragraph 6.62. Either way, an approach which depends entirely on acting for the benefit of a proscribed group pushes the meaning of "acts of terrorism" too far.

3. Training and attendance at a place of training (sections 6 and 8): again, training for "acts of terrorism" means that training to do things for the benefit of a proscribed group will qualify as an offence.

Extraterritorial Reach

3.30. Even if committed outside the United Kingdom, conduct contrary to these provisions, with the exception of funding offences is triable and punishable in the United Kingdom.¹⁰⁴

- So an overseas national who disseminates a publication overseas which encourages people to join an overseas group which happens to be proscribed in the United Kingdom, commits an offence triable in the United Kingdom.¹⁰⁵
- A person conspiring to commit such an offence, or inciting another to commit such an offence, or a secondary party to such offending would also be triable in the United Kingdom.¹⁰⁶

Prosecutorial Discretion

3.31. Beyond these offences which directly or indirectly rely upon proscription, the involvement of a proscribed group may have an impact on the exercise of prosecutorial discretion. A recent example concerns a defendant charged with attending different terrorist training camps in Iraq and Syria. He claimed that the

¹⁰⁴ Offences contrary to sections 11, 12(1) and (1A), and 13 Terrorism Act 2000 and sections 1, 2, 5, 6 and 8 Terrorism Act 2006. See section 17 Terrorism Act 2006 as recently extended by the Counter-Terrorism and Border Security Act 2019.

¹⁰⁵ Only in the case of offences contrary to sections 12(1) and (1A) (inviting or expressing support for a proscribed organisation) and s13 (uniform and publications associated with proscribed organisation) of the Terrorism Act 2000, is there is an additional limitation that the individual should be a British citizen or resident at the time of committing the offence. There is some inconsistency here: if the point is to limit those persons who may commit certain proscription offences overseas (sections 12 and 13) to British citizens, the same limitation should apply where the offence under sections 1 or 2 is only committed because it is done for the benefit of a proscribed organisation.

¹⁰⁶ Section 17(2)(e),(f) and (h) Terrorism Act 2006.

ultimate purpose of training was to fight with the YPG against Da'esh, and at his first trial the prosecution position was that if this was or might be true they would seek a conviction only on the count alleging attendance at a PKK training camp on the basis that the PKK, unlike the YPG, was a proscribed group.¹⁰⁷

3.32. Conversely, where a proscribed group appears to be involved, a decision not to investigate and prosecute for offences under the Terrorism Act 2000 may seem odd. Potential flag offences are frequently at issue in Northern Ireland. On the one hand it is an offence under section 13 of the Terrorism Act 2000 for a person to display a flag if support for a proscribed group may reasonably be inferred. On the other hand, as any resident of or visitor to Belfast will know, the display of flags and murals including insignia of proscribed groups is routine; yet prosecutions for flags offences under section 13 are rare in Northern Ireland. The wider impact of proscription can therefore include a decision *not* to prosecute.

Liability to Arrest

3.33. By section 40 of the Terrorism Act 2000, a person who commits a proscribed group membership or meeting or funding offence is a "terrorist".¹⁰⁸ A person who is reasonably suspected to be a terrorist may be arrested under section 41 and detained for up to 14 days. Police are thereby provided with access to this strongest of arrest powers for those associated with a proscribed group or their finances.

Civil Powers

3.34. If the Home Secretary is to impose a Terrorism Prevention and Investigation Measure, she first requires proof of "terrorism-related activity" which includes anything constituting an action taken for the purposes of terrorism. As the High Court

¹⁰⁷ This "self-denying ordinance" was criticized by the trial judge at first instance, as recorded by the Court of Appeal, in *R v AJ* [2019] EWCA Crim 647 at paragraphs 20 to 24. The defendant was subsequently convicted on 24 October 2019 of attending the PKK training camp.

¹⁰⁸ The funding offences are in sections 11, 12 or 15 to 18.

observed in 2017,¹⁰⁹ one way of satisfying this criterion is to prove that a person has acted for the benefit of a proscribed group.¹¹⁰

3.35. Similarly, imposing a Temporary Exclusion Order¹¹¹ requires reasonable suspicion of "terrorism-related activity" outside the United Kingdom. This may be satisfied by providing that the individual has acted for the benefit of a proscribed organisation.¹¹²

Exclusion and Deportation

3.36. If an individual is a member or supporter of a proscribed organisation, this may demonstrate that their presence in the United Kingdom is not conducive to the public good and therefore support the use of an immigration power such as exclusion or deportation.¹¹³

3.37. Two cases in 2018 demonstrate the relationship between deportation and proscribed groups:

- In *Regina (B (Algeria)) v Special Immigration Appeals Commission (Bail for Immigration Detainees intervening)*¹¹⁴ the Supreme Court considered the case of a man who had been arrested in the United Kingdom in 1998 in connection with his alleged involvement in the GIA, a proscribed Algerian organisation. He had originally been detained under the Anti-Terrorism, Crime and Security Act 2001 between 2002 and 2005, latterly in Broadmoor Hospital. Deportation proceedings were commenced but B refused to confirm his identity.¹¹⁵ The Supreme Court held that since there was no longer any power to detain B on immigration grounds, since his removal to

¹⁰⁹ *Secretary of State for the Home Department LG and Others* [2017] EWHC 1529 (Admin) at paragraph 52.

¹¹⁰ See sections 4(1)(a) and 30(1) Terrorism Prevention and Investigation Measures Act 2011, which refers back to section 1(5) Terrorism Act 2000.

¹¹¹ See further Chapter 8.

¹¹² Section 2(3) and 14(2) Counter Terrorism and Security Act 2015.

¹¹³ Home Office, *Proscribed Terrorist Organisations*, *supra*, at page 4.

¹¹⁴ [2018] AC 418.

¹¹⁵ Leading to his first appearance before the Supreme Court when the Special Immigration Appeals Commission imposed a sentence of imprisonment for failing to comply with an order to give his true identity: *B (Algeria) v Secretary of State for the Home Department* [2013] 1 WLR 435.

Algeria was not reasonably in prospect, he could not be made subject to bail either.

- In *Youssef v Secretary of State for the Home Department; N2 v Secretary of State for the Home Department*, one of the appellants was subject to deportation because of terrorist glorification of Al Qae'da.¹¹⁶ The issue was whether acts which were not completed or attempted acts of terrorism and could not be shown to have led to specific completed or attempted terrorist acts by others could be sufficient to satisfy the threshold for exclusion from the Refugee Convention under article 1F(c).¹¹⁷

3.38. Membership of a proscribed organisation could also be used to justify deprivation of citizenship in the case of dual nationals.

Digital Take-Downs

3.39. CT Police are in routine dialogue with communication service providers such as Facebook, drawing their attention to and attempting to persuade them to remove terrorist material from the internet.¹¹⁸ Whether material relates to a proscribed group will be relevant to whether United Kingdom authorities seek to persuade communication service providers to remove it, and whether the request is ultimately successful.

European Union Sanctions

3.40. Proscription orders are used at an international level to support the making of European Union sanctions under Common Position 2001/931. Proscription under the Terrorism Act 2000 is a decision of a competent authority within the meaning of Article 1(4). In *Hamas v Council*¹¹⁹ it was noted that the European Union sanction could have

¹¹⁶ [2018] 3 W.L.R. 1532 at paragraph 14.

¹¹⁷ Youssef's appeal was allowed on the narrow basis that the tribunal below had not stood back and fully considered the gravity of his conduct before invoking the exclusion clauses, see paragraph 87.

¹¹⁸ There is a statutory power to require the taking down of material under section 3 Terrorism Act 2006, but this power has never been used.

¹¹⁹ Case T-289/15, 6 March 2019, at paragraph 66.

been based solely on the Home Secretary's decision to proscribe Hamas-Izz al-Din al-Qassem in 2001.

Non-jury trials in Northern Ireland

3.41. The Director of Public Prosecutions for Northern Ireland is empowered to issue a certificate requiring a trial on indictment to take place without a jury. Under the Justice and Security (Northern Ireland) Act 2007, section 1, there is a two-stage test. Three of the four ways of satisfying the first stage refer to proscribed organisations, for example suspecting that the defendant or an associate of the defendant is a member of proscribed organisation.¹²⁰ The fourth condition, not to do with proscribed groups but offences motivated by religious or political hostility was considered by the Supreme Court in *Re Hutchings Judicial Review*.¹²¹

The Charity Sector

3.42. Guidance from the Charity Commission for England and Wales refers to "inappropriate expressions of support by a trustee for a proscribed organisation" as a form of abuse which may require an official response.¹²² In a decision published in March 2018, concerning the Anatolia People's Cultural Centre, the Charity Commission stated that "...Trustees must therefore not engage in conduct or activities which would lead a reasonable member of the public to conclude that the charity or its trustees are associated with a proscribed organisation or terrorism generally."¹²³

¹²⁰ Section 1(10) Justice and Security (Northern Ireland) Act 2007.

¹²¹ [2019] UKSC 26.

¹²²

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/354726/Charities_and_terrorism_MP_factsheet_7.pdf, at page 1.

¹²³ <https://www.gov.uk/government/publications/charity-inquiry-anatolia-peoples-cultural-centre/anatolia-peoples-cultural-centre> under "Lessons for the Wider Sector."

Overseas Aid Agencies

3.43. Extraterritorial United Kingdom proscription offences are not unique in requiring the close and time-consuming attention of leading aid agencies which operate overseas.¹²⁴ The impact of United States counter-terrorism legislation is particularly acute.¹²⁵ The risk of committing offences or falling foul of the authorities is most acute where aid agencies are operating in territories which are under the *de facto* control of designated or proscribed groups, or where such groups are active on the ground.

- I am aware of an instance where a proscribed group seized a consignment of aid overseas and sought to bargain with the aid agency for its return.
- Lord Anderson QC in his *Terrorism Acts in 2013 Report*¹²⁶ drew attention to policies of overseas “community acceptance” or “constructive engagement” with groups which exert effective political and military control over an area. This is done to assist agencies to protect staff, mitigate loss of assets and ensure aid is delivered to communities in need.
- 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.¹²⁷

3.44. The Government is entitled to point out that the risk of individuals or organisations being prosecuted for a terrorism offence as a result of their involvement in humanitarian efforts or conflict resolution is low.¹²⁸ But it is one thing for the authorities to point to the low incidence of prosecution; no responsible international non-governmental organisation can be cavalier¹²⁹ about the risks of:

¹²⁴ I refer to aid agencies providing humanitarian relief but the points equally apply to agencies providing capacity-building or peacebuilding services.

¹²⁵ See for example Modirzadeh, Lewis and Bruderlein, ‘Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape’ (2011) *IRRC* Volume 93 Number 883.

¹²⁶ At paragraph 9.27.

¹²⁷ There are particular difficulties where proscribed groups have joined a government, for example Hizbollah, proscribed under the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2019, which holds various government ministries in Lebanon.

¹²⁸ For Information Home Office, *Operating within Counter-Terrorism Legislation*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795459/20190411_info_sheet_003_.pdf.

¹²⁹ Or alternatively adopt a “Don’t ask, don’t tell” approach.

1. Breaches of the criminal law. Charities have a responsibility for United Kingdom nationals or locally engaged staff deployed to impoverished areas where proscribed groups operate, and trustees are unlikely to be satisfied if terrorism laws are in fact being breached, even if criminal proceedings are unlikely;
2. Non-compliance with the terms of Department for International Development aid grants which expressly require aid agencies to ensure that their programmes are fully compliant with counter terrorist financing legislation including proscription¹³⁰;
3. Banks slowing down transactions, freezing accounts and in some cases closing accounts in order to reduce their risk of inadvertently breaching counter-terrorism financing legislation, referred to as bank de-risking.¹³¹ The Government has recognised this phenomenon, especially "for non-governmental organisations operating in areas where terrorist groups operate";¹³²
4. For relevant charities, failing to comply with guidance issued by the Charity Commission for England and Wales by which it is a legal requirement that trustees must take adequate steps to ensure that they do not, even inadvertently, commit a criminal offence in the United Kingdom or overseas by working with proscribed organisations.¹³³

¹³⁰ I have been provided with the terms of an "Accountable Grant Arrangement" from the Department for International Development.

¹³¹ Charity Finance Group, *Impact of Money Laundering and Counter- terrorism Regulations on Charities*, (March 2018) <https://cfg.org.uk/userfiles/documents/Policy%20documents/Impact%20of%20money%20laundering%20and%20counter-terrorism%20regulations%20on%20charities.pdf> at 1.

¹³² See Information Note, *supra*.

¹³³ Charity Commission, *Compliance toolkit: protecting charities from harm*, Chapter 1, Module 5, "Proscribed Organisations" https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/568809/Chapter1_Module5.pdf at page 6 of 8.

Footprint: Conclusion

3.45. The proscription footprint extends well beyond the bounds of criminal liability and has real consequence beyond the confines of the individual proscribed group. Indeed this accounts for the power and utility of proscription which is why, as I consider below:

- There is little excuse for not keeping the list of proscribed organisations up to date.
- Steps must be taken to reduce the impact on overseas aid agencies.

Keeping the list Up to Date

3.46. Prior to the enactment of the Terrorism Act 2000, the only proscribed groups were those engaging in Northern Irish related terrorism. At the time, the Government was in two minds about whether to extend the power to non-Northern Irish groups and regarded the position as "finely balanced".¹³⁴ Although the decision to confer a more general power on the Home Secretary has proven to be the right one, it was recognised at the time that maintaining an up to date list of proscribed groups would be a formidable task.¹³⁵

3.47. Despite the size of its footprint, proscription is neither time limited nor the subject of periodic review. This distinguishes it from the regime for financial sanctions under the Terrorist Asset- Freezing etc. Act 2010 and designated area orders under the Counter-Terrorism and Border Security Act 2019.¹³⁶

3.48. In practice therefore, a proscribed group will only be removed from the list:

1. If a proactive decision is taken by the Home Secretary to make an order removing a group.¹³⁷

¹³⁴ Legislation Against Terrorism, A Consultation Paper, CM4178, 1998, at paragraph 4.17.

¹³⁵ Ibid, at paragraph 4.16.

¹³⁶ Final designations under Terrorist Asset Freezing Etc Act 2010 lapse after one year if not renewed, see section 4; designations under the Counter Terrorism and Border Security 2019 must be kept under review and lapse after 3 years, section 58C of the Terrorism Act. 2000.

¹³⁷ Under section 3(3)(b) of the Terrorism Act 2000.

2. If an application is made for deproscription and the Home Secretary considers that the application was well-founded and thereafter makes an order removing the group.¹³⁸
3. If a successful appeal is brought against the refusal of the Home Secretary to deproscribe before the Proscribed Organisations Appeals Commission.¹³⁹

3.49. In the sole decision of the Proscribed Organisations Appeals Commission to date, the Commission stated *obiter* that it was the duty of the Secretary of State to hold periodic reviews. The judges observed that since it cannot have been Parliament's intention that an organisation for which there were no longer any grounds for believing is currently concerned in terrorism should remain on the list "for any longer than is absolutely necessary", it was "incumbent" on the Secretary of State to "consider at regular intervals" whether the power to deproscribe should be exercised.¹⁴⁰ The Commission was informed that the Secretary of State did carry out reviews roughly every 12 months; this was a practice that the Secretary of State "should continue to adopt" and served to underline the Commission's view that this practice was a "proper reflection of the Secretary of State's statutory duty".¹⁴¹

3.50. By 2013, the newly formed Proscription Review Group had inherited the function of carrying out annual reviews of all proscribed groups and recommending to Ministers the maintenance or proscription or deproscription¹⁴² but this practice ended in 2014.¹⁴³

3.51. The absence of a requirement to review has been the subject of repeated criticism by previous Independent Reviewers. Lord Anderson QC reserved his most strident remarks as Independent Reviewer for the Government's refusal to implement a review scheme, referring to the continued proscription of some 14 groups in respect of which the statutory test was not satisfied as "an affront to the rule of law".¹⁴⁴ The acceptability of maintaining a list which includes groups who are no longer currently

¹³⁸ Under section 4 of the Terrorism Act 2000.

¹³⁹ Under section 5 of the Terrorism Act 2000.

¹⁴⁰ *Lord Alton of Liverpool & others (In the Matter of The People's Mojahadeen Organisation of Iran) v Secretary of State for the Home Department* PC/02/2006, 30 November 2007, at paragraph 73.

¹⁴¹ The Secretary of State appealed the Commission's decision to the Court of Appeal, [2008] EWCA Civ 443. The appeal was dismissed; the Court of Appeal did not comment on the duty to review identified by the Commission.

¹⁴² Lord Anderson QC, *Terrorism Acts in 2012 Report*, at 5.8 to 5.9.

¹⁴³ Professor Clive Walker QC, "Executive Legal Measures and Terrorism: Proscription and Financial Sanctions", Annex 2 to Max Hill QC, *Terrorism Acts in 2016 Report*.

¹⁴⁴ Lord Anderson QC, *Terrorism Acts in 2016 Report*, at 5.24.

involved in terrorism falls must also be judged in light of the proscription footprint, because the law of proscription is part of so many different rules of law capable of affecting individual rights and behaviour both in the United Kingdom and abroad. The authority of the list must also depend upon it being up to date.

3.52. In responding to Lord Anderson QC's criticisms, the position of the Government has been threefold: firstly, that it is not convinced that the absence of a review would in practice prevent any injustice, secondly, that regular reviews could lead to perverse outcomes and thirdly, that such a scheme would have considerable practical and financial disadvantages.¹⁴⁵

3.53. During the passage of the Counter-Terrorism and Border Security Act 2019, unsuccessful attempts were made by Lord Anderson QC to reform proscription powers by amending the threshold and also by demanding a review.¹⁴⁶ The Government's objections to reforming the system were given fuller explanation by Baroness Williams.¹⁴⁷

3.54. Taking these objections in turn.

3.55. Firstly, the fact that some individuals have **an opportunity to apply to for deproscription**, and thereby cause the government to carry out a review¹⁴⁸ with possibility of onward appeal to the Proscribed Organisations Appeal Commission, is a very incomplete answer to the rule of law point. If there is no moral blameworthiness or public protection reason why conduct should be unlawful, it is no answer to say that an application may be made to change the law before the conduct takes place. This remains the case even though, as has been emphasized to me by officials, the application could simply take the form of a letter with no added cost to the individual.

3.56. Moreover, it is quite possible that an application will fail on procedural grounds, as occurred recently when an attempt was made in 2017 to apply for the

¹⁴⁵ Government Response to *Terrorism Acts in 2016 Report*, at page 5, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/630771/60502_Cm_9489_Accessible.pdf.

¹⁴⁶ Hansard (House of Lords) Vol 793 Col 1749 12 November 2018; Hansard (House of Lords) Vol 794 Col 1643, 17 December 2018.

¹⁴⁷ Hansard (House of Lords), Vol 794 Col 1647, 17 December 2018,

¹⁴⁸ Pursuant to regulation 7 of SI 2006/2299, the application must be determined within 90 days of receipt, see reg 7.

deproscription of the Red Hand Commando, a Northern Irish loyalist group.¹⁴⁹ This is because any application for deproscription under s4(3) must comply with the Proscribed Organisations (Applications for Deproscription etc.) Regulations 2006/2299 which require that applications are made by the organisation which has been proscribed. This requires that the person making the application must explain the position they hold in the organisation or their authority to act on behalf of that organisation. It is not difficult to see why a potentially fractured group, towards the end of its operational life, may find it difficult to put forward a person holding a formal position or having the organisation's authority.

3.57. Alternatively, the application may be made by a person affected by the organisation's proscription, in which case the person must set out "the manner in which the applicant is affected".¹⁵⁰ Whilst less onerous, the requirement to set out *how* a person is affected is nonetheless problematic. Parliament has recognised that those who apply for deproscription may be concerned about the evidential use of what they say in their applications, and has therefore created a limited scheme of immunity for such statements.¹⁵¹ But that immunity does not prevent information submitted being used as intelligence against the individual concerned.

3.58. It is also possible that reliance on a form of adversarial process, with application, followed by response, and then appeal is less than ideal when assessing terrorist risk. In 2015 the Sikh Youth Federation applied for deproscription but after a refusal, without reasons, the Government was directed by the Proscribed Organisation Appeal Commission to provide these, and on the day that those reasons were due the Government conceded the case and laid an order for deproscription.¹⁵²

3.59. Secondly, there is the possibility of **perverse outcomes**. This refers to the risk that deproscription of a group, without a review first having been sought, could have a "significant and unsettling impact on the political situation and the peace process" in Northern Ireland.¹⁵³ The gravity of the situation in Northern Ireland commands attention. But the rule of law applies as much in Northern Ireland as elsewhere, and

¹⁴⁹ The application was not considered to be valid and the matter did not proceed.

¹⁵⁰ Regulation 3(3)(b).

¹⁵¹ Affecting proceedings for offences contrary to sections 11-13, 15-19 and 56 of the of the Terrorism Act 2000 only: see section 10.

¹⁵² The details were given by Lord Rosser at Hansard, (House of Lords) Vol 769 Col 1985, 17 March 2016.

¹⁵³ Baroness Williams, *supra*.

it is quite open to Parliament to amend the criterion in section 3 from “is concerned in terrorism” to “is or has been concerned in terrorism” if the historic involvement of proscribed groups in terrorist activity means that deproscription can never be countenanced. I consider the question of proscription and deproscription in the Northern Irish context in more detail in Chapter 9.

3.60. Thirdly, **practical and financial disadvantages**. Whilst the Government did not resist changes “primarily” for these reasons,¹⁵⁴ the Government referred to the diversion of operational resources in carrying out reviews of proscribed groups. I accept that any review would require the diversion of some resources and that any review would have to be carried out professionally.¹⁵⁵ However, the resource commitment should not be overstated. Furthermore, the Government has now given a commitment in Parliament that if the Government became aware of “fresh information that casts serious doubt on whether proscription remains appropriate for a given group, it will be given serious consideration irrespective of whether there has been an application for deproscription”.¹⁵⁶ This concession, welcome as it is, casts doubt on whether a fuller system of review could not be accommodated.

3.61. There is a further unarticulated objection which is the political risk of deproscription. Lord Anderson QC has previously referred to the “almost eccentric courage” that would be required by a mainstream political leader to take the risk of making a deproscription order.¹⁵⁷

3.62. None of the three reasons given are sufficient to justify the current position. The solution which I **recommend** is that proscription orders should automatically lapse after a set period such as three years. There would be no *duty* to conduct a proactive review of every proscription order. The Secretary of State would have a power to extend a proscription order before its expiry, subject to annulment in the Houses of Parliament.¹⁵⁸ This would increase the role of Parliament, which is currently excluded from considering existing proscription orders unless an order for deproscription or amendment is laid.¹⁵⁹ Existing proscription orders would not

¹⁵⁴ *Ibid.*

¹⁵⁵ The Joint Terrorism Assessment Centre is the body responsible body for carrying out assessments.

¹⁵⁶ Baroness Williams *supra*.

¹⁵⁷ Lord Anderson QC, *Terrorism Acts in 2011 Report*, at 4.51, citing Professor Conor Gearty, *Civil Liberties* (OUP 2007), at page 158.

¹⁵⁸ Under section 123(2) Terrorism Act 2000.

¹⁵⁹ Section 123(4) Terrorism Act 2000.

immediately lapse, but would be treated as if they had been newly made when the amendments to section 3 Terrorism Act 2000 came into force. In this way, the proscription power would secure its legitimacy.

Reducing the Burden on Aid Agencies

3.63. A practical means by which aid agencies can continue to operate in difficult areas without jeopardising legitimate counter-terrorism imperatives remains elusive.¹⁶⁰ There appears to be no prospect of a specific exemption that would allow aid agencies to operate because this would create a "loophole" for unscrupulous individuals.¹⁶¹

3.64. The brokering of a practical solution is not within my remit. But ultimately it is the *criminal* prohibition in the proscription legislation which underpins the peril for aid agencies and banks. In other fields, prosecutorial guidance has been published which aids certainty for individuals and organisations, most relevantly the Bribery Act 2010 guidance issued jointly by the Director of the Serious Fraud Office and the Director of Public Prosecutions¹⁶² which relates to offences such as bribing foreign officials and includes factors tending for and against prosecution in cases of bribery and corruption. Other guidance issued by the CPS relates to overseas terrorist offending,¹⁶³ assisted suicide,¹⁶⁴ and road traffic.¹⁶⁵

3.65. Despite the fact that the Government has stated that there is no need for any separate guidance to aid agencies¹⁶⁶ the Home Office has published what looks very much like guidance in connection with the offence under section 12(2) of the Terrorism Act 2000 (arranging or managing a meeting to be addressed by a member of a proscribed organisation), referring to the fact that it is a defence to arrange a "genuinely benign meeting" which is "...interpreted as a meeting at which the terrorist

¹⁶⁰ See recently, Norwegian Refugee Council (2018), "Principles Under Pressure", https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/nrc-principles_under_pressure-report-2018-screen.pdf.

¹⁶¹ For Information Note, *supra* at page 3.

¹⁶² <https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and>.

¹⁶³ <https://www.cps.gov.uk/legal-guidance/terrorism-guidance-relation-prosecution-offences-relating-daesh-and-conflict-syria>.

¹⁶⁴ <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide>.

¹⁶⁵ <https://www.cps.gov.uk/legal-guidance/road-traffic-charging>.

¹⁶⁶ For Information Note, *supra* at page 3.

activities of the group are not promoted or encouraged, for example, a meeting designed to encourage a designated group to engage in a peace process or facilitate delivery of humanitarian aid where this does not involve knowingly transferring assets to a proscribed organisation."¹⁶⁷

3.66. Welcome though this is, this is not substitute for guidance issued by the Director of Public Prosecutors or the Attorney General whose consent is required for prosecutions of proscription offences committed outside the United Kingdom.¹⁶⁸ Nor does it extend to other offences, such as those which could be committed by an individual or entity in the United Kingdom who enters into an arrangement by which monies are to be transferred, having reasonable cause to suspect it will end up in the hands of a proscribed group overseas.¹⁶⁹ Given the reach of the proscription powers, I **recommend** that the Home Secretary should invite the Attorney General to consider the issue of prosecutorial guidance on overseas aid agencies and proscribed groups. The need to ensure that counter terrorism laws do not stifle legitimate humanitarian activities is of international concern.¹⁷⁰

3.67. Unlike the sanctions regimes¹⁷¹, there is no scheme for government to licence activities which would otherwise be contrary to the proscription offences. Scope does exist, although it is doubtful how much it is used by aid agencies, for prior consent to be sought for financial transactions which would otherwise amount to terrorist financing offences contrary to sections 15 to 18 of the Terrorism Act 2000.¹⁷² If consent is not specifically refused within 7 days, consent is deemed to have been given.¹⁷³ In practice, the consent regime is administered by the National Crime Agency with support and advice from CT Police; in a difficult case, decisions on

¹⁶⁷ Ibid at page 7. This goes significantly further than the Government's general guidance on Proscribed Organisations which mere notes that the proscription offences do not prevent non-governmental organisations interacting with proscribed organisations overseas.

¹⁶⁸ Section 117(2A) Terrorism Act 2000.

¹⁶⁹ Section 17 Terrorism Act 2000.

¹⁷⁰ See UNSC Resolution 2462, Article 24, which "urges states, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law."

¹⁷¹ Section 17 Terrorist Asset-Freezing Etc Act 2010, regulation 9 The ISIL (Da'esh) and Al-Qaida (Asset-Freezing) Regulations 2011, regulation 9; post-Brexit, the legislation is the Sanctions and Anti-Money-Laundering Act 2018, with a licencing regime established by section 15.

¹⁷² By making a request for prior consent under section 21ZA of the Terrorism Act 2000. I consider this procedure further in Chapter 4.

¹⁷³ Section 21ZA(2) Terrorism Act 2000.

consent will be informed by discussions with the Home Office and potentially Ministers.

3.68. Although the idea of seeking permission to provide money or other resources which might end up benefiting a terrorist organisation might seem outlandish this is a real issue for overseas aid organisations who need to deal with actual or possible members of proscribed groups when distributing aid in conflict zones.

3.69. I will report to Her Majesty's Treasury on the operation of the sanctions regimes in due course: that is a reporting function separate from this Report into terrorism legislation. It is already apparent to me that more can be done to ensure that where a licencing regime exists, as it does for sanctions, it should be as user-friendly as possible. Government and police should be prepared to work with the sector so that where applications for licences or consent are made, they are made in the right form and with sufficient detail that they can be properly and effectively considered. Aid agencies could also establish real expertise in these mechanisms, potentially on a shared basis.¹⁷⁴ I look forward to reporting on whether effective approval mechanisms do exist, whether they are underused, and whether they can be improved.

3.70. Finally, following a recommendation by Lord Anderson QC in his *Terrorism Acts in 2013 Report*,¹⁷⁵ in 2017 the Government formally established a 'Tri-Sector Working Group' comprising representatives from three sectors – government and regulators, the banking sector and international non-governmental organisations. Its aim is to develop practical solutions to managing risks in high-risk jurisdictions and is a very welcome recognition that government and the aid sector have a shared interest in ensuring that aid is delivered in hard-to-reach and dangerous areas such as Syria and Somalia. I commend the joint efforts, and the involvement of multiple government departments including the Home Office, Treasury, Foreign and Commonwealth Office, and the Department for International Development, that have been made to date. However, I urge faster progress in addressing the problems faced by international non-governmental organisations. Lord Anderson QC's recommendation about establishing a joint dialogue was made in 2014, and tangible results are

¹⁷⁴ For example, by seeking joint funding for a single subject matter expert in sanctions and counter-terrorism financing to advise on and settle applications for consent across the sector. I suspect such a post would suit a junior lawyer as a temporary position and be much sought after.

¹⁷⁵ Lord Anderson QC, *Terrorism Acts in 2013 Report*, at 9.33.

required. The United Kingdom is considered to be a world leader in aid, and should not be tripped up by its own laws.

INVESTIGATING TERRORISM

Introduction

4.1 The close relationship between CT Police and MI5 is at the core of counter-terrorism investigations. MI5's investigative powers are outside my scope and are subject to oversight and review by the Investigatory Powers Commissioner. For their part CT Police use a mixture of common law, non-terrorism statutory powers¹⁷⁶, and powers under the Terrorism Act 2000 and other counter-terrorism legislation. This Chapter considers this final category of powers.

Stop and Search

4.2 The stop and search powers under the Terrorism Act 2000 are, in summary:

- i. Section 43, a power to stop and search a person reasonably suspected to be a terrorist to discover whether he has in his possession anything which may constitute evidence that he is a terrorist;
- ii. Section 43A, a power to stop and search a vehicle which it is reasonably suspected is being used for terrorism, for evidence that it is being used for such purposes;
- iii. Section 47A, a no-suspicion power that can only be used in the extremely limited circumstances.

Sections 43 and 43A

4.3. Figures for the use of section 43 are published in Great Britain only for the Metropolitan Police Service area¹⁷⁷.

¹⁷⁶ Such as the Police and Criminal Evidence Act 1984.

¹⁷⁷ For Lord Anderson QC's *Terrorism Acts in 2015 Report*, Professor Walker carried out a survey of some of the largest forces, see 6.6.

London

4.3 In the year ending 31 December 2018, 643 persons were stopped and searched by the MPS under section 43.¹⁷⁸ This is a fall of 19% compared with the previous year's total of 776, which was the highest number of stops since 2011. There were 57 arrests made following a section 43 stop and search, down 6 on the previous year's total of 62. The arrest rate increased by one percent on the previous year, with 9% of stops resulting in arrest.

| Year | Searches | Arrests |
|------|----------|---------|
| 2010 | 995 | n/a |
| 2011 | 1052 | 32 (3%) |
| 2012 | 614 | 35 (6%) |
| 2013 | 491 | 34 (7%) |
| 2014 | 394 | 25 (6%) |
| 2015 | 521 | 57(11%) |
| 2016 | 483 | 44 (9%) |
| 2017 | 776 | 62 (8%) |
| 2018 | 643 | 57 (9%) |

4.4. The self-defined ethnicity of those stopped under section 43 in London since 2010 is as follows:¹⁷⁹

| Year | White | Asian | Black | Chinese / Other | Mixed/not stated | Total |
|------|-------|-------|-------|-----------------|------------------|-------|
| 2010 | 43% | 30% | 11% | 7% | 9% | 999 |

¹⁷⁸ Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, quarterly update to September 2019*, table Q - S.01 and financial year ending 31 March 2019 table Q – S.01 and quarterly update to December 2018 S.01.

¹⁷⁹ Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, quarterly update to September 2019*, table Q - S.02, year ending 31 March 2019 table Q – S.02 and year ending 31 December 2018 A - S.02

| | | | | | | |
|-------------|-----|-----|-----|-----|-----|------|
| 2011 | 35% | 37% | 9% | 8% | 11% | 1052 |
| 2012 | 39% | 31% | 12% | 7% | 11% | 614 |
| 2013 | 34% | 32% | 14% | 9% | 10% | 491 |
| 2014 | 41% | 22% | 12% | 9% | 16% | 394 |
| 2015 | 30% | 27% | 13% | 10% | 21% | 521 |
| 2016 | 28% | 27% | 11% | 12% | 22% | 483 |
| 2017 | 30% | 27% | 14% | 7% | 22% | 776 |
| 2018 | 25% | 26% | 16% | 13% | 19% | 643 |

4.5. For the reasons I explained in Chapter 1¹⁸⁰, these categories may not be sufficiently nuanced to provide an accurate picture of who is being stopped under section 43 of the Terrorism Act 2000.

Northern Ireland

4.6. In Northern Ireland in 2018:¹⁸¹

- i. 41 people were stopped and searched under section 43 of the Terrorism Act 2000, down from 65 in the previous year.
- ii. A further 2 were stopped under section 43A, down from 3 in the previous year.
- iii. 9 people were stopped under sections 43 and 43A (down from 31 in 2017), and 13 under sections 43 and/or 43A in combination with other powers (sections 21 and 24 of the Justice and Security (Northern Ireland) Act 2007, sections 21 and 24 of the Justice and Security (Northern Ireland) Act 2007 and section 24 and Misuse of Drugs Act 1971, section 53 of the Firearms Order 2004 and other legislative powers).

¹⁸⁰ At 1.36.

¹⁸¹ Police Service of Northern Ireland, *Police Recorded Security Situation Statistics Northern Ireland*, table 5.

4.7. Unlike in Great Britain, data on the ethnicity of those stopped is not published in Northern Ireland.

Other forces

4.8. In several of his reports, Lord Anderson QC recommended that other forces publish figures as well. In 2016, the then Home Secretary responded that the Home Office was working with the police to investigate whether this information could be collated and published at a national level. Despite three years having elapsed since the Home Secretary made this commitment, no progress appears to have been made.

4.9. My attempts to obtain these figures from individual forces by way of Freedom of Information requests have so far proven unsuccessful.

Section 47A

4.10. Section 47A of the Terrorism Act 2000 contains an exceptional power, enabling an officer of assistant chief constable rank¹⁸² to grant authority for suspicion-less stops and searches in a specified area.¹⁸³ Pedestrians, vehicles and their occupants may be searched, but only for the purpose of discovering evidence either that (i) the vehicle is being used for the purposes of terrorism, or (ii) that the person concerned is a terrorist.¹⁸⁴

4.11. Authorisation may only be given if the senior officer reasonably suspects that an act of terrorism "will take place" and reasonably considers that the authorisation is necessary to prevent such an act.¹⁸⁵ A Code of Practice (2012) governs the exercise of the power to authorise, and the conduct of stops and searches.¹⁸⁶ Notably, the general threat of terrorism, or vulnerability of a particular site or event, may be taken into account but should not form the sole basis of an authorisation.¹⁸⁷

¹⁸² Or Commander in the Metropolitan or City of London police areas.

¹⁸³ Further provision is made under Schedule 6B.

¹⁸⁴ Section 47A(4) Terrorism Act 2000.

¹⁸⁵ Section 47A(1)(b) Terrorism Act 2000.

¹⁸⁶ <https://www.gov.uk/government/publications/code-of-practice-for-the-exercise-of-stop-and-search-powers>.

¹⁸⁷ Ibid at paragraph 4.1.5.

- 4.12. The power is considerably narrower than the original authorisation regime, which could be invoked wherever "expedient" for the prevention of acts of terrorism, and which was held to be unlawful by the Strasbourg Court¹⁸⁸ and subsequently repealed.¹⁸⁹ There were no uses of this power in 2018.
- 4.13. The first use of the power was in Northern Ireland in 2013, in the circumstances described by Lord Anderson QC in his *Terrorism Acts in 2013 Report*.¹⁹⁰ An inspection of the exercise of this power was carried out by Lord Anderson QC on a visit to Belfast, and by Human Rights Advisor of the Northern Ireland Policing Board.¹⁹¹
- 4.14. The only other use of this power was in September 2017, in each case resulting from the Parson's Green attack in London. The threat level was briefly raised to critical, as it was not known if the perpetrator of the Parsons Green attack was a lone actor, and the perpetrator, Ahmed Hassan, was then at large.¹⁹²
- 4.15. There were four authorisations by the following police forces: British Transport Police, City of London Police, West Yorkshire Police and North Yorkshire Police. 149 stops and searches were conducted under these authorisations, leading to 5 arrests. Of these, 145 stops were conducted by the British Transport Police resulting in 4 arrests; 3 stops were carried out by North Yorkshire, resulting in 1 arrest and 1 stop was carried out by West Yorkshire Police with no arrest resulting; whilst no stops were carried out by City of London Police.¹⁹³
- 4.16. I have reviewed each of the four detailed written authorisations:

¹⁸⁸ *Gillan and Quinton v United Kingdom* [2010] ECHR 28. See further Lord Anderson QC, *Terrorism Acts in 2011 Report*, at 8.6.

¹⁸⁹ By section 59 of the Protection of Freedoms Act 2012.

¹⁹⁰ At paragraph 6.9.

¹⁹¹ Transparency Report, 2018, at paragraph 5.1,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727961/CCS207_CCS0418538240-1_Transparency_Report_2018_Web_Accessible.pdf.

¹⁹² Max Hill QC, *Terrorism Acts in 2017 Report*, at 3.10. Hassan was arrested on 16 September 2017 at Dover.

¹⁹³ Home Office, *Police powers and procedures England and Wales, year ending 31 March 2018*, published 25 October 2018, at paragraph 4.4. These figures are slightly higher than those contained in the Government's Transparency Report 2018, published July 2018, at paragraph 5.1. The earlier publication date may account for this difference.

- i. British Transport Police. The stated purpose was to prevent persons transporting items for use in a terrorist attack from entering the network unchecked. It applied on the rail network throughout the United Kingdom. It was made orally and then confirmed in writing and lasted from 13:00 on 16 September 2017 to 12:59 on 18 September 2017.¹⁹⁴
- ii. City of London Police. The stated purpose was to protect vulnerable locations. It applied to the whole of the force area. It was made orally and then confirmed in writing and lasted from 15:50 on 16 September 2017 to 11:00 on 18 September 2017.¹⁹⁵
- iii. West Yorkshire Police. The stated purpose was to protect crowded and vulnerable locations. It applied to the whole of West Yorkshire. It was made orally and then confirmed in writing and lasted from 12:40 on 16 September 2017 to 12:39 on 18 September 2017.
- iv. North Yorkshire Police. The stated purpose was to protect crowded iconic sites within York. It applied to the whole of the City of York. It was made orally and then confirmed in writing and lasted for 23 minutes from 14:45 on 17 September 2017 to 15:08 on 17 September 2017 which is one minute after the formal decision by the Joint Terrorism Analysis Centre to lower the threat level from Critical to Severe.¹⁹⁶

4.17. Given the earlier attacks at Westminster Bridge, Manchester Arena, London Bridge, and Finsbury Park Mosque, these authorisations will have been made against a heightened state of alert. In each case the authorisation was based on the raising of the general United Kingdom threat level to Critical, rather than any intelligence of a particular threat in a particular geographical area (or in the case of the British Transport Police, to the rail network). I am yet to discuss the authorisations with the Forces concerned, or to review the stops and searches that were carried out. It is not clear why no other Forces granted authorisations, since the basis of the authorisations could have applied equally to many other, if not all, Forces.

¹⁹⁴ The authorisation wrongly records the date as August.

¹⁹⁵ The copy of the written authorisation seen was not signed but I have assumed that the wet ink copy has been retained by the force concerned.

¹⁹⁶ The paperwork records elsewhere that it was rescinded at 14:44 on 21 September 2017, but this appears to be an error. Authorisations can only last for 48 hours, unless authorised by the Secretary of State, and no such authorisation was given

4.18. What the above authorisations do demonstrate, however, is that each of these local Forces responded to changes in the national threat level, and moreover whether or not section 47A should be activated in these circumstances is a national rather than local issue. I **recommend** that CT Policing should consider providing national advice to forces on whether, in response to a raising of the national threat level to critical, authorisations under section 47A should be made; and that the Home Office and the police consider whether the 2012 Code of Practice, which is now several years old, requires revision.

"Terrorist investigation" powers

4.19. Section 32 of the Terrorism Act 2000 defines a terrorist investigation as an investigation of (a) the commission, preparation or instigation of acts of terrorism, (b) an act which appears to have been done for the purposes of terrorism, (c) the resources of a proscribed organisation, (d) the possibility of making an order for proscription under section 3(3), or (e) the commission, preparation or instigation of an offence under the Terrorism Act 2000 or under Part 1 of the Terrorism Act 2006 other than the offences under sections 1 (encouragement of terrorism) and 2 (terrorist publications).

4.20. This definition provides a very wide umbrella for the exercise of the following powers in the Terrorism Act 2000. The continuing exemption of investigations into encouraging terrorism and terrorist publications - offences both carrying a maximum of 15 years' imprisonment since the recent amendments made by the Counter-Terrorism and Border Security Act 2019, may seem anomalous, especially since both offences are now serious enough to be extraterritorial.¹⁹⁷ But neither of these offences, serious though they are, relate to an immediate risk to life or limb, which is where the exceptional powers described below are most warranted.¹⁹⁸ The definition is also relevant to the tipping off offence created under section 39: it is an offence punishable by up to 5 years' imprisonment to disclose information likely to prejudice a terrorist investigation.

¹⁹⁷ Section 17(2)(a) Terrorism Act 2000, as amended by the Counter-Terrorism and Border Security Act 2019.

¹⁹⁸ There is also a bespoke search power for terrorist publications under section 28 Terrorism Act 2006, considered below.

Cordons

4.21. Section 33 of the Terrorism Act 2000 gives police officers of at least the rank of superintendent the power to authorise the use of a cordon in an area where it is considered expedient to do so for the purposes of a terrorist investigation. A police officer may order persons (including drivers) to leave cordoned areas, and prohibit pedestrian or vehicle access, and it is an offence to fail to comply with such a requirement. Cordons are typically set up to investigate a suspected package or to deal with the consequences of a terrorism-related incident.

4.22. Statistics for cordons are reported by financial year for both Great Britain and Northern Ireland.¹⁹⁹

| Police force | 2012/13 | 2013/14 | 2014/15 | 2015/16 | 2016/17 | 2017/18 | 2018/19 |
|--------------------|---------|---------|---------|---------|---------|---------|---------|
| Avon & Somerset | - | - | - | - | - | - | - |
| Cheshire | - | - | - | - | - | 6 | - |
| Cumbria | - | - | - | - | - | 1 | - |
| Dyfed-Powys | - | - | - | - | 1 | - | - |
| Gloucestershire | - | - | 1 | - | - | - | - |
| Greater Manchester | - | 7 | 11 | 7 | 3 | 28 | 2 |
| Lancashire | - | - | - | 4 | 2 | - | 2 |
| Leicestershire | 1 | - | - | - | - | - | - |
| City of London | 4 | 1 | 4 | - | 2 | 2 | - |
| Merseyside | 3 | 4 | 6 | 4 | - | 3 | 2 |

¹⁹⁹ Home Office, Operation of police powers under the Terrorism Act 2000 and subsequent legislation: *Arrests, outcomes, and stop and search, Great Britain, financial year ending March 2019*, table S.04; and Northern Ireland Office, *Terrorism Legislation Annual Statistics 2018/19*. These statistics for cordons contrast with the limited figures available for stop and search.

| | | | | | | | |
|---------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Metropolitan Police Service | 4 | 3 | 7 | 22 | 15 | 11 | 9 |
| North Yorkshire | - | 1 | - | - | 1 | - | - |
| Nottinghamshire | - | - | - | - | - | - | - |
| South Wales | - | - | - | - | 1 | - | - |
| Thames Valley | - | - | 2 | - | - | - | - |
| West Midlands | - | - | - | 1 | - | - | - |
| England and Wales | 12 | 16 | 31 | 38 | 25 | 51 | 15 |
| British Transport Police | - | - | - | - | - | - | - |
| Scotland | - | - | - | - | - | - | - |
| Northern Ireland | 57 | 55 | 45 | 43 | 29 | 13 | 12 |
| United Kingdom | 69 | 71 | 76 | 81 | 54 | 64 | 27 |

4.23. Three of the four major 2017 attacks (London Bridge, Manchester Arena, Finsbury Park Mosque) happened in the financial year 2017/18, so it is not surprising that there were many fewer police cordons erected in 2018/19. The figures for Northern Ireland are of potential significance, having shown a significant decline since 2012/3, down from 57 to 12 in 2018/19. It is not obvious why this should be the case given that the number of security related incidents in Northern Ireland has not declined to the same degree.

4.24. Where a cordon is erected a police officer of the rank of at least superintendent (or any constable of any rank in cases of urgency) may authorise the search of premises which are wholly or partly within a cordoned area where there are reasonable grounds for believing that there is material on the premises likely to be of substantial value to a terrorist investigation, and which does not consist of or

include excepted material.²⁰⁰ In his *Terrorism Acts in 2017 Report*, Max Hill QC noted that this power had been used in Operation Manteline, the investigation into the Manchester Arena attack, and questioned whether this power may be exercised in any cases other than urgent ones.²⁰¹

4.25. As Max Hill QC also observed, paragraph 15 of Schedule 5 allows officers of at least the rank of superintendent to allow searches which would ordinarily be subject to search warrant applications under paragraphs 1 and 11 (considered below). Under the cross-heading, "Urgent cases" paragraph 15 provides that "...(2) An order shall not be made under this paragraph unless the officer has reasonable grounds for believing - (a) that the case is one of great emergency; and (b) that immediate action is necessary."²⁰²

4.26. By contrast, the power to authorise a search within a cordon under paragraph 3 contains no requirement that the case is one of great emergency or that immediate action is necessary. The only reference to urgency applies where it is an officer of lesser rank granting authorisation, so that a constable, rather than a superintendent, may grant the authorisation "if he considers it necessary by reason of urgency".²⁰³ No considerations of urgency apply if authorisation is given by a superintendent or above. Nor it is necessary to report the exercise of such a power to the Secretary of State.

4.27. Whilst a separate power to search premises within a cordoned area is justified in a fast-moving investigation, it is difficult to see how amending paragraph 3 so that searches of premises within a cordon (which may include residential premises) can only be authorised in cases of urgency would damage CT Police's operational ability. Indeed, in Operation Manteline, CT Police having exercised the power subsequently applied for a search warrant to give a measure of judicial oversight to the exercise.²⁰⁴ The nature of the intrusion means that the power to authorise it should either be that of a judge or, if the power is to be exercised by a police officer in connection with a cordon, should only be capable of being exercised in cases of clear urgency. I therefore **recommend** that paragraph 3 of Schedule 5 is amended so that the power

²⁰⁰ Paragraph 3, Schedule 5 Terrorism Act 2000.

²⁰¹ *Terrorism Acts in 2017 Report* at 4.21.

²⁰² Such cases also must be notified to the Secretary of State, paragraph 15(3). I have not seen statistics for 2018.

²⁰³ At paragraph 3(2).

²⁰⁴ Max Hill QC, *Terrorism Acts in 2017 Report* at 4.21.

to authorise searches of premises within cordons, irrespective of the rank of the authorising officer, should only be exercised in urgent cases.

Search warrants

4.28. Paragraph 1 of Schedule 5 to the Terrorism Act 2000 provides a power for the magistrates' court to authorise entry, search and seizure of anything likely to be of substantial value to a terrorist investigation. Although the power is modelled on section 8 of the Police and Criminal Evidence Act 1984, it does not require suspicion of a specific offence and, as the Law Commission has recently noted "terrorist investigation" can go wider than preparing for a prosecution, and the power for a search to be authorised by a Superintendent under paragraph 15 of Schedule 5 in cases of urgency has no parallel in ordinary policing.²⁰⁵ Other parts of Schedule 5 deal with access to excluded or special procedure material.²⁰⁶ It must be shown that there are reasonable grounds for believing that there is material on the premises that is likely to be of substantial value (whether by itself or taken together with other material) to the investigation.

4.29. There are no statistics for the use of this power in Great Britain, but in Northern Ireland in 2018, 181 premises were searched under warrants granted under Schedule 5²⁰⁷.

4.30. As with search warrants generally, there is an onus on those who apply for search warrants under the Terrorism Act 2000 to ensure that the information on which the warrant is sought is fully and transparently set out before the judge, a point made recently by the Divisional Court in Northern Ireland in the context of a Schedule 5 warrant.²⁰⁸

4.31. There are two other powers which do not depend on the existence of a terrorist investigation. Section 42 of the Terrorism Act 2000 contains a power to issue a search warrant to allow a constable to search premises for a potential terrorist. Section 28 of the Terrorism Act 2006 enables a search to be carried out for terrorist

²⁰⁵ Law Commission, *Search Warrants* (LCCP 235, 2018), at paragraph 11.37. The Commission has advised against including this terrorism power within any reformed and consolidated power.

²⁰⁶ At paragraph 11.54.

²⁰⁷ Northern Ireland Terrorism Legislation: Annual Statistics 2017/2018 and 2018/19.

²⁰⁸ *An Application by Sean McVeigh for Judicial Review (No. 2)* [2017] NIQB 61, at paragraph 48.

publications²⁰⁹. Both depend upon establishing reasonable grounds of suspicion. Whilst this may be justified in the context of searching for a potential terrorist, it is unclear to me why searching for terrorist publications does not depend upon reasonable grounds to believe in line with the powers in Schedule 5.²¹⁰

Production Orders

4.32. Paragraph 5 of Schedule 5 enables a court to require production of material of substantial value (whether by itself or taken together with other material). There is no urgency provision for authorisation to be granted by a police officer.

4.33. This appears to be a frequently used power. I have been informed by National Counter Terrorism Policing Headquarters that in 2018 524 production orders were granted.²¹¹ I will report on more recent uses of this power in connection with high-profile investigations in my next annual report. A particular use of this power relates to un-broadcast journalistic material which brings the right of freedom of expression strongly into play.²¹²

Customer Information Orders, Explanation Orders and Account Monitoring Orders

4.34. Customer information orders may be granted under paragraph 1 of Schedule 6 to the Terrorism Act 2000 in connection with financial information. There are no official or other statistics available to me as to how often this power is used. The same is true of explanation orders under paragraph 13 of Schedule 5, which may require a person to provide an explanation for material seized under warrant or produced in response to a production order.²¹³

²⁰⁹ There are no statistics for the use of this power in Great Britain, but the power was not exercised in 2018 in Northern Ireland.

²¹⁰ Unlike for other terrorist search powers, police do not have the ability to seize and sift, in cases where privileged material may be caught up with relevant material, under the Criminal Justice and Police Act 2001. Provision has been made by Part 1 Counter-Terrorism Act 2008, but this Part is yet to be brought into force.

²¹¹ This is not an official statistic and should be treated as such with caution.

²¹² See *R (on the application of Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin).

²¹³ This power was considered *obiter* in *R (on the application of Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6, at paragraphs 91 to 93.

4.35. Account monitoring orders under paragraph 2(1) of Schedule 6A to the Terrorism Act 2000, which require financial institutions to supply bank account information for a specified period, appear to be widely used. I have been informed by National Counter Terrorism Policing Headquarters that in 2018 there were 376 account monitoring orders²¹⁴

Post-charge questioning

4.36. Power is conferred by sections 22 to 26 of the Counter-Terrorism Act 2008 to question a suspect post-charge, in exceptional circumstances, in relation to persons in detention charged with terrorism offences. Failure to answer questions may give rise to adverse inferences being drawn at trial. Approval must first be granted by a judge of the Crown Court. I have not been supplied with any figures for the use of this special power.

Financial Investigations

4.37. Financial investigators within the National Terrorist Financial Investigation Unit play an important supportive role in most terrorism investigations. This is because financial information is a very rich source of potential evidence. Powers exist to apply for disclosure orders in cases of "terrorist financing investigations" under Schedule 5A to the Terrorism Act 2000, and in respect of disclosures already made by the regulated sector, for further information orders under section 22B Terrorism Act 2000. A requirement to disclose financial information is a routine aspect of TPIMs and could be a requirement of a Serious Crime Prevention Order.²¹⁵ No statistics exist on the exercise of any of these powers.

4.38. Speaking to Counter Terrorism Financial Investigators in the West Midlands, I was struck by the care with which they consider whether to use terrorism powers to access financial information, alert to the possible impact on relations between individuals and their banks.

²¹⁴ Again, this is not an official statistic and must be treated with caution. It is common for these to be combined by production orders under Schedule 5.

²¹⁵ Which I consider in Chapter 8.

Suspicious Activity Reports

4.39. A source of information which companies and individuals are duty bound to provide are Suspicious Activity Reports (known as SARs) under the Terrorism Act 2000:

- Within the regulated sector, entities such as banks are bound to provide information if they know or suspect, or have reasonable grounds for knowing or suspecting, that an individual has committed or has attempted to commit a terrorist financing offence under sections 15 to 18 Terrorism Act 2000.²¹⁶
- Outside the regulated sector, a person who obtains information in the course of his trade, profession, business or employment must otherwise disclose that information to a constable if they believe or suspect that another person has committed such an offence.²¹⁷
- In any case, if a person obtains the prior consent of a constable to enter into a transaction, they will not commit a terrorist financing offence.²¹⁸ A report which includes a request for consent is known as a Defence Against Terrorist Financing SAR.

4.40. Failure to comply with this duty to report is a criminal offence, punishable by up to 5 years imprisonment²¹⁹ As with non-terrorism SARs, the UK Financial Intelligence Unit within the National Crime Agency is responsible for the reporting regime²²⁰ and for receiving, analysing and onward dissemination of all SARs relating to potential terrorist activity.. I have been provided with the following figures by the UK Financial Intelligence Unit for 2018:²²¹

- Terrorism Act 2000 SARs disseminated: 1,208.
- Proceeds of Crime Act 2002 SARs identified as potentially relevant to terrorism and disseminated: 570.
- Defence against Terrorist Financing SARs disseminated: 372.
- Defence against Terrorist Financing SARs refused: 60, with the total value of the assets in question approximately £1.9 million.

²¹⁶ Section 21A et seq Terrorism Act 2000.

²¹⁷ Section 19 Terrorism Act 2000.

²¹⁸ Section 21ZA of the Terrorism Act 2000.

²¹⁹ Section 21A Terrorism Act 2000.

²²⁰ Further detail is given in Law Commission, *Anti-Money Laundering: The SARs regime*, (LCCP 236, 2018) which includes a chapter on terrorism financing.

²²¹ The NCA publishes figures for the financial year in its annual report, see <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/256-2018-sars-annual-report/file>.

ARRESTING AND DETAINING

Introduction

- 5.1. The vast majority of arrests of suspected terrorists continue to be made under the Police and Criminal Evidence Act 1984 in England and Wales, the Criminal Justice (Scotland) Act 2016 in Scotland, and the Police and Criminal Evidence (Northern Ireland) Order 1989 in Northern Ireland. As with terrorist investigations generally, police use their ordinary powers without recourse to specialist terrorism legislation.
- 5.2. However, police throughout the United Kingdom have a special power of arrest for suspected terrorists²²² provided by section 41 of the Terrorism Act 2000 and which differs from ordinary arrest:
1. Unusually, the arresting officer need have no specific offence in mind: it is enough, by virtue of sections 41(1) and 40(1)(b) of the Terrorism Act 2000, 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.
 2. A maximum period of **pre-charge detention**, in excess of the 96 hours allowed under the Police and Criminal Evidence Act 1984, 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 2011,²²³ though the fact that no charges have at that stage been brought, and that detention is usually in a police cell rather than prison accommodation, makes close scrutiny of the conditions of detention essential. 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.
 3. In contrast to the arrest power in the Police and Criminal Evidence Act 1984, police bail is not available. I consider this point further below. That means that a person arrested under section 41 of the Terrorism Act 2000, but in the

²²² "Terrorist" is defined by section 40 Terrorism Act 2000.

²²³ The history is detailed in Lord Anderson QC, *The Terrorism Acts in 2011*, at paragraphs 7.12-7.16. Twelve days has been described by the ECtHR as "a relatively short period of time" and "the early stages of the deprivation of liberty" (*Magee and others v UK* (2016) 62 EHRR 10, at paragraph 105).

event not charged or arrested under some other power, must be unconditionally released.

4. The ***treatment of detainees*** is governed by special rules contained in Part I of and Schedule 8 to the Terrorism Act 2000 and (save in Scotland) by Code H of the Police and Criminal Evidence Act 1984.
5. There are wider powers to take and retain ***identification data and samples***.²²⁴

5.3. Where an individual is arrested under section 41, this will generally have been an intelligence led operation. The challenge for police and prosecutors, who will usually be engaged at this early stage, is to convert what is suspected against the individual - perhaps based on sensitive intelligence - into evidence for use in court. In some cases, an arrest will be carried out because of the imperative need to intervene, even though this may jeopardise the gathering of evidence. Lord Anderson QC has previously described the “extremely high” pace of terrorist investigations.²²⁵

5.4. In summary, there are four types of arrest which are likely to be carried out:

- Arrest under section 41 Terrorism Act 2000 on suspicion of being a terrorist, whether or not a specific offence is in the mind of the arresting officer.
- Arrest under the Police and Criminal Evidence Act 1984 on suspicion of a terrorist offence under the Terrorism Act 2000 or the Terrorism Act 2006.
- Arrest under the Police and Criminal Evidence Act 1984 on suspicion of a non-terrorist offence such as attempted wounding which is nonetheless terrorism-related.
- Arrest under the Police and Criminal Evidence Act 1984 on suspicion of a non-terrorism related offence such as benefit fraud, where this will have a disruptive impact on a suspected terrorist.

²²⁴ The oversight of biometrics taken under Schedule 8 to the Terrorism Act 2000 is considered at 6.109 to 6.129.

²²⁵ Lord Anderson QC, *Terrorism Acts in 2015 Report*, at 8.9.

Arrests in 2018

5.5. In **Great Britain**, there were 36 arrests made under section 41 of the Terrorism Act 2000. This represents a fall of 120 from 2017, in which there were 156 arrests, reflecting the serious attacks conducted in London and Manchester. Arrests made under section 41 represented 13% of the total “*terrorism related arrests*”, of which there were 283 in 2018.²²⁶ This is a fall of 184 from the previous year, in which there were 467 arrests for terrorism related offences in Great Britain. There were no terrorism related arrests in Scotland.²²⁷

5.6. It is worth noting that the vast majority of “*terrorism related arrests*” in 2018 (87%) were made under the Police and Criminal Evidence Act 1984 rather than section 41 of the Terrorism Act 2000. This continues the recent trend and contrasts with the period from 2003 – 2007, in which over 90% of arrests were made under section 41. Some explanations for this shift were offered by Lord Anderson QC in his *Terrorism Acts in 2014 Report*.²²⁸

5.7. In **Northern Ireland** there were a total of 148 arrests made under section 41 of the Terrorism Act 2000, down from 171 in the previous year (a 13% reduction).²²⁹ It is worth noting that four times as many people were subject to a section 41 arrest in Northern Ireland (which has just 3% of the total United Kingdom population) as in the rest of the United Kingdom. This issue is discussed in greater detail in Chapter 9.

Periods of detention in 2018

5.8. In **Great Britain**, of the 36 people arrested under section 41 of the Terrorism Act 2000²³⁰:

- i. Just 11% were held in pre-charge detention for less than 48 hours (after which time, a warrant for further detention is required from the court). This compares to 33% in 2017 and 14% in 2016.

²²⁶ Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to September 2019*, Table Q - A.01.

²²⁷ Freedom of Information request to Police Scotland.

²²⁸ At 7.6.

²²⁹ PSNI, *Police Recorded Security Statistics in Northern Ireland*, table 7.

²³⁰ Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to December 2018*, Table A.02.

- ii. 89% were held for less than a week, in line with the average of 88% since 2001.
- iii. 4 people were detained beyond a week.
- iv. No one was detained beyond 12 days.
- v. It follows that the maximum period of 14 days was not reached, and there has been no indication to me that this period is proving insufficient, notwithstanding the challenges to obtaining evidence posed by encryption. Should a plot of extraordinary complexity arise, an emergency Bill has been available for activation since 2011 allowing detention for up to 28 days.²³¹

5.9. In **England and Wales**, all applications for warrants of further detention are currently made to Westminster Magistrates' Court in London. Solicitors for detained persons attend special police cells known as TACT suites where "virtual courts" are assembled, live-linked to the actual Magistrates' Court. From my own observations, police work with the CPS to assemble high quality and meticulously detailed applications. The table below sets out the number of warrants of further detention authorised since 2012.²³²

| Year | Count |
|------|-------|
| 2012 | 33 |
| 2013 | 24 |
| 2014 | 53 |
| 2015 | 39 |
| 2016 | 34 |
| 2017 | 114 |
| 2018 | 33 |

²³¹ Described in Lord Anderson QC, *Terrorism Acts in 2016 Report*, at 8.8 - 8.10.

²³² These have been provided to me by the National Counter Terrorism Policing Headquarters.

- 5.10. In *Northern Ireland*, of the 148 people detained under section 41 Terrorism Act 2000, there were 4 applications for warrants of further detention, and no refusals²³³. There are no equivalent statistics for Great Britain. Like Lord Anderson QC²³⁴, I **recommend** that data on success rates for warrants of further detention in England and Wales should be published. I note that statistics on grants and refusals of applications for warrants of further detention under the Police and Criminal Evidence Act 1984 are publicly available²³⁵.
- 5.11. Of the 148 individuals in Northern Ireland, 144 were detained for 48 hours or less before being released or charged. 16 persons in total were charged, 14 of whom were detained for 48 hours or less, and 2 who were detained for more than 48 hours. Of the 132 released without charge, 130 were detained for 48 hours or less. There were 28 requests to have someone informed of which 3 were delayed. No requests for access to a solicitor were delayed²³⁶. Again, there are no equivalent statistics for Great Britain.
- 5.12. A 2009 decision of the Northern Irish High Court²³⁷ recognised that any decision on an application for a warrant of further detention must encompass an examination of the lawfulness of the original arrest. This broad power to review the lawfulness of arrest was relied upon by the United Kingdom when resisting a challenge to lawfulness of the Schedule 8 regime in *Magee v United Kingdom* before the European Court of Human Rights.²³⁸ I am not aware of whether in practice the lawfulness of arrest is ever in issue in applications for further warrants of detention under Schedule 8.
- 5.13. Although *Magee v United Kingdom* also confirmed that there was no human rights obligation for a judge considering a warrant of further detention to have the power to grant release on conditional **bail**,²³⁹ Lord Anderson QC had long recommended that there should be a power to grant police bail for those arrested

²³³ Northern Ireland Terrorism Legislation: Annual Statistics 2017/2018 and 2018/2019.

²³⁴ Terrorism Acts in 2015 Report, at 1.11.

²³⁵ Home Office, Other PACE powers data tables: police powers and procedures year ending 31 March 2018, table D.04.

²³⁶ *Ibid*, at tables 4.2, 4.3 and 4.4.

²³⁷ *In the Matter of an Application for Judicial Review by Colin Duffy and others* [2009] NIQB 31, Sir Brian Kerr LCJ giving the judgment of the court.

²³⁸ *Magee and others v UK* (2016) 62 EHRR 10, at paragraph 100.

²³⁹ At paragraph 101.

under section 41 of the Terrorism Act 2000, where safe to do so.²⁴⁰ The Government's response was that a cautious albeit open-minded approach was needed to this issue but that a power to grant bail could put the public at risk. I have tested this issue widely, speaking to Home Office officials and many CT Police officers in a range of counter-terrorism positions, in both Great Britain and in Northern Ireland.

5.14. In principle there are advantages of conferring on the police a power to grant conditional bail to those who would otherwise be detained for up to 14 days, with a right of application to a court. In particular, a person arrested under section 41 is as much entitled to the presumption of innocence, and to the minimum interference with his personal liberty, as a person arrested under the Police and Criminal Evidence Act 1984. The seriousness of terrorism offences varies widely. As was been observed by the Northern Ireland Court of Appeal in *Duffy*²⁴¹ in principle if conditional bail is suitable for an individual, that might make the difference between detention and release. Moreover, once charged the individual does have the right to apply for bail.²⁴²

5.15. It could also be considered counter-intuitive for CT Police to reject the possibility of this option, a further "tool in the toolbox" because:

- (i) Delays in analysing electronic, perhaps encrypted, data might result in insufficient evidence to charge within the 14-day period, when release on conditional bail would allow the police some measure of control over the individual pending further analysis. The cliff-edge of release or charge could be avoided.
- (ii) Of particular relevance to Northern Ireland, the unconditional release of an arrested individual against whom sufficient evidence to charge has not yet been assembled, followed by re-arrest at a later stage once the evidence has been obtained, might (unfairly) encourage a narrative of harassment. This phenomenon could be addressed by release under investigation on conditional bail.

²⁴⁰ Lord Anderson QC, *Terrorism Acts in 2011 Report*, at 7.71 to 7.73 and 7.77.

²⁴¹ *In the matter of an application for judicial review by Colin Duffy and others (No. 2)* [2011] NIQB 16, at paragraph 31.

²⁴² In Northern Ireland, unlike the rest of the United Kingdom, it is common for individuals charged with terrorism offences to be released on bail. I discuss this further in Chapter 9.

- (iii) Release on conditional bail may be the only humane option where children are arrested under section 41.²⁴³
- (iv) An increasingly complex and changing threat picture, and different emerging forms of terrorism, would suggest that a greater range of options was desirable.
- (v) The fact that the vast majority of terrorism arrests are carried out using the Police and Criminal Evidence Act 1984, where bail is available, might tend to suggest that bail is not in principle incompatible with carrying out an effective terrorism investigation.

5.16. A modified bail scheme could allow the police (and courts) to release on conditions where appropriate, matching the 'release under investigation' conditions that apply to bail following PACE arrest.²⁴⁴ Difficulty of enforcing compliance could be addressed by extending the provisions of the Policing and Crime Act 2017 which already make it an offence to breach pre-charge bail conditions relating to travel in terrorism cases.²⁴⁵

5.17. However, I do not propose in this Report to make a recommendation that a bail scheme is created. I have listed the potential operational advantages of a bail option following section 41 arrest, but experienced Senior Investigation Officers have repeatedly told me that:

- (i) The need to charge or release within 14 days provides a clarity and focus to the investigation and is an invaluable lever for demanding the immediate release of resources such as technical assistance. In the immediate aftermath of a section 41 arrest, this enables investigators to command resources from the rest of the counter-terrorism machine in a way that would not otherwise be possible. This was corroborated to me by a police digital forensics unit, whose resources are in constant demand.
- (ii) The timing of arrests, and the management of risk to the public (for example, the tipping off of co-conspirators) following arrest are

²⁴³ In Australia, where there is a presumption against granting bail to individuals *charged* with terrorism offences, the INSLM (my equivalent) noted in his annual report (2016) at 21-2 that a comparatively high proportion of minors had nonetheless been granted bail.

²⁴⁴ See sections 34 and 37 Police and Criminal Evidence Act 1984.

²⁴⁵ Sections 68-9 Policing and Crime Act 2017. Otherwise, it is not a separate offence to breach bail.

meticulously planned. The ability to detain for up to 14 days, subject only to obtaining a warrant of further detention, without the distraction of having to consider (a) what bail conditions might be sufficient to safeguard the public and (b) how to manage risk in the event that a court granted conditional bail in spite of police submissions, is highly prized.

5.18. Another practical objection, though to my mind less compelling, is that pre-charge bail is limited to a period of 28 days unless extended using the procedure now contained in Police and Criminal Evidence Act 1984, which could have the effect of merely postponing difficult decisions on sufficiency of evidence.²⁴⁶

5.19. Identifying operational advantage is insufficient when considering whether the impact on individuals, who are to be presumed innocent whilst in pre-charge detention, is justified. But the impact on individuals appears to be more theoretical than real. Release is a possibility at any stage and, after 54 hours, must be considered by a judge. The total period of time during which the choice of detain or release is a binary one is limited to 14 days. As the statistics demonstrate, police exercise a choice whether to arrest under section 41, or under the Police and Criminal Evidence Act 1984, and do exercise this choice in the interests of individuals such as children so as to ensure that bail is available in particular cases.²⁴⁷ I do however intend to keep this matter under review.

Conditions of pre-charge detention under Schedule 8

5.20. Since January 2017, the Independent Reviewer of Terrorism Legislation has been officially designated as part of the United Kingdom's National Preventive Mechanism. As a signatory to the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the United Kingdom is obliged to have a mechanism in place to review conditions of detention including terrorism detention.²⁴⁸ The pillars on which the independent monitoring of conditions of terrorism detention are built are the visits of the independent custody visitors. They are security-cleared volunteers trained and coordinated by local Police and Crime Commissioners (or their equivalent in large cities, and in Scotland and

²⁴⁶ Sections 47ZA-ZM Police and Criminal Evidence Act 1984.

²⁴⁷ See further 5.29.

²⁴⁸ For further background see <https://www.nationalpreventivemechanism.org.uk/about/background/>.

Northern Ireland). Their reports allow Police and Crime Commissioners to raise issues of immediate concern with the police who are responsible for the facilities. They are notified whenever a terrorist suspect is detained in TACT suites.

5.21. Custody visitors in England and Wales operate under their own Code of Practice made under section 51(8) of the Police Reform Act 2002²⁴⁹ and in Scotland under a Code issued by the Scottish Police Authority in accordance with Chapter 16 of the Police and Fire Reform (Scotland) Act 2012. In Northern Ireland, custody visitors operate through arrangements put in place, and in the light of guidance issued, by the Northern Ireland Policing Board under the Police (Northern Ireland) Act 2000²⁵⁰. Custody visitors attempt to carry out daily visits for those held under section 41. This is to be encouraged, because of the essentially solitary and lengthy nature of section 41 detention. However, as I report in Chapter 9, the rates of custody visits in Northern Ireland require improvement.

5.22. My role is to add an additional layer of scrutiny, which is enabled by access to all independent custody visitors reports,²⁵¹ my engagement with the Independent Custody Visitors Association, my right to visit custody suites, and my ability to raise issues of legislative and other practical reform in my annual reports. I am specifically authorised to consider the treatment of the treatment of terrorist suspects detained under a warrant of further detention under Schedule 8, that is, a person who has been arrested under section 41 and had their detention beyond 48 hours authorised by a judge.²⁵²

5.23. I am separately notified by the police when specialist terrorist detention cells become and cease to be operational and have sought and obtained briefings on the circumstances of arrests. Since my appointment I have visited one specialist terrorism suite while it was in operation. Like my predecessors, I was impressed by the

²⁴⁹ Dated 2013, see <https://www.gov.uk/government/consultations/independent-custody-visitor-icv-code-of-practice-consultation> for the Code and background.

²⁵⁰ Section 78.

²⁵¹ I received my first report on 14 June 2019 from the West Midlands independent custody visitors, and continue to receive them. The obligation for these to be sent to me in England and Wales is contained in section 117 Coroners and Justice Act 2009, and in Scotland under Section 12 of the Police and Fire Reform Act 2012 (Consequential Provisions and Modifications) Order 2013. Although there is no statutory requirement in Northern Ireland, I have continued to receive reports from Northern Ireland. There have been no detentions in Scotland since my appointment.

²⁵² By virtue of section 36 Terrorism Act 2006.

professionalism of the staff and the avoidance of over-formulaic security measures.²⁵³ I hosted the annual Terrorism Custody Visitors Network Meeting, which is chaired by the Independent Custody Visitors Association, in my Chambers and I met the national Chair of the National Preventive Mechanism in preparation for the visit of the Convention Against Torture Sub-Committee to the United Kingdom in September 2019.

5.24. My predecessor, Max Hill QC, assisted the Independent Custody Visitors Association in creating a recommended form of report for independent custody visitors (Appendix 2 to the current ICVA training manual) but it is still not being used by all custody visitors. Some of the forms that are being used, for example by custody visitors in Northern Ireland, are not only different from the recommended form, but are confusing and in some cases have not been filled in correctly (I suspect, owing to the confusing nature of the form). The absence of consistency means that the information provided by independent custody is different, depending on the identity of the force area in which the detainee is held, and it is difficult for me to compare the quality of reporting and treatment across different regions. I **recommend** that Police and Crime Commissioners coordinate to ensure that their independent custody visitors all use the recommended form in Appendix 2 of the current Independent Custody Visitors Association training manual.²⁵⁴

5.25. In January and February 2019 HM Inspectorate of Prisons and HM Inspectorate of Constabulary and Fire & Rescue Services carried out its first inspection of terrorist custody suites in England and Wales. Their comprehensive report²⁵⁵ found that there was a good standard of care for those detained, meeting and in some cases exceeding required standards, and that the environments and conditions in which detainees were held were generally of a good standard.²⁵⁶ However, criticisms were made of governance and oversight. This stems from the fact that CT Policing is coordinated nationally, but terrorism suites are hosted by individual

²⁵³ For example, the staff to detainee ratio is such that chairs are not screwed down, unlike in ordinary custody suites.

²⁵⁴ If and when the recommended form is reviewed, I suggest that the nature of the detention (section 41 or PACE) should be indicated on the form; and that any actions taken by Independent Custody Visitors in response to concerns identified should also be summarised.

²⁵⁵ <https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2019/07/TACT-custody-suites-Web-2019.pdf>.

²⁵⁶ At paragraph 56.

forces, and was found to have led to oversight gaps and inconsistencies in practice.²⁵⁷ One consequence was lack of collection of data.

5.26. There is no reason to doubt that this Inspection Report accurately describes how terrorism suites were operated in 2018. I am confident that the criticisms in the Inspection Report will be addressed since it is clear from my predecessors' reports and from my own (more limited) experiences that considerable pride is taken in the operation of these suites. This flows from (a) an understanding of the impact that good treatment of terrorist suspects (and conversely bad treatment) may have on the outcome of terrorist trials and (b) a recognition that longer pre-trial detention periods demand the highest standards.

5.27. The practice of carrying out night-time checks remotely via CCTV to avoid disturbing detainees sleep was referred to by the inspectors.²⁵⁸ The Inspection Report noted that this practice was potentially unsafe as it could not always identify changes in a detainee's condition, and was in any event inconsistent with College of Policing Guidance. It is obviously right that practice should follow Guidance, and I **recommend** that the question of whether the practice of remote night-time monitoring is actually unsafe, bearing in mind the desirability of avoiding continuously broken sleep for detainees who may be held for up to 14 days²⁵⁹ should be resolved.

5.28. Two points of relevance to the legislation, as opposed to the practice, arise out of the Inspection Report.

5.29. Firstly, the Inspection found that custody staff were unclear as to start time of the detention clock when a suspect had been initially detained under the ports examination power in Schedule 7 Terrorism Act 2000 or where he had been initially arrested under the Police and Criminal Evidence Act 1984.

- The position for Schedule 7 detainees is clear: under section 41(3)(b) of the Terrorism Act 2000, the detention clock starts at the time that the Schedule 7 examination (not detention) began, and if a Schedule 7 examinee is then arrested under section 41 that time counts towards his subsequent detention.

²⁵⁷ At paragraph 57.

²⁵⁸ At paragraph 3.21.

²⁵⁹ As commented on in Max Hill QC, *Terrorism Acts in 2016 Report*, at 6.42.

- The Terrorism Act 2000 is silent as to the effect of prior arrest under the Police and Evidence Act 1984. Given that a person is liable to be detained under the Police and Criminal Evidence Act 1984 for up to 96 hours (4 days),²⁶⁰ it could be argued that deducting this from the maximum terrorism detention of 14 days²⁶¹ could significantly reduce the amount of time available for detention under Schedule 8.
- However, it is difficult to envisage a situation in which an individual is arrested under the Police and Criminal Evidence Act 1984 for a terrorism-related offence, and then re-arrested under section 41 Terrorism Act 2000, where a total time of 14 days detention is both necessary and justified.
- The position may be different if a person is first arrested for a non-terrorism-related offence and it is only in the course of investigating that first offence that a potential terrorism offence is uncovered. Whilst one solution might be to recommend that the clock should start to run for any terrorism-related arrest under the Police and Criminal Evidence Act 1984, it is undesirable that the calculation of detention should depend on anything as uncertain as whether an offence is, or is not, terrorism-related.
- I therefore **recommend** that section 41 Terrorism Act 2000 is amended so that the "relevant" time includes the time of arrest under the Police and Criminal Evidence Act 1984 for specified terrorist offences. I understand that this reflects current practice in any event.²⁶²

5.30. Secondly, the Inspection Report notes the particular difficulties that arise when children are kept in terrorist custody suites. On one occasion,²⁶³ flexible thinking meant that a decision was taken to arrest under the Police and Criminal Evidence Act 1984 because of the availability of bail, unlike following an arrest under section 41. On another occasion,²⁶⁴ a child previously held in a terrorist custody suite was transferred post-charge and late one evening to local authority alternative accommodation in recognition of the Home Office concordat on children in custody²⁶⁵, albeit the child had asked to remain in the suite because he was due at court early

²⁶⁰ By a magistrates' court warrant granted under section 44 of the Police and Criminal Evidence Act 1984.

²⁶¹ See paragraph 36(3)(b)(ii) Schedule 8 to Terrorism Act 2000.

²⁶² When I asked for a briefing on a live operation, I found out that this is precisely what had taken place.

²⁶³ Paragraph 4.40.

²⁶⁴ Paragraph 4.44.

²⁶⁵ See <https://www.gov.uk/government/publications/concordat-on-children-in-custody>.

the next morning. The Inspection Reports suggests that there is merit in developing a national approach to those detained in terrorist custody.²⁶⁶ This is a difficult and complex area, and I can do no more than endorse the need to keep the position of children arrested as suspected terrorists under constant review. It is too early to suggest that changes will be necessary to the primary legislation or to Code H, but that is a possibility.

5.31. A separate point not addressed in the Inspection Report but drawn to my attention by one of the inspectorate concerns the process of designation of those places where a person may be detained under section 41 of the Terrorism Act.²⁶⁷ The relevant designation is contained in Annex D to Home Office Circular 03/2001 and designates any police station in Great Britain, and Gough Barracks in Northern Ireland, as a place where a person arrested under section 41 may be detained. The effect is to designate, in Great Britain, a far wider range of locations than are ever used: there are in fact only 5 terrorist custody suites in England and Wales, and one in Scotland.²⁶⁸ The nature of section 41 detention (in effective isolation, and for up to 14 days) undoubtedly merits special facilities. However, I have no indication from my own experience or from any of my predecessors' reports, that there is any risk of transfer to unsuitable facilities. The possibility that other police stations would ever be used is theoretical; save perhaps in an extraordinarily large plot where the use of other detention facilities would be justified by the pressure of numbers.

5.32. The Inspection Report concerns England and Wales only. There were no terrorist arrests in Scotland during 2018. I consider the position in Northern Ireland separately in Chapter 9.

Arrest Outcomes

5.33. The following paragraphs set out the extent to which criminal proceedings did, or did not, result from terrorism arrests. Given the special and highly restrictive arrest and detention regime created by section 41 and Schedule 8 Terrorism Act 2000, particular attention should be given to the extent to which arrests under section 41 led to individuals being prosecuted, or merely released without charge.

²⁶⁶ Paragraph 4.44.

²⁶⁷ Pursuant to paragraph 1 of Schedule 8 Terrorism Act 2000.

²⁶⁸ Further details of the terrorist custody suite in Scotland are given in <https://www.scotland.police.uk/assets/pdf/151934/184779/care-and-welfare-of-persons-in-police-custody-sop>, at paragraph 8.11.2.

Numbers charged in 2018

- 5.34. Of the 283 “terrorism-related arrests” in **Great Britain** in 2018, 136 people were charged with an offence (48%).²⁶⁹ This compares to a charge rate of 39% for “terrorism-related arrests” made in 2017 and 51% in 2016. However, of the 36 individuals arrested under section 41 of the Terrorism Act 2000, 24 were charged (67%),²⁷⁰ no doubt reflecting the intelligence-led nature of many such arrests. The number of charges following arrests made in 2018 may yet increase as more investigations are completed.
- 5.35. Of the 136 people charged with an offence, having been arrested on suspicion of committing a terrorism-related offence in 2018²⁷¹, 53 were charged with an offence under the Terrorism Act 2000 and 20 under other terrorism legislation. 32 were charged with terrorism related offences (other than those contained in terrorism legislation) and 31 were charged with non-terrorism related offences.
- 5.36. The principal offence for which persons were charged under the Terrorism Acts in **Great Britain** were those relating to proscribed organisations (21 persons, which is the highest figure for the reporting period beginning 2002).²⁷² The other offences were the collection of information likely to be useful in the commission of an act of terrorism (18 persons); those relating to port and border controls (6 persons); preparation of terrorist acts (5 persons, significantly down from the 32 in 2014, 22 in 2015, 24 in 2016, and 25 in 2017); and the encouragement of terrorism (7 persons). A further 5 persons were charged with disseminating a terrorist publication; 6 were charged with terrorist fundraising offences; 1 person was charged with using or threatening to use a noxious substance; 1 person was charged with an offence relating to the provision of information relating to a terrorist investigation; 1 person was charged with a weapons training offence; 1 person was charged with training for

²⁶⁹ Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to September 2019* Table Q - A.03.

²⁷⁰ Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to September 2019*, Table Q - A.02.

²⁷¹ Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to September 2019*, Tables Q - A.05a-5c.

²⁷² Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to September 2019*, Table Q - A.05a.

terrorism and 1 was charged with contravening the prohibitions imposed by a Terrorism Prevention and Investigation Measure.²⁷³

5.37. Because Home Office statistics only contain the principal offence with which an individual is charged, these figures must be approached with caution because it is likely that figures underplay the number of “lesser” charges. For example, if an individual is charged with a serious offence such as preparation for terrorist acts, but also with collection of terrorist information found on his computer at the time of arrest, this other offence will not be recorded.

5.38. By contrast to the figure for Great Britain, of the 148 people arrested in **Northern Ireland** only 16 were charged with an offence (11%).²⁷⁴ This is the second lowest charge rate since the commencement of the Terrorism Act 2000, with the lowest rate being in 2017 (6%). As discussed in greater detail in Chapter 9, the charge rate following arrest in Northern Ireland has remained consistently low.

Gender, age, ethnicity and nationality

5.39. The Home Office publishes detailed figures for the gender, age, ethnicity and nationality of those subject to terrorism-related arrest, charge and conviction in 2018.²⁷⁵ No such figures are published in Northern Ireland.

5.40. **Women** comprised 11% of “*terrorism related arrests*” in 2018, 9% of those charged with terrorism-related offences and 6% of those convicted after charge.²⁷⁶ These proportions are in line with the figures since 2011; prior to that, females accounted for a much smaller percentage.

5.41. In terms of **age**, the figures for Great Britain in 2018 are as follows:²⁷⁷

²⁷³ I discuss breaches of Terrorism Prevention and Investigation Measures further in Chapter 8.

²⁷⁴ PSNI, *Security Situation Statistics in Northern Ireland*, Table 7.

²⁷⁵ Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to September 2019*, Tables Q - A09 – Q - A12c.

²⁷⁶ Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to September 2019*, Table Q - A09.

²⁷⁷ Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to September 2019*, Table Q - A10.

| 2018 | Under 18 | 18-20 | 21-24 | 25-29 | 30 and over |
|---|-----------------|--------------|--------------|--------------|--------------------|
| % of terrorism-related arrests | 6% | 10% | 16% | 19% | 49% |
| % of terrorism-related charges | 6% | 12% | 17% | 21% | 44% |
| % of terrorism-related convictions | 3% | 11% | 18% | 23% | 45% |

5.42. As for **ethnic appearance** the figures (based upon officer-defined data) for Great Britain in 2018 are as follows:²⁷⁸

| 2018 | White | Black | Asian | Other | Not known |
|---|--------------|--------------|--------------|--------------|------------------|
| % of terrorism-related arrests | 43% | 13% | 31% | 12% | 1% |
| % of terrorism-related charges | 45% | 18% | 31% | 4% | 2% |
| % of terrorism-related convictions | 41% | 21% | 33% | 5% | 0% |

5.43. As the table below demonstrates, the figures (based upon officer-defined data) suggest a significant increase in the proportion of White and Black persons arrested, charged and convicted of terrorism-related offences in 2018, and a correspondingly significant decrease in the proportion of persons of Asian ethnic appearance arrested, charged and convicted.

²⁷⁸ Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to September 2019*, Table Q - A11.

| 2001 - 2017 | White | Black | Asian | Other | Not known |
|---|--------------|--------------|--------------|--------------|------------------|
| % of terrorism-related arrests | 30% | 12% | 40% | 17% | 1% |
| % of terrorism-related charges | 31% | 14% | 42% | 12% | 1% |
| % of terrorism-related convictions | 29% | 15% | 45% | 9% | 1% |

5.44. In terms of self-defined **nationality**, British citizens²⁷⁹ comprised 74% of those arrested for terrorism related offences in 2018, 82% of those charged with terrorism related offences, and 83% of those convicted of such offences.²⁸⁰

5.45. Of the 859 persons convicted of terrorism related offences in Great Britain between September 2001 – December 2018, the largest numbers of foreign nationals have come from Algeria (35), Somalia (23), Pakistan (22), Albania (17), Iraq (13) and Ireland (10).²⁸¹

5.46. No statistics are published for the self-defined, or officer-defined, religion of those arrested. What this means is that the statistics do not accurately assist in determining the arrest rate of Muslim suspects, and whether it is static or changing over time.

²⁷⁹ I have assumed that this includes dual-nationals.

²⁸⁰ Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to September 2019*, Tables Q - A12a – 12c.

²⁸¹ Home Office, *Operation of police powers under the Terrorism Act 2000, quarterly update to September 2018*, Table A12c.

6. STOPPING THE TRAVELLING PUBLIC

Port and Border Controls: Introduction

- 6.1. Schedule 7 to the Terrorism Act 2000 allows police officers to stop and question (“examine”) members of the travelling public at ports and borders to determine if they are terrorists; to search them; to detain them; to require them to hand over their electronic devices for examination and copying; and to take their fingerprints and DNA. Failing to cooperate with an examination is a criminal offence. Flights may be missed. Upset may be caused at being questioned under a terrorism power. No reasonable suspicion is needed to exercise the power.
- 6.2. Since 9/11, members of the travelling public who are or who appear to be Muslim have been notably affected by the operation of Schedule 7. In origin, however, it is a power deriving from provisions for dealing with Northern Irish terrorism, and as the terrorist threat mutates, and so long as terrorists continue to pass through ports and borders, the profile of those subject to Schedule 7 powers will, or should, vary measurably. The power is now used increasingly to examine individuals, to determine whether they are involved in Right Wing terrorism.
- 6.3. Nonetheless, the ethnic profile of those being examined has not shifted substantially despite the recent change in the ethnic appearance of those who are subject to terrorism-related arrests, charges and convictions¹. It is unfortunate that data is not taken and published on the apparent or self-declared religion of those who are stopped, whether as a means of raising alarms, or offering reassurance that the Schedule 7 powers are not confined to one group of the travelling public.
- 6.4. The approach I have taken in this Chapter is to identify the operational environment in which the Schedule 7 power is used, and to consider in some depth three particular aspects of the power: the power to detain, the power to download devices, and the power to take biometrics.
- 6.5. The principal sources of the law are Schedule 7 Terrorism Act 2000, and the Code of Practice for Examining and Review Officers under Schedule 7 (March 2015).

¹ See further 6.47 below.

Officers are required to apply the Code of Practice subject to two further documents: a Home Office circular dealing with racial and other characteristics² and a Home Office document entitled, *Reviewing and Retention of Journalistic Material under Schedule 7 to the Terrorism Act 2000*, which was issued in light of the claim brought against the Home Secretary by David Miranda.³ A new version of the Code of Practice is awaited.⁴

6.6. Schedule 8 to the Terrorism Act 2000 governs the treatment of those who go on to be detained under Schedule 7. But Schedule 8 also deals with the detention of people arrested under section 41 and I look forward to the time that separate statutory regimes are enacted. As different as these detention regimes were from each other when the Terrorism Act 2000 was originally enacted, the differences are now so acute⁵ that eventually they should be disentangled.

6.7. The recording of examinations following detention under Schedule 7 at police stations is subject to a further Code of Practice.⁶ The Northern Irish version is currently under consultation. My response is available on my website.⁷ Again, this also deals with section 41 detainees, with the result that interviewees are referred to as 'suspects', which is entirely inaccurate for Schedule 7 examinees.

Who Uses the Power?

6.8. The decision whether or not to examine under Schedule 7 rests on the individual officers of Counter Terrorist Border Policing stationed on the front line at ports and borders. Sitting behind these individual officers are regional control desks, and 5 national police teams working on rules-based targeting; ships; passengers; threat; and goods. As explained in more detail below, the police work closely with

² Home Office Circular 001/2016.

³ *R (on the application of Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6.

⁴ The Home Office consulted on an amended Code in the early part of 2019. My response to the consultation is at <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2019/09/190904-formal-response-to-Sched7-Code.pdf>.

⁵ For example, as to the nature of the biometrics that may be taken and the reviews that must be carried out.

⁶ *Code of Practice for the video recording with sound of interviews of persons detained under section 41 of, or Schedule 7 to, the Terrorism Act 2000 and post-charge questioning of persons authorised under sections 22 or 23 of the Counter-Terrorism Act 2008.*

⁷ <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2019/09/190827-formal-response-to-NI-Recording-Code-1.pdf>.

other public bodies such as MI5 to identify particular individuals of national security concern who they would like front line officers to stop and examine.

6.9. These officers have the power to stop and examine any person at a port or border area who is entering or leaving Great Britain or Northern Ireland, or travelling by air within Great Britain or Northern Ireland to question them for the purposes of determining if they appear to be a terrorist.⁸ So the power to examine is not limited to individuals who have already been identified as potential terrorists. Officers are able to carry out "tasked stops" (for example, based on a recommendation from MI5) and "untasked stops" based on the officer's assessment of the member of the travelling public although the difference between these categories is "less than might appear".⁹

6.10. As police officers, they will be drawn into other counter-terrorism related as well as general policing work, such as safeguarding minors, detecting human trafficking, public order and false passports. Safeguarding is a constant preoccupation when dealing with terrorist members of the travelling public - whether adults seeking to expose their own children to dangerous conditions overseas, or children travelling in their own right. The Government has stated that since 2015, around 100 children have been safeguarded by the courts from being taken to conflict areas in Syria and Iraq.¹⁰

6.11. This may require urgent coordination with local authorities and the courts, and in due course care proceedings. Safeguarding has become such a feature of the counter-terrorism landscape that Family Courts have had to generate their own procedures to deal with the types of cases and police evidence that it now needs to handle.¹¹ There are reported family cases concerning the children of TPIM

⁸ Paragraph 2 of Schedule 7 Terrorism Act 2000.

⁹ Lord Anderson QC, *Terrorism Acts in 2011 Report*, at 9.54.

¹⁰ CONTEST 3.0 (2018), paragraph 169. In *A Local Authority v A Mother* [2018] EWHC 2054 (Fam) a care order was upheld for a child of British nationals who had gone to Raqqa for extremist purposes. The father was being prosecuted in Turkey, and the mother (with her child) had been deported back to the UK. Both parents had an extremist mindset supportive of Da'esh, at paragraph 112. *Re Waltham Forest LBC; Re Secretary of State for the Home Department v IM, LG AND JM* [2018] EWHC 1664 (Admin) concerned the disclosure of materials gathered for TPIM applications within care proceedings.

¹¹ *The Role of the Attorney General in appointing Advocates to the Court or Special Advocates in Family Cases* (26 March 2015, Sir James Mumby P); *Radicalisation Cases in the Family Courts*, (8 October 2015, Sir James Mumby P); *Re R (Closed Material Procedure: Special Advocates: Funding)* [2017] EWHC 1793 (Fam).

subjects.¹² There have also been applications by the police for disclosure from Family Court proceedings.¹³

6.12. Since 2015, Schedule 7 powers may only be used by trained and accredited officers and accreditation must be addressed in the Code of Practice.¹⁴ In order to become accredited, individual officers, who have been previously selected as suitable for the role as a CT Borders officer, sit a pass/fail examination, and are subject to a further two-yearly pass/fail test. A score of 75% or above is required for a pass. I have been shown two examples of accreditation papers, both multiple choice papers (questions followed by 4 alternative answers) on the powers and duties of examining officers.¹⁵ Training is common to England, Wales, Scotland and Northern Ireland.

6.13. Guidance for examining officers is provided by the College of Policing. It was not clear to me that all guidance used by officers in the field was provided as part of the training and accreditation process; it obviously should. In principle, an officer could have his accreditation withdrawn for performance issues at any stage but there is a lack of consistent human resourcing practice amongst the 43 different forces who supply accredited officers. This is a matter that I intend to keep under review.

6.14. In principle, the Schedule 7 power can also be used by specially designated and accredited immigration officers or customs officers.¹⁶ In practice this would require, first, consultation with the local chief officer of police on the training regime and the proposal to accredit; second, training; third, accreditation by the Director General of Border Force. Even then the immigration or customs officer could only operate if a police officer is not readily available, or if specifically requested to do so by police sergeant or higher ranking officer. Unsurprisingly, no immigration or customs officer is yet to be designated.

¹² *A Local Authority v A Mother* [2017] EWHC 3741 (Fam), the father being one of the subjects of *Secretary of State for the Home Department v LG, IM and JM* [2017] EWHC 1529 (Admin).

¹³ *Re M (Children)* [2019] EWCA Civ 1364. There are currently no Family Court rules to underpin closed proceedings where national security information is in issue.

¹⁴ Para 1A of Schedule 7, inserted by the Anti-Social Behaviour, Crime and Policing Act 2014

¹⁵ The complete 'Training Pathway' is intended to be based on 6 stages of recruitment and selection; induction; mentoring; initial training; accreditation; individual performance management.

¹⁶ Paragraph 1(b) and (c) of Schedule 7. See the Code of Practice, paragraphs 10 to 13.

- 6.15. It is naturally tempting to have a spare power in reserve, but I **recommend** that consideration is given to whether the current power to designate immigration and customs officers under paragraph 1A is necessary. There is a general and a specific reason for this. The general reason is that Schedule 7 is a counter-terrorist measure, with specific and strong powers, not to be confused with immigration or customs matters. Provision already exists under the Code of Practice for non-accredited police officers to act in an emergency.¹⁷
- 6.16. The specific reason is that CT Border Policing officers have to examine individuals travelling across the Common Travel Area between the Republic of Ireland and the United Kingdom where routine immigration checks are forbidden,¹⁸ and those travelling within the United Kingdom between Great Britain and Northern Ireland. Reserving the Schedule 7 power to police officers alone would demonstrate that the power is a specific counter-terrorist measure rather than a disguised form of immigration control. This is a point I consider further in Chapter 9.

The working environment

- 6.17. Ports differ widely, from the controlled and predictable operating environment of international airports, to the more frenetic pace of roll-on roll-off ferry ports. In preparation for this Report, I visited airports, seaports and railway stations at Heathrow, Coquelles (Channel Tunnel), Dover, Holyhead, Birmingham, Belfast, and Loch Ryan in Scotland. On each occasion I viewed facilities and spent time with front line officers both in discussion and watching them interact with the travelling public. I also visited the national ports training centre in the West Midlands.
- 6.18. Key to the effective and fair use of Schedule 7 is the quality of *information* preceding a decision on whether to examine, and the ability for CT Police officers to identify passengers as they embark or disembark. In international airport environments, the quality of advance passenger data¹⁹ and the need to show passports to establish identity greatly assist officers in deciding whether to use the Schedule 7 power. At busy ferry ports, where advance passenger data may be fragmentary, the process is harder, particularly where passports are not required for immigration purposes.

¹⁷ At paragraph 14.

¹⁸ By virtue of section 1(3) Immigration Act 1971.

¹⁹ Such as "Advance Passenger Information" required from passenger service operators.

6.19. The quality of *interaction* at the port is also relevant. The greater the degree of interaction between the individual and border officials, the more opportunity for CT police officers to observe and make information-rich decisions, and the less room there is for hunches and decisions based on generalisations and unlawful prejudice. In Common Travel Area ports, the absence of routine immigration controls means the challenge is (a) to identify those who are on watchlists and (b) watch for behaviour of concern to CT police officers.

6.20. In practice, different ports have to come up with different solutions. For example, I witnessed the use of powers to examine for false or cancelled passports under section 147 and Schedule 8 to the Anti-Social Behaviour, Crime and Policing Act 2014. By law, this power cannot be used to compel production of travel documents solely in order to decide whether to conduct an examination: the power to examine travel documents for counter-terrorist purposes only arises once the Schedule 7 power is exercised. In other ports there was close cooperation between different types of officials.

6.21. Finally, the effective use of the additional Schedule 7 powers such as biometric and data capture, will depend upon the quality and accessibility of *equipment*. It was clear from my visits that technical capabilities differed widely between the ports. Officers should not be discouraged from using their powers where appropriate by lack of training, or lack of access to suitable equipment.

Screening

6.22. The interaction between CT police officers and individuals before any Schedule 7 examination starts has become known as “screening”. These are questions asked by officers using common law powers common to every constable. However, the obligation to answer questions only arises once the examination starts, a process accompanied by formal notification that the process has begun.²⁰

6.23. The current version of the Code of Practice seeks to draw a detailed distinction between screening and examination but has given rise to uncertainty. The

²⁰ *Code of Practice*, at paragraph 21.

most common questions posed by examining officers during my ports visits concerned the definition of screening.

6.24. As Max Hill QC pointed out in his final report, officers should not be discouraged from speaking to members of the travelling public since doing so may lead to the Schedule 7 power not being invoked.²¹ However, as Lord Anderson QC has previously noted²² it remains important that screening questions are not allowed to become a form of unregulated Schedule 7 interview, particularly given that passengers may not appreciate the difference between a conversation with an officer under common law powers, and under Schedule 7.

6.25. A further consideration is the use of handheld devices by CT Police, which I witnessed at Belfast City Airport, and which I was told would be deployed more generally. These enable officers to carry out quick non-intrusive checks as part of the screening process (for example, to determine if a person is wanted) without commencing the Schedule 7 process. It would be regrettable if the screening was not flexible enough to accommodate this practice. Caution should be exercised before seeking to define what should and should not be done by CT Police in exercise of common law powers, and I have already proposed²³ that the Code of Practice should not seek to do so. Of course when CT Police interact with the travelling public in this way, it is just as they would with any member of the public, and the same standards of courtesy, fairness and lack of prejudice apply.

Small ports and airports

6.26. I have not yet had the opportunity to visit smaller ports and airports. Lord Anderson QC in his final report referred to the “new ports policing hub model”.²⁴ The model was perceived by its critics as a cost-saving measure that would concentrate activities in hub ports. Lord Anderson QC suggested that the coverage of smaller south and east coast ports, marinas and landing places might be considered by his successor. In the absence of a visit, I have taken this point up with the national training centre which provides overall guidance to CT Borders policing, and which is familiar with this issue. Their conclusion is that coverage of small ports and airports

²¹ Max Hill QC, *Terrorism Acts in 2017 Report*, at 11.5.

²² Lord Anderson QC, *Terrorism Acts in 2015 Report*, at 7.33(b).

²³ In my response to the consultation.

²⁴ Lord Anderson QC, *Terrorism Acts in 2015 Report*, at 7.38.

is adequate, and that any risk posed is much more likely to be one emanating from organised crime than from terrorism. I will consider this issue in more detail in time for my next annual Report.

Frequency of use

Great Britain

6.27. In the past few years there has been a significant decline in the number of Schedule 7 examinations in Great Britain. In the period 2010/11, the year data was first published, there were 65,684 stops²⁵. By 2016, the calendar year figure had declined to 19,355 and in 2017 to 16,349. In the year under review, the figure declined by a further 27% to 11,876.²⁶ This represents a decrease of 80% since the year ending December 2012.

6.28. As has been emphasized before, it is important to examine these figures in context. Some 325 million passengers transited ports in Great Britain in 2018. Accordingly, less than one hundredth of 1% of the travelling public are subject to a Schedule 7 examination. These statistics do not tell the whole story of interactions between counter-terrorist police and the travelling public: unlike Schedule 7 examinations, there are no statistics on the number of members of the travelling public who are stopped and asked screening questions.

6.29. From my visits, I have identified a number of potential reasons for the drop in Schedule 7 examinations in Great Britain:

- i. Better targeting and less reliance on intuitive stops.
- ii. More screening leading to fewer examinations.
- iii. Fewer CT Police at ports and borders.²⁷

²⁵ Said to be a fall of approximately 23 per cent on 2009/10, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/116740/hosb1511.pdf at paragraph 2.4.

²⁶ Operation of police powers under the Terrorism Act 2000, *year ending December 2018*, table S.03 and Operation of police powers under the Terrorism Act 2000, *year ending September 2019*, table Q - S.04

²⁷ Following the DRR (Demand Risk and Resource) review recommendations for counter-terrorism ports policing in England and Wales, referred to in Lord Anderson QC's *Terrorism Acts in 2015 Report* at 7.38 to 7.40 in the context of small ports and airports, but in fact introducing wider cost-saving measures.

- iv. Reluctance to use the power because of paperwork. I consider this point in particular in relation to detention.
- v. Reluctance to use the power because of general uncertainty as to when it is appropriate to do so.
- vi. The fact that 'carding' under paragraph 16 of Schedule 7 is no longer included in the statistics.

6.30. I **recommend** that the Home Office conduct research into the factors behind the fall in the use of Schedule 7. Such a change in usage could indicate that the power is less useful than has been supposed. Anyone carrying out a review of this type of power must keep constantly in mind the following statistic: in 2007/8 the power under section 44 to stop and search anywhere in the UK was used a total of 117, 278 times.²⁸ It was repealed, but its replacement, section 47A, has only been used on a handful of occasions and, as Lord Anderson QC observed did not appear to have been "very much missed".²⁹

6.31. My attention has also been drawn to factors that could unjustifiably lead to an increase in the use of Schedule 7:

- (i) Perceived management targets for the use of the power.
- (ii) General concern that blame will be pointed if a terrorist who goes on to commit an attack is seen to have "slipped through the net".

6.32. The only response to these push factors is that senior management must provide the greatest support to front line CT Police officers. The Schedule 7 power is a difficult power to exercise. Individual officers must be given the confidence both to use the power, and not to use the power. Confidence will not be improved by numerical targets or expectations.

Northern Ireland

6.33. In 2016, there were 2,082 Schedule 7 stops in Northern Ireland, in 2017 there were 1,248 stops. In the year under review, that figure fell to 717.³⁰ This represents

²⁸ Ministry of Justice, *Statistics on Race and the Criminal Justice System 2007/8*.

²⁹ Lord Anderson QC, "Shielding the Compass: How to Fight Terrorism Without Defeating the Law" [2013] 3 E.H.R.L.R. 233.

³⁰ This data has been provided to me on a calendar year basis by the PSNI.

a decline of 43% in a single year and, since 2016, a 66% decline in the number of Schedule 7 stops in Northern Ireland.

6.34. In 2018, 6 people were detained. This represents a reduction from 2017, when 11 people were detained.³¹ These detentions are significant, as they are the first to have occurred in Northern Ireland since Schedule 7 was amended by the Anti-Social Behaviour, Crime and Policing Act 2014. In his *Terrorism Acts in 2015 Report*, Lord Anderson QC commented that he found the lack of detentions in Northern Ireland remarkable and suggested that this was something that merited further investigation.³² In his *Terrorism Acts in 2017 Report*, Max Hill QC noted how the PSNI had advised the Northern Ireland Policing Board that port officers in Northern Ireland do not encounter the same level of difficulties as at some other UK ports regarding language barriers due to the lack of international carriers.³³ As a result, the PSNI explained that most examinations at ports were completed within one hour, negating the requirement for a detention.

6.35. The historic lack of detentions in Northern Ireland is something I raised with ports officers during my visits to Belfast. The explanation I was given is that individuals who are engaged in Northern Ireland related terrorism are often well-known to the PSNI. When these individuals transit through ports and are subject to a Schedule 7 examination, there is no need to detain them with a view to obtaining their biometrics, because the police already possess them. I consider the use of Schedule 7 further in Chapter 9.

Utility

6.36. The value of Schedule 7 extends beyond what can be measured in terms of arrests, seizures, and the gathering of admissible evidence.³⁴ Time spent at a threat assessment centre allowed me to see how fragmentary data was re-assembled to enrich CT Police and MI5's understanding of those identified as a possible or actual terrorist threat. Because the likelihood of a terrorist act is statistically low, the process of identifying individuals who present a real risk requiring further operational investment is a painstaking one and is unlikely to yield immediate results.

³¹ Ibid.

³² Lord Anderson QC, *Terrorism Acts in 2015 Report*, at 7.13.

³³ Max Hill QC, *Terrorism Acts in 2017 Report*, at 8.18.

³⁴ I refer below to the value of data and biometrics that is taken at port stops.

6.37. There are good reasons why counter-terrorism powers should be available at ports:

- a. For individuals travelling to join Da'esh in Syria and Iraq, it is the last chance for British police to stop them, and the first chance to intercept them coming back into the United Kingdom. This consideration applies both to adult members of the travelling public and to children.³⁵
- b. Post-attack, terrorists may seek to flee the country. In 2017 Ahmed Hassan, the Parsons Green bomber, was stopped at Dover after his photograph was circulated to ports officers.
- c. Ports offer a controlled environment to (a) identify and (b) interact with known or suspected individuals.
 - (i) That opportunity could have been profitably taken in the case of the Manchester attacker, Salman Abedi, on his return from Libya. He was what was then known as a closed Subject of Interest but could have been placed on a watchlist following his travel to Libya in April 2017. This would have triggered an alert when he returned shortly before the attack, which could have enabled him to be questioned and searched at the airport under Schedule 7³⁶.
 - (ii) A similar point has been made about one of the London Bridge attackers, Youssef Zaghba. Had information from the Italian authorities been processed more quickly, this might have led to him being put on a terrorist watch list.³⁷ Indeed, port stops may offer CT Police the only means of interacting with individuals of interest where other investigative resources are not deployed.

6.38. There are striking examples, such as the case of the bomb-maker Khalid Ali³⁸, of the Schedule 7 power being effectively used to counteract a terrorist threat.

³⁵ In *Re Z* [2015] EWHC 2350 (Fam), an application was granted without notice for wardship of a 17-year-old girl of Somali background. She was stopped at an airport under Schedule 7 with a one-way ticket. Several other such cases have occurred, with some families of members of the travelling public being critical when intervention has failed.

³⁶ Lord Anderson QC's unclassified review of December 2017, at paragraph 3.16: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664682/Attacks_in_London_and_Manchester_Open_Report.pdf.

³⁷ Lord Anderson QC, *ibid*, at paragraph 2.65 et seq; Transcript 13.6.19 London Bridge Inquests page 9, Witness L.

³⁸ See paragraph 6.122 below.

However, I encourage the Home Office to gather systematic data about the overall utility of the Schedule 7 power. In his *Terrorism Acts in 2016 Report*,³⁹ Lord Anderson QC made reference to analysis being conducted by CT police on the utility of holding downloaded data for given periods of time; and that information on the value of the intelligence obtained would be collated and then submitted to the Home Office for review.

6.39. In particular:

- Individual examples of utility do not demonstrate the continuing need for this power in this form. This is particularly the case in terms of the longer term benefits flowing from data and biometric capture, both considered in detail below.
- Examples cited do not always distinguish between tasked and untasked stops. Classified data shown to me indicates that in about 20% of untasked stops, an intelligence briefing, rather than a simple record, was created. This suggests that the officer obtained something of counter-terrorism value in a significant proportion of such examinations.

6.40. The value of data on the utility of Schedule 7 is threefold (i) for monitoring (ii) to inform Parliament and public debate (iii) potentially to help border officers decide whether to use the power. Border officers are not immune from wondering whether, if called upon, they could justify clearly why the possible benefit of using the Schedule 7 power was proportionate in a given case.⁴⁰

6.41. In his *Terrorism Acts in 2017 Report* Max Hill QC posed the question, What is the right number?⁴¹ It has not been suggested to me that the continuing slide in the use of Schedule 7 has resulted in intelligence deficits. This suggests that the use of the power can be further reduced without diminishing its utility. Whilst precision in numbers is impossible, the golden outcome to be sought is that officers are confident to use the power when appropriate, and equally confident not to use the power when not justified.

³⁹ Lord Anderson QC, *Terrorism Acts in 2016 Report*, at 7.28.

⁴⁰ Another theme was that border officers would welcome more feedback, specific or generic, on the value of tasked stops.

⁴¹ Max Hill QC, *Terrorism Acts in 2017 Report*, at 8.5(b).

Ethnicity of those examined

6.42. The collection of ethnicity data for Schedule 7 stops has been carried out on a self-definition basis since April 2010. The figures for Great Britain for the past 7 years are as follows:⁴²

Total examinations

| | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 |
|-------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| White | 39% | 41% | 37% | 27% | 28% | 29% | 24% |
| Mixed | 3% | 5% | 6% | 5% | 3% | 4% | 6% |
| Black | 9% | 8% | 8% | 8% | 7% | 7% | 7% |
| Asian | 24% | 21% | 23% | 30% | 28% | 27% | 25% |
| Chinese or other | 18% | 17% | 19% | 23% | 22% | 19% | 23% |
| Not stated | 7% | 8% | 8% | 7% | 11% | 14% | 15% |

Detentions

| | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 |
|-------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| White | 10% | 11% | 10% | 12% | 12% | 12% | 11% |
| Mixed | 2% | 6% | 6% | 6% | 7% | 7% | 7% |
| Black | 24% | 15% | 13% | 9% | 9% | 11% | 11% |
| Asian | 32% | 32% | 35% | 37% | 33% | 28% | 28% |
| Chinese or other | 18% | 26% | 27% | 26% | 22% | 25% | 29% |
| Not stated | 13% | 9% | 9% | 10% | 17% | 17% | 14% |

⁴² Operation of police powers under the Terrorism Act 2000: quarterly update to *December 2018*, table S.03 and Operation of police powers under the Terrorism Act 2000 *quarterly update to September 2019*, table Q - S.04

- 6.43. These figures must be treated with caution, as there is no subcategory to refer to persons of non-black North African and Middle Eastern ethnicity. Instead, the catch-all category “Chinese or other” is used⁴³.
- 6.44. In 2018, as in previous years, a high proportion of those examined in Great Britain declined to state their ethnicity. This, combined with the difficulties in ascertaining the ethnic make-up of the international travelling public and the breadth of the ethnic categories that are relied upon, make accuracy in this area difficult to achieve.
- 6.45. The statistics also show that those who self-define as Asian or “Chinese or other” were several times more likely to be questioned and detained under Schedule 7 than their presence in the general population would seem to warrant.
- 6.46. This does not necessarily mean that Schedule 7 is being used in a manner which is unlawful. This is because Schedule 7 is not intended to be a randomly-exercised power. Rather, in deciding whom to select for examination, port officers “*must be informed by the threat from terrorism to the United Kingdom and its interests posed by the various terrorist groups, networks and individuals active in, and outside the United Kingdom*” and must take into account such factors as “*individuals or groups whose current or past involvement in acts or threats of terrorism is known or suspected, and supporters or sponsors of such activity who are known or suspected*”, “*any information in the origins and/or location of terrorist groups*”, and “*possible current, emerging and future terrorist activity*”.⁴⁴
- 6.47. However, as I report in Chapter 5⁴⁵, the significant decrease in the number of persons of Asian ethnic appearance⁴⁶ being arrested, charged and convicted for terrorism-related offences is not matched by a correspondingly significant decrease in the proportion of such individuals examined under Schedule 7. In his *Terrorism Acts in 2015 Report*, Lord Anderson QC drew attention⁴⁷ to examinations for less than an hour of persons of Asian appearance comprising 28%, and examinations of more than an hour or detained comprising 36% of the total, compared to 53 to 55%

⁴³ I refer to the need to improve ethnicity data generally at 1.36.

⁴⁴ *Code of Practice*, at paragraph 19.

⁴⁵ At 5.42 to 5.43.

⁴⁶ The data for arrests does not use the category “Chinese or other”, and it is possible that the category “Asian” therefore includes many of those who would be categorised as “Chinese or other”.

⁴⁷ At 7.20.

of those arrested, charged and convicted in 2015 being of Asian appearance. By way of broad comparison, in 2018 the total number of those examined of Asian appearance is 25%, and detained of Asian appearance is 28%, against 31% of those arrested, 30% of those charged and 33% of those convicted being of Asian appearance.

6.48. It is too early to draw conclusions from this lack of correlating decline. It cannot be said at this juncture whether the significant change in the ethnic appearance of those convicted of terrorism-related offences in 2018 will be sustained in the coming years, or whether it represents a change in the nature of the threat from terrorism.

6.49. But the risk, to which these figures potentially draw attention, is that those who are being selected intuitively, rather than on the basis of specific intelligence, are being selected on the basis of unfair discrimination. The 2015 Code of Practice sought to address this by requiring that 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".⁴⁸ Following the Supreme Court decision in *Beghal*⁴⁹ officers have been required to read the Code as if it stated that it was only appropriate for protected characteristics such as race or religion "...to be used as criteria for selection if present in association with factors which show a connection with the threat from terrorism".⁵⁰

6.50. The implication that race or religion could be used as a criterion for selection is problematic. Whilst it is right that in *Beghal*,⁵¹ Lord Hughes (with whom Lord Hodge agreed) indicated that the Code should be amended in this way, this paragraph was not expressly endorsed by Lords Dyson and Neuberger, and Lord Kerr took the view⁵² that if one of the reasons for selection was religious belief or ethnic origin this would amount to direct discrimination.⁵³ The difficulty with the proposed wording (in particular the words "criteria for selection") is that it tends to overstate the reliance that should be placed on protected characteristics. If the words "criteria for selection" are to be retained, it would be preferable to state: "Examining officers must take

⁴⁸ Ibid.

⁴⁹ *Beghal v Director of Public Prosecutions* [2015] UKSC 49.

⁵⁰ Home Office Circular, 001/2016, <https://www.gov.uk/government/publications/circular-0012016-schedule-7-to-the-terrorism-act-2000/circular-0012016-schedule-7-to-the-terrorism-act-2000>.

⁵¹ *Beghal v Director of Public Prosecutions* [2015] UKSC 49, at paragraph 50.

⁵² Ibid, at paragraph 104.

⁵³ For completeness, it is difficult to read much into what the European Court of Human Rights made of this issue in *Beghal v United Kingdom* [2019] ECHR 181. The relevant paragraph in that judgment is 97.

particular care to ensure that “protected characteristics” (whether separately or together) are not to be used as criteria for selection *except to the extent that* they are used in association with considerations that relate to the threat from terrorism”.

6.51. I have no positive reason to believe that where border officers speak to a member of the travelling public on an intuitive basis, their decision to move from screening to formal examination is consciously motivated by bias. But proper training, well-worded Codes of Practice, and constant vigilance are vital in order to monitor whether the Schedule 7 power is nonetheless being used to discriminate on grounds, in particular, of race or religion.

Conduct of Examinations

6.52. I experienced first-hand how CT Police officers are careful about how they exercise a power which they regard, rightly, as sensitive and exceptional, and use tact and discretion in their dealings with members of the public. However, Schedule 7 continues to be a source of complaint and since my appointment I have conducted meetings and received correspondence which raise broader points which I address below. It is difficult to get a larger sense of how many complaints are lodged because individual forces no longer refer Schedule 7 related complaints to the Independent Office of Police Complaints.⁵⁴

Questioning about private religious practice

6.53. Lord Anderson QC recommended⁵⁵ that questions about private religious observance (e.g. prayer) should be asked, if at all, only in the highly exceptional case when there is a clear and objective reason for doing so. The Home Secretary agreed that these questions should only be asked in a Schedule 7 examination if there was a clear and objective reason for doing so, and stated that he would explore with the police whether current guidance was sufficient.

6.54. I am unaware that any new guidance has been issued.

⁵⁴ Although Lord Anderson QC was able to obtain information from forces in 2016 - there were 43 complaints.

⁵⁵ Lord Anderson QC, *Terrorism Act 2015 Report*, at 10.17.

6.55. From my own observations during visits to ports, viewing of briefing documents, and discussions with border officers and supervisors, there is clearly scope to refine the circumstances in which such questions are deployed. I hear much about building rapport with the travelling public; but bristling may be the more likely reaction to such questions, and I remain sceptical that more cannot be done. Two points were made to me by CT Police: (a) an individual's religious practice may be relevant to understanding motivation and social networks of importance to a terrorist investigation and (b) skilful questioning will allow these questions to be dropped naturally into the examination in a way that will minimise offence. There is, however, a degree of standardisation about the questions that border officers are encouraged to ask, and I **recommend** that the Home Office and CT Police review whether questions about private religious observance should form part of standard lists of questions circulated to ports officers.

Transparency

6.56. Some members of the travelling public have expressed bafflement that examining officers ask questions to which they must know the answers, or could obtain from open sources.⁵⁶ But the knowledge of, and facilities available to, border officers should not be overestimated. I accept that questioning about mundane topics, particularly at the start of an examination, may be important in building a rapport and establishing understanding. As far as possible, however, there is merit in officers being as transparent as possible in explaining why an examination is taking a certain course. If delay is caused by the examination of a phone, for example, a direct explanation is preferable to asking questions simply to play for time.

6.57. I have been referred to and read research commissioned by CT Police on what is described as a "procedural justice" approach to Schedule 7 examinations. The principle, known as "Participate", is that participants will be more willing to cooperate where they perceive their treatment as fair. I do not know whether any follow up has been done on whether lessons have been learnt and are being applied consistently, but I look forward to reporting on this in my next Report.

⁵⁶ For example, questions about an individual's company directorships, which are available on the Companies House website.

6.58. I identified the following additional points which could improve the experience of those examined:

- a) In order to minimise disruption, border officers should continue to consider whether an inbound may be as effective as an outbound stop. I **recommend** that the Code of Practice should be amended to reflect this.
- b) Efforts should continue to be made to ensure that the travelling public are not given a counter-terrorist “trace” simply because they have been stopped before, and that information relating to previous stops is readily accessible to ports officers. In particular, I **recommend** that the Home Office and police review the extent to which individual forces limit access to information they have placed on counter-terrorism computer systems.⁵⁷
- c) Some forces assist frequent travellers by endorsing a Schedule 7 leaflet with the date of their stop, and the warrant number of the officer concerned. If another stop takes place, this allows ports officers to quickly check the position, and may allow the examination to be concluded more quickly. Consideration should be given to whether this practice can be adopted more widely.
- d) I was informed by one community organisation of local engagement with CT Police which had enabled officers to make more informed decisions.⁵⁸ This is to be encouraged.

Better Targeting: Joint Working

6.59. An innovative but perhaps overdue reform is the creation of a joint team, comprising co-located MI5 officials and CT police officers with borders experience. The advantage of combining the frontline experience of police officers with MI5's analytical demand for port stops is clear.

6.60. Firstly, port circulation sheets (“PCS”), used by MI5 for recommending borders officers to use their Schedule 7 powers against named individuals have in the past lacked clarity, requiring officers to seek further information before or during examinations.⁵⁹ Uncertainty about why an examination is being recommended may

⁵⁷ A practice known as “golden-keying”.

⁵⁸ CT ports officers were warned to expect large numbers of religious pilgrims carrying black flags.

⁵⁹ As described in *R (CC) v Commissioner of Police of the Metropolis and another* [2011] EWHC 3316, at paragraph 26.

extend the length of time needed for an interview, and at worst lead to unnecessary examinations. Police officers in the joint team can challenge MI5 to “break out” more intelligence to front line officers. PCSs are drafted more clearly, with greater attention to what front line officers need to know, and this process may lead to unnecessary PCSs being withdrawn altogether.

6.61. Secondly, greater interaction between MI5 and police leads to better understanding: by MI5, as to the practical and human consequences of ports stops; by police officers, as to the value of obtaining information from the named individual. This should avoid the possibility of requests to examine individuals simply because they have a counter-terrorism “trace”. It should also lead to a better focus on whether a stop could be equally effective in-bound as out-bound, thereby minimising disruption to travel plans.

6.62. Thirdly, joint working has been accompanied by a spring-cleaning of MI5's approach to PCS. Obsolescent or purely historic PCS are to be weeded out. There is now a much clearer scheme for identifying which Subjects of Interest should be placed on watchlists, together with individuals drawn to their attention by foreign police and intelligence agencies. The relevance of keeping watchlists up to date with information provided by foreign authorities was the subject of evidence in the London Bridge Inquests, when it emerged that one of the attackers Youssef Zaghba had been flagged by the Italian authorities.⁶⁰ But where watchlists depend on shared databases, vigilance is necessary. MI5 and CT police are entitled to have *some* confidence that individuals are included by participating countries with good reason; but more work is needed to ensure that names do not become trapped on watchlists with little or no opportunity for internal review. I was informed that those on watchlists will not necessarily be the subject of requests to CT Borders officers for Schedule 7 examinations to be carried out.

6.63. Fourthly, it has led to a greater appreciation of each other's capabilities, for example the abilities of police regarding biometrics.

⁶⁰ Transcript 13.6.19 London Bridge Inquests p9, Witness L.

- 6.64. Fifthly, central triaging of PCSs should diminish the risk that information provided by one force, for example relating to a previous stop, is withheld (on a 'need to know' basis)⁶¹ from officers in a second force encountering the same individual.
- 6.65. Sixthly, the joint team is a central point of contact for ports officers, available at all hours, meaning that where further information is needed there is an improved likelihood that it can be provided in a timely and constructive manner.
- 6.66. The issue of repeated stops of the same individual, which can readily be perceived as harassment, remains troubling. I accept that a previous examination cannot mean that there is no value in a subsequent stop: events may have moved on, or the value of intelligence from previous stop may require enhancement. It follows that the mere fact of an earlier stop may be relatively uninformative as to the necessity and proportionality of the next one. However, I encourage the fullest attention to be given to the fact of a previous stop, and **recommend** that PCSs should always expressly record the number of previous Schedule 7 examinations so that this factor is always considered at the point of clearing the PCS for dissemination to ports, and by the officer deciding whether to conduct the stop.
- 6.67. Finally, the practice of joint working must not be allowed to obscure the fact that the power under Schedule 7 belongs to CT Police and not MI5.

Advance Passenger Data

- 6.68. Tasking, and the use of PCS, is often most effective if CT Police and MI5 know that an individual is travelling.
- 6.69. Given the importance placed on ports in UK counter-terrorism legislation, and the imperative of better targeting, it is surprising that the UK - still - does not have detailed advance notice of all those arriving into the United Kingdom. In his final report, Lord Anderson QC drew attention to "...widespread dissatisfaction with the quality of manifests on the part of police who are seeking to protect the population for terrorism at both Channel and Irish Sea ports" and shared their view that better quality information, provided reliably and in advance, would "substantially improve"

⁶¹ See 6.58(c) above.

their ability to target Schedule 7 examinations effectively on those routes, leading to a recommendation that the quality of manifest data should be improved.⁶²

6.70. The issue has not gone away and vulnerabilities remain. In addition, better opportunities to target should also result in less inconvenience to innocent members of the travelling public who may otherwise be stopped.⁶³

6.71. In its reply to Lord Anderson QC's recommendations, the Government responded that⁶⁴:

- a) "Since Exit Checks were introduced in April 2015, on-departure data is received for all passengers from international rail and maritime carriers operating scheduled commercial routes from the UK". I observe that this relates to *departure* from the UK rather than arrival, and does not apply to routes within the Common Travel Area. This also leaves open the question of whether departure data is received in sufficient time by CT Police to take action on it.
- b) "For international rail passengers travelling to the UK, 100% of those passengers must present to a juxtaposed immigration control in Belgium or France where they are subject to counter-terrorism watchlisting. Similarly 59% of all maritime passengers must present to a juxtaposed immigration control in France and be subject to checks before they arrive in the UK." Those that do not enter via a juxtaposed control, will be subject to immigration control and watchlisting checks on arrival in the UK. But watchlisting is not the only basis upon which officers may legitimately wish to stop members of the travelling public. For example, the authorities may be able to identify a particular pattern of travel that is being exploited by terrorists, not all of whom are likely to be on watchlists.
- c) "Only 5% of all international maritime passengers arrive in the UK without any pre-arrival notification or examination." However, I reiterate that it is the quality of the data which counts.
- d) It was "taking steps to improve the quality of manifest data" by consensual means: through engagement with cross-channel "rail and maritime operators" and, "with the Governments of Belgium, France and the Netherlands", and "with carriers

⁶² Lord Anderson QC, *Terrorism Acts in 2015 Report*, at 7.41-48, 10.15.

⁶³ Lord Anderson QC, *The Terrorism Acts in 2011*, footnote 303.

⁶⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/630771/60502_Cm_9489_Accessible.pdf, at page 7.

operating within the CTA". I am aware that these steps are indeed continuing and bearing fruit. However, a consensual approach is likely to be fragile and risks inconsistency.

6.72. Power already exists under the Terrorism Act 2000⁶⁵ to require specified information from the owners or agents of ships or aircraft. The nature of the information that may be required is prescribed by statutory instrument⁶⁶ and includes: the person's full name, gender, date of birth, home address and nationality; and where that person has a travel document, its type, number, country of issue and expiry date. However, when the statutory instrument was laid before the House of Lords, the Government explained that industry bodies had expressed "genuine concern" and gave an assurance that there would first be consultation and agreement, so far as possible; and noted a police commitment that they would not place a requirement on domestic carriers to undertake "routine collection of the information" as specified in the instrument.⁶⁷ Fortification for this approach was provided by a 2002 Home Office circular which records that there will be no "systematic attempt" to exercise the power until further consultation has taken place.⁶⁸

6.73. Advance passenger data is not a complete solution. Where there are no routine immigration controls allowing identity checks to be made, if a decision has been made to stop an individual from their advance data, it is still necessary to find a way of stopping the right vehicle or the right person.⁶⁹

6.74. 17 years have elapsed since the 2002 commitment, and it is clear that negotiations have not yet opened the way to routine collection of valuable advance data by consent. There are strong national security and rights-based reasons for enabling ports officers to use Schedule 7 in an effective and targeted way.

6.75. I therefore **recommend** that CT Police and the Home Secretary should now withdraw the 2002 commitment and make clear that the power under Schedule 7 to

⁶⁵ Paragraph 17 of Schedule 7 Terrorism Act 2000.

⁶⁶ Schedule 7 to the Terrorism Act (Information) Order 2000 2002/1945.

⁶⁷ Hansard, House of Lords, 18 July 2002, col1480.

⁶⁸ Home Office Circular 44/2002, <http://www.statewatch.org/news/2002/aug/hoc44.pdf>.

⁶⁹ An attempt was made to introduce e-Borders into the Common Travel Area in 2009, see https://www.legislation.gov.uk/ukia/2009/18/pdfs/ukia_20090018_en.pdf, but was defeated in Parliament.

require advance passenger data is one that the authorities are, at the very least now willing to use.

Detention

6.76. Some power to detain is an inevitable corollary of the power to examine. I saw no examples myself of members of the travelling public, who have already complied with ticket and (including on some ferry routes) security checks administered by private port and carrier staff, refusing to speak to border officers. But if an individual refused to do so or decided to leave an examination once it had started, border officers would otherwise have no practical power to examine. However, as will be seen, detention is used more widely.

6.77. In 2018, in Great Britain, the rate of detention following an examination was 15%, up from 10% in the previous year.⁷⁰ This continues the upward trend in the rate of detentions in recent years. As the table below demonstrates, as the number of Schedule 7 stops has decreased, there has been a significant increase in the number of detentions. Three strip searches were carried out and postponement of questioning was refused on three occasions in 2018.⁷¹

| | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 |
|---------------------|--------|--------|--------|--------|--------|--------|--------|
| Examinations | 60,127 | 46,184 | 35,004 | 27,530 | 19,355 | 16,349 | 11,876 |
| < 1 hour | 57,822 | 44,330 | 33,103 | 25,690 | 17,857 | 14,703 | 10,131 |
| Detained | 614 | 549 | 1,043 | 1,828 | 1,539 | 1,700 | 1,836 |
| % detained | 1% | 1% | 3% | 7% | 8% | 10% | 15% |
| Biometrics | 547 | 353 | 462 | 511 | N/A | N/A | N/A |

6.78. Since July 2014, anyone questioned and detained for longer than one hour must be detained and provided with their associated rights. The figures indicate that

⁷⁰ Operation of police powers under the Terrorism Act 2000 and subsequent legislation: quarterly update to *December 2018*, table S.04 and Operation of police powers under the Terrorism Act 2000 quarterly update to *September 2019*, table Q - S.04

⁷¹ Northern Ireland has very different figures, as I report in Chapter 9.

76 people were detained prior to the 1-hour mark in 2018. The most common reason for this is for the purpose of taking biometrics. As set out in the Code of Practice other reasons for detaining someone before the 1-hour mark include preventing an uncooperative person from leaving, as they would otherwise be entitled to do.⁷²

6.79. The detention aspect of Schedule 7 remains relatively unexamined by the courts, and despite a heavy judicial indication in 2004 that scrutiny would be merited.⁷³ When the issue eventually came before the courts in *Beghal*, the facts did not allow a full examination of the issue.⁷⁴ A case concerning formal detention is therefore awaited.

6.80. Nonetheless, the majority view in the Supreme Court⁷⁵ was that where detention took place (a) it would be justified if no more than was necessary to complete the process of examination but (b) if detention was maintained beyond what was necessary to complete the process, then it ought to be justified by objectively demonstrated suspicion. Lord Hughes considered in the latter category the hypothetical example of a person who was bent on refusing to cooperate.⁷⁶

6.81. In light of my extensive visits to ports, and discussions with front line and supervising ports officers, it is difficult to envisage that hypothetical example occurring in practice. It is not in the interests of ports officers to string out examinations under detention any longer than necessary because of the associated paperwork⁷⁷ and the fact that every examination takes an officer away from the front line; and if resistance was experienced, the approach is to prosecute for non-compliance under paragraph 18(1). During the year under review, 6 people were convicted of committing offences in relation to Schedule 7 in Great Britain.⁷⁸ No one was convicted of such an offence in Northern Ireland⁷⁹.

⁷² *Code of Practice*, at paragraph 46.

⁷³ *R v Gul* [2013] UKSC 64, at paragraph 64.

⁷⁴ In the Supreme Court, for the majority, any issue of Article 5 "barely arises" if at all (paragraphs 52 to 56, 73) and the Court did not make any finding as to whether the treatment amounted to detention; in the European Court of Human Rights, the court declined to consider the matter because there had been no formal detention, at paragraph 96.

⁷⁵ At paragraphs 55 and 73.

⁷⁶ At paragraph 54.

⁷⁷ Detention requires regular review and could only be authorised if "necessary for the purposes of exercising" the power to examine, see paragraph 20K Schedule 8 Terrorism Act 2000.

⁷⁸ Operation of police powers under the Terrorism Act 2000 quarterly update to *September 2019*, table Q -A.08a.

⁷⁹ Northern Ireland Terrorism Legislation: Annual Statistics 2017/2018 and 2018/2019.

6.82. Even though many detentions do not result in the examinee being moved from the interview room where their examination commenced (a) some detainees will be removed to a police station, and in any event (b) detention marks a change of relationship between the individual and the authorities and is a "substantial interference" with the liberty of the subject.⁸⁰

6.83. An important pillar of the 2015 reforms to Schedule 7 was the increase in safeguards for those examined for longer periods. In order to access those safeguards, detention became mandatory once an examination entered its second hour. Whilst an increase in safeguards is to be welcomed, it is striking that this increase comes at a cost: automatic detention. Consideration of the statistics shows that, in contrast to the falling figures for examination, the detention figures shows an upward trend despite the number of examinations falling.

6.84. These changes were brought about by the Anti-social Behavior, Crime and Policing Act 2014 which provided that: "After the end of the 1 hour period, the person may not be questioned ...unless the person is detained under paragraph 6."⁸¹

6.85. The new safeguards, which do not appear to have caused any damage to the utility of the power, were that:

- a) searches were confined to non-intimate searches, with the restrictions on strip searches described above introduced (paragraph 8(3) to (7) Schedule 7 Terrorism Act 2000);
- b) the power to take blood and urine samples was removed;
- c) a person detained was ensured the right to have a third person informed, when detained at the port as well as if taken to a police station (paragraph 6(1) Schedule 8);

⁸⁰ *Beghal* at paragraph 52. It appears that the Strasbourg Court regarded the absence of formal detention in her case decisive as to whether Article 5 was engaged.

⁸¹ Section 148 and Schedule 9 to the 2014 Act, amending paragraph 2 Schedule 7 Terrorism Act 2000, by inserting paragraph 6A into Schedule 7.

- d) all persons detained were ensured the right to consult a solicitor, and the questioning is now to be postponed until his arrival unless that would prejudice the inquiry being made (paragraph 7A Schedule 8)⁸²;
- e) a new requirement for periodic review of detention by a senior officer was introduced (Part 1A Schedule 8).

6.86. All these changes were implemented following a public consultation. The purpose of the amendment to the detention regime was said⁸³ to be to “provide more clarity and consistency to the operation of Schedule 7”, in light of responses from, among others, the Independent Police Complaints Commission and the Association of Chief Police Officers⁸⁴, noting in particular that all individuals examined for more than one hour would thereby have a right to access legal advice.

6.87. The notion that detention should be automatic, even when the surrender of liberty brings with it additional rights, is highly problematic. Additionally, because biometrics (fingerprints, DNA) may only be taken from a detained person but not otherwise⁸⁵, the risk of conveyor-belt processing cannot be discounted: from hour long examination, to detention, to biometric capture, which would be inconsistent with the requirement for separate consideration of separate powers. As it was put to me, it can be “difficult to stop the ball rolling”.⁸⁶ Even without the further adverse effects on counter-terrorist policing and personal liberty which are discussed below, I would have recommended that consideration be given to removing any notion of automatic detention. It is not clear why additional rights could not be accorded either on detention or after one hour's examination (if not detained), with any loss of clarity.

6.88. Adverse impacts on both operational effectiveness and personal liberty arise from the accompanying bureaucracy. By virtue of Part 1A (“Review of detention under Schedule 7”), a person's detention must be reviewed by a review officer before

⁸² Where an individual is not detained, it is in the discretion of the examining officer whether to allow legal consultation at private expense; similarly, it is in the discretion of the officer to notify a named person.

⁸³ At paragraph 35 in https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/212548/WEB_-_2013_07_15_Review_of_the_operation_of_Schedule_7_A_Public_Consulta____.pdf.

⁸⁴ Now the National Police Chiefs' Council.

⁸⁵ Paragraph 10(1) of Schedule 8 to the Terrorism Act 2000.

⁸⁶ So far as data downloads are concerned, I have been able to see statistics not in the public domain which show that the relationship between detention and data downloads is extremely high. It is not possible to say that data downloads were taken because of detention, but the same risk is present.

the end of one hour, and thereafter at intervals of not more than 2 hours.⁸⁷ The review officer must be a senior officer who has not been directly involved in questioning the detained person.⁸⁸ In compliance with the Code of Practice,⁸⁹ review officers fill out a Review of Detention form which, in its current incarnation, contains 33 boxes which must be filled out (and a further 3 which require attention if rights have been delayed). The form includes simple matters like identity details and whether the individual has been informed of particular rights, but also more substantive matters requiring a free text response.⁹⁰ The individual or his solicitor must be given an opportunity to make representations, which must be properly considered.

6.89. During my visits to ports, it was repeatedly emphasized to me that even the simpler aspects of the process, particularly where the individual has an interpreter, are time consuming. Locating a review officer and ensuring that the review officer is able to conduct his or her review and fill in the Review of Detention form may take the majority of the first hour of detention. This is because detention must be reviewed before the expiry of one hour. In addition, in a busy port, finding a review officer (if there are multiple detentions as sometimes happens) may be difficult; the Act allows for no flexibility by allowing a further 20 minutes of detention where delay in the review is unavoidable.

6.90. The first effect, confirmed to me on a visit to the joint team, is the phenomenon of officers being discouraged from continuing examinations in order to avoid having to prepare the necessary paperwork for a detention review. It is damaging to counter-terrorism policing if officers are disincentivized by paperwork from continuing to examine where it would otherwise be appropriate to continue an examination. I was shown an example of an individual who was arrested after terrorist content was found on his phone, who had been examined on an earlier occasion on his return from Lebanon. It was possible to infer that the previous examination was cut short to avoid having to prepare the detention paperwork.

6.91. The second effect is that individuals are examined for longer than they might otherwise have been, again because the first hour of detention is routinely taken up

⁸⁷ Paragraph 20K(1)-(3) of Schedule 8 to the Terrorism Act 2000.

⁸⁸ Paragraph 20K(6) of Schedule 8 to the Terrorism Act 2000.

⁸⁹ At paragraph 64.

⁹⁰ For example, an explanation as to whether the examination is being conducted diligently and expeditiously.

with preparing for the review of detention. So from a rights perspective, not only the fact of automatic detention, but the way in which this automatic detention operates is negative and should be reformed.

6.92. A further adverse consequence of automatic detention was pointed out: the character of a Schedule 7 encounter may be entirely changed by detention. Detention may result in a less cooperative and informative examination, and a loss of useful information for countering terrorism.

6.93. I therefore **recommend** that consideration be given to amending Schedule 8 so that detention is not automatic after one hour, whilst ensuring that rights become available to individuals after one hour's examination. I do not recommend the alternative of maintaining automatic detention but to moving the requirement for a review back to the 2-hour mark. To do so would be to dilute the safeguards provided by the review process.

6.94. Finally, I saw no evidence that the reduced period of 6 hours (from 9 hours, prior to the Anti-Social Behaviour Crime and Policing Act 2014) has presented real operational difficulties. Lord Anderson QC noted that border officers had sometimes complained that this shortening presented operational difficulties but that few real examples were forthcoming.⁹¹

Data Downloads

6.95. The downloading of data from electronic devices has been the subject of earlier reports. Given the richness of the information available from smartphones, it is foreseeable that the overall benefit of Schedule 7 will shift from the questioning of the individual, and towards the data they carry.

6.96. According to information supplied to me by the Counter-Terrorism Policing Headquarters, the number of individuals whose devices are downloaded is significant and continues to rise.

6.97. There is a wide variation between the regions in the downloading of data where a person is examined but not detained.⁹²

⁹¹ Lord Anderson QC, *Terrorism Acts in 2015 Report*, at 7.54 to 7.57.

⁹² Confidential data provided to me for Q4 2018/19.

- 6.98. Like anything else carried by the individual under examination, a mobile phone may be searched (paragraph 8(1)(b)) for the purpose of determining whether *that* individual falls within section 40(1)(b). PIN numbers may be demanded to assist in accessing the device.⁹³ Cooperation with fingerprint and facial recognition unlocking may also need to be required.
- 6.99. Consequential powers under Schedule 7 are not limited to considering the status or otherwise of the examined individual. A device may be detained for up to 7 days “for the purpose of examination” (paragraph 11(2)(a)), and a copy of the data may be made and retained for so long as necessary for the purposes of determining whether “a person” falls within section 40(1)(b) (paragraph 11A(3)(a)).⁹⁴
- 6.100. The importance of data capture at ports is not to be underestimated. 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.⁹⁵ This importance has been re-emphasized to me. Obtaining data in this way remains the most significant opportunity for capturing mobile phone data which, when analysed and in combination with other information, may allow the authorities to detect terrorist threats from individuals and groups, for example by demonstrating contact between individuals who have separately come to the attention of the authorities.⁹⁶ However, given the volume and nature of data typically held on mobile phones, the scope for unnecessary intrusion into the private life of the person examined, and for collateral intrusion into the private lives of others, is significant and is constantly expanding. Taken together, it is open to question whether Schedule 7 and the Code of Practice in force in 2018 provided sufficient safeguards for individuals whose data is captured in this way.
- 6.101. In *Beghal*, Lord Hughes sounded a note of caution if Schedule 7 were to be used to justify the indefinite retention of a “bank of data”, and suggested the possibility that there might need to be a higher threshold for data retention of a phone

⁹³ Paragraph 5(a).

⁹⁴ Additional reasons for retaining a copy of data are for use as evidence and for use in connection with an immigration decision, paragraphs 11A(3)(b) and (c).

⁹⁵ Lord Anderson QC, evidence to the Home Affairs Select Committee at <https://www.parliament.uk/documents/commons-committees/home-affairs/CT-11a-David-Anderson-QC-supplementary.pdf>.

⁹⁶ *Beghal*, at paragraph 57.

download after the expiry of a limited initial period during which comparisons could be made with other data. There is obvious sense in bolstering safeguards at the retention phase where data protection standards apply.⁹⁷

- a) However, the risks of unjustified intrusion should also be managed at the point of the initial decision to search and copy a mobile phone.
- b) Whilst some data surrender on the part of members of the travelling public is both inevitable and justified (as with the provision of Advance Passenger Information), the law does not provide authority for a “digital tax” for crossing borders, and the power to search mobile phones is strictly limited to enabling officers to determine whether that individual is a terrorist.
- c) The challenge is that the significance of any piece of data may not be immediately apparent and may only become apparent at a significantly later point in time, when combined with other records.

6.102. Detailed and repeated visits to ports, together with a visit to the national training facility, has made apparent to me that the 'data journey' for downloaded devices is not uniform.

- a) The extent to which data can be considered at ports depends on the quality of the examination devices available to ports officers.
- b) Further developments in technology may permit greater “live” interrogation of mobile phones so that copying and retention may not prove necessary.
- c) Where copying is carried out, basic data such as contacts will be considered centrally.
- d) The extent to which further data is transferred to a central repository will depend upon the degree of interest in the individual concerned.
- e) For example, if the individual is a known subject of interest, a deeper and fuller analysis of downloaded data is likely.

⁹⁷ Under the Data Protection Act 2018.

6.103. The current Code of Practice only deals with data in a very limited way. It is currently undergoing a process of revision, like the Digital Downloads Policy used by ports officers.⁹⁸

6.104. Any policy of data downloads must contain fair limits to examination, copying and retention. But like other legislation, the Terrorism Act 2000 works well for physical documents, which can be readily sorted and separated, but less so for electronic data. One of the particular challenges with electronic data is how to identify relevant, irrelevant and prohibited data which should not be examined (such as legally privileged material) within the gigabytes of available data; and how to sort it and ensure that only the right data is retained and the rest destroyed. This will depend on the technology and training available to officers in all the different ports where Schedule 7 powers are exercised. The ideal in many cases would be a light touch but targeted triaging of the device, followed by greater examination and exploitation depending on what is found.

6.105. Schedule 7 is silent as to whether examination of privileged material is permitted. The Code of Practice March 2015 merely provides that examining officers should cease reviewing, and not copy, information which they have reasonable grounds for believing is subject to legal privilege, as well as "excluded material" or "special procedure material".⁹⁹ This part of the Code was initially introduced as a Home Office circular pending the judgment in *Miranda* which concerned access to confidential journalistic material. When that judgment was delivered, the Court concluded that the constraints on the exercise of the powers "do not afford effective protection of journalistic rights"; and observed that such material has better protection under "other legal regimes", citing sections 11 to 14 Police and Criminal Evidence Act 1984, where "journalistic material" falls within the categories of "special procedure material" or "excluded material" and similar protections arise in Schedule 5 to the Terrorism Act 2000.

6.106. Although additional safeguards are welcome, these paragraphs of the Code suffer from certain difficulties:

⁹⁸ In his Terrorism Acts in 2015 Report, Lord Anderson QC referred at 7.4 to the need for proper safeguards in retaining electronic data, and the Home Secretary referred in her response to a review of the Digital Downloads at Ports policy. The review has therefore been going on for a significant time.

⁹⁹ Defined by sections 11 and 14 Police and Criminal Evidence Act 1984.

- a) If the intention is rather to allow officers to take whatever steps are needed to identify potentially prohibited material and then isolate it, and return it, or have it reviewed independently, then that process is not spelt out at all.¹⁰⁰
- b) It is doubtful whether the same heightened degree of protection that should be provided to legally privileged material, and to journalistic material, should also be provided to other albeit confidential material, such as confidential business records. There is material which should not on any ground be examined (privileged), material which should be considered only on the basis of a warrant (journalistic), and material such as business records which arguably require a lesser degree of protection. In serious fraud cases, non-judicial powers of access to business documents are available and certain powers of Her Majesty's Revenue and Customs officers are not so restricted.¹⁰¹ The current position may not make any practical difference but I **recommend** that consideration is given to whether lack of access to confidential business material under Schedule 7 inhibits the identification of terrorists.

6.107. Other counter-terrorism and related legislation has recognised and sought to address the issue of separating material. A process of prior judicial authorisation by the Investigatory Powers Commissioners is established for legally privileged material under Schedule 3 to the Counter-Terrorism and Border Security Act 2019, which is the new regime for examining individuals who may be concerned in hostile state activity such as spying. Powers to retain mixed material were enacted for certain powers under the Terrorism Act 2000¹⁰² but never brought into force.¹⁰³

6.108. Another issue which is not clearly addressed is the issue of remote access to cloud-based data. The Law Commission has consulted on this issue in its analysis of search warrants, and its Report is awaited. Any legislative developments to the Police and Criminal Evidence Act 1984 scheme may require amendment to Schedule 7. I propose to keep the question of access to cloud-based data under review, but more generally the challenge of keeping pace with technology means that the adequacy of Schedule 7 powers require constant attention.

¹⁰⁰ An attempt was made in the proposed amended draft Code of Practice published in February 2019, but as I stated in my response to the consultation, I was not persuaded that the proposals were technically feasible.

¹⁰¹ Law Commission, *Search Warrants* (LCCP 285, 2018), at paragraph 9.33, footnote 743.

¹⁰² Section 43 and parts of Schedule 5, although not Schedule 7.

¹⁰³ Sections 1 to 9 Counter-Terrorism Act 2008.

Biometrics

6.109. Schedule 8 to the Terrorism Act 2000 gives examining officers the power to take fingerprints and other biometric data. In some circumstances these can be obtained without the detained person's consent. In the past, statistics on the number of people who had their biometrics captured during the course of a Schedule 7 detention were published. Since 2015 this has no longer been the case and I **recommend** that this change is reversed: the significance of and public interest in understanding the taking and use of biometrics has only increased since 2015, and the figures should be made publicly available.

6.110. In the absence of published statistics, I have obtained figures on the total number of National Security Determinations approved by Chief Officers (which I discuss further below). In 2017, Chief Officers approved 322 National Security Determinations, and in 2018 that figure rose to 497. Only some of these National Security Determinations will concern biometrics obtained following a Schedule 7 examination, so the figures must be treated with caution. They do, however, demonstrate that the number of members of the travelling public whose biometrics are retained is relatively low, given the total number of individuals who are detained and who, as a result, are eligible to have their biometrics taken by ports officers.

6.111. As with electronic data, legislation such as the Terrorism Act 2000 was enacted before our current understanding of biometrics. The Biometrics Commissioner, Professor Paul Wiles, has made this point forcefully in his 2018 Report in light of the growth of second-generation biometrics.¹⁰⁴ Schedule 7 provides special protection only for the obtaining of:

- a) Fingerprints.
- b) Non-intimate samples. In England and Wales these are defined in section 65 of the Police and Criminal Evidence Act 1984, which applies by virtue of paragraph 15 to Schedule 8, as a sample of hair other than pubic hair, a sample taken from a nail or from under a nail, a swab taken from any part of a person's

¹⁰⁴ Biometrics Commissioner, *Annual Report* (March 2019), at paragraphs 15 to 18.

body other than a part which would make the taking intimate, saliva, a skin impression. In practice a DNA mouth swab is taken¹⁰⁵.

6.112. Different levels of safeguards apply. Under paragraph 10, no fingerprints or DNA may be taken unless the individual is detained¹⁰⁶ - such a person will thereby become entitled to a greater range of entitlements than if they are merely examined.

6.113. They may be taken from a detained person at a port only if the individual gives his consent in writing¹⁰⁷ or if he has been previously convicted of a recordable offence.¹⁰⁸ The decision of an examining officer to seek the consent of a potentially nervous member of the travelling public, anxious to get on their way, is nonetheless an important one. Consent should not be sought as a matter of routine, and the taking of biometrics is a separate decision, and should be proportionate. The Code of Practice should be amended to reflect this.¹⁰⁹

6.114. Caution must therefore be exercised against a 'conveyor-belt' of decision making, especially where detention is automatic after one hour. The current restricted guidance issued to border officers was formulated in 2016 at a time when it was considered that officers were making insufficient use of their powers to take biometrics. Although it does not exclude the exercise of individual discretion, it has a strong dissuasive effect against officers deciding *not* to take biometrics once an individual has been detained. Whatever the intentions of this guidance, it tends to blur the fact that each exercise of a Schedule 7 power requires a separate decision. I **recommend** that the restricted guidance on biometric capture is reviewed.

6.115. If the individual does not consent in writing and has not been previously convicted of a recordable offence, fingerprints and DNA may only be taken at a police station under the authority of a superintendent or higher ranking police officer.¹¹⁰ The safeguards applicable to Scotland are those set out in the Criminal Procedure

¹⁰⁵ In Northern Ireland definitions are provided by the Police and Criminal Evidence (Northern Ireland) Order 1989. In Scotland, section 18 Criminal Procedure (Scotland) Act 1995 applies by virtue of paragraph 20 of Schedule 8.

¹⁰⁶ Paragraph 10(1) Schedule 8 in England Wales and Northern Ireland, and paragraph 20 in Scotland.

¹⁰⁷ Paragraph 10(2), (3).

¹⁰⁸ Paragraph 10(4)(a) and (b).

¹⁰⁹ See my response to the Code of Practice consultation.

¹¹⁰ Paragraph 10(4)(a).

(Scotland) Act 1995, as modified by paragraph 20. Authorisation may be given for the taking of fingerprints from the person where it is necessary in order to assist in determining whether he is a terrorist,¹¹¹ or in order to identify the individual where identity is reasonably in doubt.¹¹² Authorisation may be given for the taking of DNA only where it is necessary in order to assist in determining whether he is a terrorist.¹¹³ The individual must be informed of the reasons why his fingerprints, or DNA sample, is being taken.¹¹⁴

6.116. In addition, a separate power under paragraph 2 enables any examining officer, without oversight, to take any steps which are reasonably necessary for photographing a detained person, measuring him, or identifying him.¹¹⁵ This power expressly does not extend to the taking of fingerprints or DNA.¹¹⁶ The purpose of this is to ensure that the higher safeguards applicable under paragraph 10 to traditional biometrics, fingerprints and DNA, are not circumvented.

6.117. But technology now enables photographs or videos to be assembled into a unique identifier: for example, a biometric template which can be used for facial recognition purposes.¹¹⁷ The parallels with fingerprints and DNA are obvious and such data is "intrinsically private" in character.¹¹⁸

6.118. The potential future use of images taken using the paragraph 2 power does not necessarily require additional safeguards to be built in; after all, biometric templates can be created from single custody photographs.¹¹⁹ But if the paragraph 2 power were to be used specifically in order to assemble a biometric template, then the rationale for requiring that process also to be considered a biometric process, and subject to the paragraph 10¹²⁰ safeguards, would be compelling.

¹¹¹ Paragraph 10(6)(b). Terrorist has the meaning in section 40(1)(b) of the Terrorism Act 2000.

¹¹² Paragraph 10(6A).

¹¹³ Paragraph 10(6)(b).

¹¹⁴ Paragraph 11.

¹¹⁵ Paragraph 2.

¹¹⁶ Paragraph 2(3).

¹¹⁷ See description of the technology in *R (on application of Edward Bridges) v The Chief Constable of South Wales Police, Secretary of State for the Home Department, Information Commissioner, Surveillance Camera Commissioner* [2019] EWHC 2341 (Admin), at paragraph 32.

¹¹⁸ *Ibid*, at paragraph 57.

¹¹⁹ As was primarily the case in *Bridges, supra*, at paragraph 30.

¹²⁰ Paragraph 20 in Scotland.

- 6.119. Facial recognition technology at ports could become relevant to the Schedule 7 process. Facial scanning of all passengers in order to identify them against a watchlist is an obvious future application of this technology which, if properly controlled, subject to adequate safeguards, and sufficiently transparent, could achieve the twin outcomes of improving security at ports, and limiting the need for officers to use “high discretion” or untargeted stops.¹²¹
- 6.120. However, as the Biometrics Commissioner observes in his 2018 Report, whilst there are legitimate reasons to explore new uses of biometric technology, any trials need to be properly evaluated, and legislation should keep pace with developments.¹²² I echo those observations and note that the Secretary of State has set up an Oversight and Advisory Board, comprising representatives from the police, Home Office, the Surveillance Camera Commissioner, the Information Commissioner, the Biometrics Commissioner, and the Forensic Science Regulator, to co-ordinate consideration of the use of facial imaging and AFR by law enforcement authorities.¹²³ The role of biometrics at ports and borders is no doubt something of which the Board is aware. In addition, where consistent with primary legislation, Codes of Practice and guidance to ports officers should keep abreast of modern technologies.
- 6.121. Fingerprints or DNA profiles which are obtained under Schedule 7 (or following arrest under section 41) are subject to a special regime created by the Protection of Freedoms Act 2012 which governs their destruction and retention.¹²⁴ In summary, unless the person has been previously convicted of a recordable offence, these biometrics may be kept for an initial specified period and then for further periods so long as a chief officer of police makes a “National Security Determination” in favour of their retention.¹²⁵ In addition, they must be destroyed if it appears that the taking

¹²¹ At the same time, emerging technology should not be allowed to obscure the importance of ordinary biometrics. It enhances the ability of CT Policing to verify identity and opportunities for disruption (for example, where terrorist suspect is recorded as being wanted for a non-national security crime) where they are able to search quickly and effectively across adequate and up to date biometric holdings. This puts a premium on effective mobile equipment such as “Livescan”.

¹²² At paragraphs 15 – 18.

¹²³ *Bridges, supra*, at paragraph 44.

¹²⁴ Paragraphs 20A to 20N.

¹²⁵ Paragraphs 20C and 20E.

under Schedule 7 was unlawful.¹²⁶ For those detained under section 41, destruction follows if the arrest was unlawful or based on mistaken identity.¹²⁷

6.122. The Home Office has issued Guidance on the making and renewing of National Security Determinations.¹²⁸

6.123. This regime, including the making of National Security Determinations, is subject to review by the Biometrics Commissioner,¹²⁹ together with the treatment of biometric material under other national security legislation.¹³⁰ The Biometrics Commissioner has power to order the destruction of biometric data when in his view its retention is not necessary. The role includes access to sensitive information used by the police. Chapter 4 of his 2018 Report deals expressly with "Biometrics and National Security". I have met with the Biometrics Commissioner for the purposes of this Report.

6.124. One issue arising out of the operation of the National Security Determinations regime under paragraphs 20A-N Schedule 8 Terrorism Act 2000, and on which it is appropriate for me to comment as Independent Reviewer, following discussion with the Biometrics Commissioner, is the basis upon which chief officers are required to make determinations, as described by the Biometrics Commissioner in his 2018 Report.¹³¹ MI5 may provide holding codes which are intended to set out the risk presented by the individual, and therefore a, or the, basis for retaining his biometrics.

6.125. What the holding code does not amount to is any sort of detailed intelligence case. If MI5 is prepared to provide greater information in Ports Circulation Sheets to assist an officer in determining which individuals to stop and examine, the same question arises why MI5 should not share greater information with those Chief Officers responsible for making determinations as to whether the DNA of those individuals should be retained.

¹²⁶ Paragraph 20A(2)(a), 20G(2)(a).

¹²⁷ Paragraph 20A(2)(b), 20G(2)(b).

¹²⁸ Protection of Freedoms Act 2012 Guidance on the making or renewing of national security determinations allowing the retention of biometric data, June 2013, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/208290/retention-biometric-data-guidance.pdf.

¹²⁹ By virtue of 20(6)(b) Protection of Freedoms Act 2012.

¹³⁰ Section 18 Counter-Terrorism Act 2008; Schedule 6 of the Terrorism Prevention and Investigation Measures Act 2011: see section 20(c) and (d) of the 2012 Act.

¹³¹ At paragraphs 105 to 109.

- 6.126. The possibility of sharing more information should be increased by recent amendments made by the Counter-Terrorism and Border Security Act 2019. National Security Determinations may now be made by any Chief Officer of police rather than the Chief Officer of the force area in which the fingerprint or sample was taken.¹³² This is likely to lead to a smaller cadre of Chief Officers making these decisions.
- 6.127. Fundamental to the taking, and retention of, biometrics, with all the cost and complexities of National Security Determinations and oversight, is utility. In his 2018 Report the Biometrics Commissioner addressed this issue in general terms but bemoaned the paucity of data and narrative provided to him, a matter which he had commented on in his previous Report.¹³³ There are striking examples where the retention of biometrics has been of dramatic value. In 2018 Khalid Ali, who had made bombs for the Taliban in Afghanistan and had plotted a terror attack near Parliament, was sentenced to life imprisonment with a minimum recommendation of 40 years.¹³⁴ As was reported at the time, his fingerprints were taken from a Schedule 7 stop in 2016, and later matched to fingerprints taken from the components of an Improvised Explosive Device, by now held on an FBI database.¹³⁵ As I report in Chapter 7, biometric material is likely to play an important role in any criminal justice response to the Foreign Terrorist Fighter phenomenon.
- 6.128. In addition to database matches which lead to prosecution and investigation for terrorist offences, matches with the general Police database may give rise to what officials describe as further disruptive opportunities if, for example, an individual of national security concern can be arrested and prosecuted for an offence of burglary. Establishing identity, where there is any doubt as the true identity of the person being examined, is also important for the effectiveness of Schedule 7 stops.
- 6.129. But there is no substitute for a proper examination of the overall benefit of biometric capture. I join with the hope expressed by the Biometric Commissioner that new software that the police are introducing during this year will enable better

¹³² Paragraph 10 of Schedule 2 to the 2019 Act, amending paragraph 20J of Schedule 8 Terrorism Act 2000.

¹³³ Paragraph 115.

¹³⁴ <https://www.cps.gov.uk/cps/news/taliban-bomb-maker-jailed-life>.

¹³⁵ <https://www.bbc.co.uk/news/uk-44570128>.

evaluation of National Security Determinations, both by the police and by the Biometrics Commissioner in his oversight role.

Carding

- 6.130. Paragraph 16 of Schedule 7, and the Terrorism Act 2000 (Carding) Order 2001/426, enables border officers to require passengers to fill in landing or embarkation cards by providing specified information such as biographical details and purpose of visit. Failure to comply is an offence.
- 6.131. This process of obtaining set information is separate from the conduct of an examination under paragraph 2. However, CT Police informed me that for some time carding was recorded for statistical purposes as Schedule 7 examinations. I was informed that this was no longer the case, but it would be regrettable if the use of carding fell off the statistical radar. I **recommend** that separate statistics are recorded for the use of carding under paragraph 16.

Freight

- 6.132. There were 6,295 examinations of unaccompanied freight in 2018 in Great Britain (1,655 air freight and 4,640 sea freight), as compared with 9,264 the previous year.¹³⁶ This represents a decrease of 32%.
- 6.133. Examination of goods under paragraph 9 of Schedule 7 is not a covert process. Where an examination is conducted, border officers leave a leaflet. The question arises, what is an examination? By virtue of paragraph 9(4) border officers may enter buildings and vehicles including containers¹³⁷ in order to determine whether to carry out an examination. Such entry in itself would not count as an examination. But entering a container, particularly a refrigerated container holding foodstuffs, is a significant matter which some border officers therefore treat as a formal examination.
- 6.134. I have not yet been able to formulate a view on this issue or on the related issue, whether a leaflet should be provided whenever the paragraph 9(4) power is exercised. This is a matter I will address in more detail in my next Report.

¹³⁶ Operation of police powers under the Terrorism Act 2000 quarterly update to *September 2019*, table Q S.04 and Operation of police powers under the Terrorism Act 2000 financial *year ending March 2019*, table Q S.04

¹³⁷ Section 116(1) of the Terrorism Act 2000.

The No Suspicion Threshold

- 6.135. Two developments mean that I do not revisit in this Report the larger question of whether a suspicion-based threshold should be required to exercise some or all of the Schedule 7 powers.¹³⁸
- 6.136. The first is the European Court of Human Rights' conclusion in *Beghal v United Kingdom* that no-suspicion powers were not inherently contrary to an individual's fundamental human rights.¹³⁹
- 6.137. This was consistent with the Supreme Court's earlier conclusion, by a majority and with a strong dissent from Lord Kerr: the lack of a need for objectively established grounds for suspicion did not mean that there were insufficient safeguards or that any exercise of the power was not in accordance with the law.¹⁴⁰
- 6.138. The Supreme Court and the European Court of Human Rights differed over the question of whether the power as it existed in 2011 - and without its subsequent legislative amendments - was capable of being subject to effective judicial review. The majority in the Supreme Court were satisfied that the judicial review was an effective safeguard. It was available in cases of bad faith or collateral purpose, and also through the principle of legitimate expectation where a breach of the Code or of the statutory restrictions was in issue. The majority observed that courts are used to requiring police officers to justify their use of powers and to drawing the correct inference if there is material to do so, and to identify use of the power for collateral purposes.¹⁴¹
- 6.139. However, the Strasbourg Court found that there was an inherent difficulty in challenging the lawfulness of the exercise of a no-suspicion power. This was one of the features, together with (at that time) a maximum of 9 hours' examination without right of access to a lawyer, which led to its conclusion that Mrs Beghal's stop was not in accordance with Article 8 of the European Convention on Human Rights.¹⁴²

¹³⁸ Most recently, Max Hill QC endorsed the introduction of a 'reasonable grounds to support' criterion: Max Hill QC, *Terrorism Acts in 2017 Report*, at 8.2.

¹³⁹ *Beghal v United Kingdom* [2019] ECHR 181, at paragraphs 93-99, and 109.

¹⁴⁰ At paragraph 44.

¹⁴¹ Paragraph 43(ix).

¹⁴² At paragraph 109.

6.140. The changes in the Schedule 7 regime since *Beghal* - in particular the lowering of maximum period of detention, and the availability of lawyers when detained at ports - provide a basis for distinguishing the European Court of Human Rights' decision. But the tension between the Court's conclusions that no-suspicion powers are not inherently objectionable, but nonetheless seriously affect the possibility of judicial review, waits to be resolved, most acutely where the formal power to detention has been used¹⁴³.

6.141. Arguments about the reviewability of a Schedule 7 examination were tangentially raised in a different High Court case¹⁴⁴. It was argued that on a prosecution for failing to comply with an examination, the prosecution should lead evidence to explain the basis for the Schedule 7 stop. The High Court rejected this suggestion, at least in the absence of some specific factors being advanced as to why the stop was unlawful¹⁴⁵.

6.142. The second is the enactment of the new border regime for hostile state actors by Schedule 3 to the Counter-Terrorism and Border Security Act 2019. The issue of whether a further no-suspicion based border power should be introduced was directly raised during legislative scrutiny of the Bill.¹⁴⁶ The criticisms were addressed by the Government in response¹⁴⁷ and in debates.¹⁴⁸ During debates in the Commons, two particular points were relied on by the Government: fragmentary intelligence, such as intelligence allowing officers to identify a group of dangerous individuals arriving on a flight, but without sufficient information to form a reasonable suspicion against any one individual;¹⁴⁹ and the risk that sensitive intelligence might be disclosed if reasonable grounds were required. An opposition motion to introduce a suspicion-based threshold was withdrawn.

¹⁴³ At paragraph 110.

¹⁴⁴ *Rabbani v Director of Public Prosecutions* [2018] 2 Cr.App.R. 28.

¹⁴⁵ At paragraphs 27 to 28.

¹⁴⁶ By the Joint Committee on Human Rights, Ninth Report of Session 2017-9 at 82, and by Liberty at Committee Stage Evidence (June 2018).

¹⁴⁷ HC 1578 (2018) at 14.

¹⁴⁸ On the floor of the House of Commons, Hansard vol 642, Col 641, col 685; and also before the Public Bill Committee.

¹⁴⁹ A variation of this would be it is known that a particular item is being carried, but the item may have been swapped around amongst a group of members of the travelling public.

6.143. The possibility that the Schedule 7 power was being used to deal with counter-espionage and counter-proliferation, giving rise to the need for a separate power, was noted by Lord Anderson QC during his time as Independent Reviewer.¹⁵⁰ At the time of drafting my Report, the newly enacted Schedule 3 is not yet in force, and the Code of Practice is yet to be laid before Parliament. Once it is, that sort of activity will be covered by the new power enabling ports officers to examine individuals in targeted and, potentially, untargeted but intuition-led stops.

6.144. It remains to be seen whether the operation of Schedule 3 generates large numbers of stops. The oversight of the Schedule 3 power belongs to the Investigatory Powers Commissioner but remains relevant to my review of the Terrorism Acts in two ways. Firstly, it is important that the existence of this new power does not lead to any confusion as when Schedule 7 is or is not appropriate - I have seen no indication that this is likely to occur, but I will keep this under review. Secondly, the use of a different no-suspicion ports power may be capable in due course of suggesting improvements in the use of Schedule 7. As noted above, the provision for judicial oversight of access to privileged material is only found in Schedule 3.

6.145. Recent Parliamentary endorsement of a no-suspicion border power does not mean that the operation of Schedule 7 is perfect or even acceptable; but it does indicate that for the present, improvements to the regime are likely to be found by carefully testing and modifying the way in which the power is exercised, by the Codes, by guidance, and by training - towards rationality and away from gut instinct. As identified above, this will also depend upon the operating environment at ports, and the extent to which advance passenger information is available.

¹⁵⁰ Evidence to the Home Affairs Select Committee, 30 January 2018. Available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/counterterrorism/oral/77802.html>. Other factors leading to the perceived need for a new regime were the Miranda litigation and the Salisbury attack in 2018.

7. TERRORISM TRIALS AND SENTENCING

The Importance of the Criminal Justice System

- 7.1. The pre-eminence of the criminal justice system in countering terrorism follows firstly from the fact that it is the police, in the form of a national network highly integrated with MI5, who are the front line in responding to the terrorist threat. Secondly, for all the utility of non-criminal measures, society remains most comfortable with criminal processes and outcomes¹.
- 7.2. So that terrorism offences are prosecuted like any other criminal offence, temptations to smuggle in special procedures should be resisted². Similar restraints should apply when creating new terrorist offences: the challenge is to ensure that types of criminal liability do not deviate from traditional principles of culpability and harm.
- 7.3. The Crown Prosecution Service Special Crime and Counter Terrorism Division prosecute all terrorism cases in England and Wales. The Crown Prosecution Service website includes useful pages on commonly encountered offences, summaries of counter-terrorism prosecutions and guidance on Syria-related offences³. Prosecution in Scotland is carried out by the Crown Office and Procurator Fiscal Service. However, because courts throughout the United Kingdom have jurisdiction over terrorism offences⁴ arrangements are in place to determine the most suitable place for prosecution, which means that the location of the offence may not determine who is responsible for prosecution⁵. The Public Prosecution Service for Northern Ireland prosecutes terrorism offences in Northern Ireland.

¹ Although this satisfaction is tempered, in Northern Ireland, by widespread concern about the length of criminal proceedings, in part resulting from the continuing use of oral committal hearings.

² In "Pre-emption: A Knife That Cuts Both Ways" (Norton, 2006) at pages 116-121 Derschowitz cites an Israeli official who observed that it would be absurd to "wreck our entire judicial system" in order to accommodate those few cases which might justify a different approach.

³ <https://www.cps.gov.uk/terrorism>.

⁴ Section 130 Terrorism Act 2000, section 39(5) Terrorism Act 2006.

⁵ Joint Statement by Her Majesty's Attorney General and the Lord Advocate on handling of terrorism cases,

https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Protocols_and_Memorandum_of_Understanding/Handling%20of%20Terrorist%20Cases%20where%20the%20Jurisdiction%20to%20Prosecute%20is%20shared%20by%20Prosecuting%20Authorities%20within%20the%20UK.PDF.

7.4. Terrorism legislation does not dictate whether prosecution is the right approach in every case. The independent prosecution services apply a two-stage test relating to evidence and public interest. The penalisation of "pre-cursor behaviour"⁶ as demonstrated by the newly amended section 58 Terrorism Act 2000 (viewing on the internet of information likely to be useful to a terrorist) means that ever more conduct is pulled into the orbit of terrorism offending, and dictates that there can be no lessening of the need to consider both the evidential threshold and the public interest. Other choices may need to be made, for example, between prosecuting as a Terrorism Act offence or under Parts 3 and 3A of the Public Order Act 1986 (racial and religious hatred offences)⁷.

7.5. In England and Wales and Northern Ireland, under section 117(2A) of the Terrorism Act 2000 and section 19(2) of the Terrorism Act 2006, high level permission must be obtained for certain prosecutions. If an offence under those Acts⁸ is said to have been committed outside the United Kingdom or for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, the permission of the Attorney General or Advocate General for Northern Ireland, is required. According to data provided to me by the Attorney General's Office, in 2016 there were 45 applications for the Attorney General's consent in relation to 60 suspects. Permission to consent was given in all 45 applications. In 2017, there were 37 applications consent in relation to 48 suspects. Permission to consent was given for 35 applications and was declined in 2 applications (relating to 7 suspects). In 2018, 16 applications for consent were made in relation to 17 suspects. Permission to consent was given in all 16 applications.

Charges in 2018

7.6. Following arrests made in 2018, 105 people in Great Britain have since been charged with a terrorism-related offence as a principal offence⁹. Of these:

⁶ Pre-cursor behaviour refers to conduct anterior to an act of violence.

⁷ It is worth noting that where a terrorism attack has actually occurred, the charge is less like to be a terrorist offence: for example, murder or an explosives offence.

⁸ Save for a limited number of offences listed at section 117(1) Terrorism Act 2000.

⁹ Operation of Police Powers under the Terrorism Act 2000, quarterly update to September 2019, Table Q -A.04.

- 73 were charged with offences under terrorism legislation. According to official data¹⁰, in 2018 offences were charged under the Terrorism Acts 2000 and 2006, the Anti-terrorism, Crime and Security Act 2001 (relating to noxious substances), and the Terrorism Prevention and Investigation Measures Act 2011 (relating to breach of a TPIM).
- 32 were charged with terrorism-related offences under non-terrorism legislation.

7.7. The most common charges in 2018 were those relating to proscribed organisations in sections 11 to 13 of the Terrorism Act 2000. These offences were charged 21 times as the principal offence. This is the first time that these offences have been the most commonly charged. These offences vary in terms of maximum sentence. The offences in sections 11 and 12 of the Terrorism Act 2000 carry a maximum sentence of 10 years' imprisonment on indictment. The offence in section 13, however, is a summary only offence.

7.8. As I report in Chapter 2, during 2018 new and modified versions of existing criminal offences were created¹¹, including the offence of expressing an opinion that is supportive of a proscribed organisation but being reckless as to effect of that opinion contrary to section 12(1A) Terrorism Act 2000. Not all counter-terrorism measures are ever used¹², but official statistics do not assist in monitoring the use of new offences or in understanding which offences are most used in practice. Although the pool of terrorism-related convictions is comparatively small, official statistics only include the 'principal offence' in multi-offence conviction cases. For example, if an individual is convicted of attack planning contrary to section 5 Terrorism Act 2006, but also convicted of the less serious offence of encouraging terrorism contrary to section 1 of that Act, only the first offence will be shown. I **recommend** that consideration be given by the Home Office as to whether it would be possible to include in official statistics all terrorism-related offences which are charged and prosecuted.

¹⁰ Operation of Police Powers under the Terrorism Act 2000, Table Q - A.05a, quarterly update to September 2019

¹¹ Eventually enacted in the Counter-Terrorism and Border Security Act 2019.

¹² For example, section 3 Terrorism Act 2006.

Prosecutions in 2018

7.9. In 2018 84 terrorism trials were completed in Great Britain¹³. Previous high conviction rates were maintained: 76 defendants were convicted (90%), and 8 were acquitted (10%). As in previous years, the number of guilty pleas was significant. 63% of defendants pleaded guilty, compared to 51% who pleaded guilty in 2017¹⁴. By way of contrast, only 3 individuals were convicted in Northern Ireland of an offence under terrorist legislation in 2018¹⁵.

7.10. Details of the principal terrorism convictions in England and Wales in 2018 are recorded by the Counter-Terrorism Division of the Crown Prosecution and available on the Crown Prosecution Service website¹⁶.

7.11. Conduct leading to convictions in 2018 under the Terrorism Act 2000 or the Terrorism Act 2006 included:

- a. **planning atrocities in the United Kingdom**, (*R v Khalid Omar Ali, R v Husnain Rashid, R v Ahmed Hassan, R v Lewis Ludlow, R v Umar Ahmed Haque*).
- b. **possessing information likely to be of practical utility for terrorism**, (*R v Mohammed Abbas Idris Awan, R v Zana Abbas Sulieman, R v Atiq Ahmed, R v Abdulrahman Alcharbati, R v Sudesh Amman*).
- c. **failure to comply with a Schedule 7 Terrorism Act 2000 examination**, (*R v Muzaffar Abdullah, R v Desmond Christie, R v Mizanur Uddin, R v Sam Saba*).
- d. **planning to travel to Syria**, (*R v Sandeep Samra, R v Gary Staples, R v a Youth, R v Aweys Shikey*).

¹³ One trial was not concluded due to the death of the defendant during trial.

¹⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/783893/police-powers-terrorism-dec2018-hosb0519.pdf, at paragraph 4.3. The statistics do not indicate the number of convictions following a hung jury, then retrial.

¹⁵ Northern Ireland Terrorism Legislation: Annual Statistics 2017/2018 and 2018/2019, table 7.1.

¹⁶ <https://www.cps.gov.uk/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-2016>.

- e. **disseminating publications encouraging violence**, (*R v Rabar Mala*, *R v Abrias Thaqi*, *R v Nourdeen Abdullah Al-Gharib*, *R v Adam Paul Wyatt*, *R v Mohammed Khiliji*).

7.12. As in previous years, the large majority of terrorism convictions in 2018 related to violent Islamist extremists or their sympathisers.

7.13. But this was by no means the full picture because, by way of example:

- a. A far-right extremist Darren Osborne was convicted of the murder of Makram Ali, after he deliberately drove into him outside Finsbury Park Mosque. The judge found that the murder occurred for a terrorist purpose and sentenced Osborne to concurrent sentences of life imprisonment with a minimum term of 43 years.
- b. Connor Ward, a neo-Nazi, was sentenced in Scotland to life imprisonment for planning to carry out atrocities against worshippers in Aberdeen mosques.
- c. Jack Coulson, a neo-Nazi, who had previously been convicted of making a pipe bomb, was convicted of possession of a copy of the “Big Book of Mischief”, a document likely to be useful to a terrorist. He was sentenced to 4 years and 8 months detention.
- d. Christopher Partington, a historic supporter of the IRA, was convicted of possessing a significant amount of material that was likely to be of use to a terrorist. Of the recovered publications, one was entitled “Poor Man’s James Bond”, a 479-page manual that included advice on do-it-yourself explosives, associated electronics, how to make automatic weapons, unarmed combat and poisons. Other publications found on his phone centred on the making of booby traps, black powder and explosives. He was sentenced to 3 years’ imprisonment. I consider Northern Irish criminal proceedings further at Chapter 9.

7.14. Significantly, 2018 saw the first convictions linked to the proscribed extreme right-wing organisation National Action. In July 2018 two men were sentenced to a

total of 14 years' imprisonment for being members of the proscribed organisation¹⁷. In November 2018, a total of six people were sentenced at Birmingham Crown Court for being members of the same organisation¹⁸. Their sentences ranged from five to six-and-a-half years' imprisonment.

7.15. Although not treated as terrorism, a number of individuals were convicted of stirring up hatred against members of the Muslim community (*R v Peter John Tovey*, *R v Jonathan Jennings*, *R v John Hanson*, *R v David Bitten*, *R v Rodenne Chand*, *R v Ian Evans*). A Nazi-sympathiser and far-right extremist Liam Seabrook was sentenced to 8 years' imprisonment after he stockpiled weapons with the intention of using them to attack mosques, but the offences of which he was convicted were non-terrorism offences¹⁹.

Foreign Terrorist Fighters and criminal prosecution

7.16. Although 2018 saw a decrease in the number of cases linked to Syria when compared to previous years, many British citizens and former residents remain in Syria or Iraq after travelling to fight in support of Da'esh.

- The overall effectiveness of domestic criminal law in addressing the **risk** posed by those who return is still difficult to gauge. Counter-terrorism officials will say that it depends on the likelihood of conviction and the length of sentence.
- But the wider benefits of domestic prosecution include maintaining public confidence, which is undermined if individuals are seen to act with impunity, preventing false-counter narratives, and enabling the facts to emerge in a trial forum commanding wide public acceptance.

7.17. One of the Government's three-year commitments in its counter-terrorism strategy CONTEST²⁰ was to "bring foreign fighters to justice in accordance with due legal process if there is evidence that crimes have been committed, regardless of their nationality." This leaves open the possibility of the United Kingdom contributing to

¹⁷ <https://www.bbc.co.uk/news/uk-politics-44873178>.

¹⁸ <https://www.bbc.co.uk/news/stories-45919730>.

¹⁹ Making a threat to kill, sending malicious communications, threatening to destroy property and having articles with intent to destroy property.

²⁰ At paragraph 140.

bringing Foreign Terrorist Fighters to trial elsewhere than in the United Kingdom. The collective obligation of states to bring to justice those involved in terrorist activity arising out of Syrian conflict is well-established²¹.

7.18. The Government's figures for Foreign Terrorist Fighters originating from the United Kingdom are that more than 900 individuals travelled from the UK to engage with the conflict in Syria, of which 20% were killed overseas and 40% have returned. The majority of the returners did so in the earlier stages of the Syrian conflict and were investigated on return, with a "significant proportion" assessed as being no longer of national security concern. Those who remain include "many of the most dangerous" as a result of training, indoctrination, and an expanded network of terrorist contacts²².

7.19. Of those who have returned, estimated at 360 in March 2019, 10% of these are said to have been prosecuted²³. The Crown Prosecution Service does not publish data on the prosecution of Foreign Terrorist Fighters as a sub-category of terrorist prosecutions²⁴, but, in the absence of official Crown Prosecution Service statistics and at my request Professor Clive Walker QC, carried out an analysis of case descriptions available on the Crown Prosecution Service website²⁵ for the years 2016, 2017 and 2018.

- There were 2 (2016), 2 (2017), and 2 (2018) successful prosecutions of Foreign Terrorist Fighter returnees²⁶.
- It is difficult to reconcile these numbers with the total of approximately 40 given by the Government, but this may be explained by a higher rate of

²¹ United Nations Security Council Resolution 2178, 24 September 2014, at article 6, referring back to Resolution 1373 (2001). UNSCR 2178 is reinforced by UNSCR 2396 (21 December 2017), article 29 and the Madrid Guiding Principles of 2015-18 (S/2015/93923, December 2015, https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Madrid-Guiding-Principles_EN.pdf; https://www.un.org/sc/ctc/wp-content/uploads/2018/12/2018-Addendum-to-the-2015-Madrid-Guiding-Principles_as_adopted.pdf S/2018/1177).

²² CONTEST, paragraphs 167-8.

²³ HC Briefing Paper, number 8519, 15 March 2019 at paragraph 3. I have been informed that the figure of 10% derives from the figure of "approximately 40" individuals who have been prosecuted on their return from Syria in respect of Syria-linked offences given in Parliamentary answer number 223138; and by the Home Secretary at Hansard, Vol654 Col1492, 20 February 2019.

²⁴

<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-04-11/910352/>.

²⁵ As at 9 September 2019.

²⁶ Including a returnee from Ukraine and one from Afghanistan.

prosecution of returnees in earlier years of the Syrian conflict and the possibility that some of these prosecutions were not successful²⁷.

- There are higher numbers of successful prosecutions of those attempting to travel²⁸: 8 (2016), 9 (2017), 3 (2018).
- The numbers for those not travelling or attempting to travel but engaged in Foreign Terrorist Fighter direct support activity such as funding and travel facilitation are 9 (2016), 2 (2017), 0 (2018).
- Overall, as a percentage of prosecutions successfully concluded in this period by the Crown Prosecution Service Counter-Terrorism Division the figure for returnees is 5%, for attempted travellers is 17% and for direct support activity is 9%.

7.20. According to the same analysis, the most common offences for successful prosecution of returnees in this period were preparation for acts of terrorism (section 5 Terrorism Act 2006) and membership of a proscribed group (section 11 Terrorism Act 2000). A clear majority of the attempted travellers category were successfully prosecuted under section 5 Terrorism Act 2006. Direct support activity was prosecuted using funding offences (sections 15 and 17 Terrorism Act 2000) and section 5 Terrorism Act 2006.

7.21. Each British national or resident Foreign Terrorist Fighter is assigned a Senior Investigating Officer within CT Policing. As with all criminal cases, whether a prosecution can be brought ultimately depends upon the Crown Prosecution Service's assessment as to the sufficiency of evidence and the public interest. The application of this assessment in practice has produced outcomes that have been questioned individually²⁹ and at a policy level. In April 2018, the United States Attorney General told a Senate panel hearing of his disappointment that the British "...are not willing to

²⁷ The Crown Prosecution Service website does not give details of acquittals. But the rate of successful prosecution of terrorist offences has since 2010 been very high.

²⁸ Including those who were intercepted outside the United Kingdom such as in Turkey.

²⁹ In January 2016, and again in February 2018, the Crown Prosecution Service in consultation with the Attorney General concluded that there was insufficient evidence to prosecute Shafee El Sheikh for murder as a member of Syrian-based "Beatles": *R. (on the application of El Gizouli) v Secretary of State for the Home Department* [2019] 1 W.L.R. 3463 at paragraph 11.

try the cases but intend to tell us how to try them"³⁰. But the rate of United Kingdom terrorism prosecutions has been held up as a good example compared to Canada³¹.

7.22. The sharp challenge in prosecuting returning Foreign Terrorist Fighters *for their activities overseas* is the difficulty in collecting so-called **battlefield evidence**. This may be forensic evidence taken from Improvised Explosive Devices. According to the Home Secretary, success depends upon close cooperation with the Ministry of Defence, the United Kingdom's military allies on the ground and the "Five Eyes" intelligence partnership³². Routine matters such as taking witness statements are hampered by the lack of national infrastructure and police forces³³. The significance of a lack of national infrastructure is that requests for mutual legal assistance are not possible; in these circumstances the Crown Prosecution Service may have to rely on digital media to build a case³⁴.

7.23. Other forms of evidence include materials left on or before departure from the United Kingdom, and admissions made (whether to the media while overseas, or on return)³⁵. Improving the collection, handling, preservation and sharing of relevant information and evidence obtained from conflict zones has been identified as an international objective³⁶.

7.24. As already noted, the Crown Prosecution Service continues to enjoy a remarkable success rate in terrorist prosecutions. The question therefore arises as to whether a more forward-leaning approach could be taken by the Crown Prosecution Service to this **hard-to-reach category**, with a greater tolerance of the risk of acquittal. On one view it seems an obvious inference that where a person has been

³⁰ Ibid at paragraph 15.

³¹ West, The Problem of "Relevance": Intelligence to Evidence Lessons from UK Terrorism Prosecutions, *Manitoba Law Journal* 41(4) 2018.

³² HC Debs Vol663 Col53, 11 March 2019. There is also the work of the International, Impartial and Independent Mechanism (Syria, UNGA resolution 71/248 on 21 December 2016) and the Iraq Investigative Team (UNSCR 2379 of 21 September 2017).

³³ HC Deb, 18 March 2019, C258WH.

³⁴ Speech by Sue Hemming, Crown Prosecution Service Head of Counter Terrorism, at the National Security Summit, London, 25 October 2017, <https://www.cps.gov.uk/cps/news/speech-sue-hemming-cps-head-counter-terrorism-national-security-summit-london-25-october>.

³⁵ Walker, 'Foreign Terrorist Fighters and UK Counter Terrorism Laws', *The Asian Yearbook of Human Rights and Humanitarian Law* (2018) Vol 2 at page 187. Walker notes that more mature FTFs will seek to cleanse themselves of incriminating digital material before they return home.

³⁶ UN level guidance addendum to the 2015 Madrid Principles formulated by the United Nations Security Council Counter-Terrorism Committee under UNSCR 2014/2178. For the 2018 Addendum to these principles, see https://www.un.org/sc/ctc/wp-content/uploads/2018/12/2018-Addendum-to-the-2015-Madrid-Guiding-Principles_as_adopted.pdf.

to Syria, they must have been there for terrorist purposes, and that their travel to Syria itself constitutes evidence, perhaps sufficient evidence for there to be a case to answer, of an offence contrary to section 5 Terrorism Act 2006 (preparing to commit a terrorist offence). However, seasoned prosecutors point out that merely proving that an individual has travelled to Syria will not persuade a jury to the criminal standard, because:

- juries may feel unable to exclude the possibility that the reason for travel was humanitarian or born out of naïve curiosity.
- even where there is proof of an intention to fight (for example, discovery of photographs of the defendant holding weapons), juries may be reluctant to convict if there is a possibility that the defendant was aligned with non-Da'esh forces against the Syrian regime or was in fact fighting Da'esh.

7.25. For this reason, prosecutors generally require additional evidence: either (i) on-scene evidence (fingerprints recovered from the battlefield, or other directly incriminating photographs) or (ii) what is referred to as 'mindset evidence' which may allow the Crown Prosecution Service to rebut the defence of innocent travel.

7.26. The Crown Prosecution Service's *Terrorism: Guidance in relation to the prosecution of individuals involved in terrorism overseas*³⁷ lists the **types of offences** that are likely to be considered in these types of cases. The suggested offences are section 5 Terrorism Act 2006 (preparation for acts of terrorism), sections 6 and 8 Terrorism Act 2006 (providing and receiving training), sections 15 to 18 Terrorism Act 2000 (funding offences), section 54 Terrorism Act 2000 (providing and receiving weapons training), sections 57 Terrorism Act 2000 (possession of articles for terrorist purpose), and section 58 Terrorism Act 2000 (possession of information likely to be useful to a terrorist).

7.27. These offences may not always be effective for those who have travelled out in order to align themselves with Da'esh but only to play an indirect support or passive role on arrival³⁸. As Professor Walker's analysis shows, membership of a proscribed

³⁷ <https://www.cps.gov.uk/legal-guidance/terrorism-guidance-relation-prosecution-offences-relating-daesh-and-conflict-syria>, revised September 2019. It was previously entitled *Terrorism: Guidance in relation to the prosecution of offences relating to Daesh and the conflict in Syria, Iraq and Libya*.

³⁸ The United Nations has noted that women and children "may have served in many different roles, including as supporters, facilitators, or perpetrators of terrorists acts, and may be victims of terrorism",

organisation contrary to section 11 Terrorism Act 2000 is a further potential offence, although proof of membership is not straightforward³⁹.

7.28. The culpability of those who travel to Syria or Iraq and provide only moral (that is, intangible) support to proscribed organisations such as Da'esh is not directly addressed in the criminal offence provisions under the Terrorism Acts 2000 and 2006. For this category of travellers there may sometimes be major extenuating circumstances: for example, girls who are groomed in the United Kingdom and are ultimately persuaded to go out to join Da'esh. But the importance of "emotional help" and "mental comfort" to groups who "derive encouragement from the fact that they have the support of others, even if it may not in every instance be active or tangible support", is real⁴⁰. Under current law, it is an offence to invite such support (section 12(1) Terrorism Act 2000), but not an offence actually to provide it.

7.29. I have detected no particular enthusiasm on the part of CT Police or the Crown Prosecution Service for a further offence to be created, and Parliament has only recently considered whether the existing offences need to be tightened or amended⁴¹. It would be a challenge to frame an offence whose ambit was sufficiently clear. But whether there is a lacuna in the law for this category of behaviour is something I intend to keep under review⁴².

7.30. Two further potential responses to the problem of terrorist travellers are to reinvigorate the offence of treason, and to make it an offence to travel to particular areas. Quite correctly, treason has not been adopted as a response⁴³. But Parliament

2018 Addendum, *supra*, at paragraph 27. Indirect support roles might include cooking meals, marriage to a fighter or rearing children.

³⁹ *R v Ahmed* [2011] EWCA Crim 184 at paragraphs 86 to 95.

⁴⁰ *R v Chaudary (Anjem); Rahman* [2018] 1 WLR 695 at paragraphs 46, the Court of Appeal agreeing with the trial judge's analysis.

⁴¹ In the Counter-Terrorism and Border Security Act 2019. I will consider in a future report the November 2019 suggestion by the London Bridge coroner, HHJ Lucraft QC, that possession of certain extreme propaganda should be penalised: <https://londonbridgeinquests.independent.gov.uk/wp-content/uploads/2019/11/Final-Report-on-Action-to-Prevent-Future-Deaths-Report.pdf>.

⁴² It has been suggested to me that a further offence that may be committed by 'jihadi brides' is that of failing to disclose material information about acts of terrorism committed by others, contrary to section 38B Terrorism Act 2000. The failure may take place on return to the United Kingdom (section 38B(6)) but the information must be known or believed by the defendant to be 'material' to preventing an act of terrorism, or enabling the prosecution of an individual in the United Kingdom, neither of which may be easy to prove.

⁴³ For my analysis of why treason is the wrong response, see 'Changing Times, Changing Treason?', my speech delivered to Royal United Services Institute on 9 September 19,

has now inserted a new offence of entering or failing to return from a designated area into the Terrorism Act 2000⁴⁴. If an area is designated (none has been up to the date of writing this report), it will then be an offence to enter or remain in that area punishable by up to 10 years' imprisonment.

7.31. As well as a defence of reasonable excuse there is a series of specific exemptions contained within the new provisions⁴⁵ which cover for example work as a journalist or sole care for a relative. This new offence cannot apply to those who have already left the area before it is designated; and even if an area of Syria or Iraq is designated, those who remain may be able to argue successfully that practical difficulties prevented them from returning to the United Kingdom.

7.32. I will consider the question of designation further in my next Report. As my predecessors have all reported, aid agencies find it difficult to operate in conflict zones because their work brings them, their employees, their agency workers, into direct or indirect conflict with proscribed groups, and with individuals or entities who are subject to economic sanctions. It would be counter-productive if the banks on whom aid agencies depend formed the incorrect view that merely transferring monies to anyone in a designated area would attract criminal liability. Careful messaging is needed to ensure that designation as a terrorist hotspot does not lead to a form of geographical sanction.

7.33. The Crown Prosecution Service guidance on Syria, Iraq and Libya also addresses the **public interest test**. The starting point is that if individuals decide to travel to Syria to take part in fighting, otherwise than in accordance with a properly authorised United Kingdom government operation, then it is likely that the public interest would favour of prosecution⁴⁶ but that a prosecution is less likely if it is established that (i) the suspect was involved solely in providing direct medical assistance, or (ii) there was no credible indication that he or she had acted in violation of international humanitarian law or other applicable international law⁴⁷. For minors,

<https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2019/09/190909-Treason-Speech-to-RUSI.pdf>.

⁴⁴ Section 58B, inserted by section 4(2) Counter-Terrorism and Border Security Act 2019.

⁴⁵ Section 58B(2)-(6). If evidence of a defence is led, then section 118 Terrorism Act 2000 applies and prosecution must disprove it beyond reasonable doubt, see Schedule 3 Counter-Terrorism and Border Security Act 2019, para 38 amending s118(5)(a) Terrorism Act 2000.

⁴⁶ Paragraph 16.

⁴⁷ Paragraph 17.

the general point is made that the younger the suspect, the less likely it is that prosecution is required. The guidance does not deal with the position of 'jihadi brides' or the position of those who travelled to fight against Da'esh.

7.34. The interaction between the potential prosecution of dual-citizenship Foreign Terrorist Fighters and **depriving** them of their citizenship⁴⁸ is complex.

- On the one hand, the United Kingdom asserts extraterritorial jurisdiction over many terrorist offences committed overseas, a jurisdiction that does not depend upon the nationality of the defendant⁴⁹. It follows that depriving dual nationals of their citizenship does not bar prosecution in the United Kingdom.
- On the other hand, deprivation of citizenship has been seen as a powerful signal that the United Kingdom does not intend to deal with the individual concerned⁵⁰. The Government has stated that where such individuals poses any threat to this country, it will do "everything in [its] power to prevent their return"⁵¹.

Sentences in 2018

7.35. Of the 76 people tried and convicted in Great Britain of terrorism-related offences⁵²:

- a. 6 received life sentences.
- b. 4 received sentences of between 10 and 30 years.
- c. 26 received sentences of between 4 and 10 years.

⁴⁸ Under section 40 British Nationality Act 1981.

⁴⁹ The principal source of extraterritorial jurisdiction is set out in section 17 Terrorism Act 2006. Even where liability turns on nationality, this is nationality at the time of the offences, not subsequently: see section 17(3A), or, in respect of the Designated Area offence, section 58B(1)(b).

⁵⁰ When the dual UK-Canadian national Jack Letts was deprived of his citizenship, the Canadian Government accused the UK of "offloading" its responsibilities:
<https://www.telegraph.co.uk/news/2019/08/19/jihadi-jack-canada-disappointed-uk-has-off-loadedresponsibilities/>; see also Jenkins, 'Options for Dealing with Islamic State Foreign Fighters Currently Detained in Syria', CTC Sentinel (2019) Vol 12, Issue 5 by removing their right to return to the United Kingdom.

⁵¹ HC Deb, 18 March 2019, C258WH.

⁵² Operation of Police Powers under the Terrorism Act 2000, Table Q - C.04, quarterly update to September 2019

d. 29 received sentences of between 1 and 4 years.

e. 1 received a sentence of less than 1 year.

7.36. Ten received non-custodial sentences such as a conditional discharge.

7.37. Not all terrorist offenders are convicted of terrorism offences. For example, as noted above, Darren Osborne was convicted of murder and attempted murder for perpetrating the Finsbury Park Mosque attack in 2017. Under sections 30 and 31 Counter-Terrorism Act 2008, judges are required to determine whether an offence has a terrorist connection and if so, to treat that circumstance as an aggravating factor⁵³.

7.38. Imprisonment following conviction, and restrictive measures imposed following release, have long been considered a relatively straightforward and immediate means of reducing the risk posed by terrorist offenders. That calculation is reinforced through the amendments made to sentencing practice by the Counter-Terrorism and Border Security Act 2019. Even where convictions are not secured for the gravest offences, lesser offences provide an entry point into long periods of notification under Part 4 Counter-Terrorism Act 2008 which I discuss below.

7.39. Longer sentences for the following offences have now been implemented by the Counter-Terrorism and Border Security Act 2019⁵⁴:

- a. failing to disclose information about acts of terrorism as soon as reasonably practicable contrary to section 38B of the Terrorism Act 2000 – maximum sentence increased from 5 years to 10 years;
- b. collecting information of a kind likely to be useful to a person committing or preparing an act of terrorism contrary to section 58 of the Terrorism Act 2000 - maximum sentence increased from 10 years to 15 years;
- c. eliciting, publishing, or communicating information about members of the armed forces, intelligence services or the police which is of a kind likely to be useful to a

⁵³ The offences for which a judge must make this determination are specified in Schedule 2 and include offences such as murder, wounding with intent and firearms offences.

⁵⁴ Section 7.

person committing or preparing an act of terrorism contrary to section 58A of the Terrorism Act 2000 - maximum sentence increased from 10 to 15 years;

- d. encouraging terrorism contrary to section 1 of the Terrorism Act 2006 - maximum sentence increased from 7 years to 15 years;
- e. disseminating terrorist publications contrary to section 2 Terrorism Act 2006 - maximum sentence increased from 7 years to 15 years.

7.40. Each of these increases provides additional headroom for sentencing courts, and further opportunities for the authorities to exploit criminal proceedings as a significant medium-term means of disrupting the terrorist aspirations of individuals and groups⁵⁵. But not all these offences will necessarily be committed by offenders posing a direct terrorist risk: failure to disclose contrary to section 38B Terrorism Act 2000 may be committed by family members who, whilst reluctant to report their relatives, are not themselves active terrorists.

7.41. According to the Government, these increases were justified by a change in the terrorist threat, in particular, the rapid trajectory of radicalisation which resulted in individuals of risk "moving quickly on to attack planning". It was considered that increased maximum penalties "better reflect the increased risk and the seriousness of these offences"⁵⁶. Each of the above offences concern pre-cursor conduct, that is conduct which does not constitute an attack but might lead to the offender, or another person, carrying out an attack at some future date.

7.42. But whilst it is correct that individuals who engage in this type of conduct may rapidly progress into low-sophistication attacks with knives and vehicles, that will not always be the case⁵⁷. In March 2018 the Sentencing Council published its Terrorism Offences: Definitive Guidance (2018) concerning the approach to be taken by

⁵⁵ Different considerations will apply to those prosecuted for terrorism and terrorism-related offending in the Youth Court, an aspect of criminal prosecution I have not considered in this Chapter.

⁵⁶ Home Office, Counter-Terrorism Border and Security Bill, Sentencing Factsheet, page 2: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778110/2019-02-11_Criminal_Sentences_Fact_Sheet_RA.pdf. The Government also noted that the Independent Reviewer, Max Hill QC, had recommended an increase to certain sentences.

⁵⁷ Lord Denning observed that for a person to be punished not for something that he has already done, but which he might do in future, would be "contrary to all principle", *Everett v Ribbands*, [1952] 2 Q.B. 198, at page 206, cited in Derrshowitz, *Preemption: A Knife That Cuts Both Ways* (Norton, 2007) at page 7.

sentencing judges, based on the harm risked or caused, and the culpability of the offender⁵⁸. One highly experienced former judge has raised the question, "In the case of a terrorist, what information does [the sentencing judge] have to go on?" pointing out that sensitive information which may be very relevant to the basis for sentence is generally withheld; and that the use of predictive models such as the Violent Extremist Risk Assessment mechanism may not be perfect⁵⁹. Longer sentences appear to build in an assumption of increased risk.

7.43. The Counter-Terrorism and Border Security Act 2019 has also amended the provisions in Part 12 of the Criminal Justice Act 2003, which enable a court to impose an extended sentence of imprisonment (section 226A and 226B) or a special custodial sentence "for certain offenders of particular concern" (section 236A). The effect is to create a list of terrorist offences which could lead:

- In the case of more serious offences, to an extended determinate sentence, delaying the point at which a person may be released from the custodial part of their sentence and adding an extended period of licence supervision;
- In the case of less serious offences, to a special sentence removing automatic release at the half-way stage, and providing for a minimum of 12 months on licence.

7.44. The consequence of longer sentences, or sentences with a longer custodial element, awaits fuller analysis. In April 2017 a joint unit known as JEXU, the Joint Extremist Unit, was established by Her Majesty's Prison and Probation Service and the Home Office with oversight of terrorist offenders in prison and on probation⁶⁰. Officials point to the risk of "cliff edge" sentences, which provide an insufficient probation period before coming to an end. The ability to monitor and assess offenders in the community after release, with a process of incrementally reduced controls and supported rehabilitation, balanced against public protection considerations, is highly prized.

⁵⁸ Updated guidance to take account of the newly increased sentences is awaited. There is no equivalent to the Sentencing Council guidance applicable to Northern Ireland, where, as I report in Chapter 9, the levels of sentencing have been historically lower than in the rest of the United Kingdom.

⁵⁹ Sir John Saunders, 'A judicial view from the UK on assessing the risk posed by convicted terrorists', ERA Forum (2019) Vol 19 at pages 369–373.

⁶⁰ Answer to Written Question number 220119, 12 February 2019 (Answered on: 19 February 2019).

7.45. Similarly, longer sentences may have consequential implications for an offender's rehabilitation and adjustment to normal life on eventual release. The specific risk with terrorist offenders is both involvement in prison radicalisation⁶¹ and, for the 'new generation' of less ideological more opportunistic terrorist offenders, finding themselves in prolonged contact with more committed extremists⁶².

Prison in 2018

7.46. At the end of 2018, 221 individuals were in prison for terrorism-related offences (down from 224 a year earlier)⁶³.

7.47. Of these, 175 were Islamist extremists (down from 192 the previous year), 28 were identified as holding extreme right-wing ideologies, and 18 were classified as "other" (a category which includes prisoners not classified as holding a specific ideology). Significantly, 2018 saw the highest number of individuals in custody for terrorism-related offences who adhere to an extreme right-wing ideology⁶⁴.

7.48. Of the 221 prisoners identified as terrorists, 173 declared themselves as Muslim. Twenty of the prisoners self-identified as Christian, 1 as Buddhist, 1 as Jewish, and 2 as Sikh. As for the remainder, 16 declared themselves as having no religion, 7 belonged to "other religious groups", and 1 was unrecorded⁶⁵.

Ancillary orders used against terrorist offenders

7.49. In addition to general sentencing powers, terrorism legislation provides for specific ancillary orders for convicted terrorist offenders.

⁶¹ Following the 2016 Acheson Report (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/547032/acheson-review-summary-aug-2016.pdf), the Prison (Amendment) Rules 2017, SI 2017/560, allow for a special separation regime for extremist prisoners. There are currently two Separation Centres in operation.

⁶² The same point can be made in respect of those who commit facilitative offences such as non-disclosure or dissemination of terrorist materials.

⁶³ Operation of Police Powers under the Terrorism Act 2000, quarterly update to September 2019 publication, Table Q P.01,

⁶⁴ Ibid.

⁶⁵ Operation of Police Powers under the Terrorism Act 2000, at Table P.04, quarterly update to December 2018 publication.

- Under Part 2 of the Anti-social Behaviour, Crime and Policing Act 2014, the sentencing court may make a criminal behaviour order that it considers will help prevent the offender from engaging in conduct that causes or is likely to cause harassment, alarm or distress to any person. The precondition is that the offender has engaged in such behaviour in the past. This type of order has been given to terrorist offenders on at least two occasions in 2018, in both cases restricting their access to the internet and their ability to disseminate extreme Islamist propaganda⁶⁶. An order may be time limited or until further order.
- Under the Serious Crime Act 2007, the sentencing court may impose a serious crime prevention order for up to 5 years. This is a civil injunctive order which is aimed at preventing serious crime which, following amendments made by the Counter-Terrorism and Border Security Act 2019, has been defined to include various terrorist offences⁶⁷. If a person breaches an order he or she commits a criminal offence. The precondition for imposition is that the Crown Court has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales⁶⁸. I report on the power of the High Court to make such an order, even in the absence of a conviction, in Chapter 8⁶⁹.
- Schedule 5 to the Counter-Terrorism Act 2008 powers the Crown Court to prohibit foreign travel for convicted offenders.
- In some cases, the police will seize property at the time of arrest that has been or is intended to be used for the purposes of terrorism. On conviction, the sentencing court can make an order for forfeiture of that property under section 23 or 23A Terrorism Act 2000. I have been unable to obtain statistics for the use of this power in 2018.

⁶⁶ *R v Atiq Ahmed* and *R v Arbias Thaqi*.

⁶⁷ The listed offences correspond to those to which the notification requirements apply and therefore include the principal proscribed organisation, terrorist financing, and the Terrorism Act 2006 terrorist offences.

⁶⁸ Section 19 Serious Crime Act 2007.

⁶⁹ At 8.64.

Releases from prison

7.50. In Great Britain in the year ending 30 December 2018, 57 persons in prison for terrorism-related offences were released⁷⁰. Of these, 1 was serving a sentence of imprisonment for public protection, 30 were serving a sentence of 4 years' imprisonment or longer, 18 were serving a sentence of imprisonment of at least 12 months but less than 4 years, 1 was serving a sentence of less than 6 months, and 7 had not been sentenced⁷¹. Releases included Anjem Choudary and Mohammad Rahman of Al-Muhajiroun.

7.51. There are no equivalent statistics for Northern Ireland.

7.52. In most cases, the timing of release will have been determined by the Parole Board. Legislative architecture exists for the Parole Board to consider sensitive material for the purpose of determining risk⁷², but this is rarely used⁷³. Increasingly, licence conditions given to released terrorist prisoners resemble the conditions that may be attached under Terrorism Prevention and Investigation Orders, which I report on at Chapter 8.

7.53. In addition, under Part 4 of the Counter-Terrorism Act 2008, released terrorist offenders must provide police with personal information, notify any changes to this information, confirm its accuracy periodically and notify relevant authorities of any proposed foreign travel⁷⁴. In 2018, notification requirements applied to a significant number of terrorist cases⁷⁵. This regime applies to individuals convicted of a listed terrorist offence and to those whose offences have been found to have a terrorism connection.

⁷⁰ Operation of Police Powers under the Terrorism Act 2000, , quarterly update to September 2019 Table Q P.05

⁷¹ The total of 49 includes persons held on remand prior to charge / sentence, and what are described as "non-criminal prisoners".

⁷² Rule 17 Parole Board Rules 2019.

⁷³ In Northern Ireland, special closed proceedings are available to consider the recall of prisoners for breach of licence: <https://www.nidirect.gov.uk/articles/licence-revocation-and-national-security>.

⁷⁴ Section 58 and Schedule 5 Counter-Terrorism Act 2008 enables a court to impose a foreign travel restriction order on a person subject to notification requirements. There are no statistics on the exercise of the power in Great Britain. The power was not exercised in Northern Ireland: Northern Ireland Terrorism Legislation: Annual Statistics 2017/2018 and 2018/2019, table 14.1.

⁷⁵ Of the 38 cases recorded on the Crown Prosecution Service website, notification requirements were identified as having applied to 11 offenders. 3 individuals were made subject to notification requirements in 2018: Northern Ireland Terrorism Legislation: Annual Statistics 2017/2018 and 2018/2019, table 13.1.

- The requirement to consider whether certain non-terrorist offences have a terrorist connection and, therefore, to treat that circumstance as an aggravating feature under section 30 to 31 Counter-Terrorism Act 2008, has been extended to Northern Ireland and enlarged in England, Wales and Scotland. For example, offences contrary to section 18 of the Offences Against the Person Act 1861 have been added to the list of specified offences. According to the Government, between 2012 and 2017 seven individuals were charged with this offence in England and Wales, where the offence was considered to be terrorist related. The consequence is to increase the pool of individuals subject the notification requirements under Part 4 of the Counter-Terrorism Act 2008⁷⁶.
- Notification requirements may also be imposed by the High Court on individuals convicted of terrorist offences overseas⁷⁷. There are no public statistics on the exercise of this power in Great Britain; the power was not exercised in 2018 in Northern Ireland⁷⁸.

7.54. The Counter-Terrorism and Border Security Act 2019 amends section 47 Counter-Terrorism Act 2008 to add further categories of information that must be provided on the initial notification, including:

- a. the offenders' contact details (phone number, email address) on the date of conviction;
- b. the offender's contact details on the date of notification;
- c. the information identifying any vehicle used by the offender (e.g. registration number, model and colour of the vehicle and the location where the vehicle is normally stored when not in use);
- d. details of any bank accounts or equivalent (including accounts held jointly with another person and any business accounts held by the offender where he or she runs a business through a company) and any debit, credit, charge or prepaid cards held by the offender; and
- e. details of any passport or other identity document held by the offender.

⁷⁶ The list does not include an offence of failing to provide an encryption key contrary to section 49 Regulation of Investigatory Powers Act 2000.

⁷⁷ See *Commissioner of Police of the Metropolis v Ahsan* [2015] EWHC 2354 (Admin).

⁷⁸ Northern Ireland Terrorism Legislation: Annual Statistics 2017/2018 and 2018/2019, table 13.2.

7.55. Further changes in the Counter-Terrorism and Border Security Act 2019 relate to keeping notified information up to date and creating a duty on homeless terrorist offenders to re-notify the police on a weekly rather than annual basis.

7.56. The *minimum* period for which this information must be provided is 10 years⁷⁹. For the offences attracting sentences of 10 years' imprisonment or more, it is 30 years. There is no opportunity to seek a review of the period, or the amount of information that must be provided. The parallel with the treatment of sex offenders under Part 2 of the Sexual Offences Act 2003 is clear but not exact. Unlike terrorist notification requirements, notification requirements for sex offenders may last indefinitely; but indefinite sex-offender notification requirements are subject to a review mechanism. As the burden of notification for qualifying terrorist offenders increases, the lack of a review mechanism appears unfair and counterproductive, because it offers no means of tapering obligations to aid reintegration and reward good behaviour⁸⁰. I **recommend** that consideration be given to establishing a means to review terrorist notification requirements.

7.57. Breach of a notification requirement is an offence punishable by up to 5 years' imprisonment⁸¹. In January 2018 the Government conferred a power of prosecution appeal against sentences for breaches which are considered too low⁸².

7.58. A novel power to grant a search warrant "for the purpose of assessing the risks posed by the person to whom the warrant relates" was inserted by the Counter-Terrorism and Border Security Act 2019⁸³ where it is "necessary" to search the premises and where a constable has "sought entry to the premises" to carry out a search on at least two prior occasions. The discretion conferred on officers, whose request to enter premises carries the threat of a search warrant if repeatedly refused, and conferred on the magistrates' courts, is considerable, and has no parallel other than the power to grant warrants to check whether a person subject to Terrorism

⁷⁹ Section 53 Counter Terrorism Act 2008.

⁸⁰ Tapering obligations is a feature of the management of individuals subject to Terrorism Prevention and Investigation Measures.

⁸¹ For example, Hana Gul Khan pleaded guilty and was sentenced on 25 November 2016 to a total of 180 hours Community Order for this offence <https://www.cps.gov.uk/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-2016>.

⁸² By amending the Unduly Lenient Sentence scheme, <https://www.gov.uk/government/news/public-can-challenge-more-lenient-terror-sentences-from-today>.

⁸³ Section 56A Counter-Terrorism Act 2008.

Prevention and Investigation Measures is compliant⁸⁴. Given that notification periods can extend for 30 years⁸⁵, with no opportunity for review, unlike Terrorism Prevention and Investigation Measures which last for two years and are subject to High Court review, this is a remarkable power. It remains to be seen whether this power is used (or threatened) and whether judicial scrutiny proves to be a sufficient safeguard.

7.59. To date, notification has been given a clean bill of health in the courts and found not to amount to a disproportionate interference with an individual's private and family life⁸⁶. But notification continues to prove contentious, particularly in Northern Ireland. In 2019 the High Court of Northern Ireland dismissed a challenge to notification of foreign travel (including between Northern Ireland and the Republic of Ireland) based on the right to freedom of movement within the European Union⁸⁷. I am informed that there are more challenges in the pipeline.

General assessment

7.60. The United Kingdom now has a comprehensive system for mitigating the risk posed by convicted terrorists: longer sentences, preventive orders, sentences spent in separate units, changes to the release point, additional licence supervision, and onerous post-release notification requirements. There is much to commend in using criminal convictions, secured beyond reasonable doubt in open court proceedings, as the entry point for managing terrorist risk. But distinctions between prevention and punishment are not always watertight⁸⁸. As terrorist offences increasingly operate at the preparatory stage of conduct, caution is required to ensure that these measures remain sufficiently targeted and proportionate.

⁸⁴ Paragraph 8 Schedule 5 Terrorism Prevention and Investigation Measures Act 2011.

⁸⁵ Section 53(1)(a) Counter Terrorism Act 2008.

⁸⁶ *R (on the application of Mohamed Irfan) v Secretary of State for the Home Department* [2012] EWHC 840 (Admin) concerned an individual released after a 4-year sentence for an offence contrary to section 5 Terrorism Act 2000. The Court of Appeal upheld the decision at [2012] EWCA Civ 1471.

⁸⁷ *In the matter of an application for judicial review by Anthony John McDonnell Anthony* [2019] NIQB 48. The Claimant had been convicted of collecting information likely to be useful to terrorists, in this case the car registration numbers of police officers, contrary to section 58 Terrorism Act 2000.

⁸⁸ As noted by Lord Bingham in *Secretary of State for the Home Department v MB*, [2008] 1 A.C. 440 at paragraph 23.

8. SPECIAL CIVIL POWERS

Introduction

- 8.1. Terrorism Prevention and Investigation Measures (TPIMs) and Temporary Exclusion Orders (TEOs) are two special statutory powers deployed by the Home Secretary, often at the initiative of MI5. As I report in Chapter 1, these are not the only counter-terrorist powers used by the Home Secretary, but they are the only ones that the Independent Reviewer is entitled to report on.
- 8.2. This Chapter also features three civil counter-terrorism powers available to the police and the Crown Prosecution Service. Passport seizure and deprivation is a relatively new power designed to deal with terrorist travellers. Terrorist property forfeiture, and terrorist serious crime prevention orders are adapted versions of existing powers addressing ordinary criminal conduct by means of civil proceedings.

TPIMS

Generally

- 8.3. Terrorism Prevention and Investigation Measures (TPIMs) are resource-heavy administrative measures imposed on individuals in the United Kingdom, irrespective of their nationality, by the Home Secretary. They are usually based on some secret intelligence. The purpose of these administrative measures is to control the terrorist risk presented by individuals still at liberty in the community where criminal prosecution is not an option. For example, MI5 might have a strong intelligence case that an individual is engaged in terrorist activity, but no evidence that could be used in a criminal prosecution.
- 8.4. TPIMs replaced the old Control Order regime created by the Prevention of Terrorism Act 2005¹. Their title is something of a misnomer: no measures are imposed specifically for the purpose of investigation. There is merely a duty to keep the

¹ However, the former imposition of Control Orders continues to be litigated. *AL v Secretary of State for the Home Department* [2018] EWCA Civ 278 concerned whether a control order imposed in 2006 was justified.

question of prosecution for terrorism-related activity under review². Given the post-release measures that are now available for *convicted* terrorists³, the benefits of securing enough evidence for prosecutions wherever possible cannot be overstated.

- 8.5. There are up to 14 measures that can be imposed including overnight residence requirements; relocation to another part of the United Kingdom; police reporting; an electronic monitoring tag; exclusion from specific places; limits on association; limits on the use of financial services and use of telephones and computers; and a ban on holding travel documents. Breach of any measure is a criminal offence. Once a TPIM is made, a notice is served on the individual setting out their obligations. TPIM measures have frequently had an impact on the TPIM subject's family: for example, limiting the number and type of internet connections in a household has an impact on children carrying out their homework.
- 8.6. The principal criteria for imposing a TPIM⁴ are (a) the Secretary of State is satisfied, on the balance of probabilities, that the individual is, or has been, involved in terrorism-related activity and (b) that she reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for specific terrorism prevention and investigation measures to be imposed on the individual.
- 8.7. TPIMs may be **extended** for up to 2 years. Following this, a new TPIM may be imposed but only on the basis of fresh terrorism-related activity. For individuals who pose an enduring risk, and who may be prepared to weather out a 2-year restriction on their ability to engage in terrorism, this 2-year limitation is considered a significant limitation. TPIMs may be brought to an end by being **revoked** and may be **revived** where they have previously been revoked or allowed to expire⁵.

² Section 10 Terrorism Prevention and Investigation Measures Act 2011.

³ See further Chapter 7.

⁴ Section 3 Terrorism Prevention and Investigation Measures Act 2011.

⁵ Ibid section 31.

TPIMs in 2018

8.8. Detailed information about TPIMs is laid before Parliament quarterly⁶, based on TPIM notices in force on 28 February, 31 May, 31 August and 30 November. The data presented to Parliament for 2018 is summarised below.

| | TPIM notices in force at end of period | TPIM notices in respect of British citizens | TPIM notices extended | TPIM notices revoked | TPIM notices revived | Variations made to measures specified in TPIM notices | Applications to vary measures specified in TPIM notices refused | Individuals subject to relocation |
|-------------------|--|---|-----------------------|----------------------|----------------------|---|---|-----------------------------------|
| 1/11/17 - 28/2/18 | 8 | 7 | 1 | 0 | 1 | 6 | 1 | 8 |
| 1/3/18- 31/05/18 | 8 | 7 | 0 | 0 | 0 | 10 | 7 | 8 |
| 1/6/18- 31/08/18 | 6 | 6 | 0 | 1 | 0 | 3 | 2 | 4 |
| 1/9/18- 30/11/18 | 5 | 5 | 1 | 1 | 0 | 5 | 1 | 3 |

8.9. This data does not indicate how many new TPIMs came into force, but I have been informed by officials that in 2018:

- 4 new TPIMs came into force in respect of 4 British citizens. Of these one subject was relocated, three were not relocated.
- 5 TPIMs came to an end because the 2 year period had expired.

⁶ As required by section 19 Terrorism Prevention and Investigation Measures Act 2011.

- 2 TPIMs were revoked: one because the individual was subject to immigration action; the other because of imprisonment.

8.10. The second half of 2018 therefore saw a reduction in the use of relocation. This trend was to continue into 2019: as of 28 February 2019 there were 4 TPIMs in force of which 2 were relocated, and on 31 May 2019 only 1 of 3 remaining TPIMs was relocated. As I report below, this reflects a new approach to TPIMs.

8.11. No TPIM has ever been imposed in Northern Ireland.⁷

Court proceedings in 2018

8.12. **Reviews** of TPIMs take place in the High Court⁸ using the procedure contained in Part 80 of the Civil Procedure Rules, although it is open to an individual to opt out of a review. Reviews require the appointment of security-cleared advocates known as special advocates to consider and make submissions on material that cannot be disclosed to the TPIM subject for reasons of national security. Evidence is generally heard from a Home Office and Security Service witness. A notable feature of the regime is that the Secretary of State must carry out an extensive search across government databases for 'exculpatory material' which may assist the TPIM subject⁹.

8.13. There were **no** court reviews in 2018.

8.14. The data provided to Parliament shows that no one was charged with **breaching** their TPIM notice in the period to 28 February 2018. In the period to 31 May 2018, one individual had been charged with a breach of his TPIM notice. In the periods to 31 August 2018 and 31 November 2018, 3 individuals were recorded as being charged (although it is not clear if this includes the first individual, and whether any charges were discontinued).

⁷ TPIMs are, via control orders under the Prevention of Terrorism Act 2005, the direct descendants of non-criminal detention under the Anti-Terrorism Crime and Security Act 2001, long since abolished. The parallel with internment (under the Northern Ireland (Emergency Provisions) Act 1973, Schedule 1, which was withdrawn in late 1975) would be more than uncomfortable.

⁸ Section 9 Terrorism Prevention and Investigation Measures Act 2011.

⁹ Ibid, paragraph 3 of Schedule 4, and CPR rules 80.1(3)(g) and 80.23.

- 8.15. One of those charged was also convicted in 2018. 'HB' who was arrested in October 2018 and initially pleaded guilty to two breaches. His TPIM measures had prevented him from having in his possession, or using, any electronic communication devices without prior permission. He had been found with an unauthorised smart phone and MP3 player that acted like a USB stick. It subsequently transpired that he had also used his unauthorised phone to connect to the internet and used chat apps including via the encrypted messaging app Telegram, before wiping the data from his phone. He pleaded guilty to a further breach and was sentenced to 16 months' imprisonment¹⁰.
- 8.16. The above figures do not indicate how many breaches took place because it is unlikely that all detected breaches give rise to criminal prosecutions. It has been previously reported that conviction rates for TPIM breaches are generally low¹¹, and that breaches may well go unpunished.
- 8.17. Some of the challenges of prosecuting breaches of obligations imposed by administrative orders were considered by Lord Anderson QC in his "Control Orders in 2011" and "TPIMs in 2012" Reports¹². Whether those challenges have been overcome is something I propose to revert to in my next annual Report. This is because during 2019 (falling outside the scope of this Report) there were a number of contested criminal trials for breaches of TPIMs.

TPIM Review Groups (TRGs)

- 8.18. In preparation for this report I attended a number of TRGs. The intention of these meetings is to bring officials together in order to consider the effectiveness and proportionality of existing measures, identify any difficulties encountered, and address the longer-term outlook. Some of the issues considered are intensely practical, such as whether adjustments are needed to ensure that a TPIM subject can take his children to school at the start of a new term or obtain suitable housing. It was pleasing to observe that officials considered these points with the seriousness and attention to detail that they deserve.

¹⁰ <https://www.cps.gov.uk/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-2016>.

¹¹ Lord Anderson QC, *TPIMS in 2013 Report* at 5.2.

¹² At 3.6 and 10.5, respectively.

8.19. Indeed, the extent to which decision-makers at these meetings have to engage with practical details is striking, but such is the nature of TPIMs - their intention is to create a practical means of disrupting and preventing terrorist activity which the individual might otherwise engage in during their ordinary daily routine. Given the importance of fine-tuning TPIM measures, and of ensuring that they have no greater impact than can be properly justified, particularly where other family members such as children are concerned, thought might be given to creating a post at MI5 or CT policing with real subject matter expertise in what might be described as local authority competencies.

8.20. A Home Office official chairs the meeting and, on the occasions I was present, provided a measure of challenge to operational views of police and MI5. The question of whether there is sufficient evidence to prosecute is not discussed because this issue is analysed at a separate meeting.

8.21. In his Report on the former Control Order regime, Lord MacDonald QC observed that whilst police were required to make regular assessments of the state of evidence against control order subjects, this was different from setting out to build cases and that the scrutiny he had witnessed was 'frankly inadequate'¹³. The TPIM regime is designed to address this because by section 10 of the Act, "...The Secretary of State must consult the chief officer of the appropriate police force...whether there is evidence available that could realistically be used for the purposes of prosecuting the individual for an offence relating to terrorism" and the chief officer of police must keep the investigation of the individual under review, and "report" to the Secretary of State on that review.

8.22. However, compliance with the section 10 duty is in practice signified by a tick in a box in the relevant TRG draft minutes. Neither the Home Secretary nor Home Office officials are briefed on the evidence that is available. Although the police are rightly operationally independent of the Home Office, and the question of prosecution is one for the police and prosecutors rather than for civil servants and politicians, it is open to question whether the present practice amounts to sufficient consultation. I am not aware of the process by which the question of sufficiency of evidence is scrutinised at a prior stage but this is of obvious importance given:

¹³ *Review of Counter-Terrorism and Security Powers, Cm8003* (2011) at page 10, paragraph 10.

- The principle that TPIMs are measures of second resort behind criminal prosecution;
- The fact that, as I report in Chapter 7, criminal sentencing can now provide many of the preventive measures otherwise covered in a TPIM.

New variant TPIMs

8.23. Traditionally, TPIMs have proven to be seriously resource intensive. Firstly, the burden on the individual is intense: complying with complex obligations, responding to correspondence and searches, and arranging legal representation. So too is the burden on the Home Office and MI5 in preparing the case, carrying out periodic reviews and responding to requests for variations.

8.24. Secondly, there are operational costs involved for the police and MI5 in monitoring compliance with TPIMs, for example by means of surveillance¹⁴. The appetite for non-compliance is low, especially after Ibrahim Magag in 2012 and Mohammed Mohamad in 2013 absconded from their TPIMs and left the United Kingdom¹⁵.

8.25. Official concern about non-compliance may lead to defensive thinking¹⁶ with the following potential outcomes:

- The imposition of **additional** obligations on the individual to mitigate the risk of non-compliance with other obligations;
- a more **restrictive** approach to agreeing variations; and
- More police and MI5 **resources** being used to monitor compliance than might otherwise be justified by the threat posed by the individual.

8.26. Outcomes which risk too great a burden on individuals, and too great a burden on officials, and perhaps discouraging wider use of TPIMs where they would otherwise be an appropriate response¹⁷, are in no one's interest.

¹⁴ As Lord Anderson QC reported in his *TPIMs in 2013 Report* at 6.5.

¹⁵ *Ibid* at 4.35-4.40.

¹⁶ Leading Max Hill QC in his *Terrorism Acts in 2017 Report* at 5.15, to recommend that an individual should not be treated as an elevated abscond risk merely because there was no evidence that they were not going to abscond.

¹⁷ For example, if there was an increased return of Foreign Terrorist Fighters.

8.27. The use of a new variant of TPIMs is therefore positive. For individuals such as terrorist radicalisers the approach is to impose few individual measures. These could be limited to measures preventing them from associating directly or indirectly with certain individuals. In such cases, the shift from the first incarnation of administrative control, namely control orders imposed under the Prevention of Terrorism Act 2005, with their multiplicity of severe obligations including to a different part of the United Kingdom is dramatic.

8.28. Officials inform me that, whilst they consider that this version of TPIM has always been an option, it was only recently that these were thought to be operationally appropriate. The Home Office's aspiration, as yet untested, is that the litigation burden of establishing the necessity for such orders may be less than for previous orders. The following factors may support this:

- If fewer obligations are imposed, it may be that fewer allegations of Terrorist Related Activity can be relied upon in making the TPIM, even if more allegations could be made.
- This should lessen the burden of witness preparation and could, in a simple case, dispense with the need for a live witness all together.
- This could lead to less material being considered exculpatory and having to be considered for disclosure to the individual.

8.29. However, because to date all individuals subject to this form of TPIM have opted out of a High Court review, this approach is yet to be scrutinized by judges. This is something that I will need to keep under review. No suggestion has been made to me by officials that the new approach needs to be supported by different legislative provisions. I also intend to keep under review the broader question of whether TPIMs are being insufficiently used because an overly defensive approach to compliance means that more resources are committed than may, on the whole, be justified.

8.30. One of the pillars of High Court review is the role of security-cleared special advocates who represent the interest of the TPIM subject when sensitive intelligence is relied upon before the Court. The support available to special advocates has been the subject of criticism by my predecessors¹⁸. I have been informed by current special advocates that recent improvements have resolved the

¹⁸ Most recently Max Hill QC in his *Terrorism Acts in 2017 Report* at 10.7 to 10.11.

most acute problems, but that the move of the Special Advocates Support Office to an address further away from the court and barristers' chambers is leading to further logistical problems. This is something that I propose to keep under review.

8.31. In a similar vein, I have been informed there are no facilities for special advocates or the Special Advocates Support Office in Northern Ireland to hold sensitive material. No TPIM has ever been imposed in Northern Ireland, but litigating these complex orders requires special advocates to have independent secure access to the material relied upon by the Secretary of State. The role of Special Advocates in Northern Ireland already extends to appearing in closed material proceedings under the Justice and Security Act 2013, and in prisoner recall or release cases which are based solely or partly on national security sensitive information.

8.32. Finally, I have not had the opportunity to speak to any TPIM subjects since my appointment about the impact upon them. It would be wrong to conclude that because no legal challenges have been launched to this latest tranche of TPIMs, that they are anything other than powerful and intrusive legal instruments which must be carefully considered at every turn.

Temporary Exclusion Orders

Generally

8.33. The Counter-Terrorism and Security Act 2015 empowered the Home Secretary to impose a new form of order called a Temporary Exclusion Order (TEO) on British citizens who are outside the United Kingdom. The purpose of a TEO is to control the manner of an individual's return to the United Kingdom, and to provide a limited measure of control over that individual thereafter. It has particular relevance to British nationals who are believed to have left the United Kingdom to align themselves with terrorist groups such as Da'esh and therefore engaged in terrorism-related activity abroad.

8.34. I attended a TEO Quarterly Management Group at which all current and recently expired TEOs were discussed by Home Office officials, Foreign and Commonwealth Office officials, MI5, and CT police.

- 8.35. In the first instance, a TEO prevents the individual from returning to the United Kingdom unless he or she has first applied for and been given a "permit to return" by the Secretary of State¹⁹(unless the subject is being deported). The effect of a TEO coming into force is also that any British passport held is invalidated²⁰. To that limited extent the individual is "excluded"²¹. A permit to return may specify the precise flight the individual should take on their return as well as the date, time and place of arrival.
- 8.36. Once returned, a TEO permits the imposition of two of the same obligations that may be imposed on TPIM subjects, namely a duty to report to a police station and a duty to attend appointments. In practice, these appointments are likely to require attendance with a practitioner specialising in what is known as the "Desistence and Disengagement Programme".
- 8.37. There is uncertainty as to how far the *conduct* of appointments may be controlled. Paragraph 10A of Schedule 1 to the Terrorism Prevention and Investigation Act 2011, applied by section 9 of the Counter-Terrorism and Security Act 2015, enables an obligation to be imposed that may require a person to comply with "...any reasonable directions given by the *Secretary of State* that relate to matters about which the individual is required to attend an appointment" (emphasis added). The burden is therefore on the Home Office to identify practical points that may inhibit the effectiveness of sessions. It would be open to the Secretary of State to give directions in the form of a Memorandum of Understanding as to what individuals attending sessions must and must not do, to maximise the effectiveness of these sessions.
- 8.38. Additionally, TEOs may also require a person to notify their place of residence to the police²². A breach of the permit to return, or any of the post-return obligations,

¹⁹ Section 5 Counter-Terrorism and Security Act 2015. Where a person is to be deported to the United Kingdom against their will, then a permit must be issued.

²⁰ Ibid section 4(9).

²¹ The use of the word exclusion has proven problematic in communications with foreign authorities. The point of TEOs is to enable but control return, not exclude.

²² Section 9 Counter-Terrorism and Security Act 2015.

without reasonable excuse is an offence, punishable by up to 5 years' imprisonment or a fine for both²³.

8.39. The statutory criteria for the imposition of a TEO, and the requirement to seek prior permission from the court, have much in common with those of the TPIM regime²⁴. However, a TEO may be made where the Secretary of State **reasonably suspects** that the individual is or has been involved in terrorism-related activity **outside the United Kingdom**, whereas a TPIM may only be made if the Secretary of State is satisfied on the balance of probabilities of involvement in terrorist-related activity in the United Kingdom or overseas.

8.40. It is also a necessary condition for a TEO, unlike for a TPIM, that the individual has the right of abode in the United Kingdom²⁵. TEOs may only apply to British citizens and certain Commonwealth citizens²⁶. They do not apply to non-British national residents, nor to dual nationals who are subsequently deprived of their British citizenship.

8.41. TEOs are the responsibility of the Special Cases Unit in the Home Office. This unit is responsible for advising the Home Secretary on the use of general immigration-related powers for national security purposes, such as exclusion. Once a referral is made, it will be processed by the Unit and referred to the TEO Liaison Group, chaired by Counter Terrorism Policing. If a decision is ultimately made to recommend a TEO by the Special Cases Unit, then a submission is sent to the Home Secretary detailing the terrorism-related activity reasonably suspected and other relevant information.

8.42. If the Secretary of State agrees, then an application is made to the High Court for permission to impose a TEO. There are urgency provisions which allow TEOs to be imposed without the permission of the court (and then referred to the courts immediately following imposition), but to date those provisions have not been used. Quarterly meetings are held to review any orders in force, including the need for obligations. I was provided with an example of how TEO obligations may be

²³ Ibid section 10. Paradoxically, it is not an offence to return in breach of a permanent exclusion order.

²⁴ Compare sections 2 to 3 Counter-Terrorism and Security Act 2015 and sections 3 and 6 Terrorism Prevention and Investigation Measures Act 2011.

²⁵ Section 2(6) Counter-Terrorism and Security Act 2015.

²⁶ Ibid Explanatory Notes, paragraph 39.

amended. This concerned a female TEO subject known as YZ who challenged the continuation of an obligation to attend mentoring sessions.

8.43. There is a right to apply for a review to the High Court²⁷ but unlike for TPIMs, there is no requirement for a TEO to be listed for automatic review. There is no requirement for consultation with the police over whether prosecution is possible although I have been informed that this takes place. However, as with TPIMs, Home Office officials have no means of testing the conclusions drawn on the prospects of prosecution.

8.44. The typical profile is a British mono-national who has travelled to Syria and spent time in Da'esh controlled areas and may therefore have been (i) further radicalised, (ii) de-sensitised through exposure to extreme violence, and (iii) provided with some terrorist training. TEOs are considered to be particularly appropriate for returning women. Despite the relatively limited obligations that may be imposed (compared to the broader TPIM power), I am informed that the Home Office consider that TEOs are an effective response for a range of individuals returning from Syria and Iraq, especially in the absence of a criminal justice response. I have seen one file where a decision to impose a TEO was taken for an individual with dual nationality.

8.45. There are no law reports concerning appeals against or challenges to TEOs but a flavour of the use of TEOs is apparent from a family case. In *Re M (Children)*²⁸, the Court of Appeal upheld an order by the High Court permitting disclosure of documents generated in care proceedings to CT Police. The father, a British national, had left the United Kingdom for apparent terrorist purposes. He met and married his wife, also a British citizen, in Syria. The entire family was detained in immigration detention in Turkey and indicated that they wished to return to the United Kingdom. A TEO was imposed on the father in November 2018, and the family returned to Manchester Airport in January 2019. The children were taken into police protection, and later made subject to an interim care order. The parents were interviewed under caution and released.

²⁷ Ibid Section 11.

²⁸ [2019] EWCA Civ 1364.

Practical Issues

- 8.46. The Home Office position is that it intends to serve TEOs in person wherever possible, but this is often difficult in practice given the types of location in which TEO subjects are present or, quite likely, detained. In some cases, alternative methods such as serving notice to a person's legal representatives, or their last known address, are used.
- 8.47. Upon imposition of a TEO, the individual's British passport or travel document is cancelled. Any application for a permit to return must set out the date, time and route by which the individual wishes to travel. Upon permission being granted, subjects will be issued with an Emergency Travel Document together with a cover letter, both of which form the 'permit to return'.
- 8.48. Securing that an individual return on a particular flight is likely to require a degree of cooperation with the host state if the subject is detained (to date, most returns have been from Turkey). There are likely to be particular difficulties if an individual is held by non-state actors.
- 8.49. Because TEOs are imposed on individuals outside the United Kingdom, there is no guarantee that those individuals will ever return. What this means in practice is that the necessary paperwork for TEOs is generated, the prior permission of the court is obtained, and means is found of notifying the individual in question. But the individual may simply remain outside the United Kingdom and, eventually, the TEO will expire. This is because by section 4(3) of the 2015 Act, a TEO comes into force when notice of its imposition is given and is in force for a period of two years.
- 8.50. At that point, a new TEO needs to be obtained. In addition, if a TEO has been in force for some time, it may be necessary to obtain a new one so that, if the individual does return, he or she may be subject to TEO obligations for as close to 2 years as possible. If an individual returns with only 2 months left to run, the utility of in-country obligations is severely curtailed. For example, deradicalisation activity is likely to require more than a few weeks' attendance with a mentor.
- 8.51. It is right that a TEO should be of time limited duration. On the other hand, there is insufficient reason why a TEO should expire 2 years after the individual is notified if they continue to remain outside the United Kingdom. The impact on the individual

is limited at most. Whilst the TEO should come into force when notified to the individual - because it is that order which obliges them to apply for a permit to return - there is no good reason why the two-year period should not be tied to the period following their return. That would relieve the Home Office, MI5 and CT police of the unnecessary task of re-applying for a TEO that has never applied with effect in the United Kingdom. I therefore **recommend** that section 4(3) Counter-Terrorism and Security Act 2015 is amended so that a TEO expires two years after the individual's return to the United Kingdom.

TEOs in 2018

8.52. No TEOs were imposed in 2015 or 2016. In 2017, 9 TEOs were imposed (3 males, 6 females) and 4 of these returned to the United Kingdom. In 2018, a total of 16 TEOs (14 males and 2 females) were imposed and 5 of these returned to the United Kingdom²⁹.

8.53. Of the 9 TEO subjects who have returned to the United Kingdom, 2 have had their TEOs revoked before they expired. Of this 9, 4 (1 male and 3 females) returned to the United Kingdom in 2017, and 5 (2 males and 3 females) returned to the United Kingdom in 2018.

8.54. 2019 saw the first expiry of TEOs imposed on individuals who had returned to the United Kingdom. Three TEOs imposed on female returnees expired.

8.55. It is an inevitable feature of the scheme that not all individuals who are made subject to TEOs will apply for a permit to return and return, as the table below shows:

| Year | Number of TEOs imposed | Number of returnees |
|-------------|-------------------------------|----------------------------|
| 2016 | 0 | 0 |
| 2017 | 9 (3 males, 6 females) | 4 (1 male, 3 females) |
| 2018 | 16 (14 males, 2 females) | 5 (2 males, 3 females) |

²⁹ Home Office, *Transparency Report*, 2019.

8.56. Of the 16 TEO subjects who have not returned to the United Kingdom, at the time of drafting 2 have expired and those TEOs have not been reimposed.

8.57. There have been no prosecutions of TEO subjects, but I am informed that an individual has recently been charged with breaching their in-country reporting requirement and awaits trial.

General Assessment of TEOs

8.58. A classified High-Level evaluation of TEOs done in March 2019 indicates that TEOs are considered successful in mitigating threat to the United Kingdom public.

8.59. The benefits of TEOs fall into two parts:

- Out of country: reassurance that the authorities will be aware of return to the United Kingdom; ability to define travel arrangements to the United Kingdom;
- Once returned: ability to require attendance at deradicalisation sessions; ability to monitor the individual's whereabouts through notification and reporting; disruptive impact on that individual's ability to engage in terrorist-related activity.

8.60. It follows that there is a category of individuals who have returned from places such as Syria for whom the milder obligations of a TEO appear to have been sufficient. By contrast, no TPIM notices were imposed on returners in 2018³⁰. This may be because the higher threshold required for the making of a TPIM³¹ could not be met. But either way, the effectiveness of TEOs with their lower rank of obligations is a useful comparator when considering whether more severe obligations are required for TPIM subjects.

8.61. As already noted, TEOs are only available for British citizens and some Commonwealth citizens. I **recommend** that the Home Office considers whether TEOs should be available for individuals other than British citizens. It is clear that deprivation of citizenship has been a major part of the United Kingdom's response to those who have travelled to Da'esh-controlled areas. But the lack of a power to

³⁰ Source: Home Office.

³¹ Satisfaction on the balance of probabilities as opposed to reasonable suspicion.

impose TEOs on non-British individuals who, for whatever reason, are able to return to the United Kingdom is an unnecessary gap in the legislation.

8.62. The Home Office is due to undertake a 5-year review of the TEO legislation in 2020. Given that the first TEOs on returnees have now expired, and more can be expected, it is to be hoped that this review encompasses what is known about the activities of these individuals after expiry. The question is, whether TEOs have proven a successful means of safely addressing the potential risk from individuals who are likely to have witnessed, and may well have supported or even participated in, terrorist violence overseas. There is merit in officials who have oversight of the TEO legislation being given insight into individual cases after the TEO has come to an end, if necessary, by being made privy to current sensitive operations. Whilst MI5 and CT Police are naturally reluctant to divulge information on current operations, I encourage greater sharing of information on the long-term consequences of TEOs.

Serious Crime Prevention Orders

8.63. In the hierarchy of counter-terrorism measures, serious crime prevention orders (SCPOs) against terrorists rank high in terms of legal principle. They are judge-made and based on powers that apply to *all* criminal offending. The possibility of making SCPOs against terrorists has always been available in theory but was boosted by amendments contained in the Counter-Terrorism and Border Security Act 2019³².

8.64. As I discuss in Chapter 7³³, the Serious Crime Act 2007 enables an SCPO to be made in the Crown Court following conviction. Where there has been no conviction in England or Wales, an application can nonetheless be made in civil proceedings to the High Court³⁴. CPR Part 77 and its accompanying Practice Direction set out the procedure for applying for such orders. Application may be made by the Director of Public Prosecutions in England and Wales, the Lord Advocate, or the Director of Public Prosecutions for Northern Ireland.

³² By including in the definition of serious offences in Part 1 of Schedule 1 Serious Crime Act 2007, any offence for the time being listed in section 41(1) of the Counter-Terrorism Act 2008. Prior to this, it was always open to a court to find under sections 2(2)(b) and 2(5)(b)(ii) that an unlisted offence was “sufficiently serious” to qualify.

³³ At 7.50.

³⁴ Section 1(1) Serious Crime Act 2007.

- 8.65. The basis for an order is that the High Court in England and Wales, or in Northern Ireland, or the Court of Session or Sheriff in Scotland, may make an order if (a) it is satisfied that a person has been “involved in serious crime“ (whether in its local jurisdiction or elsewhere); and (b) it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales³⁵.
- 8.66. A conviction is not required because, importantly, being “involved in serious crime” includes a person having conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence in a country outside England and Wales³⁶. The burden of proof is the civil standard³⁷ and the exercise in deciding whether there are reasonable grounds for believing that an order would protect the public by preventing, restricting or disrupting involvement in serious crime, has been described not as a matter not of disputed fact but of judgment and assessment of future risk³⁸.
- 8.67. The Serious Crime Act 2007 does not expressly limit the types of prohibitions, restrictions or requirements that may be imposed by an SCPO and orders last for up to 5 years³⁹. In principle, these could mirror those available under TPIMs. Breach of an SCPO is a criminal offence punishable by up to 5 years imprisonment.
- 8.68. The power of the High Court to make SCPOs is a seriously underused power generally⁴⁰, and has not been used in connection with suspected terrorists to date.
- 8.69. There are many difficulties in establishing specific offences to the criminal standard even on the part of those who are known to have travelled to Syria⁴¹. But the ability of the High Court to make orders on the balance of probabilities, coupled with a need to show conduct that merely “facilitates” terrorism offences, is capable of providing an alternative to TPIMs. Given the state of flux overseas, and the risk of multiple returning Foreign Terrorist Fighters for whom the state of evidence may

³⁵ Ibid, section 1(1). Conduct that it reasonable in the circumstances is to be disregarded: section 4(3).

³⁶ Ibid, sections 2(1)(c), 2(3).

³⁷ Ibid, section 35.

³⁸ The leading authority on SCPOs generally is the judgment given by Hughes LJ in *R v Hancox and Duffy* [2010] 2 Cr. App. R. (S.) 74.

³⁹ Sections 5, 17 Serious Crime Act 2007.

⁴⁰ An SCPO was made by the High Court against a previously convicted drug trafficker, in 2013. There are no other reported instances.

⁴¹ See Chapter 9.

be limited, the possibility that an SCPO could provide a judicial means of mitigating that risk should not be overlooked.

8.70. There is a difference between a power being available on the statute book, and that power being viewed as a practical option. I therefore **recommend** that the Home Secretary and CT Police consider whether it would be practicable to obtain civil Serious Crime Prevention Orders against returning Foreign Terrorist Fighters, for whom prosecution and Terrorism Prevention and Investigation Measures were not an option.

Passport seizure and retention

8.71. Schedule 1 to the Counter-Terrorism and Security Act 2015 is a power exercised at ports. It enables police officers and accredited immigration and customs officials to seize travel documents such as passports to disrupt immediate travel, when it is reasonably suspected that a person intends to travel to engage in terrorism-related activity outside the UK. Retention may then be authorised by a senior officer, to continue for the purposes of the Secretary of State considering whether to cancel it⁴², for deciding whether not to bring criminal proceedings, and for the purposes of consideration being given to any other counter-terrorism order or measure that may be imposed either by a court or by the Secretary of State⁴³.

8.72. The total permitted time for retention is 14 days. However, this may be extended for up to 30 days by a judge so long as consideration is being given to those matters diligently and expeditiously⁴⁴.

8.73. The table below sets out the frequency with which this power has been exercised since it was introduced.

| Year | Number of persons whose passports were seized |
|-------------|--|
| 2015 | 24 |
| 2016 | 15 |

⁴² Using the Royal Prerogative.

⁴³ Schedule 1, paragraph 5 Counter Terrorism and Security Act 2015.

⁴⁴ *Ibid*, paragraph 8. Passports may also be retained if needed as evidence for criminal proceedings, or in connection with deportation, paragraph 7(2).

| | |
|------|----|
| 2017 | 14 |
| 2018 | 5 |

8.74. I have been informed that in 2 of the 5 cases in 2018, the travel document was retained for longer than the 14 days. There are no statistics setting out what the eventual outcome was (that is, whether cancellation, or criminal proceedings, or some other order or measure).

8.75. Nor are there any reported cases in which the courts have ruled directly on the seizure and retention power, although the power was exercised in two cases in which the subsequent passport cancellation was challenged. Both cases concerned seizures at Dover⁴⁵.

8.76. Where travel documents are seized, the focus of attention is likely to be the eventual outcome of the seizure. But seizure is nonetheless a significant power whose use is capable of disrupting onward travel for far longer than is possible under Schedule 7 Terrorism Act which I report on in Chapter 6.

Civil Forfeiture

8.77. Police officers have specific powers to seize and apply for summary forfeiture of certain types of property which is (a) is intended to be used for the purposes of terrorism, (b) consists of resources of an organisation which is a proscribed organisation, or (c) is, or represents, property obtained through terrorism⁴⁶. The type

⁴⁵ In *R (AS) v Secretary of State for the Home Department* [2018] EWHC 1792 (Admin), the High Court dismissed a challenge to the cancellation of a passport that had been initially seized at Dover using this power. Permission to apply for judicial review of the seizure decision had been refused on the papers and not pursued. *B, ND v Secretary of State for the Home Department v Commissioner of Police for the Metropolis* [2018] EWHC 2651 (Admin), concerned two individuals who were part of a humanitarian convoy passing through Dover. The cancellations were upheld.

⁴⁶ Under Part 1 Anti-Terrorism Crime and Security Act 2001.

of property are cash⁴⁷, “listed assets” such as precious metals and stones⁴⁸ and the contents of bank and building society accounts⁴⁹.

8.78. In addition, non-terrorist powers under the Proceeds of Crime Act 2002 are used for disruptive effect. An example might be where cash is seized as being derived from drug trafficking, where CT Police believe the funds to be destined for a proscribed organisation.

8.79. It is difficult to report on the use of these powers in the absence of secure statistics. The Government published an Action Plan for anti-money laundering and counter-terrorist finance in April 2016⁵⁰ and renewed its commitment to target and disrupt terrorist finance in its most recent version of CONTEST⁵¹. There is now a very substantial regime for summary forfeiture of many forms of property of real value. It currently excludes crypto and other electronic currencies.

⁴⁷ Ibid, Parts 1-3, 5-6 of Schedule 1. An example of the use of this power is the seizure and uncontested forfeiture in 2017 of £822.30 collected by the Anatolia Peoples Cultural Centre which the police believed were to be used in terrorism and formed part of the funds of a proscribed organisation, the DHKP-C. See further, <https://www.gov.uk/government/publications/charity-inquiry-anatolia-peoples-cultural-centre/anatolia-peoples-cultural-centre>.

⁴⁸ Ibid, Part 4A of Schedule 1.

⁴⁹ Ibid, Part 4B of Schedule 1.

⁵⁰ <https://www.gov.uk/government/publications/action-plan-for-anti-money-laundering-and-counter-terrorist-finance>.

⁵¹ See page 44.

9. NORTHERN IRELAND

Introduction

9.1. There are matters which arise in Northern Ireland which have no parallel in Great Britain. To ensure they receive the appropriate scrutiny, I have decided to devote a separate chapter to Northern Ireland. The analysis in this chapter is informed by visits I have made to Northern Ireland and builds upon some of the work that was done by my immediate predecessors¹.

9.2. My decision to consider Northern Ireland related issues separately from those which arise in Great Britain should not be taken as an attempt to distinguish the legal position that applies in these two constituent parts of the United Kingdom. On the contrary, given that the Terrorism Acts apply to all parts of the United Kingdom and that national security is an excepted matter under the Northern Ireland Act 1998², counter-terrorism legislation exists for Northern Ireland just as much as it does for Great Britain. By putting focus on Northern Ireland, it is intended:

- That sufficient attention is given to the operation of the Terrorism Acts in Northern Ireland to allow a meaningful comparison to be made with their operation in Great Britain.
- To identify lessons to be learned from how the Terrorism Acts apply in Northern Ireland that could be used to inform practice in Great Britain (and vice versa). The fact that Northern Ireland has experienced terrorism in various forms over a long period of time means that the reflections of those who have lived through years of conflict can be particularly valuable.
- To sense-check how national legislation applies in this particular context.

9.3. There are two other Independent Reviewers whose work overlaps with mine. David Seymour CB is the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, which provides Northern Irish-specific powers in connection with munitions and wireless apparatus and the principal powers of stop and search used by the PSNI. His eleventh report, covering the period 1 July 2017 to 31 July 2018,

¹ Tribute is also due to Alyson Kilpatrick BL, my Special Adviser in Belfast, and in particular to Karl Laird, my Special Adviser in London.

² Section 1 and Schedule 2, paragraph 17.

was published in March 2019³. His Honour Brian Barker CBE QC is the Independent Reviewer of National Security Arrangements in Northern Ireland. The main findings of his report, covering the period from 1 January 2017 to 31 December 2018, were published in May 2019⁴.

9.4. In this Chapter I consider the following:

1. The threat from Northern Ireland related terrorism;
2. Proscribed organisations;
3. Terrorism Investigations including stop and search;
4. Arrests;
5. Ports and Border powers;
6. In less detail than I would have liked to, terrorist trials.

The Northern Ireland Security Situation

9.5. The threat from Northern Ireland-related terrorism in Northern Ireland remains at “severe” (meaning that an attack is highly likely). As the following statistics demonstrate, it cannot be said that this is an exaggerated assessment, but the way in which attacks are recorded as terrorist or national security attacks, as opposed to paramilitary-style attacks, or as attributable to the security situation, has no parallel in Great Britain. So far as 2018 is concerned:

1. Two civilians were killed as the result of “deaths attributable to the security situation”⁵. There were 39 shooting incidents and 17 bombing incidents in which 20 bombing devices were used⁶. The PSNI recovered 39 firearms, 1.26 kg of explosives and 3,290 rounds of ammunition⁷.
2. There was one national security attack, against PSNI officers, using firearms⁸. This compares to five in 2017, four in 2016, and 16 in 2015⁹.

3

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786456/Eleventh_Report_of_the_Independent_Reviewer_of_Justice_and_Security.pdf.

⁴ House of Commons Written Statement 1538, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-05-07/HCWS1538/>.

⁵ PSNI, Security Situation Statistics, information up to and including March 2019, table 3.

⁶ Ibid, table 5.

⁷ Ibid, table 6.

⁸ <https://www.gov.uk/government/news/londonderry-attack>.

⁹ <https://www.gov.uk/government/speeches/security-situation-in-northern-ireland>.

3. Of the 60 security incidents reported by the United Kingdom to Europol in 2018, 56 were acts of security-related incidents in Northern Ireland¹⁰.
4. There was a total of 68 casualties as a result of paramilitary style attacks. There were 17 shootings (2 perpetrated by Loyalist groups and 15 by Republican groups) and 51 paramilitary style assaults (40 perpetrated by Loyalist groups and 11 by Republican groups)¹¹.

9.6. The threat from dissident Republican groups emanates mainly from the New IRA, the Continuity IRA, Arm na Poblachta (ANP, Army of the Republic), Óglaigh na hÉireann (ONH, Warriors of Ireland), and the Irish Republican Movement (IRM). The IRM was formed in late 2017 when, following a period of infighting in ONH, the group split into two rival factions, the ONH and the IRM. In January 2018, ONH declared a cessation of attacks against the British State but it remains engaged in other paramilitary activity including carrying out paramilitary style attacks against those suspected of involvement in anti-social behaviour and drug dealing in the community¹². All these groups, with the apparent exception of ONH, remain committed to using violence to achieve their aims¹³.

9.7. In 2018 these dissident Republican groups maintained their access to a range of firearms and explosives to plan and execute attacks, albeit with hampered capability compared with previous years. Despite good cooperation between the PSNI and An Garda Síochána, terrorists (who frequently engage in other unlawful activity such as smuggling) can move with relative freedom across the border with the Republic of Ireland. The attacks that were carried out in 2018 involved the use of firearms or improvised explosive devices, such as pipe bombs¹⁴. The use of larger and more destructive devices was not observed in 2018. PSNI officers, prison officers, and members of the Armed Forces remain the primary targets¹⁵.

¹⁰ <https://www.europol.europa.eu/activities-services/main-reports/terrorism-situation-and-trend-report-2019-te-sat>, page 68, footnote 37.

¹¹ PSNI, Security Situation Statistics, information up to and including March 2019, table 4.

¹² <https://www.psnipolice.uk/news/Latest-News/230118-onh-ceasefire/>.

¹³ <https://www.europol.europa.eu/activities-services/main-reports/terrorism-situation-and-trend-report-2019-te-saT>, page 53.

¹⁴ <https://www.europol.europa.eu/activities-services/main-reports/terrorism-situation-and-trend-report-2019-te-saT>, page 53.

¹⁵ Ibid.

- 9.8. In terms of developments amongst Loyalist paramilitaries, in April 2018 a statement was published entitled “A Loyalist Declaration of Transformation from the Red Hand Commando, Ulster Defence Association and the Ulster Volunteer Force”. This statement included language condemning all forms of criminality and restating the commitment of these organisations to the peace process¹⁶. There were incidents in 2018, particularly over the contentious issue of bonfires, which called the sentiments expressed in this statement into question¹⁷.
- 9.9. There were a number of other notable events which took place in 2018. Rioting took place in Derry/Londonderry between 8 and 13 July. The PSNI attributed the violence to the New IRA and stated that the intent of this group was to kill police officers. The PSNI used attenuating energy projectiles (the replacement for the L21A1 plastic baton round since 2005) and at least 70 petrol bombs were thrown at police¹⁸.
- 9.10. On 13 July a homemade bomb was thrown at the West Belfast home of Gerry Adams, former leader of Sinn Féin and later that day another bomb exploded at the nearby home of a Sinn Féin official¹⁹.
- 9.11. On 11 July there were localised public disorder and security incidents connected to two loyalist bonfires in East Belfast. Police came under attack from petrol bombs and other projectiles. This violence was confined largely to East Belfast and outlying areas and failed to gain wider traction in other Loyalist areas²⁰. Earlier in the year there were outbreaks of localised disorder during unlawful republican Easter Rising parades in Lurgan (on 31 March)²¹ and Derry/Londonderry (on 2 April)²².
- 9.12. Significantly, in March 2018 the threat from Northern Ireland related terrorism in Great Britain was lowered from “*substantial*” (an attack is a strong possibility) to “*moderate*” (an attack is possible but not likely). This was perhaps a reflection of the fact that the most recent dissident republican attacks in Great Britain took place in

¹⁶ https://cain.ulster.ac.uk/events/peace/docs/2018-04-09_loyalist-declaration.htm.

¹⁷ Independent Reporting Commission, First Report, HC1665, October 2018 at paragraph 1.27.

¹⁸ <https://www.psni.police.uk/news/Latest-News/130718-chief-constable-says-new-ira-orchestrating-derrylondonderry-violence/>.

¹⁹ <https://www.bbc.com/news/uk-northern-ireland-44830392?>

²⁰ <https://www.bbc.co.uk/news/uk-northern-ireland-44790903>.

²¹ <https://www.bbc.co.uk/news/uk-northern-ireland-43604937>.

²² <https://www.irishtimes.com/news/crime-and-law/police-attacked-with-petrol-bombs-at-dissident-parade-in-derry-1.3448262>.

April 2014, when a series of improvised explosive devices were posted to various targets. However:

- In March 2019, improvised explosive devices were posted to Waterloo Station, buildings near Heathrow and London City Airport and the University of Glasgow. The New IRA took responsibility for posting these devices. This will be covered in next year's Report.
- Sectarian hostility, not amounting to terrorism, is not geographically confined to Northern Ireland, because of the links and frequent travel between communities in Northern Ireland and the West of Scotland, particularly Glasgow.

9.13. Finally, officials point to an emerging risk of online activity being used to encourage a new generation of potential terrorists, who have no direct experience of the Troubles, but are bitterly opposed to the current political settlement. The phenomenon of young people being attracted to violence through online radicalisation is of course very much an issue throughout the United Kingdom.

Paramilitary Groups

9.14. As the statistics demonstrate, paramilitary groups were extremely active during the course of 2018. The point has been made²³ that:

Some 20 years after the Belfast/Good Friday Agreement, paramilitarism remains a stark reality of life in Northern Ireland. The picture in terms of paramilitarism is a complex one and cannot be easily summarised. There is a wide spectrum involved. At one end are gangsterism and criminality – paramilitaries who use the conflict as a cloak behind which they engage in criminal activity. At the other end are people holding membership of illegal paramilitary organisations, who do so for a mix of political, societal and personal reasons but who, notwithstanding that they hold membership which is in itself a criminal offence, are not actively engaged in criminal activity. And undoubtedly some retain their membership because they are fearful of the repercussions if they decide to leave their paramilitary organisation.”

²³ Independent Reporting Commission, at paragraph 1.21.

9.15. In 2018 there were some important developments aimed at tackling criminality linked to paramilitaries. Many of these emanate from the Fresh Start Agreement, which was concluded between the United Kingdom and Irish Governments and the Northern Irish Executive in 2015 in response to continued paramilitary activity in Northern Ireland. The overarching goal of the Fresh Start Agreement is to end paramilitarism “once and for all”.

9.16. Paramilitary groups have no counterpart in Great Britain.

Brexit

9.17. It is uncontroversial that the security situation in Northern Ireland is most sensitive to Brexit. During my visits to Northern Ireland in July, September and October 2019, that impact was described to me principally as:

- Risks flowing from the creation of a hard border involving infrastructure, which is likely to be targeted by Dissident Republicans.
- General upheaval affecting the political settlement at a time when sectarian influences remain strong.
- Loss of the European Arrest Warrant to enable the extradition of terrorists between the United Kingdom and the Republic of Ireland. The European Arrest Warrant regime enables the two states to reframe the exchange of those wanted or convicted for what some describe as ‘political offences’ in terms of ordinary European-wide cooperation in criminal justice matters.
- Loss of information-sharing.

Proscription

9.18. In this section I focus in detail on the role that proscription plays in Northern Ireland, based on the same legislative provisions in the Terrorism Act 2000 which apply in the rest of the United Kingdom²⁴. Fourteen of the groups which are proscribed in the United Kingdom are, or have been, actively engaged in Northern Ireland related terrorism. These groups have been proscribed for many years, long before the Terrorism Act 2000 was enacted. As the Terrorism Act 2000 was being debated in Parliament, the point was made that some of the proscribed groups were more or less

²⁴ See Chapter 3. The proscription powers in Northern Ireland are exercised by the Secretary of State for Northern Ireland.

inactive. The Government nevertheless considered it necessary to proscribe them so as to deny the use of a potent title²⁵.

9.19. In 2018, the list of proscribed Northern Ireland organisations remained unchanged. In September 2017 an application was submitted for the deproscription of the Red Hand Commando, a loyalist organisation. In April 2018 the application was declared invalid by the Northern Ireland Office for failing to comply with the requirements set out in the Proscribed Organisations (Applications for Deproscription etc.) Regulations 2006/2299.

9.20. Statistics on decisions to prosecute for offences under sections 11 to 13 are provided in Chapter 3²⁶.

9.21. As I have discussed in Chapter 3, proscription carries with it a significant footprint. In Northern Ireland, the extent of this footprint is even greater than it is in Great Britain because most of the grounds listed in the Justice and Security (Northern Ireland) Act 2007 which enable the Director of Public Prosecutions for Northern Ireland to issue a certificate authorising a non-jury trial on indictment relate to proscription. For example, if the offence in question was suspected by the Director of Public Prosecutions to have been committed on behalf of a proscribed organisation, and the Director is satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury, he can issue a certificate authorising a judge-only trial. This power is even broader than it first appears, as it applies not just to someone who is a member of a proscribed organisation, but also to those who are an associate of such an individual. This widens the pool significantly.

The Northern Ireland proscribed organisations

9.22. Broadly speaking, proscribed organisations in Northern Ireland fall into three categories. In the first category are those organisations which actively target police officers, prison officers, and other individuals who are seen as embodying the

²⁵ Hansard (House of Commons) Standing Committee D, co.76, 25 January 2000, Adam Ingram cited in Walker (2018) "They haven't gone away you know". *The Persistence of Proscription and the Problems of Deproscription, Terrorism and Political Violence*, 30:2, 236-258.

²⁶ At 3.21.

authority of the state. These organisations pose a significant threat to life, as they are actively engaged in planning potentially lethal attacks and have the resources to carry them out. Most of the dissident Republican groups (New IRA, the Continuity IRA, Óglaigh na hÉireann and the Irish Republic Movement) fall into this category²⁷.

9.23. However, one of the active dissident Republican groups, Arm na Poblachta (ANP, Army of the Republic), is not considered by the Northern Ireland Office to be proscribed because it developed separately from the IRA. In 2018 this group claimed responsibility for the killing of Raymond Johnston²⁸.

9.24. The second category are those organisations which are, for the most part, inactive other than for heritage purposes. Cumann na mBan, a women's paramilitary organisation, is an example of such a group. Although it still exists, it no longer engages in violence of any kind.

9.25. The third category are those organisations which, whilst still proscribed, have more in common with organised crime groups. These organisations appear to use violence as a means of furthering their criminal ends, including for the purpose of exercising control at a community level in order to maintain their dominant status. They are engaged in drug dealing and various other forms of criminality, such as so-called punishment beatings. Unlike the organisations in the first category, the state's security and criminal justice actors are neither a central target of their violence, nor implicated in the broader ideology that motivates their activities. In 2015, the assessment of the PSNI and MI5 was that "*none of these groups is planning or conducting terrorist attacks*"²⁹. The Ulster Volunteer Force is an example of such an organisation.

9.26. The fact that the organisations in the third category do not direct their violence towards the state does not preclude them from being engaged in terrorism for the purposes of section 1 of the Terrorism Act 2000. The definition of terrorism includes

²⁷ MI5 and PSNI, "Paramilitary Groups in Northern Ireland" (2015) paragraph 2(ii) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/469548/Paramilitary_Groups_in_Northern_Ireland_-_20_Oct_2015.pdf. These groups are all considered by the Northern Irish Office to be proscribed as emanations of the IRA, under the principle established by the House of Lords in *R v Z* [2005] UKHL 35.

²⁸ <http://www.irishnews.com/news/northernirelandnews/2018/06/21/raymond-johnston-dissident-group-arm-na-poblachta-murdered-young-dad-1361818/?ref=sh>.

²⁹ "Paramilitary Groups in Northern Ireland", supra, at paragraph 2(v).

the use of threat of violence designed to intimidate "the public or a section of the public" not simply police officers, soldiers or government employees³⁰. A useful comparator from Great Britain is the Finsbury Park mosque attack of 2017, in which Makram Ali was murdered by Darren Osborne. This attack directed not towards the state, but towards the Muslim community, was rightly treated as terrorism and had Darren Osborne been intercepted before he carried out the attack, his preparations would have qualified as conduct contrary to section 5 Terrorism Act 2006. It follows that attacks on one's own community, as is the case with so much violence perpetrated by paramilitaries, may qualify as terrorism if done for the purpose of advancing a political, religious, racial or ideological cause³¹. So too may the display of the flags of proscribed groups if done to intimidate other sections of society for those reasons.

9.27. But if violence or its threat is directed towards maximising profit from drug dealing, or retaining control over local criminal markets, then these groups are more difficult to categorise as being concerned in terrorism, which is the precondition for proscription under section 3(4) Terrorism Act 2000.

- This is because they will not be seeking to advance an ideological cause, at least in the sense meant by section 1 of the Terrorism Act 2000. In fact, the only way in which these organisations may be engaging in terrorism at all is as a result of their continuing proscription.
- For some of these organisations the leadership may have sincerely committed to using peaceful means to achieve their ideological objectives³².
- Other individuals may continue to hold membership for a mix of political, societal and personal reasons without being engaged in criminal activity at all, other than through their membership.
- As noted by the Fresh Start Penal report on the Disbandment of Paramilitary Groups in Northern Ireland of May 2016³³ the labels of Loyalist or Republican paramilitary group are often used as a 'badge of convenience' for purely criminal activity, and for aggrandising the capacity of those responsible for criminal acts. It noted that "...Most paramilitary groups in Northern Ireland are no longer engaged in planning or executing terrorist activities"³⁴.

³⁰ Section 1(1)(b) Terrorism Act 2000. This precondition is not required at all if firearms or explosives are involved, section 1(3).

³¹ Section 1(1)(c) Terrorism Act 2000.

³² "Paramilitary Groups in Northern Ireland", supra, at paragraph 2(viii).

³³ At paragraph 4.44.

³⁴ Ibid.

The Third Category

- 9.28. The tools which are relied upon to disrupt the activities of a proscribed organisation will depend upon the type of activity engaged in. For example, the national security machine tends to bear down more heavily upon those organisations which are actively involved in planning attacks of significant scale upon state actors and which, as a result, pose the most significant threat to life. The current focus is therefore on the Dissident Republican groups. Given that there must be some basis upon which resources are prioritised, this approach is justifiable.
- 9.29. In the third category described above, however, there have been increased efforts in Northern Ireland to use **non-Terrorism Act powers** to disrupt the activities of those proscribed organisations which more closely resemble organised crime groups than active terrorist organisations.
- 9.30. Many of these efforts were invigorated by the Fresh Start Agreement, which was concluded between the United Kingdom and Irish Governments and the Northern Irish Executive in 2015 in response to continued activities of paramilitary groups in Northern Ireland. The overarching goal of the Fresh Start Agreement is to end paramilitarism “*once and for all*”.
- 9.31. The **Fresh Start Panel’s Report on the Disbandment of Paramilitary Groups in Northern Ireland** appeared in 2016 and sought to “*create conditions in which groups would transform, wither away, completely change and lose their significance*”. Its analysis of why people involve themselves in paramilitarism focused not on political ideology, but on educational, economic, and social causes.
- 9.32. Paramilitarism is not defined in the Fresh Start Agreement or in the accompanying legislation, and there is no authoritative list of paramilitary organisations. The term paramilitary is in practice used to describe the activities of organisations which, whilst they are proscribed, do not present the same threat to life as other proscribed organisations³⁵. As already reported, these groups may use the badges and structures of the conflict, but only as a shield behind which they or certain

³⁵ Punishment beatings may well present a threat to life, but not in the same way as bomb attacks.

individuals within those groups engage in drug dealing, racketeering, and other criminal activities.

9.33. Tellingly, the activities of these organisations, in so far as they involve the infliction of violence, are not categorised for the purposes of data gathering in Northern Ireland as being security related. They fall into a separate category. This bears out the impression that these groups are perceived as having transitioned from being ideologically motivated to being motivated by other ends. They remain, however, the focus of intense police activity³⁶.

9.34. As part of the law enforcement effort to address paramilitarism the **Paramilitary Crime Task Force** was established in late 2017 and became fully operational in 2018. It brings together officers from the PSNI, the National Crime Agency³⁷ and Her Majesty's Revenue and Customs. It has recently conducted a number of operations³⁸. This appears to signal an operational shift towards dealing with paramilitaries as organised crime groups and not as active terrorist organisations.

9.35. The efforts which are being made to disrupt the activities of paramilitaries using non-Terrorism Act 2000 powers are a welcome development. Just because the Terrorism Acts can be used, does not necessarily mean that they should be used. If the powers contained in non-terrorism legislation are sufficient to meet operational needs, then there should be no need to resort to the Terrorism Acts. It also means that the incidence of 'state' powers exercised against proscribed groups and their members cannot be measured simply in terms of terrorism or security powers.

9.36. However, the very possibility of using Terrorism Act powers against these still-proscribed groups is not without significance. The flags of various proscribed organisations can be seen flying around Belfast and other parts of Northern Ireland and give rise to potential criminal liability under section 13 of the Terrorism Act 2000. Very rarely, however, are the people who fly these flags prosecuted or the flags seized

³⁶ Separate from the activities of law enforcement, the Northern Ireland Executive's Social Investment Fund provides funds to community projects, some of which will be led by former or current members of proscribed organisations.

³⁷ With oversight from the Northern Ireland Policing Board.

³⁸ An example is the National Crime Agency's use of civil recovery powers to remove assets from paramilitary-linked individuals in 2019: <https://nationalcrimeagency.gov.uk/news/nca-seizes-property-linked-to-paramilitary-group>.

under section 13(4)³⁹. As I experienced during my trips to Northern Ireland, the non-use of available powers can lead to the view that the powers in the Terrorism Acts are principally used against only one community in Northern Ireland.

9.37. Terrorism powers are still used against loyalist groups, albeit the motivation may be expressed as addressing criminality rather than safeguarding national security. In September 2018, David Coleman was sentenced to three years' imprisonment for being a member of the Ulster Defence Association after his home was searched by the Paramilitary Crime Task Force and various Ulster Defence Association paraphernalia was found. Following his conviction, a senior officer of the Task Force stated that this was "...a clear message that there is not, and will not be, any hiding place for paramilitaries and their criminality"⁴⁰.

9.38. The impression I have formed to date, and one which I will continue to keep under review in future reports, is that a decision to use the powers in the Terrorism Acts is based upon an assessment of the threat posed by the organisation and its members.

- The powers are used against those organisations which are most obviously engaged in terrorism as opposed to organised crime.
- A nuanced approach to the exercise of the powers is preferable to one that takes no account of the threat the organisation in question poses. It would be perverse to say that the PSNI ought to adopt a blanket policy that would require the provisions of the Terrorism Acts to be used against *all* proscribed organisations on *every* occasion, irrespective of whether there is an operational need to do so.
- A reduction in the use of the Terrorism Acts, and the shift towards normalisation that it heralds, are things which ought to be welcomed.

Continuing Proscription and Deproscription

9.39. Section 3(4) Terrorism Act 2000 sets out the test for new proscriptions. The Secretary of State may exercise the power to add an organisation to the list of proscribed groups, "...only if [s]he believes that it is concerned in terrorism". It is some time since a new Northern Irish group was proscribed⁴¹. But the question of whether

³⁹ One difficulty is identifying the person who is responsible for displaying the offending flag.

⁴⁰ <https://www.policeprofessional.com/news/man-sentenced-for-allegiance-to-proscribed-paramilitary-group/>.

⁴¹ All the 14 organisations proscribed under the Terrorism Act 2000 had been proscribed under earlier legislation.

currently proscribed groups would be added to the list today has particular resonance in Northern Ireland where, in 2016, the Fresh Start Panel recommended that both the United Kingdom and Irish Governments should review the legislation relating to paramilitary groups, specifically the Terrorism Act 2000, "...to ensure that it remains in step with the transitioning status of groups in Northern Ireland."⁴² In its first report, the Independent Reporting Commission, established by both Governments under the terms of the Fresh Start Agreement noted this recommendation and recorded⁴³ that both Governments had "...advised that they continue to keep relevant legislation under review to ensure its effectiveness".

9.40. This question is not new. As long ago as his *Terrorism Acts in 2007 Report*, Lord Carlile QC stated⁴⁴:

"I believe that some of the proscribed organisations connected with Northern Ireland may have dwindled to almost or actually nothing. Given the good level of intelligence probably available about such organisations, Ministers should consider carefully whether some should be removed from the list on the grounds of effective redundancy."

9.41. As it happens, the position in Northern Ireland is considered by the Government to be a positive reason *not* to engage in a process of review. It could have a "significant and unsettling impact on the political situation and the peace process"⁴⁵.

9.42. I am not qualified to assess the potential impact of unsought deproscription on the situation in Northern Ireland, but the law already allows for applications for deproscription to be made, even in Northern Ireland, so the risk of unsettling the situation already exists if such an application were to succeed⁴⁶. On the other hand, if many groups are already being treated in practice as organised criminals rather than terrorists, it can only be the symbolic aspect of deproscription that gives rise to unsettling possibilities.

⁴² The Fresh Start Panel Report on the Disbandment of Paramilitary Groups in Northern Ireland, May 2016, at paragraph 4.46 and Recommendation C3: https://cain.ulster.ac.uk/events/peace/stormont-agreement/2016-06-07_Fresh-Start-Panel_paramilitary-groups.pdf.

⁴³ At page 72.

⁴⁴ At paragraph 68.

⁴⁵ 17.12.18, Hansard, Col 1647.

⁴⁶ The application by Red Hand Commando was contentious, <https://www.irishnews.com/news/2017/09/13/news/victims-express-outrage-at-red-hand-commando-bid-for-legality-1135060/>.

9.43. It was also suggested to me that deproscription, which I consider below, might be considered as an undue reward for a group which although no longer of national security concern has failed to desist from broader criminal activities. But this reinforces the need to maintain clarity of purpose: proscription is status related to terrorism and terrorism alone.

9.44. All of the above is a slender basis for resisting change, even on entirely pragmatic grounds. It must outweigh, if the basis is a good one, the unsettling impact of the authorities in practice no longer treating many of these groups as terrorists at all. It is a particularly slender basis for resisting change for the entirety of the United Kingdom.

9.45. The change I have recommended to the law⁴⁷ is not that there should be a duty to review, but that existing proscriptions should lapse three years after the coming into force of an amended section 3 Terrorism Act 2000. If the Secretary of State believes that Northern Ireland groups are still actively engaged in terrorism, then he may decide to extend the proscription orders at that point. At that stage the question of whether they are still concerned in terrorism will not depend upon whether attacks are simply being made against the state but on whether their activities meet the definition of terrorism in section 1 Terrorism Act 2000.

Investigations

9.46. In this part, I consider the stop and search powers, and the use of police cordons, in Northern Ireland. Other terrorist powers which are available in Northern Ireland are considered in Chapter 4.

Stop, Search and Question

9.47. The powers of stop and search in sections 43, 43A, and 47A of the Terrorism Act 2000 exist alongside the much more widely used powers in the Justice and Security (Northern Ireland) Act 2007. In summary, the most pertinent powers in the 2007 Act are:

⁴⁷ At Chapter 3.

1. Section 21 – A power to stop a person for so long as is necessary to question him to ascertain his identity and movements. There is also a power to stop a person for so long as is necessary to question him to ascertain— (a) what he knows about a recent explosion or another recent incident endangering life; (b) what he knows about a person killed or injured in a recent explosion or incident. It is an offence for a person to fail to stop; to fail to answer a question; or to fail to answer to the best of his knowledge and ability a question which has been addressed to him. This power includes a power to stop vehicles.

2. Section 23 – A power to enter any premises if it is considered necessary in the course of operations for the preservation of peace or the maintenance of order. An authorisation from an officer of at least the rank of superintendent must be obtained before this power can be exercised, unless it is not reasonably practicable to obtain authorisation.

3. Section 24/Schedule 3, paragraph 2 – A power to enter any premises for the purpose of ascertaining whether there are any munitions unlawfully on the premises, or whether there is any wireless apparatus on the premises. An officer may not enter a dwelling unless he is an authorised officer and he reasonably suspects that the dwelling unlawfully contains munitions or contains wireless apparatus.

4. Section 24/Schedule 3, paragraph 4 – A power to stop and search a person whom a constable reasonably suspects to have munitions unlawfully on him or to have wireless apparatus on him⁴⁸.

5. Section 26/Schedule 3 – These provisions extend the power to search premises to stop vehicles and to take a vehicle to any place for the purposes of carrying out a search. It is an offence to fail to stop a vehicle.

9.48. These powers are, in some respects, broader than the comparable provisions in the Terrorism Act 2000.

- For example, a stop and search can only be conducted in accordance with section 43 of the Terrorism Act 2000 if the individual in question is reasonably suspected

⁴⁸ The lawfulness of this power, which depends upon a prior authorisation having been given by a senior officer, was upheld in 2018 by the Divisional Court in *In The Matter of an Application by Stephen Ramsey for Judicial Review (“No. 2”)* [2018] NIQB 83.

of being a terrorist and the purpose of the search is to discover whether he has in his possession anything which may constitute evidence that he is a terrorist.

- By contrast, the stop and question power in section 21 of the Justice and Security (Northern Ireland) Act 2007 can be exercised without the need for reasonable suspicion.

9.49. David Seymour CB, the Independent Reviewer for the Justice and Security (Northern Ireland) Act 2007 has noted that the primary role of section 21 is not to trigger the prosecution process but as a preventative device to stop people being killed or injured by explosives⁴⁹. As part of his detailed understanding of how the PSNI operates, he considers the use of stops under both the Justice and Security (Northern Ireland) Act 2007 and the Terrorism Act 2000 and has made recommendations (such as the wearing of body worn video equipment) which are relevant to both sets of powers. The purpose of this part of my Report is to complement his analysis by setting out and considering the data on a calendar year basis so that it is comparable to the statistics which are available for Great Britain.

9.50. The table below shows how frequently the stop and search powers in sections 43, 43A and 47A of the Terrorism Act 2000 have been used in Northern Ireland since 2013, by calendar year. It also shows the frequency with which the comparable powers in the Justice and Security (Northern Ireland) Act 2007 have been used. The reference to "TACT in conjunction with other powers" refers to the use of powers under the Terrorism Act 2000 together with powers under the Justice and Security Act 2007.

| | Section 43 | Section 43A | Sections 43/43A | Section 47A | TACT in conjunction with other powers | Section 21 JSA | Section 24 JSA | Sections 21/24 JSA |
|-------------|-------------------|--------------------|------------------------|--------------------|--|-----------------------|-----------------------|---------------------------|
| 2013 | 77 | 10 | 29 | 70 | 30 | 1497 | 5609 | 863 |
| 2014 | 77 | 4 | 15 | 0 | 18 | 1301 | 3660 | 563 |
| 2015 | 105 | 13 | 78 | 0 | 38 | 1307 | 4384 | 619 |
| 2016 | 91 | 11 | 92 | 0 | 34 | 1783 | 7285 | 986 |

⁴⁹ 7th Report, 2015, at paragraph 7.15. The lawfulness of this power was upheld by the Divisional Court in *Murchu v PSNI and Secretary of State for Northern Ireland* [2019] NIQB 75.

| | | | | | | | | |
|-------------|----|---|----|---|----|------|------|-----|
| 2017 | 65 | 3 | 29 | 0 | 13 | 1163 | 6109 | 610 |
| 2018 | 41 | 2 | 9 | 0 | 13 | 1023 | 6052 | 323 |

9.51. Unlike in Great Britain, the self-defined ethnicity of those stopped in Northern Ireland is not published⁵⁰.

9.52. There are four observations which may be made about these figures. The first is that the use of the powers in the Terrorism Acts is dwarfed by the use of those contained in the Justice and Security (Northern Ireland) Act 2007. The power to stop vehicles is almost exclusively carried out under section 21 Justice and Security (Northern Ireland) Act 2007 rather than section 43A Terrorism Act 2000. This is not surprising given that, as has already been explained, the power in section 21 of the 2007 Act can be exercised without the need for reasonable suspicion. However, there are some circumstances in which the use of Justice and Security powers may not be appropriate, for example when an officer is specifically looking for items other than munitions and wireless apparatuses. An example is a list of vehicle registration numbers believed to belong to PSNI officers, recorded by dissident republicans for use in future attacks.

9.53. The second is that the use of the powers in the Terrorism Act 2000 has declined significantly in recent years. In two years, there has been a 46% reduction in the number of stops carried out under section 43 of the Terrorism Act 2000. The decline in the number of stops conducted under a combination of sections 43 and 43A has been even more dramatic, as this has declined by 90% since 2016. There has also been a decline in the use of section of 21 of the Justice and Security (Northern Ireland) Act 2007, although it is not as marked⁵¹. This decline is something that David Seymour CB has commented upon. In his most recent annual report, Mr Seymour states that he can find no clear reason for the decline. He explains that there is no indication that the decline is the result of any particular strategy on the part of the PSNI or an improved security situation⁵². Nor am I aware of any reason for this reduction.

⁵⁰ Some ethnicity statistics have in the past been presented to the Northern Ireland Policing Board but not published.

⁵¹ I refer to section 21 in particular because it is a no suspicion power. The scale of the use of the section 24 suspicion-based power should not be overlooked.

⁵² At paragraph 6.3.

9.54. The third observation is that the arrest rate following a stop and search under section 43 of the Terrorism Act 2000, while low, is much higher than the arrest rate following a search under section 21 of the Justice and Security (Northern Ireland) Act 2007. David Seymour CB has repeatedly noted in his reports how the arrest rate following a section 21 stop rarely reaches 1%. By way of contrast, the arrest rate following a section 43 stop has, for many years, hovered at around 10%⁵³. In Northern Ireland the arrest rate following a section 43 stop is broadly in line with that in Great Britain⁵⁴, so I have no reasons for believing that the PSNI is using the power inappropriately. The use which is being made of the powers in the Justice and Security (Northern Ireland) Act 2007 falls outside of my remit.

9.55. Nor can the utility of section 43 of the Terrorism Act 2000 be measured solely by reference to the number of arrests. This is another reason why, for the time being, I am not concerned by the use that is being made of the power in section 43.

9.56. The fourth observation that there may be other powers than section 43 Terrorism Act 2000, aside from the Justice and Security Act powers, that are used against members or supporters of proscribed groups. As I have already noted, there is a concerted attempt in Northern Ireland to use ordinary policing powers against paramilitaries and paramilitary activity where the phenomenon is treated as in effect one of organised crime rather than terrorism.

Cordons

9.57. The following table sets out the number of designated cordons in place in each year since the Terrorism Act 2000 was enacted. There has been a significant decline in the use of cordons in Northern Ireland. No explanation has been provided for this decline. The magnitude of the decline may come as a surprise, given that the threat level remains unchanged.

⁵³ The latest figures are at para 6.12 of Mr Seymour's eleventh report.

⁵⁴ For the figures for Great Britain, see 5.33.

| Year | Number of designated cordons |
|---------|------------------------------|
| 2001 | 62 |
| 2002 | 239 |
| 2003 | 175 |
| 2004 | 126 |
| 2005 | 72 |
| 2006 | 38 |
| 2007 | 29 |
| 2008 | 59 |
| 2009 | 102 |
| 2009/10 | 128 |
| 2010/11 | 120 |
| 2011/12 | 87 |
| 2012/13 | 57 |
| 2013/14 | 55 |
| 2014/15 | 45 |
| 2015/16 | 43 |
| 2016/17 | 29 |
| 2017/18 | 13 |

Arrest and Detentions

9.58. The powers of arrest in section 41 of the Terrorism Act 2000 are set out in Chapter 5. In Northern Ireland there were a total of 148 arrests made under section 41 in 2018, down from 171 arrests in the previous year (a 13% reduction). In Great Britain, 36 people were arrested in the same period. Therefore, four times as many people were subject to a section 41 arrest in Northern Ireland (which has just 3% of

the total UK population) as in the rest of the UK. These statistics must be treated with caution. Unlike in Great Britain, figures are not collected for arrests which are for terrorism-related offences, but which were made under legislation other than section 41 of the Terrorism Acts. For this reason, there may be more terrorism-related arrests in Northern Ireland than these figures reveal.

9.59. Of the 148 people detained under section 41 Terrorism Act 2000, there were 4 applications for warrants of further detention, and no refusals⁵⁵.

9.60. 144 of these were detained for 48 hours or less before being released or charged. 16 persons in total were charged, 14 of whom were detained for 48 hours or less, and 2 who were detained for more than 48 hours. Of the 132 released without charge, 130 were detained for 48 hours or less. There were 28 requests to have someone informed of which 3 were delayed. No requests for access to a solicitor were delayed⁵⁶. There are no equivalent statistics for Great Britain.

9.61. In Chapter 5 I have considered, but not recommended, the possibility of bail for those arrested and detained under section 41. This was because, in Great Britain, the benefits would not be substantial and are strongly outweighed by reasons of operational effectiveness. It is fair to say that the position is different in Northern Ireland. Delays in the justice system⁵⁷ mean that it is common for individuals arrested and *charged* with terrorism offences to be released on bail for long periods. Being able to arrest under section 41, then bail, would avoid the need to release individuals unconditionally and then, if further evidence has been obtained, re-arrest them. It was suggested to me that the appearance of unconditional release followed by re-arrest for the same matter could be a source of tension. Although it was not suggested to me that an ability to bail would result in more charges being brought, I accept that the ability to bail would have some benefits for policing terrorism in Northern Ireland. But those benefits would be less clear if changes were made to reduce delays in the rest of the criminal justice system, which as I have said results in the routine bailing of those charged with terrorism offences, and do not appear to justify changes throughout the United Kingdom.

⁵⁵ Northern Ireland Terrorism Legislation: Annual Statistics 2017/2018 and 2018/2019, Table 3.1.

⁵⁶ *Ibid*, at tables 4.2, 4.3 and 4.4.

⁵⁷ See further 9.95 to 9.98.

9.62. The 148 arrests under section 41 resulted in 16 charges (11%). This is the second lowest charge rate since the commencement of the Terrorism Act 2000, with the lowest rate being in 2017 (6%). Of the 16 people who were charged, 3 were charged with offences under the Terrorism Acts. One person was charged with an offence under section 57 of the Terrorism Act 2000, one person was charged with an offence under section 58, and one person was charged with an offence under section 58 and section 5 of the Terrorism Act 2006.

9.63. The large number of arrests and the low charge rate have been scrutinised by my predecessors. Lord Anderson QC commented that the figures were “*disappointing*”⁵⁸ and that they suggested that the PSNI may be overusing the arrest power.

9.64. To ascertain why the charge rate is so low, in 2015 Lord Anderson QC asked his, and now my, Northern Ireland special advisor, Alyson Kilpatrick BL, to conduct a review of the 168 arrests which were made that year. This followed a review that was conducted by the PSNI. Lord Anderson QC was keen to know whether section 41 of the Terrorism Act 2000 was being used in circumstances where PACE would have been more appropriate, and whether the low charging rates indicated that the threshold of reasonable suspicion had not always been reached.

9.65. Alyson Kilpatrick BL was afforded access to all relevant information to enable her to make an assessment of the grounds for the arrests, the decisions to charge or not to charge and the oversight of the arrests by counter terrorism supervisors. She also interviewed a senior PSNI officer with responsibility for counter-terrorism investigations⁵⁹.

9.66. The conclusion of the review was that the arrests under consideration did result from terrorism-related investigations of suspected terrorism related offences, and that arresting officers anticipated charging under the Terrorism Act 2000. Lord Anderson QC noted, however, that intelligence indicating a charge under Terrorism Act 2000 was often not converted into evidence sufficient to charge.

⁵⁸ *Terrorism Acts in 2015 Report* at 8.16.

⁵⁹ *Ibid* at 8.17 - 8.21.

9.67. Lord Anderson QC made the point that the conversion of intelligence into evidence is a challenge in many terrorism-related investigations but appears to be particularly difficult in Northern Ireland. Factors are sometimes said to include suspects who can operate locally, leaving little online trace; the need to protect sources of intelligence; and fear of retaliation on the part of witnesses (a feature of small tight-knit communities).

9.68. The Northern Ireland Policing Board received a confidential and detailed report from the PSNI, further to a recommendation in its Human Rights Annual Report 2015, examining these issues. In its subsequent Human Rights Annual Report, the Policing Board recognised the work that was being done to monitor this issue but said no more about it.

9.69. Both the number of arrests and the charge rate for 2018 appear anomalous when compared to the comparable figure for Great Britain (37%). As Lord Anderson QC pointed out, it is important not to lose sight of the challenges which arise in Northern Ireland and which do not necessarily have a direct parallel in Great Britain. These explain, to some extent, the difficulties encountered in Northern Ireland, but do not necessarily provide a complete explanation for the disparity revealed by the figures. I intend to keep this matter under review.⁶⁰

Conditions of detention

9.70. Independent Custody Visitors in Northern Ireland are trained and coordinated by the Northern Ireland Policing Board.

9.71. Unlike in Great Britain, there is no statutory requirement in Northern Ireland for custody visitors' reports to be sent to me. I have, however, received reports from Northern Ireland, although to date it has proven difficult to establish a reliable means of communication between London and the part of the Northern Ireland Policing Board which oversees the scheme.

⁶⁰ A further possibility which I arose from some of my meetings with the PSNI is the police's own sense of obligation to carry out an arrest even where prosecution is a remote possibility. I note that in *Fitzsimmons v Chief Constable of Police Service of Northern Ireland* [2013] NIQB 92, at paragraph 21, McCloskey J considered that the police had been "duty bound" to carry out an arrest because of statutory duties owed by them to the public under section 32(1)(d) Police (Northern Ireland) Act 2000.

9.72. My immediate predecessor, Max Hill QC, assisted the Independent Custody Visitors Association in creating a recommended form of report for custody visitors (Appendix 2 to the current training manual) but it is still not being used by all custody visitors. Some of the forms that are being used, for example by custody visitors in Northern Ireland, are not only different from the recommended form, but are confusing and in some cases have not been filled in correctly (I suspect, owing to the confusing nature of the form). The absence of consistency means that the information provided by custody visitors is different, depending on the identity of the force area in which the detainee is held, and it is difficult for me to compare the quality of reporting and treatment across different regions. I **recommend** that the Northern Ireland Policing Board ensure that their independent custody visitors all use the recommended form in Appendix 2⁶¹.

9.73. Max Hill QC noted in both of his reports that detainees in Northern Ireland demonstrated a reluctance to consent to independent custody visitors visiting them⁶². Mr Hill worked with solicitors, custody staff, and visitors to ensure that detainees in Northern Ireland were encouraged to view the volunteers as individuals who are there to promote the welfare of all detained persons. This led to a change in policy, as ICVs in Northern Ireland now introduce themselves to detainees to encourage greater participation (which they did not do before).

9.74. The table below sets out information about the independent custody visits which took place in Northern Ireland in 2018.

| 2018 | Detainees | Valid visits | Invalid visits | Seen by ICVs | CCTV reviews | Unsatisfactory visits |
|-------------|------------------|---------------------|-----------------------|---------------------|---------------------|------------------------------|
| | 43 | 38 | 5 | 7 | 1 | 4 |

9.75. The rate of individuals detained under section 41 of the Terrorism Act 2000 who consented to being visited by an independent custody visitor is still low (16%), especially when compared to those who were detained under the Police and Criminal Evidence (Northern Ireland) Order 1989 (98%). Regrettably, I have been unable to

⁶¹ If and when the recommended form is reviewed, I suggest that the nature of the detention (section 41 or PACE) should be indicated on the form; and that any actions taken by ICVs in response to concerns identified should also be summarised.

⁶² *Terrorism Acts in 2017 Report*, at 9.31.

obtain statistics for previous years in order to consider whether the change in policy has led to greater participation.

9.76. Another unsatisfactory feature of these statistics is that of the 148 arrests which were made under section 41 of the Terrorism Act 2000 in 2018, there were only 43 independent custody visits. This means that only 29% of those detained were visited by an independent custody visitor. Anecdotally, I have been told that it is not unusual for visits to be aborted due to delay, as independent visitors may not be able to conduct their visits immediately on arrival. This is a point that may merit further attention from the Northern Ireland Policing Board.

Stopping the Travelling Public

9.77. Schedule 7 to the Terrorism Act 2000 allows officers to stop and question (*examine*) those travelling through ports and borders to determine if they are terrorists; to search them; to detain them; to require them to hand over their electronic devices for examination and copying; and to take their fingerprints and DNA. Failing to cooperate with an examination is a criminal offence. I report on this power in detail in Chapter 6. In the preparation for this Chapter, I visited Belfast City Airport and Belfast seaport to observe how Schedule 7 is used by front line officers in Northern Ireland. I also visited Loch Ryan seaport in the West of Scotland which connects to Belfast seaport by ferry.

9.78. The majority of travel into and out of Northern Ireland is domestic (between Northern Ireland and Great Britain) and within the Common Travel Area (between Northern Ireland and the Republic of Ireland) meaning that there is limited advance information on who is travelling and therefore limited opportunity to carry out tasked stops⁶³. This means there is less scope for the model of joint CT Police/ MI5 working that I report on in Chapter 6.

9.79. Northern Ireland has the UK's only international land border. There is provision in Schedule 7 to the Terrorism Act 2000 to take account of this fact. A Schedule 7 examination can take place at a port or in "*the border area*". Paragraph 4(1) of Schedule 7 provides that a place in Northern Ireland is within the border area if it is no more than one mile from the border between Northern Ireland and the Republic of

⁶³ For tasked and untasked examinations at ports, see 6.9.

Ireland. By virtue of paragraph 4(2) if a train goes from the Republic of Ireland to Northern Ireland, the first place in Northern Ireland at which it stops for the purpose of allowing passengers to disembark is within the border area for the purposes of conducting a Schedule 7 examination. This latter paragraph exists to accommodate the direct train route which runs between Belfast and Dublin. The first place in Northern Ireland at which the train stops is Newry, a town approximately 8 kilometres from the border with the Republic of Ireland. In addition, authorisations have been in force on a continuous basis in recent years under Schedule 3 to the Justice and Security (Northern Ireland) Act 2007, which enable officers throughout Northern Ireland, including border areas, to stop people and vehicles to look for munitions and wireless apparatus on a no-suspicion basis. I propose to consider whether retaining a power to examine at a land border under Schedule 7 is justified when the outcome of Brexit is known.

9.80. As I discussed in Chapter 6, there has been a significant decline in the number of Schedule 7 examinations in Great Britain.

9.81. There has also been a decline in the number of Schedule 7 stops in Northern Ireland. In 2016, there were 2,082 stops, in 2017 there were 1,248 stops. In 2018, that figure fell to 717. This represents a decline of 43% in a single year and, since 2016, a 66% decline. During a visit to Northern Ireland ports I saw the use by PSNI officers of handheld devices which enabled them to cross-check information given during screening and prior to any examination taking place⁶⁴. This ability to access information quickly and on site may result in suspicions being allayed immediately, and the recent introduction of this technology could well see the rate of examinations under Schedule 7 falling further.

9.82. Some unease was expressed to me about pressure being placed on PSNI officers to carry out examinations, for example to disrupt known terrorists without necessarily seeking to obtain any information from them for the purposes of examination.

9.83. The use of Schedule 7 purely as a means of disruption, without any intention to determine if the person was a terrorist, is outside the law. I was informed that this pressure has now been successfully resisted.

⁶⁴ As to screening, see 6.22 et seq.

9.84. In 2018, 6 people were detained in Northern Ireland. In 2017, 11 people were detained. These detentions are significant, as they are the first to have occurred since Schedule 7 was amended by the Anti-Social Behaviour, Crime and Policing Act 2014. In his final report, Lord Anderson QC commented that he found the lack of detentions in Northern Ireland “*remarkable*” and suggested that this was something that merited further investigation. In his 2017 report, Max Hill QC noted how the PSNI had advised the Northern Ireland Policing Board that port officers in Northern Ireland do not encounter the same level of difficulties as at some other UK ports regarding language barriers due to the lack of international carriers. As a result, the PSNI explained that most examinations at ports were completed within one hour, negating the requirement for a detention.

9.85. The historic lack of detentions in Northern Ireland is something I raised with ports officers during my visits to Belfast. The explanation I was given is that individuals who are, or who are suspected to be, engaged in Northern Ireland related terrorism are often well-known to the PSNI. When these individuals transit through ports and are subject to a Schedule 7 examination, there is no need to detain them with a view to obtaining their biometrics⁶⁵, because the police already possess them. This is a plausible explanation for the difference in detention figures between Northern Ireland and Great Britain.

9.86. The fact that the PSNI rely so much on discretion when deciding who to examine under Schedule 7 brings the importance of training and safeguards against irrational or discriminatory use into sharp relief.

9.87. Ethnicity data for Schedule 7 stops has, historically, not been published in Northern Ireland. I have obtained this data directly from the PSNI. The figures for self-defined ethnicity for Northern Ireland for the past 3 years are as follows:

⁶⁵ As is required for biometrics to be taken, paragraph 10 Schedule 7 Terrorism Act 2000.

Total examinations

| | 2016 | 2017 | 2018 |
|-------------------------|-------------|-------------|-------------|
| White | 92% | 82% | 78% |
| Mixed | 1% | 2% | 4% |
| Black | 1% | 3% | 4% |
| Asian | 4% | 7% | 10% |
| Chinese or other | 1% | 6% | 3% |
| Not stated | 1% | 0% | <0.5% |

Detentions

| | 2016 | 2017 | 2018 |
|-------------------------|-------------|-------------|-------------|
| White | 0% | 36% | 17% |
| Mixed | 0% | 0% | 0% |
| Black | 0% | 0% | 17% |
| Asian | 0% | 64% | 17% |
| Chinese or other | 0% | 0% | 33% |
| Not stated | 0% | 0% | 17% |

9.88. In comparison to Great Britain, very few people in Northern Ireland decline to state their ethnicity when asked to do so by a ports officer. As a result, these statistics may present a more accurate picture of the self-defined ethnicity of individuals who are subject to a Schedule 7 examination than the statistics which are available for Great Britain⁶⁶.

9.89. The other noteworthy aspect of these statistics is that travellers who self-define as being of Asian ethnicity represent a smaller proportion of individuals subject to a

⁶⁶ Although, as with Great Britain, the ethnicity categories are too wide, see 1.36.

Schedule 7 examination in Northern Ireland than in Great Britain. This is likely to reflect the less diverse population of Northern Ireland society, but in the absence of ethnicity data for travellers to and from Northern Ireland, it is impossible to tell whether these figures are evidence that the Schedule 7 powers are being used fairly. For detention, the statistical samples are very small and no conclusions can yet be safely drawn from the ethnic breakdown of those who are detained.

9.90. Because the PSNI examine individuals travelling across the Common Travel Area between the Republic of Ireland and the United Kingdom, where routine immigration checks are forbidden⁶⁷, and those travelling within the United Kingdom between Great Britain and Northern Ireland, the question of whether Schedule 7 powers are being used in Northern Ireland as a form of disguised immigration power continues to be raised. As I witnessed at first hand, it is the case that Schedule 7 examinations by the PSNI may result in immigration officers being summoned rather than a terrorism outcome. This is because matters which may attract the attention of counter-terrorism officers (for example, avoidance of officials) may equally be explained by an uncertain immigration status (as well as by reasons unconnected to either terrorism or immigration).

9.91. However, I detected no indication that Schedule 7 powers were being misused for immigration purposes. The identity of those who use the powers is crucial. PSNI officers at port are deployed first and foremost as counter-terrorism officers. The reality, and certainly the perception, might be different were Border Force officials to be designated under Schedule 7, a possibility I describe in Chapter 6. As I recommend, reserving the Schedule 7 power to police officers alone would demonstrate that the power is a specific counter-terrorist measure rather than a disguised form of immigration control.

9.92. Statistical data from Northern Ireland would ideally capture the community background (Nationalist/ Loyalist/ neither) of those who are stopped under Schedule 7⁶⁸.

⁶⁷ Section 1(3) Immigration Act 1971.

⁶⁸ Community background is not recorded in Northern Ireland for the use of any policing powers but it is recorded in other contexts such as custody. A pilot scheme was conducted by the PSNI but was abandoned.

9.93. The final point to note is that prosecutions in Northern Ireland for failing to comply with the requirements of a Schedule 7 examination are now taking place. Unlike in Great Britain, where prosecutions have taken place, albeit sporadically, for a number of years, this is a relatively new departure in Northern Ireland. The outcomes of these prosecutions are something I will be able to report on next year.

Terrorist Trials and Sentencing

9.94. The Public Prosecution Service for Northern Ireland does not have a website equivalent to the Crown Prosecution Service of England and Wales, which details the terrorism prosecutions in a given year. My Northern Ireland Special Adviser, Alyson Kilpatrick BL, has provided me with details about some of the prominent cases in 2018. Many of these are not prosecutions but concern Northern Ireland's past.

1. In December 2017, an individual was acquitted of encouraging terrorism and inviting support for a proscribed organisation, charges which arose out of a speech he gave at an Easter commemoration in April 2015. The Court held that oral delivery of a speech did not amount to an offence of encouraging terrorism contrary to section 1(2) Terrorism Act 2006 on the basis that the words "publication" excluded merely oral statements at a meeting⁶⁹. No appeal was brought by the Public Prosecution Service on a point of law. It will be important to keep under review whether this case inhibits the ability of the Northern Irish courts to deal with the public encouragement of terrorism, especially since section 1(2) implements the UK's obligation under the Article 5 of the Council of Europe Convention on the Prevention of Terrorism to penalise public provocations to commit a terrorist offence⁷⁰.
2. In January 2018 the Court of Appeal had to determine the correct approach to disclosure in a 'legacy' civil claim brought against the PSNI in relation to the criminal activities of a protected informant⁷¹.

⁶⁹ R v Damien Fennell, 1 December 2017, ICOS No: 16/023017.

⁷⁰ C.Walker, Blackstone's Guide to Anti-Terrorism Legislation (3rd ed, 2014) at paragraph 2.48.

⁷¹ [2018] NICA 3. The *Peruvian Guano* test still applies in NI, despite a recommendation that the test be aligned with England and Wales, see paragraphs 26 to 9.

3. In June 2018 an individual stood trial for the 2012 murder of prison officer David Black. He was also charged with being a member of a proscribed organisation, being in possession of articles for use in terrorism, and the preparation of terrorist acts. Colton J directed that a not guilty verdict be entered in respect of all the charges⁷².
4. The Divisional Court refused permission to apply for judicial review of the PPS's decision to defer the question of whether to charge Freddie Scappaticci - who is alleged to be the British agent known as "Stakeknife" - with perjury until the conclusion of Chief Constable Boutcher's investigation into the matter⁷³.
5. In May 2018, Darren McAllister, Thomas Pearson, and Thomas O'Hara were convicted for their roles in disposing of a vehicle which was used in a murder committed by members of the Ulster Defence Association, a proscribed organisation⁷⁴.
6. In June 2018, nine defendants were sent to the Crown Court to be tried for allegedly committing a range of offences contrary to the Terrorism Act 2000. This followed an unsuccessful no bill application⁷⁵. Their trials have yet to take place.
7. In October 2018, the Lord Chief Justice upheld the legality of an application for mutual legal assistance made by the PSNI, to the authorities in the USA, requesting the tapes of interviews given by Republican participants in an oral history project, which touched on the death of Jean McConville, who was "disappeared" by the IRA⁷⁶. An appeal is to be heard by the Supreme Court.

9.95. Criminal procedure in Northern Ireland is distinct from that in England and Wales in a number of material respects. First, Northern Ireland still has oral committal hearings. As a result of recommendations made by a 1994 Royal Commission, oral committal hearings were abolished in England and Wales, but they still exist in

⁷² [2018] NICC 10.

⁷³ [2018] NIQB 88.

⁷⁴ [2018] NICA 45.

⁷⁵ [2018] NICC 11.

⁷⁶ [2018] NIQB 79.

Northern Ireland. As Lord Anderson QC has suggested⁷⁷, one of the reasons why difficulties are encountered in Northern Ireland in bringing successful terrorism prosecutions could be because of the aggressive adversarial court processes, with all defendants requesting old style committals during which every point is fought over. Part 2 of the Justice Act (Northern Ireland) 2015 provides for restrictions on the holding of preliminary investigations, but it stops short of abolishing old-style committals, and the relevant sections are still to be brought into force. In 2018, the Northern Ireland Audit Office recommended abolishing oral committal hearings with a view to increasing the efficiency of the criminal justice system⁷⁸. The lack of a functioning government in Northern Ireland inhibits the achievement of this goal, given that it would require devolved legislation.

9.96. The second point to note about criminal procedure in Northern Ireland is that the special rules which have assisted the effective case management of terrorist cases in England and Wales have had no equivalent in Northern Ireland. As Lord Anderson QC also pointed out this leads to delays and frequent adjournments⁷⁹. There is no reason to think that the situation has improved since then. In fact, the increase in the number of prosecutions for historic offences could mean that the situation has deteriorated.

9.97. Trial statistics show a consistent lag between charge and prosecution. By 8 July 2018, only one person had been tried of those who had been detained under section 41 since April 2017⁸⁰, and by 23 July 2019, only two individuals had been tried of those who had been detained under section 41 since April 2018⁸¹.

9.98. The third point to note is that most, if not all, terrorism trials in Northern Ireland are tried by a judge sitting without a jury. If the offence in question is alleged to have been committed on behalf of a proscribed organisation, and the Director for Public Prosecutions is satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury, he can issue a certificate authorising a judge-only trial. Under this system, disclosure decisions are

⁷⁷ *Terrorism Acts in 2015 Report* at 9.17.

⁷⁸ 3rd recommendation, <https://www.niauditoffice.gov.uk/sites/niao/files/media-files/Speeding%20up%20Justice.pdf>.

⁷⁹ At 9.17.

⁸⁰ Northern Ireland Terrorism Legislation: Annual Statistics 2017/2018, page 14 of 31.

⁸¹ Northern Ireland Terrorism Legislation: Annual Statistics 2018/2019, page 14 of 31. Both were acquitted. One person in this period was not proceeded against.

not made by the trial judge, but by another judge, and as a result, as Lord Carlile QC pointed out in 2015, in his capacity as Independent Reviewer of National Security Arrangements in Northern Ireland, there may be a "disconnect between the day by day reality of the trial and the insulated disclosure process."⁸² This approach to disclosure may have the consequence of deterring reliance by the prosecution upon sensitive evidence, or, if such evidence is relied upon and its disclosure is ordered, causing the prosecution to offer no evidence.

9.99. One clear and documented outcome of the criminal process in Northern Ireland is delay. Unlike in Great Britain, it is common that individuals charged with terrorism offences are on bail pending trial. Given the length of time required, at some point prolonged pre-trial detention will cease to be justifiable⁸³.

9.100. The final noteworthy point relates not to criminal procedure, but to sentencing. I have been told that sentences in Northern Ireland are low when compared to the equivalent sentence an offender would receive in England and Wales. This is a view which has been expressed by others. For example, Lord Carlile QC stated in 2015 that sentencing was in need of appraisal and noted that, generally, such sentences in terrorism cases are considerably shorter than comparable sentences in England and Wales, with notably different tariffs in murder cases. This point was also made by the Fresh Start Panel, to which reference has already been made. In 2016 it reported that there was dissatisfaction with the sentences received by those convicted of terrorism offences⁸⁴.

9.101. Although I have been unable to quantify the difference in sentencing approach, it has been commented upon enough times to enable me to say with confidence that it exists. I posed the question of how the sentencing courts would treat an Islamist terrorist convicted of terrorism offences in Northern Ireland. The alternatives are equally unpalatable: would the sentence be shorter than in Great Britain, or longer than those given to traditional Northern Irish terrorists?

⁸² <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2015-03-23/HLWS415/>.

⁸³ I have been informed that the unwritten rule in Northern Ireland is that pre-trial detention lasts up to 2 years.

⁸⁴ At paragraph 3.25, https://cain.ulster.ac.uk/events/peace/stormont-agreement/2016-06-07_Fresh-Start-Panel_paramilitary-groups.pdf.

9.102. Two factors may contribute to this problem. The first is that there is no equivalent of the Sentencing Council in Northern Ireland. The consistency and rigour which the Sentencing Council brings to sentencing in England and Wales may be difficult to achieve in Northern Ireland, in the absence of a body tasked with taking an objective, consultative, and holistic approach to sentencing. There is, for example, no equivalent of the Definitive Guidelines on the Sentencing of Terrorism Offences, which have been in place in England and Wales since 2018, and which are intended to bring consistency to the sentencing of terrorism offences.

9.103. The second factor relates to the restricted ability to refer unduly lenient sentences to the Court of Appeal. In England and Wales, it is possible for the Attorney General to refer sentences which he believes are unduly lenient to the Court of Appeal. The list of offences which may be referred is broad and includes all of the most serious terrorism offences (and some not so serious). The list of offences was expanded in 2017 to include nine further offences⁸⁵. In Northern Ireland, the DPP may refer the sentences of those who are convicted of a narrow range of offences to the Court of Appeal. In 2016 the Fresh Start Panel Report recommended that the Department of Justice ensure a mechanism exists for the referral of unduly lenient sentences to the Court of Appeal for offences linked to terrorism and organised crime groups⁸⁶. This recommendation was included as part of the Sentencing Policy Review, which commenced in 2016, and the recommendation finally came into effect in late 2019⁸⁷. The ability to refer sentences for offences which are linked to terrorism to the Court of Appeal may address the sentencing disparity. In the absence of definitive guidelines, this cannot be guaranteed, however. This is especially the case if the low sentences reflect a culture which "normalises" some offending. This is offending which, had it occurred in England and Wales, would be treated as exceptional and would attract a substantial sentence.

⁸⁵ <https://www.gov.uk/government/news/further-9-terror-related-offences-added-to-unduly-lenient-sentence-scheme>.

⁸⁶ <https://www.justice-ni.gov.uk/news/terrorist-and-paramilitary-related-offences-added-unduly-lenient-sentence-scheme>.

⁸⁷ Criminal Justice Act 1988 (Reviews of Sentencing) Order (Northern Ireland) 2019, SI 2019/131.

10. RECOMMENDATIONS

Introduction (Chapter 1)

- 10.1. The Independent Reviewer of Terrorism Legislation should be given statutory authority to review any immigration power used by the Home Secretary to the extent that it is used in counter-terrorism (1.16).
- 10.2. More precise and consistent data should be collected and published on the use of counter-terrorism powers to address the points identified at 1.30 to 1.38 of this Report (1.39).

Terrorist Groups (Chapter 3)

- 10.3. Proscription orders should automatically lapse after a set period such as three years (3.62).
- 10.4. The Home Secretary should invite the Attorney General to consider issuing of prosecutorial guidance on overseas aid agencies and proscribed groups (3.66).

Terrorist Investigations (Chapter 4)

- 10.5. CT Policing should consider providing national advice to forces on whether, in response to a raising of the national threat level to critical, authorisations under section 47A Terrorism Act should be made; and the Home Office and CT Police should consider whether the 2012 Code of Practice on section 47A, which is now several years old, requires revision (4.18).
- 10.6. Paragraph 3 of Schedule 5 to the Terrorism Act should be is amended so that the power to authorise searches of premises within cordons, irrespective of the rank of the authorising officer, should only be exercised in urgent cases (4.27).

Arrest and Detention (Chapter 5)

- 10.7. Statistics on the success rate of applications for warrants of further detention under Schedule 8 to the Terrorism Act 2000 should be published (5.10).

- 10.8. Police and Crime Commissioners (and equivalent authorities in England, Wales and Scotland) should ensure that their independent custody visitors all use the recommended form in Appendix 2 of the current Independent Custody Visitors Association training manual (5.24).
- 10.9. The question of whether the practice of remote night-time monitoring is actually unsafe, bearing in mind the desirability of avoiding continuously broken sleep for detainees who may be held for up to 14 days should be resolved (5.27).
- 10.10. Section 41 Terrorism Act 2000 should be amended so that the "relevant" time includes the time of arrest under the Police and Criminal Evidence Act 1984 for specified terrorist offences (5.29).

Ports and Borders (Chapter 6)

- 10.11. Consideration should be given to whether the current power to designate immigration and customs officers as examining officers under paragraph 1A of Schedule 7 to the Terrorism Act 2000 is necessary (6.15).
- 10.12. The Home Office should conduct research into the factors behind the fall in the use of Schedule 7 (6.30).
- 10.13. The Home Office and CT Police should review whether questions about private religious observance should form part of any standard lists of questions circulated to ports officers (6.55).
- 10.14. The Code of Practice should be amended to require border officers to consider whether an inbound examination may be as effective as an outbound examination (6.58(a)).
- 10.15. The Home Office and CT Police should review the extent to which individual forces limit access to information they have placed on counter-terrorism computer systems accessible to border officers (6.58(b)).
- 10.16. Port Circulation Sheets should expressly record the number of previous Schedule 7 examinations so that this factor is always considered in deciding whether to conduct a further examination (6.66).

- 10.17. CT Police and the Home Secretary should withdraw the commitment made in 2002 that the power to require the provision of advance passenger information in paragraph 17 of Schedule 7 Terrorism Act 2000 would only be used after further consultation (6.75).
- 10.18. Consideration should be given to amending Schedule 8 Terrorism Act 2000 so that detention is not automatic after one hour (6.93).
- 10.19. Consideration should be given to whether lack of access to confidential business material under Schedule 7 Terrorism Act 2000 inhibits the identification of terrorist (6.106).
- 10.20. Statistics on the numbers of individuals who have had their biometric data taken at ports should be published (6.109).
- 10.21. Current restricted guidance on biometric data should be reviewed to ensure it does not inhibit officers from exercising their discretion appropriately in every individual case (6.114).
- 10.22. Separate statistics should be taken and published for the use of carding under paragraph 16 of Schedule 7 Terrorism Act 2000 (6.131).

Terrorism Trials and Sentences (Chapter 7)

- 10.23. Consideration should be given to whether it would be possible to include in official statistics all terrorism-related offences which are charged, and prosecuted (7.8).
- 10.24. Consideration should be given to establishing a means to review terrorist notification requirements under Counter-Terrorism Act 2008 (7.56).

Civil Powers (Chapter 8)

- 10.25. Section 4(3) Counter-Terrorism and Security Act 2015 should be amended so that a Temporary Exclusion Order expires two years after the individual's return to the United Kingdom (8.51).

10.26. The Home Secretary should consider whether Temporary Exclusion Orders should be available for individuals other than British citizens (8.61).

10.27. The Home Secretary and CT Police should consider whether it would be practicable to obtain civil Serious Crime Prevention Orders against returning Foreign Terrorist Fighters, for whom prosecution and Terrorism Prevention and Investigation Measures were not an option (8.70).

Northern Ireland (Chapter 9)

10.28. The Northern Ireland Policing Board should ensure that their independent custody visitors all use the recommended form in Appendix 2 of the current Independent Custody Visitors Association training manual (9.70).

ANNEX

Previous Recommendations: Lord Anderson QC

In his *Terrorism Acts in 2015 Report*¹, Lord Anderson QC collated his final recommendations together with those outstanding from earlier reports. I set these out below, together with the Government's response of July 2017², adding cross-references to my Report where I consider the point further.

The **first** recommendation was that efforts should continue to provide data and/or the publication of 4 categories of data:

- a. the number and success rates of warrants for further detention in Great Britain. The Home Secretary stated that data is held by the National Counter-Terrorism Policing Operations Centre on the number of applications for a warrant for further detention under Schedule 8 to the Terrorism Act 2000. I reiterate the recommendation that the success rate is also published at 5.10.
- b. the number of refusals of access to solicitors in Great Britain, and the length of any delays. The Home Secretary stated that the Home Office had investigated whether it would be feasible to publish data on refusals of access to solicitors in Great Britain under Schedule 8, but concluded that the cost would be disproportionate. As I observe at 1.35, I can see no clear reason why these statistics are available for one part of the United Kingdom, but not another.
- c. ethnicity data based on more up-to-date categories. The Home Secretary agreed that it would be helpful for the published statistics on police counter-terrorism powers to reflect the updated 2011 census ethnicity categories. However, the position has not been sufficiently addressed as I report at 1.36.

¹ At Chapter 10.

²

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/630771/60502_Cm_9489_Accessible.pdf.

- d. the use of TA 2000 ss. 43 and 43A stop and search powers in relation to police forces outside London and Northern Ireland. The Home Office agreed to publish these statistics, but that has still not taken place. Figures on the use of these powers are still bundled as “associated legislation” together with section 1 Police and Criminal Evidence Act 1984³.

The **second** recommendation was that the Independent Reviewer of Terrorism Legislation should be given statutory authority to review (a) the exercise of the Royal Prerogative power to cancel or refuse to issue a British passport; and (b) any other law or power to the extent that it is used in relation to counter-terrorism. The Government declined to do so, and I repeat this recommendation in Chapter 1.

The **third** recommendation concerned the definition of terrorism in section 1 Terrorism Act 2000 and in particular (i) that the phrase “*designed to influence the government or an international organisation*” in TA 2000 s. 1(1)(b) should be replaced by the phrase “*designed to compel, coerce or undermine the government or an international organisation*” and (ii) that section 1(3) should be repealed. The Home Secretary agreed that “activity clearly falling outside the common-sense definition of terrorism should not be caught by terrorism laws”, and that care should be taken to avoid a chilling effect on legitimate journalism and activism, but was satisfied that the current statutory definition had not so far had this effect. I refer to the implications of this broad definition at 2.33 to 2.35.

The **fourth** recommendation concerned reform of the deproscription process. In the absence of a duty to review proscriptions, Lord Anderson QC recommended that applications for deproscription must be promptly handled, and statutory time limits respected; deproscription must follow automatically, without regard for discretionary factors, if the statutory test is not met; when an application for deproscription is refused by the Secretary of State, the fullest possible reasons should be given so that the organisation in question can properly assess the prospects for appeal; persons should not be put to the expense and uncertainty of resorting to POAC unless the Government is prepared to defend its judgement and has the evidence confidently to do so. The Home Secretary stated that he was unconvinced that a system of regular reviews was

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/751215/police-powers-procedures-mar18-hosb2418.pdf.

appropriate, but agreed that the existing statutory time limits should be respected, and noted Lord Anderson's recommendations concerning the requirement of the statutory test, and concerning litigation in POAC. I consider proscription in detail at Chapter 3.

The **fifth** recommendation concerned the desirability of requiring objectively demonstrated grounds for the exercise of enhanced Schedule 7 powers under review, in the light of dicta in *Beghal v Director of Public Prosecutions*⁴. The Home Secretary stated that he would keep the issue under review but was of the view that introducing a requirement of suspicion would fundamentally undermine the utility of the power. I consider the Schedule 7 no suspicion threshold at 6.135 *et seq.*

The **sixth** recommendation was that any policy on the retention of electronic data must fully comply with the applicable legal constraints, and there must be effective guarantees of the proper implementation of whatever guidelines are applied. The Home Secretary referred to a review by the police of the Digital Downloads at Ports policy, which would be implemented in compliance with the law. I examine the issue of data downloads at 6.95 *et seq.*

The **seventh** recommendation was that there should be a statutory bar to the introduction of Schedule 7 admissions to a subsequent criminal trial. A statutory bar has now been inserted into Schedule 7 by the Counter-Terrorism and Border Security Act 2019.

The **eighth** recommendation concerned Schedule 7 screening questions, and the need to address screening in the primary legislation and in the Code of Practice, to avoid discrimination and excessive length, and to promote consistency. The Home Secretary said that he would consider referring to screening in the Code, but not in primary legislation. The issue of screening is addressed by me at 6.22 *et seq.*

The **ninth** recommendation was that steps should be taken to ensure that the quality of manifest data is improved and that so far as possible, police at seaports and on the international rail network have timely access to reliable information about passengers so as to enable them more effectively to target their Schedule 7 stops. I consider this issue and the Government's response at 6.68 *et seq.*

⁴ [2015] UKSC 49.

The **tenth** recommendation was that, if there was a national security need to extend the purposes for which Schedule 7 could be used to include counter-espionage and counter-proliferation, that should be done. This issue has been addressed by Parliament through the enactment of Schedule 3 to the Counter-Terrorism and Border Security Act 2019, which is designed to address hostile state activity at ports and borders.

The **eleventh** recommendation was that questions about private religious observance (e.g. prayer) should be asked, if at all, only in the highly exceptional case when there is a clear and objective reason for doing so. The Home Secretary agreed that these questions should only be asked in a Schedule 7 examination if there was a clear and objective reason for doing so, and stated that he would explore with the police whether current guidance was sufficient. I address this issue at 6.53 to 6.55.

The **twelfth** recommendation concerned the detention under Schedule 8 of those arrested under section 41 Terrorism Act 2000, and reform to paragraph 32 of Schedule 8: by requiring any court considering a warrant of further detention to be satisfied that the person was lawfully arrested; that the person was told with sufficient clarity the offences he was suspected of committing and the reasons for the suspicions leading to his arrest; that there is a real prospect of evidence emerging during the period for which further detention is sought; and that the continued detention is proportionate in all the circumstances. The Home Secretary considered that the amendment was generally unnecessary because of duty of the court to consider these matters in any event; and that the "real prospect" test might not be achievable in practice. I refer to Schedule 8 and detention at Chapter 5.

The **thirteenth** recommendation was that the law should be changed to allow the Schedule 8 detention clock to be suspended in the case of detainees who are admitted to hospital. The law was reformed by the insertion of subsections (8A) and (8B) into section 41, and subparagraph (3A) into paragraph 6A of Schedule 7 to the Terrorism Act 2000⁵.

The **fourteenth** recommendation was that PACE Code H should be reviewed so as to ensure that it properly encapsulates the limits on permissible safety interviews as set out in *Ibrahim v United Kingdom*⁶. The Home Secretary stated that the Home Office had worked with the police to consider whether any amendments were necessary, and was

⁵ By section 18 Counter-Terrorism and Border Security Act 2019.

⁶ *Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09*, 13 September 2016.

satisfied that the breach of Article 6 rights in *Ibrahim* had arisen from an operational failure to follow the Code rather than a flaw in the Code; and that paragraph 10 is clear about the circumstances in which cautions must be given, and covers circumstances such as in this case. I do not refer to this in my report but will keep this issue under review.

The **fifteenth** recommendation was that there should be a power to grant police bail where it is safe to do so to persons arrested under TA 2000 s. 41, so as to prevent unnecessary detention and give the police operational flexibility. The Home Secretary disagreed for operation reasons. I consider this issue at 5.13 to 5.19.

The **sixteenth** recommendation was to encourage further dialogue between international NGOs and the Government, with a view to resolving the difficulties that the NGOs have identified as a consequence of the anti-terrorism legislation. The Home Secretary stated that the Government was in dialogue with NGOs and was keeping existing guidance for NGOs under review. This area is addressed at 3.43 to 3.45 and 3.63 to 3.70.

The **seventeenth** recommendation was that any further proposals to deal with the problem of radicalisers or “hate preachers” (including any consultation on proposals for a Bill on countering extremism) should take into account (a) the options already available under existing legislation; and (b) the possibility of amending or clarifying existing criminal offences. Amendments to criminal offences in the Terrorism Acts 2000 and 2006 were made by the Counter-Terrorism and Border Security Act 2019 and are referred to at 2.39.

Previous Recommendations: Max Hill QC

In his final report, his Report in 2017, Max Hill QC made the following recommendations. Once again, I have set out the Government response of April 2019⁷, and cross-referred to this Report where applicable.

His **first** recommendation was that lessons should be learned from Operation Manteline, the operation into the Manchester Arena attack in 2017, and in particular the impact on the local community. The Home Secretary noted that a review or resource and resilience was carried out following the 2017 attacks, and that a ‘Consequence Management Cell’

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793896/CCS0419986420-001_The_Govt_Response_to_the_Annual_Report_2017_Web_Accessible__1_.pdf.

(CMC) had been set up to respond to and mitigate any negative impacts on the local community.

His **second** recommendation was that the police should review and where necessary improve their understanding of arrest and search provisions, and to consider carefully the appropriateness of transporting detainees large distances from their place of arrest. The Home Secretary responded that the arrest and search provisions were understood by the police; and that careful consideration was being given to whether detainees should be moved.

His **third** recommendation was that the test for assessing whether an abscond risk continued to exist for TPIM subjects should be relaxed. The Home Secretary stated that the Home Office would work with the Security Service to review whether more detailed assessments of abscond risk could be prepared for consideration at TPIM Review Group meetings.

His **fourth** recommendation was to review the necessity to relocate in every TPIM case. A related recommendation was that there should be more flexible use of the available TPIM measures. The Home Secretary responded that the need for relocation in individual cases would continue to be reviewed. I refer to the practice of more flexible 'single allegation' TPIMs at 8.23 to 8.29.

His **fifth** recommendation was that notice of variations to TPIMs should be personally served on the TPIM subjects rather than their solicitors. The Home Secretary stated that this would be done in appropriate cases but that it would not be a justifiable use of resources to do so in every case.

His **sixth** recommendation was that local authorities, including their Social Services departments, should be appropriately briefed on TPIMs wherever relevant and necessary, with suitable limitations upon the use of any information provided. The Home Secretary agreed that there can be benefits to briefing local authorities, and that this did occur, subject to protecting sensitive information.

His **seventh** recommendation was that a 'reasonable grounds to support' threshold for the use of Schedule 7 powers should be inserted into the Code of Practice. The Home Secretary rejected the introduction of a new legal threshold on the basis that it would not be effective in offering reassurance about the exercise of the power and would introduce

uncertainty. I consider the exercise of the Schedule 7 powers, including detention, data and biometrics, throughout Chapter 6.

His **eighth** recommendation was that there may be merit in considering the extent and number of permissible screening questions, where they do not lead to the use of Schedule 7 detention. The Home Secretary recognised that there had been some confusion around the questions which could be asked during screening, and those that could only be asked during examination, and stated that it intended to revise the Code of Practice to make this clearer. I refer to screening at 6.22 *et seq.*

His **ninth** recommendation concerned the need to train officers to use Schedule 7 powers for domestic flights and travel. The Home Secretary stated that these powers were used on all routes and that the Home Office would work with the police to ensure appropriate training.

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