

# **The Terrorism Acts in 2019**

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

By

**JONATHAN HALL Q.C.**

**Independent Reviewer of Terrorism Legislation**

March 2021

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## EXECUTIVE SUMMARY

- Two terrorist attacks featured prominently in 2019: the **Christchurch mosque attack** in New Zealand that quickly inspired imitative attacks in the United Kingdom and elsewhere, and the **Fishmonger's Hall attack** which led to a profound reassessment of the sentencing and management of terrorist offenders (Chapter 1)
- Islamist terrorism remains the principal threat in Great Britain, and Dissident Republicanism in Northern Ireland. But the internet is a cornucopia of violent ideologies: I examine the rise of **novel cause terrorism** such as attacks by incels and school shooters, and consider how the current definition of terrorism measures up (Chapter 2)
- Three Islamist terrorist groups were proscribed in 2019, including the entirety of Hizballah. The **review process** remains far from perfect, and greater grip is needed in the field of **humanitarian aid** and counter-terrorism (Chapter 3)
- **Encryption** remains a stumbling block. **Journalistic versus investigative interests** arose in police applications for unbroadcast TV footage of interviews with Shamima Begum and members of 'the Beatles' (Chapter 4)
- The most arrested-for offence remains possession of information likely to be useful to a terrorist. I consider whether powers deal adequately with **injured suspects** arrested in hospital (Chapter 5)
- Despite the rise in Right Wing Terrorism, there is **no change** in the balance of white and non-white persons stopped at ports and airports. I look at small ports and airfields, and the need for greater safeguards on the handling of **digital product** (Chapter 6)
- Superficially attractive, an offence of possession of **terrorist propaganda** is difficult to formulate without being unworkable in practice. The failed terrorist prosecutions of individuals for **fighting against Da'esh/ Islamic State** draw attention to the Attorney General's role and the importance of prosecutorial discretion (Chapter 7)
- Care is needed to avoid **Terrorism Prevention and Investigation Measures** drifting into additional years, and there is a problem with legal aid that needs immediate attention. I also consider some of the options for **children** returning from terror zones. (Chapter 8)
- The investigation and prosecution of terrorism looks and feels very different in Northern Ireland from the rest of the United Kingdom. I recommend greater **transparency** about how terrorism legislation operates in practice (Chapter 9)
- The Scottish system for investigating and prosecuting terrorism is also different. There is a need for **legally enforceable standards** to protect persons detained following arrest under section 41 Terrorism Act 2000 (Chapter 10)



## 1. INTRODUCTION

- 1.1. This is my second annual report as Independent Reviewer and includes my review into Terrorism Prevention and Investigation Measures<sup>1</sup>. My first annual report, *The Terrorism Acts in 2018*, was published in March 2020. The government's response to that report was published in October 2020<sup>2</sup>.
- 1.2. The attacks of 2017 continue to cast a long shadow, although by the end of 2019 the threat level was reduced in Great Britain to 'substantial' for the first time since August 2014<sup>3</sup>, before being taken back up to 'severe' in November 2020 after the terrorist attacks in France and Austria. The threat from Northern-Ireland Related Terrorism in Northern Ireland has remained throughout at the level of 'severe'.
- 1.3. This was not a year for new terrorism legislation. Many of the changes made by the Counter-Terrorism and Border Security Act 2019 gradually came into force during the course of 2019, but detailed implementation of amended ports and border powers for examining potential terrorists did not occur until late 2020.
- 1.4. The need to consider further terrorism legislation was, however, supplied by the attacks at Fishmonger's Hall in late 2019, and in Streatham a few months later, both by released terrorist offenders. In next year's report I will analyse the changes made by the emergency Terrorist Offenders (Restriction of Early Release) Act 2020 and those that are likely to follow from the Counter-Terrorism and Sentencing Bill. The focus on hostile state activity, considered separate from terrorism, continues<sup>4</sup>.
- 1.5. As I reported last year, terrorism powers are complex and challenging, but my overall assessment is that the legislation is well understood, and conscientiously deployed. This impression is fortified by the cooperation I received from CT Police and officials in preparing this report, and their openness to challenge.

### **Terrorism Legislation**

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<sup>1</sup> Under section 20 Terrorism Prevention and Investigation Measures Act 2011.

<sup>2</sup> <https://www.gov.uk/government/publications/response-to-the-operation-of-the-terrorism-acts-in-2018-report/review-of-the-operation-of-the-terrorism-acts-in-2018-accessible-version>.

<sup>3</sup> Meaning that an attack was no longer considered highly likely, HCWS 76 4 November 2019.

<sup>4</sup> In 2020 it was revealed that a new Joint State Threats Assessment Team had been created: <https://www.mi5.gov.uk/joint-state-threats-assessment-team>.

1.6. The primary attention of the authorities, and the first object of terrorism legislation, must be on avoiding deaths and injuries. Writing about the wider impact of terrorism, in terms that are uncannily applicable to the COVID pandemic of 2020, Professor Waldron referred to the possibility of terrorism also leading to, "...the emergence of a new sort of ethos governing choices about going out versus staying home, an attenuation of large-scale social interaction, and a marked degradation in the practices of mass consumer society that depend on secure large-scale social interaction, and in the cheerful spirit of security that permeates such a society and on which its prosperity depends."<sup>5</sup> In the foreword to its counter-terrorism strategy of 2018, known as Contest 3.0, the government refers to this wider object as "preserv[ing] our way of life"<sup>6</sup>.

1.7. This goal ultimately justifies the greater attention played to deaths caused by terrorism than the far more numerous deaths caused by ordinary knife crime. Terrorist attacks have, and are usually intended to have, a societal impact; victims may be selected at random, or for their symbolic value. For this reason, terrorism legislation rightly puts an emphasis on anticipating and preventing attacks. It does this by permitting action to be taken against individuals well before they have armed themselves with firearms, knives or explosives, for example because they are members of a proscribed group, or because materials in their possession such as terrorist manuals show what they might do or persuade someone else to do in the future.

1.8. The difficulty posed for terrorism legislation is that providing a wider sense of security to the population can come to have too heavy an impact (a) on individuals who, by accident or by design, become objects of suspicion and (b) on the population as a whole, if too many ordinary freedoms are sacrificed for the general good. Identifying an acceptable balance between liberty and security is complicated by the fact that there is no single way of life in the United Kingdom that needs to be preserved above all others.

1.9. In his report that led to the Terrorism Act 2000, Lord Lloyd identified four principles that have stood the test of time:

(a) Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure.

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<sup>5</sup> Waldron, J., Terrorism and the Uses of Terrorism, *Journal of Ethics* 8: 5-35 (2004).

<sup>6</sup> Cm 9608 (June 2018), Home Secretary, Foreword.

(b) Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual.

(c) The need for additional safeguards should be considered alongside any additional powers.

(d) The law should comply with the United Kingdom's obligations under international law.<sup>7</sup>

1.10. Emerging behaviours put stress on how terrorism legislation operates. In Chapter 2 I draw attention to some of the ideological causes which are emerging in connection with violent attacks and violent aspirations, some of which stretch the boundaries of what may be termed terrorism. I also consider the terrorism prosecutions of those who joined Kurdish groups to fight *against* Da'esh, in 2019 still the most potent global and domestic terrorist threat despite battlefield reverses. The continuing levels of violence in Northern Ireland, whether labelled terrorism or paramilitary violence, offer a reminder that old forms of violence die hard.

1.11. Terrorism legislation is increasingly used in Great Britain to deal with discrete types of terrorist activity. As I discuss in Chapter 8, during 2019 Terrorism Prevention and Investigation Measures were principally used to bear down on proselytising members of the proscribed organisation Al-Muhajiroun. The Temporary Exclusion Order regime (like the as-yet-unused Designated Area Offence) is essentially a reaction to British citizens and residents travelling to Da'esh<sup>8</sup> controlled areas in Syria and Iraq from 2014. Membership offences have been used almost exclusively to prosecute Right Wing Terrorists. Attention is now turning to the sentencing of terrorists and post-release regimes although not, as yet, to regulating their behaviour whilst in custody.

1.12. Perhaps because of the events of 2017, the scaled-up response to Right Wing Terrorism<sup>9</sup>, and the more visible application of terrorism legislation to non-Muslims, terrorism legislation attracted little controversy during 2019 in Great Britain. The three

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<sup>7</sup> Inquiry into Legislation against Terrorism (1996) at paragraph 3.1.

<sup>8</sup> The so-called Islamic State, IS, or ISIS.

<sup>9</sup> In 2019 the government announced that the terrorism threat level would henceforth be based on the threats from all forms of terrorism, irrespective of ideology:  
<https://www.gov.uk/government/news/threat-level-system-updated-to-include-all-forms-of-terrorism>.

issues that appear to draw the greatest fire from campaigning organisations are Schedule 7 Terrorism Act 2000, Prevent, and citizenship deprivation<sup>10</sup>. Only the first of these falls within my remit. Despite the inadequate level of independent review of citizenship deprivation, my recommendation that the role of Independent Reviewer should be extended to any legislation used for counter-terrorism purposes was rejected by the government<sup>11</sup>.

1.13. Lack of public controversy has no impact on the need for careful review of all existing measures. It is always necessary to consider the possibility that terrorism powers, if not carefully regulated, may be abused or exercised carelessly, lead to unintended consequences, or simply have too harsh an impact.

1.14. Terrorism legislation is never enough. The authorities cannot be everywhere all the time, no matter what powers they are granted, nor would that be desirable. The London Bridge inquests pointed to the role of family members who knew much about the views and conduct of one of the killers, Khuram Butt, but failed to do anything about them<sup>12</sup>. Protective security, simply making the object of the terrorist physically less practicable, is becoming increasingly prominent<sup>13</sup> as seen in the publication of Home Office Guidance on marauding terrorist attacks<sup>14</sup>, a new strategy on countering the possible use of drones in terrorism<sup>15</sup>, recommendations arising out of the Westminster Bridge and London Bridge inquests and in the terms of reference for the Manchester Arena public inquiry<sup>16</sup>.

## **My Approach**

1.15. I was appointed in May 2019. As with my first annual report, and in common with my predecessors and Australian counterpart Dr James Renwick, whose distinguished period as Independent National Security Legislation Monitor concluded

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<sup>10</sup> See, for example, Cage, 20 Years of TACT: Justice under Threat (2020); MEND Muslim Manifesto (2019).

<sup>11</sup> I should also note that the government has still not appointed a reviewer under section 13 Justice and Security Act 2013 into the use of closed material proceedings. The reviewer was meant to have reported by June 2018.

<sup>12</sup> <https://londonbridgeinquests.independent.gov.uk/wp-content/uploads/2019/08/Ruling-on-A2-and-Determinations-2.8.19.pdf> at paragraph 116

<sup>13</sup> This is the 'Protect' strand of the government's counter-terrorism strategy: Contest 3.0 at page 53.

<sup>14</sup> <https://www.gov.uk/government/publications/marauding-terrorist-attacks> (June 2020).

<sup>15</sup> UK Counter Unmanned Aircraft Strategy (CP 187, Oct 2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840789/Counter-Unmanned\\_Aircraft\\_Strategy\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840789/Counter-Unmanned_Aircraft_Strategy_Web_Accessible.pdf).

<sup>16</sup> <https://manchesterarenainquiry.org.uk/2019/wp-content/uploads/2019/11/Terms-of-Reference.pdf>.

in 2020, I have also taken to heart the Cold War maxim, "Trust but Verify"<sup>17</sup>. Trust in the person of an independent reviewer is not enough; verification requires the greatest possible transparency in matters of terrorism legislation and its use. Counter-terrorism work, like any other form of law enforcement, can only be carried out with the public's informed consent, and one of the key purposes of my reports is to inform the public as far as is consistent with operational secrecy.

1.16. One of the consequences of the 2017 attacks is the ever greater level of detail about counter-terrorism that has entered the public domain. The Westminster and London Bridge inquests concluded with the delivery of reports in late 2018 and 2019 respectively. The inquest into the Manchester Arena attack was converted into a public inquiry in October 2019 and is ongoing. All of these provide insights into the practical realities of counter-terrorism which would never have been ventilated in public only a decade ago. I refer in Chapter 9 to the need for greater transparency in Northern Ireland.

1.17. The approach I have taken is that terrorism legislation is up to scratch when effective in terms of its practical utility, and justifiable in terms of its impact on the rights and liberties of individuals and the wider public<sup>18</sup>.

### **Statistics**

1.18. In its October 2020 response to my first annual report the government agreed to make some changes to the processes of collecting and publishing statistics relating to terrorism. I hope to report on the nature and effectiveness of those changes in next year's annual report.

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<sup>17</sup> Lord Anderson QC, *A Question of Trust: Report of the Investigatory Powers Review, 2015*; James Renwick SC, *Report concerning the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and Related Matters, 2020*.

<sup>18</sup> For a detailed analysis of the role of the Independent Reviewer, see Blackburn, J., De Londras, F., Morgan, L., *Accountability and Review in the Counter-Terrorist State*, (Bristol University Press, 2020).

## 2. REVIEW OF 2019

### A Year of Diversification

2.1. Two episodes of terrorist violence in 2019 stand out.

- In March a live-streamed gun attack on worshippers at mosques in Christchurch, New Zealand was carried out by the white supremacist gunman, Brenton Tarrant. The viral load of this attack quickly spread globally, inspiring an attempted terrorist stabbing the following day in Stanwell, near Heathrow, and a further live-streamed attack in November on a synagogue in Halle, Germany<sup>19</sup>. Classic Right-Wing terrorism requires no novel law to detect, deter or prosecute but its mutations and near relations such as Inceldom<sup>20</sup> and school shootings stretch the boundaries of what might be considered Right Wing terrorism or even terrorism at all. I consider novel cause terrorism, which is no longer merely a theoretical question, below.
- In November, a knife attack was conducted at Fishmonger's Hall in November by the released Islamist terrorist Usman Khan. This, and the Streatham attack by another released prisoner, Sudesh Amman, in February 2020, put the spotlight on the risk posed by terrorist or radicalised prisoners on release, and led to the profound sentencing changes contained in the Terrorist Offenders (Restriction of Early Release) Act 2020 and proposed in the Counter-Terrorism and Sentencing Bill 2020.

2.2. As in previous years, Islamist terrorism continues to be main source of terrorism in Great Britain, and Dissident Republican terrorism its main source in Northern Ireland. There were 3 deaths caused by attacks in the United Kingdom that were declared as terrorist incidents in Great Britain or National Security incidents in Northern Ireland: the killings of Saskia Jones and Jack Merritt at Fishmonger's Hall, and the murder of Lyra McKee in Derry/Londonderry. Within the European Union, 13 people were recorded as having died from terrorist or major violent extremist attacks<sup>21</sup> but unlike 2018 when all fatalities were ascribed to "jihadist attacks"<sup>22</sup>, in 2019 10 deaths resulted from jihadist attacks and 3 from Right Wing Terrorism attacks (all in Germany).

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<sup>19</sup> And by way of reaction, the Christchurch Call issued by the New Zealand Government and others, <https://www.christchurchcall.com>, to eliminate terrorist and violent extremist content online.

<sup>20</sup> A belief system considered later in this Chapter.

<sup>21</sup> European Union Terrorism Situation and Trend report (TE-SAT) 2020, p11.

<sup>22</sup> Terrorism Acts in 2018 at 2.1.

Terrorism-related arrests in the European Union have been remarkably constant for the last 5 years within a range of 1,004 to 1,219<sup>23</sup>. Of particular interest all but one of the 7 completed or failed jihadist attacks were committed alone, whilst most foiled plots involved multiple suspects<sup>24</sup>.

2.3. Around the world the vast majority of deaths from terrorism have occurred during civil conflicts. In 2019 a significant fall in deaths from terrorism worldwide is ascribed to the military defeat of Da'esh in Syria and Iraq, and interventions against Boko Haram in Nigeria<sup>25</sup>.

2.4. Significant terrorist events in the United Kingdom in 2019 included the following. I have added some international incidents of particular note but not those relating to the ongoing conflicts in Afghanistan, Syria, Iraq, Nigeria, Pakistan and Somalia.

**31 December 2018** Mahdi Mohammed stabbed three people at Manchester Victoria Station on New Year's Eve in an Islamist attack. The defendant who suffered from mental illness subsequently pleaded guilty to attempted murder and was sentenced to life imprisonment<sup>26</sup>.

**5 March 2019**, Islamist extremist knife attack on prison guards in Conde-Sur-Sarthe prison France, injuring 2, Islamist terrorism.

**15 March 2019** Right Wing attack by Brenton Tarrant on mosques in Christchurch, New Zealand, killing 49 people.

**16 March 2019** Right Wing attack on man at Tesco car park in Stanwell, near Heathrow, after expressing support for Christchurch attack. Vincent Fuller was convicted of attempted murder.<sup>27</sup>

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<sup>23</sup> TE-SAT, p12.

<sup>24</sup> *Ibid*, page 14.

<sup>25</sup> Global Peace Index 2020, [https://visionofhumanity.org/wp-content/uploads/2020/10/GPI\\_2020\\_web.pdf](https://visionofhumanity.org/wp-content/uploads/2020/10/GPI_2020_web.pdf) estimates death from terrorism as under 8,000 in 2019. Global Terrorism Database, [https://www.start.umd.edu/pubs/START\\_GTD\\_GlobalTerrorismOverview2019\\_July2020.pdf](https://www.start.umd.edu/pubs/START_GTD_GlobalTerrorismOverview2019_July2020.pdf), estimates 20,000 deaths (including 6,000 perpetrators). The question of which deaths should be designated as being caused by terrorism remains controversial.

<sup>26</sup> <https://www.cps.gov.uk/cps/news/new-years-eve-manchester-station-knife-attacker-given-life-sentence>.

<sup>27</sup> <https://www.cps.gov.uk/cps/news/anti-muslim-supporter-new-zealand-mosque-killer-jailed-attempted-murder>.

**18 March 2019** Islamist extremist shooting on tram in Utrecht, Netherlands.

**18 April 2019**, Dissident Republican murder of Lyra McKee, journalist, in Derry, Northern Ireland.

**21 April 2019** Islamist extremist suicide bombings of churches and hotels on Easter Day in Sri Lanka killing 267.

**27 April 2019**, Right Wing shooting at synagogue in Poway, California, on person killed. This took place exactly 6 months after the mass shooting at Pittsburgh Synagogue, Pennsylvania, killing 11.

**24 May 2019**, Islamist extremist bomb attack in Lyon, France, injuring 13.

**3 July 2019** Arrests of Mohiussunnath Chowdhury arrested for plotting Islamist extremist attack on a Pride parade. He was later sentenced to life imprisonment<sup>28</sup>. He had been acquitted in December 2018 of planning an earlier terrorist attack outside Buckingham Palace.

**3 August 2019**, Right Wing mass shooting at Walmart store, El Paso, Texas, Right Wing terrorism killing 23 (apparently inspired by Christchurch).

**10 August**, Right Wing shooting at Mosque outside Baerum, Norway killing 1 (apparently inspired by Christchurch).

**19 August 2019** Northern Ireland-related terrorist bomb attack in Newtownbutler Northern Ireland, linked to a hoax device intended to lure police to the area.

**3 October 2019**, Islamist extremist stabbing attack by administrative worker on police colleagues at police headquarters in Paris, killing 4.

**9 October 2019**, Right Wing shooting attack on synagogue in Halle, Germany killing 2 (apparently inspired by Christchurch).

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<sup>28</sup> <https://www.cps.gov.uk/cps/news/terrorist-given-life-pride-attack-plot>.



**10 Oct 2019** Safiyya Shaikh arrested for an Islamist extremist plot to bomb St Paul's cathedral, subsequently sentenced to life imprisonment<sup>29</sup>.

**29 November 2019** Islamist extremist knife attacks by Usman Khan at Fishmonger's Hall, London killing 2 people.

## **Novel Cause Terrorism**

### ***Introduction***

2.5. In last year's report I drew attention to the growing range of ideologies that fall to be measured against the yardstick of terrorism<sup>30</sup>. Whilst diverse motivations leading to violence are nothing new<sup>31</sup> the counter-terrorism machine in recent years has shown a greater willingness to identify a wider range of activity as falling within its remit. So, moving beyond its former categories of International Terrorism and Northern Ireland-related Terrorism, MI5 noted announced that it had, in April 2020, assumed primacy for Right Wing Terrorism and "Left, Anarchist and Single-Issue Terrorism" (known as LASIT)<sup>32</sup>.

2.6. In this chapter I consider some of the more exotic ideologies that present themselves. A linked phenomenon is known as "Mixed, Unclear or Uncertain", which points not so much to the question of classification but the problem of proof where (i) an individual appears to be motivated by a different or even competing ideologies, or (ii) their actions appear to be driven by personal rather than ideological motivations.

2.7. As Independent Reviewer I am notified whenever a TACT suite is activated in England and Wales. This gives me an opportunity to speak to senior investigating officers about their caseload. I can say that the difficulties caused by novel ideologies are in no way theoretical.

2.8. There are a number of factors at work not just in the diversification of the threat but in the increased willingness of the modern CT machine to *consider* a wider range of threats than a decade ago.

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<sup>29</sup> <https://www.cps.gov.uk/cps/news/st-pauls-cathedral-bomb-plotter-given-life>.

<sup>30</sup> Terrorism Acts in 2018 at 2.32 to 2.35.

<sup>31</sup> See for example, Cutterbuck, R., 'Britain in Agony: the Growth of Political Violence', Faber & Faber (1978).

<sup>32</sup> <https://www.mi5.gov.uk/counter-terrorism>.

### *Growth of Right-Wing Terrorism*

2.9. Firstly, the growth in the scale and threat of Right-Wing Terrorism has led to the recognition that the same processes should apply to all kinds of terrorism, irrespective of the ideology that inspires it<sup>33</sup>.

### *Internet*

2.10. Secondly, the internet has enabled individuals to identify with any number of violent causes and with similar-minded individuals<sup>34</sup>. Violent ideas that in the past might have been short-lived or dismissed by friends and family as wayward fantasy can be developed and fortified by online communities and radicalisers. The internet has been hugely exploited by Islamist terrorists. The use of online humour, memes and jargon also provide particularly fertile ground for distilling and spreading extreme anti-Semitic, anti-Muslim and misogynistic beliefs that can inspire violence; although the difficulty of interpreting this as terrorist, coupled with powerful free speech protections in the United States, means that sites and forums hosting this material are difficult for the authorities to disrupt<sup>35</sup>.

### *Lone Attacks*

2.11. Thirdly, the phenomenon of lone attacks, identified by the governments as a particular source of the current terrorist threat<sup>36</sup>, means that investigators cannot necessarily refer to well-established group ideologies. Instead, CT Police and prosecutors tend to draw on words spoken at or about the time of attack, and ideological material found on electronic devices or in communications. Some of these may be contradictory, or best described as a mixed pot of grievances.

### *Mental Health and Learning Difficulties*

2.12. Fourthly, it is necessary to draw attention to the role of poor mental health and learning difficulties, which is often (but not exclusively) linked to lone actors. The need

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<sup>33</sup> Lord Anderson QC, Attacks in London and Manchester Independent Assessment of MI5 and Police Internal Reviews (December 2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/664682/Attacks\\_in\\_London\\_and\\_Manchester\\_Open\\_Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664682/Attacks_in_London_and_Manchester_Open_Report.pdf), at paragraph 3.43.

<sup>34</sup> See for example, Tinnes, J., Bibliography: 'Internet-Driven Right-Wing Terrorism' (2020) 14 Perspectives on Terrorism 168.

<sup>35</sup> Conway, M., 'Routing the Extreme Right' (2020) 165 RUSI Journal 108-113.

<sup>36</sup> Contest 3.0 at paragraph 46.

to avoid stigma and unfair generalisations is important, but the government has recognised that terrorists who act alone may be more likely to have a background that includes mental ill health and learning difficulties<sup>37</sup>.

- It is fair to say that CT Police and researchers have different perspectives on the prevalence and importance of mental health in terrorism offending. There is a significant literature tracking the potential link between mental ill health and fixations or violence<sup>38</sup> although a recent analysis of ERG 22+ assessments for the Ministry of Justice indicates a low presence of poor mental health in “extremist offenders”<sup>39</sup>.
- My own experience is that CT Police frequently identify poor mental health in those they arrest (which is the not the same as those ultimately convicted of terrorism offences): for example, I was informed by officers from one TACT suite that one particular arrest was the first in 18 months where there had been no mental health aspect. CT Police spend increasing amounts of time considering diagnosis or treatment for this cohort.

2.13. Individuals suffering from poor mental health or learning difficulties are often extremely isolated and may be particularly susceptible to online radicalisation. Because the internet can provide methodology such as instruction manuals as well as inspiration, social inhibitions which might prevent group membership no longer present a bar to action. Evidence suggests that Autism Spectrum Disorder is over-represented in lone-actor terrorist samples, compared to the general population<sup>40</sup>. Unpalatable though it may be, a large number of lone actor plots are believed by CT Police, rightly or wrongly, to involve individuals on the autistic spectrum.

2.14. Identifying whether an attack by a mentally disordered offender is a terrorist attack is complex. There are a number of killings, in particular stabbings, that are carried out by mentally disordered offenders at any one time (a volume that is far

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<sup>37</sup> Contest 3.0 at paragraph 117.

<sup>38</sup> For example, James, D.V. et al., ‘The role of mental disorder in attacks on European politicians’ 1990–2004 (2007) 116 *Acta Psychiatrica Scandanavica* 334, 341; Corner, E. et al, ‘Mental Disorders, Personality Traits, and Grievance-Fueled Targeted Violence: The Evidence Base and Implications for Research and Practice’ (2018) 100 *Journal of Personality Assessment* 459.

<sup>39</sup> Powis, B., Randhawa, K., & Bishopp, P., ‘The Structural Properties of the Extremism Risk Guidelines (ERG22+): A Structured Formulation Tool for Extremist Offenders’ (2019).

<sup>40</sup> Background to research project, Susceptibility to radicalisation in those with Autism Spectrum Disorder, University of Manchester (2019), [https://www.research.manchester.ac.uk/portal/en/projects/susceptibility-to-radicalisation-in-those-with-autism-spectrum-disorder\(00113b1e-6b96-4044-87e2-6c8bfde0208d\).html](https://www.research.manchester.ac.uk/portal/en/projects/susceptibility-to-radicalisation-in-those-with-autism-spectrum-disorder(00113b1e-6b96-4044-87e2-6c8bfde0208d).html).

fewer than the stabbings, usually gang-related, carried out by *non*-mentally disordered offenders). Some are ultimately found to be terrorism-related such as the stabbings at Manchester Victoria Station on New Year's Eve 2018<sup>41</sup>, whilst others such as the stabbings in the Arndale Centre in October 2019 are not<sup>42</sup>.

## Children

2.15. Fifthly, there is an increasing number of children arrested by CT Police. Similar questions regarding the depth of ideological attachment arise. CT Police and prosecutors must assess whether a plot is schoolboy fantasy or a desire for violence in the real world. Young people may be more likely to embrace non-traditional calls to violence.

2.16. The youngest terrorist offender was 14 at the time of his offence. He adopted an online persona and sent thousands of messages which inspired a violent extremist in Australia to prepare a beheading attack on the Anzac Day parade in 2015<sup>43</sup>. Known as RXG he was sentenced to detention for life for inciting terrorism overseas and in 2019 secured lifelong anonymity<sup>44</sup>. Cases from 2019 included:

- A 16-year old from Durham arrested in March 2019 and subsequently convicted of attack-planning for a race war, and other terrorism offences. Describing himself in his diary as a fascist, he noted that two years previously he had advocated “punk rock ideals and Marxism”. It was common ground that he suffered from autistic spectrum disorder<sup>45</sup>.
- A 16-year old boy from Bradford found guilty in May 2019 of possession of articles likely to be useful to a terrorist and an explosive substances offence. He was found with a non-viable device in his bedroom having previously been referred to Channel, a programme designed to divert people from extremist violence<sup>46</sup>.

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<sup>41</sup> <https://www.cps.gov.uk/cps/news/new-years-eve-manchester-station-knife-attacker-given-life-sentence>

<sup>42</sup> <https://www.bbc.co.uk/news/uk-england-50014205>.

<sup>43</sup> The Australian attacker was sentenced to 10 years for attack planning: Queen v Besim [2016] VSC 537.

<sup>44</sup> RXG v Ministry of Justice [2019] EWHC 2026 (QB).

<sup>45</sup> <https://www.bbc.co.uk/news/uk-england-tyne-51022706>.

<sup>46</sup> <https://www.bbc.co.uk/news/uk-england-leeds-49772780>;  
<https://www.thetelegraphandargus.co.uk/news/18143420.amp/>.

2.17. I am informed by the Counter-Terrorism Division of the Crown Prosecution Service that they are now charging “far more youths” than before, whilst the National Lead for Counter-Terrorism Policing has spoken of a real concern over the attraction of young and mid-teens towards violence found online, and the speed and depth of online relationships that can be used to incite and instruct<sup>47</sup>. The internet as entry point and enabler offers few barriers to the young, whilst a tendency towards rejection of society, absolutism, hero worship<sup>48</sup> and despair is a natural incident of late childhood which is not uncongenial to the terrorist recruiter and to self-radicalisation.

2.18. I consider the potential to manage terrorist risk posed by children but outside the criminal justice system in Chapter 8.

### ***Current Terrorism Classification***

#### *Islamist Terrorism and Northern Ireland-related Terrorism.*

2.19. These remain the predominant threats in Great Britain and Northern Ireland, respectively. Islamist Terrorism used to be described inappositely as International Counter-Terrorism (ICT)<sup>49</sup>. Northern Ireland-related Terrorism is still known by its acronym, NIRT.

#### *Right Wing Terrorism*

2.20. Acts that are now considered Right-Wing Terrorism used to fall within the broader terminological umbrella of “Domestic Extremism”, leading to the later descriptor Domestic Extremist Terrorism<sup>50</sup>. It is sometimes referred by the less than accurate acronym XRW (Extreme Right Wing).

2.21. CT Police subdivide Right-Wing Terrorism into violence carried out to advance the following causes: white supremacy (neo-Nazis), white nationalism (where white identity is at war with modern culture), and cultural nationalism (predominantly, anti-

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<sup>47</sup> Assistant Chief Constable Neil Basu speaking in Panorama, ‘Hunting the Neo Nazis’ (June 2020), <https://www.bbc.co.uk/iplayer/episode/m000k4x1/panorama-hunting-the-neonazis>.

<sup>48</sup> In particular of Elliot Rodgers (Incel-inspired shootings at Isla Vista, California in 2014) and Eric and Harris and Dylan Klebold (Columbine School shooters in 1999).

<sup>49</sup> Lord Anderson QC, Implementation Stocktake (2019) at 8.2 et seq.

<sup>50</sup> Implementation Stocktake, supra, at paragraph 8.5.

Islam)<sup>51</sup>. It is often motivated by 'siege culture', as articulated by the neo-Nazi James Mason in the 1980s, and the 'Great Replacement', a theory that white people are being replaced by non-white people<sup>52</sup>, as well as old fashioned Nazi dogma. Modern "esoteric Nazism" can present a strange mix of classical anti-Semitism and elements of the occult, in which extreme behaviours including viewing child sex abuse images are encouraged in order to desensitize followers who seek an "acceleration" of the final confrontation<sup>53</sup>.

2.22. The Christchurch attack in 2019 in New Zealand had a powerful galvanising effect on individuals involved in or tempted by Right Wing Terrorism. However, this is no homogenous grouping and encompasses divergent strands such as anti-state conspiracists and pro-state patriots.

### *Left Wing Terrorism*

2.23. LASIT stands for Left, Anarchist and Single Issue Terrorism and now falls within MI5's primacy<sup>54</sup>. In June 2019, CT Police carried out what was reported as an intelligence-led investigation into suspected left-wing terrorism<sup>55</sup>.

### *Anarchist Terrorism*

2.24. Anarchist terrorism is now associated with southern European states<sup>56</sup>. As a political attack on the rule of law, it can have much in common with Right-Wing and Left-Wing Terrorism.

### *Single Issue Terrorism*

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<sup>51</sup> In the United States, the acronym REMT is used for racially or ethnically motivated terrorism: <https://www.state.gov/reports/country-reports-on-terrorism-2019/>.

<sup>52</sup> TE-SAT, *supra*, at page 70. The originator of the theory is Renaud Camus, 'Le Grand Remplacement' (2011).

<sup>53</sup> As demonstrated by the case of the Durham teenager referred to above. <https://www.bbc.co.uk/news/uk-england-tyne-50397477>.

<sup>54</sup> <https://www.mi5.gov.uk/counter-terrorism>.

<sup>55</sup> <https://www.bbc.co.uk/news/uk-england-leeds-52963192>. Dominic Noble, who was reported to have had mental health problems, subsequently killed himself in prison, <https://www.leeds-live.co.uk/news/leeds-news/sister-terror-suspect-dominic-noble-18813872>.

<sup>56</sup> All left-wing and anarchist terrorist attacks for 2019 took place in Greece, Italy and Spain: TE-SAT, *supra*, at page 58.

2.25. The final component of LASIT, Single Issue Terrorism is used by CT Police as something of a catchall as it includes some ethnic or nationalist terrorism such as Sikh terrorism<sup>57</sup>, as well as fringe causes that are difficult to categorise.

2.26. Europol refer to single-issue extremist groups as using “criminal means to change a specific policy or practice, as opposed to replacing the entire political, social and economic system in a society. The groups within this category are concerned, for example, with animal rights, environmental protection or anti-abortion campaigns”<sup>58</sup>. When the Terrorism Act 2000 was enacted abortion campaigns traditionally associated with the United States were thought to be potential source of terrorist risk<sup>59</sup>.

### ***Other Potential Terrorist Causes***

2.27. Although there is no limit to the number of potential causes, the next section considers:

- two non-traditional causes: Incels, and those that motivate school-shootings.
- the phenomenon of Mixed, Unstable or Unclear ideologies.
- two areas that lurk beyond the boundaries of terrorism: hate crime and domestic extremism.

### ***Incels***

2.28. Incel stands for involuntary celibate. This form of self-identification dates back to a website founded in the 1990s as support for people who found it hard to obtain sexual experience. In its modern form the incel worldview is grounded in two ineluctably intertwined beliefs: society is a hierarchy where one’s place is determined mostly by physical characteristics, and women are the primary culprits for this hierarchy<sup>60</sup>; it has an engrossing iconography, is strongly nostalgic and its adherents refer to “taking the black pill”. The risk is that sexual frustration is leveraged into violence. The most famous attack was carried out by Elliot Rodger near the campus

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<sup>57</sup> The catch-all nature of this categorisation should not obscure the fact that ethnic or nationalist terrorism is responsible for many terrorist deaths worldwide.

<sup>58</sup> TE-SAT, *supra*, at page 80.

<sup>59</sup> Legislation Against Terrorism, Cm 1478 (1998) at paragraph 3.12.

<sup>60</sup> Hoffman, B., Ware, J. & Shapiro, E. (2020) ‘Assessing the Threat of Incel Violence’, *Studies in Conflict & Terrorism*, 43:7, 565-587.

of University of California, Santa Barbara in 2014. After he killed 6 people and himself a manifesto called “My Twisted World” came to light, in which he called for revenge attacks against women<sup>61</sup>. This attack was glorified on Facebook by Alek Minassian, who was on the autistic spectrum, shortly before he killed 10 people in Toronto, Canada<sup>62</sup> and Scott Beirle who killed two women at a yoga studio in Florida<sup>63</sup>.

2.29. In 2019 the arrest of Anwar Driouich raised the spectre of incel-inspired violence in the United Kingdom. Driouich had acquired a component of high explosives and seven terrorist manuals and was obsessed by terrorism and other mass casualty attacks. Although he had searched for materials about incels<sup>64</sup>, it was accepted by the police that he did not have any “terrorist mind-set”<sup>65</sup>.

2.30. Incel-inspired attacks are almost invariably carried out by lone actors, meaning that identification of the role placed by inceldom is complicated. In their study of the phenomenon, Hoffman, Ware and Shapiro identify: those who carry out violence with explicit political aims, acting as part of a broader militant community; those who espouse a mixture of influences including inceldom to frame their violence without perpetrating violence to further a political agenda; self-confessed incels whose violence is carried out for unrelated reasons; and those who seek to justify ex post facto as being incel-related.

2.31. Hostility based on gender is not confined to incels and is also strongly present in Right Wing Terrorist discourse<sup>66</sup>.

### *Columbine/ School Shootings*

2.32. Unlike the United States, the United Kingdom has no equivalent rollcall of school shootings. The dominant example is the shooting dead of 13 people at Columbine High School in Colorado in 1999 by two students, Eric Harris and Dylan Klebold. Their acts, weapons, and dress are the subject of fascination by online school shooting interest groups populated by ‘fans’<sup>67</sup>.

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<sup>61</sup> *Ibid.*

<sup>62</sup> <https://www.bbc.co.uk/news/world-us-canada-43892189>

<sup>63</sup> <https://www.theguardian.com/us-news/2018/nov/02/tallahassee-florida-yoga-shooting>.

<sup>64</sup> <https://www.bbc.co.uk/news/uk-england-tees-52071379>

<sup>65</sup> <https://www.counterterrorism.police.uk/middlesbrough-man-sentenced-for-explosives-and-terrorism-offences/>. He was sentenced to 20 months’ imprisonment.

<sup>66</sup> UN Counter-Terrorism Committee Executive Directorate, Trends Alert, April 2020, page 5.

<sup>67</sup> Raitanen, J. and Oksanen, A., ‘Deep Interest in School Shootings and Online Radicalisation’ (2019) 6 Journal of Threat Assessment and Management 159 – 22.



2.33. The reach of this fascination is not confined to the United States as demonstrated by the following violent plots in England:

- In 2018, two teenage boys who plotted a Columbine-style shooting in Northallerton, North Yorkshire, were convicted of conspiracy to murder. The shooting appears to have been motivated by a desire for personal revenge and a sense of being 'anti-heroes'. They were said to have idealised Eric Harris and Dylan Klebold<sup>68</sup>.
- In 2019 another teenager was sentenced to 19 years' imprisonment for attempting to possess firearms and ammunition with intention of carrying out a mass shooting under the banner "Gotterdammerung" (indicating downfall of the gods, or the end of time). He had carried out extensive research into Columbine and the Norway attacks by the Right Wing Terrorist Anders Breivik<sup>69</sup>.
- Also in 2019, a 21-year old was convicted of plotting a massacre at a football match in Workington, Cumbria. He "idolised' the Columbine shooters<sup>70</sup>. His case was not said to be motivated by terrorist but by "hatred and a desire for revenge"<sup>71</sup>.

2.34. As these examples demonstrate, Columbine and its perpetrators exercise a powerful pull towards emulation. The ideological component is less clear, appearing (superficially at least) to be a form of violent nihilism, although in practice individuals often have a strong identitarian attachment. It has something akin to the incel's revolution of the unhappy or "beta uprising".

#### *Mixed, Unstable or Unclear ideologies*

2.35. This is a category that was introduced into analysis of Prevent statistics in the year 2017-18 to describe a situation where "...the ideology presented is mixed (involving a combination of elements from multiple ideologies<sup>72</sup>), unstable (shifting between different ideologies), or unclear (where the individual does not present a coherent ideology, yet may still pose a terrorist risk<sup>73</sup>)". The creation of this new category was said to have been as a result of exploration and development of the

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<sup>68</sup> <https://www.bbc.co.uk/news/uk-england-york-north-yorkshire-44898341>.

<sup>69</sup> <https://www.cps.gov.uk/south-west/news/teenager-jailed-19-years-after-researching-mass-shooting>.

<sup>70</sup> <https://www.cps.gov.uk/cps/news/vengeful-loner-jailed-terrorism-plot-against-his-hometown>.

<sup>71</sup> <https://www.bbc.co.uk/news/uk-england-cumbria-48104347>.

<sup>72</sup> As in the Northallerton case, *supra*, in which the plotters employed far right-wing terminology such as cleansing the gene pool, in addition to referring to Columbine.

<sup>73</sup> In principle, this might have captured the case of the Unabomber, Ted Kaczynski, whose long and ill-defined manifesto against industrialisation and technology could hardly be described as coherent.

statistics, "...and a genuine increase in the number of cases presenting with these kinds of ideology." <sup>74</sup>.

2.36. Recent Prevent statistics indicate that of the 5,738 *referrals*, 1,404 individuals (24%) were referred for concerns related to Islamist radicalisation and 1,389 (24%) were referred for concerns related to right-wing radicalisation, but a total of 2,169 individuals (38%) were referred with a mixed, unstable or unclear ideology, of which the majority (1,252; 58%) had no concern identified following an initial assessment<sup>75</sup>. Very few of these referrals for a mixed, unstable or unclear ideology resulted in *adoption* by the Channel process<sup>76</sup>.

2.37. These statistics tend to demonstrate (i) that referring authorities are at least concerned about a significant number of people who do not fall within the traditional categories and either (ii) that on analysis their cases appear to be so unrelated to future terrorism that further work within PREVENT is not appropriate or (iii) there are limited tools available.

2.38. So far as investigators and prosecutors are concerned, this category might be thought to present a problem of proof: establishing that the defendant acted in order to advance a political or ideological cause appears more difficult where the ideology identified in the evidence is not a single ideology, or not constant, or incoherent.

### *Hate Crime*

2.39. This term can be used to describe a very wide range of criminal behaviour where the perpetrator either displays or is motivated by hostility towards the victim's disability, race, religion, sexual orientation or transgender identity<sup>77</sup>. These strands are covered by legislation which allows for a sentencing uplift for those convicted of a hate crime<sup>78</sup>. In the most severe cases, hate crime stands just below the terrorism

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<sup>74</sup> Prevent Statistical Bulletin 31/18 (December 2018)  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/763254/individuals-referred-supported-prevent-programme-apr2017-mar2018-hosb3118.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/763254/individuals-referred-supported-prevent-programme-apr2017-mar2018-hosb3118.pdf), at paragraph 2.7 and footnote 4.

<sup>75</sup> The remaining 776 individuals (14%) were referred for concerns related to other types of radicalisation:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/853646/individuals-referred-supported-prevent-programme-apr2018-mar2019-hosb3219.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853646/individuals-referred-supported-prevent-programme-apr2018-mar2019-hosb3219.pdf).

<sup>76</sup> *Ibid* at 11. Only 19 (3%) of adopted cases came from this category.

<sup>77</sup> CPS, Hate Crime, <https://www.cps.gov.uk/crime-info/hate-crime>.

<sup>78</sup> sections 28-32 of the Crime and Disorder Act 1998 and sections 145 and 146 of the Criminal Justice Act 2003.

threshold. In 2019 a British man was prosecuted for religiously aggravated assault for a vehicle-borne attacks on Muslim worshippers<sup>79</sup>, and an Iraqi man was prosecuted for attempted murder having stated that he wanted to “kill English people”<sup>80</sup> but neither case was treated as terrorism.

2.40. It is probably the case that certain conduct that was previously considered hate crime would today be prosecuted as terrorism, for example the case of David Copeland who described himself as a Nazi and set about bombing ethnic minority areas in Brixton and Brick Lane, and a gay pub in Soho<sup>81</sup>. Some have raised the risk that the race and religion of the attacker may influence the investigation and prosecution of suspected terrorists, with extreme right-wing violence “often underestimated or not considered to be terrorism”<sup>82</sup>. I have seen no indication that this is the case. Prosecutors speak of difficult decisions which are unlikely to please everybody. Distinguishing between individuals who are carrying out attacks purely out of hate, and individuals who carry out attacks in order to “advance a cause” is not easy.

#### *Domestic Extremism.*

2.41. Domestic extremism is an amorphous concept that in the past stretched from groups which currently pose no more than occasional public order concerns (such as animal rights, or anti-fracking protestors) to attack-planning by associates of the proscribed terrorist organisation National Action<sup>83</sup>. Now that Right Wing Terrorism and LASIT have been unpicked from the compound and added to MI5’s to do list, it covers a smaller set of activity.

2.42. In 2019, the Metropolitan Police Service provided the following definition:

*“Domestic extremism mainly refers to individuals or groups that carry out criminal acts of direct action in pursuit of a campaign.”*

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<sup>79</sup> <https://www.independent.co.uk/news/uk/crime/martin-stokes-cricklewood-crash-muslim-community-centre-jail-a8810556.html>.

<sup>80</sup> <https://www.standard.co.uk/news/crime/man-jailed-for-two-decades-after-saying-he-wanted-to-kill-english-people-before-going-on-rampage-a4214166.html>

<sup>81</sup> *R v Copeland* [2011] EWCA Crim 1711.

<sup>82</sup> UN Counter-Terrorism Committee Executive Directorate, Trends Alert, April 2020, page 5, [https://www.un.org/sc/ctc/wp-content/uploads/2020/04/CTED\\_Trends\\_Alert\\_Extreme\\_Right-Wing\\_Terrorism.pdf](https://www.un.org/sc/ctc/wp-content/uploads/2020/04/CTED_Trends_Alert_Extreme_Right-Wing_Terrorism.pdf).

<sup>83</sup> Lord Anderson QC, Implementation Stocktake, at paragraph 8.3.

*They usually aim to prevent something from happening or to change legislation or domestic policy, but try to do so outside of the normal democratic process. They are motivated by domestic causes other than the dispute over Northern Ireland's status.*<sup>84</sup>

2.43. Extremism may be a useful concept in other contexts, but it is not a basis for criminal liability, let alone treating someone as a terrorist. As the police found when 'Extinction Rebellion' was identified by CT Police in a leaflet concerned with safeguarding young people<sup>85</sup>, the risk of addressing 'domestic extremism' within the counter-terrorism machine is that the police could be accused of picking favoured and less favoured ideologies<sup>86</sup>.

### **Terrorist Causes**

2.44. Although the United Kingdom has obligations under international law to prevent and punish conduct that will often qualify as terrorism under domestic law, there is no internationally agreed definition of terrorism<sup>87</sup>.

2.45. To qualify as terrorism under section 1(1) Terrorism Act 2000, the use or threat of action must meet three cumulative criteria:

- The action must reach a certain level of seriousness. The level of seriousness is defined and includes serious violence against persons or serious damage to property<sup>88</sup> ('the first limb').

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<sup>84</sup> [https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/disclosure\\_2019/july\\_2019/specialist-operations---definition-of-domestic-extremism](https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/disclosure_2019/july_2019/specialist-operations---definition-of-domestic-extremism).

<sup>85</sup> Dodd, V. and Grierson, J., Terrorism police list Extinction Rebellion as extremist ideology (2020) The Guardian 10 January.

<sup>86</sup> Observations about different ideologies and the manner of policing were made by Jonathan Sumption, 'Government by decree: Covid-19 and the Constitution', Cambridge Freshfields Annual Law Lecture (2020), [https://resources.law.cam.ac.uk/privatelaw/Freshfields\\_Lecture\\_2020\\_Government\\_by\\_Decree.pdf](https://resources.law.cam.ac.uk/privatelaw/Freshfields_Lecture_2020_Government_by_Decree.pdf). Policing of political demonstrations is always likely to attract complaints of lack of even-handedness.

<sup>87</sup> *Al-Sirri v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening)* [2013] 1 AC 745, para 37.

<sup>88</sup> Section 1(2). This cannot be accidental; the defendant must either intend or be reckless as to these outcomes: *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6, <https://www.bailii.org/ew/cases/EWCA/Civ/2016/6.html>.

- the use or threat must have a particular target, namely influencing a government or an international governmental organisation or intimidating the public or a section of the public<sup>89</sup> ('the second limb').
- the use or threat must be made for the purpose of advancing a political, religious, racial or ideological cause<sup>90</sup> ('the third limb').

2.46. The scope of the third limb has widened over time. The first statutory definition in Northern Ireland-specific legislation concerned the use or threat of violence for political ends<sup>91</sup>. This was expanded under the Terrorism Act 2000 to encompass advancing a religious or ideological cause<sup>92</sup>, and under the Counter-Terrorism Act 2008, a racial cause<sup>93</sup>. Despite its width today, the absence of the words "or other" demonstrates that the set of causes is not unlimited. A conscious decision was taken not to include "social cause" (as found in a definition used by the FBI in the United States) on the grounds that it might draw in ordinary crimes where there was no intent to disrupt or undermine the democratic process<sup>94</sup>.

2.47. The terrorism definition as a whole has been the subject of analysis in the reports of previous Independent Reviewers<sup>95</sup>. Aside from Lord Carlile QC's recommendation that racial causes be included, there has been no other recommendation that the third limb should be altered<sup>96</sup>. Lord Anderson QC noted that at the very least the third limb served the function of narrowing down actions that would otherwise fall within the terrorism definition<sup>97</sup>. Although the Independent Reviewer's Australian counterpart, the Independent National Security Legislation

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<sup>89</sup> Not just the government or public of the United Kingdom see section 1(4)(c), (d). If firearms or explosives are used, there is no need to consider this criterion: section 1(3).

<sup>90</sup> This third criterion is sometimes referred to as purpose or motive.

<sup>91</sup> *Detention of Terrorists (Northern Ireland) Order 1972*. Her Majesty's Stationary Office, *Northern Ireland Statutes and Orders in Council having effect as such, 1972 (1973)* 682, Prevention of Terrorism (Temporary Provisions) Act 1974, section 9(1). I am very grateful to Professor Clive Walker QC, my senior special adviser, for many of the references in, and his thoughts on, this chapter.

<sup>92</sup> Terrorism Act 2000 section 1(1)(c) as originally enacted.

<sup>93</sup> Counter-Terrorism Act 2008 section 75.

<sup>94</sup> Legislation Against Terrorism, Consultation Paper, Cm 4178, at paragraph 3.16.

<sup>95</sup> Lord Carlile QC, The Definition of Terrorism, Cm7052. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228856/7052.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228856/7052.pdf). Lord Anderson QC, Terrorism Acts in 2011 report at Chapter 3; Terrorism Acts in 2012 report at Chapter 4; *Note on the definition of terrorism under the Terrorism Act 2000, section 1, in the light of the Salisbury incident*, annexed to Max Hill QC, Terrorism Acts in 2017.

<sup>96</sup> For Lord Anderson QC's criticisms of other aspects, see Terrorism Acts in 2012 report at 4.3 and 4.19.

<sup>97</sup> See in particular Terrorism Acts in 2012 report at 4.10 et seq, giving the example of a gangland stabbing designed to influence a rival gang's community. Absent the third limb, this would fall within the definition.

Monitor (INSLM), has previously been critical of the inclusion of a motive requirement<sup>98</sup>, and in particular one that refers to a religious cause:

- The width of the first two limbs is so broad<sup>99</sup>, as Lord Anderson QC has pointed out, that unless the scope of terrorism is narrowed by reference to a “cause” then ordinary criminal behaviour may be included.
- Reliance on “political cause” appears inapt for individuals pursuing a religious manifesto based on divine rather than worldly distinctions between believers and non-believers<sup>100</sup>.

2.48. On the other hand, as the INSLM has pointed out, states are not required by international law to make special provision for “causes”<sup>101</sup>. UN Security Council Resolution 1566, adopted under Chapter VII of the Charter of the United Nations Act 1945, calls on all states to prosecute or extradite terrorists and to take steps to ensure terrorism is prevented and punished. Although it expressly refers to considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, this is by way of requiring states to prevent certain violent actions irrespective of motive rather than to punish because of motive.

### *Scale and Groups*

2.49. Whether or not an action is made for the purpose of advancing a cause within the third limb does not depend on the cause being shared by a group of like-minded individuals, let alone that the cause should operate at a certain level of popularity. The Shorter Oxford English Dictionary defines “cause” as “That side of any question or controversy espoused *by a person* or party; a movement which inspires the efforts of its supporters” [emphasis added]. Unlike the statutory definition which governs certain insurance losses through acts of terrorism<sup>102</sup>, the Terrorism Act definition eschews reference to groups or organisations: organisations are a subset of those who may be concerned in terrorism<sup>103</sup>.

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<sup>98</sup> Walker, B., INSLM report 2012 at pages 115-6, [https://www.pmc.gov.au/sites/default/files/publications/INSLM\\_Annual\\_Report\\_20121220.pdf](https://www.pmc.gov.au/sites/default/files/publications/INSLM_Annual_Report_20121220.pdf).

<sup>99</sup> The relatively low threshold of seriousness and the fact that “public” includes a “section of the public”.

<sup>100</sup> Some have argued that the “political” is sufficiently wide in itself so that the other categories are superfluous, Terrorism Acts in 2012 at 4.14. This is to strain meaning of political too far.

<sup>101</sup> INSLM report 2012 at page 114.

<sup>102</sup> Reinsurance (Acts of Terrorism) Act 1993, section 2(2).

<sup>103</sup> Leading to their potential proscription under section 3(4).

2.50. On the other hand, the fact that an individual operates as part of a group may indicate that a counter-terrorism response is justified. Prior to the enactment of the Terrorism Act 2000, the government observed that such exceptional powers "...are used only as and when the security situation warrants them" and questioned whether the current or probable future threat from "domestic terrorism" could "...be said to be such that special powers are needed to deal with it"<sup>104</sup>. The tipping-point at which a counter-terrorist response may be required is sometimes referred to as the point that the threat amounts to a "national security threat":

"Beyond the extreme right-wing threat, there are a number of other groups and individuals that carry out criminal acts to achieve political goals. They may be motivated by animal rights, the extreme left-wing or environmental issues. None of these groups are currently assessed as posing a *national security threat*, but there remains the possibility that may change, and that a counter-terrorism response could be required in the future."<sup>105</sup> [emphasis added].

2.51. The "national security" threshold creates far too many imponderables. National security is not defined in statute, and risks circularity: for example, the national security strategy for 2010 made it one of the government's priorities to tackle terrorism<sup>106</sup>. Moreover, in Northern Ireland (as I report in Chapter 9), national security is not a threshold for terrorism but a recognition that resources must be focussed on certain groups (identifiable as "national security terrorists" as opposed to other sorts of terrorists). Be that as it may, implicit is the recognition that counter-terrorism powers should be exercised with self-restraint. Whilst certain activities may, strictly speaking, satisfy the terrorism definition, ordinary law enforcement powers may suffice.

2.52. Moving from investigative action to prosecution, a common cause, especially one that is shared in writing or through the use of images, is likely to be easier to prove under the third limb of the terrorism definition. Where a cause is entirely private it may be difficult to exclude the possibility that the true motivation was personal and emotional rather than political or ideological.

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<sup>104</sup> Legislation against Terrorism, Cm 4178 (1998) at paragraph 3.7.

<sup>105</sup> Contest 3.0, at paragraph 63.

<sup>106</sup> A Strong Britain in an Age of Uncertainty (2010), Cm 7953, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61936/national-security-strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/61936/national-security-strategy.pdf).

2.53. Contemporary use of counter-terrorism powers is of course directed to lone actors as much as members of groups<sup>107</sup>. Vincent Fuller was convicted of attempting to murder a bystander near Heathrow Airport on the day after the Christchurch massacre in March 2019<sup>108</sup>. The trial judge found that this offence had a terrorist connection, observing that "It is immaterial that there is no evidence that you were a member of, or subscribed to, to any particular group or organisation...In my judgement a terrorist-related offence may be committed by a person acting alone, on his own initiative, and without any significant planning"<sup>109</sup>. The decision to investigate and prosecute this as terrorism, rather than hate crime, may be explained by two factors:

- Firstly, despite not being a member of any group, it was apparent that Fuller had some adherence to a pre-existing and readily identifiable body of beliefs, as demonstrated by his praise of the Christchurch killer and white supremacists.
- Secondly, the body of beliefs to which Fuller had some adherence are a major factor in the growing phenomenon described as Right-Wing Terrorism. So even though he was a lone actor, and however idiosyncratic his beliefs, Fuller's actions may be seen as part of a wider violent movement. He differs from Lord Carlile QC's example of a "lone, violent and eccentric campaigner against the use of electricity"<sup>110</sup>.

2.54. Even if individuals act alone, the prior consumption by them of inspirational texts, memes, videos and images that have been posted by others, suggests that the word "lone actor" is not entirely apposite. This is particularly so where online communities form mutually supportive networks, however diffuse and ill-defined<sup>111</sup>.

### *Coherence and depth*

2.55. The third limb does not require that the "cause" being advanced has any particular degree of coherence or pedigree or has lodged, in the mind of the suspected terrorist, for any specific period of time.

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<sup>107</sup> For a US perspective, Hoffman, B., Clarke, C., 'The Next American Terrorist: Growing Irrelevance of Organizational Structure for US Domestic Terrorism', The Cipher Brief (2 July 2020), <https://www.thecipherbrief.com/the-next-american-terrorist>.

<sup>108</sup> <https://www.cps.gov.uk/cps/news/anti-muslim-supporter-new-zealand-mosque-killer-jailed-attempted-murder>.

<sup>109</sup> <https://www.bbc.co.uk/news/uk-england-surrey-49652977>.

<sup>110</sup> The Definition of Terrorism, supra, at paragraph 15.

<sup>111</sup> Schuurman, B. et al, 'End of the Lone Wolf: The Typology that Should Not Have Been' (2019) 42 *Studies in Conflict & Terrorism* 771.



2.56. This is less a problem for investigators than for prosecutors. Because investigative powers generally operate at a level of suspicion, it will generally be possible for CT Police to investigate incels or school shooters, for example, in order to establish or rule out a cause associated with Right Wing Terrorism. For prosecutors, the challenge is to establish beyond reasonable doubt that the action was done to advance an ideological cause rather than for some purely personal or emotional reason<sup>112</sup>. In school shooter cases, for example, the planned massacre may be characterised as an extreme form of revenge on despised teachers or classmates.

2.57. But terrorism is not just committed by ideological experts, and a sense of perspective is required<sup>113</sup>. The possibility (if not the likelihood) that there are some purely personal motivations at work in any case of contemplated violence does not exclude it from the ambit of terrorism<sup>114</sup>. The extremity of the violence contemplated, as in the school shooting example, may itself demonstrate an intention to advance a cause which goes well beyond the merely personal. An intention to disseminate online, and the deliberate imitation of aspects of earlier killings (for example, by emulating the clothing worn by the Columbine two<sup>115</sup>), may also reveal that the killings are intended to be symbolic, carry a wider significance, and therefore serve to advance some form of cause.

2.58. The third limb is satisfied where the use or threat is made for the purpose of *advancing* an ideological cause, but the precise types of advancement are not limited. In his seminal article 'Terrorism and the Uses of Terrorism'<sup>116</sup> Professor Jeremy Waldron identifies seven modes of terrorism other than the coercive ("Do this, or I'll explode a bomb") which include:

- "propaganda of the deed", i.e. violence intended to attract publicity to a cause.
- Violence designed to bring about a transformation in the mentality or attitude of the targeted population.

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<sup>112</sup> INSLM, 2012, *supra* at paragraphs 118-120.

<sup>113</sup> Holbrook, D. and Horgan, J. 'Terrorism and Ideology: Cracking the Nut', 13 Perspectives on Terrorism 6 (December 2019)

<sup>114</sup> The State Coroner of New South Wales was therefore, with respect, right to conclude in the *Inquest into the deaths arising from the Lindt Cafe Siege*, (Findings and Recommendations State Coroner of New South Wales, May 2017) at page 239 (paragraph 74) that "...the fact that [the attacker] may have been driven in part by personal reasons does not mean he was not a terrorist". I am grateful to Jessie Smith for drawing this investigation to my attention.

<sup>115</sup> White J., 'Terrorism and the Mass Media', RUSI (May 2020) draws attention to the effect of mass media on "social contagion" or "mimetic" forms of violence.

<sup>116</sup> Journal of Ethics 8: 5-35 (2004).

- violence intended to cause a state "show its true colours" by provoking a reaction.

2.59. To these modes of advancement can be added violence that is designed to prepare the ground; for example, violence that is intended to desensitize or groom volunteers for a final confrontation such as a racial showdown or struggle between believers and non-believers<sup>117</sup>. By hastening the collapse of society and social structures by sowing chaos and creating political tension – sometimes referred to as “accelerationism”<sup>118</sup> – the despicable truth about society can be revealed and confronted. One of the most frequent ideas on the far right concerns the taking of the “red pill”<sup>119</sup> (or in inceldom, the “black pill”), a recognition of the sinister powers at work in society and the need to open one’s eyes to them. The sinister powers may be exercised by Jews, or Muslims or very often, in a bridge between traditional Right Wing Terrorism and inceldom, women<sup>120</sup>.

2.60. No matter if the precise contours of the future ideal society are sketchy or diverse<sup>121</sup> or even contradictory, the cause of collapsing the old and corrupt system is a powerful attractor to violence. An individual who uses or threatens violence of sufficient seriousness in pursuit of such a cause, and does so to intimidate a section of the public, is likely to satisfy the third limb of the Terrorism Act definition.

- Even if the *ideology* which led to them espousing the need for social collapse is mixed, unstable or unclear, their violence may therefore serve to advance an *ideological cause*.
- If it were otherwise, a person who carried out a symbolic killing in order to accelerate a final confrontation but who was confused about precisely why that final confrontation was necessary, would fall outside the definition of terrorism.
- The definition does not require the authorities to identify a group of ideas that may be said to form an “ideology”, a label that superficially at least might suggest a degree of internal coherence<sup>122</sup>. The issue in the statutory definition

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<sup>117</sup> As in “esoteric Nazism”. ‘Seige’, a tract by the neo-Nazi James Mason is deeply influential on the need for terrorist acts to provoke a race war and downfall of the global political system.

<sup>118</sup> CTED Trends Alert, United Nations (July 2020), at page 3.

<sup>119</sup> Taken from the film, *The Matrix*, Warner Brothers (1999).

<sup>120</sup> CTED Trends Alert, United Nations (April 2020), at page 5.

<sup>121</sup> For example, a purely white society versus an ethnically mixed but culturally pure society.

<sup>122</sup> Superficially, because ideological appears together with political, religious and racial in section 1(1)(c) Terrorism Act 2000. None of these other species of cause appears to demand a particular degree of internal logic or consistency.

is whether the person is advancing an ideological (or political, or religious, or racial) *cause*.

2.61. Professor Hoffman concluded that violence committed by the more extreme fringes of the incel community should be considered within the concept of terrorism because of a clear overarching narrative whereby the outgroup (women) oppresses the ingroup (incels) until order is restored by means of radical overthrow<sup>123</sup>. The overall ideological cause is apparent. The Canadian authorities have recently charged an incel-inspired knife attack in Toronto in February 2020 with terrorism offences<sup>124</sup>. The statutory definition in the Terrorism Act 2000 is no less inclusive.

### *Controlling Factors and Touchstones*

2.62. The Terrorism Act definition is sufficiently broad to capture modern phenomena such as incel violence. But the breadth of the definition has its drawbacks. The following factors – at least – are in play when considering whether the use or threat or violence should be classified as terrorism.

- Firstly, suspected terrorism unlocks the powerful investigative tools available to CT Police, such as arrest and detention under section 41 and Schedule 8 Terrorism Act 2000, and provides access to the powers and assets of the intelligence agencies.
- Secondly, if a jury can be satisfied of criminal charges, terrorism legislation penalises a broader range of behaviour (for example, preparatory acts<sup>125</sup>) and results in heavier penalties and greater intervention following release<sup>126</sup>.
- Thirdly, wide executive powers become available to the Secretary of State such as Terrorism Prevention and Investigation Measures and proscription of terrorist groups.
- Fourthly, use of terrorism legislation in this way may effectively bear down on the social harm caused by the use of threat of violence which would otherwise curtail normal activities, heighten suspicion, promote prejudice and do incalculable harm to community relations, with the authorities being perceived as powerless to act<sup>127</sup>.

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<sup>123</sup> Hoffman et al, *supra*.

<sup>124</sup> <https://www.cbc.ca/news/canada/toronto/incel-canada-terrorism-1.5577015>.

<sup>125</sup> Section 5 Terrorism Act 2006.

<sup>126</sup> Terrorism notification under Part 4 Counter-Terrorism Act 2008.

<sup>127</sup> Some of the reasons why protection against terrorism is necessary; Lord Anderson QC, 'A Question of Trust' (June 2015), <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf> at paragraph 3.8.

- Fifthly, and conversely, actions on or near the margins of lawful debate could become unfairly stigmatised as terrorism, clamping down on basic freedoms all together or creating a climate of fear of the authorities by people outside the political or social mainstream<sup>128</sup>.
- Sixthly, an overambitious use of terrorism legislation could go beyond what society at large understood as “terrorism”, so that the public might come to wonder whether harsher measures were being deployed than were really warranted. This might be reflected in a jury refusing to convict.
- Seventhly, traditional labelling of whether something is or is not terrorism may conceal inequalities in treatment of equally harmful phenomena<sup>129</sup>.
- Eighthly, classifying more actions as terrorism may increase the general sense of insecurity in the population, as acts which were previously dealt with under the general criminal law are given huge and demoralising coverage as “terrorist attacks”.
- Ninthly, it may lead to a diversion of resources from more significant terrorist threats or from general policing, and towards treating current social problems in terms of their security implications.
- Tenthly, ideologies and actions may be rocketed into greater prominence and risk being glamourised<sup>130</sup>.

2.63. Despite its critics, the Terrorism Act definition is, as Lord Carlile QC concluded over a decade ago, ‘practical and effective’<sup>131</sup> and later ‘useful and broadly fit for purpose.’<sup>132</sup> I refer to the importance of classifying something as terrorism because I

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<sup>128</sup> Blocking of websites as “extremist” by the Russian authorities were found to be unjustified in *Vladimir Kharitonov v. Russia* (application no. 10795/14), *OOO Flavus and Others v. Russia* (application nos 12468/15, 23489/15, and 19074/16), *Bulgakov v. Russia* (no. 20159/15), and *Engels v. Russia* (no. 61919/16).

<sup>129</sup> Freeman, H., *Guardian* (27 May 2014),

<https://www.theguardian.com/commentisfree/2014/may/27/elliott-rodger-was-misogynist-killing-spree>.

But, as J.M.Berger points out, these problems are not solved by reflexively categorizing all public violence as terrorism, nor by demanding that the term be applied to the actions of a particular identity group when it does not fit the criteria: ‘The Difference between a Killer and a Terrorist’, *The Atlantic* (26 April 2018) <https://www.theatlantic.com/politics/archive/2018/04/the-difference-between-killer-and-terrorist/558998/>.

<sup>130</sup> As a “badge of honour”: Lord Carlile QC, ‘The Definition of Terrorism’, *supra*, at 33-34.

<sup>131</sup> Lord Carlile QC, *Report on the operation in 2004 of the Terrorism Act 2000*, (Report, Independent Reviewer of Terrorism Legislation, United Kingdom, 2004) at 28; Lord Carlile QC, *Report on the operation in 2005 of the Terrorism Act 2000*, (Report, Independent Reviewer of Terrorism Legislation, United Kingdom, 2005) at 32.

<sup>132</sup> Lord Carlile QC, ‘The Definition of Terrorism’, *supra*, (n 10) 47.

accept that the search for a tighter definition of terrorism, one that would use the clarity of statutory drafting to fence off certain behaviours in the interests of greater legal certainty<sup>133</sup>, only gets more difficult as one appreciates the richness and complexity of modern violent behaviour<sup>134</sup>. The onus must therefore be on how the terrorism definition is applied.

2.64. As to *who* applies the definition, in practice this is CT Police or PSNI, advised by its lawyers and by specialist prosecutors within the Crown Prosecution Service, and MI5, advised by its lawyers. I detect no rush to overclassify behaviour as terrorism, and a proper sensitivity that self-restraint is a virtue. CT Police have in practice sought to construct a matrix to guide them as to when terrorist powers might be appropriate judged by the nature of the activity being investigated, and its potential outcome, or scale of threatened harm. As I have already suggested, the main definitional challenges arise when prosecuting, rather than investigating.

2.65. In the case of both investigators and prosecutors an incremental approach is likely, and desirable. External demands for deviant behaviours to be recognised as terrorism should be resisted, and a decision to treat something as terrorism should never be paraded as a sign of strength or virtue. The use of terrorism powers is better considered as a necessary but regrettable response to behaviour when ordinary criminal law and processes are insufficient.

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<sup>133</sup> Zedner, L., 'Terrorizing Criminal Law', *Crim Law and Philos* (2014) 8:99-121 (2014); *R v Gul* [2013] UKSC 64, paras 26, 36 ; Martin Scheinin, *Promotion and Protection of Human Rights* (E/CN.4/2006/98, 28 December 2005) paragraphs 37, 50. The difficulty with hard borders, as opposed to flexibility, is that exceptional events may prompt a hunt for technical exceptions: McKinnon, A., 'Counterterrorism and Checks and Balances: the Spanish and American Examples' (2018) *NYU Law Review* Vol 82:602

<sup>134</sup> Waldron, J., 'Terrorism and the Uses of Terrorism', *Journal of Ethics* 8: 5-35 (2004).

### 3. TERRORIST GROUPS

#### Introduction

3.1. Proscription, an executive decision by the Home Secretary to ban an organisation and place it on a list of proscribed organisations<sup>135</sup>, has both a practical and a symbolic aspect<sup>136</sup>. In a mature scheme of counter-terrorism legislation, some form of banning measure is inevitable and desirable in order to bear down on the terrorist threat emanating from identified organisations committed to violence and to meet international obligations.

#### Direct Effect

3.2. The practical effect of proscription is at its most visible and direct where the proscribed group operates in the United Kingdom, leading, for example to the prosecution of individuals on account of their expressions of support for a particular cause whilst present in the United Kingdom. Sections 11 to 13 Terrorism Act 2000 outlaw membership of, and expressions or displays of support for, banned organisations..

3.3. In May 2019 PKK flag-wavers who had demonstrated outside Broadcasting House in Central London were convicted on appeal to the Crown Court. The Partiya Karkeren Kurdistani, a Kurdish separatist movement, has been a proscribed organisation since 2001. In a subsequent legal challenge, the Divisional Court found that section 13 Terrorism Act 2000 creates an offence of strict liability and therefore did not require the prosecution to prove that the flag-waver knew or intended that others might suspect that he was a member or supporter of the banned group<sup>137</sup>.

- One reason given was the importance of giving "practical effect" to proscription<sup>138</sup>, necessitating a clear outright ban on the symbol without needing to consider the intention of the person charged with displaying it.
- The Supreme Court has given permission to appeal this decision: on the issues of strict liability and on the issue of freedom of expression (Article 10 ECHR).

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<sup>135</sup> Under section 3 Terrorism Act 2000. The proscribed groups list is published at <https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2>.

<sup>136</sup> The mechanics of proscription are described in Terrorism Acts in 2018 at 3.1 to 3.10.

<sup>137</sup> *Pwr and others v DPP* [2020] EWHC 798 (Admin) <https://www.judiciary.uk/wp-content/uploads/2020/04/Pwr-judgment-approved-final-as-handed-down-on-03-04-20-002.pdf>.

<sup>138</sup> At paragraph 52.

- In 2016 the Court of Appeal declined to accept that there a clear distinction between support that incited violence and support that did not<sup>139</sup>.
- Assuming that the interest in deterring involvement in proscribed organisations is a sufficient public good to justify interfering with otherwise lawful activities<sup>140</sup>, this puts significant weight on the original and *continuing* decision to proscribe. This is relevant to keeping the proscription list up to date (see below, where I refer to the question of deproscription).

3.4. Since April 2019, this offence can be prosecuted in the United Kingdom if committed overseas by a British national or resident<sup>141</sup>, an extension of extra-territorial jurisdiction introduced, according to the government, in order to deal with British nationals or residents who have joined proscribed organisations overseas who “reach back to individuals in the UK via the internet, seeking to build support for that organisations”<sup>142</sup>, but with wider potential application.

3.5. The potency of proscription in criminal proceedings is not limited to membership and flag offences. As a result of the deeming provision in section 1(5) Terrorism Act 2000,

*"In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation"*

Any funding for the benefit of a proscribed group therefore risks prosecution for terrorist funding contrary to section 17 Terrorism Act 2000, which prohibits funding arrangements with knowledge or reasonable cause to suspect that money or property will or may be used “for the purposes of terrorism”. The offence may be committed without the defendant actually suspecting that the funding is intended for a particular group, a point confirmed by the Supreme Court in the case of the parents of the Da'esh recruit Jack Letts<sup>143</sup> who were both convicted of this offence in 2019<sup>144</sup>.

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<sup>139</sup> *R v Chaudhary and Rahman* [2016] EWCA Crim 61 at paragraph 89.

<sup>140</sup> *Sheldrake v Director of Public Prosecutions, Attorney General's Reference (No 4 of 2002)* [2005] 1 AC 264 at paragraph 54.

<sup>141</sup> Section 17(2)(ca) Terrorism Act 2006 as amended by the Counter-Terrorism and Border Security Act 2019.

<sup>142</sup> Hansard (HL) vol 796, col 307 (28 February 2019), Baroness Williams of Trafford (Security Minister), [https://hansard.parliament.uk/Lords/2019-02-28/debates/E661F0BE-B640-4241-853F-1C788818B7CC/TerrorismAct2000\(ProscribedOrganisations\)\(Amendment\)Order2019](https://hansard.parliament.uk/Lords/2019-02-28/debates/E661F0BE-B640-4241-853F-1C788818B7CC/TerrorismAct2000(ProscribedOrganisations)(Amendment)Order2019).

<sup>143</sup> *R v Lane and Betts* [2018] UKSC 36, <https://www.supremecourt.uk/cases/docs/uksc-2017-0080-judgment.pdf>.

<sup>144</sup> <https://www.cps.gov.uk/cps/news/sally-lane-and-john-letts-sentenced-sending-money-daesh-supporting-son>.

3.6. Most strikingly, this deeming provision applies to the most serious terrorism offences under the Terrorism Act 2006, such as communication (sections 1 and 2), attack-planning (section 5) and training offences (sections 6 and 8)<sup>145</sup>.

3.7. During 2018, the most prominent effect of proscription in the Great Britain was the prosecution of individuals for membership of the Right Wing Terrorist group National Action, which had been proscribed two years previously.

- The prosecutions arose out of investigations by West Midlands Counter Terrorism Unit<sup>146</sup> and the North West Counter Terrorism Unit<sup>147</sup>. National Action member Jack Renshaw was also sentenced to life imprisonment in May 2019 for plotting to murder his Member of Parliament, Rosie Cooper MP for West Lancashire as an intended blow against a “Jewish-controlled state”<sup>148</sup>.
- Since National Action’s proscription, a total 21 individuals have been charged with terrorism offences arising out of their involvement in it, leading to the convictions of 17 individuals (of which 15 were convicted of proscription offences)<sup>149</sup>.
- By 2019, the prosecutions against National Action had concluded. In fact no further charges for any membership offences in relation to any proscribed group were brought in Great Britain in 2019<sup>150</sup>.

3.8. In Northern Ireland, in 2018, between 9-11 people were charged with proscription offences in Northern Ireland. I have not been provided with statistics for the calendar year 2019.

3.9. Proscription has also underpinned the use in 2019 of Terrorism Prevention and Investigation Measures (TPIMs) against members of the proscribed organisation Al Muhajiroun. The relevance of proscription to the use of TPIMs is that the gateway to TPIMs is proof of “terrorism-related activity”, which once again may be demonstrated

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<sup>145</sup> Terrorism Acts in 2018 at 3.29.

<sup>146</sup> Deakin and others, Operation Sacae, Nathan Pryke and others, Op Daystreak; Alice Cutter and others, Op Cyclor: CPS Press Briefing Note, February 2019.

<sup>147</sup> Jack Renshaw and others, Op Harplike.

<sup>148</sup> <https://www.cps.gov.uk/cps/news/life-sentence-white-supremacist-mp-murder-plot>.

<sup>149</sup> Source: Home Office, Office of Security and Counter-Terrorism.

<sup>150</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - C.02, quarterly update to December 2019.



by acting “for the benefit of a proscribed organisation”<sup>151</sup>. I report further on the use of TPIMs against Al Muhajiroun in Chapter 8.

3.10. A less visible but still practical effect of proscription<sup>152</sup> is its relevance to persuading overseas internet service providers to take down material generated by such groups. Given their constitutional free speech guarantees, proscription makes a request for takedown more credible when dealing with US communication service providers<sup>153</sup>.

### **Symbolic Effect**

3.11. This mostly arises when the group operates overseas and where the case for proscription is driven, in the words of the fifth discretionary factor used by the Secretary of State when deciding whether to ban a terrorist group, by “the need to support other members of the international community in the global fight against terrorism”<sup>154</sup>.

- Proscription of groups that have limited operation in the United Kingdom is a way of supporting allies but is open to the charge that inclusion on the proscription list says more about the United Kingdom's international relationships than the operational need to bear down on a particular group<sup>155</sup>.
- Natural reticence over diplomatic relationships means that the government is unlikely to indicate when support for allies is the predominant reason for proscription, making it difficult for Parliament to scrutinise proscription measures brought forward for affirmative resolution. For example, no direct connection with the United Kingdom was publicly asserted for the banning of two Egyptian and two

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<sup>151</sup> Terrorism Acts in 2018 at 3.34.

<sup>152</sup> For a full list of the direct and indirect “proscription footprint” see Terrorism Acts in 2018 at 3.16 to 3.45.

<sup>153</sup> This is particularly difficult where dealing with US domestic groups: see Molstad, M., ‘Our Inner Demons: Prosecuting Domestic Terrorism’, 61 B.C.L. Rev. 339 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss1/8>. For a clear explanation of the complexities of the law on US domestic extremism, see McCord, M., ‘It’s Time for Congress to Make Domestic Terrorism a Federal Crime’, 5 December 2018, <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime>.

<sup>154</sup> Terrorism Acts in 2018 at 3.4.

<sup>155</sup> Referring to US measures, Meserole, C. and Byman, D, ‘Terrorist Definitions and Designations Lists’, RUSI (2019) suggest that international banning measures could be driven by nakedly political considerations such as arms sales: [https://rusi.org/sites/default/files/20190722\\_grntt\\_paper\\_07\\_final.pdf](https://rusi.org/sites/default/files/20190722_grntt_paper_07_final.pdf).

Bahraini based groups in 2017 but ministers declined to say whether the basis was a threat posed to the United Kingdom or international support or both<sup>156</sup>.

### **Proscription Orders in 2019**

3.12. The following three organisations were proscribed by the Home Secretary in March 2019<sup>157</sup>.

3.13. Firstly, Ansaroul Islam<sup>158</sup>. According to the Home Office, Ansaroul Islam's overarching aim is to establish dominance over the historic Fulani kingdom of Djelgoodji (northern Burkina Faso and central Mali) and the implementation of its own strict Salafi Sharia. The group announced its existence on 16 December 2016 and claimed responsibility for an attack on an army outpost in Nassoumboa (Burkina Faso) which killed at least 12 soldiers

3.14. Secondly, Jamaat Nusrat al-Islam Wal-Muslimin (JNIM)<sup>159</sup>. The Home Office states that JNIM was established in March 2017, as a federation of various Al Qa'ida-aligned groups in Mali. JNIM's area of operations encompasses northern and central Mali, northern Burkina Faso and western Niger (the western Sahel region).

3.15. Thirdly, the political wing of Hizballah. Hizballah's External Security Organisation has been proscribed since 2001. The proscription was extended in 2008 to include the entirety of Hizballah's military apparatus, namely the Jihad Council and all the units reporting to it. The most recent extension was based, according to the Home Secretary, on the basis that "we are no longer able to distinguish between their already banned military wing and the political party"<sup>160</sup>.

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<sup>156</sup> Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2017 No.1325. See Almutawa, A., and Walker, C., 'Proscription by Proxy: The banning of foreign groups' (pending 2021) Public Law.

<sup>157</sup> The Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2019/406, for reasons given in the consolidated list of proscribed organisations, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/849493/20191101\\_Proscription\\_SG\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/849493/20191101_Proscription_SG_.pdf).

<sup>158</sup> Also known as Ansar ul Islam and Ansaroul Islam Lil Irchad Wal Jihad.

<sup>159</sup> Also known as Jamaat Nusrat al-Islam Wal- Muslimin (JNIM), Nusrat al-Islam, Nusrat al-Islam wal Muslimeen (NIM), including Ansar al- Dine (AAD), Macina Liberation Front (MLF), al-Murabitun, al-Qa'ida in the Maghreb and az- Zallaqa.

<sup>160</sup> <https://www.gov.uk/government/news/hizballah-to-be-banned-alongside-other-terrorist-organisations>.

3.16. These proscriptions were approved in both Houses of Parliament, with the debate in the Lords indicating a striking degree of consensus on the making of proscription orders<sup>161</sup>.

### **Alias Names Orders in 2019**

3.17. Orders recognising alternative names for existing proscribed groups were made with effect from February 2019<sup>162</sup> in relation to a Marxist-Leninist group operating in Turkey, the Revolutionary People's Liberation Party - Front (Devrimci Halk Kurtulus Partisi - Cephesi)<sup>163</sup>, and in relation to Da'esh<sup>164</sup>.

### **Deproscription in 2019**

3.18. In November 2019 the Libyan Islamic Fighting Group became only the fourth proscribed group to be removed from the list using the power under section 3(3)(b) Terrorism Act 2000<sup>165</sup>. An application was made in January 2019 which was considered to have satisfied the relevant statutory criterion under section 4 (an application may be made by the organisation or any person affected by the group's proscription) despite the group being assessed to be "defunct" and no longer existing<sup>166</sup>. I referred to the importance of this statutory criterion last year, in connection with the failed application by Northern Irish proscribed organisation the Red Hand Commando<sup>167</sup>.

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<sup>161</sup> Lord Rosser, speaking for the Opposition, stated that, "Ever since the Terrorism Act 2000, no proscription order brought forward by any Government has been opposed by the official Opposition, and that is not about to change", Hansard (HL) vol 796, col 310,

[https://hansard.parliament.uk/Lords/2019-02-28/debates/E661F0BE-B640-4241-853F-1C788818B7CC/TerrorismAct2000\(ProscribedOrganisations\)\(Amendment\)Order2019](https://hansard.parliament.uk/Lords/2019-02-28/debates/E661F0BE-B640-4241-853F-1C788818B7CC/TerrorismAct2000(ProscribedOrganisations)(Amendment)Order2019).

<sup>162</sup> The Proscribed Organisations (Name Change) Order 2019, 2019/329, [https://www.legislation.gov.uk/ukxi/2019/329/pdfs/ukxi\\_20190329\\_en.pdf](https://www.legislation.gov.uk/ukxi/2019/329/pdfs/ukxi_20190329_en.pdf).

<sup>163</sup> Recognising the alias names, "Revolutionary People's Liberation Front (DHKC)", "Revolutionary People's Liberation Party (DHKP)", and "Revolutionary People's Liberation Front/Armed Propaganda Units (DHKC/SPB)". Professor Walker QC has pointed out an apparent typographical error in the statutory instrument namely that the name specified in paragraph (2)(a) differs from the name in paragraph (1) by virtue of the placement of the apostrophe in the second word.

<sup>164</sup> Recognising the alias names, "Jaysh Khalid Bin Walid (JKbW) (JKW)" "Jaysh Khalid bin al-Walid (KBW)" and "Khalid ibn- Walid Army (KBWA)".

<sup>165</sup> The Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 2) Order 2019, <https://www.legislation.gov.uk/ukxi/2019/1446/made>.

<sup>166</sup> Explanatory Memorandum to Order, [https://www.legislation.gov.uk/ukxi/2019/1446/pdfs/ukxiem\\_20191446\\_en.pdf](https://www.legislation.gov.uk/ukxi/2019/1446/pdfs/ukxiem_20191446_en.pdf).

<sup>167</sup> Terrorism Acts in 2018 at 3.56.

3.19. In recent years members of the Libyan Islamic Fighting Group had been prosecuted for terrorism offences<sup>168</sup>, made subject to control orders<sup>169</sup>, and been party to high profile civil litigation against the government<sup>170</sup>. The opposition opposed its deproscription in Committee, citing lack of information<sup>171</sup>.

3.20. Another group which applied for deproscription was Liberation Tigers of Tamil Elam (LTTE). Its application by letter in November 2018 was refused in March 2019<sup>172</sup>. Its appeal against its continuing proscription was determined by the Proscribed Organisations Appeal Commission (POAC) in 2020.

3.21. Last year I recommended that proscription orders should be made to lapse automatically after 3 years, as currently occurs in Australia<sup>173</sup>, unless positively renewed. This recommendation was rejected by the government, as have all similar recommendations by my predecessors. However, the judgment of POAC in the LTTE case, which found that the Home Secretary's decision was flawed<sup>174</sup>, reinforces my view that the current situation is imperfect.

- POAC found that the decision was flawed because the views of the Proscription Review Group, a meeting of officials<sup>175</sup> which considered the case for and against continuing proscription, were materially misstated in the Submission put to the Home Secretary<sup>176</sup>.

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<sup>168</sup> *R v IK, AB and KA* [2007] EWCA Crim 971

<sup>169</sup> For example, *AF*, whose case established the principle that a minimum amount of disclosure must be given in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 (10 June 2009), [www.bailii.org/uk/cases/UKHL/2009/28.html](http://www.bailii.org/uk/cases/UKHL/2009/28.html).

<sup>170</sup> *Belhaj and others v Rt Hon Jack Straw and others* [2017] UKSC 3; *Kamoka and others v the Security Service and others* [2019] EWHC 290 (QB).

<sup>171</sup> Hansard (HC) Fourth Delegated Legislation Committee (31 October 2019).

[https://hansard.parliament.uk/Commons/2019-10-31/debates/5d7a34bf-1a9e-4a5e-bc90-923e35501b1d/DraftTerrorismAct2000\(ProscribedOrganisations\)\(Amendment\)\(No2\)Order2019](https://hansard.parliament.uk/Commons/2019-10-31/debates/5d7a34bf-1a9e-4a5e-bc90-923e35501b1d/DraftTerrorismAct2000(ProscribedOrganisations)(Amendment)(No2)Order2019).

<sup>172</sup> The European Court of Justice had earlier confirmed the delisting of the LTTE because the process had not taken account of its military defeat in 2009: *KP* Case C458/15, 20 June 2019.

<sup>173</sup> Under section 102.1 of the Criminal Code. In 2019 the listing of Jamiat ul-Ansar lapsed because the Australian government concluded that there was currently insufficient contemporaneous information from classified and open sources to demonstrate that Jamiat ul-Ansar satisfied the legislative criteria: report of Parliamentary Joint Committee on Intelligence and Security (August 2019, Canberra) at paragraph 3.53,

[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024300/toc\\_pdf/ReviewofthelistingandredelistingofsixorganisationsasterroristorganisationsundertheCriminalCode.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024300/toc_pdf/ReviewofthelistingandredelistingofsixorganisationsasterroristorganisationsundertheCriminalCode.pdf;fileType=application%2Fpdf).

<sup>174</sup> *Arumagam and others v Secretary of State for the Home Department* PC/04/2019.

<sup>175</sup> Chaired by the Home Office but including officials from the Foreign and Commonwealth Office and the Joint Terrorism Assessment Centre.

<sup>176</sup> *Arumagam, supra*, at paragraph 115.

- The impression created by the judgment is that officials, particularly Home Office and intelligence officials, had to carry out an assessment of the intelligence and the discretionary factors, and assemble a submission, from a relatively standing start<sup>177</sup>. Following the deproscription application dated 27 November 2018, the Secretary of State had until early March to respond<sup>178</sup>. The Joint Terrorism Assessment Centre and Proscription Review Group were both was informed of the application on 19 December 2018<sup>179</sup>. A submission was put to the Home Secretary on 22 February 2019<sup>180</sup>.
- This impression ought not to arise because, as POAC noted twice in its judgment, the Secretary of State is under a continuing duty, whether or not there is a deproscription application, to consider from time to time whether an organisation should stay on the banned list<sup>181</sup>. This is what POAC had said in 2007<sup>182</sup>.
- In fact, the government has not carried out periodic reviews since 2014<sup>183</sup>. The government has stated that the Secretary of State would give consideration to deproscription of a group "if new information casts doubt on whether proscription remains appropriate", even if no application was submitted<sup>184</sup>. I doubt this is an effective substitute: the lapse of the threat posed by an organisation is unlikely to come in the form of positive information which is enough to grab the attention of officials.
- The case does not reflect well on the proscription regime. Proscription is such a powerful tool that the response to any application for deproscription ought to be done seamlessly. It is impossible to avoid the impression that the quality of decision-making would have been better if the government had fully recognised its continuing duty to keep all proscriptions under periodic review.

## Flexibility

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<sup>177</sup> There had been previous applications for deproscription, the most recent in 2014: *Arumagam, supra*, at paragraph 24.

<sup>178</sup> Paragraph 26.

<sup>179</sup> Paragraphs 27, 29.

<sup>180</sup> Paragraph 54.

<sup>181</sup> Paragraphs 19, 103.

<sup>182</sup> *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 69-73.

<sup>183</sup> Terrorism Acts in 2018 at 3.50.

<sup>184</sup> <https://www.gov.uk/government/publications/response-to-the-operation-of-the-terrorism-acts-in-2018-report/review-of-the-operation-of-the-terrorism-acts-in-2018-accessible-version>.

- 3.22. The proscription power is sufficiently flexible to ban organizations whose existence is greater online than in the real world<sup>185</sup>. Ever since the addition in 2006 of unlawful glorification of terrorism as a ground for proscription<sup>186</sup>, an activity that is particularly conducive to online activity, the entire threat posed by a group may be online<sup>187</sup>.
- 3.23. Divergent views are expressed by CT Police and officials about the virtues of banning online groups. On one view it is a ‘whack-a-mole’ strategy that is bound to be defeated by nimble re-naming, anonymity and the use of persona, leading to a never-ending increase in the list of proscribed organisations. On the other hand, it can be time-consuming for online brands to build up presence in a crowded market, so making it difficult for terrorist groups to use a particular website or identity can yield significant disruption.
- 3.24. The power to proscribe under section 3 Terrorism Act 2000 is directed at organisations not individuals but this does not require a formal command and control structure since, by section 121, “*Organisation’ includes any association or combination of persons.*”
- 3.25. Indeed, the reality of criminal groups, including terrorist groups, is that formal structures may not exist<sup>188</sup>. The application of the word “organisation” to more diverse groupings such as internet forums (such a 4chan), or ideological movements (such as incelism, discussed in Chapter 2), is untested, as is the question of whether an organisation can exist without at least some identifiable members. However, proscription under the Terrorism Act 2000 is ultimately directed at organisations; it is not a means of banning online *content* that is not otherwise unlawful<sup>189</sup>.

## **Aid Agencies**

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<sup>185</sup> I will consider the banning of the Right Wing Terrorist groups Sonnenkrieg Division and Feuerkrieg Division in 2020 in next year’s report.

<sup>186</sup> By section 21 Terrorism Act 2006.

<sup>187</sup> As in the case of the Global Islamic Media Front, an Al Aa’ida-associated propaganda group banned in 2016; The Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No.2) Order 2016, no.770, <https://www.legislation.gov.uk/uksi/2016/770/made>.

<sup>188</sup> *R v Ahmed* [2011] EWCA Crim 184 at paragraph 87.

<sup>189</sup> I discuss the potential criminalisation of ‘terrorist propoganda’ in Chapter 7.

3.26. Last year I drew attention to the burden placed by counter-terrorism legislation on aid agencies operating in difficult areas of the world<sup>190</sup>, as well as the phenomenon of bank de-risking<sup>191</sup>. The following hypothetical scenarios have been provided to me which illustrate the risk that aid agencies run of committing terrorist funding offences contrary to sections 15 to 18 Terrorism Act 2000:

- a proscribed group may establish a monopoly on the supply of key project inputs such as fuel, either directly or through proxy companies linked to it.
- a proscribed group charges a fee for access to a geographic area that it controls.
- proscribed groups may levy specific fees for access to camps for internally displaced persons that they control;
- governing institutions linked to a proscribed group could levy fees or taxes for essential services, e.g. provision of electricity, water, waste collection etc. in areas it controls.
- beneficiary groups receiving humanitarian aid could include individuals who are known or suspected to be affiliated with a proscribed group.
- Aid agencies may have little option, if they are able to reach certain at risk populations, but to run programmes in collaboration with governing institutions, in which senior individuals have links to proscribed groups. An example would be delivering a health programme in hospitals under the control of a government official who is connected to a proscribed group, or which is directly controlled by a proscribed group.
- Non-governmental organisations may end up covering the travel and subsistence costs of participants, who are or suspected to be involved in proscribed groups, in peace-building initiatives aimed at negotiating an end to violent conduct.

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<sup>190</sup> Terrorism Acts in 2018 at 3.43 to 3.44.

<sup>191</sup> <https://www.civilsociety.co.uk/news/some-muslim-charities-could-close-after-bank-changes-says-mcf-boss.html>. A prudent and rational decision to close a customer's account does not require proof of wrongdoing: *N v RBS* [2019] EWHC 1770 (Comm).

3.27. A real example arises from the operation of the Bab Al-Hawa crossing between Turkey and Syria. In December 2018 the Charity Commission issued an alert<sup>192</sup> for charities seeking to bring aid through this crossing to Idlib province in Syria. This was because of reporting that the crossing was under the control of Hay'at Tahir Al-Sham (HTS), an alternative name for Al Qa'ida<sup>193</sup>. Drawing attention to section 17 Terrorism Act 2000, the Charity Commission noted,

*“There is a risk that HTS could incur financial benefit from any aid passing through the Bab Al-Hawa crossing and therefore charities and their partners, using this crossing, may be inadvertently funding HTS.”*

3.28. Recent research indicates that aid activity in a particular area may increase hostile activity by terrorists<sup>194</sup>, and it would be naïve not to recognise the potential for harm that may inadvertently result from the availability of aid monies to proscribed groups. However, it would be equally naïve not to recognise that aid agencies must operate in the most testing circumstances. I recommended last year that prosecutorial guidance should be published on the use of proscription offences (including funding offences) against aid agencies operating overseas. I am pleased that the Attorney General has written to the Director of Public Prosecutions, inviting him to consider issuing prosecutorial guidance, and I look forward to reporting on the progress of any guidance next year.

3.29. The Tri-Sector Working Group<sup>195</sup> has continued to meet, has acquired a small secretariat, and provides a unique forum for dialogue between government and the aid sector. I have been briefed on its current workstreams which include scoping out the possible use of section 21ZA Terrorism Act 2000 (defence against terrorist financing offences based on consent) by aid agencies. I am pleased to report that one

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<sup>192</sup> <https://www.gov.uk/government/news/alert-for-charities-operating-in-syria-or-turkey-about-aid-passing-through-the-bab-al-hawa-crossing>.

<sup>193</sup> The Proscribed Organisations (Name Change) Order 2017 No.615.

<sup>194</sup> Nemeth, S.C. and Mauslein, J.A., 'Generosity Is a Dangerous Game: Aid Allocation and the Risks of Terrorism' (2020) 32 *Terrorism and Political Violence* 382.

<sup>195</sup> Terrorism Acts in 2018 at 3.70. The Group is referred to in 'National risk assessment of money laundering and terrorist financing 2020' (published by HM Treasury and the Home Office) at paragraph 2.65,

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/945411/NRA\\_2020\\_v1.2\\_FOR\\_PUBLICATION.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945411/NRA_2020_v1.2_FOR_PUBLICATION.pdf).



tangible outcome has been achieved<sup>196</sup> but greater progress towards other tangible outcomes is required.

3.30. The issues undoubtedly require attention, public commitment and coordination at the highest political level between government departments whose policy objectives may suffer cross currents: on the one hand, seeking to bear down on the risks of terrorism and on the other hand ensuring that aid agencies (to which the government is a major funder) can operate effectively in risky environments. During 2019, UN Security Council noted for the first time<sup>197</sup> in resolutions adopted under Chapter VII the risk that counter-terrorist financing and counter-terrorism measures might impede “exclusively humanitarian activities” and urged states when designing and implementing such measures to take into account the potential impact of those measures<sup>198</sup>.

3.31. I do not doubt that the government recognises this imperative. For example, section 12 Terrorism Act 2000 makes it an offence among other things to arrange, manage, or assist in arranging or managing a meeting which the defendant knows is to be addressed by a person who belongs or professes to belong to a proscribed organisation.

- A defence is available for those who can prove that they had no reasonable cause to believe that the address would support a proscribed organisation or further its activities<sup>199</sup> which, according to the Explanatory Notes, “is intended to permit the arranging of genuinely benign meetings”<sup>200</sup>.
- In a “For Information Note”<sup>201</sup> published jointly by the Home Office and the Office of Financial Sanctions Implementation at HM Treasury, the government has stated that, “...A ‘genuinely benign’ meeting is interpreted as a meeting at which the terrorist activities of the group are not promoted or encouraged, for example, a meeting designed to encourage a designated group to engage in

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<sup>196</sup> Securing amendment to the Department for International Trade’s published guidance on the humanitarian exceptions to Syrian fuel purchases, <https://www.gov.uk/guidance/sanctions-on-syria#crude-oil-and-petroleum-products>.

<sup>197</sup> McKeever, D., ‘International Humanitarian Law and counterterrorism: fundamental values, conflicting obligations’ (2020) 69 *International and Comparative Law Quarterly* 43

<sup>198</sup> S/RES/2462 (2019), paragraph 6 and S/RES/2462 (2019), paragraph 24.

<sup>199</sup> Section 12(4).

<sup>200</sup> <https://www.legislation.gov.uk/ukpga/2000/11/notes/division/4/2/6>.

<sup>201</sup> <https://www.gov.uk/government/publications/operating-within-counter-terrorism-legislation/for-information-note-operating-within-counter-terrorism-legislation>, updated April 2019.

a peace process or facilitate delivery of humanitarian aid where this does not involve knowingly transferring assets to a proscribed organisation.”

- That same passage has recently been incorporated into the Home Office’s consolidated list of Proscribed Terrorism Organisations<sup>202</sup>.
- During the debate in the House of Lords on the proscription of Hezbollah the government went further. The Security Minister stating<sup>203</sup> that, “...in any event, it is not illegal to hold a meeting with a proscribed organisation that is benign or for a legitimate purpose. It is only attending or organising a meeting intended to support or further the activities of the organisation that, as noble Lords would expect, is unlawful.”

3.32. This is a welcome acknowledgment that certainty and comfort can and should be given to aid agencies operating in this field. But in my view the government needs to go further. Taking the example of section 21ZA, the National Crime Agency will decide in any given case whether consent should be given to an aid agency to proceed in the types of scenarios I have identified above. The work of the Tri Sector working group is likely to be inhibited, and may be conducted on an unrealistic basis, in the absence of understanding whether, when push comes to shove, the NCA might be prepared to give consent.

3.33. The difficulty of such a decision, bearing in mind the different public interests at stake, is not to be doubted. If section 21ZA is not, in practice, a viable option it is better to know; if it is viable in certain situations but not others, then again it is better to know. The practical operation of terrorism legislation would be clearer, and it would be open to Parliament to consider amendments, if it thought appropriate, to provide greater protection to aid agencies in the same way that recent terrorism legislation does<sup>204</sup>. If section 21ZA is viable in some circumstances, it ought to be possible to formulate public guidance on the factors that are likely to be most relevant.

3.34. I accept that any decision on whether ultimately to grant consent must be considered by the NCA on a case-by-case basis, and in real not hypothetical

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<sup>202</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/901434/20200717\\_Proscription.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901434/20200717_Proscription.pdf).

<sup>203</sup> Hansard (HL) vol 796, col 325 (28 February 2019), Baroness Williams, [https://hansard.parliament.uk/Lords/2019-02-28/debates/E661F0BE-B640-4241-853F-1C788818B7CC/TerrorismAct2000\(ProscribedOrganisations\)\(Amendment\)Order2019](https://hansard.parliament.uk/Lords/2019-02-28/debates/E661F0BE-B640-4241-853F-1C788818B7CC/TerrorismAct2000(ProscribedOrganisations)(Amendment)Order2019)

<sup>204</sup> Those exclusively providing aid of a humanitarian nature are excluded from the ambit of the designated area offence, section 58B Terrorism Act 2000, created by the Counter-Terrorism and Border Security Act 2019.

circumstances. However, the situations listed above at 3.26 are tangible enough to allow progress to be made if the right officials are sufficiently engaged. This includes both the Home Office officials and National Crime Agency officers who would, if a section 21AZ request for consent was made, be responsible for considering the matter and consulting as appropriate with ministers. I therefore **recommend** that Home Office officials and National Crime Agency officers should meet with aid agencies within the Tri Sector Working Group to consider (and 'workshop') the situations identified at 3.26 with a view to formulating guidance on the use of section 21ZA in connection with humanitarian assistance.

## **4. INVESTIGATING TERRORISM**

### **Introduction**

4.1. This chapter is concerned with the investigative powers conferred by the Terrorism Act 2000 and other counter-terrorism legislation. The majority of these powers are used by specialist police to investigate leads which may have been identified by CT Police or passed on by MI5. Some, like cordons and stop and search powers, are more responsive and may be exercised in the wake of a terrorist incident or where an individual suddenly raises suspicions.

### **Stop and Search**

4.2. In summary, the stop and search powers under the Terrorism Act 2000 are:

- 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.
- 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.
- Section 47A, a no-suspicion power that can only be used in extremely limited circumstances.

### **Section 43 and 43A**

#### ***London***

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

4.4. In 2018, 643 persons were stopped and searched in London under section 43. In the year under review, 663 persons were stopped and searched<sup>205</sup>. This represents an increase of 3%. There were 65 arrests made following a section 43 stop and search,

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<sup>205</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - S.01, quarterly update to December 2019.

up from 57 in 2018 (a 14% increase)<sup>206</sup>. The arrest rate increased by one percentage point on the previous year, with 10% of stops resulting in an arrest. It is important to bear in mind that arrests following terrorism stops are more likely to be for general criminal matters such as possession of drugs than arrests for terrorism offences, but this does not in itself indicate that the stop power is being misused.

4.5. The self-defined ethnicity of those stopped under section 43 in London since 2010 is as follows<sup>207</sup>:

<b>Year</b>	<b>White</b>	<b>Asian</b>	<b>Black</b>	<b>Chinese/Other</b>	<b>Mixed/not stated</b>	<b>Total</b>
<b>2010</b>	43%	30%	11%	7%	9%	999
<b>2011</b>	35%	37%	9%	8%	11%	1052
<b>2012</b>	39%	31%	12%	7%	11%	614
<b>2013</b>	34%	32%	14%	9%	10%	491
<b>2014</b>	41%	22%	12%	9%	16%	394
<b>2015</b>	30%	27%	13%	10%	21%	521
<b>2016</b>	29%	27%	11%	12%	21%	482
<b>2017</b>	30%	27%	14%	7%	22%	776
<b>2018</b>	25%	26%	16%	13%	19%	643
<b>2019</b>	29%	23%	11%	10%	27%	663

4.6. There was therefore an increase in stops of those people who identified themselves as “White” in the latest year, and a greater number of stops where the ethnicity was not stated. In addition, there was a reduction in stops of people who self-identified as “Asian”.

### ***Northern Ireland***

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<sup>206</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - S.01, quarterly update to December 2019.

<sup>207</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - S.02, quarterly update to December 2019.

4.7. In Northern Ireland in 2019<sup>208</sup>:

- 26 people were stopped and searched under section 43 of the Terrorism Act 2000, down from 41 in the previous year.
- A further 4 were stopped under section 43A, up from 2 in the previous year.
- 8 people were stopped under sections 43 and 43A (9 were stopped in 2018), and 5 under sections 43/43A in combination with the special security powers available in Northern Ireland under the Justice and Security (Northern Ireland) Act 2007. By far the most stops in Northern Ireland are under this Act<sup>209</sup>.

4.8. Unlike in Great Britain, data on the ethnicity of those stopped is not published in Northern Ireland. Nor, yet, is data on the 'community background' of those stopped and searched. A recent decision of the Court of Appeal of Northern Ireland means that the PSNI have an obligation to carry out some form of monitoring the community background of those stopped under Justice and Security (Northern Ireland) Act 2007 powers. I consider this issue in the context of the use of Terrorism Act powers in Chapter 9.

### ***Other forces***

4.9. Data for the other forces in Great Britain is not published.

### **Section 47A**

4.10. Section 47A confers a power upon an officer of assistant chief constable rank to grant authority for suspicion-less stops and searches in a specified area in limited circumstances. It is infrequently used and is most likely to be deployed in the wake of a terrorist incident or in response to threat information which might exceptionally justify random stops and searches of members of the public in a particular area.

4.11. The first use of this power in the United Kingdom was in Northern Ireland in 2013. The only other uses were in various locations in England in September 2017, in each case subsequent to the raising of the United Kingdom threat level to Critical

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<sup>208</sup> Calendar year data provided by Police Service of Northern Ireland. Regrettably the PSNI no longer provide data by quarter.

<sup>209</sup> See further Chapter 9.

following the Parson's Green attack in London<sup>210</sup>. In the year under review, there were no section 47A authorisations.

4.12. In last year's report I recommended 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 requires revision. The government has agreed that further guidance is appropriate, and I look forward to reporting on the guidance in next year's report.

### **Cordons**

4.13. 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 person to leave cordoned areas, and prohibit pedestrian or vehicle access, and it is an offence to fail to comply with such a requirement.

4.14. Statistics for cordons are reported by financial year for both Great Britain and Northern Ireland<sup>211</sup>:

<b>Police force</b>	<b>2018/19</b>	<b>2019/20</b>
Avon & Somerset	-	-
Cheshire	-	-
Cumbria	-	-
Dyfed-Powys	-	-
Gloucestershire	-	-
Greater Manchester	2	5
Lancashire	2	2
Leicestershire	-	-
City of London	-	1

<sup>210</sup> Terrorism Acts in 2018 at 4.10 to 4.18.

<sup>211</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - S.04, quarterly update to March 2020 and Police Service of Northern Ireland, *Policing Recorded Security Situation Statistics Northern Ireland*, table 5.

Merseyside	2	-
Metropolitan Police Service	9	1
North Yorkshire	-	-
Nottinghamshire	-	-
South Wales	-	-
Thames Valley	-	-
West Midlands	-	-
<b>England and Wales</b>	<b>15</b>	<b>9</b>
<b>British Transport Police</b>	-	-
<b>Scotland</b>	-	-
<b>Northern Ireland</b>	<b>12</b>	<b>15</b>
<b>United Kingdom</b>	<b>27</b>	<b>24</b>

4.15. I am pleased that the government has agreed with my recommendation in last year's annual report that the power to authorise searches of premises within cordons should only be exercised in urgent cases, and that it will look to amend the legislation at the next available opportunity.

### **Terrorism Powers and Modern Technology**

4.16. The special investigative powers contained in the Terrorism Act 2000, and the general investigative powers in the Police and Criminal Evidence Act 1984 ('PACE') that are heavily used by CT Police, were created before the era of all pervasive and phenomenally powerful modern technology. The government's counter-terrorism strategy CONTEST 3.0 correctly identifies that this technology creates both dangers and opportunities<sup>212</sup>.

- On the risk side, terrorists are better able to spread their message, recruit followers, and coordinate their activities<sup>213</sup>. But the effect of technology is also more unpredictable, based on the sheer volume and variety of violent ideologies coursing through the internet, together with the means (explosives manuals, knife

<sup>212</sup> Cm 9608 (June 2018), at paragraph 78.

<sup>213</sup> Mahmood, R. and Jetter, M., 'Communications Technology and Terrorism' (2019) Journal of Conflict Resolution.



techniques and the like) for carrying these out, which may inspire or enable a lone actor to move from fantasy to attack.

- On the opportunities side, technical possibilities abound and vast amounts of data are potentially available to sift for clues and build evidence, subject always to the difficulties of encryption that I consider further below.

4.17. The starting point for any law on investigatory powers is the right to respect for private life, home and communications and the right to protection of personal data. As Lord Anderson QC noted in his review of the Intelligence Agencies' ability to access bulk data, these legal rights are sometimes expressed in terms of the right to be let alone, the right to conceal information about ourselves or the right to control our own affairs. They enable the expression of individuality, facilitate trust, friendship and intimacy, help secure other human rights and empower the individual against the state<sup>214</sup>. But as technology develops, there is the need "...for the law to keep up, both in the interests of national security and the protection of the public, and in the interests of the civil liberties of individuals".<sup>215</sup>

4.18. These points are no less valid where it is not highly sophisticated technical operations being conducted by GCHQ but simply CT Police entering premises and seizing devices. What has changed is not the exercise of the power to seize, but the extent of data which is available. In Chapter 6 I refer to the use of Schedule 7 Terrorism Act to download the contents of mobile phones as people travel through ports and borders and the extent to which this allows CT Police to peer into the lives of individuals. The same considerations apply where mobile phones and personal computers are uplifted during searches under Schedule 5 Terrorism Act 2000, or on compliance searches under the Counter-Terrorism Act 2008 or the Terrorism Prevention and Investigation Act 2011<sup>216</sup>.

4.19. Senior Investigator Officers in CT Police can now turn to special digital advisers on practical issues. The current statutory framework has not kept pace with developments, leading the Law Commission to recommend a wide review of the powers of search, production and seizure in respect of electronic material<sup>217</sup>. It is not simply the fact that

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<sup>214</sup> Lord Anderson QC, Bulk Powers Review Final Report (2016) at paragraph 9.1, <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/08/Bulk-Powers-Review-final-report.pdf>.

<sup>215</sup> *R (Liberty) v Secretary of State for the Home Department and another* [2019] EWHC 2057 (Admin) at 200.

<sup>216</sup> Under paragraph 8 Schedule 5 TPIM Act 2011; the 2008 Act relates to released terrorist offenders subject to notification provisions, see *Terrorism Acts in 2018* at 7.58.

<sup>217</sup> *Search Warrants*, Law Com No 396, HC 852, at paragraph 18.101.

current legislation does not deal neatly with scenarios such as access to cloud material. A more fundamental flaw is the mismatch between statutes that speak of searching people or places, and seizing things that are found, and the fact that modern data analysis does not involve reading the contents of a phone from start to finish as if they were pages in a diary. The old conceptual framework may risk overstating the degree of actual privacy invasion involved, because the actual amount of data viewed by humans following selection for examination may be minimal<sup>218</sup>. Set against this consideration is the potential for much more data to be examined and the risk that more sensitive information will be located or deduced.

4.20. A more suitable statutory framework, which would apply equally to non-terrorism matters, would (i) be device neutral (ii) be location neutral in the case of remotely stored data<sup>219</sup> (iii) provide appropriate safeguards governing investigative steps *after* seizure<sup>220</sup>.

4.21. Encryption is a constant challenge to CT Police. Despite advances in decryption, there remains the possibility that in the near future some terrorism investigations will be defeated by suspects withholding passwords, meaning that police cannot obtain access to electronic evidence of attack planning or terrorist publications. Contemporary terrorists are more tech-savvy than their predecessors and technical ability is seen as a badge of honour particularly amongst Right Wing Terrorists.

4.22. The two clear<sup>221</sup> powers that are available to CT Police are: section 49 Regulation of Investigatory Powers Act 2000 and Schedule 7 Terrorism Act 2000. Under Schedule 7 members of the travelling public may be required to produce passwords (or their equivalent) for mobile phones during the course of examination, and failure to do so is not infrequently prosecuted as a breach of the duty to comply with such examinations

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<sup>218</sup> In the context of bulk acquisition, the stages are collection, filtering (effectively filtering out) and selection for examination (where analysts form a judgment as to what data is actually worth considering): Bulk Powers Report, *supra*, at 2.14.

<sup>219</sup> Subject to whether the data were accessible from the seized device, or not.

<sup>220</sup> According to a recent High Court judgment, Article 8 has not gone so far as to require prior judicial or independent authorisation of selectors or search criteria: *R (Liberty) v Secretary of State for the Home Department*, *supra*, at 140. Hence, arguably, the need for greater clarity in statute as to what investigators are permitted to do. For example, the Investigatory Powers Act 2016 provides safeguards relating to the examination of data.

<sup>221</sup> In its report on Search Warrants, *supra*, The Law Commission draws attention to the power under section 19(4) PACE to compel the production of information stored in electronic form which is accessible from the premises searched. At best this is of marginal utility as the Law Commission identify at paragraphs 18.57 to 18.64; they recommend that the power to compel passwords in this context should be made clearer and more effective, paragraph 16.222.

with a maximum penalty of 3 months imprisonment<sup>222</sup>. I say no more about the use of this power which is limited to ports and certain border areas<sup>223</sup>.

4.23. The section 49 power is available to a number of authorities in addition to the police and Secretary of State, and is not limited to terrorism, although a failure to comply with a notice produced under section 49 in a "national security case" risks an elevated maximum five-year sentence<sup>224</sup>. Use of section 49 power is subject to a bespoke Code of Practice<sup>225</sup>.

4.24. The section 49 power can be best described as a lock with many levers. In summary form,

- The encrypted thing must first of all come lawfully into the possession of the authorities<sup>226</sup>;
- Secondly, no notice may be given to any person requiring production of a key without first obtaining the appropriate permission, which may be judicial or senior but internal<sup>227</sup>.
- Thirdly, that permission can only be granted if the National Technical Assistance Centre (NTAC), a unit of GCHQ,<sup>228</sup> first gives prior written advice<sup>229</sup>.
- Fourthly, the notice is only effective once it is given to the individual, who may not be the person from whom the encrypted thing has been obtained. It may only be given if the imposition of a disclosure requirement satisfies a number of statutory tests including, "...that it is not reasonably practicable for the person with the appropriate permission to obtain possession of the protected information in an intelligible form without the giving of a notice under this section"<sup>230</sup>.

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<sup>222</sup> For example, *R v Adam Ephraim*, CPS website, <https://www.cps.gov.uk/crime-info/terrorism/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-2016>.

<sup>223</sup> Schedule 7 is covered in Chapter 6.

<sup>224</sup> Section 53(5A) Regulation of Investigatory Powers Act 2000.

<sup>225</sup> Investigation of Protected Electronic Information Code of Practice (August 2018), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/742064/RIPA\\_Part\\_III\\_Code\\_of\\_Practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742064/RIPA_Part_III_Code_of_Practice.pdf).

<sup>226</sup> Section 49(1).

<sup>227</sup> Section 49(2).

<sup>228</sup> <https://www.gchq.gov.uk/information/national-technical-assistance-centre>.

<sup>229</sup> Code, para 3.10.

<sup>230</sup> Section 49(2)(d).

- Finally, any prosecution of a person for knowingly failing to comply can only be brought if the Crown Prosecution Service considers that the evidential and public interest tests are met.

4.25. The majority of reported authorities that refer to the use of section 49 do not concern terrorism but child sex abuse investigations<sup>231</sup>, computer misuse<sup>232</sup>, drug-dealing<sup>233</sup>, gang-related violence<sup>234</sup>, firearms<sup>235</sup>, and fraud and money-laundering<sup>236</sup>. The leading case in the terrorism context concerns defendants who had been charged with planning to assist another to abscond from a control order and other terrorism offences. After being charged, section 49 notices were administered in relation to computers seized on arrest. The case concerns the privilege against self-incrimination, and the Court of Appeal rejected the proposition that the defendants' privilege against self-incrimination meant that no prosecution for failing to comply with the notices should proceed<sup>237</sup>.

4.26. I have been unable to obtain any statistics for the use of the power in the context of terrorism investigations. However, what I have picked up anecdotally from a number of different sources, is that the use of section 49 by CT Police is likely to be rare indeed<sup>238</sup>. Prior to 2017, use of section 49 was overseen by the Office of Surveillance Commissioners (OSC) whose reports deal with the power briefly and show that since 2010-11, the number of approvals granted by NTAC ranged from 26 (2010-11) to 159 (2016-17)<sup>239</sup>. It is now overseen by the Investigatory Powers Commissioner's Office (IPCO) which recorded that 106 approvals were granted by NTAC in 2017<sup>240</sup>, and 66 in 2018<sup>241</sup>.

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<sup>231</sup> *Greater Manchester Police v Andrews* [2011] EWHC 1966 (Admin); *R v Cutler (Barry George)* [2011] EWCA Crim 2781; *R v Southwell* [2012] EWCA Crim 2882; *R v Howe* [2009] EWCA Crim 2707

<sup>232</sup> *R v Martin (Lewys Stephen)* [2013] EWCA Crim 1420. *Love v National Crime Agency*, 10 May 2016, Magistrates' Court.

<sup>233</sup> *R v Butcher and others* [2014] EWCA Crim 3035

<sup>234</sup> *R v Khan (Mucktar)* [2018] EWCA Crim 2893

<sup>235</sup> *R v Soloman* [2019] EWCA Crim 1356

<sup>236</sup> *R v Spencer* [2019] EWCA Crim 2240

<sup>237</sup> *R v S and another* [2008] EWCA Crim 2177. The issue of self-incrimination now falls to be considered in the light of the Supreme Court decision in *Volaw Trust and others v The Office of the Comptroller of Taxes and another* [2019] UKPC 29.

<sup>238</sup> The same is true of 'advisory notices' which police sometimes issue prior to a formal section 49 notice.

<sup>239</sup> The number of notices actually served is less than the number of NTAC approvals granted. The range is from 12 in 2010-11 and 37 in 2014-15. No figures for are available after this.

<sup>240</sup>

<https://www.ipco.org.uk/docs/IPCO%20Annual%20Report%202017%20Web%20Accessible%20Version%2020190131.pdf> at paragraph 6.7.

<sup>241</sup> <https://ipco.org.uk/docs/IPCO%20Annual%20Report%202018%20final.pdf> at paragraph 11.70.

4.27. The need to formulate a regulatory framework for encryption resulted from the burgeoning e-commerce sector of the 1990s. The 1999 consultation paper which foreshadowed the enactment of section 49 was issued by the Department of Trade and Industry and entitled “Building Confidence in Electronic Commerce<sup>242</sup>. It noted that terrorists and criminals were already starting to exploit encryption<sup>243</sup>. The central role of encryption to e-commerce, as well as concerns for civil liberties, meant that the government was sensitive about heavy-handed measures to require the handing over of cryptographic keys. Solutions such as key escrow were rejected largely on the basis of the business case that it would undermine the United Kingdom’s potential leading role in online trade<sup>244</sup>.

4.28. The safeguards contained in section 49 recognise that requiring production of a password key means more than asking for data that may be relevant. It means granting access to a whole host of potentially irrelevant but sensible data that happens to be encrypted in the same way. It reflects the potency of a decryption key which may, unless it is carefully protected, result in access being obtained by unauthorised third parties. It is not difficult to see why obtaining an encryption key from a bank, if it was used to encrypt any number of customers’ data, would risk both collateral intrusion and compromise to the security of the bank’s business model. From the perspective of encryption by individuals, the fact that someone has troubled to encrypt their communications may once have demonstrated that the underlying information was particularly sensitive, and worthy of protection. However, the modern form of encryption encountered by CT Police is default encryption resulting from the fact that all phones require passwords to access the information they hold or give access to<sup>245</sup>. Each of these passwords is unique to the individual user and so obtaining disclosure of A’s password has no impact on the protection of the information by B.

4.29. Considering why section 49 is so infrequently used, it is possible to identify 4 persuasive reasons:

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<sup>242</sup>Available at <https://www.cyber-rights.org/crypto/consfn1.pdf>. A detailed analysis of the background to the enactment of section 49 is given by Akdeniz, Y., and Walker, C., ‘Whisper who dares: Encryption, privacy rights and the new world disorder’ in *The Internet, Law and Society*, Pearson (2002).

<sup>243</sup> *Ibid*, 48-50.

<sup>244</sup> Chatterjee, B., ‘New but not improved: a critical examination of revisions to the Regulation of Investigation Powers Act 2000 encryption provisions’, *International Journal of Law and Information Technology* (2011)

<sup>245</sup> Often multiple passwords. Modern phones may also disguise the number of applications on a phone by using the ‘Hidden Space’ option, <https://9to5google.com/2019/07/09/oneplus-launcher-hidden-space-password/>.

- The machinery for obtaining permission is unwieldy and in no way suited to high-pressure terrorism investigations where time is limited before an individual must be either charged or released<sup>246</sup>. Even where time is not so much of the essence any delay reduces the enforceability of the notice that is eventually served because the individual may more plausibly say that they no longer remember.
- The threshold test that obtaining the key “should offer a realistic prospect of bringing the expected benefit”<sup>247</sup> is difficult to apply where, as frequently happens, multiple devices are seized and it is difficult to aver that gaining access to any particular device offers a realistic prospect of an evidential dividend.
- There is a lack of clarity about timeframes. A notice may only be served where it is not “reasonably practicable” for the information to be obtained in any other way<sup>248</sup>. But this begs the question whether, in the context of a maximum 14-day period of pre-charge detention, a technical attempt to crack the encryption that might take 28 days would be reasonably practicable or not.
- The gatekeeper role played by NTAC<sup>249</sup> builds in unpredictability and delay.

4.30. It is undoubtedly the case that more might be done to train CT Police on the use of section 49 as it presently exists. However, since Parliament has already identified that encryption is of particular relevance in the context of terrorism<sup>250</sup>, and given the pressure nature of counter-terrorism investigations, there would be merit in considering a special power to compel passwords even if only following arrest under section 41 Terrorism Act 2000. There would be a natural fit between the judicial supervision that already exists through warrants of further detention after 48 hours up to a maximum of 14 days, and the consideration of whether permission should be granted to administer an encryption notice, because so much of pre-charge detention under Schedule 8 Terrorism Act 2000 is made necessary by the demands of digital analysis. There are countervailing reasons to consider, in particular the need not to muddy the right to silence in interview by compulsory demands for information. I **recommend** that consideration is given by the Home Secretary to whether new or amended powers are needed for police to compel encryption keys in counter-terrorism investigations.

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<sup>246</sup> Following section 41 Terrorism Act 2000, a person may be held up to a maximum of 14 days. Even the rules for when judicial authorisation is or is not required under Schedule 2 RIPA and paragraphs 9.21 to 9.27 of the Code are complex and difficult to navigate.

<sup>247</sup> Code 3.39.

<sup>248</sup> Code 3.15.

<sup>249</sup> Said to provide assurance to the Commissioner that the scope for the inappropriate use of the powers is mitigated, Code 3.11.

<sup>250</sup> Section 15 Terrorism Act 2006 increased the maximum sentence for failing to comply with a section 49 notice in a national security case from 2 to 5 years.

## **Search warrants**

- 4.31. Paragraph 1 of Schedule 5 to the Terrorism Act 2000 provides a power for a magistrates' court to authorise entry, search, and seizure of anything likely to be of substantial value to a terrorist investigation. This power can be exercised without the need for suspicion of a specific offence. A search can be authorised by a Superintendent in cases of urgency. There must be 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.
- 4.32. There are no statistics for the use of this power in Great Britain. In Northern Ireland in 2019, 201 premises were searched under warrants granted pursuant to Schedule 5.<sup>251</sup>

## **Production Orders**

- 4.33. Paragraph 5 of Schedule 5 enables a court to require the production of certain categories of material, including journalistic material<sup>252</sup>. There is no urgency provision for authorisation to be granted by a police officer.
- 4.34. An application may be granted if the conditions under paragraph 6 are met.
- The first condition is that it is sought for the purposes of a terrorist investigation and that "...there are reasonable grounds for believing that the material is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation."
  - The second condition is that: "...there are reasonable grounds for believing that it is in the public interest that the material should be produced or that access to it should be given having regard - (a) to the benefit likely to accrue to a terrorist investigation if the material is obtained, and (b) to the circumstances under which the person concerned has any of the material in his possession, custody or power."

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<sup>251</sup> Northern Ireland Office, *Northern Ireland Terrorism Legislation Annual Statistics 2017/18 and 2018/19*, table 2.2.

<sup>252</sup> Excluded or special procedure material as defined by paragraph 4 Schedule 5 and section 14 PACE 1984.

- It follows that unlike production orders under PACE, a TACT production order may be granted purely in support of a terrorist investigation<sup>253</sup> without the need to establish reasonable grounds for believing that an indictable offence has been committed, or that the fruits of the production order will be admissible in evidence<sup>254</sup>.
- As a result, there is “a somewhat broader scope” for making orders in terrorism than in other criminal cases<sup>255</sup>.

4.35. According to unofficial statistics provided to me by National Counter-Terrorism Policing Headquarters, there were 497 production orders obtained by CT Policing in England and Wales in 2019 under *any* power (PACE, Proceeds of Crime Act 2002 or Terrorism Act 2000)<sup>256</sup>. I have been informed that it is not possible to identify which of the production orders were obtained under Schedule 5(5) Terrorism Act 2000. 55 production orders were granted under Schedule 5(7) which allows for a production order to be made in respect of material that has not yet, but is expected to, come into existence.

### ***Journalistic Material***

4.36. Although applications for production orders against journalists in terrorism cases are less frequent than applications under PACE, 2019 saw examples of applications in particularly high profile terrorism investigations. In each case, the applications concerned access to un-broadcast interview material:

- *Channel 4 Television v Met Police Commissioner*, January 2019<sup>257</sup>: a contested application for access to unbroadcast interview footage of James Matthews, the British national prosecuted for fighting against Da’esh whose case is considered in more detail in Chapter 7.

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<sup>253</sup> As defined by section 32. See further Terrorism Acts in 2018 at 4.19.

<sup>254</sup> Paragraph 2 Schedule 1 PACE. The need for material, if produced under PACE, to be immediately admissible in evidence without more was recently confirmed in *R (BBC) v Newcastle Crown Court* [2019] EWHC 2756 (Admin).

<sup>255</sup> *Channel 4 Television v Metropolitan Police Commissioner* [2019] 1 WLUK 322, <https://www.bailii.org/ew/cases/Misc/2019/2.html>, at paragraph 42, Edis J. The formulations of the access conditions of “substantial value” and the “public interest” mirror those in PACE.

<sup>256</sup> I am informed that the returns on which the data is based do not adequately distinguish between terrorism and other production orders.

<sup>257</sup> <https://www.bailii.org/ew/cases/Misc/2019/2.html>.



- *Metropolitan Police Service v Times Newspapers Limited and others*, September 2019: contested application for access to footage from interviews in Syria with Shamima Begum<sup>258</sup>.
- *Metropolitan Police Service v CNN*, October 2019: unopposed application for access to unbroadcast interview material with Alexander Kotey and El Shafee El Sheikh in Syria. These individuals are alleged to have been part of the Da'esh execution squad known as "the Beatles".

4.37. The breadth of the Schedule 5 power brings into very sharp focus the frequently opposing interests of the authorities in investigating terrorism and journalists in maintaining the freedom of the press<sup>259</sup>. Such applications are always on notice<sup>260</sup>.

4.38. That a higher category of protection is due to journalistic material has been unequivocally recognised by the courts (and subsequently by Parliament), most notably in the case of David Miranda<sup>261</sup> who was stopped under Schedule 7 Terrorism Act 2000 carrying highly sensitive material which was also journalistic material<sup>262</sup>.

4.39. This reflects the particular role that freedom of expression plays, sometimes described as the "lifeblood" of a democratic society, and the particular need for journalists to be free to go about their work in order to act as "watchdogs" on behalf of the public interest<sup>263</sup>.

4.40. These considerations apply no less in the context of terrorism where extraordinary powers require public awareness and public debate, and sometimes require the spotlight to be shone on areas which make necessary but uncomfortable reading. Moreover, the very fact that terrorism has to do with the secret powers of the state can lead to a certain cultural guardedness on the part of the authorities which means that journalists play a particularly important role in ensuring that issues are brought into the public domain. Whilst it would be naïve to suppose that journalistic freedom could never result in unjustified damage to national security, my own

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<sup>258</sup> Copy of judgment is at <https://www.matrixlaw.co.uk/wp-content/uploads/2019/09/Metropolitan-Police-Service-v-Times-Newspapers-Ltd-and-Ors-Crown-Ct-4-Sep-2019.pdf>.

<sup>259</sup> The subject of a fascinating event in June 2019, <https://www.indexoncensorship.org/2019/06/debate-state-security-v-freedom-of-the-press/>.

<sup>260</sup> Criminal Procedure Rules 47.5(4).

<sup>261</sup> *R (Miranda) v Secretary of State for the Home Department and other* [2016] EWCA Civ 6.

<sup>262</sup> His case led in part to the enactment of Schedule 3 and to amendments to the Schedule 7 Code of Practice.

<sup>263</sup> *R (Liberty) v Secretary of State for the Home Department*, *supra*, at 301.

observations as Independent Reviewer is that journalists exercise their role responsibly.

4.41. None of the trio of cases above concerned the disclosure of confidential sources. There was no secrecy as to who was giving the interviews. There was no issue of unfairness to the interviewees who had no legitimate interest in controlling which parts were broadcast, and which not. Nor was it said that the life of the journalist would be imperilled as famously arose in Northern Ireland in the Sunday Tribune case<sup>264</sup>.

- The argument mounted in the Begum case was that the grant of a production order undermined journalistic *methodology* because journalists risked being perceived as information-gatherers on behalf of the state and would no longer enjoy the privileged access that comes through neutrality.
- At its extremity, the argument goes, this could lead to journalists, not to mention the local fixers on whom they frequently depend in dangerous parts of the world, being targeted by hostile groups as intelligence-gatherers on behalf of governments.
- It was not argued that journalistic material should be exempt but that this consideration should weigh heavily in the proportionality balance<sup>265</sup>.

4.42. The creeping prospect that granting a production order will make the job of journalists more difficult in future, or even more dangerous, is a staple response to applications for production orders but one which is difficult to make good evidentially. It is in reality a public policy argument, not dissimilar to the policy of “neither confirm nor deny” that is deployed by the authorities in matters of intelligence where what is in issue is often the damage that departing from the policy may cause in *future* cases, and which has been widely accepted<sup>266</sup>. It follows that the journalistic argument cannot be dismissed on that basis as a form of special pleading; and in *R (BskyB) v Chelmsford Crown Court (2012)*<sup>267</sup> the High Court quashed a warrant where the judge had failed to give sufficient weight to this aspect, observing that:

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<sup>264</sup> *In the matter of Suzanne Breen* [2009] NICty 4, <https://judiciaryni.uk/sites/judiciary/files/decisions/In%20the%20matter%20of%20an%20application%20by%20D-Inspector%20Justyn%20Galloway%2C%20PSNI%2C%20under%20Paragraph%205%2C%20Schedule%205%20Of%20The%20Terrorism%20Act%202000.pdf>.

<sup>265</sup> See *Bergens Tidende v Norway (2001)* 31 EHRR 16 at paragraph 52.

<sup>266</sup> See for example, *Scappaticci, Re an application for judicial review* [2003] NIQB 56.

<sup>267</sup> *[2012] EWHC 1295 (Admin)* at paragraph 44.

“... *The interference caused by such orders cannot and should not be dismissed merely because a small proportion of that which is filmed may be published. The judge should have feared for the loss of trust in those hitherto believed to be neutral observers, if such observers may be too readily compelled to hand over their material. It is the neutrality of the press which affords them protection and augments their ability freely to obtain and disseminate visual recording of events. There was no basis on which the judge could dismiss the evidence of a number of witnesses of the effect of handing over a vast amount of film, whether under compulsion or no.*”

4.43. Moreover, faced with applications for production orders for their material, journalists often consider it a point of duty to oppose such applications so that, if material is handed over, it is only done under protest and where the merits have been fully tested<sup>268</sup>.

4.44. However, this can give rise to – what was described to me as – elaborate dances where production orders against journalists are never formally conceded but are resisted as a matter of principle in order to flag the institutional independence of the press and safeguard against routine demands, with all the attendant time and costs of considering and drafting a response and in some cases instructing counsel. In the *Matthews* case Channel 4 issued an unsuccessful application for over £57,000 costs to respond to the (ultimately unsuccessful) production order: the legislation does not provide the court with a costs jurisdiction; nor did the media’s Article 10 rights to freedom of express require that there should be<sup>269</sup>.

4.45. No responsible journalist is likely to claim that the law should be reformed so that journalistic material should enjoy **complete immunity** from disclosure to the authorities in all circumstances whether in the response to a judicial order<sup>270</sup>, or through the public reporting obligations under the Terrorism Act 2000<sup>271</sup>. The fact that

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<sup>268</sup> For an account of this policy in action, the case of the BBC’s John Conway is of interest, <https://www.bbc.co.uk/news/uk-northern-ireland-21688957>. The policy was acknowledged by Edis J in *Metropolitan Police Service v CNN*, supra, at paragraph 66.

<sup>269</sup> There was also, Edis J. noted, a double-edge consideration: costs might not only deter the police from seeking production in an appropriate case, but deter journalists from opposing in an appropriate case.

<sup>270</sup> Journalistic interests are not absolute even in the protection of sources: *Malik v Manchester Crown Court* [2008] EWHC 1362 (Admin) at 110.

<sup>271</sup> Principally, section 38B Terrorism Act 2000.

it is difficult in the era of 'citizen journalists' to pin down a clear definition makes an absolute immunity, akin to the protection provided to legally privileged material, even harder to justify. The public interest in the effective investigation of terrorism ranks very highly. Moreover the gravitational pull in really serious cases towards the authorities seeking to get their hands on every scrap of interview material is readily understandable where evidential reliance may be placed on the broadcast material: context, it may be argued before a judge or jury, is everything, and how else can be police ensure that admissions are understood and the existence of inducements discounted.

4.46. The tangible frustration in the media is that applications concern clearly irrelevant material – otherwise it would have been broadcast. Whilst it is correct that the media are unlikely to understand the details of the police investigation nor the challenges of putting together a prosecution case, a sense of realism from CT Police is undoubtedly required. This is particularly so if part of the thinking behind an application is the sense that the police will otherwise be criticized for not seeking out potentially exonerating material<sup>272</sup>.

- In two of the three cases (*Begum, Khotey/El Sheikh*) the Court ultimately found that the nature of the material justified its production.
- However, in two of the three cases (*Begum, Matthews*) the applications were found to be premature.
  - In *Begum* the Court ruled that there were not reasonable grounds for believing that it was in the public interest that the material should be produced or that access to it should be given having regard to the benefit likely to accrue to a terrorist investigation if the material was obtained. There was, the Court found, little prospect of arrest or prosecution whilst *Begum* remained overseas. The media were required to give undertakings that they would not dispose of the material in case a subsequent application needed to be made.
  - In *Matthews* the judge held<sup>273</sup> that it would be inappropriate to make an order for production of journalistic material, which would engage

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<sup>272</sup> Under the Criminal Procedure and Investigations Act 1996 and Code. The new draft Guidelines on which the Attorney General has recently consulted address the issue of third party material, but not specifically journalistic material; neither do the relevant Judicial Protocol, the Joint Protocol on Third Party Material nor the relevant part of the CPS's Disclosure Guidelines. This was not a feature of any of the three cases referred to.

<sup>273</sup> At paragraph 14

Channel 4's rights under Article 10 ECHR, in circumstances where the prosecution might be stayed for unconnected reasons.

4.47. Undoubtedly CT Police will conclude as a result of *Begum* and *Matthews* that **self-restraint** is a virtue. There should usually be no reason to doubt that material will be preserved at the police's request until a production order might be justified. The mere fact that the media refuse to consent immediately to production order applications, or show a questioning or sceptical approach, is legitimate journalistic behaviour. It does not show that they cannot be trusted, a point made resoundingly by the Lord Chief Justice of Northern Ireland Court in the *Loughinisland* case which reached its conclusion, with the quashing of the warrants granted against documentary makers, in 2020<sup>274</sup>.

4.48. Self-restraint includes a careful process of reviewing and refining the nature of any application so that it is no wider than necessary, together with consideration of whether the material can be obtained from some other source. Many of the earlier reported cases demonstrate a need to contain fishing expeditions or inadequately evidenced or thought-through assertions<sup>275</sup>.

4.49. But assuming an application is not premature, and is well-drafted, this leaves the question of *what function* the journalistic interest plays in the public interest balance. It is certainly correct that where journalistic material is the target of an application, that imports an extra degree of rigour in the examination of the application reflected in the requirement, in the Criminal Procedure Rules, that any such application should be in the presence of the respondent<sup>276</sup>.

4.50. The logical consequence of the extra weight to be accorded to press freedom is that some applications may be refused on public interest grounds where a like application against non-journalistic material would succeed, even in terrorism cases.

4.51. Because these are difficult balances to be struck, and in the interests of greater transparency and certainty, I **recommend** that the government should make arrangements, in consultation with the judiciary, to publish all first instance judgments

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<sup>274</sup> *Re Fine Point Films, In The Matter Of An Application By Fine Point Films And Trevor Birney For Judicial Review* [2020] NICA 35, [https://judiciaryni.uk/sites/judiciary/files/decisions/Fine%20Point%20Films%20and%20Birney%2C%20McCaffrey%20and%20PSNI%20and%20Durham%20Constabulary%20Applications\\_0.pdf](https://judiciaryni.uk/sites/judiciary/files/decisions/Fine%20Point%20Films%20and%20Birney%2C%20McCaffrey%20and%20PSNI%20and%20Durham%20Constabulary%20Applications_0.pdf)

<sup>275</sup> Walker, C., *The Anti-Terrorism Legislation*, Blackstones (3<sup>rd</sup> edition) at 4.20 to 4.26.

<sup>276</sup> Criminal Procedure Rules, rule 47.5(4).

on applications for journalistic material under Schedule 5 Terrorism Act; and, where publication has to be delayed on the grounds of prejudicing a forthcoming trial, to ensure that judgments are available for use in other cases.

4.52. I do not go so far as to recommend that Schedule 5 should be amended so that applications for journalistic material can only be granted by a High Court judge, but there is a strong argument that such arguments should only ever be heard by the most senior judges who try criminal cases.

### **Post-charge questioning**

4.53. Power is conferred by sections 22 to 26 of the Counter-Terrorism Act 2008 to question a suspect post-charge, in exceptional circumstances, if it is in relation to a terrorism offence or an offence that appears to have a terrorist connection. 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. The power has not yet been brought into force in Northern Ireland but this year I am able to report on the three occasions on which the power has been used including, most notably in 2019, in the case of the Manchester Arena bomber Hashem Abedi.

4.54. The statutory requirements for approval are that further questioning is necessary in the interests of justice, that the investigation is being conducted diligently and expeditiously, and that what is authorised will not interfere unduly with the preparation of the person's defence to the charge in question or any other charge<sup>277</sup>. When considering the application, the Court may exercise its inherent power to hear from the police *ex parte* in order to establish whether the statutory conditions are satisfied. The power is to be exercised in accordance with PACE Code H<sup>278</sup> which provides that investigators who are contemplating such an application should first consider why it was not possible to obtain the evidence before charge, how and why the need to question after charge was first recognised, to what degree the questioning is expected to contribute further to the case, and how close the questioning is to the defendant's trial. In England and Wales, a further Code provides for the video recording with sound of such interviews<sup>279</sup>.

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<sup>277</sup> Section 22(6) Counter-Terrorism Act 2008.

<sup>278</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/826816/PACE-Code-H-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826816/PACE-Code-H-2019.pdf) at Note 15E.

<sup>279</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97939/video-recording-code-of-practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97939/video-recording-code-of-practice.pdf).

4.55. The judge may only authorise a period up to a maximum of 48 hours before further authorisation must be sought. The 48-hour period must run continuously from the commencement of questioning, which must include breaks in questioning in accordance with Code H<sup>280</sup>. Section 22 does not provide an additional power of arrest or detention. In terrorism cases it is likely to be exercised on individuals who have been remanded into custody following charge.

4.56. Although enacted in 2008, post-charge questioning was not brought into force in Great Britain until 2012<sup>281</sup>. It was supported by some as a means of keeping a lid on the length of pre-charge detention<sup>282</sup>. The declared rationale is set out in Code H itself<sup>283</sup> as follows: "...because it is acknowledged that terrorist investigations can be large and complex and that a great deal of evidence can come to light following the charge of a terrorism suspect. This can occur, for instance, from the translation of material or as the result of additional investigation."

4.57. There have been three uses of this power to date. In each case the application has been made on notice by the Crown Prosecution Service<sup>284</sup>, and granted by a High Court judge sitting at the Central Criminal Court.

- R v Muhammad Aftab Suleman, 24 December 2014. Police found 430 documents containing extremist literature on a pen drive in a search of his home in December 2014. Originally charged with collecting material likely to be useful to a terrorist contrary to section 58 Terrorism Act 2000, it then became apparent that the defendant was uploading terrorist material to YouTube. Approval was granted to question him post-charge in relation to encouragement of terrorism and terrorist publication offences contrary to sections 1 and 2 Terrorism Act 2006. He gave a no comment interview. He later pleaded guilty to five counts of possessing documents likely to be of use to a person preparing or committing an act of terrorism and two counts of distributing a terrorist publication<sup>285</sup>.

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<sup>280</sup> Code H Paragraph 15.5.

<sup>281</sup> Walker, C., 'Post Charge Questioning in UK terrorism cases: straining the adversarial process', (2016) 20 International Journal of Human Rights 649-665 describes the history of the provision.

<sup>282</sup> Joint Human Rights Committee, Twentieth Report (2008) at paragraphs 57-58, <https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/108/10802.htm>.

<sup>283</sup> At Code 15

<sup>284</sup> The Crown Prosecution Service provided me with the details that follow, together with some of the supporting documents.

<sup>285</sup> <https://www.bbc.co.uk/news/uk-england-manchester-33574903>.

- R v Suhaib Majeed, March 2016. After his arrest for possession of firearms, materials were found on his computer leading to a further arrest under the Terrorism Act 2000. Approval was granted. The defendant was subsequently convicted with fellow university student Tarik Hassane of plotting a drive-by shooting of police, soldiers and members of the public and sentenced to life imprisonment<sup>286</sup>.
- R v Hashem Abedi, July 2019. The defendant was arrested in Libya in 2017 and was extradited to the United Kingdom in 2019. He was charged with assisting his brother to carry out the Manchester Arena attack. Permission was granted to question him in interview, where he provided a prepared statement. Mr Justice Baker's summing up of 13 and 16 March 2020, which I have seen, shows that the admissions made by the defendant in the post-charge interview, and what the prosecution said were "patently untrue" explanations for some of his conduct, formed a significant part of the case against him. Hashem Abedi was convicted in 2020 and sentenced to life imprisonment for the murder of 22 people<sup>287</sup>.

4.58. Given the sparing use of the provision to date, and the particularly serious and complex nature of at least two of three cases, coupled with the oversight (in practice) of a High Court judge, it is difficult to conclude that section 22 Counter-Terrorism Act 2008 amounts to a damaging inroad into ordinary criminal procedure<sup>288</sup>. Although other offences such as fraud can be particularly complex, meaning that further evidence is likely to come to light as the investigation unfolds, in terrorism cases there is a special imperative, not present in fraud cases, to charge and remand potentially dangerous individuals as soon as possible. The cases of *Suleman* and *Majeed* shows that further material, particularly electronic material that may have been encrypted, can change the shape of a terrorism investigation. The use of post-charge questioning for Hashem Abedi was driven by different concerns that do not fit so neatly within this rationale. The need for questioning was driven by the fact that his arrest was followed by lengthy extradition proceedings rather than interview. He could have been questioned voluntarily<sup>289</sup> after his return although no adverse inference would have arisen had he chosen not to answer.

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<sup>286</sup> <https://www.cps.gov.uk/crime-info/terrorism/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-2016>; <https://www.judiciary.uk/wp-content/uploads/2016/04/r-v-hassane-sentencing.pdf>.

<sup>287</sup> <https://www.cps.gov.uk/cps/news/brother-manchester-bomber-jailed-55-years>.

<sup>288</sup> The general rule is that a person may not be questioned after charge, save in limited circumstances and in any event without the possibility of adverse inference: PACE Code C paragraph 16.5.

<sup>289</sup> Code H paragraph 15.6.



## **Financial Investigations**

4.59. Financial investigators within the National Terrorist Financial Investigation Unit play an important supportive role in most terrorist investigations. 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 of the Terrorism Act 2000. A requirement to disclose financial information is a routine condition imposed by TPIMs and could be a requirement of a Serious Crime Prevention Order. No official statistics are available for the use of these powers but I am informed by National Counter-Terrorism Police Headquarters that approximately 5 disclosure orders were made in 2019 (I do not know how many notices were issued under these orders).

## ***Customer Information Orders, Explanation Orders and Account Monitoring Orders***

4.60. Customer information orders may be granted under paragraph 1 of Schedule 6 to the Terrorism Act 2000 in connection with financial information. Explanation orders may be made under paragraph 13 of Schedule 5, requiring a person to provide an explanation for material seized under warrant or produced in response to a production order. I am told that there were no customer information orders or explanation orders obtained by CT Police in 2019. As I reported last year, 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 that 212 account monitoring orders were made in 2019.

## ***Suspicious Activity Reports***

4.61. Suspicious Activity Reports (known as SARs) must be provided by businesses and individuals in certain circumstances under the Terrorism Act 2000, and requests may be made to the authorities for permission to carry through a transaction (known as a Defence Against Terrorist Financing SAR)<sup>290</sup>. Failure to comply with this duty to report is a criminal offence, punishable by up to 5 years' imprisonment. In addition,

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<sup>290</sup> Terrorism Acts in 2018 at 4.39.

SARS that have been provided under the Proceeds of Crime Act 2002 that are identified as having a potential terrorism link may need to be assessed by CT Police. The NCA publishes statistics on a financial year basis<sup>291</sup>. For 2019, I have been provided with the following statistics:

- Terrorism Act 2000 SARs disseminated for assessment: 955.
- Defence Against Terrorist Financing SARs disseminated for assessment: 368.
- POCA SARs disseminated for assessment: 502.

4.62. The SARS regime, including its counter-terrorism aspect, is now subject of a Law Commission Report<sup>292</sup>. No significant amendments are proposed. The statutory guidance which the Law Commission recommends on the operation of the consent regime under section 21ZA Terrorism Act 2000 is limited to explaining the meaning of the statutory language, rather than indicating the circumstances in which consent might be given<sup>293</sup>.

### ***The Crime (Overseas Production Orders) Act 2019***

4.63. In 2019 the Crime (Overseas Production Orders) Act 2019 was granted Royal Assent. Where a relevant international agreement is in place, the Act confers upon the police and other investigative agencies the power to request data directly from communication service providers which are based outside of the United Kingdom. This will make it unnecessary to rely upon mutual legal assistance in relevant cases. The Act is intended to reduce the time it takes for data to be produced, which currently takes an average of six months. In October 2019 the first data sharing agreement was entered into between the Governments of the United Kingdom and the United States.

4.64. An overseas production order can only be granted by a Crown Court judge if the conditions contained in the Act are satisfied. By virtue of section 4(3) of the Act, the judge must be satisfied that there are reasonable grounds for believing that an indictable offence has been committed and proceedings in respect of the offence have

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<sup>291</sup> <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/390-sars-annual-report-2019/file>.

<sup>292</sup> Law Commission, Anti-money laundering: the SARs regime Law Com 384, 2019, [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/6.5569\\_LC\\_Anti-Money-Laundering\\_Report\\_FINAL\\_WEB\\_120619.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/6.5569_LC_Anti-Money-Laundering_Report_FINAL_WEB_120619.pdf).

<sup>293</sup> Recommendation 10, paragraph 6.26.

been instituted or the offence is being investigated; or the order is sought for the purposes of a terrorist investigation.

4.65. The data sharing agreement makes reference not just to stored electronic data (such as emails), but also to “the interception of wire or electronic communications”. Domestic investigative agencies will therefore be able to request not only stored electronic data, such as emails, directly from foreign communications service providers, but also data that is in the course of being transmitted. In July 2020 it was announced that the Investigatory Powers Commissioner will oversee compliance by public authorities with the data sharing agreement.<sup>294</sup>

4.66. To date, no applications for an overseas production order have been made as the diplomatic notes which are necessary to bring the data sharing agreement into force have yet to be exchanged.

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294 The Functions of the Investigatory Powers Commissioner (Oversight of the Data Access Agreement between the United Kingdom and the United States of America and of functions exercisable under the Crime (Overseas Production Orders) Act 2019) Regulations 2020.

## 5. ARRESTING AND DETAINING

### Introduction

5.1. As I observed last year, the vast majority of arrests of suspected terrorists continue to be made in England and Wales under the Police and Criminal Evidence Act 1984 in England and Wales, and in Scotland under the Criminal Justice (Scotland) Act 2016. The position in Northern Ireland is not so clear because statistics from the PSNI do not have a separate category for terrorism-related arrests made under Police and Criminal Evidence (Northern Ireland) Order 1989 or any other non-terrorist arrest power.

5.2. A special power exists in section 41 of the Terrorism Act 2000, which may be exercised by police throughout the United Kingdom. I examined in last year's report how the power conferred upon police by section 41 differs from ordinary arrest powers<sup>295</sup>.

### Arrests in 2019

5.3. In **Great Britain** there were 44 arrests made under section 41 of the Terrorism Act 2000<sup>296</sup>. This is an increase of 8 compared with the 36 arrests made in the previous year<sup>297</sup>. Arrests made under section 41 represented 16% of the total "*terrorism-related arrests*", of which there were 282 in 2019 (the same number as 2018). 2018 and 2019 jointly saw the lowest number of terrorism-related arrests in the last six calendar years but remain above the annual average of 260 arrests over the life of the Terrorism Act 2000. 2019 is the first full year in which the category "*terrorism-related arrests*" has been widened to include all arrests with a terrorist element, whether the offence was terrorism-related or not<sup>298</sup>. CT Police may for example arrest a suspected terrorism for a non-terrorism offence in order to disrupt their activities.

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<sup>295</sup> Terrorism Acts in 2018 at 5.2.

<sup>296</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - A.01, quarterly update to September 2020.

<sup>297</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - A.01, quarterly update to December 2020

<sup>298</sup> Quarterly update to December 2019, page 4, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/869780/police-powers-terrorism-dec2019-hosb0720.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869780/police-powers-terrorism-dec2019-hosb0720.pdf).

5.4. In **Northern Ireland** there were a total of 152 arrests made under section 41 of the Terrorism Act 2000 (a reduction of one from the previous year)<sup>299</sup>. This continues the trend observed in recent years namely that despite having only 3% of the United Kingdom population, Northern Ireland accounts for 77% of the arrests made under section 41 of the Terrorism Act 2000.

#### **Detention following section 41 arrest in 2019**

5.5. Persons arrested under section 41 may be detained up to a maximum of 14 days if authorised by a judicial authority<sup>300</sup>. Their detention is governed by the rules found in Schedule 8 Terrorism Act 2000 and a Code of Practice (Code H). They are generally held in specialist police cells known as TACT suites.

#### ***Length of detention***

5.6. In **Great Britain**, of the 44 people arrested under section 41 of the Terrorism Act 2000<sup>301</sup>:

- Just 14% 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 11% in 2018, 33% in 2017, and 14% in 2016.
- 75% were held for less than a week, lower than the average of 89% since 2001.
- 11 people were detained beyond a week (up from 4 last year).
- 10 people were detained for between 10 and 14 days.
- 4 people were detained for between 13 and 14 days.

5.7. In 2018 no one was detained beyond 12 days, so these statistics demonstrate that some detentions were longer for the year under review. Technical challenges, in

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<sup>299</sup> Police Service of Northern Ireland, *Policing Recorded Security Situation Statistics Northern Ireland*, table 5 provides a figure of 147. However, I have been informed that PSNI statistics do not include those arrested under section 41 for reasons that are not deemed to be linked to the security situation. There were 5 of these arrests in 2019.

<sup>300</sup> Paragraph 36(3)(b)(ii) Schedule 8 Terrorism Act 2000.

<sup>301</sup> Operation of Police Powers under the Terrorism Act 2000, Table A – A.02, quarterly update to September 2020.

particular where multiple encrypted devices are seized on arrest, may push CT Police to the limit. But it has not been stated to me by either CT Police or officials that 14 days is simply too short to carry out an effective investigation before the person must be released or charged.

5.8. Only one of these 44 persons was arrested in **Scotland**. He was detained for a period of 46 hours 42 minutes<sup>302</sup>.

5.9. In **Northern Ireland** of the 152 people detained under section 41 of the Terrorism Act 2000, 149 were detained for 48 hours or less and 3 for over 48 hours.<sup>303</sup>

### ***Injured suspects and interaction with PACE arrests***

5.10. As a result of amendments made by the Counter-Terrorism and Border Security Act 2019 which came into force during 2020, the TACT detention clock for a person detained under section 41 who is subsequently “removed to hospital” because they need medical treatment is paused<sup>304</sup>. This means that the requirements for seeking additional approval for continuing detention and the overall 14-day time limit, which starts to run at the point of arrest<sup>305</sup>, are unaffected whilst an individual is taken for or receiving treatment. This amendment does not limit the places from where the person has to be ‘removed’ and is therefore apt to cover removal from places apart from TACT suites<sup>306</sup>.

5.11. However, the amendments do not apply to a person arrested *at hospital* under section 41. The situation might arise in which, following an explosion in which numerous persons were injured and taken to hospital, the suspected bomber is not identified until after they have already started receiving treatment. Because the detention clock would start to run, it is unlikely that police would use the section 41

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<sup>302</sup> Information provided to me by the Crown Office and Procurator Fiscal Service.

<sup>303</sup> Northern Ireland Office, *Northern Ireland Terrorism Legislation Annual Statistics 2017/18 and 2018/19*, table 4.1.

<sup>304</sup> Unless they are questioned at or on their way to or from hospital: section 41(8A) Terrorism Act 2000.

<sup>305</sup> Section 41(3)(a) and paragraph 36(3B) Schedule 8 Terrorism Act 2000.

<sup>306</sup> It was reported in July 2020 that an individual was bitten by a police dog during the course of his arrest for terrorism, and taken to straight to hospital: <https://www.standard.co.uk/news/crime/terror-suspect-bitten-foot-police-dog-east-london-a4493916.html>. In principle the 2019 amendments would apply to this situation. Because the detention clock starts at the point of arrest (see footnote 9), it is unlikely that ‘detention’ requires that the person is first taken to a place of detention that has been designated under paragraph 1 of Schedule 8.

power of arrest in that situation but would instead rely on their general power to arrest on suspicion of an offence under section 24 of the Police and Criminal Evidence Act 1984 (PACE).

- The PACE clock operates differently from the TACT detention clock. Rather than starting to run at the point of arrest, when a person in hospital is arrested under PACE on suspicion of a terrorism offence and is to be taken directly to a police station and there detained to be interviewed, the PACE clock only starts on arrival at that police station<sup>307</sup>.
- This means that a person so arrested on suspicion of a terrorism offence under PACE would not need to be released but, whatever the length of their hospital treatment, could be still be taken to a police station and interviewed and detained up to a maximum of 96 hours.
- It would also be open to CT Police to re-arrest the individual under section 41 on arrival at the police station, beginning the TACT detention clock at that point.
- In last year's report I pointed out that it was difficult to envisage a situation in which a further 14 days detention following arrest under section 41 could be justified in addition to any periods of detention following arrest under PACE. I therefore recommended that the TACT detention clock should begin, if the person had already been arrested on suspicion of a terrorism offence under PACE<sup>308</sup>, at the point of PACE arrest.
- In her response to this recommendation, the Home Secretary stated that she understood the reasoning but was undertaking further work with officials and CT Police to fully understand the legal and operational complexities of making this change.

5.12. One operational complexity that therefore needs to be considered concerns a person who is arrested on suspicion of a terrorism offence whilst at hospital. If the clock is made to start at the point of arrest under PACE, then any subsequent power to detain under Schedule 8 for the purpose of interview will be diminished or lost if the individual spends any significant period of time in hospital. One potential solution would be to further amend section 41 so that the detention clock does not run when a person is arrested in hospital, not just 'removed to hospital'. There may be situations in which arrest under PACE is not a realistic option, for example if a person is injured

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<sup>307</sup> Section 41(2)(d) PACE.

<sup>308</sup> Terrorism Acts in 2018 at 5.29.

during the course of an intelligence-led arrest, but where it is not possible to specify the nature of the suspected offence.

5.13. I **recommend** that CT Police and the Home Office consider whether section 41 deals adequately with persons arrested for terrorism offences in hospital.

5.14. The key legal consideration is that any period of detention pre-charge needs to be subject to adequate safeguards and oversight. Unlike PACE, the Terrorism Act 2000 and Code H do not expressly permit internal police reviews of continued detention that are required in the initial periods of detention under Schedule 8<sup>309</sup> to be conducted via live link or telephone<sup>310</sup>. There may be circumstances, such as the COVID-19 pandemic, where securing the physical presence of an inspector or superintendent is difficult or undesirable, and in those circumstances remote oversight is better than no oversight. However, it was not suggested to me that securing the attendance of the right officers was not possible during the pandemic. Given the nature and character of Schedule 8 detention I therefore do not make a general recommendation that police authorisations for Schedule 8 detention should be able to be carried out remotely.

### ***Warrants of Further Detention***

5.15. In ***England and Wales*** applications for warrants for further detention are routinely made to designated District Judges at Westminster Magistrates' Court in London via video link from TACT suites<sup>311</sup>. In 2019 there were 40 *individuals* made subject to warrants for further detention, compared to 31 in 2018<sup>312</sup>.

<b>Year</b>	<b>Count</b>
2012	33
2013	18
2014	54
2015	39
2016	35

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<sup>309</sup> Paragraph 21 et seq Schedule 8 Terrorism Act 2000.

<sup>310</sup> Contrast PACE sections 40A and 45A(2), and Code C paragraphs 15.9 *et seq*.

<sup>311</sup> In principle, the flexibility provided by paragraph 33(4) would enable the use of technology to link to a person detained at a hospital.

<sup>312</sup> Figures provided by National Counter-Terrorism Policing Headquarters. For the purpose of last year's report, I was provided with a different set of figures, namely the total number of individual warrants: see Terrorism Acts in 2018 at 5.9.



2017	126
2018	31
2019	40
<b>Total</b>	<b>376</b>

5.16. I reported last year that there are no statistics on the success rates for warrants for further detention in England and Wales. The government has accepted my recommendation that these statistics should be published.

5.17. A judicial authority may issue a warrant of further detention, on application by the police, only if satisfied<sup>313</sup> (a) that there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary for obtaining relevant evidence by questioning or otherwise, to preserve relevant evidence, or pending the obtaining of evidence through examination or analysis (for example, data from seized electronic devices) and (b) that the investigation is being conducted diligently and expeditiously.

5.18. It is clear to me that the standard of preparation and presentation of applications for warrants of further detention is high, with good detail on the number of officers assigned to the investigation (in order to address the second statutory criterion). Applications are made in the presence of the detainee and their lawyer by a police superintendent rather than the officer with greatest knowledge of the investigation, the senior investigating officer (known as the “SIO”). I accept that it would be counterproductive to divert the SIO from running a high-paced investigation into preparing for and presenting the application; and if the judicial authority is unsatisfied about any aspect of the application, it can ask for further information.

5.19. That includes, by virtue of paragraphs 33 and 34 of Schedule 8, requiring sensitive information to be given in the absence of the detainee or their lawyer where non-disclosure is justified<sup>314</sup>. The need for exacting scrutiny of the grounds for further detention, and the value to the detained person of the judicial authority being able to ask penetrating questions even on matters of sensitivity, has been emphasized by the most senior judges<sup>315</sup>.

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<sup>313</sup> Paragraph 32(1) and (1A)

<sup>314</sup> Paragraph 34(2) sets out the grounds.

<sup>315</sup> *Ward v Police Service of Northern Ireland* [2007] UKHL 50.

5.20. In England and Wales initial warrants of further detention are often uncontentious. At the early stage of intelligence-led investigations the necessity for some additional period of detention may be readily established; less so as the investigation progresses and additional warrants of further detention are sought. Detainees are usually represented by solicitors. The position is different in Northern Ireland where senior barristers may be instructed and where the process may be more drawn out.

### ***Conditions and Safeguards***

5.21. Schedule 8 and PACE Code H<sup>316</sup>, together with PACE Code C that applies to all suspects, govern the treatment, conditions and safeguards for those detained following arrest under section 41.

5.22. During early 2019, HM Inspectorate of Prisons and HM Inspectorate of Constabulary and Fire & Rescue Services carried out a joint inspection of TACT suites in England and Wales<sup>317</sup> whose findings were largely positive. More detailed criteria used by the inspectorates when assessing TACT suites were published in 2018<sup>318</sup>.

5.23. Last year I drew attention to the practice of rousing sleeping detainees to check on their welfare and recommended<sup>319</sup> that this practice was reassessed. I am pleased to report that the police have undertaken to reassess the relevant College of Policing Guidance to determine whether remote monitoring may be feasible.

5.24. A separate and detailed Code H issued under the Police and Criminal Evidence (Northern Ireland) Order 1989 applies in Northern Ireland<sup>320</sup>. There is no Code in Scotland: I draw attention to this, and make a recommendation on it, in Chapter 10.

5.25. It remains unsatisfactory that there are no secure statistics on the exercise of the strong power by a police superintendent in certain limited circumstances to delay the exercise by the detained persons of the right to have someone notified and to

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<sup>316</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/903475/pace-code-h-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903475/pace-code-h-2019.pdf).

<sup>317</sup> <https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2019/07/TACT-custody-suites-Web-2019.pdf>: see further Terrorism Acts in 2018 at 5.25.

<sup>318</sup> <https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2019/02/Expectations-TACT-Custody-FINAL-231118-1.pdf>.

<sup>319</sup> At 5.27.

<sup>320</sup> <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/pace-code-h-2015.pdf>.

consult a solicitor<sup>321</sup> or the power exercisable by a Commander or Assistant Chief Constable to require consultation with a solicitor within sight and hearing of another officer<sup>322</sup>. The first power is the basis for ‘safety interviews’, the short-term questioning of suspects in the absence of legal representation where they may have information relevant to public safety. The power was exercised following the arrests of some of the would-be suicide bombers on 21 July 2005, whilst a further armed suspect was potentially at large<sup>323</sup>.

5.26. The form used by CT Police to record arrests and other incidental matters impedes data-gathering: it does not specifically require the arresting officer to state whether either of these powers has been exercised. Whilst the form refers to delay, in practice (as the underlying data demonstrates) officers have used this to refer to delays in consultation when the detained person has asked for a specific solicitor as opposed to a duty solicitor.

5.27. The need for secure statistics is enhanced by the fact that the second power was substantially modified by the Counter-Terrorism and Border Security Act 2019 so that it now permits a superintendent in certain circumstances to require the detained person to consult a different solicitor of their choosing<sup>324</sup>. It is right that where Parliament has modified legislation in this way it is possible to measure how if at all the powers are used in practice. I therefore **recommend** that CT Police Headquarters should modify the forms completed by arresting officers so that any use by police superintendents of the power under paragraphs 8 and 9 is clearly recorded, and the data gathered.

5.28. Since January 2017 the Independent Reviewer 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. In

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<sup>321</sup> Paragraph 8 Schedule 8 Terrorism Act 2000.

<sup>322</sup> Paragraph 9.

<sup>323</sup> This power was not exercised in relation to Ismail Abdurahman, whose questioning led to a finding by the Grand Chamber of European Court of Human Rights that his right to a fair trial and right to legal assistance had been violated in *Ibrahim and others v United Kingdom*, App.Nos. 50541/08, 50571/08, 50573/08 and 40351/09 (13 September 2016). Despite this violation, his conviction was found to be safe on a reference by the Criminal Cases Review Commission: *R v Ismail Abdurahman* [2019] EWCA Crim 2239.

<sup>324</sup> In force from 13 August 2020.

practice I consider custody visitors' reports, which must be sent to me<sup>325</sup>; discuss matters informally with custody officers; attend meetings of the Independent Custody Visitors Association which relate to TACT suites; and respond to relevant consultations<sup>326</sup>.

5.29. In England and Wales, independent custody visitors operate under a Code of Practice<sup>327</sup>. The 2019 joint inspection, matching my own experience, found that individual forces welcomed and acted on feedback from independent visitors<sup>328</sup>. Custody visitors in England and Wales 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.

5.30. The position is less satisfactory in Scotland and Northern Ireland. Scotland, as I report in Chapter 10, has no public Code setting out the rights and responsibilities of independent visitors. In Northern Ireland, there is no Code and, as I report in Chapter 9, the rates of meaningful custody visits require improvement.

### **Arrest Outcomes in 2019**

5.31. Given that the special and highly restrictive detention regime created by section 41 and Schedule 8 of the Terrorism Act 2000, particular attention should be given to the extent to which arrests under section 41 led to people being prosecuted, or merely released without charge.

### ***Numbers charged***<sup>329</sup>

5.32. In 2019 of the 282 "terrorism-related arrests" in **Great Britain** 102 people (36%) were charged with an offence<sup>330</sup>. This compares to a charge rate of 48% for "terrorism-

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<sup>325</sup> Under section 51 Police Reform Act 2002, as amended by section 117 Coroners and Justice Act 2009.

<sup>326</sup> Most recently, a review of the TACT healthcare service specification, in which I drew attention to the need for the specifications to welfare needs of children detained under Schedule 8.

<sup>327</sup> Independent Custody Visitors Code of Practice (2013), [https://icva.org.uk/wp-content/uploads/2018/11/Independent\\_custody\\_visitors\\_code\\_of\\_practice-1.pdf](https://icva.org.uk/wp-content/uploads/2018/11/Independent_custody_visitors_code_of_practice-1.pdf).

<sup>328</sup> HM Inspectorate of Prisons etc. Inspection report, *supra*, at paragraph 1.21.

<sup>329</sup> Some cases from arrests made in 2019 are still under investigation. The current charge rate shown in the more recent years/quarters is likely to be lower than final figures which will be published in subsequent releases. It follows that until all cases in a given period are finalised, care should be taken when comparing charge rates over time. Figures provided in this section are as at Sept 2020.

<sup>330</sup> Operation of Police Powers under the Terrorism Act 2000, Table A – A.03, quarterly update to September 2020.

related arrests” made in 2018 and 39% in 2017<sup>331</sup>. Of the 44 people specifically arrested under section 41 of the Terrorism Act 2000, 26 were charged (59%). The significantly higher charge rate of persons arrested under section 41 no doubt reflects the intelligence-led nature of many such arrests (although it does represent a decline of 8% from last year).

5.33. Although the number of “terrorism-related arrests” has decreased only slightly from 2018, in the year under review there was a 24% decline in the number of persons charged. In 2019 the fewest number of persons were charged following a “terrorism-related arrest” since 2011.

5.34. Of the 282 people who were arrested, 89 (32%) were released without being charged and 66 (23%) were released under investigation<sup>332</sup>. Alternative action is recorded as having been taken in 23 cases (8%), which included 14 recalls to prison. This is the highest number of prison recalls since the Terrorism Act 2000 was enacted.

5.35. Of the 102 people charged with an offence having been arrested on suspicion of committing a terrorism-related offence in 2019, 37 were charged with an offence under the Terrorism Act 2000 and 27 under other terrorism legislation. 15 people were charged with terrorism related offences (other than those contained in terrorism legislation) and 23 were charged with non-terrorism related offences<sup>333</sup>.

5.36. The most common principal offence<sup>334</sup> for which persons were charged under the Terrorism Acts in **Great Britain** was the collection of information useful to an act of terrorism (26 persons, which is the highest figure for the reporting period beginning 2002). The other principal offences were preparation for terrorist acts (8 persons), failure to comply with a port examination (6 persons), dissemination of terrorist publications (6 persons), breach of a foreign travel restriction (4 persons, which is the highest figure since the reporting period beginning 2002), encouragement of terrorism (4 persons), breach of a TPIM (3 persons, the joint highest figure since the reporting period beginning 2002), possession of an article for terrorist purposes (1 person), terrorist fundraising (2 persons), possession of information relating to a terrorist investigation (1 person), inciting terrorism acts overseas (1 person), and breach of temporary exclusion order (1 person, the first conviction for this offence).

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<sup>331</sup> Operation of Police Powers under the Terrorism Act 2000, Table A – A.03, quarterly update to December 2019

<sup>332</sup> Ibid, Table A – A.02.

<sup>333</sup> Ibid, Table A – A.05a:A.05c.

<sup>334</sup> Ibid, Table A – A.05a, quarterly update to September 2020.

5.37. As I explained last year, because Home Office statistics only refer to the principal offence with which an individual is charged, these figures must be approached with caution because it is likely that the figures do not reflect 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 terrorism information found on his computer at the time of his arrest, this latter offence will not be recorded.

5.38. By contrast to the figure for Great Britain, of the 152 arrests made under section 41 of the Terrorism Act 2000 in **Northern Ireland** only 20 people were charged with an offence (12%)<sup>335</sup>. This is an increase of two from the previous year. This low charge rate continues a trend that both I and my predecessors have remarked upon. I examine the charge rate in Northern Ireland in more detail in Chapter 9.

***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 2019. No such figures are published in Northern Ireland.

5.40. **Women** comprised 11% of “terrorism related arrests” in 2019, 8% of those charged with terrorism-related offences, and 11% of convictions.. These figures are broadly consistent with those from last year<sup>336</sup>.

5.41. In terms of **age**, the figures for Great Britain in 2019 are as follows (showing last year’s figures in brackets)<sup>337338</sup>:

<b>2019</b>	<b>Under 18</b>	<b>18-20</b>	<b>21-24</b>	<b>25-29</b>	<b>30 and over</b>
<b>% of terrorism-related arrests</b>	4% (6%)	10% (10%)	11% (16%)	17% (19%)	57% (49%)
<b>% of terrorism-related charges</b>	8% (6%)	15% (13%)	15% (17%)	18% (21%)	44 (43%)
<b>% of terrorism-related convictions</b>	9% (3%)	15% (12%)	11% (15%)	26% (24%)	40% (46%)

<sup>335</sup> Northern Ireland Office, Northern Ireland Terrorism Legislation Annual Statistics 2018/19 and 2019/20, table 4.1.

<sup>336</sup> Operation of Police Powers under the Terrorism Act 2000, Table A – A.09 quarterly update to September 2020.

<sup>337</sup> Ibid, Table A – A.10.

<sup>338</sup> Operation of Police Powers under the Terrorism Act 2000, Table A – A.10 quarterly update to March 2020

5.42. As for **ethnic appearance** the figures based upon officer-defined data for Great Britain in 2019 are as follows<sup>339,340</sup>

<b>2019</b>	<b>White</b>	<b>Black</b>	<b>Asian</b>	<b>Other</b>	<b>Not known</b>
<b>% of terrorism-related arrests</b>	41% (43%)	8% (13%)	39% (31%)	11% (12%)	0% (1%)
<b>% of terrorism-related charges</b>	46% (45%)	10% (18%)	32% (32%)	13% (4%)	0% (1%)
<b>% of terrorism-related convictions<sup>341</sup></b>	45% (40%)	15% (19%)	23% (35%)	17% (5%)	0% (1%)

5.43. These figures broadly continue a trend I remarked upon last year, as they suggest a significant increase in the proportion of White and Black persons arrested, charged and convicted of terrorism-related offences and a correspondingly significant decrease in the proportion of persons of Asian ethnic appearance arrested, charged and convicted.

5.44. In terms of self-defined **nationality**, British citizens comprised 70% of those arrested for terrorism-related offences in 2019, and 71% of those convicted of such offences<sup>342</sup>.

5.45. As I reported last year, no statistics are published for the self-defined, or officer-defined, religion of those arrested. As a result, the statistics do not accurately assist in determining the arrest rate of Muslim suspects, and whether it is static or changing over time.

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<sup>339</sup> Operation of Police Powers under the Terrorism Act 2000, Table A – A.11 quarterly update to September 2020

<sup>340</sup> Operation of Police Powers under the Terrorism Act 2000, Table A – A.11 quarterly update to March 2020

<sup>341</sup> This is included for completeness but needs to be treated with caution since many of the charges will not have yet been determined by the courts.

<sup>342</sup> Operation of Police Powers under the Terrorism Act 2000, Table A – A.11 quarterly update to September 2020Ibid, Table A – A.12a.

## 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 and documents for examination and copying; and to take their fingerprints and DNA. As I explained last year, failure to cooperate with an examination is a criminal offence. This power may be exercised without the need for reasonable suspicion. In broad terms the use of the power may be tasked (based on some advance intelligence including rules-based targeting) or untasked (based purely on the officer’s own assessment of the need to carry out an examination).
- 6.2. Details about the police officers<sup>343</sup> who use the power (collectively referred to as CT Borders Policing), the working environment at commercial ports and airports, the recent and welcome creation of a joint team of CT Borders Policing and MI5 to manage the dissemination of port circulations sheets, and the outcome of the *Beghal* litigation concerning the no-suspicion nature of the Schedule 7 power, are all covered in detail in Chapter 7 of last year’s annual report.

### Small Ports and Airports

- 6.3. To complete the picture of the working environment in which Schedule 7 powers may be exercised, it is necessary to consider General Maritime and General Aviation. General Maritime refers to unscheduled sailings to and from smaller ports, whilst General Aviation refers to unscheduled flights from aerodromes and airfields. There are said to be 120 cargo handling ports and over 400 non-cargo handling ports and harbours around the United Kingdom<sup>344</sup>, whilst the number of aerodromes and airfields in the United Kingdom supporting General Aviation is estimated at around 500 and over 1000 respectively<sup>345</sup>.

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<sup>343</sup> The government rejected my recommendation that Customs Officers and Border Force officials should not be capable of being designated as examining officers under Schedule 7, at least for the time being.

<sup>344</sup> Maritime UK website, <https://www.maritimeuk.org/about/our-sector/ports/>. This does not include jetties.

<sup>345</sup> Royal Aeronautical Society website, <https://www.aerosociety.com/news/uk-ga-sector-in-crisis/>.



6.4. Although Schedule 7 powers can also be used to examine a person on a ship or aircraft which has arrived at any other place in Great Britain or Northern Ireland, they cannot be exercised in respect of individuals on ships merely because they have entered territorial waters<sup>346</sup>. Jersey, Guernsey and the Isle of Man have their own separate legislation equivalent to Schedule 7<sup>347</sup> but their proximity to the United Kingdom, and the lack of immigration controls between them and the mainland, means that CT Borders Policing have to work closely with law enforcement officials in the Islands.

6.5. In general terms, CT Borders Policing operates a hub model involving officers travelling out to smaller ports and airports where needed. An inevitable consequence of the sheer number and spread of small ports and airports throughout the United Kingdom is that relationships with harbour masters and airstrip security are of paramount importance. Broader law enforcement projects are in place to heighten awareness: Operation Kraken relating to suspicious behaviour at sea<sup>348</sup> and Project Pegasus relating to criminal and terrorist risks in the general aviation sector<sup>349</sup>. The total number of Schedule 7 examinations that take place in a General Maritime or General Aviation setting is tiny.

### **General Maritime**

6.6. Even more so than its commercial counterpart, the General Maritime environment provides limited advance travel information for systematic analysis by CT Borders Policing. The lack of information in the immigration context was noted by the Chief Inspector of Borders and Immigration in 2016<sup>350</sup>. Whether this is a significant gap in the counter-terrorism armoury is difficult to evaluate. According to Europol there are no signs of illegal immigration channels being *systematically* exploited by terrorist

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<sup>346</sup> Paragraph 2(3) Schedule 7 Terrorism Act 2000. Whether powers created by statute extends to the territorial waters is generally a matter of ordinary statutory interpretation: Craes On Legislation (11th Edition) at paragraphs 11.2.8 to 11.2.9. The language of paragraph 2(3) is inconsistent with Schedule 7 extending to the territorial waters of the United Kingdom.

<sup>347</sup> Schedule 8 Terrorism (Jersey) Law 2002; Schedule 8 Terrorism and Crime (Bailiwick of Guernsey) Law 2002; Schedule 7 Anti-Terrorism and Crime Act 2003.

<sup>348</sup> <https://www.gov.uk/government/publications/report-suspicious-behaviour-at-sea-project-kraken/report-suspicious-behaviour-at-sea-project-kraken>.

<sup>349</sup> <https://www.gov.uk/government/publications/report-suspicious-behaviour-at-small-airfields-project-pegasus/report-suspicious-behaviour-at-a-small-airfield-project-pegasus>.

<sup>350</sup> Foreword, Inspection of General Aviation and General Maritime, January 2016, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/547695/ICIBI-report-on-GAGM-January\\_2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/547695/ICIBI-report-on-GAGM-January_2016.pdf). The Government's response is here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/491879/Formal\\_response\\_to\\_ICI\\_report\\_on\\_GA\\_GM\\_-\\_14\\_January\\_2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/491879/Formal_response_to_ICI_report_on_GA_GM_-_14_January_2016.pdf).

organisations<sup>351</sup>, and in any event these are more likely to involve clandestine landing sights away from ports all together. The current high rate of small boat landings on the shoreline of the United Kingdom raises a different problem: that of ensuring that the desirably quick processing and dispersal of recent arrivals is consistent with CT Borders Police having an opportunity to consider the exercise of their Schedule 7 powers.

### **General Aviation**

6.7. Although historically considered an issue for the United Kingdom Border Force, the approach to General Aviation is now multi-agency. More travel information is supplied than for General Maritime under General Aviation Report guidance<sup>352</sup> which contains a mixture of requests and reporting obligations based on the Customs and Excise Management Act 1979 and, in relation to air travel within the Common Travel Area (Great Britain, the Channel Islands, the Isle of Man, Northern Ireland, the Republic of Ireland) the Terrorism Act 2000<sup>353</sup>, and reporting requests. In principle, the non-submission of a report is a flag to follow up. Given that Schedule 3 of the Counter-Terrorism and Border Security Act 2019 only came into force in August 2020, the extent to which General Aviation will be of relevance to the exercise of Schedule 3 powers for countering HSA is yet to be determined.

6.8. As with General Maritime, it is difficult to evaluate conclusively whether the concentration of CT Borders Police in larger hub ports and airports risks a dangerous gap in coverage, an issue to which attention was drawn by Lord Anderson QC in his final report<sup>354</sup>. All that can be said in broad terms is that the sheer number of entry points into the United Kingdom through smaller ports aerodromes and airfields is bound to represent a challenge to the Schedule 7 legislative model which focuses counter-terrorism powers on ports and points of arrival; that there is no current evidence that this potential vulnerability has led to actual damage; but that recognising that this is a potential vulnerability is better than ignoring the issue all together. It is to be noted that during 2020 some CT regions (such as the South-West and Police

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<sup>351</sup> Terrorism Situation and Trend report, Europol (2020), European Union Terrorism Situation and Trend report (TE-SAT) 2020 at page 44.

<sup>352</sup> General Aviation Report (GAR) Guidance (August 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/828290/GAR-Instructions-August-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/828290/GAR-Instructions-August-2019.pdf).

<sup>353</sup> Paragraph 12 Schedule 7 which requires the securing of approval or the giving of notice when arriving at a non-designated port.

<sup>354</sup> Lord Anderson QC, *Terrorism Acts in 2015* at 7.38.

Scotland) sensibly used the lower passenger flow caused by COVID-19 to refresh their relationships with harbour masters and airstrip security and look at their coverage afresh.

## **Frequency of Use**

### ***Great Britain***

6.9. As I remarked upon last year, in the past few years there has been a significant decline in the number of Schedule 7 examination in Great Britain. In the period 2010/11, the year data was first published, there were 65,684 examinations. In 2018 there were 11,876 examinations and in the year under review there were 9,543<sup>355</sup>. This represents a decline of 20% from last year and, since the year ending December 2012, a decrease of 84.

### ***Northern Ireland***

6.10. The picture in Northern Ireland is also of continuing decline. Fewer historic statistics are available but there has been an overall drop of 73% from 2016 (2082 persons examined) to 2019 (559 persons examined)<sup>356</sup>.

## **Decline and Utility**

6.11. In last year's report I suggested 6 potential reasons for the decline<sup>357</sup>. An additional potential reason is the rolling out of hand-held devices. On the spot access to police data allows CT Borders Police to make smarter decisions about whether to use their examination powers following their initial interaction with the member of the public<sup>358</sup>. It is possible that officers who might in the past have decided to conduct a Schedule 7 examination based on intuition are able to dispel concerns by consulting this police data. I am informed the government agrees with my recommendation that research should be carried out into the decline in Schedule 7's use.

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<sup>355</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - S.03, quarterly update to September 2020

<sup>356</sup> Northern Ireland Office, *Northern Ireland Terrorism Legislation: Annual Statistics 2018/19* (Belfast, 2019) p.21.

<sup>357</sup> Terrorism Acts in 2018 at 6.29.

<sup>358</sup> This interaction used to be known as "screening": Terrorism Acts in 2018 at 6.22-6.25. This term has been removed from the new Code of Practice, paragraphs 20-21. Evidence of the impact of mobile devices arises from a comparison of Q2 and Q3 of the 2019/20 data discussed below.

6.12. Of greater significance is the utility of the power, and the task of evaluating it has been seriously improved by a United Kingdom-wide<sup>359</sup> system for capturing and analysing data generated by CT Borders Policing operating since 1 October 2019. This system includes greatly improved and standardised means of inputting data on the use of the individual powers within Schedule 7 to examine, detain, download devices, and take biometrics, and provides an exceptionally powerful means of analysing that data at United Kingdom, regional and local level. It also provides a rich picture of the variety of tasks that CT Borders Police officers are involved in, including a great deal of general crime in some locations.

6.13. Having spent time with an analyst looking at this system, and some of the reports generated by it, it is clear to me that:

- It is possible to form some proper assessment of the utility of the use of Schedule 7 powers by considering the output from that examination, in the form of ports intelligence reports. For the 12-month period from 1 July 2018 to 30 June 2019 (that is, before the new system became operational) ports intelligence reports with a relevance to national security were filed in roughly half of tasked examinations and one fifth of untasked examinations. CT Policing Headquarters have also developed a system for identifying the extent to which Schedule 7 examinations have contributed to the disruption of terrorism: whilst this exercise is bound to be evaluative, it is nonetheless to be welcomed in confirming or challenging the utility of Schedule 7.
- A self-critical analysis can be conducted by comparing the performance of different regions. The numbers examined naturally vary widely within the United Kingdom (for example it is used far more in the London region than the South-West) but there are significant differences between regions in terms of the detention of those who are examined, and the percentage of data downloads and biometric captures that are carried out, and security intelligence reports generated.
- This raises the question whether, if one region carries out, say, markedly more detentions than any other, those detentions were all strictly necessary or could have been reduced in line with other regions; it may be that in those places Schedule 7 can be operated with less impact on the rights and freedoms of

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<sup>359</sup> There are 11 CT police units in the United Kingdom, including Scotland and Northern Ireland.

individual members of the public. This offers a means of optimising the use of powers and mitigates the risk that what have been described to me as different cultural practices develop within particular CT regions. Some of the variations will be explicable on grounds of more or fewer tasked stops and the technical and operational capacity available at each port.

- The system also allows a finer analysis of particular trends, for example whether mandatory detention after one hour<sup>360</sup> and its associated administrative formalities may have had the effect of creating a category of just-under-the-hour examinations<sup>361</sup>.
- Analysis of the data is presented periodically to a performance board within CT Borders Policing. There is no external membership (that is, anyone from outside CT Borders Policing) and so there is a strong onus on its members to ensure that this analysis is used to its full extent to identify and challenge outliers from both perspectives: heavy use of a power may be an indication of effective counter-terrorism at work, but may be an indication that powers are being used too freely. As with any metric, certain outcomes should not be allowed to become, unthinkingly, a measure of success: for example, the mere fact that a person has been detained under Schedule 7 does not indicate that the original decision to examine was appropriate. I am confident from my preparations for this report that CT Borders Policing command is aware of these issues.
- It must be acknowledged that drawing wider conclusions from the data for 2020 will be made more difficult following the severe impact of COVID-19 on travel numbers and the use of Schedule 7.

## Detention

6.14. The power to examine includes a power to detain<sup>362</sup> and requires no suspicion, reasonable or otherwise. Such a power is unavoidable if examinations are to be effective in the face of uncooperative behaviour. However, in last year's report I questioned whether mandatory detention after an hour in all cases struck the right balance between personal liberty and administrative effectiveness<sup>363</sup>. I welcome the

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<sup>360</sup> Paragraph 6A Schedule 7 Terrorism Act 2000.

<sup>361</sup> Terrorism Acts in 2018 at 6.90.

<sup>362</sup> Paragraph 6 Schedule 7 Terrorism Act 2000.

<sup>363</sup> Terrorism Acts in 2018 at 6.87-93.

fact that the government is proposing to review the detention process in conjunction with the police.

6.15. During 2019 the government issued a revised notice to be given to those detained<sup>364</sup> which clarified the conditions for taking biometrics, and which is now replicated in the revised Code of Practice which is considered below.

### **Great Britain**

6.16. In the year under review, there were 2,082 detentions in Great Britain<sup>365</sup>. This is an increase of 246 (13%) from last year. This means that 22 of those examined in Great Britain were detained.

	2012	2013	2014	2015	2016	2017	2018	2019
<b>Examinations</b>	60,127	46,184	35,004	27,530	19,355	16,349	11,876	9,543
<b>&lt; 1 hour</b>	57,822	44,330	33,013	25,690	17,857	14,703	10,131	7,548
<b>Detained</b>	614	549	1,043	1,828	1,539	1,700	1,836	2,082
<b>% detained</b>	1%	1%	3%	7%	8%	10%	15%	22%
<b>Biometrics</b>	547	353	462	511	N/A	N/A	N/A	N/A

6.17. What this table demonstrates is that the whilst the power to detain has remained at broadly similar levels since 2015, it is steadily risen as a percentage of examinations as the number of total examinations has fallen. The number of under the hour examinations (after which point, under the reforms implemented in July 2014, detention becomes mandatory if the examination is to continue<sup>366</sup>) is correspondingly declining. In addition there are slightly more detentions than over the hour examinations which indicates that some members of the public were detained but their examination concluded before the hour mark.

6.18. Further internal data provided to me for England and Wales shows that in the year under review:

- There were more, but not substantially more, tasked stops than untasked stops.

<sup>364</sup> <https://www.gov.uk/government/publications/circular-0082019-schedule-7-to-the-terrorism-act-2000>, September 2019.

<sup>365</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - S.03, quarterly update to September 2020

<sup>366</sup> Paragraph 6A Schedule 7 Terrorism Act 2000, inserted by the Anti-Social Behaviour, Crime and Policing Act 2014.

- Individuals examined following tasked stops were far more likely to be detained, have their media downloaded, and their biometrics taken than following an untasked stop, by a factor of roughly 5.

6.19. The comparison between the rate of detentions, data downloads and biometric capture for tasked and untasked stops is striking and positive. What the picture shows is that the more intrusive powers in Schedule 7 are far more likely to be used where CT Police know who they are stopping and why, rather than on the basis of intuition. As I noted in last year's report<sup>367</sup>, the key to Schedule 7 is greater information, and the greater the reliance on intuitive stops, the greater the risk of selection on the basis of unfair discrimination. Although this internal data does not exclude the possibility that *selection* is driven by irrational or prejudicial concerns, the data does tend to demonstrate that detention, data download and biometric capture is more likely to be the product of informed decision-making.

### ***Northern Ireland***

6.20. There was a substantial rise in the number of detentions but from a very low base and to a still very modest total compared to the number of travellers. There were no detentions at all in 2016, 11 in 2017, 6 in 2018 and 31 in 2019. This means that in 2019 6% of those examined in Northern Ireland were detained. Some possible explanations for the disparity with the rest of the United Kingdom was offered in last year's report<sup>368</sup>.

### **Self-Defined Ethnicity**

#### ***Great Britain***

6.21. 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 8 years are as follows:<sup>369</sup>

#### Total examinations

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<sup>367</sup> Terrorism Acts in 2018 at 6.18 and 6.49.

<sup>368</sup> Terrorism Acts in 2018 at 9.85.

<sup>369</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - S.03, quarterly update to December 2019.

	2012	2013	2014	2015	2016	2017	2018	2019
<b>White</b>	39%	41%	37%	27%	28%	29%	24%	23%
<b>Mixed</b>	3%	5%	6%	5%	3%	4%	6%	5%
<b>Black</b>	9%	8%	8%	8%	7%	7%	7%	7%
<b>Asian</b>	24%	21%	23%	30%	28%	27%	25%	26%
<b>Chinese or other</b>	18%	17%	19%	23%	22%	19%	23%	27%
<b>Not stated</b>	7%	8%	8%	7%	11%	14%	15%	12%

### Detentions

	2012	2013	2014	2015	2016	2017	2018	2019
<b>White</b>	10%	11%	10%	12%	12%	12%	11%	13%
<b>Mixed</b>	2%	6%	6%	6%	7%	7%	7%	6%
<b>Black</b>	24%	15%	13%	9%	9%	11%	11%	7%
<b>Asian</b>	32%	32%	35%	37%	33%	28%	28%	30%
<b>Chinese or other</b>	18%	26%	27%	26%	22%	25%	29%	29%
<b>Not stated</b>	13%	9%	9%	10%	17%	17%	14%	15%

6.22. The 2019 figures do not show an appreciable change from 2018 and it is difficult to identify any trends other than continuing slow decline in the number of black persons examined or detained. It remains the case that a member of the travelling public is more likely to be examined if Asian, or Chinese or other, than if white (relative to their numbers in the population) and even more likely to be detained. Whilst this data does not indicate the religious or ideological identity of the person stopped, it is a reasonable inference that the main use of Schedule 7 powers is to detect Islamist terrorism which continues to be the principal threat within Great Britain.



6.23. In my previous report I raised the question of whether, as arrests and prosecutions of white persons increase (probably but not exclusively as a result of police action against Right Wing Terrorism), the balance of examinations of white and non-white persons will change. When comparison is made to the arrest and prosecution figures<sup>370</sup> that has not proven to be the case in 2019.

### ***Northern Ireland***

6.24. The self-defined ethnicity of those examined and detained in Northern Ireland provided to me by PSNI is as follows:

#### ***Total examinations***

	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
<b>White</b>	92%	82%	78%	55%
<b>Mixed</b>	1%	2%	4%	10%
<b>Black</b>	1%	3%	4%	4%
<b>Asian</b>	4%	7%	10%	13%
<b>Chinese or other</b>	1%	6%	3%	10%
<b>Not stated</b>	1%	0%	<0.5%	7%

#### ***Detentions***

	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
<b>White</b>	0%	36%	17%	13%
<b>Mixed</b>	0%	0%	17%	19%
<b>Black</b>	0%	0%	17%	6%
<b>Asian</b>	0%	64%	0%	26%
<b>Chinese or other</b>	0%	0%	33%	23%
<b>Not stated</b>	0%	0%	17%	13%

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<sup>370</sup> See table at 5.42.

6.25. Compared to 2018<sup>371</sup>, there has been a significant fall in the percentage of white persons examined (78% to 55%) with an increase in the number of persons in the categories mixed race (4% to 10%), Asian (10% to 13%) and Chinese or other (3% to 13%). Even leaving out of account those whose ethnicity was not stated (7%), this is a very significant uplift in the number of Schedule 7 examinations in Northern Ireland of non-white persons. At the very least it suggests a degree of pivot away from detecting Northern Ireland-related terrorism towards, most likely, violent Islamist extremism. This is an area that the Human Rights Adviser to the Northern Ireland Policing Board and I may be able to consider jointly in the coming year.

6.26. The main change for detention data is that persons in the category Asians or Asian British are significantly more likely to be detained since last year (17% to 26%) and mixed race (0% to 19%), with a fall for the number of person Chinese or other persons (33% to 23%). Although the increase in the rate of detention of non-white persons is smaller than the increase in the rate of their examination this is again a matter that merits greater understanding.

6.27. From an individual rights perspective, the greater concern must be with untasked stops. Tasked stops, based on advance information about the individual and their known or suspected links to terrorism, are less likely to be the product of simple prejudice. I accept that some of the reason for the lack of change may be that, as has been explained to me, it is more difficult to construct rules-based targeting for Right Wing Terrorism<sup>372</sup>. But the concrete situation to which police and policy makers must be alert is one in which ports officers are faced with a large crowd of disembarking passengers, perhaps in vehicles, with little or no information that allows a careful selection. In that situation, the risk of defaulting to colour as a proxy for risk must be at its highest<sup>373</sup>, and it is this situation that requires the sharpest adherence to the improved Code of Practice at paragraph 30:

“It is not appropriate for race, ethnic background, religion and/or other “protected characteristics” (whether separately or together) to be used as

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<sup>371</sup> Terrorism Acts in 2018 at 9.87.

<sup>372</sup> The data does not indicate the balance of tasked against untasked stops within each ethnicity category: this would be a useful exercise to conduct.

<sup>373</sup> That is, the risk of too easily accepting that race is by its very nature sufficiently connected to terrorism: Walker, C., 'Neighbor terrorism and the all-risks policing of terrorism' (2009) 3 *Journal of National Security Law & Policy* 121-168.

criteria for selection except to the extent that they are used in association with considerations that relate to the threat from terrorism”<sup>374</sup>.

### **Advance information**

6.28. There remains a need for CT Borders Police to carry out Schedule 7 examinations based on intuition, for example having observed how the individual behaves as they pass through controls at a port<sup>375</sup>. But as will be apparent from last year’s report<sup>376</sup>, and this one, I am of the clear view that Schedule 7 powers are more likely to be effectively exercised to protect national security and individual rights where they are based on advanced information<sup>377</sup>.

6.29. The government did not accept my recommendation last year that it should use paragraph 17 of Schedule 7 to require advance information from carriers<sup>378</sup>. It will almost certainly be necessary to return to this topic once the arrangements for advance information following Brexit are known in early 2021.

6.30. In the Common Travel Area passports are not routinely required to be shown for immigration purposes, and CT Borders Police need to come up with ways of identifying who is travelling, especially if responding to a tasking.

- There is no power under Schedule 7 to check passports in order to determine whether to carry out an examination. The absence of a preparatory power contrasts with the position with freight: an examining officer may enter a container in order to determine whether to carry out an examination<sup>379</sup>.
- The open use of facial recognition at ports is another tactic being developed as a way of identifying who is travelling.

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<sup>374</sup> The previous version of the Code (Paragraph 19: “...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.”) implied that a person’s ethnic background or religion without more could be a reason for selection.

<sup>375</sup> Behavioural training is important for CT Borders Police, including training to ensure that cultural norms are not mistaken for suspicious behaviour.

<sup>376</sup> Terrorism Acts in 2018 at 6.74.

<sup>377</sup> I refer to *any* information about the person travelling. Technically, airlines are obliged to collect “Advance Passenger Information” which is essentially passport data and “Passenger Name Record” data which are booking details. Passenger ferries have fewer obligations.

<sup>378</sup> Under paragraph 17 Schedule 7.

<sup>379</sup> Paragraph 9(4) Schedule 7 and section 116(1) Terrorism Act 2000.

- Compulsory checks for false or cancelled passports is one lawful means of requiring identity documentation; but it is lawful only if the checks are for the predominant purpose of finding false or cancelled passports<sup>380</sup>.

6.31. Powers exercised by other officials may result in identity documents being shown, for example powers exercised by Border Force officers under the Customs and Exercise Management Act 1979. Close working between CT Borders Police and other officials is both inevitable and essential (particularly given the larger presence of Border Force officers) but does hold out the risk of statutory powers that are provided by Parliament for one purpose being pressed into service of another.

6.32. Notwithstanding my recommendation in last year's report<sup>381</sup>, I was informed that the problem of "golden-keying" persists. This is the process by which counter-terrorism information relating to an individual (which may be no more than a record that they were previously examined with no indication of terrorist involvement) is entered by one CT Borders Police in one force area, but then protected against access by CT Borders Police in another force area. In practice, police officers can find it hard to track down the appropriate person to unlock the protective golden key. In addition, the presence of an unlocked golden key can - not unnaturally - elevate the interest that police may take in a particular individual. Unlike other aspects of advance information, this is an area where access to information is entirely dependent upon the police and is one that clearly calls for improvement.

### **Conduct of Examinations**

6.33. After a lengthy period of consultation during 2019, a new Code of Practice<sup>382</sup> has now been brought into effect with effect from August 2020<sup>383</sup>. The government's response to the consultation exercise<sup>384</sup> accepted most of the suggestions I had made<sup>385</sup>. The most significant amendments are:

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<sup>380</sup> Section 147 and Schedule 8 Anti-Social Behaviour, Crime and Policing Act 2014. See Terrorism Acts in 2018 at 6.20.

<sup>381</sup> Terrorism Acts in 2018 at 6.58(b).

<sup>382</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/909016/CCS001\\_CCS0720968708-001\\_Examining\\_Officers\\_and\\_Review\\_Officers\\_Sch7\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/909016/CCS001_CCS0720968708-001_Examining_Officers_and_Review_Officers_Sch7_Accessible.pdf)

<sup>383</sup> Port Examination Codes of Practice and National Security Determinations Guidance Regulations 2020/795

<sup>384</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/890635/CCS207\\_CCS0320304068-001\\_CT\\_and\\_Border\\_Security\\_Act\\_2019\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890635/CCS207_CCS0320304068-001_CT_and_Border_Security_Act_2019_Web_Accessible.pdf)

<sup>385</sup> <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2019/09/190904-formal-response-to-Sched7-Code.pdf>.

- greater clarity on the point at which a Schedule 7 examination begins (removing the reference to “screening”).
- Reference to protected characteristics in the context of unlawful discrimination that better accords with the decision of the Supreme Court in *Beghal*<sup>386</sup>.
- improved processes for protecting legally privileged material that is encountered during the course of examinations.
- More emphasis on proportionality when an officer is considering whether to exercise further powers of detention, digital downloads and biometric capture.
- The need for local forces to monitor competence after accreditation.

6.34. I have now seen evidence that the “procedural justice” approach to Schedule 7 examinations known as “Participate” to which I referred in last year’s report<sup>387</sup> is being rolled out within CT regions. Although a clunky mnemonic<sup>388</sup>, its purpose is admirable as it emphasizes the importance of officers explaining what powers they are using to the member of the public who is being inconvenienced and, to the extent that they are able without compromising national security, why. The challenge for individual officers is to be able address all the powers: not simply the selection for examination, or detention, or downloading of data, but the taking of photographs and their retention. Officers who are able to explain their use of the power are also more likely to be confident to use their powers where it is appropriate to do so.

6.35. In England and Wales complaints relating to Schedule 7 are not made to a central body but to the force for the police area where the examination took place. At my request I have been provided with figures for forces in England and Wales by the National CT Policing Headquarters for the last few years. These are unaudited, and the returns for the various forces span slightly different time periods and appear to use slightly different criteria. With those caveats in mind it is possible to say that:

- The vast majority of complaints were made by individuals of Asian heritage, judging by the names of complainants.

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<sup>386</sup> *Beghal v Director of Public Prosecutions* [2015] UKSC 49.

<sup>387</sup> Terrorism Acts in 2018 at 6.57.

<sup>388</sup> Encourage Participation, Act with Respect, Explain that a Record will be made, Tell what legislation is being used, Act with Impartiality, Explain that you Care about Welfare, Express Interest in View/ Opinions, Explain Processes and Procedures, Act on Facts, Explain Time will be kept to a Minimum, Explain Reason for power being used.

- The overall number of complaints, even in the force areas with the busiest ports, was low (generally low single digits per year).
- Half the complaints mentioned unlawful discrimination in some form.

6.36. It does not appear from the figures provided that any of the complaints of unlawful discrimination have been upheld, but since I have not seen the local documentation I am reluctant to draw any conclusion, either way, as to the merits of the complaints.

6.37. During 2019, there was ongoing litigation arising out of a Schedule 7 examination in October 2018, which was eventually settled by the Metropolitan Police Service with a concession and payment of damages in early 2020<sup>389</sup>. The claimant was a Muslim female who was examined for approximately 3 hours (and therefore detained) at Heathrow Airport en route to Bahrain. The point in issue was the requirement to remove her hijab, with the threat of force if she failed to comply, so that she could be photographed<sup>390</sup>. This case does not demonstrate that the no-suspicion powers of Schedule 7, including the power to take photographs, are unjustified. However, it draws attention to the fact that:

- Photographing a detained person is the exercise of a particular statutory power<sup>391</sup> and therefore requires separate consideration of whether doing so is necessary and proportionate in the circumstances in question.
- Officers will need, if they apply the “procedural justice” approach identified above, to be ready to explain the reason for the taking and retention of photographs.

### **Digital Downloads**

6.38. The downloading of mobile phones occupies an increasingly important place in the operation of Schedule 7. It is worth reiterating that mobile phones now contain "our core biographical information" together with a digital footprint that is detailed enough "to reconstruct the events of our lives, our relationships with others, our likes

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<sup>389</sup> <https://www.theguardian.com/law/2020/mar/14/metropolitan-police-concede-forcing-woman-to-remove-hijab-wrong>. The article also refers to the case of another female who complained after being required to remove her hijab.

<sup>390</sup> It transpired that no Equality Impact Assessment had been carried out; now remedied.

<sup>391</sup> Paragraph 2(1)(a) Schedule 8 Terrorism Act 2000.

and dislikes, our fears, hopes, opinions, beliefs and ideas"<sup>392</sup>. Nor should the extent of information on the person's friends and family be understated.

6.39. CT Police data supports the proposition that data downloads are more likely to occur when an examination is targeted. However, the absolute number of data downloads is high and not far short of the number of individuals detained in 2019.

6.40. The revised Code of Practice and the new CT Borders Policing Guidance (January 2020) both correctly emphasize that the power to download is a discrete power meriting separate consideration. A conveyor-belt of decision making is therefore to be avoided. As well as greater clarity on legally privileged material and the use of independent counsel, the Code defines the extent to which officers may access cloud-based data (essentially, yes, but only through the device itself)<sup>393</sup>.

6.41. Work is still required, however, by CT Borders Police in each of the four nations on the data journey. This is the journey taken by data obtained from devices at port, to local computer storage to regional intelligence units to national databases. At various stages that data may be retained, deleted, or selected for further dissemination. The new Guidance provides some useful analysis and understanding of the data journey but limited information on the periods for which data must be retained (specified as a minimum of 7 years, a reference to the statutory limitation period<sup>394</sup> for bringing most legal claims in tort plus one year). However, the 7-year period:

- Is a minimum, and no reference is made to what should happen after 7 years.
- Is shorter than the review period specified under the College of Policing's Authorised Professional Practice, *Information Management: Management of Police Information*<sup>395</sup>. Under this policy, digital downloads retained as intelligence rather than as evidence should fall within Group 4 ("Intelligence products") to be reviewed according to the crime type which, in the case of terrorism, carries the highest possible risk of harm to the public, and accordingly every 10 years.

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<sup>392</sup>Karakatsanis J in the Canadian Supreme Court case of *R v Fearon* [2014] 3 S.C.R 621; to like effect the US Supreme Court case of *Riley v California* 573 US (2014) at page 17, Roberts CJ.

<sup>393</sup> Code paragraph 58.

<sup>394</sup> Limitation Act 1980.

<sup>395</sup> <https://www.app.college.police.uk/app-content/information-management/management-of-police-information/retention-review-and-disposal-of-police-information/>.

- Makes no allowance for any difference between the retention periods of personal data of children and adults<sup>396</sup>.

6.42. From my conversations with CT Borders Policing, how data is dealt with after it has been disseminated within the CT network is not sufficiently understood by frontline officers or their managers. In *Beghal*, Lord Hughes distinguished between on the one hand retaining data for long enough to compare it with other records, and on the other hand the indefinite retention of a “bank of data”<sup>397</sup>. Assuming the purpose of Schedule 7 is to serve the first purpose, but not the second, a clearer and more detailed policy on data retention would:

- Recognise that data are not to be retained indefinitely ‘just in case’ they are useful at some stage in the future<sup>398</sup>.
- Explain how and by whom decisions on data retention are to be made, noting the variety of locations at which the data may be held after copying, and the practical difficulties of separating out data once it has been copied in bulk<sup>399</sup>.
- Acknowledge the fact that the vast majority of individuals whose data is obtained through Schedule 7 have not been convicted of any terrorist offending and may not even be considered a Subject of Interest.

6.43. In addition, greater *public transparency* about the retention of digital downloads is warranted for three reasons. Firstly, greater information in the public domain about the exercise of police powers enhances the general principle of policing by consent. Secondly, greater information means that affected individuals are more likely to feel that they have been dealt with fairly. Thirdly, providing information about the use to which personal data may be put is a specific requirement of fair processing<sup>400</sup>.

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<sup>396</sup> In *R(II) v Commissioner of Police of Metropolis* [2020] EWHC 2528 it was conceded at 75(iv) that policies regarding the counter-terrorism retention of personal data applied differently to children.

<sup>397</sup> At paragraph 57.

<sup>398</sup> Unjustified data retention may lead to a violation of Article 8 European Convention on Human Rights: see recently, *Gaughran v United Kingdom*, App no.45245/15 13 February 2020. In *R(II) v Commissioner of Police of Metropolis*, *supra*, the continued retention of personal data arising from the claimant’s engagement as a child with Prevent over 4 years previously was found to be unlawful as it not been shown that its retention was needed for a policing purpose.

<sup>399</sup> Greater use of selective copying is therefore to be encouraged where appropriate and technically possible.

<sup>400</sup> Mobile Phone Data Extraction by Police Forces in England and Wales, Investigation Report, Information Commissioner (June 2020), [https://ico.org.uk/media/about-the-ico/documents/2617838/ico-report-on-mpe-in-england-and-wales-v1\\_1.pdf](https://ico.org.uk/media/about-the-ico/documents/2617838/ico-report-on-mpe-in-england-and-wales-v1_1.pdf) at paragraphs 2.2.6 and 2.4.3.



6.44. Following the Heathrow Airport litigation referred to above, an equality impact assessment on data capture was completed in November 2019. The principal impacts recognised in the assessment concern the taking of photographs by males of females, privacy where head coverings are removed, and the handling and viewing of images of females without head coverings. The mitigations suggested do not, however, refer to safeguards relating to the continuing retention of images.

### **Biometrics**

6.45. CT Borders Policing's policy on Biometric Capture at Borders was reviewed and reissued in April 2020. Unlike the predecessor policy which I criticized last year<sup>401</sup>, the new version puts fuller emphasis on the need for proportionate and necessary decision-making in connection with the taking of biometrics. Of interest is that the policy covers the taking of photographs, which are not considered as biometrics under the Schedule 7 legislation despite the fact that modern biometrics extend well beyond fingerprints and DNA. As was apparent from the recent facial recognition litigation<sup>402</sup>, one aspect of biometrics is extracting unique facial features from the images of a face; the Home Office also defines biometrics broadly<sup>403</sup>. Given the potential use of images to assemble unique biometric identifiers<sup>404</sup>, Schedule 7 continues to lag behind real world developments because it provides special protection to the retention of DNA and fingerprints only.

6.46. That special protection for DNA and fingerprints comes in the form of a scheme of National Security Determinations if the biometric data is to be further retained after a set period of time<sup>405</sup>. This is both reviewed and secured<sup>406</sup> by the Biometrics

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<sup>401</sup> Terrorism Acts in 2018 at 6.114.

<sup>402</sup> *R (on the application of Bridges) v Chief Constable of South Wales Police and others* [2020] EWCA Civ 1058.

<sup>403</sup> The term "biometrics" is described in the Home Office "Biometrics Strategy - Better Public Services Maintaining Public Trust" published in June 2018 (para.1) as "the recognition of people based on measurement and analysis of their biological characteristics or behavioural data".

<sup>404</sup> *Gaughran v UK*, App no.45245/15 13 February 2020 at paragraph 70 suggests that the potential use of photographs for facial recognition or facial mapping purposes elevates the extent to which retention interferes with privacy rights under Article 8.

<sup>405</sup> The periods authorised by National Security Determinations were changed from 2 to 5 years by the Counter-Terrorism and Border Security Act 2019. The initial retention period varies but for those with no previous convictions it is 3 years under paragraph 20B Schedule 7.

<sup>406</sup> The Commissioner has power to order the destruction of biometrics which police sought to retain under National Security Determinations; a power which he exercised in 2019 6 times.

Commissioner, Professor Paul Wiles, whose annual report on 2019<sup>407</sup> contains a forthright and compelling explanation of the need for proper governance of the new biometrics<sup>408</sup>. As Professor Wiles notes, only Scotland has made any move in this direction<sup>409</sup>. A “significant proportion” of the biometrics of which the Commissioner has oversight are taken following detention under Schedule 7<sup>410</sup>.

## **Freight**

### ***Great Britain***

6.47. There were 5,232 examinations of unaccompanied freight in 2019 in Great Britain (1,002 air freight and 4,230 sea freight), as compared with 6,295 the previous year.<sup>411</sup> This represents a decrease of 17%.

6.48. I am told that a large number of freight continues to be “screened” or “virtually examined” in order to determine whether it should be examined formally, including by use of the power to enter buildings and vehicles including containers in order to determine whether to carry out an examination<sup>412</sup>. I drew attention last year to the possibility that different examining officers have different views as to what counts as a Schedule 7 examination<sup>413</sup>.

6.49. A lack of clarity on the examination threshold means (a) that the statistics on the use of Schedule 7 may not be accurate and (b) officers may not know whether to provide a leaflet to say that CT Borders Police have, for example, entered a refrigerated container in exercise of Schedule 7 powers.

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<sup>407</sup> Annual Report 2019 (July 2020), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/897090/Biometrics\\_Commissioner\\_Annual\\_Report\\_Web\\_Access.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897090/Biometrics_Commissioner_Annual_Report_Web_Access.pdf).

<sup>408</sup> In Chapter 2, “Failures of Governance and Future Governance Needs”.

<sup>409</sup> Through enacting the Scottish Biometrics Commissioner Bill, <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/scottish-biometrics-commissioner-bill/stage-3/bill-as-passed-scottish-biometrics-commissioner-bill.pdf>. Under the Bill, the Commissioner’s general function is to support and promote the adoption of lawful, effective and ethical practices in relation to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes by the police.

<sup>410</sup> Biometrics report, Paragraph 223.

<sup>411</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - S.03, quarterly update to September 2020

<sup>412</sup> Paragraph 9(4) Schedule 7.

<sup>413</sup> Terrorism Acts in 2018 at 6.133.

6.50. I **recommend** that CT Borders Policing establish a policy in which the distinction between “screening” (using the power to enter under paragraph 9(4) of Schedule 7), and formal examination of goods, is clearly delineated.

### ***Northern Ireland***

6.51. According to statistics provided to me by the PSNI, there were 225 examinations of unaccompanied sea freight in 2019 in Northern Ireland, as compared with 1,209 examinations the previous year. This represents a decrease of 81%. An explanation offered by PSNI is that a large volume of freight is “screened”. But if that is meant to refer to what in previous years counted as a formal examination, it illustrates the importance of a national policy with clear definitions.

### **Hostile State Activity powers**

6.52. Without entering into the debate whether state acts can ever constitute terrorism<sup>414</sup>, Parliament has tacitly approved the government's policy of distinguishing between hostile acts by individuals (which may be terrorism) and hostile acts by states (which may not) by enacting Schedule 3 to the Counter-Terrorism Border Security Act 2019. This contains a power for examining officers, closely modelled on the Schedule 7 power, to examine a member of the travelling public at a port or border area to see whether they are or have been engaged in “hostile activity”. Hostile activity refers to hostile acts done for on or behalf of or otherwise in the interests of a State other than the United Kingdom, and an act is hostile if it threatens national security (either directly or by threatening the United Kingdom's economic well-being) or is an act of serious crime<sup>415</sup>. The person carrying out the activity can do so in ignorance of its true hostile significance, and the activity need not be officially sanctioned by the State in whose interests it is being carried out<sup>416</sup>.

6.53. A Code on the exercise of the Schedule 3 power<sup>417</sup> was promulgated at the same time as the new Schedule 7 Code and recognises that it may be necessary to

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<sup>414</sup> For an analysis of this issue see Professor Clive Walker QC's 'Note On The Definition Of Terrorism Under The Terrorism Act 2000, Section 1, In The Light Of The Salisbury Incident', annexed to Max Hill QC's Terrorism Acts in 2017.

<sup>415</sup> Paragraph 1(5)(6) Schedule 3.

<sup>416</sup> Paragraph 1(7).

<sup>417</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/890265/CCS207\\_CCS0320264372-001\\_ExaminingOfficersandReviewOfficers\\_Sch3\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890265/CCS207_CCS0320264372-001_ExaminingOfficersandReviewOfficers_Sch3_Web_Accessible.pdf)

switch between examination and detention under the two powers; if a person is detained under the other power the detention clock is, quite rightly, not restarted<sup>418</sup>.

6.54. The Schedule 3 powers were not in force in 2019, and only came into effect in August 2020. It is impossible to forecast at this juncture what impact the exercise of these powers, which are reviewed by the Investigatory Powers Commissioner, will have on the conduct of Schedule 7 examinations, other than to note that is some potential overlap where:

- An organisation such as Hezbollah that is proscribed under the Terrorism Act 2000 has close ties to a particular state such as Iran<sup>419</sup> that may engage in hostile activity.
- Non-state terrorist activity against national infrastructure could be encouraged by state actors as a means of sabotage<sup>420</sup>.
- Some leaders of organisations with terrorist motives are resident in hostile states.

6.55. In short, it is possible that a hint of state involvement could lead some examinations, which hitherto have been conducted under Schedule 7, to be conducted under Schedule 3. From a rights perspective, one important difference is that Schedule 3 provides a power in very limited circumstances and subject to authorisation from the Investigatory Powers Commissioner to access and retain journalistic and protected material including legally privileged material<sup>421</sup>.

6.56. In this connection, the risk of blurred edges between the Schedule 7 and Schedule 3 powers is apparent in the revised Schedule 7 Code. In response to media representations in relation to the protection of journalistic content<sup>422</sup>, the Schedule 7 Code was amended to incorporate reference<sup>423</sup> to the authorisation mechanism that exists only under Schedule 3, namely the power of the Investigatory Powers Commissioner to authorise retention and use of journalistic and legally privileged material.

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<sup>418</sup> Schedule 3 Code paragraph 130-1, 162.

<sup>419</sup> <https://www.state.gov/countering-irans-global-terrorism/>.

<sup>420</sup> See Schedule 3 Code, Annex C at paragraph 11. Cf Libya's previous support for the IRA as shown in this Report Fourth Report of the Northern Ireland Affairs Committee, Session 2016–17: [https://publications.parliament.uk/pa/cm201617/cmselect/cmniaf/49/4904.htm#\\_idTextAnchor006](https://publications.parliament.uk/pa/cm201617/cmselect/cmniaf/49/4904.htm#_idTextAnchor006).

<sup>421</sup> Paragraphs 11-22 Schedule 3.

<sup>422</sup> Government's response to consultation, *supra*, at paragraphs 19 to 26.

<sup>423</sup> Schedule 7 Code paragraphs 42, 52.

6.57. This may have been an attempt (i) to capture the essence of the *Miranda* judgment<sup>424</sup>, that access to journalistic material was prohibited unless subject to prior or urgent ex-post-facto judicial or other independent and impartial (ii) to future proof the Code in the event that an authorisation mechanism were to be enacted under Schedule 7, or (iii) simply an attempt to approximate the wording of the two Codes as closely as possible.

6.58. However, anyone reading the Schedule 7 Code might wrongly conclude that an authorisation mechanism is available for journalistic and legally privileged material seized under Schedule 7. It is not. Because the Schedule 7 Code is essential to the conduct of examining officers<sup>425</sup>, this lack of clarity is regrettable. I **recommend** that training materials on the revised Schedule 7 Code make it clear that Schedule 7 does not authorise the use of journalistic or legally privileged material.

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<sup>424</sup> *R (David Miranda) v Secretary of State for the Home Department and others* [2016] EWCA Civ 6.

<sup>425</sup> Paragraph 5 Schedule 14 Terrorism Act 2000.

## 7. TERRORISM TRIALS AND SENTENCING

7.1. In addition to reporting on terrorism trials and sentencing generally, this Chapter considers three discrete criminal topics:

- The prosecutions under terrorism legislation of individuals who went to fight *against* Da'esh with the Kurdish group the YPG.
- The potential criminalisation of terrorist propaganda as raised by the Chief Coroner following the London Bridge and Borough Market attack inquests.
- More briefly, criminal liability for giving 'moral support' to proscribed organisations.

### Introduction

7.2. The Crown Prosecution Service Special Crime and Counter Terrorism Division prosecute all terrorism cases in England and Wales. The Crown Prosecution Service website includes summaries of a selection of each year's counter-terrorism prosecutions<sup>426</sup> and some limited guidance on prosecuting offences relating to Da'esh in the Syria, Iraq and Libya that was updated during the course of 2019<sup>427</sup>. Terrorism prosecutions benefit from a level of resources that is far greater than other criminal proceedings, and the conviction rate is high. At least in Great Britain, the delays that affect so many ordinary criminal prosecutions do not prevent the speedy determination of terrorism trials.

7.3. Prosecution in Scotland is carried out by the Crown Office and the Procurator Fiscal Service. Since 2015 specialist serious crime and terrorism prosecutors have been collocated with police investigators at a modern campus outside Glasgow. The Public Prosecution Service for Northern Ireland prosecutes terrorism offences in Northern Ireland. As I noted last year, arrangements exist to determine the most suitable place for prosecution, so the location of an offence may not determine who is responsible for prosecution. I refer further to criminal proceedings in Northern Ireland, in Chapter 9, and Scotland, in Chapter 10.

7.4. Terrorism legislation, in its criminal trial aspect, can be divided into two. Firstly, there are the terrorism offences which make provision for a wider form of criminal liability

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<sup>426</sup> <https://www.cps.gov.uk/terrorism>

<sup>427</sup> <https://www.cps.gov.uk/legal-guidance/terrorism-guidance-relation-prosecution-individuals-involved-terrorism-overseas>.

than generally encountered in the criminal law: for example, by criminalising preparatory acts<sup>428</sup> or making it an offence to collect material merely on the basis that it is likely to be useful to a terrorist<sup>429</sup>. Secondly, there are the sentencing measures which affect the length of time to served<sup>430</sup>, or how terrorists (including those convicted under non-terrorism legislation whose crimes are found to be “connected to terrorism”) are required to act after release<sup>431</sup>.

7.5. Both are prone to updating legislation, particularly in light of new terrorist attacks. The most recent major updating of offences took place in the Counter-Terrorism and Border Security Act 2019<sup>432</sup>. That Act:

- Provided that the 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.
- Extended the flags and uniforms offence under section 13 to include publishing images.
- Extended the offence under section 58 Terrorism Act 2000 to possession of electronic material through streaming.
- Created a new offence of entering or remaining in a designated area in section 58B Terrorism Act 2000.
- Substituted a “reasonable person” test in the encouragement and terrorist publication offences under sections 1 and 2 Terrorism Act 2006, so that the prosecution do not need to prove that the audience did or would have understood the terrorist message.
- Extended the jurisdictional reach of various offences under the Terrorism Acts 2000 and 2006.

7.6. Major reforms to terrorist sentencing are currently before Parliament in the form of the Counter-Terrorism and Sentencing Bill: I will consider the impact of this new

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<sup>428</sup> Attack-planning under section 5 Terrorism Act 2006, sometimes referred to as a precursor crime: see Zedner, L., ‘Terrorizing Criminal Law’, *Crim Law and Philos* (2014) 8:99-121 (2014).

<sup>429</sup> Section 58 Terrorism Act 2000.

<sup>430</sup> For example, under the Terrorist Offenders (Restriction of Early Release) Act 2020.

<sup>431</sup> Part 4 Counter-Terrorism Act 2008; for the management of terrorist offenders on licence, see my ‘Terrorist Risk Offenders: Independent Review of Statutory Multi-Agency Public Protection Arrangements’ (May 2020),

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/913983/supervision-terrorism-and-terrorism-risk-offenders-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913983/supervision-terrorism-and-terrorism-risk-offenders-review.pdf).

<sup>432</sup> See Terrorism Acts in 2018 at 2.39.

legislation, directed at keeping terrorist offenders in custody for longer and subject to stronger measures such as polygraph testing on release, in next year's report.

7.7. The question arises whether which, or any, of the above reforms have had effect on the way that terrorism is prosecuted. One of objections to reforming the section 58 offence was that no reforms to section 58 were needed<sup>433</sup>. Given the Parliamentary and official time taken in formulating and debating changes to terrorism legislation, and the ratchet effect<sup>434</sup>, it is important to audit whether the previous changes were worthwhile. If claims are made that changes to legislation are necessary, those claims can be tested (even if not disproved) by reference to previous claims and whether the reforms have indeed proven useful.

7.8. One of the bars to understanding is the fact that official statistics only include the 'principal offence' in multi-offence conviction cases. As a result, the incidence of less serious offences being charged, for example those under section 58, may be significantly underreported. Last year I recommended 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.

7.9. The government has rejected this recommendation on the grounds of cost. A more modest approach, avoiding the cost of systematic national data collection, would involve the prosecution services who are solely responsible for bringing terrorism prosecutions in the United Kingdom. In order to keep tabs on whether reforms to legislation are worthwhile, I **recommend** that the Home Secretary should invite the Director of Public Prosecutions (in England and Wales), the Director of Public Prosecutions (in Northern Ireland) and the Lord Advocate (in Scotland) to ensure that their prosecution services make a record of whether amended or new offences are charged for a period of 5 years from the relevant amending or creating legislation.

7.10. I am able to report that there have been no charges for the designated area offence, because no area has yet been designated by the Secretary of State<sup>435</sup>. The provisions are based on the "Declared Area" offences in Australia. Two areas were "declared" by the Australian government: Mosul district in Iraq from March 2015 until

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<sup>433</sup> Max Hill QC, <https://terrorismlegislationreviewer.independent.gov.uk/submission-in-relation-to-clause-3-of-the-counter-terrorism-border-security-bill-2018/>.

<sup>434</sup> Reforms to terrorism legislation tend to increase liability rather than liberalise.

<sup>435</sup> Section 58C(1) Terrorism Act 2000.



December 2019 when the declaration was revoked, and Al-Raqqa province in Syria from December 2014 to November 2017<sup>436</sup>. The laws were reviewed in 2017 by Dr James Renwick SC, the Independent National Security Legislation Monitor who supported the legislation but reported that no prosecutions had taken place at that stage<sup>437</sup>.

7.11. From my attendance at a large official meeting where the possibility of designating an area or areas was discussed, I can state (i) that the question of whether to designate is an extremely difficult one because of the range of considerations that apply when deciding whether to make an area essentially 'no-go'<sup>438</sup> and (ii) that the discussion was of a very high calibre. It is tempting to consider that the offence was simply created after the horse had bolted, and that this explains the lack of designation. The dissuasive impact of the offence, and prospect of criminalising those who travelled out to join Da'esh in Syria and Iraq despite it, would have been most useful at the height of the 'Caliphate' between 2014 and 2018/2019.

### **Prosecutions in 2019**

7.12. In 2019, 54 persons were proceeded against by the Crown Prosecution Service for terrorism-related offences<sup>439</sup>. This is a decline of 30 (36) from the 84 persons in 2018. Previous high conviction rates were maintained. 47 defendants were convicted (87%), of whom 28 (60) pleaded guilty and 19 (40%) entered a not guilty plea.<sup>440</sup> In Northern Ireland 14 people were convicted and in Scotland 4 people were prosecuted of an offence under terrorist legislation in 2019.

7.13. Conduct leading to convictions in 2019 under the Terrorism Act 2000 or the Terrorism Act 2006 included:

- a. **attempted murder**, (R v Mohamud).

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<sup>436</sup> Australian government website,

<https://www.nationalsecurity.gov.au/WhatAustraliaisdoing/Pages/DeclaredAreaOffence.aspx>.

<sup>437</sup> INSLM, 'Sections 119.2 and 119.3 of the Criminal Code: Declared Areas' (September 2017).

<sup>438</sup> Including but not limited to the impact on journalists and aid agencies. Although there are defences for activities such as "providing aid of a humanitarian nature", uncertainty is inevitable: there is no scope for pre-travel authorisation letters (Home Office Circular 004/2019 of 3 May 2019 at paragraph 46).

<sup>439</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - C.01, quarterly update to September 2020

<sup>440</sup> Ibid, Table A – C.04

- b. **engaging in conduct in preparation of terrorist acts**, (*R v Yamin*, *R v Ludlow*).
- c. **failure to comply with a terrorism notification requirement**, (*R v Barnes*).
- d. **entering into a funding arrangement connected with terrorism**, (*R v Lane and Letts*, *R v Wakil*, *R v Kaabar*).
- e. **dissemination or possession of a terrorist publication**, (*R v Ashfaq*, *R v Ghani*, *R v Adam*, *R v Aweys*, *Munye and Aweys*, *R v Hussain*, *R v Kaabar*, *R v Aweys and Aweys and Mayne*, *R v Idris*),
- f. **collecting information likely to be useful to a person committing or preparing an act of terrorism**, (*R v Kaabar*)
- g. **encouragement of terrorism**, (*R v Hussain*, *R v Siddiq*),
- h. **failure to comply with a Schedule 7 Terrorism Act 2000 examination**, (*R v Ephraim*).
- i. **Making a noxious substance hoax**, (*R v Hayes*).

7.14. The large majority of terrorism convictions in 2019 related to Islamist terrorism.

### **Sentences in 2019**

7.15. Of the 47 people tried and convicted in Great Britain of terrorism-related offences<sup>441</sup>:

- 3 received life sentences.
- 6 received a sentence of between 10 and 20 years.

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<sup>441</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - C.04, quarterly update to .September 2020

- 12 received a sentence of between 4 and 10 years.
- 24 received a sentence of between 1 and 4 years.
- 1 received a hospital order and 1 received a non-custodial sentence.

7.16. Sentencing judges in England and Wales are required to follow guidelines issued by the Sentencing Council unless the interests of justice demand otherwise. Following a consultation exercise in late 2019, new guidelines were due to be issued in light of the changes made by the Counter-Terrorism and Border Security Act 2019; but publication was paused in early 2020 after the government began to amend the sentencing regime following the London Bridge and Streatham attacks<sup>442</sup>.

7.17. The guideline on attack-planning offence contrary to section 5 Terrorism Act 2006 was considered in the appeal of *Safa Boular*<sup>443</sup>.

- Because, unbeknown to Boular, MI5 role-players were involved in her plans, those plans were never likely to come to fruition.
- On that basis, the effect of the sentencing guideline was held by the Court of Appeal to be that she should be treated more leniently than a person whose plans were viable<sup>444</sup>.
- The difficulty in using “harm” or “risk of harm” in determining sentencing outcomes is particularly difficult in proactive counter-terrorism operations where the actual level of risk to the public arising out of the acts charged is minimal<sup>445</sup>: the real harm is what the defendant might have done on another occasion had their plans not been detected and subject to covert MI5 and CT Police controls.

## Prison in 2019

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<sup>442</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/6.6580\\_SC\\_Annual\\_Report\\_201920\\_WEB.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/6.6580_SC_Annual_Report_201920_WEB.pdf) at page 24.

<sup>443</sup> *R v Boular (Safaa); Boular (Rizlaine)* [2019] EWCA Crim 798.

<sup>444</sup> Paragraphs 51-52.

<sup>445</sup> See Lee, F., Case commentary, *R v Boular* (2019), paragraphs 48-52 *Sentencing News* 29 November 2019 issue 3 p.7; Kelly, R., “*Sentencing Terrorism Offences: No Harm Intended*” [2019] Crim. L.R. 764.

- 7.18. At the end of 2019, 231 individuals were in prison for terrorism-related offences (up from 222 in the previous year)<sup>446</sup>.
- 7.19. Of these, 177 were Islamist extremists (up from 176 in the previous year), 41 were identified as adhering to extreme right-wing ideologies (up from 28 the previous year, and up from only 5 in 2015), and 13 were classified as “other” (a category which includes prisoners not classified as holding a specific ideology)<sup>447</sup>.
- 7.20. Of the 231 individuals identified as terrorists, 175 declared themselves as being Muslim<sup>448</sup>. Twenty-three of the prisoners self-identified as Christian, 1 as Buddhist, 1 as Jewish, and 2 as Sikh. As for the remainder, 20 declared themselves as having no religion, 6 belonged to “other religious groups”, and 3 were unrecorded.
- 7.21. Prison time for terrorist offenders is increasing ever upwards. The reforms in 2020 mean that sentences will be increased further, and released dates delayed. One significance of these increasing terms is the attention that will need to be given to events in prison. It is increasingly clear that securing a custodial sentence for a terrorist is not ‘job done’ for CT Police and MI5.
- 7.22. Prison can make individuals more dangerous than when they entered<sup>449</sup>, or be the setting for further terrorism offending. During in 2019, a prisoner serving a life sentence for stabbing his mother was convicted of circulating Da’esh propaganda in prison<sup>450</sup>; and in the United States a terrorist prisoner was convicted of recruiting and training other prisoners to fight for Da’esh<sup>451</sup>. In January 2020, a convicted terrorist, Brusthom Ziamani, and another prisoner, Baz Hockton who had been radicalised in prison, attempted to murder a prison officer in HMP Whitemoor whilst wearing fake suicide belts<sup>452</sup>.

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<sup>446</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - P.02, quarterly update to December 2019.

<sup>447</sup> Ibid, Table A - P.01.

<sup>448</sup> Ibid, Table A - P.04.

<sup>449</sup> Silke, A. (2014). ‘Risk assessment of terrorist and extremist prisoners,’ in A. Silke (ed.), *Prisons, Terrorism and Extremism: Critical Issues In Management, Radicalisation and Reform*, pp.108-121, London: Routledge.

<sup>450</sup> *R v Abdul-Rehman Gul* 21 June 2019, Central Criminal Court.

<sup>451</sup> *R v Ahmed*, <https://www.justice.gov/opa/pr/federal-inmate-convicted-attempting-provide-material-support-isis>.

<sup>452</sup> <https://www.bbc.com/news/uk-england-cambridgeshire-54462241>.

7.23. Although there is no reason why Right Wing terrorists should not exploit opportunities to radicalise and foment violence within prisons, the main threat is posed by Islamist terrorism within the prison estate. The threat has been recognised for many years<sup>453</sup>. A 2019 study published by the Ministry of Justice into the phenomenon of Muslim groups in high security prisons found that terrorist prisoners could assume leadership positions because of the respect with which they were held<sup>454</sup>.

## **Releases from prison**

7.24. In Great Britain in the year ending 30 December 2019, 55 individuals in prison for terrorism-related offences were released<sup>455</sup>. Of these, 1 was serving a life sentence, 26 were serving a sentence of 4 years or more, 14 were serving a sentence of between 12 months and 4 years, and 14 had not been sentenced.

7.25. There are no equivalent statistics for Northern Ireland.

7.26. The government has rejected my recommendation that a mechanism should be created for reviewing terrorist notification requirements imposed upon released terrorist prisoners, which can last for 30 years. My independent report on the management of released terrorist risk offenders under Multi-Agency Public Protection Arrangements was published by the Ministry of Justice in May 2020<sup>456</sup>.

## **YPG prosecutions**

7.27. During 2019 the run of prosecutions against British citizens who had travelled overseas to join the predominantly Kurdish military unit, the Yekîneyên Parastina Gel (YPG), in their fight against Da'esh finally came to an end. The YPG is not a proscribed terrorist organisation.

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<sup>453</sup> Acheson Review, Summary of Main Findings (2016), <https://www.gov.uk/government/publications/islamist-extremism-in-prisons-probation-and-youth-justice/summary-of-the-main-findings-of-the-review-of-islamist-extremism-in-prisons-probation-and-youth-justice>.

<sup>454</sup> Powis, B., Dixon, L., Woodhams, J., 'Exploring the Nature of Muslim Groups and Related Gang Activity in Three High Security Prisons: Findings from Qualitative Research' (2019).

<sup>455</sup> Operation of Police Powers under the Terrorism Act 2000, Table A - P.05, quarterly update to September 2020

<sup>456</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/913983/supervision-terrorism-and-terrorism-risk-offenders-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913983/supervision-terrorism-and-terrorism-risk-offenders-review.pdf).

7.28. None of the cases relating to the YPG led to a verdict of guilty; most of the prosecutions were discontinued before a jury was asked to consider their verdicts.

7.29. The prosecutions raised definitional questions about whether individuals in their position should have been charged with terrorism offences, legal questions about defences to terrorism, and questions about how prosecutorial discretion was exercised. I consider these questions in the following paragraphs whilst recognising that the investigative and prosecutorial decisions in these individuals cases will have depended upon the particular facts.

7.30. These questions had been foreshadowed some years ago during the prosecution of a man called Mohammed Gul. His case concerned the dissemination of terrorist publications<sup>457</sup> depicting attacks by members of Al-Qaeda, the Taleban and other proscribed groups on Coalition forces in Iraq and Afghanistan. The specific legal issue concerned whether the defendant was encouraging terrorism where what was depicted occurred in the context of a non-international armed conflict. The Supreme Court held that he had been, but, in admonitory comments about the definition of terrorism, observed that its breadth meant that it covered "activities which might command a measure of public understanding, if not support"<sup>458</sup>. The Court gave the example of armed resistance carried out by victims of overseas oppression.

7.31. As the press coverage of the YPG prosecutions demonstrated, the acts of the defendants in these cases *did* appear to command a measure of public understanding and support. Since 2015, the YPG has played a major role in an alliance of militias called the Syrian Democratic Forces fighting in Syria against Da'esh, which is regarded by the British government as posing "a threat to the world" whose degradation and defeat is "vital for our own national security"<sup>459</sup>. The militaries of the United Kingdom and its allies openly supported the YPG in their military engagements with Da'esh<sup>460</sup>. Added to this, Kurds and minority ethnic groups such as the Yazidis, were at grave risk from Da'esh in its military expansion in the region<sup>461</sup>.

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<sup>457</sup> Contrary to section 2 Terrorism Act 2006.

<sup>458</sup> R v Gul [2013] UKSC 64, at paragraph 59.

<sup>459</sup> UK action to combat Daesh, undated, <https://www.gov.uk/government/topical-events/daesh/about>.

<sup>460</sup> R v James, Abuse of Process Ruling (15 October 2018), Edis J. at paragraph 13.

<sup>461</sup> <https://www.bbc.co.uk/news/world-middle-east-29702440>.

7.32. Despite this, individuals who went out to support the YPG were prosecuted, and prosecuted as terrorists, bringing the observations in *Gul* starkly into view<sup>462</sup>. Terrorism legislation may therefore have been used to prosecute people who would not ordinarily be considered to be terrorists<sup>463</sup>, undermining the special sense of outrage that is reserved for terrorism as opposed to other ordinary crimes<sup>464</sup>.

7.33. The direct impact of the prosecutions was that the defendants were at risk of terrorism conviction for some time, during which they were either remanded in custody, or subject to bail restrictions. In addition:

- a. It was reported that up to two dozen British citizens had returned to the United Kingdom after fighting with the YPG<sup>465</sup>, of which only a handful were prosecuted.
- b. Individuals who were considering fighting against Da'esh may have been uncertain about whether they were permitted to take up arms in this way and may still be uncertain after the failed prosecutions. George Orwell's involvement in the Spanish Civil War is only one example of the tradition of taking up arms in foreign causes, and laws against mercenaries have been rejected in the past as unjustified restrictions on the liberty of the individual<sup>466</sup>, with the possible exception of the Foreign Enlistment Act 1870.
- c. Where the cases were eventually discontinued (in all but one case), there was a lack of explanation for why this was being done, despite judicial call for greater detail<sup>467</sup>.

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<sup>462</sup> In a different case, a Briton was convicted of attack-planning contrary to section 5 Terrorism Act 2006 by planning to join the PKK and fight against Da'esh: <https://www.theguardian.com/uk-news/2015/nov/20/girl-becomes-first-briton-convicted-of-trying-to-join-fight-against-islamic-state-in-syria>. However fighting against Da'esh does not appear to have arisen as an issue in that case: *R. v Ozcelik (Silhan)* [2016] EWCA Crim 1085.

<sup>463</sup> Cf. Lord Anderson QC, Terrorism Acts in 2011 cited by the Supreme Court in *Gul*, *supra*, at paragraph 33.

<sup>464</sup> Waldron, J., 'Terrorism and the Uses of Terror', *The Journal of Ethics* 8: 5–35, 2004.

<sup>465</sup> <https://www.bbc.co.uk/news/uk-53270896>. No United States citizen has ever been charged with joining the YPG, [https://www.washingtonpost.com/world/national-security/american-civilians-who-fought-in-kurdish-units-against-isis-watch-a-dream-unravel/2019/10/18/84ce26d6-f100-11e9-b2da-606ba1ef30e3\\_story.html](https://www.washingtonpost.com/world/national-security/american-civilians-who-fought-in-kurdish-units-against-isis-watch-a-dream-unravel/2019/10/18/84ce26d6-f100-11e9-b2da-606ba1ef30e3_story.html).

<sup>466</sup> Mercenaries: Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries, Cmnd.6569, at paragraphs 15, 42. I am grateful to Jessie Smith, a PhD student at Cambridge University, for this and other references within this Chapter.

<sup>467</sup> <https://www.independent.co.uk/news/uk/crime/daniel-burke-terror-charges-dropped-soldier-isis-syria-news-a9599561.html>; <https://www.independent.co.uk/news/uk/crime/ypg-syria-kurdish-terror-charge-cps-daniel-burke-sam-newey-paul-a9612226.html>, 3 July 2020; <https://www.independent.co.uk/news/uk/crime/ypg-syria-kurdish-terror-charge-cps-daniel-burke-sam-newey-paul-a9612226.html>, 10 July 2020.

## Details of Prosecutions

7.34. The five defendants prosecuted in connection with YPG activities<sup>468</sup> were:

- **James Matthews**, arrested in 2016 on his return to the United Kingdom having, on his own admission, fought with the YPG. He was charged in 2018 with attending terrorist training camps in Iraq and Syria contrary to Section 8 of the Terrorism Act 2006<sup>469</sup>. His case was discontinued before trial<sup>470</sup>.
- **Aidan James**, arrested on his return to the United Kingdom in 2018 and charged with attack-planning contrary to section 5 Terrorism Act 2006, based on his conduct in joining the YPG to fight; and two counts of attending two terrorist training camps (a YPG camp, and a separate training camp run by an affiliated but proscribed Kurdish organisation, the PKK<sup>471</sup>) contrary to section 8 Terrorism Act 2006. He was convicted following a retrial in relation to his attendance at the PKK and sentenced to 12 months' imprisonment, consecutive to three years for drugs charges<sup>472</sup>.
- **Daniel Burke**, a former soldier, who was arrested in 2018 and again in 2019, and charged with two counts of attack-planning contrary to section 5 Terrorism Act 2006. These related to the transport arrangements he made for himself and another Briton Daniel Newey to join the YPG. He was also charged with funding terrorist contrary to section 17 Terrorism Act 2000 by supplying YPG fighters with cash and equipment<sup>473</sup>.
- **Paul Newey**, arrested in 2019 and charged with funding terrorism contrary to section 17 Terrorism Act 2000 for sending a small sum of money to his Daniel Newey, his son.
- **Sam Newey**, arrested in 2020 and charged with one offence of attack-planning contrary to section 5 Terrorism Act, for giving assistance to his brother, Daniel Newey<sup>474</sup>. The cases against Sam Newey, Daniel Burke and Paul Newey were all discontinued in 2020 before they reached trial<sup>475</sup>.

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<sup>468</sup> Excluding those such as Joshua Walker, who returned from Syria but was only prosecuted for possession of a terrorist manual, <https://www.bbc.co.uk/news/uk-england-bristol-41751193>.

<sup>469</sup> <https://www.thesun.co.uk/news/5578013/brit-jim-matthews-fought-isis-syria-court-terror-charges/>.

<sup>470</sup> <https://www.bbc.co.uk/news/uk-45017016>.

<sup>471</sup> Partiya Karkeren Kurdistanî, proscribed in 2001 under section 3 Terrorism Act 2000.

<sup>472</sup> <https://www.bbc.co.uk/news/uk-50156963>.

<sup>473</sup> <https://www.dailymail.co.uk/news/article-7814789/Ex-British-Army-soldier-32-appears-court-terror-charges.html>.

<sup>474</sup> <https://solihullobservers.co.uk/news/solihull-teen-and-father-charged-with-terrorism-offences-over-son-allegedly-fighting-with-kurds-in-syria-against-isis/>.

<sup>475</sup> <https://www.bbc.co.uk/news/uk-53270896>.



## Terrorism and Defences to Terrorism

7.35. To qualify as terrorism under section 1(1) Terrorism Act 2000, the use or threat of action must meet three cumulative criteria:

- The action must reach a certain level of seriousness, such as serious violence against persons or serious damage to property ('the first limb').
- the use or threat must have a particular target, namely influencing a government or an international governmental organisation or intimidating the public or a section of the public ('the second limb').
- the use or threat must be made for the purpose of advancing a political, religious, racial or ideological cause ('the third limb').

7.36. The **first limb** is likely to be easily satisfied in cases where individuals travel or propose to travel to participate as a combatant on the battlefield. The striking feature about the **second limb** is that it does not require those intimidated to be worthy of protection; in the absence of any limiting words in the statute, the Da'esh combatants against whom the defendants intended to fight will have qualified as a "section of the public". Nor, on the face of section 1(1) does the section of the public to be intimidated have to be different from the targets of the action: the purpose of fighting Da'esh combatants may simply have been to kill or disable those combatants (and necessarily to intimidate them in so doing) rather than seeking through that violence to intimidate a wider section of the Da'esh supporting population into withdrawing their support.

7.37. However, in practice prosecutors would have bypassed the second limb by relying on section 1(3). By this provision, if the use or threat of action involves the use of firearms or explosives it counts as terrorism, whether or not the second limb is satisfied.

- This provision has been described as controversial though not necessarily wrong<sup>476</sup>.

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<sup>476</sup> Lord Anderson QC, Terrorism Acts in 2012 at 4.19.

- The original purpose of section 1(3) was to ensure that assassinations were considered acts of terrorism even if it was unclear that any wider impact on the public or government was intended<sup>477</sup>. As Professor Clive Walker QC has noted, it does not cover assassinations by drowning, strangulation or (more pertinently following the murder of Alexander Litvinenko and the events of Salisbury) poisoning<sup>478</sup>.
- In the YPG prosecutions, it is likely to have relieved the prosecution from confronting the questions of whether Da'esh fighters qualified as "a section of the public"; and whether the purpose had to be to intimidate a wider group of individuals than the targets of the proposed violence.

7.38. It is not clear from the news reports of the YPG cases how the prosecution put their case on the **third limb**: whether on the basis that the defendants were personally motivated to advance the YPG's ideological cause of a Kurdish homeland, or on the basis that by fighting alongside the YPG their purpose can only have been to advance the YPG's cause. However,

- It is not a requirement of the third limb that the political, religious, racial or ideological cause is the defendant's own cause, and the fact that a defendant may not share the political goals of those he is fighting with can hardly be determinative.
- Otherwise a mercenary who helped a terrorist organisation to plant a bomb would be excluded from being jointly indicated for terrorism offences along with the true believers<sup>479</sup>.
- Considering an earlier definition of terrorism, the Diplock Commission noted in 1972 that terrorist organisations "...inevitably attract into their ranks ordinary criminals whose motivation for particular acts may be private gain or personal revenge."<sup>480</sup>

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<sup>477</sup> Hansard (HL), Vol 614 Col 161 (20 June 2000), Lord Bach.

<sup>478</sup> The Anti-Terrorism Legislation, Blackstones (3<sup>rd</sup> ed, 2014) at paragraph 1.32.

<sup>479</sup> As the US Supreme Court noted in the context of treason, "The case is not relieved of its harsh features by the finding of the court that the claimant did not *intend* to aid the rebellion, but only to make money. It might as well be said that the man who would sell for a sum beyond its value to a lunatic, a weapon with which he knew the latter would kill himself, only intended to make money and did not intend to aid the lunatic in his fatal purpose." *Sprott v. United States* (874, U. S.) 20 Wall. 459, 463.

<sup>480</sup> Lord Diplock, *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland*, (Report, No Cmnd. 5158, HM Government, December 1972), 5 - 6. It was this

7.39. There therefore appears to be nothing in the modern definition of terrorism which ought to have excluded the activities of YPG defendants.

7.40. Nor is there any obvious **defence** that applies:

- The approach of the courts has long been that the actual or believed justness of the cause provides no form of defence to charges of terrorism or mitigation of sentence<sup>481</sup>. A public interest exemption based on the blameworthiness of the proposed target would lead to undesirable results: after all, an individual might use violence against a terrible regime seeking to supplant it with an even worse one, as in *Sarwar*<sup>482</sup>. In that case the defendant travelled to fight against the Syrian regime but was a committed sectarian Islamist extremist who cannot have been hoping to replace the Assad regime with a liberal democracy.
- The courts have also been keen to stress that violence committed for the purpose of championing the cause of a defendant or third party can only be justified in exceptional circumstances<sup>483</sup>, leading to doubt that self-defence could ever arise in a case of terrorism<sup>484</sup>. Self-defence (and its close relative, defence of another) are certainly awkward fits where the defendant proposes to leave a place of safety and travel to an overseas battlefield; the usual appearance of justified self-defence concerns acts committed unavoidably in the heat of moment and with no reasonable alternative<sup>485</sup>.

## Discretion to Prosecute

7.41. Given this wide definition of terrorism, and lack of applicable defences, the YPG cases must be seen as examples of the importance of the prosecutorial discretion in terrorism cases. The Supreme Court in *Gul* observed how the width of the definition

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consideration that led the Commission to recommend against any offences framed by reference to political motive.

<sup>481</sup> The authorities are cited in Anti-Terrorism Legislation, *supra*, at paragraph 1.39 et seq.

<sup>482</sup> *R v Sarwar* [2016] 1 Cr App R(S) 54.

<sup>483</sup> *R v F* [2007] QB 960 at paragraph 36.

<sup>484</sup> *Begg v HMT* [2017] EWHC 3329 at paragraphs 22-23.

<sup>485</sup> A defendant cannot ask for his actions to be judged as if he was “the sheriff in a Western, the only law man in town”, *R v Jones* [2006] UKHL 16 at paragraph 74, Lord Hoffmann. The proper alternative to the use of personal violence in these situations is to use democratic methods to persuade the government or legislature to intervene.

shifted an enormous weight of responsibility onto the shoulders of prosecutors, in deciding who to prosecute, and the police, in deciding whom to arrest<sup>486</sup>.

7.42. There is in fact a double discretion at work in cases in England and Wales, and Northern Ireland. Because they concern terrorism offences committed overseas, or wholly or partly connected with the affairs of another country, YPG prosecutions may only be brought if the Director of Public Prosecutions consents to the prosecution, and where the Attorney General (or Attorney General for Northern Ireland) agrees to the prosecution<sup>487</sup>. A failure to obtain consent is fatal to any charges<sup>488</sup>. The position is different in Scotland, where prosecutions are always a matter for the Lord Advocate, the chief law officer in the criminal justice system and head of the Crown Office and Procurator Fiscal Service<sup>489</sup>.

7.43. Under the settlement in England, Wales and Northern Ireland, the prime mover in any prosecution remains the Director of Public Prosecutions, whose role is constitutionally independent of the Attorney General<sup>490</sup>. Consent will only be sought if it is considered that there is sufficient evidence to prosecute and that a prosecution is or may be in the public interest<sup>491</sup>.

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<sup>486</sup> Paragraphs 36-37, 61-64.

<sup>487</sup> Section 117(2A) Terrorism Act 2000, as amended, and section 19 Terrorism Act 2006. Overseas offences under the Terrorism Act 2000 used to require the consent of the Attorney General alone. I have been unable to resolve whether the mechanism changed in 2006 in order to relieve the Attorney General from considering requests for permission from would-be private prosecutors, or better to reflect the role of the Director of Public Prosecutions, or some other reason.

<sup>488</sup> The effect of these provisions is explained in *R v Goldan Lambert* [2009] EWCA Crim 700, a case which concerned a meeting held in the United Kingdom to support the LTTE, a proscribed organisation connected with the affairs of Sri Lanka.

<sup>489</sup> Hansard House of Lords vol 676 col 736, 7 December 2005, Baroness Scotland. Also covered in the government's useful note on universal jurisdiction, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/709127/universal-jurisdiction-note-print.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709127/universal-jurisdiction-note-print.pdf).

<sup>490</sup> Framework Agreement between the Law Officers and the DPP, March 2019 at paragraph 45, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/786142/Framework\\_agreement\\_between\\_the\\_Law\\_Officers\\_and\\_the\\_Director\\_of\\_Public\\_Prosecutions\\_CPS\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786142/Framework_agreement_between_the_Law_Officers_and_the_Director_of_Public_Prosecutions_CPS_.pdf).

<sup>491</sup> CPS Guidance, Consents to Prosecute (December 2018), <https://www.cps.gov.uk/legal-guidance/consents-prosecute#:~:text=Request%20for%20DPP's%20consent%20in%20a%20Private%20Prosecution,-See%20Private%20Prosecutions&text=If%20consent%20is%20given%2C%20that,prosecute%20will%20not%20be%20given.%22>.

7.44. The DPP has published guidance on its approach to prosecuting individuals involved in terrorism overseas<sup>492</sup>. It does not refer to particular groups or ideologies but draws attention to generic public interest factors in deciding whether a prosecution is appropriate, and contains the following passage:

“If individuals decide to travel to overseas to take part in fighting, if not in accordance with a properly authorised UK government operation, then it is likely that the public interest would be in favour of prosecution.”

7.45. The role of the Attorney General has been justified as necessary where a prosecution involves questions of public policy going beyond the facts of the case, so that it is in the democratic interest that such decisions should be made by an officer who is directly or indirectly accountable to Parliament<sup>493</sup>. It is possible to identify a broader and a narrower set of considerations having to do with terrorism prosecutions.

- More broadly, there are the ‘small p’ political considerations concerning, in Sir Hartley Shawcross’s famous description of the role, the effect of a prosecution on “public morale and order” or “any other considerations affecting public policy”<sup>494</sup>. These considerations are to be carried out “quasi-judicially”<sup>495</sup>.
- More narrowly, in terrorism cases there are likely to be “particular sensitivities” that apply when dealing with some types of international terrorism which again justify a special role for the Attorney General.<sup>496</sup> As with a decision to proscribe an overseas terrorist organisations<sup>497</sup>, a prosecution could have ramifications for international relations.

7.46. It is possible to see both considerations at work in the YPG prosecutions. In the prosecution of Aidan James, the trial judge drew attention to the Attorney General’s role:

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<sup>492</sup> Updated September 2019, <https://www.cps.gov.uk/legal-guidance/terrorism-guidance-relation-prosecution-individuals-involved-terrorism-overseas>. The 2016 version is at [https://www.cps.gov.uk/sites/default/files/documents/publications/public\\_guidance\\_december\\_2016.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/public_guidance_december_2016.pdf).

<sup>493</sup> Law Commission, *Consents to Prosecute* (1998), [http://www.lawcom.gov.uk/app/uploads/2015/03/lc255\\_Conseents\\_to\\_Prosecution.pdf](http://www.lawcom.gov.uk/app/uploads/2015/03/lc255_Conseents_to_Prosecution.pdf) at paragraphs 6.40-6.46.

<sup>494</sup> Hansard (HC), Vol 483 Col 683 (29 January 1951), [https://hansard.parliament.uk/commons/1951-01-29/debates/21322a03-f120-4bc4-8508-52e1d905044c/Prosecutions\(Attorney-GeneralSRresponsibility\)](https://hansard.parliament.uk/commons/1951-01-29/debates/21322a03-f120-4bc4-8508-52e1d905044c/Prosecutions(Attorney-GeneralSRresponsibility))

<sup>495</sup> Framework Agreement between Attorney General and DPP, *supra*, at paragraphs 49-51.

<sup>496</sup> Charles Clarke, Home Secretary, Hansard (HC), Vol 353 Col 660 (10 July 2000).

<sup>497</sup> Section 3 Terrorism Act 2000.

*“...That is because decisions about who in foreign conflicts should be prosecuted are often political decisions in that the UK may choose to prosecute those who are its opponents and not those who are its allies, even though their methods might be equally unlawful. These are not judgments that a court can make because the court is not equipped with the relevant advice of the security services and officials, and does not concern itself with UK foreign policy. Those are not matters on which the court is able to adjudicate.”<sup>498</sup>*

7.47. In the event, the judge expressed himself to be “uneasy” about “...the prosecution of a man who is able to say that at least some of the acts of terrorism for which he was preparing or trained were carried out with the support of the RAF.” But the role of the Attorney General, and the “political character” of the prosecution decision being “written into statute” meant that the judge’s personal misgivings about why Aidan James was being prosecuted, when other individuals in analogous circumstances were not being prosecuted, did not mean that the prosecutions were necessarily flawed<sup>499</sup>.

7.48. The discretion concerns not simply whether to prosecute, but *how* to prosecute. The Director of Public Prosecutions may decide that a prosecution is in the public interest only if it is presented in a particular way.

- In Aidan James’ case, the prosecution applied what the judge described as a “self-denying ordinance”: if the defendant’s conduct was done solely and exclusively in preparation for giving effect to an intention to fight for the YPG against Daesh in Syria, the prosecution argued that he should be acquitted of those counts<sup>500</sup>, even though such conduct would still amount to attack-planning contrary to section 5 Terrorism Act 2006.
- Similar standards appear to have been at work in the prosecution of Mohammed Gul: the prosecution had taken the view that “...if Israel was involved in an incursion into Gaza which involved attacks on civilians, schools, hospitals and ambulances” and the Appellant was only encouraging resistance to such attacks, they would not seek a conviction<sup>501</sup>.

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<sup>498</sup> *R v James*, Abuse of Process Ruling, *supra*, at paragraph 45.

<sup>499</sup> *Ibid*, at paragraphs 43, 46-47.

<sup>500</sup> Abuse of Process Ruling, *supra*, at paragraph 33.

<sup>501</sup> *R v Gul*, *supra*, at paragraph 7. Gul was acquitted on that count.

7.49. In similar vein I am informed that Attorney General may give conditional permission to a prosecution, in other words permission may be granted by the Attorney General depending on how the case is presented.

7.50. By convention, the terms on which the Attorney General gives consent to a prosecution are not disclosed. They were not disclosed at any stage in the YPG prosecutions (and they have not been disclosed to me). It seems that in principle the Attorney General could be required to disclose them to Parliament on the basis of parliamentary accountability, but the practice of the Attorney General giving detailed explanations for prosecution decisions<sup>502</sup> appears to have gone. One of the concerns of the Supreme Court in *Gul* was that Attorney General's consents were not "open, democratically accountable decisions"<sup>503</sup>.

7.51. It is not impossible to spell out why the public interest may favour some form of prosecution in YPG cases. In *Aidan James*, the trial judge identified the factors that can be summarised as follows<sup>504</sup>:

- The fact that amateur soldiers are less trained and therefore more likely to cause collateral damage to civilians, or conduct themselves contrary to International Humanitarian Law, than professional soldiers.
- The risk to themselves of being killed or traumatised (especially in the case of amateur soldiers with pre-existing mental illnesses).
- The impact on British foreign policy in the area if they are taken hostage.
- The risk posed to British society if they return traumatised and "experienced in killing".
- The risk that amateur soldiers may end up, through ignorance or reliance on partial information, acting against the cause they intend to promote or acting in a way that is contrary to the national interest<sup>505</sup>.

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<sup>502</sup> See for example, the detailed explanations given by Sir Hartley Shawcross on whether to prosecute illegal strikes at Hansard (HC), Vol 483 Cols 684-7

<sup>503</sup> *R v Gul*, *supra*, at 36.

<sup>504</sup> *R v James*, Abuse of Process Ruling, *supra*, at paragraph 40, cited by the Court of Appeal in *R v AJ* [2019] EWCA Crim 647, <https://www.bailii.org/ew/cases/EWCA/Crim/2019/647.html> at paragraph 24 without comment.

<sup>505</sup> Illustrated by risk in October 2019 that the YPG would end up fighting against Turkey, a Nato ally, <https://www.bbc.co.uk/news/world-middle-east-49963649>.

7.52. Since these factors would apply equally to combat against Da'esh, they do not explain the “self-denying ordinance” applied by the prosecution. Nor do they demonstrate the necessity of prosecuting the YPG defendants as terrorists.

### **Alternatives to prosecution under Terrorism Legislation**

7.53. The United Kingdom has longstanding but limited laws against foreign enlistment. However, the Foreign Enlistment Act 1870<sup>506</sup> is confined to prohibiting British citizens from signing up with the military or naval services of foreign states who are at war with a friendly foreign state. Even though “foreign state” is given a wide meaning to include persons exercising or assuming to exercise the powers of government<sup>507</sup>, it does not apply to much of modern warfare, namely civil wars or non-international armed conflict.

7.54. A commission in 1976 under Lord Diplock recommended the repeal of this legislation, which was seen as unworkable, out of date and posing a disproportionate restriction on individual liberty<sup>508</sup>. Recent attempts to update it have foundered on the basis that, at its heart, the legislation turns on distinctions of war and peace that are unhelpful in modern conditions<sup>509</sup>.

7.55. The position is different in Australia where the law penalises "incursions into foreign countries with the intention of engaging in hostile activities"<sup>510</sup>. The definition of hostile activity is particularly broad. A somewhat equivalent mechanism may be seen in section 58B Terrorism Act 2000, inserted by the Counter-Terrorism and Border Security Act 2019, which makes it an offence merely to enter or remain in a “designated area”. However, the power to designate an area has never been exercised, and was in any event too late for the YPG prosecutions.

### **Conclusion**

7.56. The YPG prosecutions illustrate two matters above all:

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<sup>506</sup> Its predecessors were the Foreign Enlistment Acts 1736 and 1819; their focus was, respectively, on preventing treason to the King, and preserving the United Kingdom's neutrality.

<sup>507</sup> Section 30.

<sup>508</sup> Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries: Report (1976).

<sup>509</sup> Hansard (HC), Vol 751 Col 213-9 (14 January 2014).

<sup>510</sup> Part 5.5 of the *Criminal Code Act* 1995 (Cth), formerly in *Crimes (Foreign Incursions and Recruitment Act)* 1978 (Cth).



- Firstly, the width of the terrorism definition.
- Secondly, the importance of the exercise of discretion on the part of the Director of Public Prosecutions and the Attorney General.

7.57. In *Gul*, the Supreme Court were ultimately persuaded that Parliament had intended a wide definition and for good reasons: terrorism may take many disparate forms, and inevitable changes will occur in international relations, in political regimes in other countries, and in the United Kingdom's foreign policy<sup>511</sup>. Any attempt to narrow the definition was to be welcomed, provided it was "...consistent with the public protection to which the legislation is directed"<sup>512</sup>.

7.58. In default of an alternative definition, and however undesirable the appearance that Parliament has delegated to the Attorney General the question of whether activity should be treated as criminal or not<sup>513</sup>, the discretions exercised by the Director of Public Prosecution and the Attorney General are vitally important.

7.59. That being the case, it is regrettable that greater transparency could not have been achieved in explaining the case for the YPG prosecutions.

- Because they pushed to limit what might be considered in ordinary language terrorism, there was a greater need to explain that the laws were not being misapplied<sup>514</sup>.
- There were, as identified above, potentially sound reasons why some sort of prosecution should be brought; and if terrorism legislation was being deployed because there was no available alternative, that could have been explained.
- There is no need to be coy about prosecutorial discretion. Wide discretion is inevitable and not wrong in principle<sup>515</sup>.

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<sup>511</sup> At paragraph 30, 39.

<sup>512</sup> At paragraph 62.

<sup>513</sup> At paragraph 36.

<sup>514</sup> By way of testing this point, it is most unlikely that a person would be prosecuted for encouraging terrorism through glorifying the actions of the YPG in combating Da'esh (section 1(3)(a) 2006 Act). This suggests that the actions of YPG defendants was not really terrorism. I am grateful to Karl Laird for this observation.

<sup>515</sup> Lord Carlile QC and Stuart Macdonald, "The Criminalisation of Terrorists' Online Preparatory Acts," in *Cyberterrorism, Assessment and Response*, ed. Tom Chen, Lee Jarvis and Stuart Macdonald (New York: Springer, 2014), 155, 159–60.

- There was a possible perception that the prosecutions appeared to be initiated, and discontinued, according to hidden policies or standards. This was not assisted by reference to a “self-denying ordinance”. If the situation was that the prosecution did not consider it in the public interest to prosecute a person whose only activities were directed at fighting against Da’esh, this should have been explained.

7.60. I do not go so far as to recommend that a ‘foreign incursion’ offence should be created to cater for such situations for two reasons. Firstly, it is possible that the particular circumstances leading to the YPG prosecutions will not recur. Secondly, if such cases do happen again, and prosecutions are brought under the Terrorism Acts, it is open to the Attorney General to cure some of the concerns expressed above by reviving the tradition of explaining to Parliament why permission was given for those prosecutions.

## **Criminalising Terrorist Propaganda**

### ***The London Bridge inquests***

7.61. On 3 July 2017, terrorist attacks carried out by Khuram Butt, Rachid Redouane, and Youssef Zagba on London Bridge and at Borough Market led to the deaths of 8 members of the public. The inquests into the 8 deaths, and the deaths of the 3 attackers who were shot dead by police, were heard in May and June 2019. Some of the evidence concerned material discovered by CT Police on Khuram Butt’s electronic devices when they had arrested him in October 2016<sup>516</sup>:

- The disturbing and gruesome material included images of mass executions, “an image of a man with a spade inserted in his face” and the killing of “apostates”.
- There were also lecture and speeches by what were described as “extremist preachers”.
- Khuram Butt’s family were aware that he had this material because he shared it with them.

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<sup>516</sup> Transcripts Day 19 pages 55, 97-98; Day 20 pages 13-18, 23; Day 21, pages 57-8. Day 36 pages 29-32: <https://londonbridgeinquests.independent.gov.uk/hearing-transcripts/>.

- Giving evidence before the Chief Coroner, a senior police officer identified as Witness M, said that the material (which he described as ‘mindset material’) did not reach the threshold of an offence under existing terrorism legislation.

7.62. In his Prevention of Future Deaths Report the Chief Coroner observed that there is no offence of possessing terrorist or extremist propaganda material and that “...It may be impossible to take action even when the material is of the most offensive and shocking character. The evidence at the Inquests indicates to me that the lack of such an offence may sometimes prevent [CT Police] taking disruptive action which could be valuable in their work of combatting terrorism.” Drawing attention to the limited incursion into free speech and civil liberties made by the offence of possession of certain forms of pornography<sup>517</sup>, the Chief Coroner suggested that consideration should be given to legislating for “offences of possessing the most serious material which glorifies or encourages terrorism.”<sup>518</sup>

- The potential disruptive action to which the Coroner referred was criminal prosecution: and the possibility that had Butt been charged with offences in October 2016 arising out of what was on his phone, he would not have been at liberty to carry out the attack in June 2017.
- The reference to “the most serious material” which glorifies or encourages terrorism is tacit acceptance that there will be much material that can inspire terrorist attacks but whose possession could not possibly form the basis of criminal prosecution without the severest and most unacceptable limitations on free speech. For example: religious texts that referred to the supremacy of true Muslims over apostates or non-believers, or articles referring to the immigrant birth rates in Europe (known to Right Wing Terrorists as “the Great Replacement”).

7.63. The incidence of this type of material in investigations into Islamist terrorism is striking. Witness M referred to the “rhetoric around jihad, martyrdom and paradise” being “quite commonplace across all the individuals we deal with”<sup>519</sup>. As I illustrate in Chapter 2, with particular reference to the livestreamed Christchurch mosque attacks

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<sup>517</sup> Referring to possession of prohibited images of children contrary to section 62 of the Coroners and Justice Act 2009.

<sup>518</sup> Paragraphs 67-68, <https://londonbridgeinquests.independent.gov.uk/wp-content/uploads/2019/11/Final-Report-on-Action-to-Prevent-Future-Deaths-Report.pdf>.

<sup>519</sup> Transcript Day 20 page 17.

in 2019, the incidence of propaganda material in Right Wing Terrorism is also impossible to ignore<sup>520</sup>.

#### *Current measures against possession of Terrorist Propaganda Material*

7.64. The criminal law is well-stocked with measures which prohibit the sharing of terrorist<sup>521</sup> or other harmful material<sup>522</sup>.

7.65. However mere possession<sup>523</sup> of Terrorist Propaganda Material is far less penalised. Possession may give rise to an offence in certain limited circumstances depending (a) on the precise nature of the material and (b) on what can be shown about the intention of the person in possession.

7.66. As to the nature of the material, it is an offence:

- under section 58 Terrorism Act 2000 (collecting or making a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism), if the material itself happens to contain information by its very nature is designed to provide practical assistance to a terrorist, such as a bomb-making manual or instructions on how to carry out a knife attack<sup>524</sup>. This rather depends on CT Police striking lucky and finding that some of the material provides a 'hit' against a database of material that is already considered to amount to an offence against section 58, or making a case that previously unencountered material satisfies the definition. The fact that section 58 is the most prosecuted terrorism offence in England and Wales suggests that this type of material is in wide circulation. But it comprises a limited category of material that would not include, for example, images of mass killings or exhortations to commit terrorist atrocities.

7.67. As to the intention of the individual, it is an offence:

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<sup>520</sup> Weimman G and Nasri, N., "*The Virus of Hate*", Interdisciplinary Center, Herzliya (2020).

<sup>521</sup> Section 12 Terrorism Act 2000; sections 1 and 2 Terrorism Act 2006.

<sup>522</sup> Children and Young Persons (Harmful Publications) Act 1955; Obscene Publications Act 1959; section 1 of the Malicious Communications Act 1988.

<sup>523</sup> As opposed to sharing the material which may be an offence under section 1 Terrorism Act 2006, section 12 Terrorism Act 2000,

<sup>524</sup> *R v G* [2009] UKHL 13 at paragraph 43.

- Under section 57 Terrorism Act 2000 (possession of article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism), if it can be proven beyond reasonable doubt that the circumstances in which the material is held give rise to that reasonable suspicion, and the prosecution is able to disprove any evidence given by the defendant that the article was not held for the commission etc. of an act of terrorism<sup>525</sup>. This requires a degree of proof well beyond mere possession of Propaganda Material and would not, for example, apply even if the prosecution were able to prove that the defendant was becoming radicalised and desensitized by viewing it repeatedly.
- Under section 2 (2)(f) Terrorism Act 2006 (possession of a terrorist publication with a view to its distribution), if it can be proven that the defendant held material which qualifies as a terrorist publication with the ulterior intent of distributing it. Although terrorist publication is widely drawn (likely to be understood by a reasonable person as a direct or indirect encouragement to acts of terrorism, including through glorification of past acts of terrorism<sup>526</sup>) and may cover a wide range of Propaganda Material, the need for proof of intended circulation means that it has no bearing on individuals who possess this material for their sole use.

### *Attempts to frame new offence*

7.68. As the Coroner observed, it is an offence to be in possession of certain forms of pornographic images. In addition to prohibited images of children offence under section 62 Coroners and Justice Act 2009, it is an offence to have possession of an “extreme pornographic image” under section 63 Criminal Justice and Immigration Act 2008. For both offences the definition of pornographic depends upon an imputed intention of the producer of the images: it must be reasonable to assume that the image was produced solely or principally for the purpose of sexual arousal<sup>527</sup>. The nature of an “extreme image” is one that portrays in an explicit and realistic way acts

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<sup>525</sup> *R v G*, *supra*, at paragraphs 54, 63.

<sup>526</sup> Section 2(3) Terrorism Act 2006.

<sup>527</sup> Section 63(3) 2008 Act; section 62(2) 2009 Act.

of particular violence, sexual or otherwise, against living people, as well as sexual acts on corpses or animals<sup>528</sup>.

7.69. With this in mind I have attempted to formulate an offence of possessing extreme terrorist propaganda which does not require any proof that the defendant had any ulterior purpose in mind. In other words, the offence is directed at mere possession.

7.70. Model 1: the first attempt considers the imputed intention of the producer of the Propaganda Material by analogy with the violent pornography offence.

- It would be an offence to possess an extreme terrorist image.
- A terrorist image would be one of such a nature "...that it must reasonably be assumed to have been produced solely or principally for the purposes of directly or indirectly encouraging the commission or preparation of acts of terrorism."
- An extreme terrorist image would be one depicting especially grave forms of violence.

7.71. An immediate technical drawback for this model is that it is confined to images. It is uncertain how it would apply to images of extreme violence such as executions of hostages, because it would not be clear whether the producer's intention was to encourage others, or to spread fear.

7.72. Model 2: the second attempt considers how the Propaganda Material is likely to be understood.

- It would be an offence to possess extreme terrorist propaganda.
- Terrorist propaganda would be material "...likely to be understood by a reasonable person as directly or indirectly encouraging the commission or preparation of acts of terrorism".
- Extreme propaganda would be propaganda that depicts the act of terrorism, in words or image, by reference to especially grave forms of violence.

7.73. Such an offence would be extremely broad in its potential application as it would cover both a sermon calling for non-believers to be killed as well as branded

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<sup>528</sup> Sections 7, 7A 2008 Act.

Da'esh videos. However, its application to images of violence would be uncertain unless accompanied by encouraging words.

7.74. Model 3: the third attempt excludes consideration of terrorist motivations but focusses on the type of material and mode of recording that is frequently encountered in terrorist propaganda. It draws on the Australian Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019<sup>529</sup>, passed after the Christchurch attacks, which penalises the first-person recording or streaming of abhorrent violent conduct<sup>530</sup>.

- It would be an offence to possess extreme violent material.
- Extreme violent material would be material depicting grave acts of violence, such as torture or execution, recorded by a person engaged in those acts.

7.75. The immediate objection to this offence is that it is both too wide, having no necessary relation to terrorism at all, and too narrow, in that the material must be recorded by a person engaged in the relevant conduct.

### *Analysis*

7.76. There are principled, and further important practical objections to criminalising mere possession of Propaganda Material which, to my mind, are ultimately fatal to the task of identifying a suitable terrorist offence.

7.77. Potential defendants would include the very large number of people who simply drawn to watching images of extreme violence including terrorist violence<sup>531</sup>. The first, and to my mind, conclusive objection is therefore that a whole new class of individuals would be pulled within the ambit of terrorist offending and terrorist sentencing. These

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<sup>529</sup> [http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num\\_act/ccaovma2019536/sch1.html?context=1;query=Abhorrent%20mask\\_path=au/legis/cth/num\\_act](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/num_act/ccaovma2019536/sch1.html?context=1;query=Abhorrent%20mask_path=au/legis/cth/num_act).

<sup>530</sup> Albeit the offence in Australia is directed at service providers who fail to remove such material following notification.

<sup>531</sup> For example, Snyder, B., 'Why I Can't Stop Watching Horrifying ISIS Decapitation Videos', *Wired* (2015) <https://www.wired.com/2015/02/on-watching-gore-and-death-online/>. Videos of beheadings, torture and suicide, are said to generate millions of monthly views by fans of gratuitous violence: Millar, J., 'Inside the world of Gore: Why Gruesome Videos Draw a Crowd', *GQ* (2017), <https://www.gq.com.au/success/opinions/inside-the-world-of-gore-why-gruesome-videos-draw-a-crowd/news-story/b995b81af16713e679a2f74ba8522694>.

individuals, far removed from comparison with Khuram Butt, would be prosecuted and sentenced as terrorists, subject to delayed release<sup>532</sup> and special measures on release such as terrorist registration under Part 4 Counter-Terrorism Act 2008.

7.78. This illustrates the danger of penalising conduct where the harm is remote<sup>533</sup>. Very many of the individuals who choose to view Propaganda Material are unlikely to have anything to do with terrorist acts in future; that is also true of individuals identified by the authorities as Subjects of Interest<sup>534</sup>. For some this is a serious objection to the existing section 58 Terrorism Act 2000 offence<sup>535</sup>, which at least has the benefit of restricting the circulation of information that is objectively useful to terrorists.

7.79. It could be argued that the possession of such material creates a market for the production of such material in future (by parity with child abuse images). But even this consideration is only likely to apply to a subset of Propaganda Material where it can genuinely be said that a suicide bombing, for example, only took place for its filmic value<sup>536</sup>. The consideration would not apply to Propaganda Material showing violence that is staged or digitally faked<sup>537</sup>.

7.80. Because of the extent to which Propaganda Material is in circulation within the general population, the extent to which it is punished would depend largely on executive discretion: as to who is arrested, whose electronic devices are analysed, and who is put forward on public interest grounds for prosecution. The scope of this executive discretion<sup>538</sup> and the risk of impermissible discriminatory outcomes would be too wide.

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<sup>532</sup> Counter-Terrorism and Sentencing Bill 2020.

<sup>533</sup> Zedner, L., 'Terrorizing Criminal Law, Crim Law and Philosophy' (2014) 8:99-121 (2014)

<sup>534</sup> "...SOIs very often view such material without even planning or committing an attack", Chief Coroner, Prevention of Future Deaths Report, *supra*, at paragraph 64.

<sup>535</sup> Cornford, A., 'Terrorist precursor offences: evaluating the law in practice', Crim.L.R. 2020, 8, 663-685 concludes that too much innocent conduct is restricted, and too few realistic preventive benefits achieved, to justify the section 58 offence at its margins.

<sup>536</sup> Maini-Thompson, S., Criminalising the possession of "terrorist propaganda": a human rights analysis (2020) *UK Human Rights Blog*, <https://ukhumanrightsblog.com/2020/01/21/criminalising-the-possession-of-terrorist-propaganda-a-human-rights-analysis/#more-139071>.

<sup>537</sup> If faked material were to be excluded from the scope of the offence, by contrast to the inclusion of indecent pseudo-photographs of children (section 160 Criminal Justice Act 1988), it would be necessary to for the prosecution to prove that the offending material was genuine and that the defendant had some awareness that this was or might be the case.

<sup>538</sup> *R v Gul*, *supra*, at paragraph 63-4.



7.81. Secondly, there are serious objections based on personal rights and freedoms without suggesting that individuals have any legitimate right to consume images of torture or execution. The diffuseness of what amounts to “propaganda” means that footage that journalists may need to obtain, let alone publish, in order to establish or illustrate facts, for example footage of an attack by Da’esh on a Coalition base, could fall within the purview of newly prohibited material. In some situations, Propaganda Material may be the only evidence available that terrorist attacks or gross human rights abuse are taking place. Even with strong and clear defences for journalists or human rights monitors or lawyers, the business of understanding what is happening in conflict zones would be prejudiced.

7.82. The position would be more severe in respect of Propaganda Material made up of words alone. According to a recent Europol report, even non-violent material can be “just as persuasive as its gory counterpart and can even cultivate broader appeal because of its normalised content”<sup>539</sup>, as can “strong hints” which do not amount to direct encouragement<sup>540</sup>, but an attempt to criminalise any material that was made for, or had the effect of, encouraging, or depicted terrorist violence would stray well into materials whose possession we take for granted as part of understanding the world we live in<sup>541</sup>, not to mention political and religious texts. There is a danger of being transported into the territory of extremism, which as Lord Anderson QC has pointed out is a word but not a useful legal concept<sup>542</sup>.

7.83. The above objections do not call into question the extent to which Propaganda Material may, in the wrong hands, have a seriously deleterious impact by engendering profound hostility towards and dehumanising the enemy, and by normalising violent acts and lowering inhibitions to violence. There is an increasingly significant current profile of young, isolated individuals, often with poor mental health, who seem to be very affected by this sort of material. It is true that a focus on online material must not

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<sup>539</sup> Vox Pol (2019), <https://www.voxpol.eu/on-the-importance-of-taking-down-non-violent-terrorist-content/>.

<sup>540</sup> Macdonald, S., Social Media, Terrorist Content Prohibitions and the Rule of Law, George Washington University (2019), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Social%20Media%2C%20Terrorist%20Content%20Prohibitions%2C%20and%20the%20Rule%20of%20Law.pdf>.

<sup>541</sup> For example, in the course of preparing Chapter 2 of this report, I read freely available Incel tracts and memes which could be viewed as encouragements to terrorism.

<sup>542</sup> ‘Extremism and the Law’ (2019), <https://www.daqc.co.uk/wp-content/uploads/sites/22/2019/03/here-3.pdf>.

distract from understanding the offline trajectories of terrorists<sup>543</sup>, and assumptions about the causative effect of Propaganda Material should be tested. However, in order to guide future policy decisions, whether on the creation of a new offence (which I do not recommend), or on the approach to digital takedowns (see below), it would be helpful to obtain to create a secure evidence base on the prevalence of violent material found in the possession of individuals convicted in the United Kingdom of acts of terrorism.

### *Digital Take Down*

7.84. Criminalising the consumers of Propaganda Material is one possible way solution. The other solution concerns the service providers.

7.85. However imperfect it may be to leave the policing of online terrorist harm to private companies, who are not benevolent enablers of human interaction and knowledge sharing but successful companies whose success is measured in shareholder returns<sup>544</sup>, this does at least provide some opportunity to address the source and scale of the problem<sup>545</sup>. Moreover, because the terms and conditions of service providers allow them to take down a far wider range of material than is material that is criminal, removal of Propoganda Material does not depend upon the criminal law of the United Kingdom or elsewhere.

7.86. At present, all take downs are voluntary. CT Police in the form of the Counter Terrorism Internet Referral Unit are in constant contact with service providers but are yet to issue a compulsive notice under section 3 Terrorism Act 2006, which is viewed as a remedy of last resort<sup>546</sup>.

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<sup>543</sup> Whittaker, J., Herath, C., 'Understanding the Online and Offline Dynamics of Terrorist Pathways' (2020), Global Network on Extremism and Technology, <https://gnet-research.org/2020/07/13/understanding-the-online-and-offline-dynamics-of-terrorist-pathways/>.

<sup>544</sup> Australian Competition and Consumer Commission Chair Rod Sims, speech to Melbourne Press Club, 13 August 2019, <https://www.accc.gov.au/speech/the-digital-platforms-inquiry-melbourne-press-club-speech>.

<sup>545</sup> For a sense of scale, publicly available information relating to 2018 states that in 2018, Facebook 'took action' on 19 million pieces of internet content that was considered to be terrorist propaganda related to ISIS, al-Qaeda and their affiliate groups: <https://transparency.facebook.com/community-standards-enforcement#terrorist-propaganda>.

<sup>546</sup> The Electronic Commerce Directive (Terrorism Act 2006) Regulations 2007, SI 2007/1550, set out how sections 1-4 Terrorism Act 2006 interact with EU on e-commerce and protections for service providers.

7.87. Following the attacks in 2017, the major service providers formed the Global Internet Forum to Counter Terrorism (GIFCT) with a view to creating and encouraging shared standards for automated removal<sup>547</sup>. However, the search for common ground means that in practice GIFCT members' attention is directed to (a) content related to organizations on the United Nations Security Council's consolidated sanctions list and (b) material from or relating to terrorist incidents such as the Christchurch and Halle attacks identified under a Content Incident Protocol<sup>548</sup>.

7.88. Possible domestic Online Harms legislation at some stage in the future, still highly contested<sup>549</sup>, would replace patchy and imperfect self-regulation with a legal duty to maintain effective systems which filter or remove harmful content<sup>550</sup>. A proposal has also been made by the EU to address the dissemination of terrorist content online<sup>551</sup>, which has been welcomed by the government<sup>552</sup> but has not advanced since 2019 due to the pandemic<sup>553</sup>.

7.89. The government proposes the publication of an "interim voluntary Code of Practice" on terrorist content prior to the establishment of a legally enforceable regime<sup>554</sup>. Assuming that the Code is based upon categories of material that are currently unlawful under terrorism (and other) legislation distinctions then arise between:

- material that it is unlawful for service providers to host. This is generally limited under "e-commerce" laws to unlawful material of which the service provider is positively aware, being under no obligation to carry out general monitoring<sup>555</sup>.
- Material that it is unlawful for a person to possess by virtue of the nature of the material (rather than the circumstances in which it is possessed, of which a

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<sup>547</sup> Tech Against Terrorism is an initiative launched by the UN Counter Terrorism Executive Directorate. Nation state initiatives operate through the EU Internet Forum, G20/G7, Tech Against Terrorism, and the Aqaba Process (Jordan).

<sup>548</sup> <https://www.gifct.org/transparency/>.

<sup>549</sup> See recently, Elsom, C., 'Safety without Censorship', Centre for Policy Studies (2020).

<sup>550</sup> Lord Anderson QC, 'Taming the Wild West: Government and the Internet' (2019).

<sup>551</sup> Proposal for a Regulation on preventing the dissemination of terrorist content online; Council number 12129/18 + ADDs 1–3, COM(18) 640.

<sup>552</sup> Forty-first Report HC 301–xl (2017–19), chapter 6 (24 October 2018), <https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-xl/301-xl.pdf>.

<sup>553</sup> Twenty-third report (2019-21) (October 2020), <https://publications.parliament.uk/pa/cm5801/cmselect/cmeuleg/229-xix/22909.htm>.

<sup>554</sup> <https://www.gov.uk/government/consultations/online-harms-white-paper/public-feedback/online-harms-white-paper-initial-consultation-response#executive-summary>.

<sup>555</sup> Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) implementing E-Commerce Directive 2000/31/EC.

service provider may be unaware). As set out above, this is material that offends section 58 Terrorism Act 2000.

- Material that it unlawful for a person (the user-generator) to post online. This is a wider category of material including terrorist publications and material encouraging support for terrorist organisations.

7.90. The question, as yet unresolved because no voluntary Code of Practice has yet been published, is how unlawfulness is to be calculated: by reference to the service provider alone (in which case the service providers can take a passive stance until alerted to the material's existence by law enforcement), by reference to the nature of the material alone (leading to a very narrow set of material), or by reference to the unlawful acts of the users who post the material.

7.91. As one goes further from a limited set of defined (and hashed) images, the harder it becomes to identify standards for removal, and the less easy it is to rely on artificial intelligence. There are no clear-cut, industry-recognised standards for what constitutes terrorist online content. Europol's recommendation about taking down even non-violent material produced by designated terrorist organisations<sup>556</sup> exposes a difficult issue. Material which may on careful human and contextual analysis be considered terrorist propaganda, for example the obscure online memes, jokes, conspiracy theories and dark humour beloved of supporters of Right Wing Terrorism, is constructed from general speech. The process is easier when dealing with material that is branded with the name of a proscribed group, or celebrates a defined terrorist incident<sup>557</sup>.

## Providing Support to Proscribed Organisations

7.92. In last year's report I drew attention to the slender but important distinction in the criminalization of "moral support"<sup>558</sup>.

7.93. On the one hand, section 12 (1) Terrorism Act 2000 criminalizes the *inviting* of support for a proscribed organisation where the support is not, or is not restricted to,

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<sup>556</sup> <https://www.voxpol.eu/on-the-importance-of-taking-down-non-violent-terrorist-content/>.

<sup>557</sup> 'New Zealand bans video game glorifying Christchurch mosque shooting' (2019) <https://www.reuters.com/article/us-newzealand-shooting-censor/new-zealand-bans-video-game-glorifying-christchurch-mosque-shooting-idUSKBN1XA0D5>.

<sup>558</sup> Terrorism Acts in 2018 at 7.27-29.

the provision of money or other property (which would be a separate offence under section 15). It is, subject to the other elements being made out, an offence contrary to section 12(1) Terrorism Act 2000 to invite moral or intellectual support for a proscribed organization. This was determined during the prosecution of Anjem Choudary and Mohammed Rahman, two senior leaders of Al-Muhajaroun ("ALM" considered further in Chapter 8) who gave various talks in which they sought,

"...to validate the legitimacy of the Caliphate, and the Caliph, and to emphasise the obligation on others to obey, or provide support to Al Baghdadi. One of those obligations was to travel (or make "Hijra") to the Islamic state. Whilst it is accepted that the talks do not contain explicit invitations to violence, the talks are said to be invitations of general support for the Islamic State declared by ISIL, and do not limit themselves as to the manner in which support should be given."

7.94. The Court of Appeal held that the support in question may be practical or tangible but need not be, and agreed with the trial judge's analysis that "support" can encompass "...intellectual support: that is to say, agreement with and approval, approbation or endorsement of, that which is supported." noting that a group may derive encouragement from the fact that it has the support of others<sup>559</sup>.

7.95. On the other hand, there is no general offence of *providing* support to a proscribed organisation. For example, it was common ground in *Choudary* that it was not an offence to *express* intellectual or moral support for a proscribed organisation, other than where that expression takes the form of flags or uniforms whose display is prohibited by section 13<sup>560</sup>.

- In the United it is an offence to provide "material support to Foreign Terrorist Organizations." This prohibits the provision of any "material support or resources" to a designated terrorist organization including "any property, tangible or intangible, or service."<sup>561</sup>.

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<sup>559</sup> R v Choudary and Rahman [2016] EWCA Crim 61 at paragraph 46, <https://www.bailii.org/ew/cases/EWCA/Crim/2016/61.html>

<sup>560</sup> At paragraph 5.

<sup>561</sup> 18 U.S.C. § 2339B.

- France uses sweeping laws based on association with other terrorists<sup>562</sup>. Prosecutors are not obliged to demonstrate the existence of any specific plot, only the broad contours of a hypothetical one which may be inferred from a broad range of circumstances.

7.96. This ground is at least partially covered in the United Kingdom by:

- The offence of using money or other property "for the purposes of terrorism" contrary to section 16 Terrorism Act 2000; by section 1(5), a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation. Accordingly, using money or other property for the benefit of a proscribed organisation is an offence. This could include providing financial support or support in the form of weapons, or clothing, or some other property. This conduct could also be captured by the related offence of entering into a funding arrangement contrary to section 17.
- Encouraging the commission, preparation or instigation of acts of terrorism, contrary to section 1 Terrorism Act 2006. This applies to a statement that is likely to be understood by a reasonable person as a direct or indirect encouragement or other inducement to commit terrorism offences. In theory, this could extend to expressions of support for a proscribed organisation but only if they qualified as direct or indirect encouragements to terrorism, particularly since it includes "glorification" of past conduct as conduct that should be emulated<sup>563</sup>.
- Preparation of terrorist acts contrary to section 5 Terrorism Act 2006. If a person "engages" in any preparatory conduct with the intention of assisting another to commit acts of terrorism, which may be particular acts of terrorism or acts of terrorism generally. Although typically used to prosecute "attack-planning" it could cover the provision of accommodation or credit card fraud to raise living expenses<sup>564</sup>. Since, by section 20(2), an act of terrorism includes anything taken for the purposes of terrorism (and therefore, by section 1(5), for the benefit of a proscribed organisation), providing accommodation to members of

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<sup>562</sup> Association de malfaiteurs terroriste.

<sup>563</sup> Section 1(3).

<sup>564</sup> Lord Carlile QC, 'Proposals by Her Majesty's Government for Changes to the Laws Against Terrorism' (Home Office, London, 2005) para 30.

Da'esh could be subject of such a prosecution. However the government played down the width of the provision during the passage of the legislation, specifically stating that a donation for the benefit of a proscribed organisation would not be caught and that the word "engages" implied a sense of particular activity<sup>565</sup>. There is no authority on this point but it should be noted that section 5 carries a maximum life imprisonment: in this context, to consider support for proscribed organisations as "acts of terrorism" would be going too far.

- The offence of entering in or remaining in a designated area contrary to section 58B Terrorism Act 2000, which would not require proof of any act of support. No designation order has yet been made and so there is not scope for liability at present.

7.97. In last year's report I drew attention to the "indirect support roles" for proscribed organisations that might be played by women in the so-called Califate, such as cooking meals for Da'esh fighters, marrying a Da'esh fighter in order to support their terrorist activities, or rearing children as a future generation of fighters. None of these activities would appear on their own to involve the provision of money or other property for the benefit of a proscribed organisation (section 16-7 Terrorism Act 2000), the encouragement of acts of terrorism (section 1 Terrorism Act 2006), or preparatory conduct with the intention of assisting acts of terrorism (section 5 Terrorism Act 2006).

7.98. However, despite having drawn public attention to this point<sup>566</sup>, neither the police nor the Crown Prosecution Service have drawn my attention to any concrete example of a person providing support to Da'esh fighters which they have been unable to prosecute because of a lacuna in the law. This may simply be because of the problem of proof of activities overseas. This is not simply a question of proving what the individual is supposed to have done, but where they were at the time, and rebutting defences raised such as duress. In these circumstances I say no more about reforming the law in this area.

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<sup>565</sup> Walker, C., *The Anti-Terrorism Legislation* (3rd ed, Oxford) at paragraph 6.62.

<sup>566</sup> E.g. 'Scanning the Horizon', January 2020, <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/01/200122-HJS-speech-.pdf> at paragraph 33

## 8. SPECIAL CIVIL POWERS

8.1. One of the continuing preoccupations of counter-terrorism is how to deter individuals from committing serious acts of terrorism, other than by using the criminal justice model of arrest, prosecute, imprison. This Chapter considers special non-criminal measures found in counter-terrorism legislation.

### **Introduction: Desistance and Disengagement Programmes**

8.2. Compulsory attendance at Desistance and Disengagement Programmes (DDP) is a routine component of both Terrorism Prevention and Investigation Measures (TPIMs) and Temporary Exclusion Orders (TEOs). For TEOs, it is one of the only three requirements that may be imposed following return to the United Kingdom<sup>567</sup>. Before turning to TPIMs and TEOs individually, I consider the nature and uncertain effectiveness of 'DDP' in deterring terrorist acts.

8.3. DDP was established as a programme in 2016 for released terrorist offenders on licence. It was expanded into prisons in 2018.

8.4. DDP is described in the government's strategic policy Contest 3.0<sup>568</sup> as:

“...a range of intensive tailored interventions and practical support, designed to tackle the drivers of radicalisation around universal needs for identity, self-esteem, meaning and purpose; as well as to address personal grievances that the extremist narrative has exacerbated. Support could include mentoring, psychological support, theological and ideological advice.”

8.5. Officials emphasize that DDP is not the same as “deradicalization”, a tacit recognition that seeking to change a person's beliefs is a perilous endeavour. The more modest goal is to change behaviours.

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<sup>567</sup> Attendance at DDP sessions has been imposed as a requirement for all TEO subjects who have returned to the UK to date. The other obligations are reporting at a police station, and notifying place of residence: section 9(2) Counter-Terrorism and Security Act 2015.

<sup>568</sup> Contest 3.0 at paragraphs 129-130, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/716907/140618\\_CCS207\\_CCS0218929798-1\\_CONTEST\\_3.0\\_WEB.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf).



8.6. There are a number of strands of DDP which are managed by the Office of Security and Counter-Terrorism in the Home Office and the Joint Extremism Unit in the Ministry of Justice:

- For released offenders, as a requirement of their licence condition.
- For TPIM subjects, by way of an appointment measure<sup>569</sup>.
- For TEO subjects, by way of an appointment measure<sup>570</sup>.
- In prisons, for individuals convicted of TACT-or-TACT-related offences or identified as exhibiting extremist behaviour by prison staff.

8.7. In practice a person on DDP will be required to meet with two mentors (sometimes referred to as intervention providers), usually but not necessarily for 2 sessions of 2 hours per week. The practical mentor is intended to help with matters such as finding work or developing a new hobby. There is no official assessment of the utility of practical mentors; I am informed (but have no way of confirming) that some individuals have formed strong and fruitful relationships with practical mentors. TPIM or TEO subjects in particular may have few people with whom they are willing or able to discuss the practical realities of their situation.

8.8. Theological mentors are intended to deliver what could be described as religious or ideological talking therapy, through which the individual's beliefs can be considered and challenged, leading, potentially, to modification or disavowal. There is no official assessment of the utility of theological mentors and no great claims for theological mentoring are made by officials.

8.9. There are also difficult moral choices involved in the selection and funding of theological mentors. Take the example of an Islamist terrorist whose terrorist behaviour is inspired by religious views that encourage the use of violence against Western democracy. It may be far more likely that such an individual will respond to a deeply conservative cleric, with hostile views towards Jews, women and gay people, than to a modern reform-minded cleric.

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<sup>569</sup> Paragraph 10A, Schedule 1 TPIM Act 2011.

<sup>570</sup> Section 9(2)(a)(ii) Counter-Terrorism and Security Act 2015.

8.10. DDP also provides access to funds (known as the "practical fund") which are not available elsewhere. They could pay for psychological support, autism assessment, access to an education course, or payments of a housing deposit.

### **Non-engagement**

8.11. Compulsory attendance does not necessarily lead to beneficial engagement<sup>571</sup>.

8.12. Disruptive behaviour or deliberate disengagement during mentoring (both practical and theological) is, I am informed, a significant problem. The more extreme examples include pretending to sleep, wearing headphones or taking long toilet breaks. Preventing such behaviour may be easier for offenders on licence (who have a general obligation to 'be of good behaviour'<sup>572</sup>) but a legislative test that would define engagement for TPIM or TEP subjects, enabling prosecution for non-compliance, would be hard to frame. Officials are limited to requiring the individual to "comply with any reasonable directions" given by the Home Secretary that relate to the DDP appointment<sup>573</sup>. An individual could therefore be required to remove their headphones before each session and leave them in reception.

8.13. Possible reasons why a TPIM or TEO subject may refuse to engage with DDP sessions emerge from ongoing litigation brought by a TEO subject known as QX. As recorded by the High Court, QX,

"...has for a substantial period refused to engage with mentoring sessions. He has been a party to proceedings in the Family Court and subject to criminal investigation. He has expressed concern that anything he said during a mentoring session would be used against him in court. In his witness statement made for the purposes of these proceedings, he says that from March 2019 he spent the mentoring appointments playing chess with the mentor and engaging in minimal conversation. The appointments then moved to a library. Since then, he has spent the time reading a book which he brings with him."<sup>574</sup>

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<sup>571</sup> "The Home Office cannot require the Respondent actively to engage with the I[ntervention] P[rovider].": *IM and others* [2017] EWHC 1529, Nicol J. at paragraph 32(l).

<sup>572</sup> Paragraph 2.3, Probation Service Instruction 12/2015, <https://www.justice.gov.uk/downloads/offenders/psipso/psi-2015/psi-12-2015-licences-conditions-licence-supervision-notices.pdf>.

<sup>573</sup> Section 10A(1)(b) Counter-Terrorism and Security Act 2015.

<sup>574</sup> *QX v Secretary of State for the Home Department* [2020] EWHC 1221 (Admin), <https://www.bailii.org/ew/cases/EWHC/Admin/2020/1221.html>.

8.14. The position of the Secretary of State<sup>575</sup> was that compulsory attendance was justified because:

- It supports reintegration into society.
- It reduces a person's ability to engage in terrorism-related activity.
- It provides an opportunity for officials to understand their "mindset" (with non-engagement being a potential sign that the individual remains a continuing threat).
- It provides general assurance as to the individual's location at frequent points throughout the week.
- Removing the obligation would only encourage other subjects to decline to engage with DDP in future.

8.15. From QX's perspective, the sessions were simply used for gathering intelligence. A further hearing is awaited on the key issue identified by the Court<sup>576</sup>: whether there is any rational purpose for requiring QX to attend sessions that he cannot be forced to engage in in any meaningful way.

8.16. Allied to non-engagement is *apparent* engagement, telling a mentor what they want to hear in order to falsely persuade the authorities of a change of mindset.

### ***Measures of Success***

8.17. It is possible to distinguish between two potential metrics of success for the DDP programme.

8.18. The first is the goal of rehabilitation, reintegration with mainstream society, or long-term deterrence. Even allowing for the difficulties in defining recidivism in the terrorist context<sup>577</sup>, this goes beyond mere non-offending or re-offending. It is certainly possible to say that individuals are not deterred from committing offences simply because they know they have been identified as possible terrorists of the future. In

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<sup>575</sup> *QX v Secretary of State for the Home Department* [2020] EWHC 2508 (Admin) at paragraphs 14, 17, 19, 20, 35, 37.

<sup>576</sup> *Ibid*, paragraph 39.

<sup>577</sup> Altier, M.B., Horgan, J., Thoroughgood, C., 'Returning to the Fight: What the Literature on Criminal Recidivism Can Contribute to our Understanding of Terrorist Recidivism', US Department of Homeland Security (2012).

May 2019 alone, three individuals were convicted of terrorism offences having earlier been referred to Channel<sup>578</sup>.

8.19. In the absence of systematic evaluation, no one knows whether DDP is effective at achieving this first goal<sup>579</sup>. Conventional wisdom suggests that practical measures such as helping an individual into employment may be beneficial. Given the importance of social or family networks as an entry point to terrorist activity, some doubt the utility of any form of ideological mentoring<sup>580</sup>.

8.20. The second metric, even in the cases of complete non-engagement, is the practical dividend identified in QX: providing an opportunity to obtain insight into an individual's mindset, and knowledge that the individual is at a particular place at a particular time.

### ***International comparators***

8.21. There is also uncertainty as to the effectiveness of overseas programmes<sup>581</sup>.

8.22. At my request, Dr Diane Webber<sup>582</sup> carried out a survey of deradicalisation, disengagement and reintegration programmes (both voluntary and compulsory) in 10 countries<sup>583</sup> with a focus on returning foreign terrorist fighters. The best-known of these is the Aarhus model in Denmark which has a focus on practical and psychological, but not ideological, interventions for individuals returning from Da'esh controlled territories in Syria and Iraq. In Kazakhstan, which is notable for having

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<sup>578</sup> *R v X2*, 2 May 2019, section 58 Terrorism Act 2000 and Explosives Substances Act offence; *R v Ghorri*, 9 May 2019, section 58 Terrorism Act 2000; *R v Ghani*, 9 May 2019, section 58 Terrorism Act 2000. Channel panels are a form of Prevent intervention.

<sup>579</sup> The Youth Justice Board published a systematic review of evidence, Christmann, K., 'Preventing Religious Radicalisation and Violent Extremism' (2012) which noted a very limited evidence base and poor, though voluminous, scholarship.

<sup>580</sup> Morris, M., Eberhard, F., Rivera, J., Watsula, M., 'Deradicalisation: A Review of the Literature with Comparison to Findings in the Literatures on Degang and Deprogramming', Islam, Terrorism and Jihad (December 2012), <https://www.newageislam.com/islamterrorism-and-jihad/a-research-brief/deradicalisation-a-review-of-the-literature-with-comparison-to-findings-in-the-literatures-on-deganging-and-deprogramming/d/9720>; and in the Northern Ireland context, Ferguson, N. and McAuley, J.W., 'Radicalization or Reaction: Understanding Engagement in Violent Extremism in Northern Ireland' (2019) Political Psychology.

<sup>581</sup> 'The return of foreign fighters to EU Soil: ex-post evaluation', European Parliamentary Research Service (May 2018), [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS\\_STU\(2018\)621811\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf).

<sup>582</sup> Visiting Fellow at Georgetown University Centre on National Security and The Law.

<sup>583</sup> Australia, Belgium, Canada, Denmark, France, Germany, Kazakhstan, Netherlands, USA, Uzbekistan.

repatriated hundreds of mainly women and children from Syria<sup>584</sup>, there are 17 rehabilitation and reintegration centres across the country. Overall, Dr Webber concludes,

"Little is reported or known about the effectiveness of the programmes dealing with deradicalization/disengagement/reintegration. Many of them are in their infancy, and the programmes will not achieve instant results, but the greatest challenge must be to prove that they contribute to a reduced terror threat or that the paucity or reduction of terror attacks are due to the success of any of these programmes."

### TPIMs in 2019

8.23. Terrorism Prevention and Investigation Measures (TPIMs) are special civil measures imposed on individuals to limit the capability and improve the monitoring of individuals who cannot be prosecuted for their terrorism-related activities<sup>585</sup>. They were introduced in 2011 as less severe types of control orders following the review carried out under the Coalition Government by Lord MacDonald QC<sup>586</sup>. They are anticipatory, in that they seek to forestall future terrorist harm<sup>587</sup> but require some proof of involvement in terrorism-related activity. Their greatest drawback is that morally culpable behaviour is addressed outside the criminal process and subject to closed procedures from which the TPIM subject is excluded.

8.24. Parliament approved the continuation of the TPIM scheme for a further five years in 2016, meaning that it will now expire, unless further extended, on 14 December 2021<sup>588</sup>. Significant proposals to change the regime are, at the time of writing, before Parliament in the Counter-Terrorism and Sentencing Bill 2020 which will if enacted:

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<sup>584</sup> European Eye on Radicalisation, <https://eeradicalization.com/repatriating-foreign-fighters-the-case-of-kazakhstan/>.

<sup>585</sup> For a fuller description of the power, Terrorism Acts in 2018 at 8.3 et seq.

<sup>586</sup> 'Review of Counter-Terrorism and Security Powers' (2011), Cm 8003.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97971/report-by-lord-mcdonald.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97971/report-by-lord-mcdonald.pdf).

<sup>587</sup> Walker, C., *Anti-Terrorism Legislation*, 3rd ed, Oxford at 7.01. This is not unique to civil measures: some of the most charged criminal offences such as section 58 Terrorism Act 2000 (possession of item useful to a terrorist) are really designed to address future rather than current harm.

<sup>588</sup> Terrorism Prevention and Investigation Measures Act 2011 (Continuation) Order 2016 SI 2016 No.1166.

- Reduce the required standard of proof to reasonable grounds of suspicion.
- Permit TPIMs to endure beyond their current two year limit.

8.25. The principal sources of public information on TPIMs are contained in quarterly written Ministerial statements setting out the number of individuals subject to TPIMs, whether they are British nationals, whether they have been relocated, and summarising any criminal proceedings resulting from breaches of TPIMs during that period<sup>589</sup>. Further summary information is provided in the annual Transparency Report<sup>590</sup>.

8.26. TPIM subjects are almost invariably anonymised in court judgments and known by two-letter monikers, LF, JM, etc. High Court reviews under section 9 amount to strong and detailed judicial oversight, although (as reported below) not all TPIMs are subject to review, and it is likely to be over 6 months between the service of a TPIM notice (when the measure takes effect) and that review being heard by the court (let alone judgment given)<sup>591</sup>. It follows that TPIMs provide momentous powers to the executive to affect individual rights and freedoms before being subject to detailed judicial scrutiny; the role of the High Court when considering prior permission involves a light touch, confined to determining whether the decisions of the Home Secretary are “obviously flawed”, and carried out in secret<sup>592</sup>.

8.27. In 2019, and for the first time ever, second TPIMs were imposed on individuals, relying on “new terrorism-related activity”<sup>593</sup>.

8.28. The imposition of TPIM measures comes at a cost, depriving each TPIM subject of a significant measure of personal freedom and cutting across their family

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<sup>589</sup> The statements for 1 December 2018 to 29 February 2020 are at: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-05-09/HCWS1549/>; <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-07-22/HCWS1780/>; <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-10-08/HCWS1855/>; <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2020-01-27/HLWS60/>; <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-04-28/HCWS203/>.

<sup>590</sup> The most recent covers the period 2018/19 (March 2020), CP212, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/919625/CCS0320317274-001\\_HM\\_Government\\_Transparency\\_Report\\_Web\\_Accessible.pdf#page17](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919625/CCS0320317274-001_HM_Government_Transparency_Report_Web_Accessible.pdf#page17).

<sup>591</sup> 9 months in LF, 8 months in IM and others, and 10 months QT.

<sup>592</sup> Section 6(3) TPIM Act 2011.

<sup>593</sup> TPIM Act 2011, section 3(6) defines “new terrorism-related activity”.

and private lives. TPIMs inevitably affect family members even though they themselves are not the target<sup>594</sup>.

8.29. To date TPIMs have not been used in Northern Ireland or Scotland.

### **TPIMS and Al-Muhajiroun**

8.30. The following review of TPIMs in 2019 is done thematically by reference to their almost exclusive use during the last 4 years against members of the proscribed Islamist organisation, Al-Muhajiroun (ALM)<sup>595</sup>. A sufficient number of TPIMs against members of ALM are now subject of open judgments by the High Court to allow publication of a more detailed evaluation than might otherwise have been possible. I have read the closed judgments, and spoken to officials about these cases.

8.31. ALM, a group which presents an "obvious danger"<sup>596</sup> through its radicalisation of individuals and encouragement of terrorist acts, has been a focus of counter-terrorist activity in the United Kingdom for over a decade. Academic works have sought to chronicle the rise to prominence of the group, its ideological outlook, its impact on the United Kingdom, as well as the impact of external pressures on the group through prosecutions and other measures taken by the authorities<sup>597</sup>. TPIMs have become valued by the Home Office, MI5 and CT Police as a particularly effective but not decisive way of bearing down on a group that operates both as a terrorist as well as a social network, with strong and resilient links between members.

8.32. In 2016, TPIMs were imposed on ALM senior leadership figures, IM, JM, LG and LF. Each of these TPIMs were reviewed and upheld by High Court judges during 2017<sup>598</sup>. With one exception, these TPIMs reached the end of their 2-year limit and expired in 2018. In the same year Anjem Choudhary (ALM's leader) and Mizanur

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<sup>594</sup> *LF, supra*, at paragraph 2.

<sup>595</sup> The only other TPIM taking effect in 2019 was in respect of an individual assessed to have previously been in Da'esh controlled territories about which nothing further is in the public domain (expired in 2019). During 2019 permission was granted for a further TPIM for a new individual not based on his membership of ALM who was considered to be an attack planner. That TPIM was served and later revoked in January 2020.

<sup>596</sup> *LF v Secretary of State for the Home Department* [2017] EWHC 2685, Laing J. [www.bailii.org/ew/cases/EWHC/Admin/2017/2685.html](http://www.bailii.org/ew/cases/EWHC/Admin/2017/2685.html)) at 253.

<sup>597</sup> Wiktorowicz, Q., 'Radical Islam Rising: Muslim Extremism in the West', Rowman & Littlefield (2005); Wood, G., 'The Way of the Strangers: Encounters with the Islamic State', Allen Lane (2016); Kenney, M. 'The Islamic State in Britain', Cambridge (2018); Weeks, DI, 'Al Muhajiroun: A Case Study in Contemporary Islamic Activism', Palgrave Macmillan (2020).

<sup>598</sup> *IM, JM and LG* [2017] EWHC 1529, Nicol J. [www.bailii.org/ew/cases/EWHC/Admin/2017/1529.html](http://www.bailii.org/ew/cases/EWHC/Admin/2017/1529.html); *LF, supra*, Laing J.

Rahman, both convicted in 2015 of encouraging support for Da'esh, were released on licence<sup>599</sup>.

8.33. During 2018, MI5's assessment was that ALM continued to exist as a functioning organisation and was a threat to national security<sup>600</sup>. In that year TPIMs were imposed on four other prominent ALM members, JD, HB, HC and QT. Each of these orders was extended for a further year.

- JD: considered to be a member of ALM, not relocated and subject to less stringent measures under a 'new variation TPIM'<sup>601</sup> which has not been considered by the court to date.
- HB: considered to be member of ALM, not relocated and subject to 'new variation TPIM' which again has not been considered by the court; convicted in 2018 of breaching his TPIM and sentenced to 16 months' imprisonment<sup>602</sup>.
- HC: considered to be a member of ALM, not relocated, subject to 'new variant TPIM', again no court consideration.
- QT: found by the High Court in 2019 to be a long-standing member of ALM who had given encouragement to the commission or preparation of acts of terrorism and who had previously attempted to join Da'esh<sup>603</sup>. Subject to strict measures including relocation. He was arrested in February 2019 for breaching of his TPIM notice and was sentenced to 16 months' imprisonment after pleading guilty to 8 counts. The TPIM was revoked during his imprisonment and subsequently revived on release.

8.34. During 2019 second TPIMs were made against JM and LF, whose TPIMs had expired during 2018.

- JM: found by the High Court in 2017 during his first TPIM to be a senior leader of ALM who encouraged and through radicalisation facilitated the travel of others to joint Da'esh<sup>604</sup>. Subject to stringent measures under his second TPIM including

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<sup>599</sup> Choudhary is subject to UN sanctions: <https://www.un.org/securitycouncil/content/anjem-choudary> and was added to the EU list [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018XC1018\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018XC1018(02)&from=EN).

<sup>600</sup> *QT v Secretary of State for the Home Department* [2019] EWHC 2583 (Admin), Supperstone J, <https://www.bailii.org/ew/cases/EWHC/Admin/2019/2583.html>.

<sup>601</sup> See Terrorism Acts in 2018 at 8.23 et seq, and see further below.

<sup>602</sup> <https://www.cps.gov.uk/crime-info/terrorism/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-2016>.

<sup>603</sup> *QT*, *supra*, at paragraphs 121-123.

<sup>604</sup> *IM, JM and LG*, *supra*, at paragraphs 244-5.



relocation, with a reporting requirement greater than the reduced measure imposed by the High Court under his first TPIM<sup>605</sup>.

- LF: found by the High Court in 2017 during his first TPIM to be a senior leader of ALM with a leading role in communications and logistics for ALM<sup>606</sup> in a judgment which contains a detailed analysis<sup>607</sup> of how his speeches, "...when read together... were intended, and would reasonably be understood by at least some of his audience, to signal his, and ALM's, endorsement of the Caliphate, and of travel to ISIL-controlled territory". Subject to stringent measures under his second TPIM including relocation, and higher reporting measures than previously<sup>608</sup>. LF was sentenced in April 2019 to a suspended sentence for breaching his first TPIM.

## Operation of the Legislative Scheme

### *High Court Reviews*

8.35. The three ALM High Court decisions in *IM*, *JM and LG*, *LF*, and *QT*, establish or illustrate a number of propositions about how the TPIM regime operates and demonstrate the importance of judicial oversight.

8.36. Firstly, when push comes to shove, the Secretary of State has, rightly in my view, not sought to argue that the court should uphold a TPIM unless the court was itself satisfied to the requisite standard<sup>609</sup> that the individual is or has been engaged in terrorism-related activity<sup>610</sup> described as a 'pragmatic stance'. It is to be hoped that this is also a *principled* recognition that, although the Secretary of State is the original decision-maker, independent objective and unfettered evaluation by the High Court is an essential safeguard. It would be a wan review that was confined to considering the reasonableness of the Secretary of State's assessment.

8.37. Secondly, specific findings of fact do not need to be made as to the precise nature of the terrorism-related activity in which an individual is involved<sup>611</sup>.

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<sup>605</sup> *Ibid*, at paragraphs 212, 278.

<sup>606</sup> *LF*, *supra*, at paragraph 233.

<sup>607</sup> *Ibid*, at paragraphs 142-218.

<sup>608</sup> *Ibid*, at paragraph 262.

<sup>609</sup> On the balance of probabilities.

<sup>610</sup> *IM*, *JM and LG*, *supra*, at paragraph 42; *LF*, *supra*, at paragraph 22.

<sup>611</sup> *Ibid*, at paragraph 44. It seems that the government's expectations that raising the standard of proof in 2015 would have some impact on the granularity of the analysis (Hansard (House of Lords) vol.759 Col.486-7, 2 Feb 2015 (Report Stage), Lord Bates) have not been met.

8.38. Thirdly, the terrorism from which a TPIM is intended to protect the public does not have to be terrorism committed by the TPIM subject themselves. So in principle a TPIM could be made against person A to prevent terrorism by person B, subject to it being necessary and proportionate to make an order for such indirect purposes<sup>612</sup>. On the other hand, it is not permissible to impose a TPIM on an individual simply for the general deterrent effect on others<sup>613</sup>. This is a welcome rejection by the High Court of such instrumentality; individuals are not a means to an end, however justified the object of degrading a group such as ALM.

8.39. Fourthly “terrorist-related activity” whose proof is fundamental to the making of a TPIM need not be criminal activity, and may arise largely through involvement in a proscribed organisation:

- activity under section 4(1)(c) (“conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so”) is wider than the offence of encouraging terrorism under section 1 Terrorism Act 2006<sup>614</sup> and therefore a person does not have to engage in criminal activity in order to engage in terrorist-related activity.
- activity under section 4(1)(a) (“the commission, preparation or instigation of acts of terrorism”) includes acts done “for the benefit of” a proscribed organisation<sup>615</sup>, and is not confined to raising money<sup>616</sup>. In LF’s case the acts done for the benefit of ALM were being a senior leader, paying the rent and phone bill for a community centre used by ALM, and propagating ALM’s message enthusiastically and articulately.
- The way that non-violent activity is thus brought into scope demonstrates why proscription is such a powerful tool<sup>617</sup>.

8.40. Fifthly, broad brush and vague allegations will not do: references to ‘radicalisation’, ‘extremism’ and the ‘creation of an environment’ are unhelpful and legally meaningless<sup>618</sup>.

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<sup>612</sup> *IM and others, supra*, at paragraph 52.

<sup>613</sup> *IM and others, supra*, at paragraph 71.

<sup>614</sup> *LF, supra*, at paragraphs 221-3.

<sup>615</sup> By application of section 1(5) Terrorism Act 2000 and section 30(1) TPIM Act 2011. *LF, supra*, at paragraph 52.

<sup>616</sup> *LF, supra*, at paragraph 247.

<sup>617</sup> I described this as the proscription footprint, *Terrorism Acts in 2018* at 3.17 *et seq.*

<sup>618</sup> *LF, supra*, at paragraph 225.

8.41. More generally, a relatively settled TPIM jurisprudence means that TPIM reviews are not extended by the attritional features often found in national security litigation, whereby the merits of cases tend to be postponed behind preliminary points of law<sup>619</sup>.

8.42. The quality of the review process makes the non-review of the “new variant TPIMs” in the cases of JD, HB and HC, for reasons that I explain below, even starker.

***Prosecution as an alternative.***

8.43. I return again<sup>620</sup> to the issue of whether every reasonable effort is being made to prosecute TPIM subjects, in order to vindicate the priority that ordinary criminal prosecution should have over specialised civil measures such as TPIMs. This priority is demonstrated by section 10, by which 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”.

8.44. Although the Act does not *mandate* criminal proceedings where there is such evidence, it is implicit in it that criminal prosecution ought generally to be used as a means of managing terrorist risk, as was accepted by the government at the time of formulating the legislation<sup>621</sup>. The criminal justice route for dealing with terrorists commands the widest public support and is the fairest process. Ideally individuals who endanger the public by engaging in terrorism-related activity should be identified, punished and sentenced.

8.45. There has been no judicial consideration of this aspect of TPIMs. It is doubtful that the court on a review hearing under section 9 is able to consider it<sup>622</sup>, and the question of whether a prosecution should be brought is one on which courts are

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<sup>619</sup> For example, the case of Shamima Begum whose case reached the Supreme Court in late 2020 without consideration of the merits of her case.

<sup>620</sup> Cf. Terrorism Acts in 2018 at 8.21-2.

<sup>621</sup> Lord Anderson QC, ‘Control Orders in 2011’ (March 2012), recommendation 2, with which the government in its response agreed, Cm 8443, page 6.

<sup>622</sup> See section 9(1) TPIM Act 2011 for the role of the court.

reluctant to opine<sup>623</sup>. In any event, lawyers representing TPIM subjects are unlikely to consider it in the interests of their clients to argue in favour of a prosecution, and for the same reason neither are special advocates who have access to the totality of the relevant material.

8.46. By section 10 the chief officer must secure that the investigation of the individual's conduct with a view to prosecuting them for an offence relating to terrorism is kept under review and report back to the Secretary of State on that review. The duty of the chief officer to *report back* on their continuing review was an additional requirement when the TPIM regime was created. Under the former control order regime the Secretary of State was merely obliged to consult the chief officer of police at the outset. So the TPIM Act 2011 brings in the need for a continuing dialogue.

8.47. It is the contents of that dialogue to which it is necessary to draw attention. As presently formulated the duty imposed on the Secretary of State by section 10 is ambiguous because "whether there is evidence available" is capable of being understood in two senses, as either:

- A duty to ask the police whether they are currently in possession of evidence that gives rise to a realistic prospect of conviction. This is the current sense in which the duty is understood; or,
- A duty to ask the police whether a combination of evidence they currently hold *and evidence that they do not hold but could readily obtain* could be used to secure a conviction.

8.48. The problem with the first interpretation of the duty is that it encourages a certain passivity on the part of Home Office officials which does not accord sufficient weight to the priority of criminal prosecution. That priority is not served where officials can be satisfied, as they currently are, by a simple certification in the relevant draft TRG minutes, by means of a tick in a box, that there is currently insufficient evidence for prosecution. Nor does this approach vindicate the penultimate word in Terrorism Prevention and Investigation Measures.

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<sup>623</sup> *R (Birmingham) v. Director of the Serious Fraud Office* [2007] 2 WLR 635, paragraph 63, Laws LJ.

8.49. The second, more chivvying, interpretation should therefore be favoured. The police should be asked and encouraged to look at whether further reasonable investigation could result in criminal proceedings.

8.50. There is no plausible argument that this approach could damage national security: in most cases, criminal prosecution is likely to lead to stronger and more disruptive intervention against terrorist risk (remand in custody, sentence of imprisonment) than a TPIM; and if prosecution leads to acquittal, a TPIM can be used in a suitable case with reliance on the material disclosed in the prosecution. Nor do I detect any reluctance from officials on that basis; the more likely explanation is habit, an understandable sensitivity about appearing to cross the operational independence of the police and the institutional independence of the Crown Prosecution Service, and a lack of prosecutorial experience within the Office of Security and Counter-Terrorism<sup>624</sup>.

8.51. This is a matter I have raised with officials on various occasions in connection with TPIM cases. On one occasion it was apparent that a significant amount of (electronic) evidence of terrorism offending had been obtained in respect of a TPIM subject; what was lacking was analysis of the evidence. There may be cases where the sensitive intelligence that is admissible in closed TPIM proceedings points the way to compiling a criminal case based on alternative open sources of evidence.

8.52. I therefore **recommend** that the Secretary of State should keep under review the question of whether there either currently exists *or might reasonably be obtained* evidence that gives rise to a realistic prospect of conviction of the TPIM subject.

### ***Passage of Time***

8.53. The Secretary of State has a statutory duty to keep the necessity of TPIM measures under review<sup>625</sup>, in practice through the meetings of officials at periodic TPIM Review Groups. She must also consider the issue of necessity if extending a TPIM beyond the initial period of one year<sup>626</sup>.

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<sup>624</sup> There is at least one secondee in OSCT from CT Police, but none from the Crown Prosecution Service.

<sup>625</sup> Section 11.

<sup>626</sup> Section 5.

8.54. It is well established that consideration of the necessity of any measure requires an analysis of proportionality<sup>627</sup>. It is therefore reasonably simple to recite that the period of time already spent by an individual under TPIM measures is bound to be relevant. Axiomatically so: just as longer criminal sentences are considered as delivering greater punishment, irrespective of the particular impact on the prisoner of each additional year, so too the impact of a TPIM restriction on a TPIM subject must be greater than the impact of a restriction lasting a lesser period of time:

- This is an additional consideration to the incidental effects of restrictions over time, such as the withering of a relationship which might survive a restriction for one year but not two.
- Translated into practice, it ought to follow that the additional period of time could tip the balance between continuing a TPIM or not, *even without any change in the underlying national security case*.

8.55. From my own interactions with officials, and attendance at TPIM review group meetings, I can report that granular attention is given to the necessity and proportionality of TPIM measures with good focus on the legal criteria, and a healthy degree of internal challenge. I have, however, yet to see evidence that the mere passage of time is sufficiently accounted for. This is different from considering the cumulative effect of individual measures<sup>628</sup>. My challenge to officials has been to recognise the possibility that measures that are acceptable for the initial year, may cease to be so thereafter. Even judicial oversight has, to date, only gone so far. Whilst the High Court is required on any review to consider the necessity and proportionality of the continuation of TPIMs measures, experience of control orders suggests that mere lapse of time is unlikely to make the difference between quashing or upholding the measures if they are otherwise necessary<sup>629</sup>.

8.56. The challenge is particularly acute in the context of dyed-in-the-wool radicalisers such as members of ALM. It is unlikely, absent genuine and verifiable

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<sup>627</sup> *Secretary of State for the Home Department v MB* [2007] QB 415 at paragraph 63, a control order case, which has been applied equally to TPIMs see for example *DD v SSHD* [2015] EWHC 1681 (Admin).

<sup>628</sup> *JJ v Secretary of State for the Home Department* [2007] UKHL 45.

<sup>629</sup> *GG and NN* [2009] EWHC 142 (Admin) at paragraph 50, "If there is evidence that an individual remains a danger, an order should continue for however long is necessary", Collins J.

disengagement (sometimes referred to as a “change of heart”<sup>630</sup> or “disavowal”<sup>631</sup>) that mere passage of time will alleviate the risk posed by a TPIM subject.

- It follows that once a TPIM has been imposed in these types of cases, it is almost bound to endure to the statutory maximum.
- Indeed, analysis of every TPIM imposed since 2015 shows that every TPIM, unless revoked for extraneous reasons such as imprisonment or court order, has been renewed for a further year.
- Understandable anxiety about false compliance risks making it impossible for individuals to demonstrate that they have changed.
- The significance of this observation to the proposed removal of the 2-year maximum (as contemplated by the Counter-Terrorism and Sentencing Bill currently before Parliament) is obvious. Having no absolute upper limit, it may prove difficult to bring a TPIM to an end.

8.57. I do not suggest that the national security case for renewing the TPIM has not been made out in previous cases. However, there is nothing in the current TPIM review group draft minutes or agenda which adequately focusses the attention of officials on the lapse of time. TPIM review groups need explicitly to consider, stepping back from the detail of the case, the *fact* that yet more time has been taken from the free life of an individual.

8.58. I therefore **recommend** that in considering the proportionality of a TPIM and its measures, the TPIM review group should expressly identify the passage of time since the previous TPIM review group meeting as a factor weighing against continuation. Whether it is in fact proportionate to continue the TPIM or its measures will then depend upon an evaluation of all the circumstances.

### ***New variant TPIMs***

8.59. Last year I drew attention to the use of TPIMs containing fewer measures<sup>632</sup>. Current new variant TPIMs do not contain a relocation measure but are characterised

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<sup>630</sup> *AM v Secretary of State for the Home Department* [2011] EWHC 2486 (Admin), Silber J at paragraph 27.

<sup>631</sup> Mitting J. in *U v Secretary of State for the Home Department* SC/32/2005 14 May 2007, *Z v Secretary of State for the Home Department* SC/37/2005, 4 May 2007, in the context of special immigration proceedings.

<sup>632</sup> Terrorism Acts in 2018 at 8.23 et seq. These are sometimes referred to as SATPIMs (single allegation TPIMs), NATPIMs (new approach TPIMs) or TPIMs with reduced measures

by a limited clutch of measures focussed on stemming particular activities, for example restricting access to electronic devices to prevent involvement in online radicalisation. During 2019 there were three new variant TPIMs (against HC, HB and JD). The general view of the Home Office and MI5 is that these measures are capable of being effective and have in fact produced a targeted reduction of terrorist risk in certain cases.

8.60. The fact that the new variant TPIMs have been used at all no doubt reflects the maturity of the system, and a relatively settled understanding of the degree of proof required by the courts. This enables officials to abjure the ‘kitchen sink’ approach, and the fear that unless every allegation of involvement in terrorist-related activity is made, the order will not be upheld. It also reflects an acceptance that TPIMs are not all-or-nothing measures: some risks are targeted whilst other risks are not. There is however no appetite for rolling out new variant TPIMs in bulk.

8.61. There was no judicial consideration of new variant TPIMs in 2019.

- This means that the Secretary of State has not yet had the opportunity to test the extent to which, if at all, new variant TPIMs impose a lower administrative burden in terms of exculpatory review, disclosure, and witness evidence.
- More importantly, the individuals subject to these measures have not benefitted from independent judicial scrutiny of the necessity and proportionality of the measures imposed.

8.62. The powers of the High Court under section 9 are fundamental to the operation of the TPIM regime. They are powers exercised by way of review, not on an appeal against or challenge to the making of the TPIM brought by the TPIM subject, but as a matter of statute. So, under section 8, if the High Court gives permission for measures to be imposed by way of TPIM notice, it “must” at the same time give directions for a directions hearing; at which in turn directions “must” be given for a review hearing under section 9.

8.63. Other administrative decisions are not as a matter of course set down for judicial review or appeal. The fact that TPIM decisions are set out for automatic review demonstrates that the Court’s review is an inherent safeguard within the Act. It is not a judicial process requested by the TPIM subject, or a right that may be exercised, but an expectation of the statutory machinery.



8.64. The only circumstances in which a review hearing does not take place is if the individual requests the court to discontinue it or if the court makes its own decision, having heard the parties, to do so<sup>633</sup>.

8.65. Each of JD, HB and HC requested the court to discontinue the reviews in their cases. However, the absence of funding was a factor. JD, HB and HC had each sought funding from the Legal Aid Agency to enable them to participate in review hearings, but were refused. This would have left them with the option of participating in the review hearings as litigants in person or, as happened, requesting the court to discontinue them.

8.66. Public funding ought, subject to means, to be available in these cases given:

- The importance of judicial oversight.
- The legal complexity of the TPIM regime.
- the factual complexity of making submissions about intelligence assessments, most of which will be withheld from the TPIM subject on the grounds of national security.
- the severity of impact of *any* TPIM on an individual's rights and freedoms.

8.67. I do not know why legal funding has been refused and I am informed that steps are being taken by Home Office officials (who are not responsible for funding decisions) to understand the reasons for the Legal Aid Agency's decision-making. It would be unacceptable if funding was denied because of a misapprehension that a section 9 review is a form of challenge which required the TPIM subject to establish reasonable prospects of success. As I have explained, a section 9 review is not a challenge but an integral element of the scheme; and requiring an individual to establish the merits of his case is impossible where they do not know, and will never be told, the full reasons for the Secretary of State's decision to impose the TPIM. It would also be unacceptable if a distinction were drawn between the impact of relocation TPIMs (perhaps justifying funding) and the impact new variant TPIMs (not justifying funding).

8.68. I recognise that there are competing demands to any budget including the legal aid budget, but I have no hesitation in concluding that the fair and effective operation

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<sup>633</sup> Section 9(3).

of the TPIM legislation requires that TPIM subjects without private means should be provided with public funding for the purpose of section 9 review hearings.

8.69. I have also been informed that delays in decision-making by the Legal Aid Agency has extended the time before TPIM reviews can be listed. A TPIM is an executive measure, and delayed judicial scrutiny<sup>634</sup> is to be avoided, otherwise an individual may be subject for many months to an intrusive regime, at risk of criminal penalty for the slightest breach, which may turn out to be legally flawed.

8.70. I therefore **recommend** that the government ensures that, subject only to means, legal funding is swiftly made available to all TPIM subjects for the purpose of participating in section 9 review hearings.

### ***Breaches***

8.71. Failure to comply with a TPIM measure without reasonable excuse is a criminal offence punishable by up to 5 years' imprisonment<sup>635</sup>. Despite the challenges identified in prosecuting such breaches<sup>636</sup>, a run of recent criminal prosecutions illustrates that it is possible to secure convictions and, as a result, proves that TPIM measures carry significant penal consequences.

8.72. Of the 6 TPIM subjects in 2019, half have been convicted of TPIM breaches at some stage; taken together with the conviction of another senior leader of ALM, known as IM, that means that 4 ALM individuals subject to a TPIM have been convicted of breaching a TPIM and sentenced to immediate (or, in the case of LF suspended) imprisonment.

8.73. In 2019, the following prosecutions of TPIM breaches took place:

- QT, who pleaded guilty in March 2019 to 8 counts of breaching the controls on his use of electronic communication devices was sentenced to 16 months' imprisonment.
- EN, whose TPIM did not relate to membership of ALM, was charged with by using his wife's debit card, in breach of the financial controls which required

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<sup>634</sup> The permission hearing is no substitute: the High Court can only refuse permission under section 6 where the decision-making by the Secretary of State is obviously flawed.

<sup>635</sup> Section 23 TPIM Act 2011.

<sup>636</sup> Lord Anderson QC, 'Control orders in 2011' at 3.6; 'TPIMs in 2012' at 5.2.

him to use a specified bank card only. The case was dropped after a jury failed to agree on verdicts.

- LF was sentenced to a period of suspended imprisonment in April following his conviction for failing to comply with his reporting measure.
- IM was sentenced in December to 3 years' imprisonment following his conviction of 7 offences relating to his first TPIM. The most serious breach amounted to participating in a public televised debate in which he appeared to glorify terrorism.

8.74. One possible explanation for the success of these prosecutions is that prosecutors have found ways of explaining the significance to the jury of apparently inconsequential breaches such as failing to report precisely on time, or accessing anodyne websites.

### ***Evaluation***

8.75. Overall, the use of TPIMs against ALM in 2019 demonstrates:

- The power of proscription, which allows the Secretary of State to demonstrate “terrorism-related activity” by reference to participation in the activities of a proscribed group, even if those actions in themselves are not otherwise unlawful.
- The utility of TPIMs against radicalisers as a temporary but not lasting solution.
- That the authorities have been able to avoid an all or nothing approach by using new variant TPIMs.
- That greater care is needed to secure the primacy of criminal proceedings.
- That greater attention should be given to the passage of time.
- An unsatisfactory state of affairs in terms of legal funding.
- The fact that TPIM measures have real penal consequences if breached.

8.76. In next year's report I will evaluate the changes following from the Counter-Terrorism and Sentencing Bill. My views on the proposals are contained in two notes published during the passage of the Bill<sup>637</sup>.

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<sup>637</sup> Note 1 on TPIM Reforms, <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/06/IRTL-TPIM-1-Note-1.pdf>; Note 2 on TPIM Reforms, <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/06/IRTL-TPIM-2-Note.pdf>.

## TEOs in 2019

8.77. Temporary Exclusion Orders are used to control the return to the United Kingdom of individuals who are outside the country at the point of imposition; on return they take effect as a form of mini-TPIM<sup>638</sup>.

- No TEOs were imposed in 2015 or 2016.
- In 2017, 9 TEOs were imposed (on 3 males and 6 females).
- In 2018, a total of 16 TEOs (14 males and 2 females) were imposed.
- In 2019 6 TEOs were imposed but this is a misleading figure, as only 4 individuals were made subject to TEOs, but one individual was made subject to 3 separate orders.

8.78. The reason why 3 TEOs were imposed on one individual in 2019 is that they did not return immediately after imposition of the first two. Since TEOs currently run for a maximum of two years from the date of imposition, fresh TEOs were periodically imposed on this individual to ensure that the measures would last as long as possible once they did return. Last year I recommended that TEOs should expire two years after return<sup>639</sup>: the government has accepted my recommendation and proposes to ask Parliament to amend the Counter-Terrorism and Security Act 2015 to that end.

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)
2019	6 (2 males, 2 females)	2 (1 male, 1 female)

8.79. I also recommended that the Home Office should consider extending the TEO power to apply, in a suitable case, to non-British citizens<sup>640</sup> who return to the United Kingdom. As the recent decision of the Court of Appeal in Shamima Begum's case

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<sup>638</sup> For a description of the regime see Terrorism Acts in 2018 at 8.33 – 8.43.

<sup>639</sup> Terrorism Acts in 2018 at 8.51.

<sup>640</sup> *Ibid* at 8.61.

demonstrates<sup>641</sup>, individuals may secure a legal right to return despite having no British nationality. The government has stated that it is still considering my recommendation.

8.80. Only one individual has been prosecuted for breaching a TEO to date. This was "QQ", whose TEO was imposed in 2018; he was found guilty of breaching his TEO in February 2019; he was convicted and sentenced in 2020 to a suspended sentence<sup>642</sup>.

8.81. There is no presumption that a TEO will be reviewed by the High Court. An individual "may apply" to the court for a review<sup>643</sup>. The question of how much disclosure should be given to a TEO subject was litigated by an individual known as QX. Unsurprisingly, the High Court held that the same test for disclosure applied as for TPIM proceedings<sup>644</sup>, noting the seriousness of the impact on a TEO on the individual's freedom of movement and the fact that TEOs are expressly intended to "disrupt"<sup>645</sup>.

8.82. As I noted last year, a government review is currently being carried out, and not yet completed, into the effectiveness of TEOs.

## Children

8.83. Prosecution is inevitable for some of the terrorism offences committed by children, for example:

- A 14-year old boy known only as RXG was sentenced to life imprisonment in 2015 for encouraging a beheading attack in Australia. He was granted lifelong anonymity in 2019<sup>646</sup>.
- 16-year old Safa Boular was sentenced to life imprisonment in 2018 for planning a suicide attack in the United Kingdom. Attempts to divert Boular from

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<sup>641</sup> *Begum v Secretary of State for the Home Department and others* [2020] EWCA Civ 918, <https://www.judiciary.uk/wp-content/uploads/2020/07/WP-Begum-Judgment-NCN.pdf>.

<sup>642</sup> <https://www.bbc.co.uk/news/uk-england-leicestershire-52673463>.

<sup>643</sup> Counter-Terrorism and Security Act 2015 section 11(2).

<sup>644</sup> What is needed is sufficient information about the allegations against the individual to enable them to give effective instructions in relation to those allegations: *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28.

<sup>645</sup> *QX v SSHD* [2020] EWHC 1221 (Admin) at 84.

<sup>646</sup> *RXG v Ministry of Justice* [2019] EWHC 2026 (QB)

terrorism offending using Prevent had failed<sup>647</sup>. Her sentence was considered by the Court of Appeal in 2019<sup>648</sup>.

8.84. For some years countries have identified a trend in the high number of children radicalized to violence, recruited, and involved in terrorism-related activities. The Global Counter Terrorism Forum notes that children are increasingly recruited by terrorist groups within or outside their country. Some are abducted or forcibly recruited, some are enticed by promises of money or other material advantages, some join voluntarily, and some have little or no choice but to accompany their parents or other family members<sup>649</sup>.

8.85. In his 2018 review the Australian Independent National Security Legislation Monitor observed that whilst terrorism laws were not framed with children in mind, a small number of children do present a real threat which must be dealt with whilst acknowledging their special vulnerability<sup>650</sup>. Domestic<sup>651</sup> and international<sup>652</sup> guidance draws attention to the unique position of children as children.

8.86. CT Police and counter-terrorism officials are right to consider that for at least some children, the criminal process and its consequences provide limited benefit. From my interactions with Senior Investigating Officers, an emerging theme in 2019 is the increasingly young array of terrorist suspects being investigated and arrested. Uncertainty over the strength of their religious or ideological attachments poses

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<sup>647</sup> ACC Basu, evidence to Public Bill Committee, HC (26 June 2018), [https://publications.parliament.uk/pa/cm201719/cmpublic/CounterTerrorism/PBC219\\_Counter%20Terrorism\\_1st-7th\\_10\\_07\\_2018\\_REV.pdf](https://publications.parliament.uk/pa/cm201719/cmpublic/CounterTerrorism/PBC219_Counter%20Terrorism_1st-7th_10_07_2018_REV.pdf) at page 22.

<sup>648</sup> *R v Boular (Safaa)* [2019] EWCA Crim 798.

<sup>649</sup> GCTF, Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context (2016).

<sup>650</sup> Renwick, J., 'The prosecution and sentencing of children for terrorism' (2018), <https://www.inslm.gov.au/sites/default/files/inslm-report-prosecution-sentencing-children-for-terrorism.pdf>.

<sup>651</sup> Terrorism: Guidance in relation to the prosecution of individuals involved in terrorism overseas (September 2019), <https://www.cps.gov.uk/legal-guidance/terrorism-guidance-relation-prosecution-individuals-involved-terrorism-overseas> at paragraph 20.

<sup>652</sup> 'Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Note by the Secretary-General' UN Doc A/64/211 (3 August 2009) para 53; 'UN Standard Minimum Rules for the Administration of Juvenile Justice' (Beijing Rules), UNGA Res 44/33 (29 November 1985); UNODC, 'Handbook on Children Recruited and Exploited by Terrorist and Violent Groups: The Role of the Justice System' (2017). See also ; Quénivet, N., 'Does and Should International Law Prohibit the Prosecution of Children for War Crimes?' (2017) 28 EJIL 433, 451-453; Arai-Takahasi, Y., 'War Crimes relating to child soldiers and other children that are otherwise associated with armed groups in situations of non-international armed conflict. An incremental step toward a coherent legal framework?' *QIL* 60 (2019) 25-48

difficulties in determining whether their activities fall within the statutory definition of terrorism, a matter I discuss in Chapter 2.

8.87. A difficult cadre of children are those who have returned from Da'esh controlled areas. The fact that many children are brutalised victims<sup>653</sup>, and require rehabilitation<sup>654</sup>, does not mean that they do not present terrorist risk on return and may not have been trained specifically to carry out terrorist acts<sup>655</sup>. Ahmed Hassan, the bomber who planted an explosive device on the London Underground at Parson's Green in 2017, told CT Police in his asylum interview in January 2016 that he had spent three months in an Da'esh training camp as child, being taught how to kill and being religiously indoctrinated with Da'esh dogma: the trial judge was satisfied that this account was true, although he was not quite as young as he claimed to be<sup>656</sup>.

8.88. The government has stated that it is willing "...to repatriate unaccompanied UK minors or orphans where there is no risk to UK security"<sup>657</sup>. This poses the question of how to address that risk, either overseas or back home. So far, all children brought back have been under 10 years of age. But since matters are rarely absolute, and intelligence often incomplete, no assessment can exclude the possibility that a child may immediately, or in due course, be drawn into violence as a result of their experiences overseas.

8.89. In principle, TPIMs and TEOs could be imposed on children, although the lack of attention to the needs of children suggests that Parliament never contemplated that they would be. In each case the requirement for "involvement in terrorism-related activity"<sup>658</sup> suggests, even if not strictly required under the terms of the legislation, a degree of moral culpability that does not sit well with the position of children who have

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<sup>653</sup> Those taken to Da'esh controlled areas at a young age, or even born there, are likely to have been exposed to trauma and death.

<sup>654</sup> Van der Heide, L., Alexander, A., 'Homecoming: Considerations for Rehabilitation and Reintegrating Islamic State-affiliated Minors', Combating Terrorism Centre (June 2020).

<sup>655</sup> Having for example undertaken military training or been involved in terrorist acts. Advice for Local Authorities, Home Office, [https://adcs.org.uk/assets/documentation/DfE\\_safeguarding\\_children\\_returning\\_UK\\_from\\_Syria\\_advice\\_to\\_LAs.pdf](https://adcs.org.uk/assets/documentation/DfE_safeguarding_children_returning_UK_from_Syria_advice_to_LAs.pdf); Capone, F., 'Children In Conflicts As Victims And Perpetrators? Reassessing The Debate On Child Soldiers In Light Of The Involvement Of Children With Terrorist Groups', Questions of International Law (September 2019). The Modern Slavery Act 2015 defence does not apply to the most serious terrorism offences, see Schedule 4.

<sup>656</sup> Sentencing remarks, 23 March 2018, Haddon-Cave J., <https://www.judiciary.uk/wp-content/uploads/2018/03/r-vhassan-sentencing.pdf>. He was reported to have spent time on Channel: <https://www.bbc.co.uk/news/uk-43519540>.

<sup>657</sup> Hansard (HC), Vol 667 Col 626, Foreign Secretary (5 November 2019).

<sup>658</sup> Section 4 TPIM Act 2011; section 14(4) Counter-Terrorism and Security Act 2015.

only become involved because of parental influence or pressure. Serious crime prevention orders are only available for adults<sup>659</sup>.

### **Role of Family Courts**

8.90. One body that has developed considerable experience of children who have been or may be drawn into terrorism is the Family Division of the High Court<sup>660</sup>. In 2015 bespoke guidance “Radicalisation Cases in the Family Courts” was issued by its most senior judge<sup>661</sup>. Examinations under Schedule 7 Terrorism Act 2000 of individuals travelling or seeking to travel overseas are not infrequent sources of evidence<sup>662</sup>.

8.91. One of the first cases of its kind concerned a girl who was reported missing by her mother in 2014, apparently en route to Syria (a decision made more explicable by what was later found out about her parents). After being intercepted by CT Police she was made a Ward of Court, a form of legal guardianship, and she was subjected to obligations more familiar from TPIM proceedings: passport removal, and internet monitoring software<sup>663</sup>. Wardship has been imposed on very young children taken to Syria by their families but returned to the United Kingdom<sup>664</sup>. Wardship has also been used as a means of securing the return of children<sup>665</sup>.

8.92. A recent study of cases before the family court<sup>666</sup> reveals parents who seek to indoctrinate children, often very young, with (mainly Islamist) terrorist sympathies. These parents may appear, and may be in their own terms, close and loving. A large

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<sup>659</sup> Section 6 Serious Crime Act 2007.

<sup>660</sup> Van Ark, R., ‘The Caliphate’s Women and Children – What Role can the Family Courts play?’, ICCT (2019) contains a useful introduction to some of the early cases, <https://icct.nl/publication/part-1-the-caliphates-women-and-children-what-role-can-the-family-courts-play/>.

<sup>661</sup> *Radicalisation Cases in the Family Courts* (8 July 2015)

<https://www.judiciary.uk/wp-content/uploads/2015/10/pfd-guidance-radicalisation-cases.pdf>, Sir James Mumby, P. Adash, F., ‘The interaction between family law and counter-terrorism: a critical examination of the radicalisation cases in the family courts’, *Child and Family Law Quarterly* (2020), is right to point out the uncertain meaning of the word ‘radicalisation’; but radicalisation is not the test for intervention by the court.

<sup>662</sup> *A Local Authority v HB* [2017] EWHC 1437 (Fam),

*In re C (A Child) (Care Proceedings: Dismissal or Withdrawal)* [2018] 4 WLR 107, *A City Council v A Mother* [2019] EWHC 3076 (Fam).

<sup>663</sup> *London Borough of Tower Hamlets v B* [2015] EWHC 2491.

<sup>664</sup> *Re M* [2015] EWHC 1433 (Fam), a case in which the President of the Family Division explains the wardship jurisdiction, [https://www.familylaw.co.uk/docs/pdf-files/Re\\_M\\_Children\\_2015\\_EWHC\\_1433\\_Fam\\_.pdf](https://www.familylaw.co.uk/docs/pdf-files/Re_M_Children_2015_EWHC_1433_Fam_.pdf).

<sup>665</sup> <https://www.bbc.co.uk/news/uk-50521918>.

<sup>666</sup> Malik, N., *Henry Jackson Society* (2019), HJS <https://henryjacksonsociety.org/wp-content/uploads/2019/05/HJS-Radicalising-Our-Children-Report-NEW-web.pdf>.



portion of them have terrorist convictions or are subject to TPIMs or TEOs. In just over half of the cases, ALM had a role in influencing the family.

8.93. A case from 2019 demonstrates the nature of the challenge in some cases: the children were at risk of harm because their mother was “a strong, if not fanatical sympathiser of terrorism” and their father a sympathiser with “violent extremism and terror” who had stated a wish to become a suicide bomber, where both parents had exposed their children to terrorist material and supported the wish of one of the children to marry a Da’esh fighter<sup>667</sup>. Safaa Boular’s case suggests the risk of a terrorist upbringing: she had from the age of 12 been subject to radicalisation through the malign influence of her mother and her mother’s friends<sup>668</sup>. The case of the ‘Brighton Boys’ (three siblings who were killed after travelling to Syria) though shows that young people can be self-starters and radicalisers of other young people<sup>669</sup>.

8.94. Measures that may be imposed on children including tagging<sup>670</sup>, prohibition on travel documentation, announced and unannounced visits to the home, and an obligation on parents to engage with multi-disciplinary procedures<sup>671</sup>. This suggests that in principle the family court is equipped to make orders in respect of children where TPIM or TEOs would not be suitable.

8.95. However, the focus of family proceedings is on the risk of harm to the child rather than the risk of harm by the child. The interests of the individual child are paramount and cannot be eclipsed by wider considerations of counter-terrorism<sup>672</sup>. Moreover:

- The standard of proof in family proceedings can be demanding<sup>673</sup>.
- Local authorities have varying degrees of expertise on terrorist risk, will not have access to intelligence, or may simply take different views from CT Police<sup>674</sup>, whilst the police lack the institutional expertise of local authorities to

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<sup>667</sup> *A City Council v A Mother* [2019] EWHC 3076 (Fam).

<sup>668</sup> Boular [2019] EWCA Crim 798, at 59.

<sup>669</sup> Brighton and Hove Local Safeguarding Board, Serious Case Review (2017) <http://www.brightonandhovelscb.org.uk/wp-content/uploads/Siblings-W-and-X-SCR-July-2017.pdf>.

<sup>670</sup> *X and Y* [2015] EWHC 2265 (Fam).

<sup>671</sup> Woodward-Carlton, D., Radicalisation and the Family Courts July [2019] Fam Law 752, <https://www.42br.com/files/content/Radicalisation%20and%20the%20Family%20Courts%20.pdf>.

<sup>672</sup> 2015 Guidance <https://www.judiciary.uk/wp-content/uploads/2015/10/pfd-guidance-radicalisation-cases.pdf> at para 12, citing the decision of Hayden J. in *The London Borough of Tower Hamlets v M and ors* [2015] EWHC 869 (Fam), para 18(iv).

<sup>673</sup> Malik, N., *supra*, at page 26; Woodward-Carlton, D., *supra*.

<sup>674</sup> A striking example is *In re C (A Child) (Care Proceedings: Dismissal or Withdrawal)* [2018] 4 WLR 107, in which the local authority took the view that the evidence was insufficient to establish risk of

decide whether it is in the interests of children to bring or maintain family proceedings.

- Family procedure rules do not readily accommodate cases in which intelligence may be relevant<sup>675</sup>.

### **Other measures**

8.96. There are a sparse number of other measures that could be used or adapted to limit the risk posed by children. In response to children travelling, or being taken, to Da'esh controlled territory, guidance has been drafted by the Due Diligence and Counter Extremism Division in the Department for Education on available support for returning children, including bespoke clinical support funded by the government<sup>676</sup>. Supplemental guidance also focusses on the “need strand” rather than the “risk strand”<sup>677</sup>.

8.97. These are voluntary measures. Aside from TPIMs and, for British citizens, TEOs, there are no compulsory measures designed to address the terrorist risk posed by children, for example by requiring them to attend mentoring sessions. There is no equivalent to the Intensive Supervision and Surveillance Programme, a full-bodied set of time-filling measures that is available within the criminal justice system<sup>678</sup>. Attempts to divert children involved in terrorist activity from the criminal courts sometimes founder on this rock: criminalisation and imprisonment may expose the child to worse influences, whilst voluntary measures may prove ineffective. A decision on whether compulsion is sometimes a good thing would need to consider whether it should be badged as a counter-terrorism measure for children or, a welfare measure that also addresses terrorist risk.

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harm and applied to withdraw its application for care proceedings against a very young child. The judge refused to allow the proceedings to be withdrawn, and held that it was essential that the allegations against the parents – that they were involved in terrorist activity and wanted to take their children into a warzone - be investigated by the Court.

<sup>675</sup> By providing for use of closed material procedures and special advocates.

<sup>676</sup> Advice for Local Authorities – Safeguarding Children returning to the UK from Syria (2017), [https://adcs.org.uk/assets/documentation/DfE\\_safeguarding\\_children\\_returning\\_UK\\_from\\_Syria\\_advice\\_to\\_LAs.pdf](https://adcs.org.uk/assets/documentation/DfE_safeguarding_children_returning_UK_from_Syria_advice_to_LAs.pdf).

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[https://adcs.org.uk/assets/documentation/Advice\\_relating\\_to\\_minors\\_returning\\_from\\_Syria\\_FINAL.pdf](https://adcs.org.uk/assets/documentation/Advice_relating_to_minors_returning_from_Syria_FINAL.pdf).

<sup>678</sup> Final report on the ISSP, Youth Justice Board for England and Wales (2005), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/354919/yjb-ISSP-summary.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/354919/yjb-ISSP-summary.pdf).

## SCPOs in 2019

8.98. The government took up my recommendation<sup>679</sup> that Serious Crime Prevention Orders might be more widely used, and legislation before Parliament is designed to allow CT Police to apply for orders in counter-terrorism cases<sup>680</sup>. During 2019 the range of terrorist activity that might lead to an order was also expanded<sup>681</sup>.

8.99. During 2019 no counter-terrorism SCPO was obtained. The first SCPO was made, and breached, in Northern Ireland for a drugs matter<sup>682</sup>: their potential application to activity identified as paramilitary rather than terrorism (even though involving proscribed groups) is obvious. As I report in Chapter 10, counter-terrorism SCPOs are under active consideration in Scotland.

## Money Measures in 2019

8.100. I have been supplied by National CT Policing Headquarters with the following figures on the use which was made of various types of financial measure in 2019.

Type of order	Number
Account freezing orders	53
Account forfeiture orders	11
Anti-Terrorism, Crime and Security Act ongoing cash forfeiture proceedings	1
Anti-Terrorism, Crime and Security Act cash seizures	30 <sup>683</sup>
Cash forfeiture orders granted to CT police	26
Confiscation order made	9
Restraint orders granted	4

<sup>679</sup> Terrorism Acts in 2018 at 8.70.

<sup>680</sup> Counter-Terrorism and Sentencing Bill, clause 45.

<sup>681</sup> Schedule 1 Serious Crime Act 2007 was amended by section 14 Counter-Terrorism and Border Security Act 2019, s.14, to include offences listed in section 41(1) of the Counter-Terrorism Act 2008.

<sup>682</sup> <https://ballymenadaily.com/uncategorized/first-person-to-get-a-serious-crime-prevention-order-in-northern-ireland-admits-flouting-its-terms/>, 28 September 2019.

<sup>683</sup> This figure excludes ports and is based on an average at any one time in the calendar year.

## 9. NORTHERN IRELAND

### Introduction

- 9.1. As in last year's report, this separate chapter on Northern Ireland is intended to ensure that issues which are particular to Northern Ireland are given the scrutiny they merit<sup>684</sup>. Terrorism legislation applies generally throughout the United Kingdom, but the threat posed by Northern Ireland-related terrorism differs in a number of respects from the threat posed by Islamist terrorists, who constitute the principal terrorist threat in Great Britain.
- 9.2. Paying careful attention to how the Terrorism Acts operate in Northern Ireland is a useful way of assessing whether the legislative framework for tackling terrorism is sufficiently flexible to deal with the whole spectrum of terrorist threats faced by the United Kingdom, and to draw attention to local factors which might inhibit its effectiveness. The increase in Right Wing Terrorism gives this consideration particular resonance.
- 9.3. In my previous report I made only a single recommendation, which related to the use by independent custody visitors of the form in Appendix 2 of the current Independent Custody Visitors Association Training manual. In this year's Report I again make single recommendation: greater public transparency over the use of terrorism legislation in Northern Ireland.
- 9.4. In Northern Ireland 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. The Justice and Security (Northern Ireland) Act 2007 is in one sense broader than the Terrorism Acts, as it is concerned with preventing any risk arising from the use of munitions and not just risks arising from terrorism. Mr Seymour's twelfth report, covering the period 1 August 2018 to 31 July 2019, was

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<sup>684</sup> I am particularly grateful to the work of my special advisers Karl Laird and Aly Kilpatrick BL on this Chapter.

published in April 2020<sup>685</sup>. David Seymour is shortly to retire after 7 years in post, a post that he has occupied with sensitivity, objectivity and independence; widely admired, his guidance on Northern Ireland security matters will be missed by this Reviewer. 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 2019 to 31 December 2019, were set out in a written statement from the Secretary of State for Northern Ireland<sup>686</sup>.

## **The Northern Ireland Security Situation**

9.5. During 2019 there was no diminution in the threat level in Northern Ireland from Northern Ireland-related terrorism, which remains at “severe” (meaning that an attack is highly likely). In September 2019 the Chief Constable of the PSNI stated that his service had dealt with more terrorist investigations and call-outs in the three months since his tenure began in July than in the whole of the previous year<sup>687</sup>. The threat specifically posed by Northern Ireland-related terrorism to Great Britain, as opposed to other forms of terrorism, is no longer published separately<sup>688</sup>. In terms of the United Kingdom as a whole, Northern Ireland-related terrorism was responsible for the vast majority of terrorism that matured into action: of the 64 security-related incidents reported by the United Kingdom to Europol in 2019, 55 related to Northern Ireland<sup>689</sup>.

9.6. The terrorist threat emanates from two key groups – the new IRA (nIRA) and the Continuity IRA (CIRA). Other smaller groups, such as Arm na Poblachta (ANP) and the Irish Republican Movement (IRM), continue to have the intent to carry out attacks but lack the capability to do so. As I reported last year, in January 2018 Óglaigh na hÉireann (ONH) declared a cessation on attacks against the British state. However, ONH continues to be involved in paramilitary activity. All dissident republican groups are opposed to the political process and are committed to the use of violence to advance their causes. As David Seymour CB remarks in his latest report, it is clear

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<sup>685</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/882352/NI\\_ACT\\_2007\\_TWELFTH\\_REPORT\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882352/NI_ACT_2007_TWELFTH_REPORT_Web_Accessible.pdf).

<sup>686</sup> HCWS373, 15 July 2020, <https://questions-statements.parliament.uk/written-statements/detail/2020-07-15/HCWS373>.

<sup>687</sup> ‘Northern Ireland police chief seeks 800 more officers as terror threat grows’, The Guardian, 11 September 2019.

<sup>688</sup> The Joint Terrorism Analysis Centre assesses the threat from all forms of terrorism and produces a single national threat level describing the threat to the UK, which includes Northern Ireland, Islamist, left-wing and right-wing terrorism.

<sup>689</sup> TE-SAT report 2020, <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2020>, at page 16.

that support from the community for these groups is low<sup>690</sup>. Nevertheless, these groups have a marked impact on life in Northern Ireland.

9.7. The way in which attacks are categorised in Northern Ireland has no parallel in Great Britain. Reference is made to incidents being “terrorist or national security attacks”, “paramilitary-style attacks”, and “attributable to the security situation”. So far as 2019 was concerned:

- There were five “*national security attacks*” (one of which was outside Northern Ireland)<sup>691</sup>.
- Two civilians were killed as a result of “*deaths attributable to the security situation*”<sup>692</sup>.
- There were 39 shooting incidents and 15 bombing incidents, in which 15 bombing devices were used in connection with the “*security situation*”<sup>693</sup>.
- There were a total of 85 casualties as a result of “*paramilitary-style attacks*”<sup>694</sup>.
- These paramilitary attacks were made up of 18 “*paramilitary style shootings*” (2 committed by Loyalist groups and 16 by Republican groups) and 67 “*paramilitary style assaults*” (49 committed by Loyalist groups and 18 by Republican groups)<sup>695</sup>.
- The PSNI recovered 39 firearms, 0.53kg of explosives, and 706 rounds of ammunition<sup>696</sup>.

9.8. The attack methods used by Dissident Republican groups varied across groups. Many attacks involved firearms, and small improvised explosive devices, such as pipe bombs. Dissident Republicans also deployed larger and potentially more destructive devices in 2019, such as under-vehicle improvised explosive devices and explosively formed projectiles. Compared to 2018, the number and diversity of attacks using explosives increased. PSNI officers, prison officers, and members of the Armed Forces remain the primary targets<sup>697</sup>.

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<sup>690</sup> 12<sup>th</sup> report at paragraph 4.5.

<sup>691</sup> As deemed by PSNI.

<sup>692</sup> PSNI, Security Situation Statistics, information up to and including March 2020, table 3.

<sup>693</sup> Ibid, table 5.

<sup>694</sup> Ibid, table 4.

<sup>695</sup> Ibid.

<sup>696</sup> Ibid, table 6.

<sup>697</sup> TE-SAT report, *supra*, at page 20.

9.9. One particular incident in July 2019 was reminiscent of a tactic deployed by the IRA during the Troubles. It involved the deployment of a hoax device and a secondary improvised explosive device intended to kill or injure police officers who responded to the initial incident<sup>698</sup>. Continuity IRA claimed responsibility for this attack. Later, representatives from the Continuity IRA appeared on Swedish television claiming they had “*regrouped and reformed*” in order to continue their attacks<sup>699</sup>.

9.10. In April 2019, Dissident Republican violence led to the death of a journalist, Lyra McKee. The catalyst was an intelligence-led search for munitions conducted by the PSNI of property in the Creggan Estate in Derry/Londonderry on 18 April 2019. Serious public disorder then followed and approximately 50 Molotov cocktails were thrown at police and several vehicles were hijacked and burnt out. At approximately 11pm gun shots were fired at the police and 29-year-old Lyra McKee was killed. Saoradh – an unregistered political party formed by Dissident Republicans – subsequently claimed that a “*republican volunteer*” had accidentally shot Ms McKee while defending the community from “*Crown forces*”. Despite the condemnation by all main political parties, PSNI have stated that the attention energised dissident republicans, leading to a spike in their activities<sup>700</sup>. A man was charged with Ms McKee’s murder in February 2020.

9.11. In other incidents during 2019:

- In January a vehicle born improvised explosive device detonated outside the courthouse in Londonderry. The terrorists provided a warning which allowed the PSNI to clear the area and there were no injuries. The new IRA claimed responsibility for this attack.
- During March, a number of crude explosive devices were sent to addresses in Scotland and England, with one being recovered in a Limerick post depot after being returned. One device functioned (at Heathrow airport) but there were no injuries. The new IRA later claimed responsibility.

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<sup>698</sup> *Ibid.*

<sup>699</sup> “Continuity IRA man admits group behind Fermanagh bomb attack on Swedish TV”, Belfast Telegraph, 3 September 2019.

<sup>700</sup> <https://www.belfasttelegraph.co.uk/news/northern-ireland/dissident-republicans-energised-by-lyra-mckee-murder-police-commander-claims-38451479.html>.

- In June, the new IRA claimed responsibility for placing an improvised explosive device the under the vehicle of a PSNI officer's car in East Belfast.
- A mortar bomb was left near Strabane PSNI station in September.

9.12. Assessing the threat in Northern Ireland from terrorism as being “*severe*” can in no way be described as an overstatement.

### **National Security Matters in Northern Ireland**

9.13. In the preparation of this year's Report I have been keen to understand how devolution and national security interact in Northern Ireland.

9.14. By virtue of the Northern Ireland Act 1998 national security, special powers, and other provisions for dealing with terrorism are excepted matters. This means that national security in Northern Ireland is the responsibility of the Secretary of State for Northern Ireland rather than the Northern Ireland Executive. The role of the United Kingdom government has increased since then. In 2007, under the St Andrews Agreement<sup>701</sup>, the lead responsibility for national security intelligence work relating to Northern Ireland passed from PSNI to MI5, a Crown agency. This brings Northern Ireland into line with the rest of the United Kingdom. Some PSNI officers are collocated with MI5 officers on this intelligence work<sup>702</sup>.

9.15. But the treatment of national security matters cannot be separated from its broader legal and operational environment. PSNI, who are principally accountable to the Northern Ireland Policing Board, continue to provide the operational policing response to terrorism. Since 2010, criminal justice in Northern Ireland has been devolved: so criminal procedure, sentencing, prisons and probation are all matters for the devolved legislature and executive (in particular, the Northern Ireland Department of Justice, overseen by the Minister of Justice). To the extent that social policy

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<sup>701</sup> At Annex E.

<sup>702</sup> *Ibid.*



measures may reduce the recruitment of terrorists or lessen the impact of terrorism, these are all matters for the devolved authorities<sup>703</sup>.

9.16. Discourse between the Northern Ireland Executive and those bodies with responsibility for national security in Northern Ireland is achieved through what are known as security interface meetings<sup>704</sup>. These meetings, which take place on a quarterly basis, are attended by the Minister for Justice, the Northern Ireland Office and MI5 among others.

9.17. There is however less in the way of interaction between the devolved legislature and those responsible for national security in Northern Ireland. Local understanding of national security priorities is relevant:

- Firstly, because terrorism legislation passed by the Westminster Parliament often touches on devolved matters, as illustrated by the Counter-Terrorism and Sentencing Bill, which at the time of writing is being debated in the Westminster Parliament. Although the Westminster Parliament is ultimately free to legislate on a devolved matter such as sentencing, as a matter of convention<sup>705</sup> it will not do so in the absence of a legislative consent motion from the devolved legislature.
- Secondly, because the devolved legislature has competence over matters, particularly those relating to criminal justice, that have huge consequences for how terrorism legislation operates in practice. I discuss criminal justice delays, and sentencing, later in this Chapter.

9.18. Both these reasons place a premium on elected members of the Assembly having some understanding of terrorism and national security in Northern Ireland, notwithstanding that national security on its own falls outside their legislative competence.

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<sup>703</sup> Sections 6(2)(b), 8(a) and 25 Northern Ireland Act 1998 explains the legislative competence of the Northern Ireland Assembly where there is an overlap between excepted and devolved matters.

<sup>704</sup> Ms Sugden, Justice Minister, 1 December 2016, Minutes of Committee of Justice, Northern Ireland Assembly, <http://aims.niassembly.gov.uk/officialreport/reportssearchresultsmoereport.aspx?&eveDate=2016/12/01&rld=284028&hwclD=2564212&m=0&c=0&p=0&s=3&mv=0&o=0&ov=&cv=1&pv=0&sv=21&mi=All%20Members&pi=All%20Parties&si=2018-2019&k=TbnA9uF913/9/qy1CGtVxr2jlGoWsOOF&fd=&td=&pg=1&pm=0&aid=19914&eveid=11047#2564212>.

<sup>705</sup> Known as the 'Sewel' convention.

9.19. Standing in the way of greater engagement with elected representatives, and greater public openness, is the legacy of distrust for the institutions of national security, in particular MI5<sup>706</sup>. There are individuals and communities within Northern Ireland who view the security services and the national security apparatus with a strong degree of suspicion, and Dissident Republicans have threatened attacks against politicians for little more than supporting recruitment campaigns to the PSNI<sup>707</sup>.

### **The Threshold for Using Terrorism Act Powers**

9.20. Unlike Great Britain, the terrorist threat in Northern Ireland is more likely to emanate from terrorist organisations than lone individuals. The way in which proscribed groups are categorised in Northern Ireland is key to understanding the type of response: either a national security response using terrorism act powers, or a paramilitary response using other policing powers.

9.21. In last year's report I analysed the proscribed terrorist organisations which exist in Northern Ireland. Broadly speaking, they fall into three categories:

- Those which actively target police officers, prison officers, and other individuals who are seen as embodying the authority of the state. Most of the dissident Republican groups fall into this category (new IRA, the Continuity IRA, Óglaigh na hÉireann and the Irish Republic Movement)<sup>708</sup>.
- Those which are, for the most part, inactive other than for heritage purposes, such as Cumann na mBan, and need not be considered further.
- Those which, while still proscribed, have more in common with organised crime groups. Although exercising greater control and influence over sections of the community than is likely to be the case with organised crime groups in the rest of the United Kingdom, like them they engage in drug dealing and various other forms of criminality, mostly with the purpose of

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<sup>706</sup> Jackson, J., 'Many years on in Northern Ireland: the Diplock Legacy' (2009) 60 NILQ 213, 226.

<sup>707</sup> <https://www.belfasttelegraph.co.uk/news/northern-ireland/dissidents-planning-sinn-fein-attack-after-psni-recruitment-event-says-michelle-oneill-38946668.html>.

<sup>708</sup> 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.

making profit. The state's security and criminal justice actors are neither a central target of their violence, nor implicated in the broader ideology that motivated their activities. The Ulster Volunteer Force is an example of such an organisation. As the statistics demonstrate, paramilitary groups were even more active this year than they were in 2018. As the Independent Reporting Commission stated in its second report, which was published in 2019<sup>709</sup>, paramilitarism in Northern Ireland remains a stark reality of life.

9.22. As the first and third categories illustrate, in Northern Ireland violence by proscribed organisations against emanations of the state is characterised quite differently from other forms of violence.

### ***National security terrorism***

9.23. It is only the former type of violence that is considered "terrorist" or relating to national security: there is no other way to understand the assessment of PSNI and MI5 in 2015 that none of the groups in third category was "planning or conducting terrorist attacks" despite continuing to engage in violent activity including murder<sup>710</sup>. It is a distinction that explains how violence is recorded for statistical purposes. For example, in 2019 the statistics record that there were two deaths "*attributable to the security situation*": the murder of Ian Ogle by the Ulster Volunteer Force in January 2019; and the murder of Lyra McKee by the new IRA in April 2019. However, only the murder of Lyra McKee, arising out of shots fired by the new IRA on the police, is regarded as a "*national security attack*". Two Independent Reviewers of the Justice and Security (Northern Ireland) Act 2007 have noted this type of classification which is peculiar to Northern Ireland<sup>711</sup>.

9.24. As a rule of thumb, Dissident Republicans, who reject the Belfast/Good Friday Agreement and are assessed to direct violence against police officers and other emanations of the state, are investigated as terrorists (leading to the term 'national security terrorists'). The PSNI's Terrorism Investigation Unit primarily uses Terrorism

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<sup>709</sup> [https://www.ircommission.org/sites/irc/files/media-files/IRC%20-%202nd%20Report%202019\\_0.pdf](https://www.ircommission.org/sites/irc/files/media-files/IRC%20-%202nd%20Report%202019_0.pdf), paragraph 1.18.

<sup>710</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/469548/Paramilitary\\_Groups\\_in\\_Northern\\_Ireland\\_-\\_20\\_Oct\\_2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/469548/Paramilitary_Groups_in_Northern_Ireland_-_20_Oct_2015.pdf).

<sup>711</sup> Robert Whalley CB, 4<sup>th</sup> annual report, at paragraph 93, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/89833/fourth\\_annual\\_report\\_of\\_the\\_independent\\_reviewer\\_of\\_the\\_justice\\_and\\_security.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/89833/fourth_annual_report_of_the_independent_reviewer_of_the_justice_and_security.pdf); David Seymour, 12<sup>th</sup> annual report, *supra*, at paragraph 4.5.

Act powers in conducting its investigations and, in accordance with the St Andrews Agreement, MI5 has an important intelligence gathering function.

### ***Paramilitarism***

9.25. By contrast, the activities of groups whose violence is assessed to be directed otherwise than at emanations of the state, are considered “paramilitary” and are investigated differently.

9.26. In general, the responsibility for tackling the threat and harm from paramilitarism and organised crime is devolved and rests with the Northern Ireland Executive<sup>712</sup>. This led to the establishment and funding of a Paramilitary Crime Task Force in late 2017. This brings together officers from the PSNI, the National Crime Agency<sup>713</sup>, and Her Majesty’s Revenue and Customs and focusses on a small group of proscribed organisations that are not currently assessed to pose a risk to national security.

9.27. I have been told that this consists primarily, but not solely, of loyalist paramilitary groups<sup>714</sup>. In conducting its investigations, the Paramilitary Crime Task Force uses general powers such as those contained in the Police and Criminal Evidence (Northern Ireland) Order 1989 and the Misuse of Drugs Act 1971, although the use of Terrorism Act powers is not excluded.

9.28. Other groups may be responsible for “paramilitary” activities but will fall outside the scope of the Task Force. Their activities will be swept up by general policing.

### ***Assessment***

9.29. In last year’s Report I expressed the view that it is sensible for finite resources to be allocated with reference to the severity of the threat posed by the group in question. I accept that this may lead to some pragmatic division of labour between the

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<sup>712</sup><https://www.northernireland.gov.uk/sites/default/files/publications/newnigov/Executive%20Action%20Plan%20-%20Tackling%20Paramilitary%20Activity.pdf>.

<sup>713</sup> It is to be noted that the NCA has no involvement in counter-terrorism activities in Northern Ireland. Even if provision is made for the NCA to exercise a counter terrorism function, the function may only be exercised in Northern Ireland with the agreement of the Chief Constable of PSNI: section 2(2) Crime and Courts Act 2013.

<sup>714</sup> It also covers the Irish National Liberation Army.

PSNI's Terrorism Investigation Unit and MI5, on the one hand, and the Paramilitary Crime Task Force or general policing on the other.

9.30. Considering the severity of the threat by reference to the target of the violence is not an irrational way of proceeding. Attacks on police officers and other public servants such as prison officers are seen as more serious<sup>715</sup>, and can threaten the functioning of society at large by destabilising the forces of law and order. There is no definition of national security which mandates a counter-terrorist response to a broader range of violence<sup>716</sup>.

9.31. However, it is possible to envisage different ways national security – and by extension the national security threshold – could be understood in the context of Northern Ireland. For example, national security terrorism could apply to any activities by proscribed organisations involving explosives: whether targeted against emanations of the state or not, such activities are likely to pose a general risk to members of the public. Or it could apply to any activities of proscribed organisations that use violence to intimidate one section of the public in order to prevent them enjoying ordinary rights and freedoms, such as freedom to live in a particular area.

9.32. There are five reasons why an overly rigid approach should be avoided.

9.33. First, loyalist paramilitary groups have members which number in the thousands (although many of them are dormant). In its second report, the Independent Reporting Commission noted that the scale of the numbers involved in paramilitary groups underlines the challenges faced by Northern Irish society in bringing paramilitarism to an end<sup>717</sup>. By virtue of sheer numbers, loyalist paramilitaries have the capacity to cause significant disruption to everyday life in Northern Ireland by, for example, forcing the closure of the dual carriageway outside of Belfast City Airport<sup>718</sup>. The United Kingdom's exit from the EU may increase the potential for

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<sup>715</sup> Referring to the murder of a police officer, Morgan LCJ stated that it "...is not because the lives of public servants are more valuable than other lives but because public servants should be protected by way of deterrence having regard to the obligations and risks which they take on for the benefit of the community": *R v Wootton and McConville* [2014] NICA 69 at paragraph 23.

<sup>716</sup> The MI5 website make the point that national security is not defined, and that it "...has been the policy of successive Governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances".

<sup>717</sup> IRC, Second Report at paragraph 1.51.

<sup>718</sup> <https://www.itv.com/news/2018-07-11/vehicles-hijacked-and-torched-following-police-clearing-of-loyalist-bonfires>.

significant disruption from loyalist paramilitaries who feel Northern Ireland's place in the Union is being jeopardised.

9.34. Secondly, as recognised by the Department of Justice's Organised Crime Strategy<sup>719</sup>, there are interdependencies which can exist between organised crime, paramilitarism, and Northern Ireland-related terrorism. Failing to recognise these interdependencies would potentially enable terrorists to finance their activities using organised crime. Conversely, organised crime groups may use terrorists to create areas which are difficult to police, in which they can engage in criminality unhindered. Terrorist fundraising provisions in terrorism legislation deals expressly with monies that may end up being used by terrorists<sup>720</sup>.

9.35. Thirdly, there is no room for the perception that Northern Ireland is an enclave of the United Kingdom where the law is not enforced. The contentious issue of flags vividly demonstrates this point.<sup>721</sup> For example, in 2017 Ulster Volunteer Force flags were erected at the entrance to a train station near Belfast City Airport<sup>722</sup>. Individuals in Northern Ireland may feel intimidated when confronted by the symbols of a loyalist paramilitary group at a train station and may feel less inclined to use public transport as a result. Indeed, that may have been the motivation for erecting the flags in such a public location. According to news reports, the PSNI stated in response: "*The removal of flags is not the responsibility of the PSNI and police will only act to remove flags where there are substantial risks to public safety*". It is difficult to envisage circumstances in which the symbol of a proscribed organisation would be permitted to fly in such a prominent public space in Great Britain. Section 13(4) of the Terrorism Act 2000 confers upon the PSNI the power to seize the flags of loyalist proscribed organisations<sup>723</sup>. The fact that the symbols of loyalist paramilitaries are permitted to

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<sup>719</sup> <https://www.justice-ni.gov.uk/consultations/draft-organised-crime-strategy-ni-2020-2023>.

<sup>720</sup> Part III Terrorism Act 2000.

<sup>721</sup> In a paper published in 2013 entitled, 'The Display of Flags, Symbols and Emblems in Northern Ireland', the Northern Ireland Human Rights Commission observed that, [f]lags, symbols and emblems are often expressions of an individual's cultural and national identity. In a public space they can be used as a means of celebration and memorialisation. They may also at times be used as territorial markers and as a method of intimidation and harassment", paragraph 6.2.

<sup>722</sup> <https://www.irishnews.com/news/2017/05/18/news/police-will-not-intervene-to-remove-flags-at-train-station-near-belfast-city-airport-1029473/>.

<sup>723</sup> Where a constable reasonably suspects that it is evidence in relation to an offence and is satisfied that it is necessary to seize in order to prevent evidence being concealed, lost, altered or destroyed. When the flag of a proscribed organisation is flown, even if the person who hung the flag is currently unknown, these statutory criteria are likely to be satisfied if the police wish to investigate. The "Joint Protocol in relation to the Display of Flags in Public Areas" (<https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/Joint%20Flags%20Protocol%202005.pdf>) specifies that a joint aim of PSNI and the devolved administration is the removal of "all paramilitary flags and displays".

fly in public spaces, where they are likely to intimidate a significant proportion of the community does little to instil confidence that this conduct is taken seriously by the authorities. This '*normalisation*' of conduct that would most likely be considered unlawful elsewhere in the United Kingdom may have a corrosive impact on confidence in the authorities and institutions in Northern Ireland.

9.36. Fourthly, there is the possibility that terrorist groups whose activities are mainly confined to Great Britain, such as the extreme right wing, may migrate to Northern Ireland with a view to taking advantage of the permissive space created by paramilitaries in certain parts of Northern Ireland.

9.37. Fifthly, absent coherent explanation for why matters are dealt with as they are, sectarian suspicion may be engendered or sustained if only Dissident Republicans are dealt with as terrorists and only (or mainly) Loyalist groups are dealt with as paramilitaries.

9.38. Accepting, as I do, that Dissident Republicans continue to pose the greatest terrorist threat in terms of their capability and intent, there is still a significant persuasive burden on the authorities in Northern Ireland (or at least one of them) to explain directly to the public why the current division of labour has been adopted. In this way terrorism legislation in Northern Ireland will be used in a way that best commands public confidence; and the use of non-terrorism legislation and measures, which is to be welcomed, is also accepted as a legitimate means of addressing the legacy of violent groups.

9.39. Contest 3.0, the United Kingdom's national security strategy published in 2018, is a detailed 94-page document published by the Home Office<sup>724</sup>. But, according to a footnote, "CONTEST addresses all forms of terrorism that affect the UK and our interests overseas, with the exception of Northern Ireland related terrorism in Northern Ireland, which is the responsibility of the Secretary of State for Northern Ireland."<sup>725</sup> The focus of the Tackling Paramilitary Activity, Criminality and Organised Crime Executive Action Plan published by the Northern Ireland Executive<sup>726</sup> is, as the name suggests, focussed on paramilitarism and contains only 6 references to terrorism.

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<sup>724</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/716907/140618\\_CCS207\\_CCS0218929798-1\\_CONTEST\\_3.0\\_WEB.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf).

<sup>725</sup> Footnote 20.

<sup>726</sup>

<https://www.northernireland.gov.uk/sites/default/files/publications/newnigov/Executive%20Action%20Plan%20-%20Tackling%20Paramilitary%20Activity.pdf>.

9.40. According to the most recent report on Northern Ireland by the Intelligence and Security Committee<sup>727</sup>, “HMG has been reviewing its strategic approach to NIRT for some time now”<sup>728</sup>. The Committee welcomed this initiative but had been unable to review “the latest developments”. That strategic approach should also include, to the fullest extent possible, greater public transparency to enable:

- Understanding by the public, in whose name terrorism legislation is used, of how the authorities seek to mitigate the threat of terrorism and violence from proscribed groups in Northern Ireland.
- Understanding by policy-makers, who have a role in making devolved legislation (principally on criminal justice) that affects the way in which terrorism legislation operates in Northern Ireland, and in considering legislative consent motions where the Westminster legislation on terrorism overlaps with devolved matters.
- Understanding by national and devolved authorities operating in Northern Ireland so as to encourage more effective multi-agency working, of a type that is now being used in the Great Britain<sup>729</sup>.

9.41. I therefore **recommend** that the Secretary of State for Northern Ireland takes steps to increase public understanding of its approach to countering Northern Ireland-related terrorism in Northern Ireland. I have sought to throw greater light on the topic in this chapter, but even as a relative insider I have not found it easy to piece together the information that already exists in the public domain.

### **The Northern Ireland Proscribed Organisations**

9.42. There was no change to the list of proscribed organisations in 2019.

9.43. In last year’s Report, I recommended that proscription orders should lapse three years after the coming into force of an amended section 3 of the Terrorism Act 2000. This would also apply to the Northern Ireland proscribed organisations. The Government has rejected this recommendation as I report in Chapter 3.

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<sup>727</sup> HC 844, 5 October 2020.

<sup>728</sup> At paragraph 20.

<sup>729</sup> Lord Anderson QC, Implementation Stocktake (June 2019) at Chapter 7, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/807911/2017\\_terrorist\\_attacks\\_reviews\\_implementation\\_stock\\_take.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807911/2017_terrorist_attacks_reviews_implementation_stock_take.pdf).



9.44. It would be unsatisfactory if deproscription were not considered because it might be perceived as an undue reward for a group which has failed to desist from broader criminal activities. This is an argument that has been put to me on more than one occasion in the context of the Northern Ireland proscribed organisations. I remain of the view that this argument underappreciates the point I made last year, namely that proscription is a status that relates to terrorism and terrorism alone.

### **Investigations**

9.45. In this part, I consider stop and search powers, and the use of police cordons, in Northern Ireland. Other terrorism powers which are available in Northern Ireland are considered in Chapter 4.

#### ***Stop, Search and Question***

9.46. The powers of stop and search in sections 43, 43A, and 47A of the Terrorism Act 2000 exist alongside the more widely used powers in the Justice and Security (Northern Ireland) Act 2007. In summary, the most relevant powers in the 2007 Act are:

- Section 21 – A power to stop a person for so long as is necessary to question them to ascertain their identity and movements. There is also a power to stop a person for so long as is necessary to question them to ascertain— (a) what they know about a recent explosion or another recent incident endangering life; (b) what they know 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 their knowledge and ability a question which has been addressed to them. This power includes a power to stop vehicles.
- 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.

- 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 they reasonably suspect that the dwelling unlawfully contains munitions or contains wireless apparatus.
- Section 24/Schedule 3, paragraph 4 – A power to stop and search a person whom a constable reasonably suspects to have munitions unlawfully on them or to have wireless apparatus on them.
- 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.

9.47. In his latest Report, David Seymour CB, draws attention to the important recent decision by the Northern Ireland Court of Appeal in *Ramsey (No 2)* on the monitoring of stop and search, to which I refer further below<sup>730</sup>. He also makes a number of recommendations, some of which have a bearing on the stop and search powers contained in the Terrorism Acts, including on the use of bodyworn video cameras. In a previous report, Mr Seymour recommended that bodyworn video cameras be used by the PSNI for all stops and searches conducted under the Justice and Security (Northern Ireland) Act 2007 and the Terrorism Acts. In his 2018 Report Mr Seymour noted that bodyworn video cameras were used in only 36% of stops and searches. Following a direction issued at Assistant Chief Constable Level in May 2019, Mr Seymour notes that this figure rose to 67% in October 2019 (if vehicle only searches were excluded from the calculation the figure rose to 76%). I welcome this development and expect the upward trend to continue.

9.48. The table below<sup>731</sup> shows how frequently the stop and search powers in sections 43, 43A and 47A of the Terrorism Acts 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

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<sup>730</sup> *In the matter of an application by Steven Ramsey for Judicial Review (No 2)* [2020] NICA 14.

<sup>731</sup> PSNI, Security Situation Statistics, information up to and including March 2020, table 7.

powers under the Terrorism Act 2000 together with powers under various other legislative provisions, such as the Misuse of Drugs Act 1971.

	<b>Section 43</b>	<b>Section 43A</b>	<b>Sections 43/43A</b>	<b>Section 47A</b>	<b>TACT in conjunction with other powers</b>	<b>Section 21 JSA</b>	<b>Section 24 JSA</b>	<b>Sections 21/24 JSA</b>
<b>2013</b>	77	10	29	70	30	1497	5609	863
<b>2014</b>	77	4	15	0	18	1301	3660	563
<b>2015</b>	105	13	78	0	38	1307	4384	619
<b>2016</b>	91	11	92	0	34	1783	7285	986
<b>2017</b>	65	3	29	0	13	1163	6109	610
<b>2018</b>	41	2	9	0	13	1023	6052	323
<b>2019</b>	26	4	8	0	5	920	5003	189

9.49. Unlike in Great Britain, the self-defined ethnicity of those stopped in Northern Ireland is not published.

9.50. In 2019 there was a 37% decline in the number of stops carried out under section 43 of the Terrorism Act 2000. Since 2016 there has been a 71% decline in the number of stops carried out under section 43. Use of the other stop and search powers in the Terrorism Act 2000 has also declined significantly in the past three years. As with last year, there has also been a decline in the use of section 21 of the Justice and Security (Northern Ireland) Act 2007. Given that there has been no improvement in the security situation the decline in the use of these powers is notable. In his latest report, David Seymour CB states that the reasons for the decline in the use of these powers is not clear and is not explained by any specific strategy on the part of the PSNI. I concur with Mr Seymour's assessment. The trend may be explained by the fact that the Paramilitary Crime Task force is now fully operational and tends to use non-Terrorism Act powers. This is something I intend to raise with the PSNI.

9.51. It is also worth noting that the arrest rate following a stop under section 21 of the Justice and Security (Northern Ireland) Act 2007 remains extremely low (2%). This

may reflect the fact that the purpose of section 21 is not to trigger the prosecution process, but as a disruptive device to stop people being killed or injured by explosives<sup>732</sup>. The arrest rate in Northern Ireland following a section 43 stop hovers at around 10%, which is broadly in keeping with that in Great Britain. Given that the arrest rates in Northern Ireland and Great Britain are broadly comparable, I continue to have no reason for believing that the PSNI are using the power inappropriately. As with previous years, 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: this is unsurprising, given that the power under section 21 of the 2007 Act can be exercised without the need for reasonable suspicion.

9.52. In *Ramsey (No 2)* the Northern Ireland Court of Appeal considered the legality of the non-suspicion stop and search powers in the Justice and Security (Northern Ireland) Act 2007. The Code of Practice which accompanies the stop and search powers emphasises that there should be no discrimination in their use based on perceived religious or political opinion. It also requires the PSNI to keep statistical records on stops and searches. The PSNI has admitted that it does not record the basis of each individual search conducted under the 2007 Act and it did not do so when Mr Ramsey was stopped.

- The Court of Appeal held that the stop and search regime was Human Rights compliant in general terms.
- However, the failure to record the basis for the search led to a breach of Mr Ramsey's right to private life under Article 8.

9.53. The Court of Appeal also made a number of observations on the need to monitor community background to avoid the risk of profiling people from certain ethnicities or religious backgrounds<sup>733</sup>. Whilst the Code of Practice did not specify any particular methodology by which the monitoring should take place, it did create a legal duty to do so and in particular a requirement "...that some proportionate measure is put in place in order to ensure that there can be adequate monitoring and supervision of the community background of those being stopped and searched".<sup>734</sup>

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<sup>732</sup> 7th Report, 2015, at paragraph 7.15.

<sup>733</sup> *Ramsey (No 2)*, supra, at paragraph 54.

<sup>734</sup> At paragraph 58.

- 9.54. Although the Justice and Security Act powers fall outside my remit, community monitoring has been advocated by the Northern Ireland Policing Board for the use of Terrorism Act powers. In a paper published in October 2013 the Policing Board recommended that the PSNI should consider how to include within its recording form the community background of all persons stopped and searched under both Terrorism and Justice and Security Act powers.<sup>735</sup>
- 9.55. PSNI conducted a pilot exercise in 2013 but has yet to implement a strategy for implementing community monitoring. In his latest report<sup>736</sup> David Seymour CB makes the observation that, on one view, concerns about community monitoring are a distraction given that it is not the only method of ensuring that the powers in the 2007 Act are exercised properly and fairly. Nevertheless, it is clear from the Court of Appeal's judgment in *Ramsey* that some form of community monitoring of Justice and Security Act powers must take place.
- 9.56. Practical difficulties in carrying out individual monitoring arise from the fact that, quite rightly, individuals who are stopped and searched are not obliged to state their community background<sup>737</sup>. For their part officers may be reluctant to carry out an assessment that could shade into stereotyping.
- 9.57. Whatever approach is ultimately taken by the PSNI, what I suspect community monitoring will be likely to reveal is that the powers in the Justice and Security (Northern Ireland) Act 2007 are directed towards dissident republicans who come from a particular part of the community. This would only be evidence of discrimination in the absence of an objectively justifiable explanation of where the main terrorist threat and the use of munitions arises. The judicial view in *Ramsey (No 2)* was that "...in light of the nature and threat from [dissident republicans] it would come as no surprise to anyone in Northern Ireland that the impact on exercise of this power was more likely to be felt by the perceived catholic and/or nationalist community"<sup>738</sup>.
- 9.58. Given that the powers in the Terrorism Acts are mainly used against dissident republicans, I suspect that community monitoring of the use of sections 43, 43A and

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<sup>735</sup> Policing Board of Northern Ireland, *Human Rights Thematic Review on the use of police powers to stop and search and stop and question under the Terrorism Act 2000 and the Justice and Security (Northern Ireland) Act 2007* (2013).

<sup>736</sup> At paragraph 7.34.

<sup>737</sup> *Ramsey (No 2)*, *supra*, at paragraph 56.

<sup>738</sup> At paragraph 31.

47A of the Terrorism Act 2000 would reveal a similar, if not greater, trend. I have some sympathy with the view expressed by Mr Seymour that community monitoring may be a distraction. However, this is something I will return to next year, hopefully with the benefit of some form of community monitoring of the Justice and Security Act powers having actually taken place.

### ***Cordons***

9.59. 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 on Northern Ireland.

<b>Year</b>	<b>Number of designated cordons</b>
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

2018/19	12
2019/20	15

### ***Arrest and Detentions***

9.60. 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 152 arrests made under section 41 of the Terrorism Act 2000 in 2019 (four less than the previous year)<sup>739</sup>. In Great Britain, there were 45 arrests. This continues the trend observed in recent years, namely that despite having only 3% of the United Kingdom population, Northern Ireland accounts for 77% of the arrests made under section 41 of the Terrorism Act 2000. As I explained last year, 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 are made under legislation other than section 41 of the Terrorism Act 2000. For this reason, there may be more terrorism related arrests in Northern Ireland than these figures reveal.

9.61. Of the 152 people detained under section 41 of the Terrorism Act 2000, there were 3 applications for warrants of further detention and 0 refusals<sup>740</sup>.

9.62. The 147 ‘security situation-related’ arrests made under section 41 resulted in only 18 people being charged with an offence, a rate of 12%<sup>741</sup>. This is an increase of two from the previous year. In 2019, 14 people were convicted of terrorism offences.<sup>742</sup> It is not known what happened as a result of the 5 non-security situation-related arrests.

9.63. Both the number of arrests under section 41 of the Terrorism Act 2000 and the charge rate for 2019 appear anomalous against the comparable figure for Great Britain (60%). This continues a trend which has been evident for a number of years and which both I and my predecessors have remarked upon. I realise that there are

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<sup>739</sup> Police Service of Northern Ireland, *Policing Recorded Security Situation Statistics Northern Ireland*, table 5 record the number of arrests related to the ‘security situation’ (147). There were an additional 5 arrests under section 41 (for suspected Islamist Terrorism and Right Wing or LASIT Terrorism).

<sup>740</sup> Northern Ireland Terrorism Legislation: Annual Statistics 2018/19 and 2019/2020, Table 3.1.

<sup>741</sup> Police Service of Northern Ireland, *Policing Recorded Security Situation Statistics Northern Ireland*, table 7.

<sup>742</sup> Northern Ireland Terrorism Legislation: Annual Statistics 2018/19 and 2019/2020, Table 7.

challenges which arise in Northern Ireland which have no direct parallel in Great Britain. Although these explain to some extent the difficulties encountered in Northern Ireland, they do not provide a complete explanation for the disparity revealed by the figures.

9.64. In the preparation of this year's Report, I have sought to ascertain why section 41 of the Terrorism Act is used so often by the PSNI and results in so few charges. The only explanation I have been given is that when an arrest for a terrorist or terrorist-related offence is being planned, the default position is that section 41 of the Terrorism Act 2000 will be used. This approach differs markedly from the one that is taken in Great Britain, where arrests made under section 41 represented only 16% of the "*terrorism related arrests*" which were made in 2019. As I explained earlier, the PSNI does not record arrests for "*terrorism related activity*" which are made using non-Terrorism Act powers.

9.65. My sense from speaking to PSNI officers is that the PSNI is concerned about being perceived as disingenuous were it to conduct an arrest for terrorism related activity using a non-Terrorism Act power (for example the Police and Criminal Evidence Order 1989). Given that bail is not available when someone is arrested under section 41 of the Terrorism Act 2000, I would have thought that greater use of non-Terrorism Act powers would be welcomed. There may be perfectly justifiable reasons for not arresting someone under section 41 of the Terrorism Act 2000, for example if they are young or vulnerable and it would therefore be in their best interests to be released on bail while an investigation is ongoing.

9.66. Provided the relevant statutory conditions are satisfied, there is no legitimate objection to using a non-Terrorism Act power to arrest someone who is suspected of committing a terrorism related offence. There may be good reasons for doing so. As I have explained, this is done routinely in Great Britain, seemingly without controversy. Why this would be controversial in Northern Ireland still eludes me, but I will carry on exploring this with the PSNI. It would assist my understanding of this issue further if the PSNI could in future collate statistics for "*terrorism related arrests*" that are conducted using non-Terrorism Act powers. I have been told by the PSNI that these statistics do not currently exist, but they would help me understand how section 41 of the Terrorism Act 2000 is being used in Northern Ireland.



### ***Conditions of detention***

9.67. Independent Custody Visitors in Northern Ireland are trained and coordinated by the Northern Ireland Policing Board.

9.68. Unlike in Great Britain, there is no statutory requirement in Northern Ireland for custody visitors' reports to be sent to me, but they are sent to me.

9.69. Last year I commented that the forms I received from Northern Ireland were different from the recommended form, and were sometimes not correctly completed. I recommended that the Northern Ireland Policing Board ensure that its independent custody visitors all use the recommended form. In its response to my first Report, the government informed me that the Northern Ireland Policing Board is currently undertaking a detailed review of the capture and reporting of custody visiting statistics, which would include the feasibility of independent custody visitors in Northern Ireland using the form recommended by the Independent Custody Visitors' Association for those detained under the Terrorism Acts. I welcome this response.

9.70. The table below sets out information provided to me by the Policing Board of Northern Ireland about the independent custody visits which took place in Northern Ireland in 2019.

<b>2019</b>	<b>Detainees</b>	<b>Valid visits</b>	<b>Invalid visits</b>	<b>Seen by ICVs</b>	<b>CCTV reviews</b>	<b>Unsatisfactory visits</b>
	64	52	4	15	6	19

### ***Stopping the Travelling Public***

9.71. Schedule 7 of the Terrorism Act 2000<sup>743</sup> allows officers to examine those travelling through ports of borders to determine if they are terrorists; to search them; to detain them; to require them to hand over electronic devices for examination and copying; and to take their fingerprints. Failing to cooperate with an examination is a criminal offence.

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<sup>743</sup> See further, Chapter 6.

9.72. 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 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. In last year’s Report, I committed to considering whether retaining a power to examine at a land border under Schedule 7 is justified when the outcome of Brexit is known. Given the uncertainty that continues to surround the post-Brexit landscape, this is a matter I will return to next year.

9.73. As I discuss in Chapter 6, there has been a decline in the number of Schedule 7 examinations in Great Britain.

9.74. There has also been a decline in the number of persons stopped under Schedule 7 in Northern Ireland.

<b>Year</b>	<b>Number of stops</b>
2016	2082
2017	1248
2018	717
2019	559

9.75. In terms of detentions, in 2017, 11 people were detained. In 2018, 6 people were detained. In 2019, 31 people were detained.

9.76. One of the reasons I was given last year for the historic lack of detentions in Northern Ireland 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 biometrics, because the police already possess them. I found this to be a plausible explanation. However, this explanation does make the increase in detentions in 2019 difficult to explain. Whether this is a statistical anomaly or represents a trend is something I will be in a better position to evaluate next year.

9.77. As with last year, I obtained the figures for self-defined ethnicity directly from the PSNI as they are not published.

***Total examinations***

	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
<b>White</b>	92%	82%	78%	55%
<b>Mixed</b>	1%	2%	4%	10%
<b>Black</b>	1%	3%	4%	4%
<b>Asian</b>	4%	7%	10%	13%
<b>Chinese or other</b>	1%	6%	3%	10%
<b>Not stated</b>	1%	0%	<0.5%	7%

***Detentions***

	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
<b>White</b>	0%	36%	17%	13%
<b>Mixed</b>	0%	0%	17%	19%
<b>Black</b>	0%	0%	17%	6%
<b>Asian</b>	0%	64%	0%	26%
<b>Chinese or other</b>	0%	0%	33%	23%
<b>Not stated</b>	0%	0%	17%	13%

9.78. Given how few people are detained, I remain of the view that the statistical samples remain too small for any conclusions to be drawn from these figures about whether Schedule 7 is being fairly used in Northern Ireland. However, my impression to date is that the PSNI is very careful in its use of Schedule 7 and is diligent in ensuring that it is used only for the purpose Parliament intended. That being said, the PSNI does continue to rely a great deal on discretion when deciding who to examine under Schedule 7, thus bringing the importance of safeguards against irrational or discriminatory use into sharp relief.

9.79. The first prosecutions for failure to comply with a Schedule 7 examination have now taken place in Northern Ireland. According to data I have obtained from the PSNI, in 2017 six non-compliance cases were referred to the Public Prosecution Service. These cases resulted in five convictions (one person was convicted of a public order offence), with the decision being taken in one case not to prosecute. The sentences ranged from fines of £100 to £500. In 2019 seven non-compliance cases were referred to the Public Prosecution Service, resulting to date in a caution for obstructing police. I hope to be able to report on how the remaining cases were resolved next year.

9.80. I have been informed by the PSNI that good progress is being made on increasing its IT resources at ports. The ultimate goal is for digital downloads to be uploaded to a centralised system, where the material can be considered by digital forensic specialists. This would reduce the need to take frontline officers out of circulation. More importantly, as PSNI are aware, the potential problem with digital downloads not being held centrally is that there may be limited scope at each location for reviewing whether data should be retained or destroyed. Compliance with Article 8 of the European Convention on Human Rights requires adherence to a comprehensive retention strategy. I have been informed that the PSNI works to the national strategy which is set by the Counter-Terrorism Border Operations Centre.

9.81. One of the things which has been brought to my attention is that when a mobile device is downloaded by the PSNI during the course of a Schedule 7 examination, it will be seized if the initial triage reveals material which may be of an evidential nature<sup>744</sup>. The PSNI's aim is to return the device within seven days. There is no doubt that Schedule 7 confers upon the PSNI the power to seize mobile devices, but it will

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<sup>744</sup> Pursuant to paragraph 11(2)(b) Schedule 7 Terrorism Act 2000.

be extremely disruptive to the individual who loses access to their device. If a forensic evidential download of the contents of the device is taken, there should be no need to seize it. I have been told that steps are being taken to provide this capability at more ports, which will hopefully reduce the longer term seizure of mobile devices in future.

9.82. The Northern Ireland Court of Appeal's judgment in *Ramsey (No 2)*, which I have already considered, also raises issues about monitoring the use of Schedule 7. As I pointed out last year, the statistical data on the use of Schedule 7 in Northern Ireland does not capture the community background of those who are port stopped. The Code of Practice which governs the use of Schedule 7 of the Terrorism Act 2000 is different from the Code considered in *Ramsey (No 2)*, although it draws attention to the need to avoid unlawful discrimination. Like the stop and search powers in the Justice and Security (Northern Ireland) Act 2007, the power in Schedule 7 can be exercised without reasonable suspicion. I will return to this topic next year, once the PSNI has confirmed how it intends to comply with the judgment in *Ramsey*.

## **Brexit**

9.83. Although the United Kingdom has now left the European Union, the transition period does not end until 31 December 2020. I believe it is therefore still too early to assess how Brexit will impact upon the operation of the Terrorism Acts in Northern Ireland.

9.84. PSNI and security officials are extremely sensitive to the potential consequences of Brexit. There are obvious concerns that dissident republicans may attempt to take advantage of any disruption that results from Brexit. It is generally accepted that the erection of infrastructure at the border would become a target. If the post-Brexit settlement is perceived as undermining Northern Ireland's position within the United Kingdom, there is the risk that loyalists could engage in mass protests or target customs infrastructure. History demonstrates that loyalist protests have the potential to be extremely disruptive, and do not always end peacefully. These possibilities, combined with the loss of information-sharing and the European Arrest Warrant, could lead to a very challenging security situation.

## **Terrorist Trials, Sentencing, and Criminal Justice**

9.85. 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 prominent cases in 2019. These include:

1. In April 2019, Colton J ruled that material relating to screening interviews carried out with a covert human intelligence source (who was due to be a prosecution witness in the trial of Colin Duffy and his co-defendants) could be withheld from the defence as its disclosure would represent a real risk of serious prejudice to an important public interest.<sup>745</sup>
2. In March 2019, Sean McVeigh was sentenced to 25 years' imprisonment with an extension period of five years on licence for the attempted murder of two serving police officers by planting an under car explosive device in June 2015. He was further sentenced to an extended custodial sentence of 20 years' imprisonment with five years on licence for being in possession of explosives with intent to endanger life (to run concurrently).<sup>746</sup>
3. In May 2019, the Lord Chief Justice of Northern Ireland held that the notification requirements in the Counter-Terrorism Act 2008 were compatible with EU law.<sup>747</sup>

9.86. In evidence it gave to the Security and Intelligence Committee of Parliament in October 2019, MI5 stated that criminal justice outcomes were their "*preferred course of action whenever achievable*" and as "*the critical tool to successful and long-term disruption*" of the threat posed by Northern Ireland-related terrorism<sup>748</sup>. I agree with both the Intelligence and Security Committee of Parliament and MI5 that there are aspects of the Northern Ireland criminal justice system which undermine that aspiration.

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<sup>745</sup> [2019] NICC 10.

<sup>746</sup> [2019] NICC 8.

<sup>747</sup> [2019] NIQB 48.

<sup>748</sup> Intelligence and Security Committee of Parliament, Northern Ireland-related terrorism, paras 21-26.

9.87. Compared to the rest of the United Kingdom, the slow pace and procedural heaviness of criminal proceedings in Northern Ireland has a deleterious impact on the use of terrorism legislation:

- Individuals accused of terrorism offences either risk spending unacceptably long on remand waiting for trial, or are released on bail despite the seriousness of the offences of which they are accused and the risk they are assessed to pose.
- Terrorism allegations are only publicly tested many years after the original arrest leading to a disjunct between the use of strong counter-terrorism powers and justification for their use.
- Uncertainty about the trial process may lead to defensive and overheavy policing: for example, I detected that one of the reasons for seizing phones under Schedule 7 was that PSNI were uncertain whether an evidential copy would withstand the degree of forensic challenge that is tolerated in criminal proceedings.

9.88. Changes to the functioning of the criminal justice system are matters for the devolved legislature, the Executive, and the Northern Ireland judiciary. It would exceed my terrorism legislation remit to make positive recommendations in this field. One of the purposes of the recommendation I do make about greater transparency over countering terrorism in Northern Ireland is that decisions on reform and the pace of reform is informed by greater awareness, and demystification of, the approach to terrorism in Northern Ireland.

### ***Oral committal hearings***

9.89. As I remarked last year, in contrast to England and Wales, Northern Ireland still has oral committal hearings. Lord Anderson QC suggested<sup>749</sup> that one of the difficulties encountered in Northern Ireland in bringing successful terrorism prosecutions to trial could be the aggressive adversarial court processes, with all defendants requesting old style committals during which every point is fought over. The continued existence of oral committal hearings in Northern Ireland and whether they should be abolished has been a source of debate for some time<sup>750</sup>.

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<sup>749</sup> Terrorism Acts in 2015 at 9.17.

<sup>750</sup>[https://webarchive.nationalarchives.gov.uk/20081023091506/http://www.nio.gov.uk/the\\_future\\_of\\_committal\\_proceedings\\_in\\_northern\\_ireland.pdf](https://webarchive.nationalarchives.gov.uk/20081023091506/http://www.nio.gov.uk/the_future_of_committal_proceedings_in_northern_ireland.pdf).

9.90. In the preparation of this year's Report, I have sought to assess for myself whether Lord Anderson QC's impression was correct. It is clear to me that the continued existence of oral committal hearings is a significant source of delay. I have been provided with examples of committal hearings which have lasted months. Oral committal hearings have been abolished in England and Wales for over two decades without any suggestion that the fairness of the criminal justice system has been undermined, and I detected little principled support for their retention in Northern Ireland<sup>751</sup>. Even if they do not always entail complainants and witnesses having to give their evidence twice, which is an additional objection, they serve to impede the timely resolution of terrorism allegations.

9.91. Incremental steps have been taken to limit the availability of oral committal hearings<sup>752</sup>. In 2018 the Northern Ireland Audit Office recommended abolishing oral committal hearings all together with a view to increasing the efficiency of the criminal justice system<sup>753</sup>. Because criminal justice is a devolved matter, this recommendation was impossible to achieve in the absence of a functioning Executive.

9.92. In the agreement that was reached between the main political parties that led to the restoration of power sharing in 2020, committal reform was listed as one of the priorities of the new Northern Ireland Executive<sup>754</sup>.

9.93. A Bill was introduced into the Northern Ireland Assembly in November 2020 and is currently being debated. The effect of the Bill, if enacted, is to abolish committal proceedings entirely for indictable only offences in the case of an adult. Whilst this will affect some terrorism offences committed by adults, and some offences of the sort typically committed by terrorists, it does not cover, for example, collecting information likely to be of use to a terrorist (section 58 Terrorism Act 2000), weapons training (section 54 Terrorism Act 2000) or encouraging terrorism (section 1 Terrorism Act 2006). If this incremental approach delays the time when oral committal hearings are abolished for terrorism and terrorism connected offences, it is to be regretted.

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<sup>751</sup> For justifications that have been advanced by the Northern Ireland Law Society, see <https://www.lawsoc-ni.org/reform-of-committal-proceedings> at paragraph 1.3.

<sup>752</sup> See Part 2 of the Justice Act (Northern Ireland) 2015.

<sup>753</sup> 3rd recommendation, <https://www.niauditoffice.gov.uk/sites/niao/files/media-files/Speeding%20up%20Justice.pdf>.

<sup>754</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/856998/2020-01-08\\_a\\_new\\_decade\\_a\\_new\\_approach.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf), page 7.



Terrorism trials tend to be complex and lengthy; they tend to be at least as aggressively contested as any other criminal trial, meaning that defence lawyers inevitably exploit the opportunities to challenge the prosecution case that an oral committal provides.

### ***Other Sources of Delay***

9.94. Delay is an abiding problem. In his report on serious sexual offences, Sir John Gillen stated that, “*Delay in the criminal justice system in Northern Ireland, and in serious sexual offences in particular, has reached a tipping point where not only those inside the system but the general public and the mainstream press are demanding solutions. The injustice of current delay in the system is intolerable*”<sup>755</sup>. According to statistics published by the Department of Justice, in 2018/19 the median time taken for a case to be dealt with at court in relation to charge cases dealt with at the Crown Court was 416 days<sup>756</sup>. This figure is probably a significant underestimate when it comes to trials for terrorism offences given their complexity and the volume of disclosure applications which may be made.

9.95. As a result of these delays, individuals who are accused of very serious terrorism offences will spend years awaiting trial. I have been told that the rule of thumb in Northern Ireland is that after two years of being on remand in custody a defendant, even one who is accused of terrorism offences of the utmost gravity, will be released on bail<sup>757</sup>. Even individuals who have pleaded guilty to serious terrorism offences may be released while they await sentencing<sup>758</sup>. It is surprising, although perhaps inevitable given these delays, that individuals who may pose a serious risk to public safety are released into the community.

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<sup>755</sup> “*Report into the law and procedures in serious sexual offences in Northern Ireland*”, <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>, at paragraph 9.1.

<sup>756</sup> <https://www.justice-ni.gov.uk/news/case-processing-time-criminal-cases-dealt-courts-northern-ireland-201819-published-today>.

<sup>757</sup> A point also noted by the Independent Reporting Commission in its recent Third Report (2020) at page 68, <http://www.ircommission.org/sites/irc/files/media-files/IRC%20Third%20Report.pdf>.

<sup>758</sup> <https://www.irishnews.com/news/northernirelandnews/2020/01/30/news/top-troubles-ira-figure-pleads-guilty-in-mi5-bugging-case-1829668/>.

9.96. The Northern Ireland Criminal Justice Inspectorate has been critical of the delays in the criminal justice system for over a decade<sup>759</sup>. Very little observable progress appears to have been made to improve the situation, however. There are two additional sources of delay which I believe directly impact upon the operation of the Terrorism Acts in Northern Ireland.

9.97. First, as Lord Anderson QC recognised the special rules which have assisted the effective case management of terrorist cases in England and Wales have no equivalent in Northern Ireland<sup>760</sup>. Consideration might be given to adopting a version of the case management protocol which applies to trials for terrorism offences in England and Wales, and to ticketing judges who have experience in terrorism matters and dealing fairly with sensitive intelligence if it becomes relevant to the disclosure process. In 2018 the Department of Justice committed to consulting with the Lord Chief Justice to facilitate the effective management of cases<sup>761</sup>. I do not know where this commitment has led.

9.98. Secondly, the Criminal Procedure Rules apply only to England and Wales, meaning that courts in Northern Ireland are deprived of a clear basis for strong case management in criminal trials. The Criminal Procedure Rules incorporate an “overriding objective” into criminal litigation, a concept which includes the need for efficiency and expedition alongside paramount interests of fairness and protection of rights<sup>762</sup>. They also provide a procedural basis for “*notification hearings*” allowing the court to be informed of highly sensitive information for trial management purposes<sup>763</sup>.

9.99. Thirdly, my impression is that applications for disclosure in terrorism trials are a particular source of delay, and that applications are made which would not be entertained for long elsewhere in the United Kingdom<sup>764</sup>. Lord Carlile QC has suggested that some difficulties may arise because a separate disclosure judge is

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<sup>759</sup> As far back as August 2006, the then Inspector of Criminal Justice found that it took on average one third longer for a Crown Court case to get from point of remand to disposal in Northern Ireland than it did in England and Wales, see [http://www.cjini.org/NewsAndEvents/Press-Releases/2004-\(2\)/August/Inspection-uncovers-long-wait-for-Justice-in-North](http://www.cjini.org/NewsAndEvents/Press-Releases/2004-(2)/August/Inspection-uncovers-long-wait-for-Justice-in-North).

<sup>760</sup> *Terrorism Acts in 2015*, para 9.17.

<sup>761</sup> [http://data.parliament.uk/DepositedPapers/Files/DEP2018-0537/Departmental\\_response\\_to\\_NIAO\\_recommendations\\_on\\_avoidable\\_delay.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2018-0537/Departmental_response_to_NIAO_recommendations_on_avoidable_delay.pdf).

<sup>762</sup> CPR 1.1(2).

<sup>763</sup> Approved in *R v Ali* [2019] EWCA Crim 1527 on the basis that provision would be made in the rules thereafter.

<sup>764</sup> See for example, *The Application of Alex McCrory, Colin Duffy and others* [2019] NICC 3, an application brought by terrorism defendants against journalists from the Sunday World newspaper seeking evidence that the PSNI, security services or prosecuting authorities had undisclosed transcripts from, or expert reports relating to, covert recording devices.

insulated from the trial process<sup>765</sup>. A case management protocol and Criminal Procedure Rules could assist judges to ensure that disclosure applications do not dominate criminal proceedings unduly.

### ***Sentencing***

9.100. It is a common theme that sentences in Northern Ireland for terrorism offences are low when compared to the equivalent sentence an offender would receive in England and Wales. This was a point made by the Fresh Start Panel in its 2016 report, in which it commented that there was dissatisfaction with the sentences received by those convicted of terrorism offences<sup>766</sup>. The sentence of 10 years' imprisonment (with five years to be spent in custody) given to Darren Poleon and Brian Walsh in 2017 for planting a bomb at a Northern Ireland hotel targeting a PSNI recruitment event speaks for itself<sup>767</sup>.

- As a matter of fairness and like treatment of like cases, it is deeply unsatisfactory for Northern Ireland related terrorism to be treated any less seriously than terrorism that is perpetrated by Islamist terrorists.
- The question arises whether an Islamist extremist who was convicted in Northern Ireland would receive a longer sentence than someone who has committed an act of Northern Ireland-related terrorism; alternatively, whether such an offender would receive a more lenient sentence than they would have received had their offending taken place in Great Britain. These are unpalatable alternatives.
- Lower sentences suggest that terrorist behaviour is normalised in Northern Ireland.

9.101. In August 2019, the Department of Justice added offences linked to terrorism, paramilitarism, and organised crime groups to the unduly lenient scheme<sup>768</sup>. This is a welcome development, as it means that sentences for these offences can be referred to the Northern Ireland Court of Appeal by the Director of Public Prosecutions if they are thought to be unduly lenient.

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<sup>765</sup> Hansard (HC), Vol 594 col 94WS, Written Statements (20 March 2015).

<sup>766</sup> At paragraph 3.25, [https://cain.ulster.ac.uk/events/peace/stormont-agreement/2016-06-07\\_Fresh-Start-Panel\\_paramilitary-groups.pdf](https://cain.ulster.ac.uk/events/peace/stormont-agreement/2016-06-07_Fresh-Start-Panel_paramilitary-groups.pdf).

<sup>767</sup> <https://www.belfasttelegraph.co.uk/news/northern-ireland/sentence-for-pair-who-planted-bomb-for-derry-psni-recruitment-event-lenient-says-mp-36156540.html>.

<sup>768</sup> <https://www.justice-ni.gov.uk/news/terrorist-and-paramilitary-related-offences-added-unduly-lenient-sentence-scheme>.

9.102. However, there is no obvious benchmark for terrorism sentencing, such as the Definitive Guidelines on the Sentencing of Terrorism Offences which must be taken into consideration by judges in England and Wales<sup>769</sup>. In these circumstances, the expansion of the unduly lenient scheme may do little to solve the problem identified by the Fresh Start Panel in 2016. Certain cases are identified on the judicial website as guidelines for terrorism offences<sup>770</sup>. However, since 2000 the identified case are, in reserve chronological order:

- R v Haggarty (2020), which concerns the discount to be given to cooperating offenders.
- R v Wootton and McConville (2014), which decided that a 25-year tariff for the carefully planned terrorist murder of a police officer was appropriate for the adult defendant.
- R v McDowell (2014), which considers deterrent custodial sentences for sectarian violence.
- R v Marcus (2013), in which the court exercised its discretion not to increase the offender's sentence despite concluding that it was unduly lenient.
- R v Hazlett, in which the court exercised its discretion not to increase the offender's sentence despite concluding that it was unduly lenient.
- R v Shoukri, in which the court quashed one of the appellant's conviction on the basis that the trial judge had applied the wrong standard of proof.

9.103. These cases do not provide judges with clear guidance on the factors they should take into account when determining the sentence which should be imposed upon someone who has been convicted of a terrorism offence. For example, they do not set out how the judge should determine culpability and harm, which is particularly problematic given the inchoate nature of many terrorism offences. These cases are therefore no substitute for the sentencing guidelines which exist in England and Wales.

9.104. I have been informed that the mechanism which exists in section 30 of the Counter-Terrorism Act 2008 to empower a sentencing judge to pass a longer

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<sup>769</sup> The Department of Justice has carried out a Sentencing Policy Review consultation, which includes consideration of guideline judgments and sentencing guidelines. Responses to the consultation were published on 29 September 2020: <https://www.justice-ni.gov.uk/publications/sentencing-policy-review-consultation-responses>.

<sup>770</sup> <https://www.judiciaryni.uk/judiciary-decision-types/terrorist-offences>.

sentence if the offence had a “*terrorist connection*” is rarely used in Northern Ireland. If that is correct, it may be because identifying what amounts to terrorism in Northern Ireland remains, as I have reported above, uncertain.

### **Other matters**

9.105. The Special Advocate Support Office provides invaluable practical support to special advocates in England and Wales. Special Advocates are used with increasing frequency in Northern Ireland, but they do not benefit from the same practical facilities that are available to special advocates in London. I propose to raise with the Northern Ireland Office whether there is there is a need for an equivalent to the Special Advocate Support Office in Belfast, to minimise the risk that hearings will be delayed as a result of difficulty in transmitting and storing sensitive material.

9.106. So far as the use of civil measures is concerned, the provisions in the Criminal Finance Act 2017 enabling the making of unexplained wealth orders have not been commenced in Northern Ireland. In July 2019 the National Crime Agency obtained an unexplained wealth order against a London woman suspected of being involved in paramilitarism<sup>771</sup>. Had the woman been resident in Belfast, the option of obtaining an unexplained wealth order would not have been available to the Northern Irish law enforcement agencies. In its second report of 2019, the Independent Reporting Commission recommended the commencement of all the outstanding provisions in the Criminal Finances Act 2017<sup>772</sup>. In October 2020, the Justice Minister stated that this was one of her key priorities<sup>773</sup>.

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<sup>771</sup> <https://www.nationalcrimeagency.gov.uk/news/nca-secures-unexplained-wealth-order-against-properties-owned-by-a-northern-irish-woman>.

<sup>772</sup> <https://www.irishlegal.com/article/crackdown-on-paramilitarism-held-back-by-delay-to-committal-reforms>.

<sup>773</sup> <https://www.irishlegal.com/article/unexplained-wealth-orders-to-be-made-available-from-october-2020>.

## 10. SCOTLAND

### Introduction

10.1. This is a new Chapter. There was no report on Scotland last year principally because of the lack of terrorist activity in Scotland. By contrast 2019 saw a number of terrorist arrests. Although the Terrorism Acts apply throughout the United Kingdom because national security and powers for dealing with terrorist are reserved<sup>774</sup>, Scotland has a different legal system and, like Northern Ireland, a devolved administration which is responsible for criminal justice. A particular feature of Scottish counter-terrorism is the role played by prosecutors in the *investigation* of terrorism which I consider below.

### Uses of TACT legislation in Scotland

10.2. Despite the close connections between Northern Ireland and Scotland, and its relevance as a logistical base to both sides during the conflict, Scotland has historically experienced limited violence from Northern Ireland-related terrorism<sup>775</sup>. Recent activity this relates to low-level fundraising for proscribed organisations (buckets being passed around at football matches in Glasgow)<sup>776</sup> but other activity is more serious. In 2015, three Dissident Republicans were convicted of plotting to kill two members of a Loyalist proscribed organisation present in Scotland (Operation Hairsplitter)<sup>777</sup>. The major 2020 arrests carried out by the PSNI and others in connection with the new IRA involved the arrest of a Scottish resident and a search of premises in Edinburgh (Operation Arbacia)<sup>778</sup>.

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<sup>774</sup> Schedule 5 Part II paragraph B8 Scotland Act 1988.

<sup>775</sup> Mackay, N., 'Inside story: Why the IRA never attacked Scotland' Glasgow Herald 13 October 2019 <https://www.heraldscotland.com/news/17965179.inside-story-ira-never-attacked-scotland/>. A significant exception is the UVF pub bombing in Glasgow in 1979.

<sup>776</sup> The group Saoradh, a supporter of Dissident Republicanism which is considered by PSNI to be linked to the new IRA (<https://www.bbc.co.uk/news/uk-northern-ireland-53851675>) has recently opened a branch in Glasgow.

<sup>777</sup> <https://www.theguardian.com/uk-news/2015/aug/31/uda-murder-plot-three-men-sentenced-38-years-jail-adair>.

<sup>778</sup> <https://www.psnipolice.uk/news/Latest-News/220820-update-on-operation-arbacia/>.

10.3. Right Wing Terrorism (including attack-planning against mosques)<sup>779</sup> and Islamist Terrorism (most notably the 2007 Glasgow airport attack)<sup>780</sup> are both fixtures in Scotland, although unlike the position South of the border there is no Al-Muhajaroun presence. Youth, mental health, and mixed ideologies are increasing features of the counter-terrorism diet.

10.4. Statistics and descriptions provided to me by the Scottish Government and the Crown Office and Procurator Fiscal Service<sup>781</sup>, demonstrate the following in relation to prosecutions under the Terrorism Acts 2000 and 2006 in the *financial* year 2018-19<sup>782</sup>:

- 2 people were prosecuted for proscribed group offences. This is consistent with the handful of prosecutions since 2015 based mainly on parades and flag-flying at football matches.
- 1 person was prosecuted and convicted of failing to comply with a Schedule 7 examination contrary to section 53 Terrorism Act 2000. There was a historic high of 52 offences prosecuted in 2005-6, but the figures have fallen steeply since then. The majority concern examinations at the ferry terminals at Cairn Ryan and Loch Ryan which connect to Northern Ireland.
- 2 people were prosecuted for attack-planning contrary to section 5 Terrorism Act 2006 in 2018-9, with one conviction in this period under that section. This offence has been very rarely prosecuted in Scotland.
- There were no prosecutions for encouraging terrorism or disseminating terrorist publications contrary to sections 1 and 2 Terrorism Act 2006 (previously individuals had been convicted in 2015-16 and 2017-8).

10.5. As to terrorism arrests in the *calendar* year 2019<sup>783</sup> these include:

- *David Dudgeon*, who later pleaded guilty at Edinburgh Sheriff Court to collecting information likely to be useful to a terrorist contrary to section 58 Terrorism Act

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<sup>779</sup> <https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-43725367>;  
<https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-44823163>.

<sup>780</sup> For an example of lower-level offending, <https://www.theguardian.com/uk-news/2015/dec/09/man-jailed-pro-isis-facebook-posts-mourad-mosdefaoui>.

<sup>781</sup> Based in turn on data from the Scottish Government Criminal Justice Analytical Division.

<sup>782</sup> Using the 'principal offence' approach, meaning that these figures only record a terrorism offence if is the main offence for which the person was prosecuted.

<sup>783</sup> Other than the single example given, all the arrests were carried out under general arrest powers.

2000. The defendant had a history of mental health problems and a sustained interest in extreme right-wing material including anti-semitism. The offences came to light when the defendant's psychiatrist contacted police about his behaviour. He was sentenced to 2 years' imprisonment<sup>784</sup>.

- An individual arrested under section 41 Terrorism Act 2000 and subsequently charged with planning to livestream an attack on a mosque contrary to section 5 Terrorism Act 2006<sup>785</sup>. He is due to stand trial.
- An individual arrested on suspicion of planning a mass casualty attack. The defendant, Gabrielle Friel, was found guilty of an offence contrary to section 57 Terrorism Act 2000 and sentenced to an extended sentence of 15 years<sup>786</sup>. The charge of attack planning under section 5 Terrorism Act 2006 was found 'not proven'. The case falls into the category of 'mixed, unclear or unstable ideology'.
- An individual who has now been charged with an offence contrary to section 5 Terrorism Act 2006, together with explosives and poisoning offences, resulting from an arrest in November 2019.
- An individual subsequently acquitted of an offence contrary to section 13 Terrorism Act 2000 having uploaded an image to Facebook of himself wearing a headband stating "up the RA".
- A number of other live cases including proscribed group offences, encouragement of terrorism, and collection of information likely to be useful to a terrorist.

### **Procurator Fiscal Service**

10.6. The Lord Advocate and the Procurator Fiscals for whom he is responsible have a constitutionally distinctive and independent role in the investigation as well as the prosecution of offences including terrorism offences<sup>787</sup>. This role is peculiar to Scotland within the context of the United Kingdom<sup>788</sup>, and is recognised by section 48(5) Scotland Act 1998. As a result, officers of Police Scotland are subject to the

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<sup>784</sup> Upheld by the Appeal Court, High Court of Justiciary [2020] HCJAC 6, <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2020hcjac6.pdf?sfvrsn=0>.

<sup>785</sup> <https://www.bbc.co.uk/news/uk-scotland-50673981>.

<sup>786</sup> Sentencing remarks of Lord Beckett (12 January 2021): <https://www.judiciary.scot/home/sentences-judgments/sentences-and-opinions/2021/01/12/hma-v-gabrielle-friel>.

<sup>787</sup> The other two are investigating sudden, unexpected and unexplained deaths (there is no coronial system in Scotland) and considering complaints of criminal conduct against police whilst on duty.

<sup>788</sup> Although consistent with the position in many European jurisdictions: James Wolffe QC (Lord Advocate), 'Prosecution in the Public Interest' (2017), [https://www.apexscotland.org.uk/wp-content/uploads/2014/07/apex\\_annual\\_lecture\\_2017.pdf](https://www.apexscotland.org.uk/wp-content/uploads/2014/07/apex_annual_lecture_2017.pdf).



direction of the Lord Advocate, and of the Procurators Fiscal who hold commissions to act on his behalf, in the investigation of crime.

10.7. The Serious and Organised Crime Unit deals with all terrorism prosecutions but has no role in relation to other counter-terrorism functions of the police such as gathering intelligence or examinations under Schedule 7 Terrorism Act 2000. For constitutional as well as practical purposes Procurator Fiscals are briefed at the outset of significant terrorism investigations. Since 2015, the Serious and Organised Crime Unit of the Crown Office and Procurator Fiscal Service (“COPFS”) has been collocated with the counter-terrorism command of Police Scotland and other bodies such as the National Crime Agency and HM Revenue and Customs at the modern Scottish Crime Campus in Gartcosh outside Glasgow.

10.8. Because of the Lord Advocate’s responsibilities in relation to all criminal cases, there is no statutory requirement for prosecutions in Scotland of terrorist offences relating to matters overseas to require the further permission of a Law Officer (as is the case in England and Wales, and Northern Ireland)<sup>789</sup>. Since 2008, most terrorism offences that occur in the United Kingdom can be tried in any place in the United Kingdom so that offences that occur in Scotland can be tried in England and vice versa<sup>790</sup>. A joint statement by the Attorney General and the Lord Advocate sets out the considerations that apply in determining the place of prosecution where jurisdiction to prosecute is shared<sup>791</sup>.

### **Police Scotland**

10.9. The Chief Constable of Police Scotland is responsible for ensuring arrangements are in place to deliver the command and control of counter-terrorism policing activities in Scotland. In a United Kingdom counter-terrorism operation with a Scotland aspect, or a counter-terrorism operation occurring solely in Scotland, the Senior National Coordinator will play a coordination role and may assume national

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<sup>789</sup> Under sections 117 Terrorism Act 2000 and section 19 Terrorism Act 2006; see Hansard House of Lords vol 676 col 736, 7 December 2005, Baroness Scotland.

<sup>790</sup> Section 28 Terrorism Act 2008. The amendments followed some complications arising out of the terrorist activities in London of the Glasgow Airport bombers: see Lord Carlile, *Report on Proposed Measures for Inclusion in a Counter-Terrorism Bill* (Cm 7262, London, 2007).

<sup>791</sup>[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](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)

strategic command for the operation in Scotland, subject to the direction of the Lord Advocate, or appropriate prosecutor, through the Chief Constable<sup>792</sup>. This is in order to preserve the constitutional position whereby investigations in Scotland are ultimately subject to the direction of Lord Advocate. It may lead to separate but coordinated investigations being opened in Scotland, and England and Wales.

- For example, on 6 March 2019 information was received that a suspicious package had been posted to an individual based at Glasgow University<sup>793</sup>. The package was linked to parcels posted from Northern Ireland, one of which had arrived at its destination near Heathrow airport the previous day and had partially detonated, and the other at City of London Airport. A claim of responsibility was subsequently made by the new IRA but no one has yet been charged.
- Two separate investigations were started by SO15, the CT command of the Metropolitan Police Service, and by Police Scotland. The investigations were coordinated to avoid duplication of enquiries and to share the workload, with the Procurator Fiscal Service involved in relation to the Scottish side. Police Scotland regard this as having been a successful test of relationships and structures.

## Scottish Procedure

10.10. Terrorism is a matter specifically reserved to the government of the United Kingdom<sup>794</sup> but criminal procedure is different in Scotland from the rest of the United Kingdom, notably the nature of the courts that conduct criminal trials<sup>795</sup>, the rules of evidence such as the need for corroboration<sup>796</sup>, and the sentencing and subsequent management of released prisoners<sup>797</sup>. The main arrest power in Scotland used for

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<sup>792</sup> Pursuant to a protocol agreed between Police Scotland, COPFS, and National Counter-Terrorism Policing Headquarters.

<sup>793</sup> <https://www.bbc.co.uk/news/uk-scotland-47538402>.

<sup>794</sup> HC Briefing Paper Number CBP 8544, 5 April 2019 p13

<sup>795</sup> High Court or, for penalties up to 5 years, the Sheriff Court. There is no specialist terrorist list of High Court judges in Scotland but there are two identified Sheriffs who deal with warrants of further detention and search warrants in terrorism matters.

<sup>796</sup> The corroboration requirement in Scotland, in general terms, means that there must be two sources of evidence to prove every essential fact (this does not mean that every fact must be corroborated, but essential facts, such as the identification of the accused, and essential elements of the offence, must be). The corroborating evidence can be circumstantial evidence as well as eyewitness or forensic evidence.

<sup>797</sup> Scotland has unique sentences such as the Order for Lifelong Restriction, Sections 210B et seq Criminal Procedure (Scotland) Act 1995. There are no sentencing guidelines. Released prisoners are managed by Criminal Justice Social Work teams employed by local authorities.

terrorist offences is section 1 Criminal Justice (Scotland) Act 2016, a statute that implemented a major reform of police powers and safeguards for individuals<sup>798</sup>.

10.11. The power to arrest under section 41 Terrorism Act 2000 is now rarely used (once in 2019) and the power to authorise continued detention under Schedule 8, up to a maximum of 14 days, even more rarely (not since the arrests in 2013 in Operation Hairsplitter, the Dissident Republican plot). There is one dedicated TACT detention centre in Scotland and three satellite sites elsewhere that can be used on a temporary basis. The need to pull in specialist staff to run them, and the geography of Scotland, are factors in deciding whether to use TACT suites.

10.12. There is, surprisingly, no equivalent of Code H in Scotland. I have been informed that the duties of police officers and the rights of detainees are to be found in three documents:

- Guidelines on the extension of detention and post-charge questioning issued by the Lord Advocate in July 2012<sup>799</sup>. This is a short document which, as its name suggests, focusses on two aspects only and does not, for example, address interpreters, medical treatment, juveniles or other vulnerable detainees.
- Standard Operating Procedure on the care and welfare of persons in police custody, issued by Police Scotland<sup>800</sup>. This document only makes passing reference to terrorism or the Terrorism Act 2000 powers.
- Approved Professional Practice issued to TACT suite managers. This is not a public document.

10.13. There are three reasons why this situation is inadequate. Firstly, detention under section 41 and Schedule 8 Terrorism Act 2000 exposes detainees to far longer periods of pre-charge detention (up to 14 days) than available under ordinary arrest powers. In practice detention can be very solitary and is likely to take place in highly pressurised circumstances. It follows that *detailed and specific* rules are needed to

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<sup>798</sup> Following the decision of the Supreme Court in *Cadder v HM Advocate* [2010] UKSC 43.

<sup>799</sup> Lord Advocate's Guidelines On: The Extension Of Detention Of Persons Arrested Under Section 41 And Schedule 8 Of The Terrorism Act 2000 And Post-Charge Questioning Under Section 23 Of The Counter-Terrorism Act 2008, [https://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Lord\\_Advocates\\_Guidelines/Extension%20of%20Detention%20of%20Persons%20Arrested%20Under%20Section%2041%20and%20Schedule%208%20of%20The%20Terrorism%20Act%202000%20.PDF](https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Lord_Advocates_Guidelines/Extension%20of%20Detention%20of%20Persons%20Arrested%20Under%20Section%2041%20and%20Schedule%208%20of%20The%20Terrorism%20Act%202000%20.PDF).

<sup>800</sup> Care and Welfare of Person in Police Custody, currently being revised. The December 2019 version is at <https://www.scotland.police.uk/spa-media/0mfjn3pa/care-and-welfare-of-persons-in-police-custody-sop.pdf>.

ensure that the rights of detainees, in particular juveniles and vulnerable detainees, are safeguarded. Secondly, those detailed and specific rules need to have *legal force* meaning that police officers should have a legal duty to have comply with them, and courts should be required to take account of them in legal proceedings. Thirdly, those detailed and specific rules should be *publicly available* so that detainees, their legal adviser, custody visitors and police officers are able to consult them during detention, so that lapses can be identified and safeguards understood and promoted.

10.14. The Lord Advocate has power to issue a Code of Practice under Criminal Justice (Scotland) Act 2016<sup>801</sup> including, if it relates to the questioning, and recording of questioning, of persons suspected of committing offences, on reserved matters such as terrorism<sup>802</sup>. I therefore **recommend** that the Lord Advocate issues a Code of Practice on the detention of individuals detained under section 41 and Schedule 8 Terrorism Act 2000. I am pleased to report that the Lord Advocate, James Wolffe QC, has informed me that he accepts this recommendation (which he has seen in draft).

10.15. Important additional support for welfare standards is provided by the scheme of Independent Custody Visitors. Since 2009, custody visitors in England and Wales have a particular remit in relation to terrorist detainees<sup>803</sup>, expressly referred to in a Code of Practice<sup>804</sup>. Custody visitors form part of the United Kingdom's National Preventive Mechanism to protect against mistreatment of detainees<sup>805</sup>. Until recently the only document that set out the rights and responsibilities of custody visitors was contained in an internal Police Scotland document. During the drafting of this report I informed the Scottish Police Authority that I was proposing to recommend that it should publish such a document. I am now pleased to report that the Scottish Police Authority has now published on its website a Code of Practice on Independent Custody Visiting in Scotland<sup>806</sup>.

## Civil measures

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<sup>801</sup> Section 57, <https://www.legislation.gov.uk/asp/2016/1/section/57/enacted>.

<sup>802</sup> Article 10, The Criminal Justice (Scotland) Act 2016 (Consequential Provisions) Order 2018, <https://www.legislation.gov.uk/uksi/2018/46/article/10/made>.

<sup>803</sup> Coroners and Justice Act 2009, section 117 amending the Police Reform Act 2002. This does not extend to Scotland.

<sup>804</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/237395/Independent\\_custody\\_visitors\\_code\\_of\\_practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/237395/Independent_custody_visitors_code_of_practice.pdf).

<sup>805</sup> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

<sup>806</sup> <https://www.spa.police.uk/spa-media/tnhmb0yq/icvs-code-of-practice.pdf>.

10.16. No Terrorism Prevention and Investigation Measures (TPIMs) or Temporary Exclusion Orders have been made in respect of individuals resident in Scotland. To use such measures would require the construction of a significant new architecture for serving, administering and enforcing them, and would involve the Scottish courts for the first time in (in the case of TPIMs) granting permission and carrying out reviews. The COPFS did lodge an application for a Serious Crime Prevention Order against the convicted neo-Nazi Connor Ward in 2018<sup>807</sup> but this was not pursued in light of the discretionary life sentence imposed. COPFS regards these orders as of significance, and worth pursuing in terrorism cases, because failure to comply with their conditions, unlike failure to comply with licence conditions, is a separate offence. A Serious Crime Prevention Order for 5 years was imposed in the case of Gabrielle Friel<sup>808</sup>.

### **Ports and borders**

10.17. Police Scotland officers exercise Schedule 7 Terrorism Act 2000 in all three CT regions of Scotland: North, West and East. The two principal seaports for CT officers are Cairn Ryan and Loch Ryan on Scotland's West Coast which offer the main sea route to Northern Ireland. Roughly half of Police Scotland's interactions at ports concern Northern Ireland-related Terrorism; the rest is violent Islamic extremism and Right Wing Terrorism.

10.18. As with England, Wales and Northern Ireland there is an ongoing need, recognised by senior officers, to ensure that the storage and retention of digital downloads accords with privacy rights<sup>809</sup>. Again, as with CT Police in the rest of the United Kingdom, the outcome of negotiations on securing continuing or replacement access to EU criminal justice data and developing a substitute for the European Arrest Warrant scheme, is keenly awaited.

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<sup>807</sup> <https://www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-43400635>;  
<https://www.dailyrecord.co.uk/news/crime/neo-nazi-terrorist-caught-list-12187301>.

<sup>808</sup> See 10.5 above.

<sup>809</sup> See further Chapter 6. Away from ports, digital downloads have been a particular issue in Scotland through the use of "Cyber-kiosks": Digital Triage Devices (Scotland) Justice Sub-Committee on Policing, *Report on Police Scotland's proposal to introduce the use of digital device triage systems (cyberkiosks)* (SP Paper 512, 2019, <https://sp-bpr-en-prod-cdnep.azureedge.net/published/JSP/2019/4/8/Report-on-Police-Scotland-s-proposal-to-introduce-the-use-of-digital-device-triage-systems--cyber-kiosks-/JSPS052019R01.pdf>).

## **11. RECOMMENDATIONS**

### **Terrorist Groups (Chapter 3)**

11.1. Home Office officials and National Crime Agency officers should meet with aid agencies within the Tri Sector Working Group to consider (and ‘workshop’) the situations identified at 3.26 with a view to formulating guidance on the use of section 21ZA in connection with humanitarian assistance (3.34).

### **Terrorist Investigations (Chapter 4)**

11.2. Consideration should be given by the Home Secretary to whether new or amended powers are needed for police to compel encryption keys in counter-terrorism investigations (4.30).

11.3. The government should make arrangements, in consultation with the judiciary, to publish all first instance judgments on applications for journalistic material under Schedule 5 Terrorism Act; and, where publication has to be delayed on the grounds of prejudicing a forthcoming trial, to ensure that judgments are available for use in other cases (4.51).

### **Arrest and Detention (Chapter 5)**

11.4. CT Police and the Home Office should consider whether section 41 Terrorism Act 2000, and the time at which the detention clock starts to run, deals adequately with persons arrested for terrorism offences in hospital (5.13).

11.5. CT Police Headquarters should modify the forms completed by arresting officers so that any use by police superintendents of the power under paragraphs 8 and 9 of Schedule 8 Terrorism Act 2000 is clearly recorded, and the data gathered (5.27).

### **Ports and Borders (Chapter 6)**

11.6. CT Borders Policing should draw up a policy in which the distinction between “screening” (using the power to enter under paragraph 9(4) of Schedule 7), and formal examination of goods, is clearly delineated (6.50).

11.7. CT Police training materials on the revised Schedule 7 Code should make it clear that Schedule 7 does not authorise the use of journalistic or legally privileged material (6.58).

### **Terrorism Trial and Sentences (Chapter 7)**

11.8. The Home Secretary should invite the Director of Public Prosecutions (in England and Wales), the Director of Public Prosecutions (in Northern Ireland) and the Lord Advocate (in Scotland) to ensure that their prosecution services make a record of whether amended or new offences are charged for a period of 5 years from the relevant amending or creating legislation (7.9).

### **Civil Powers (Chapter 8)**

11.9. The Secretary of State should keep under review the question of whether there either currently exists *or might reasonably be obtained* evidence that gives rise to a realistic prospect of conviction of a TPIM subject (8.52).

11.10. In considering the proportionality of a TPIM and its measures, the TPIM review group should expressly identify the passage of time since the previous TPIM review group meeting as a factor weighing against continuation (8.58).

11.11. The government should ensure that, subject only to means, legal funding is swiftly made available to all TPIM subjects for the purpose of participating in section 9 review hearings (8.70).

### **Northern Ireland (Chapter 9)**

11.12. The Secretary of State for Northern Ireland should take steps to increase public understanding of its approach to countering Northern Ireland-related terrorism in Northern Ireland (9.41).

### **Scotland (Chapter 10)**

11.13. Lord Advocate should issue a Code of Practice on the detention of individuals detained under section 41 and Schedule 8 Terrorism Act 2000 (10.14).

## **ANNEX: RESPONSE TO PREVIOUS RECOMMENDATIONS**

In Chapter 10 of the Terrorism Acts in 2018 report I summarised my recommendations. I indicate below which recommendations have in effect been accepted or rejected by the government its response of 22 October 2020, noting that some of my recommendations were that consideration should be given by the government.

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). **Rejected**

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). **Partially accepted**

### **Terrorist Groups (Chapter 3)**

10.3. Proscription orders should automatically lapse after a set period such as three years (3.62). **Rejected**

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). **Accepted**

### **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). **Accepted**

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). **Accepted**

### **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). **Accepted**

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). **Accepted**

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). **Still subject to consideration**

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). **Still subject to consideration**

#### **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). **Rejected**

10.12. The Home Office should conduct research into the factors behind the fall in the use of Schedule 7 (6.30). **Accepted**

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). **Accepted**

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)). **Rejected**

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)). **Accepted**

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). **Rejected**

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). **Rejected**

10.18. Consideration should be given to amending Schedule 8 Terrorism Act 2000 so that detention is not automatic after one hour (6.93). **Accepted**

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). **Accepted**

10.20. Statistics on the numbers of individuals who have had their biometric data taken at ports should be published (6.109). **Accepted**

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). **Accepted**

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). **Rejected**

### **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). **Rejected**

10.24. Consideration should be given to establishing a means to review terrorist notification requirements under Counter-Terrorism Act 2008 (7.56). **Rejected**

### **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). **Accepted**

10.26. The Home Secretary should consider whether Temporary Exclusion Orders should be available for individuals other than British citizens (8.61). **Accepted**

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). **Accepted**

### **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). **Still subject to consideration**

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