REPORT ON THE OPERATION IN 2010 OF THE TERRORISM ACT 2000 AND OF PART 1 OF THE TERRORISM ACT 2006

BY

DAVID ANDERSON Q.C.

JULY 2011

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EXECUTIVE SUMMARY

Operational background

Al-Qaeda related terrorism

- During 2010, once again, no one was killed as a result of al-Qaeda related terrorism in the United Kingdom. Nor was terrorist activity detected on the scale that it existed during the peak period of 2005-2007.

- A number of attacks, arrests and convictions in 2010 however showed the continuing seriousness of the threat, which was raised to SEVERE in January 2010 and remained at that level until July 2011. Trends in 2010 included the greater involvement of al-Qaeda affiliates (in particular, Anwar al-Awlaki's al-Qaeda in the Arabian Peninsula [**AQAP**] and the radicalisation of UK residents by email and internet.

Northern Ireland related terrorism

- Shootings, bombings, booby traps, pipe bombs and grenade attacks remained a fact of life in parts of Northern Ireland, with 42 attacks on national security targets during 2010 and a number of injuries, including to police officers. Fears that dissident republican terrorist groups would extend their attacks to Great Britain, for the first time since 2001, were not realised.

Other terrorism

- Far-right extremists were convicted of a number of offences in England, including making a chemical weapon and collecting information likely to be of use for terrorism.

The counter-terrorism machine

- The vast increase in the UK's counter-terrorism resources over the past five to 10 years, among both police and security services, has improved the penetration of terrorist networks.

- In Northern Ireland, reduced police numbers have had to cope with an upturn in terrorist violence since 2009, though not to levels experienced in the past.

Legal principles

- A high proportion of terrorist activity, especially in Northern Ireland, is dealt with under the normal criminal law. That is as it should be: terrorism is crime, and should be prosecuted as such wherever possible.

- Special procedures and offences for dealing with terrorism may be justified when there is an operational need for them, when their use is confined to

cases of need and when it is proportionate to their impact on individual liberties. Such procedures and offences have proliferated over the past decade: but vigilance is required, in areas that I have specified, to ensure that these conditions are respected.

- The Government in its Review of Counter-Terrorism and Security Powers, has sought to rebalance the law, in certain respects, towards liberty. In summary, and based on the evidence of how the law has been applied in practice:
    - The intended re-balancing, in relation to stop and search powers and periods of detention before charge, is timely and appropriate.
    - The proposed implementation of each such change is however flawed and could be improved.
    - Other aspects of the TA 2000 and TA 2006 should also be reviewed: in particular, the law concerning proscribed organisations and the exercise of port and border controls.

Proscribed organisations

- The proscription of organisations concerned in terrorism fulfils a useful function, though it is heavily influenced by foreign policy concerns.
- In contrast to the ease with which the Government can proscribe an organisation, the administrative procedure for deproscription has proved ineffective, and the judicial procedure cumbersome and expensive.
- The deproscription process for organisations no longer concerned in terrorism should be eased, most obviously by time-limiting all proscriptions and allowing reproscription only if the Secretary of State can justify it on the evidence.

Arrest and detention

- TA 2000 section 41 permits arrest without suspicion of a particular offence, and detention for extended periods of time. While its use is sometimes necessary to unravel complex terrorist plots, the low proportion of those arrested under section 41 who were charged with terrorism offences in 2010 suggests that it may be overused, particularly in Northern Ireland.
- The Government's decisions to limit the maximum period of detention under section 41 to 14 days, and to provide for the wholly exceptional possibility of further extension to 28 days, are supported by the evidence.
- Its chosen method of providing for that further extension – the enactment of primary legislation in Parliament – however risks prejudicing future trials and does not meet the requirement of being practicable 365 days per year.

- The Government should instead propose to Parliament an order-making power in the Home Secretary, with safeguards, as recommended on 23 June 2011 by the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills.

Stop and search powers

- The suspension in July 2010 and effective repeal from March 2011 of TA 2000 section 44, against the background of the judgment of the European Court of Human Rights in *Gillan*, has rightly brought to an end a power which, though used more than 600,000 times, led to not a single conviction for a terrorist offence.

- Although a replacement power exists in TA 2000 section 47A, the threshold for its application is a high one. The grounds for authorising its use were not made out, either in London or on the transport network, on the day of the Royal Wedding in April 2011.

- There is little value, and some risk, in the random use of section 47A. The Code of Practice should be revisited so as to introduce full and proper guidance on the exercise of the officer's discretion to stop and search, so minimising the risk that the discretion will be used in an arbitrary manner.

Port and border controls

- The power in TA 2000 Schedule 7 to examine and detain travellers at ports performs a useful counter-terrorism function.

- The availability of fuller advance passenger and freight information could however enable ports officers to make more effective and proportionate use of the power.

- It may be questioned whether certain elements of the power (which include an obligation to answer questions, on pain of prosecution, and possible detention for up to 9 hours from commencement of examination) are necessary and subject to sufficient safeguards.

- Concerns over the discriminatory application of Schedule 7 have also been raised. However reliable figures are lacking, and I have not seen evidence that the ethnic breakdown of those examined is disproportionate to the terrorist threat (or even, though this is less relevant, to the ethnic composition of the travelling public).

- There should be a review of the extent and conditions of exercise of the Schedule 7 power, involving the widest possible consultation with police, carriers, port users and the public, with a view to ensuring that port and border controls are necessary, sufficient to meet the threat, attended by adequate safeguards and proportionately exercised.

Terrorist offences

- The United Kingdom has a powerful arsenal of specialist terrorist offences, many of them designed to criminalise the early stages of terrorist activity. The scope of those offences has been refined by parliamentary debate and judicial decision. It is preferable that terrorism be dealt with where possible through the criminal justice system, and I make no recommendations at this stage for change.

- The broad TA 2000 definition of terrorism, coupled with the breadth of some of the offences and their extensive international application, means however that more emphasis is placed than is usually desirable on the exercise of prosecutorial discretion by the CPS.

- I shall be keeping a particularly close watch, in the year ahead, on the use of provisions which impact strongly on civil liberties and in respect of which prosecutorial discretion is broad: in particular, TA 2000 sections 19, 38A, 58 and 58A, and TA 2006 sections 1-2.

Recommendations

- There should be a full review of the TA 2000 Schedule 7 power, exercisable without reasonable suspicion, to examine and detain travellers at ports and airports to determine whether they are concerned in terrorism.

- Proscription of organisations should be time-limited, so that organisations can remain on the proscribed list only if the Secretary of State can satisfy Parliament that they should do so.

- The exceptional power for judges to permit more than 14 days' pre-charge detention should be triggered by an order made on strict statutory conditions, not by primary legislation as proposed by the Government.

- The new no-suspicion stop and search power in section 47A of the Terrorism Act 2000 should be used so far as possible on the basis of intelligence or risk factors rather than on a purely random basis, and the statutory guidance should be revised to reflect this.

- A detailed list of recommendations is in section 12, below.

1. INTRODUCTION

Scope of this report

1.1. As required by section 36 of the Terrorism Act 2006 **[TA 2006]**, this report summarises the outcome of my review of the operation during 2010 of the provisions of the Terrorism Act 2000 **[TA 2000]** and Part 1 of TA 2006. The previous such annual review, conducted by my predecessor Lord Carlile of Berriew Q.C., covered the calendar year 2009 and the resulting report was laid before Parliament in July 2010.[1]

1.2. The review is variously described in TA 2006 sections 36(1) and (2) as a review of the operation of those provisions and a review of the provisions themselves. While my primary focus is on the application of the law by Government, prosecutors, police and others, I follow Lord Carlile's practice of recommending, where appropriate, change not only to the application of the law but to the law itself.

1.3. TA 2000 and TA 2006 contain many of the central elements of the United Kingdom's counter-terrorism regime, though important and controversial features of that regime, including control orders, are the subject of other laws. The contents and origins of the laws under review are shortly summarised below.

Terrorism Act 2000

1.4. TA 2000, which received Royal Assent on 20 July 2000, was the United Kingdom's first permanent counter-terrorism statute. Previous legislation had provided for a power to proscribe terrorist organisations, a range of specific offences connected with terrorism and a range of police powers relating to such matters as investigation, arrest, stop and search and detention. That legislation had been designed in response to Northern Ireland related terrorism (though some of its provisions had been extended to certain other categories of terrorism); and it was subject to annual renewal by Parliament.

1.5. TA 2000 reformed and extended the previous legislation, and put it on a permanent basis. It built upon the Government's consultation document *Legislation against terrorism* (Cm 4178), published in December 1998, which in turn owed much to Lord Lloyd of Berwick's *Inquiry into legislation against terrorism* (Cm 3420), published in October 1996 and the essential starting point for anyone who seeks to understand the evolution of United Kingdom counter-terrorism law.

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[1] The Government's Reply to that report was delayed pending various reviews, and has regrettably not yet been published.

1.6. After defining terrorism (Part I), TA 2000 provides for proscribed organisations (Part II) and the treatment of terrorist property (Part III). Part IV (Terrorist Investigations) contains various rules on cordoning, disclosure, searches and account monitoring. Part V contains terrorism-specific arrest, stop and search and port powers, while Part VI provides for a number of terrorist offences. Part VII (Northern Ireland) was subject to annual renewal and has now expired, save for certain historic purposes.[2]

1.7. TA 2000 has been amended a number of times, including by the Anti-Terrorism, Crime and Security Act 2001 [**ATCSA 2001**], TA 2006 and the Counter-Terrorism Act 2008 [**CTA 2008**]. There were no amendments in 2010, the period covered by this review, save in relation to the retention of biometric material under Schedule 8.[3]

Terrorism Act 2006

1.8. TA 2006, which received Royal Assent on 30 March 2006, was debated in the wake of the London bombings of 7 July 2005 which constitute, to date, the only large-scale success for al-Qaeda inspired terrorism on United Kingdom soil. The then Prime Minister, Tony Blair, announced in a well-known speech delivered on 5 August 2005 that "*the rules of the game have changed*". Some of the new rules are contained in TA 2006.

1.9. Part 1 of TA 2006 created a series of new terrorist offences: notably, encouragement of terrorism, dissemination of terrorist publications, preparation of terrorist acts, offences relating to terrorist training and offences concerning the making, possession and use of radioactive material and devices. "Convention offences", corresponding to those mentioned in the Council of European Convention on the Prevention of Terrorism, are listed in Schedule 1. Part 1 also increased the maximum penalties for certain offences under TA 2000 and made jurisdictional and procedural provisions.

1.10. Part 2 of TA 2006 amended the provisions of TA 2000 concerning the definition of terrorism (TA 2000, section 1), proscription of terrorist organisations (TA 2000, Part II), detention of terrorist suspects (TA 2000, Schedule 8) and searches (TA 2000, Schedules 5 and 7). Notable changes included the extension of the maximum period of detention of terrorist suspects with judicial approval to 28 days. It also amended certain provisions relating to investigative powers in other statutes. Part 3 of TA 2006 provided for this review and other supplemental matters.

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

3 Crime and Security Act 2010, section 17 (not yet in force).

1.11. TA 2006 has been amended in minor respects only. There were no amendments during 2010. Of possible future relevance to the functions of the Independent Reviewer is section 117(3) of the Coroners and Justice Act 2009, which amends section 36 so as to provide that a review such as this one may, in particular, consider whether certain requirements have been complied with in the case of terrorist suspects detained for more than 48 hours under section 41 of TA 2000. Section 117 has not yet been brought into force.

Matters not covered by this report

1.12. This review falls well short of covering the full range of United Kingdom terrorism laws. In particular:

(a) The operation of the Terrorist Asset-Freezing etc. Act 2010, in force since December 2010, will be the subject of a separate report, as required by section 31 of that Act, later in 2011. Other asset-freezing measures capable of application to suspected terrorists, including Part 2 of ATCSA 2001 and Schedule 7 to CTA 2008, are not the subject of independent review.

(b) The use in 2011 of control orders under the Prevention of Terrorism Act 2005 **[PTA 2005]** will (as in previous years) be the subject of a separate report, pursuant to section 14 of PTA 2005.

(c) Certain special measures applicable only to Northern Ireland, which had their origins in Part VII of the Terrorism Act 2000 (expired) but are now treated as public order matters under the Justice and Security (Northern Ireland) Act 2007, are the responsibility of a separate Northern Ireland reviewer, Robert Whalley C.B. His report on the year to 31 July 2011 will be published late in 2011.

(d) There is currently no provision for the independent review of the operation of ATCSA 2001 or CTA 2008, though in keeping with the practice of Lord Carlile, certain provisions of those Acts with a bearing on TA 2000 or Part 1 of TA 2006 will be touched upon in this review.

Time period covered

1.13. As in previous years, this review covers a calendar year. The change of Government following the General Election of 6 May 2010 means, however, that it was no ordinary year in the history of counter-terrorism law.

1.14. In July 2010, the Home Secretary in the new Government announced her intention to review what were described as "*the most sensitive and controversial counter-terrorism and security powers*", and "*consistent with protecting the public*

and where possible, to provide a correction in favour of liberty".[4] The review findings and recommendations, together with a report by Lord Macdonald of River Glaven Q.C.[5] and a summary of responses to the consultation,[6] were published in January 2011.

1.15. Three of the six powers selected for review fall within the ambit of this report. These were:

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

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

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

1.16. Changes were recommended in relation to the first two of those issues, and legislation prepared to give effect to them. These changes include the repeal and replacement of section 44 (which had largely ceased to be applied from July 2010) and the non-renewal of the power to detain for 28 days. While this remains a review of 2010, my task includes the making of recommendations for the future. I have thus taken account of developments in 2011 where appropriate.

Resources and methodology

Independent Reviewer

1.17. I took up the post of Independent Reviewer of Terrorism Legislation ("Independent Reviewer") on 21 February 2011. My predecessor Lord Carlile performed it with distinction for over nine years, having been appointed just a few hours before the suicide attacks of 11 September 2001.

1.18. The role and functions of the Independent Reviewer are described on my website http://terrorismlegislationreviewer.independent.gov.uk/. Chief among them is the preparation of three annual reports into different aspects of United Kingdom terrorism legislation, each of which is laid before Parliament. *Ad hoc* reports may also be produced, at the request of the Secretary of State or on the reviewer's own initiative.[7] When requested to do so and when I have something

4 *Review of Counter-Terrorism and Security Powers*, Cm 8004, January 2011.
5 Cm 8003, January 2011.
6 Cm 8005, January 2011.
7 My first such report, *Operation GIRD: Report following Review*, was laid before Parliament in May 2011. It is a detailed examination of the arrest and detention of six street cleaners who

useful to say, I give evidence to Parliamentary Committees. I have the use of a secure room in the Home Office, which I visit as necessary to interview officials and view sensitive material. My base however remains in the London Chambers where I continue to practise privately as a Q.C. The Office of Security and Counter-Terrorism **[OSCT]**, an executive directorate of the Home Office, gives me administrative help in arranging contact with Government, police and security services. It has also been kind enough to review a draft of this report for factual errors, though responsibility for its content and conclusions is mine alone.

1.19. The uniqueness of the Independent Reviewer's post derives from a combination of two factors:

(a) complete independence from Government (as seen, for example, from the fact that the Secretary of State is under a statutory duty to lay his reports before Parliament, regardless of how critical they may be); and

(b) unrestricted access, based on a very high level of security clearance, to documents and to personnel within Government, the police and the security services.

It is impressive that the security establishment allows an outsider to penetrate its mysteries in this way. This reflects the importance which our democracy attaches to rigorous independent scrutiny of the many exceptional powers that are given to the authorities in order to deal with the threat of terrorism.

1.20. Like previous reviewers, I have made it my business to travel widely throughout the United Kingdom, talking not only to those who devise and apply the terrorism laws, but those who study, campaign on or are otherwise affected by them. I am grateful to all who have taken the time to talk to me. Ministers and their Shadows, Members of Parliament and of devolved administrations, civil servants, employees of the security services, Olympics personnel, police, prosecutors, judges and lawyers in England, Scotland and Northern Ireland have all been generous with their time and their expertise. Community representatives, organisations and individuals who have been subject to the terror laws (including in Guantanamo, Belmarsh or under control orders) have educated me and directed me towards areas of particular concern. I am especially appreciative of the high quality work, generously shared, that is performed by the best of the academics and NGOs active in this field. The United Kingdom is fortunate indeed in the rigour with which establishment wisdom is routinely tested and challenged by these individuals and organisations.

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were wrongly suspected of plotting to assassinate the Pope during his visit to London in September 2010.

1.21. The duties of the Independent Reviewer are currently performed on a part-time basis, without staff or secretariat. It has been suggested in the past that he should be given a small permanent staff and an advisory group of experts, each with appropriate security clearance,[8] or replaced by a multi-member independent review panel "*so as to incorporate a range of views, to cope with the burgeoning workload, and to adopt a rolling system of appointments which would constantly infuse fresh ideas and avoid institutional capture*".[9] I have not so far associated myself with those ideas, but they may need to be revisited in due course, particularly if the functions of the Independent Reviewer continue to increase in number and extent.

1.22. In the meantime, I am delighted that Professor Clive Walker of the University of Leeds has agreed to act as Special Adviser to the Independent Reviewer. In that capacity he will ensure that I am aware of the wealth of research and scholarship, across several disciplines, that is most relevant to my responsibilities. He may also put his considerable expertise to the service of specific projects, if so requested.

1.23. The year under review had ended before I took on the task of reviewing it. With more time in post I would have read, visited and consulted more widely, both at home and abroad, before producing this report. Where I do not feel I have learned enough to express a useful opinion, I have refrained from doing so.

Use of statistics

1.24. Where possible and where Great Britain is concerned, I have relied upon police and prosecutorial statistics for the calendar year 2010, published by the Home Office on 30 June 2011.[10] A fuller set of statistics for Great Britain, compiled from a variety of sources and published by the Home Office in October 2010, cover the year to 31 March 2010 **[2009-10]**.[11] I have relied upon these where more recent comprehensive statistics are not available, or for ease of comparison with the statistics for past years, which are generally given for the year ending 31 March.

1.25. For Northern Ireland, I have relied on statistics for the year to 31 March 2010 published by the Northern Ireland Office **[NIO]**,[12] supplemented by the security situation statistics and stop and search statistics produced by the Police Service

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8 Lord Carlile's *Report on the operation in 2009 of TA 2000 and Part 1 TA 2006*, July 2010, paragraphs 306-308.

9 Clive Walker, *Terrorism and the Law* (OUP 2011), 1.89-1.95.

10 Home Office Statistical Bulletin [**HOSB**] 14/11, 30 June 2011.

11 *Operation of police powers under the TA 2000 and subsequent legislation: Great Britain 2009/10,* HOSB 18/10, 28 October 2010. See also *Police Powers and Procedures 2009/10*, HOSB 07/11, 14 April 2011.

12 *Northern Ireland Terrorism Legislation: Annual Statistics 2009/10*.

of Northern Ireland **[PSNI]**.[13] Until 2009, figures were given for the calendar year but are now given for the year to 31 March, like their counterparts in Great Britain.

1.26. All these statistics are freely available online. Accordingly, I have not reproduced them in annexes to this Report. Where unpublished figures have been supplied to me directly by Government departments or agencies, I have said so in a footnote.

1.27. The collection of statistics has improved in significant respects recently: for example, numbers of Schedule 7 examinations in Great Britain were released for the first time in 2010, and Schedule 7 ethnicity data has been collected since April 2010 on a self-defined basis, which is preferable to the officer-defined basis used in the past.

1.28. There are however some differences in practice between the collection of statistics in Great Britain and Northern Ireland, notably as regards charges and convictions for specific offences. The Home Office practice is to record only the *principal* offence for which suspects are charged, whereas the NIO records all charges. This renders it difficult both to obtain an overall picture of the use of terrorism offences in Great Britain, and to compare the usage of different offences in Great Britain and Northern Ireland.

1.29. I revisit these issues in my recommendations, below.

Secrecy

1.30. It is important that this report should be readable and usable by anyone who is interested. Accordingly, while my opinions have been influenced on particular points by material that is classified as secret in the interests of national security, and while I have benefited from confidential discussions with a wide range of people, I have been careful to give away no secrets in this report, and to make factual statements only when they can be verified on the basis of open-source materials. In consequence, this report is published in a single, open version.

1.31. As is demonstrated by the work of researchers in the field,[14] a remarkable quantity of information is, in fact, publicly available – the summings up and open judgments of courts and tribunals, and the findings of inquests and enquiries,

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13 See, most recently, *Police Recorded Security Situation Statistics 2010/11*, 12 May 2011; *PSNI Stop and Search Statistics* Quarter 4, 2010/11, both available through the PSNI website.

14 For example, the compendious *Islamist Terrorism: the British connections* (2nd edition, July 2011) researched by Robin Simcox, Hannah Stuart and Houriya Ahmed for the Henry Jackson Society and Centre for Social Cohesion, and cited by the Government in its recent PREVENT review. I make use of its research in section 2, below, and am grateful to all its authors and in particular to Robin Simcox for his assistance in clarifying certain points.

being particularly rich secondary sources. While such material is no substitute for familiarity with secret intelligence, it can go a considerable way to bridging the knowledge gap.

Recommendations

1.32. I make two recommendations concerning the collection of statistics, and would be happy to liaise with the various institutions concerned in order to explain in detail the information that it would be useful to see.

1.33. **Efforts should be made, so far as possible, to co-ordinate reporting practice and the preparation of terrorism-related statistics in Great Britain and Northern Ireland in future years.**

1.34. **Statistics should be prepared both in Great Britain and in Northern Ireland recording the total number of charges and convictions for each offence under the terrorism legislation**.

2. THE OPERATIONAL BACKGROUND

2.1. The review of terrorism laws must be more than a paper exercise. Any assessment of whether they are necessary and proportionate in their operation must be conducted with an eye both to the current nature and extent of the terrorist threat in the United Kingdom, and to the range of tools available to the counter-terrorism effort. Since United Kingdom terrorist legislation also criminalises a range of acts performed in or aimed at targets in other countries, it is relevant also to keep in mind the nature of the threat world-wide.

The terrorist threat

Terminology

2.2. Terrorism must be categorised, for any analysis of the operation of the counter-terrorism laws would be unrealistic if it failed to acknowledge the very different nature of the threat as it exists in different parts of the country.

2.3. The categories are however not easy to define. Terms such as "*Islamist*", "*Republican*" or "*far right*" are objected to by adherents of the views described, on the basis that to use them as descriptors for types of terrorism is to imply that such political viewpoints are inherently terroristic – which of course they are not. Furthermore, the terms "*Islamist*" and "*Islamic*" may be inadvertently or deliberately confused, playing into the hands of those who would characterise peaceful adherents of Islam as actual or potential terrorists. The phrase "*violent Islamist terrorism"* seeks to avoid those difficulties but is tautologous: all terrorism is violent. "*International*" is misleading when applied to the home-grown Islamist terrorists who have come to the fore particularly since 2005. "*Jihadi*" has been rejected as glamorising, and a suggested alternative, "*Takfiri*", is obscure to a mainstream audience.[15]

2.4. There is no perfect answer. In this report I use, loosely, the terms:

(a) "*Al-Qaeda-inspired terrorism*" (terrorism perpetrated or inspired by al-Qaeda, its affiliates or like-minded groups), which notwithstanding the death of Osama bin Laden in May 2011 seems a roughly accurate way of referring to the current threat from Islamist terrorism both at home and abroad;

(b) "*Northern Ireland related terrorism*" (which describes the threat, currently posed mainly by dissident Republican groups, in Northern Ireland and potentially also in Great Britain); and

[15] Rt Hon. Lord Justice Gross, *National security and the courts*, speech to RUSI conference 16 November 2010.

(c) "*other forms of terrorism*" (a disparate category, ranging from far-right and animal rights inspired violence to terrorism prompted by foreign nationalist or separatist concerns).

Al-Qaeda inspired terrorism

History

2.5. It would be folly to pretend that the threat of large-scale terrorist attack in the United Kingdom has, over the period of almost 10 years since 9/11, been anything other than real and substantial. 52 innocent people were killed when four suicide bombers struck tube trains and a London bus on 7 July 2005. Widespread loss of life in the United Kingdom could also have ensued had any of the following plots succeeded:

(a) the fertiliser bomb plot of 2003-04, for which 600 kg of fertiliser had been purchased and a detonator designed (thwarted by Operation Crevice);

(b) the 2004 plot to use a radioactive dirty bomb and exploding limousines on targets in the United Kingdom (thwarted by Operation Rhyme);

(c) the London bombs of 21 July 2005, which failed to explode on three tube trains and a bus;

(d) the airline liquid bomb plot of 2006, which targeted multiple transatlantic flights (thwarted at the last moment by Operation Overt);

(e) the 2007 plot to kidnap and behead a British Muslim soldier in Birmingham (thwarted by Operation Gamble);

(f) the London/Glasgow bombings of 2007, in which two car bombs were disabled before they could be detonated in London, and a jeep loaded with propane cylinders was set on fire outside Glasgow airport (Operation Seagram)

(g) the attempted 2008 suicide bombing of a restaurant in Exeter, in which the bomb detonated prematurely;

(h) the 2008 plan to carry out a suicide bombing on a shopping mall in Bristol, pre-empted after members of the would-be-bomber's mosque told the police of their concerns.

2.6. All those incidents have already resulted in criminal convictions in the United Kingdom. The list takes no account of the plots or potential plots which the security service **[MI5]**, the police and their overseas counterparts have headed

off without the subsequent involvement of the courts. Nor does it take account of cases that have not yet come to trial, or of the United Kingdom citizens killed abroad by al-Qaeda inspired terrorist acts, including the 67 killed in the 9/11 attacks and the 24 in the Bali bombings of 2002.

2.7. However, in terms of successful al-Qaeda inspired plots in the United Kingdom, 7/7 remains thankfully unique. Save for Kafeel Ahmed, the terrorist who died of his injuries in 2007 after driving a blazing propane-filled Jeep towards the terminal building of Glasgow International Airport, not a single person was killed in the United Kingdom as a result of al-Qaeda inspired terrorism in the periods 2001-2004 or 2006-2010.[16]

Al-Qaeda inspired terrorism in 2010

2.8. Al-Qaeda inspired terrorism was the main focus of MI5 in 2010. Jonathan Evans, its Director General, reported in September that as many as 50% of its priority plots and leads were still linked to al-Qaeda in the tribal areas of Pakistan, down from 75% two or three years earlier. Others were connected with the activities of two al-Qaeda affiliates on opposite sides of the Gulf of Aden: al-Shabaab in Somalia and al-Qaeda in the Arabian Peninsula [**AQAP**], based in Yemen.[17] There have as yet been no terrorist convictions of people who have trained in Somalia or Yemen.

2.9. Jonathan Evans stated in the same speech that "*at any one time we have a handful of investigations that we believe involve the real possibility of a terrorist attack being planned against the UK*". He singled out the threat of the Yemen-based American preacher Anwar al-Awlaki, now widely reported to be on the US kill-or-capture list and to have been the target of an unsuccessful US drone attack in May 2011. Al-Awlaki's English-language addresses, in person or on-line, appear to have influenced a remarkably large number of Islamist terrorists in the west, including some of the 9/11 hijackers. His on-line publication "Inspire" – which seeks to emulate the graphical sophistication and youth-oriented vibe more normally associated with a style or sports magazine – was launched in 2010 and published its 5th edition in April 2011.

2.10. Vastly increased resources for the police and security services, and an increasing focus on home-grown terrorism, have improved the visibility to the authorities of al-Qaeda inspired activity in the United Kingdom. For almost five years, no major plot on the scale of Operation Overt has come close to fruition. 64% of the 138 "*Islamist-related terrorism offences*" between 1999 and 2010

16 See Clive Walker, "Terrorism and the Law" (OUP, 2011), Table 1.1 for the 2001-2009 figures.

17 https://www.mi5.gov.uk/output/the-threat-to-national-security.html, address to the Worshipful Company of Security Professionals, 16 September 2010.

which resulted in convictions are reported as having taken place in the three-year period 2005-2007.[18]

2.11. Whilst the nature of the threat may be changing, however, it would be premature to pronounce that it is diminishing. The following are among the most significant terrorist incidents in 2010:

(a) Rajib Karim, a software developer with British Airways, was charged in February 2010 with preparing terrorist acts and terrorist fundraising. He was convicted in February 2011 and sentenced to a minimum of 30 years in prison. He had been in direct contact with Anwar al-Awlaki, who had sent him an email asking "*Is it possible to get a package or person with a package on board a flight heading to the US?*"[19]

(b) King's College London student Roshonara Choudhry, a "lone wolf" radicalised over the internet by the sermons of Anwar al-Awlaki, stabbed Labour MP Stephen Timms in his constituency surgery in May 2010, and was subsequently convicted of attempting to murder him. This was the first Al-Qaeda-inspired attack on a public figure in the United Kingdom, and the first conviction in the United Kingdom of a female for a violent terrorist attack.

(c) Printer cartridge bombs, believed to have been planted by AQAP and designed to detonate in mid-air, were found on cargo planes at East Midlands Airport and in Dubai in October 2010.

(d) An alleged bombing campaign directed to a series of high-profile targets was halted when nine British Bangladeshis from Cardiff, London and Stoke-on-Trent were arrested in December 2010 and charged with conspiracy to cause explosions and conduct in preparation of acts of terrorism. Among documents found in police searches are reported to have been copies of "Inspire" magazine.

2.12. It is a striking fact that Anwar al-Awlaki is alleged to have been a direct or indirect inspiration for each one of those incidents.[20] Though al-Awlaki himself has expressed a strong preference for attacking targets in the US,[21] it is difficult to avoid the conclusion that even before the death of Osama bin Laden, he and his

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18 *Islamist Terrorism: the British connections* (2nd edition, July 2011).

19 *British Airways worker Rajib Karim convicted of terrorist plot*, The Guardian 28 February 2011.

20 As, among others, for the Fort Hood shootings of November 2009, the transatlantic airliner underpants bomb of December 2009 and the Times Square bomb of May 2010.

21 Al-Awlaki's last message to Rajib Karim, as it emerged at Karim's trial, included the words: "*Our highest priority is the US. Anything there, even on a smaller scale compared to what we may do in the UK, would be our choice*."

organisation had become one of the biggest terrorist threats to the United Kingdom.

2.13. Just as importantly, the incidents summarised above show the extent to which al-Qaeda inspired terrorism has moved into the internet age. Though terrorist training camps remain powerful instruments of radicalisation, nobody convicted of a terrorist offence in the United Kingdom during 2010 had attended a training camp.[22] Human contact may be important in strengthening the resolve of the suicide bomber and in passing on bomb-making techniques. It is now clear however that practical expertise, Jihadist doctrine and even the will to commit suicide can be conveyed effectively by email and over the internet, sometimes (as in the case of Roshonara Choudhry) without a significant element even of actual or on-line dialogue.

2.14. The threat from Al-Qaeda inspired terrorism may be seen to emanate in significant measure from United Kingdom nationals, in sharp contrast to the years immediately after 2001, when al-Qaeda inspired terrorism was seen largely as a foreign threat.[23] In particular:

(a) Two thirds of "*Islamist-inspired terrorism*" offences over the period 1999-2010 were perpetrated by United Kingdom nationals.

(b) 46% of the perpetrators, over the same period, resided in London.

(c) No foreign nationals were convicted of such offences in 2010.[24]

Northern Ireland related terrorism

History

2.15. The history of terrorism in the United Kingdom in the second half of the 20th century relates overwhelmingly to Northern Ireland. Between 1969 and the signing of the Belfast ("Good Friday") Agreement in April 1998, over 3,500 people died in attacks by Irish Republican and Loyalist terrorist groups. The great majority of incidents were in Northern Ireland itself, where in the early 1970s over 200 people were killed every year as a result of the security situation.

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22 *Islamist Terrorism: the British connections* (2nd edition, July 2011). 28% of all those convicted in the UK of "*Islamist-related terrorism offences*" between 1999 and 2010 had attended training camps: *ibid.*

23 Witness the former practice of detention without trial of terrorist suspects under ATCSA 2001, which was available only as against non-UK nationals and came to an end after it was ruled to be discriminatory by the House of Lords in *A v Secretary of State for the Home Department* [2004] UKHL 56. Ironically, the system of control orders which replaced it, though applicable to both UK and foreign nationals, has been used predominantly against British citizens.

24 *Islamist Terrorism: the British connections* (2nd edition, July 2011).

There were more than 50 such deaths a year, the great majority of them civilian, throughout the 1980s and early 1990s.

2.16. Significant numbers of deaths and injuries were caused also by IRA-inspired attacks on targets in England.

(a) During the 1970s, significant numbers were killed in the Aldershot bombing, M62 coach bombing, Guildford pub bombing and Birmingham pub bombing. This period also saw the assassinations of Ross McWhirter and Airey Neave MP.

(b) The 1980s saw the Hyde Park and Regents Park bombings in London, the Harrods bomb, the Brighton hotel bombing (in which the Prime Minister had a narrow escape) and the Deal barracks bombing – incidents which between them killed 22 members of the armed services and 11 civilians, and injured many more.

(c) The 1990s were marked by a mortar attack on the garden of 10 Downing Street, the Baltic Exchange and Bishopsgate bombings, which killed four people and caused almost £2 billion worth of damage, two bomb attacks on central Manchester, injuring over 270 people, and the Canary Wharf and Docklands bombings. Soldiers, children and Ian Gow MP were killed in other IRA attacks.

Deaths in Great Britain as a result of such attacks numbered approximately 45 in the 1970s, 33 in the 1980s and 13 in the 1990s.

2.17. The political process and continuing implementation of the Good Friday Agreement has brought about a dramatic decline in terrorist activity in Northern Ireland. Since 2001, there have been no attacks in Great Britain by Northern Ireland related groups. Nonetheless, the threat from terrorist groups in Northern Ireland remains, and indeed has grown appreciably over the past few years. The murder of PC Ronan Kerr in April 2011 is a reminder that there have been fatalities in Northern Ireland due to the security situation in every year since 1969.[25]

Northern Ireland related terrorism in 2010

2.18. It is not always easy (or politic) to decide whether Northern Ireland related violence should be classed as terrorism for the purposes of TA 2000, and official statistics tend to refer instead to incidents related to the security situation. It is notable however that there were 42 attacks on national security targets in

[25] Annual figures are in the PSNI's *Police Recorded Security Situation Statistics 2010/11,*12 May 2011. 62 "*deaths due to the security situation*" are recorded between April 2001 and March 2011, 32 of them in the first two years of that period.

2010,[26] many of them targeting members of the PSNI and the British Army. PSNI recorded one security-related death in 2010/11, 72 shooting incidents, 99 bombing incidents (the highest number recorded since 2002) and 83 casualties as a result of paramilitary-style attacks. There were also many bomb hoaxes, which cause significant disruption to the public and have themselves been followed by the shooting of officers lured to the scene. The majority of these incidents were attributed to dissident republicans, but a significant minority to loyalists.

2.19. The current threat comes principally from dissident republican terrorist groups opposed to the political process, including the Real Irish Republican Army **[RIRA]**, which was responsible for the murder of two soldiers outside the Massereene Barracks in March 2009, the Continuity Irish Republican Army **[CIRA]**, which was responsible for the murder of PC Stephen Carroll in 2009 and Óglaigh na hÉirann **[ONH]**, which has claimed responsibility for a number of attacks since 2009. Some unaffiliated individuals have been engaged in or have supported attacks.

2.20. Robert Whalley CB, the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, whose extensive contacts in the province are detailed in his Third Report of November 2010, concluded in it:

> "There has been a serious deterioration in the security situation in the past year."[27]

That view was expressed not only by the security authorities but, in Mr Whalley's words, "*in every conversation I have had with the political parties and others*". As demonstrated by the several very serious incidents over the past few months, the deterioration remarked upon by Mr Whalley has unfortunately not been reversed.

Other terrorism

2.21. The only other type of terrorism that in 2010 posed a credible risk to human life in the United Kingdom is far-right extremist terrorism. That was demonstrated the previous year by the conviction of Neil Lewington, a white racist extremist found on Lowestoft station with bomb components. A number of further trials and convictions followed in 2010.

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26 *Twenty-fifth report of the Independent Monitoring Commission* HC 565, 4 November 2010. Publication of the 26th and last report of the IMC, covering the period from September 2010 to February 2011, was due in June 2011 but has been delayed. I understand that in place of the IMC reports, which have until now been the most detailed open-source account of the security situation in Northern Ireland, Ministers are to update Parliament every six months on the position.

27 *Report of the Independent Reviewer, Justice and Security (Northern Ireland) Act 2007, Third Report: 2009-2010*, November 2010, paragraph 63.

2.22. These included:

(a) The conviction and imprisonment for 10 and two years respectively of Ian and Nicky Davison, leading members of the Aryan Strike Force, for offences including preparing for acts of terrorism and making a chemical weapon (ricin) capable of killing nine people

(b) The conviction of Trevor Hannington, who had called on the internet for the killing of Jews and black people, for TA 2000 and TA 2006 offences including collecting information likely to be of use for terrorism and disseminating an instructional video on how to make a flamethrower. His co-defendant Michael Heaton was convicted of inciting racial hatred.

2.23. Other white males (including Darren Tinklin and Terence Robert Gavan, a BNP member) were convicted of explosives and firearms offences in 2010 without it being sought to establish a terrorist motivation for their actions. In June 2011 there were 17 people serving prison sentences in the United Kingdom for terrorism-related offences who are known to be associated with extreme right-wing groups.[28]

2.24. Such cases attract less publicity than cases of al-Qaeda related terrorism. Those involved in extreme right-wing terrorism tend to be less well trained, and less ambitious. As the above examples indicate, however, right-wing terrorism is not a negligible threat.

The counter-terrorism machine

2.25. The Government's strategy for protecting the United Kingdom and its interests overseas from al-Qaeda inspired terrorism has since 2003 been CONTEST. CONTEST has four strands: *Pursue* (to stop terrorist attacks); *Prevent* (to stop people from becoming terrorists or supporting violent extremism); *Protect* (to strengthen protection against terrorist attack) and *Prepare* (where an attack cannot be stopped, to mitigate its impact). That categorisation functions well. It has survived three revisions of CONTEST (the third published on 12 July 2011),[29] and inspired the equivalent EU strategy.[30] The Prevent strand was itself reviewed in June 2011. The subject-matter of this and my other reviews falls very largely within the Pursue strand, though in certain respects (e.g. the impact on communities of stop and search, and detention at ports and borders) it impacts also upon Prevent and Protect.

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28 *Prevent Strategy* Cm 8092, June 2011, 5.10.

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

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

2.26. The United Kingdom counter-terrorism resource has been transformed in scale and in organisational nature, not just since 2001 but in particular since 2005, when the 7/7 bombings and the failed attacks of 21/7 made it plain that United Kingdom targets were threatened at least as much by home-grown terrorists as by those from abroad; and that those home-grown terrorists were by no means confined to London.

2.27. At the heart of the Government's counter-terrorism effort is OSCT, an executive directorate of the Home Office, which has direct responsibility for some aspects of counter-terrorist strategy and co-ordinates the activities of many Government Departments and agencies. OSCT was formed in 2007 to replace the Counter-Terrorism and Intelligence Directorate. Its staff of around 500 include a number with a background in the Foreign Office and security services.

2.28. Of the three security services - MI5, Secret Intelligence Service **[MI6]** and the Government Communications Headquarters **[GCHQ]** – it is MI5 which is most directly responsible for protecting the United Kingdom from threats to national security, including terrorism.[31] Several hundred "leads" to terrorism and violent extremism relevant to the United Kingdom are received at Thames House, its London headquarters, every month. Those leads come from MI6, GCHQ, MI5 telephone intercepts, covert human intelligence sources **[CHIS]**, from members of the public or from other countries. Those leads are prioritised, and the higher priority leads investigated using the capabilities of MI5, the police and other agencies.

2.29. The Joint Terrorism Analysis Centre **[JTAC]**, based in Thames House, is the United Kingdom's centre for the analysis and assessment of international terrorism. It sets threat levels for international terrorism, independently of Ministers, and produces more in-depth reports on terrorist networks and capabilities. Since it was first published in August 2006, the threat level for international terrorism has generally stood at SEVERE (meaning that JTAC judged a terrorist attack to be highly likely). It was raised to CRITICAL, meaning that an attack was considered imminent, for periods of a few days in 2006 and 2007, immediately following the arrests in Operation Overt (the airline liquid bomb plot) and Operation Seagram (the London/Glasgow bomb plot).

2.30. The threat level was reduced to SUBSTANTIAL in June 2009, meaning that an attack is a strong possibility, before being raised again to SEVERE on 22 January 2010. There it remained until 11 July 2011, when it was once again reduced to SUBSTANTIAL.

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

2.31. Threat levels from Northern Ireland related terrorism, set by MI5, were published for the first time in September 2010. These threat levels were, and have remained, SEVERE for Northern Ireland and SUBSTANTIAL for Great Britain.

2.32. The policing lead in counter-terrorism matters lies with SO15 Counter Terrorism Command, based at Scotland Yard. Created in 2006, SO15 took over the roles of the former SO12 Special Branch and SO13 Anti-Terrorist Branch. Subsequently, four regional counter-terrorism units **[CTUs]** were set up in the North East, North West, West Midlands and South East. These units accommodate detectives, community contact teams, financial investigators, intelligence analysts, hi-tech investigators ports officers and embedded MI5 personnel. Each has a lead force (e.g. West Yorkshire Police in the North East) but is considered a national asset for its region as a whole. Counter-Terrorism Intelligence Units **[CTIUs]** are located in the other five Association of Chief Police Officers **[ACPO]** regions: Northern Ireland, Scotland, Wales, the North-West and the East of England. These are also substantial operations, but focussed on intelligence rather than on the investigation of offences. CTUs and CTIUs are paired up e.g. for training purposes, but operational deployment of counter-terrorism "assets" to other regions is co-ordinated by the Senior National Co-ordinator (Counter Terrorism). Collectively, SO15, the CTUs and the CTIUs are known as the Police National Counter-Terrorism Network – or "*the Network*".

2.33. The increase in the United Kingdom's counter-terrorist capacity in recent years, at least in Great Britain, has been huge. Early in 2010, the Home Affairs Select Committee reported that there were 7,700 police officers engaged in "*counter-terrorism and protective security*" across the country, with 3,000 of them engaged "*directly with what people think would be counter-terrorism*".[32] Government funding for counter-terrorism policing is some £567 million in 2010-11. The consolidated Security and Intelligence Agencies budget is set at £2 billion per annum: MI5 alone employs 3,800 people, up from less than 2,000 in 2001.

2.34. Northern Ireland is in a somewhat different position. Though police numbers remain large by British standards (7765 regular officers, as of April 2011), this compares with some 13,000 when the PSNI was founded in 2001. Policing (though not security) was devolved in 2010: but the increase in terrorist activity since 2007, the relatively small proportion of MI5 resources dedicated to

[32] *The Home Office's Response to Terrorist Attacks*, Home Affairs Committee 6th report of 2009-10, 2 February 2010, paragraph 49. The Committee expressed reservations about the considerable extent to which counter-terrorism policing is ring-fenced from other areas of police work, and concerns about the mechanisms for oversight of the police counter-terrorism budget: paragraphs 51-52.

Northern Ireland,[33] the drawdown in the military presence and the resources now being devoted to "*policing the past*" via the many pending investigations and inquests[34] leave no room for any suggestion that the PSNI is over-resourced in this area.

[33] Put at 15% of its total budget by the Home Affairs Committee 6th report of 2009-10, paragraph 53, on the basis of an article in *The Economist*.

[34] I was told in May 2011 that there were 155 outstanding investigations and 39 pending inquests in Northern Ireland, some of them very old.

3. DEFINITION OF TERRORISM (TA 2000 PART I)

3.1. Section 1 of TA 2000, as amended by TA 2006 and CTA 2008, defines terrorism. That definition is of central importance to terrorism law. It contributes to the definition of a number of offences, and forms the trigger for a number of powers including proscription, stop and search, arrest, the freezing of assets and control orders. The definition of terrorism was the subject of a report by Lord Carlile in 2007.[35]

3.2. The TA 2000 definition is remarkable by its breadth. Thus:

(a) The use or threat of action may constitute terrorism when it involves not only serious violence against a person or the endangering of human life, but the creation of a serious risk to health and safety, or serious damage to property.

(b) Where firearms or explosives are used or threatened, the only mental element required for terrorism is that the use or threat of use be made for the purposes of advancing a political, religious, racial or ideological cause.

(c) In other cases, a further mental element is also required: that the use of threat be designed to *influence* the government (or an international governmental organisation), or to *intimidate* the public or a section of the public.

(d) An action or threat of action may constitute terrorism even if it is taken outside the United Kingdom, directed to non-UK targets and designed to influence a foreign government or intimidate the public in another country.

3.3. That definition has international parallels but contrasts for example with the EU definition, as contained in the Council Framework Decision on combating terrorism.[36] That does not seek to define the range of terrorist causes (political, religious etc.) but is more restrictive in defining the categories of terrorist act and the desired impact on government (which must be something considerably more forcible than "influence").[37]

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35 *The Definition of Terrorism*", Cm 7052, March 2007.

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

37 Under the EU definition, the aim must be seriously to intimidate a population; unduly to compel a Government or international organisation to perform or abstain from performing any act; or seriously to destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation. Cf. the model definition of terrorism suggested by Martin Scheinin, UN Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism: Human

3.4. A broad definition of terrorism is understandable, in view of the various and constantly mutating forms of the threat. Furthermore, the most striking feature of the TA 2000 definition – the fact that terrorist action is "*equally criminal whether it is intended to take place in the UK or elsewhere*"[38] – reflects in relation to some offences at least the requirements of international law.

3.5. Huge numbers of people who would not be generally thought of in this country as terrorists – most topically, perhaps, participants in the revolutions and uprisings referred to collectively as the Arab Spring of 2011 – are however branded as terrorists under the TA 2000 definition. This has consequences not only for their theoretical susceptibility to prosecution,[39] but for the use of many other powers, including those listed at 3.1 above, which are dependent upon the possibility that a person may be a terrorist or committing terrorist acts.

3.6. It is undesirable, as a rule, for criminal offences to be defined so broadly as to depend wholly on prosecutorial discretion for their sensible use. As the point was put by Lord Bingham, in another context:

> "The rule of law is not well served if a crime is defined in terms wide enough to cover conduct which is not regarded as criminal and it is then left to the prosecuting authorities to exercise a blanket discretion not to prosecute to avoid injustice."[40]

A broad definition of terrorism may serve also as a temptation to use other powers (including port and border controls) for purposes other than that for which they are intended.[41]

3.7. It is not easy however to see a principled basis upon which the scope (in particular, the extra-jurisdictional scope) of the United Kingdom's definition of terrorism could or should be reduced. In practice, the prosecution of persons for terrorist offences committed outside the United Kingdom, or directed towards non-UK targets, tends to be restricted to cases in which there is some United Kingdom connection.

Rights Council, 16th session, A/HRC/16/51, 22 December 2010. Lord Carlile suggested in his 2007 report that "influence" in TA 2000 definition be replaced by "intimidation": that suggestion was not taken up.

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

39 Mitigated to some extent by section 117(2A) TA 2000, expanded in response to a recommendation of Lord Carlile, which requires the Attorney General's consent to a prosecution of an offence committed outside the UK, or for a purpose wholly or partly connected with the affairs of a country outside the UK. Consent was given under this section for 14 prosecutions in 2010, of which over half related to charges over the Christmas period.

40 *R v K* [2001] UKHL 41, paragraph 24.

41 For example, I have heard it incorrectly suggested by a ports officer that the presence of terrorism in almost every country in the world could provide a justification for using the TA 2000 Schedule 7 power to examine persons from countries whose nationals pose no terrorist threat to the UK, but who could nonetheless be of interest for counter-espionage purposes.

3.8. On a different note, the Government's Counter-Terrorism and Security Powers Review briefly considered expanding the definition of terrorism, as a possible way of securing the proscription of organisations which are not involved in terrorism but which incite hatred or violence not falling with the current definition of terrorism. The suggestion was rejected, a conclusion with which I would unhesitatingly agree.[42] To categorise the incitement of religious hatred as "*terrorism*", and to visit it with the full weight of sanctions applicable to terrorist crimes (stop and search powers, extended detention, financial sanctions, control orders) would have been heavy-handed and almost certainly counter-productive as a solution to the problem.

3.9. I make no recommendations at this stage in relation to the definition of terrorism – though I shall refer to the breadth of that definition, and its consequences, when considering the operation of other Parts of the Act.

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

4. PROSCRIBED ORGANISATIONS (TA 2000 PART II)

Law

4.1. An organisation may be proscribed by the Secretary of State under section 3 TA 2000 if she believes that it is "*concerned in terrorism*", a phrase that encompasses not only participation in and preparation for terrorism but the promotion and encouragement of terrorism. Subsections inserted by the TA 2006 provide that promotion and encouragement is to include glorification, though – importantly – only if such glorification is unlawful in the sense that it encourages emulation of the conduct or type of conduct that is being praised or celebrated.

4.2. In cases where the statutory test is satisfied, the Secretary of State exercises her discretion over whether or not to proscribe by reference to five factors. Those are:

(a) the nature and scale of the organisation's activities;

(b) the specific threat that it poses to the United Kingdom;

(c) the specific threat that it poses to British nationals overseas;

(d) the extent of the organisation's presence in the United Kingdom; and

(e) the need to support other members of the international community in the global fight against terrorism.

The last of those factors is of particular significance. It fuels the widespread belief that the proscription of groups based overseas is in many cases ordered and maintained not because of any credible threat to the safety of the United Kingdom or its citizens, but in order to further United Kingdom foreign policy goals by pleasing other governments.

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

4.4. The great majority of terrorism offences, and of counter-terrorism powers, may however be triggered without the need to prove any connection to a proscribed organisation. This reflects the difficulties in proving membership of proscribed organisations and – more fundamentally – the fact that terrorist cells and "*lone wolves*" alike can and do operate without being members of any defined organisation, let alone one which has been identified and proscribed under TA 2000.[43]

4.5. Where a proscribed organisation operates under a name other than that specified in Schedule 2, the Secretary of State may order under TA 2000 section 3(6) that the name be treated as another name for the listed organisation.

4.6. Proscription issues are considered by the Proscription Review and Recommendation Group **[PPRG]** and the Proscription Working Group **[PWG]**. Both are chaired by OSCT. The PPRG is attended principally by representatives from the Home Office, Foreign Office and JTAC. In its meetings, one of which I have attended, it reviews the status of the proscribed groups, on the basis of a review produced by JTAC, ensuring that each group is reviewed at least once in each year. It also ensures that the necessary evidence exists for the proscription of new groups to be considered. The PWG is a more senior group, attended in addition by representatives from police, the security and intelligence agencies, Cabinet Office and a range of Government departments. It pays particular attention to any "*difficult cases*" identified by the PPRG, and makes recommendations to the Home Secretary on which groups should be proscribed or deproscribed.

4.7. Parliament must agree to the proscription of any new organisation by approving the affirmative order adding the organisation to the list of proscribed organisations. Parliament does not have access to the classified material relied upon by JTAC, and has never withheld its approval.[44]

4.8. A proscribed organisation, or any person affected by its proscription, may apply to the Secretary of State for deproscription: TA 2000 section 4, a procedure governed by a very brief set of regulations.[45] It the application is rejected, an appeal may be brought to the Proscribed Organisations Appeal Commission **[POAC]**, a superior court of record whose chair must hold, or have held, high

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

44 Though the debate can be interesting: see, in relation to the proscription in 2011 of the Pakistan Taliban, Hansard (HL) 19 January 2011 col 603ff; Hansard (HC) 20 January 2011 HC col 963ff.

45 The Proscribed Organisations (Applications for Deproscription) Regulations 2001, SI 2001 No. 107.

judicial office.[46] POAC determines appeals in accordance with judicial review principles. It can sit in closed session and appoint special advocates for the purposes of dealing with secret evidence. From POAC, a further appeal on questions of law lies, by permission, to the Court of Appeal or Court of Session.[47]

Practice

Proscription

4.9. 62 terrorist organisations are currently proscribed under TA 2000. Of those:

(a) 14 are terrorist organisations connected to Northern Ireland: their proscription is the responsibility of the Secretary of State for Northern Ireland. Each of these groups was originally proscribed under legislation predating TA 2000. The list of proscribed organisations connected to Northern Ireland, which includes the Irish Republican Army **[IRA]**, Irish National Liberation Army **[INLA]**, Ulster Volunteer Force **[UVF]** and Ulster Defence Association **[UDA]**, has not changed since TA 2000 came into force. That list is significantly longer than the comparable list of "*specified organisations*" whose members are not eligible for early release from prison because the organisations are concerned in terrorism connected with the affairs of Northern Ireland and have not entered into a ceasefire.[48]

(b) 46 are international terrorist organisations. 40 were placed on Schedule 2 between 2001 and 2005. Seven have been added since, including one in 2010 and one in 2011. One organisation (PMOI, the People's Mujahideen of Iran) was deproscribed in 2008.

4.10. There were two developments in 2010 on the proscription front:

(a) Al-Muhajiroun, Islam4UK and three other appellations were ordered in January 2010 to be treated as alternative names for al-Ghurabaa and the Saved Sect, each of which had been proscribed in 2006. Al-Muhajiroun was founded in the United Kingdom in 1996 by Omar Bakri Mohammed. It was disbanded in 2004, Al Ghurabaa and the Saved Sect being successor organisations. The reformation of al-Muhajiroun was publicly announced by Anjem Choudhary in the spring of 2009. It has been claimed that more

46 TA 2000, section 5 and Schedule 3.
47 TA 2000, section 6.
48 The Northern Ireland (Sentences) Act (Specified Organisations) Order 2008, SI 2008 No. 1975, lists only six such organisations.

Islamist terrorists convicted over the period 1999-2010 had direct links to al-Muhajiroun than to any other group, including al-Qaeda.[49]

(b) Al-Shabaab, which controls part of the territory of Somalia and aims to establish an Islamist state there, was proscribed in March 2010. It has used violence against the Somali Transitional Federal Government and African Union peacekeeping forces since 2007. The group was proscribed in March 2010. In September, the Director General of MI5 stated publicly that "*significant numbers*" of United Kingdom residents were training in al-Shabaab camps to fight in the insurgency there.[50]

No attempt was made by these groups to apply for deproscription, as would be required if they were to bring their cases before POAC.

Deproscription

4.11. Eleven applications for deproscription were received between 2001 and 2009, three of them in 2009. There were no applications in 2010. All deproscription applications to date have been refused by the Secretary of State under the applicable rules.[51] One of those refusals was appealed, successfully, to POAC in 2007.[52] The Home Secretary was refused permission to appeal to the Court of Appeal.

4.12. I have verified for myself, by examination of deproscription applications made in 2009, that the Home Secretary is presented with thorough advice, with clear reference to the legal criteria, and has sight of all the supporting documentation. She is also provided with a reasoned and comprehensive response to be issued to the applicant for deproscription. The applicable Regulations make no provision, however, for the applicant to comment on the reasons advanced by the Home Secretary (let alone such secret reasons as she may not be able to advance). Plainly, the application for deproscription is no substitute for the independent scrutiny that can, if necessary, be brought to bear by POAC.

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49 Robin Simcox, Hannah Stuart and Houriya Ahmed, *Islamist Terrorism – the British Connections*, 2nd edn 2011. 18% of all "*Islamist-related terrorist offences*" over this period were said to have been linked to al-Muhajiroun, as against 13% to al-Qaeda. Five of the 11 individuals convicted for the first time of Islamism-related terrorist offences in 2010 are said to have been members of al-Muhajiroun.

50 https://www.mi5.gov.uk/output/the-threat-to-national-security.html, paragraph 14.

51 The Proscribed Organisations (Applications for Deproscription) Regulations 2001, SI 2001 No. 107.

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

4.13. The TA 2000 makes no specific provision for deproscription, save on application by the organisation concerned or any person affected – a category broadly understood in the *PMOI* case. Implicit in the annual review of each organisation that is performed by JTAC and the PPRG is the possibility that deproscription might be ordered on the Government's own initiative. However, no such step has ever been taken.

4.14. There are a number of reasons for this. The process is one-sided in that it is conducted without any input from the proscribed organisation itself. The status quo is easier to maintain, since proscription is indefinite in duration and the Home Secretary has no statutory duty to consider deproscription of her own motion. Taking some organisations off the list could well be unpalatable to foreign governments. Huge political sensitivities would undoubtedly attend any governmental deproscription initiative with a bearing on Northern Ireland. Accordingly, and notwithstanding the regular Government reviews of each organisation, the reality appears to be that the impetus for deproscription must come from the organisation itself (if still active), or its supporters.

Prosecutions

4.15. Proscription offences are among the most commonly charged offences under the terrorism legislation. In Great Britain, offences under TA 2000 sections 11-13 were charged as the principal offence in 31 cases between 2001 and 2010, with 17 convictions,[53] and no doubt as subsidiary offences in many more. In Northern Ireland, offences under TA 2000 sections 11-13 were charged 101 times over the same period (whether as principal or subsidiary offences), some 30% of all charges under TA 2000.[54] More than 80% of the charges in Northern Ireland were for membership of a proscribed organisation.

Conclusion and recommendations

The utility of proscription

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

- to deter terrorist organisations from operating in the United Kingdom, and to disrupt their ability to do so, and

- to support other countries in disrupting terrorist activity, and to send out a strong signal across the world that such organisations, and their claims to legitimacy, are rejected.

53 HOSB 18/10, 28 October 2010, table 1.3(a).

54 Northern Ireland Terrorism Legislation: Annual Statistics 2009/10, table 5a.

4.17. I echo the comment of Lord Carlile in his last review that "*the proscription of organisations is at best a fairly blunt instrument, especially when compared with the menace that can emerge from the internet*".[55] Laws designed in an age of membership cards and uniforms, and still effective across the Irish Sea in relation to groups "*whose names are legends in songs and inscribed on gravestones*",[56] are difficult to apply to the flexible networks of al-Qaeda inspired terrorism in the 21st century, let alone to the "lone wolf" who is part of no network at all.

4.18. The evidence is however that Part II TA 2000 can still be effective where al-Qaeda related as well as Northern Ireland related terrorism are concerned. The law on proscription, unlike for example the exercise of stop and search powers, is rarely cited as a source of community grievance. It produces real, if modest, gains in terms of convictions and has the ability to disrupt harmful organisations and to change their behaviour.

4.19. It remains to consider whether the process of proscription and deproscription is operating satisfactorily, or whether change needs to be recommended.

Broadening the test for proscription

4.20. As the Review of Counter-Terrorism and Security Powers pointed out in its findings, "*The current test [for proscription] is certainly broad enough to encompass any terrorism-related activity by any organisation*". However, mindful perhaps of the declared intention of both Tony Blair (in 2005) and the Conservative Party (in 2010) to proscribe Hizb ut-Tahrir, the Review went on to consider whether it would be practical either to expand the definition of terrorism or to amend the statutory test for proscription under TA 2000 so as to include not only organisations are concerned in terrorism, but those that promote views which incite hatred or violence which falls outside the scope of TA 2000 section 1.

4.21. As the Review concluded:

> "There have been a very limited number of prosecutions against individuals under existing hatred legislation and it may therefore be difficult to establish that certain groups would meet the threshold to be banned. A new regime could also be difficult to frame in a way that limits its scope to the intended target without including a wider range of organisations with varying views on race, religion and sexual orientation. It could also be viewed as an unwarranted interference with the principles of freedom of speech and political activity."

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55 Report on the operation of TA 2000 in 2009, July 2010, paragraph 73.

56 Clive Walker, *Terrorism and the Law* (OUP 2011), 8.71.

Those are formidable difficulties, which appear amply to justify the decision to stick with the status quo. A detailed study has suggested that the proscription of groups such as Hizb ut-Tahrir would prove both ineffective and counter-productive,[57] though the contrary view also demands respect.[58]

The process of proscription

4.22. The process of proscription is a convenient one for the executive. Subject only to the assent of Parliament and to consideration of the five discretionary factors set out above, the Secretary of State may proscribe an organisation on the basis of nothing more than a belief that it is, in the broadest possible sense, concerned in terrorism. Neither before nor after the addition of an organisation to Schedule 2 is she required to satisfy a court that it *is* concerned in terrorism. The only legal constraint she faces is the possibility that a proscribed organisation may subsequently seek to discharge the burden of persuading POAC that her decision was flawed on public law grounds.

4.23. It is arguable that where a right as important as the freedom of association is concerned, guaranteed by Article 11 of the European Convention on Human Rights, a less restrictive system should be operated. Possible alternative models are:

(a) The control order system under the PTA 2005, under which the burden could be placed on the Secretary of State to satisfy POAC, before or shortly after action was taken, that proscription was justified[59]

(b) Less radically, the placing of an obligation on the Secretary of State to consult the organisation concerned before proscribing it.

4.24. The first of those alternatives would add considerably to the time that would be required for an organisation to be proscribed. This would be highly undesirable in the context of organisations which are able and willing to change their names in order to avoid proscription. Though a decision to proscribe, not authorised by a court, could indeed cause unfairness, the impact of such a decision on individuals is scarcely likely to compare to that of a control order, or even an asset freezing measure.

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57 Houriya Ahmed and Hannah Stuart, *Hizb ut-Tahrir – ideology and strategy*, Centre for Social Cohesion 2009, p. 128.

58 Ed Husain, *The Islamist* (Penguin, 2007).

59 Compare the recent recommendation of the Joint Committee on Human Rights that prior judicial consent should be required before an area may be authorised for the use of stop and search powers under TA 2000 section 47A: 14th Report of 2010-12; HL Paper 155, HC 1141, 15 June 2011.

4.25. The second alternative is attractive at first sight, and was argued to be necessary at an early stage of PMOI's long campaign for deproscription. POAC however dismissed those arguments in the following terms:[60]

> "It is inevitable that much of the evidence upon which the Secretary of State will act is derived from classified information provided by the Security and Intelligence services. This information cannot be disclosed to the suspect organisation or made available to Parliament, save in broad outline. As such, an effective review of the information can only take place if there is a system akin to the one created by Parliament in the present case ... Moreover while in some cases it may be possible to consult the organisation and listen to their representations before proscription, in the majority it will be impracticable or undesirable. Such organisations frequently have a shadowy existence; it is difficult to identify who may be the appropriate person or body to consult with; and as the appellants recognise it is likely to be pointless and self-defeating to consult with organisations such as al-Qaeda even if it were possible to do so."

4.26. I have, in addition, reviewed the relevant documents and have heard no representations to the effect that the Home Secretary abused her discretion in the proscription decisions that she made in 2010 as regards al-Muhajiroun, Islam4UK or al-Shabaab.

4.27. On the basis of what I have seen, therefore, I do not recommend changes to the system for proscription. As POAC emphasised, however, that executive-friendly system is fair only so long as there is an effective means for an organisation which was wrongly proscribed or which has ceased terrorist activity to be depsroscribed.

The process of deproscription

4.28. As noted above, despite regular reviews the Secretary of State has never so far recommended deproscription, either of her own motion or on application by a proscribed organisation. While organisations are free to apply, and while annual reviews are conducted of each proscribed organisation, there may in practice be significant obstacles of a political of foreign policy nature in the way of a decision to deproscribe.

4.29. The only organisation to achieve deproscription in the past 10 years – the People's Mojahadeen Organisation of Iran **[PMOI]** – did not obtain it from the Home Secretary but was obliged to go on appeal to POAC. The POAC procedure could not be described as wholly fair, for the simple reason that some of the evidence could not be disclosed to PMOI. However, it was as thorough as

[60] In a preliminary issues Determination of 15 November 2002, paragraphs 64-73 of which are set out at paragraph 61 of the main *PMOI* judgment.

circumstances allowed. The course which it took, expressly approved by the Court of Appeal, was

> "to conduct an intense and detailed scrutiny of both open and closed material in order to decide whether this amounted to reasonable grounds for the belief that the PMOI was concerned in terrorism".[61]

4.30. In order to achieve this level of scrutiny, while at the same time protecting to the greatest extent possible both the requirements of confidentiality and the right of PMOI to a fair trial, the appeal required the formulation of written pleadings, the production of voluminous evidence, the attendance of witnesses from abroad for cross-examination, the instruction of seven barristers, including two special advocates to deal with secret material, a seven-day hearing and a judgment of almost 150 pages. A permission hearing extending over three days followed in the Court of Appeal, and had permission to appeal been granted, the already considerable costs would no doubt have increased further.

4.31. PMOI, fortunately, was a well-funded organisation which could afford to initiate the case brought on its behalf and to see it through. The same is not true of all proscribed organisations. Indeed some may be caught by Catch 22, for any attempt by them to raise money risks falling foul of the prohibition on fund-raising in TA 2000 section 15.[62]

4.32. I have been approached on behalf of one proscribed organisation, the International Sikh Youth Federation, whose supporters believe that it continues to be proscribed only as a sop to the Indian Government. They wish it to be deproscribed but have no faith in the process of internal review, and after spending some £50,000 in preparing POAC proceedings in 2001-03, subsequently withdrawn, are unwilling to contemplate recourse to what they describe as the "*slow, secretive and costly*" procedure of an appeal to POAC. It would be understandable if the same were true of others. It may even be that there are proscribed organisations in Schedule 2 which have not only ended any involvement in terrorism, but effectively ceased to function altogether. It is hardly likely in those circumstances that anyone would be prepared to go to the expense of approaching POAC on their behalf.

4.33. There seems to me to be a problem where deproscription is concerned, stemming from a combination of three factors:

(a) the relative ease (for the Government) of obtaining proscription

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61 [2008] EWCA 443, paragraph 43.

62 Legal aid is not excluded for POAC proceedings: Access to Justice Act 1999, Schedule 2, paragraph 2(l). Its availability will however be affected once the Legal Aid, Sentencing and Punishment of Offenders Bill 2011 has become law.

(b) the ineffectiveness of annual administrative reviews, conscientious though they may be, to achieve deproscription in the face of what may often be a considerable political incentive to maintain proscription; and

(c) the time and cost that is necessary to mount a claim for deproscription before POAC, exacerbated by the difficulties that proscribed organisations experience – in part, as a consequence of their proscription – in raising money to pay for such proceedings.

A symptom of that problem is the fact that in 10 years of considerable political change (not least in Northern Ireland) only one organisation has ever achieved deproscription, and that after a struggle lasting many years. As noted at 4.9(a) above, there is a marked contrast with the position under the Northern Ireland (Sentences) Act 1998.

Recommendations

4.34. The problem could be eased by the introduction of a legislative requirement that all proscriptions shall expire after a set period, the onus then resting on the Secretary of State to reproscribe if she wishes to do so. Much of the work to this end is done anyway under the current review system; but this relatively modest change could concentrate minds and render it less easy for deproscription to be defeated by foreign policy considerations.

4.35. **Organisations which are no longer involved in terrorism should have a realistic chance of achieving deproscription without the need to embark upon POAC proceedings. This should be achieved by requiring that all proscriptions shall expire after a set period, the onus then being on the Secretary of State to seek the assent of Parliament if she wishes to reproscribe and to demonstrate (with reasons) that the conditions for doing so are made out.**

4.36. **The absence of an organisation said to be concerned in Northern Ireland related terrorism from the list of "*specified organisations*" under the Northern Ireland (Sentencing) Act 1998 should be given particular weight when the proscription of such an organisation is reviewed.**

5. TERRORIST PROPERTY (TA 2000 PART III)

Law

5.1. Laws against the funding of terrorism have been on the statute book since 1989, and are demanded by the 1999 UN Convention for the Suppression of the Financing of Terrorism as well as by the 2001 and 2004 Special Recommendations on Terrorist Financing of the Financial Action Task Force [**FATF**], an organ of the G8. TA 2000 Part III, as significantly amended in particular by SI 2007/3398[63] and by CTA 2008, gives effect to those demands and in some respects goes beyond them.

5.2. Terrorist property is broadly defined in TA 2000 section 14 as money or other property which is likely to be used for the purposes of terrorism (including any resources of a proscribed organisation), proceeds of the commission of acts of terrorism and proceeds of acts carried out for the purposes of terrorism.

5.3. Sections 15-18 contain the principal offences under this Part. They catch all stages of the financing of terrorism: respectively, fundraising for the purposes of terrorism, use and possession of property for the purposes of terrorism, participation in arrangements for the funding of terrorism and the laundering of terrorist property. The required mental element for those offences is knowledge (or intention) that the money should be used, or reasonable cause to suspect that it may be used, for the purposes of terrorism: though under section 18, the onus is on the defendant to prove that he did *not* have this mental element.

5.4. By section 63, these offences may be committed outside the United Kingdom. By section 22, each offence is punishable by up to 14 years in prison. By sections 21 and 21ZA-21ZC, a person does not commit an offence under sections 15-18 if he discloses what he knows to the police or to the Serious Organised Crime Agency [**SOCA**] in good time, or has the consent of SOCA to become involved.

5.5. Sections 19 and 21A-22A concern a complex series of provisions concerning the disclosure of information. In summary:

(a) Section 19 imposes a far-reaching duty on those who believe or suspect the commission of an offence under sections 15-18, based on information that has come to their attention in the course of their trade, profession, business or employment, to disclose that belief or suspicion as soon as reasonably practicable, together with the information on which it is based, to the police, SOCA or his employer. Legal professional privilege overrides the duty to

[63] The Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007.

disclose: but subject to that, by section 20, disclosure is permitted notwithstanding what would otherwise be a legal bar. Failure to disclose, without reasonable excuse, is an offence punishable by up to five years in prison.

(b) Sections 21A and 21B make provision comparable to section 19 for disclosure by persons who come by their information when working in the regulated sector as defined in Schedule 3A (e.g. bankers, insurance intermediaries, accountants, insolvency practitioners and estate agents). The maximum penalty is again five years in prison. The duty is however stricter even than section 19, in that reasonable grounds for knowledge or suspicion are enough to ground the offence: actual knowledge or suspicion is not required. The distinction is said to be justified by greater awareness and higher standards of reporting in the financial sector.[64]

(c) Section 21C requires the police to pass on any information disclosed under Part III to SOCA.

(d) Section 21D creates an offence, punishable by up to five years in prison, of "*tipping off*" another person (with the exception of persons specified in sections 21E-G) that a Part III disclosure has been made or is being investigated, with the likely result of prejudice to any consequent investigation.

5.6. Sections 23-23B provide for the court before which a person is convicted of a range of terrorist offences, not limited to offences under Part III, to order the forfeiture of money or other property used or intended to be used for the purposes of terrorism. By section 23B, a court in making such order shall have regard to the value of the property and the likely financial and other effects on the convicted person. Schedule 4 makes extensive further provision for forfeiture orders.[65]

5.7. The power to seize cash, formerly in sections 24 to 31 of TA 2000, is now contained in section 1 of and Schedule 1 to ATCSA 2001 – which falls outside the scope of this report. The power of seizure enables the forfeiture of "*terrorist cash*" in civil proceedings before a magistrates' court or sheriff, whether or not any criminal proceedings have been brought. [66]

64 Home Office, *Regulatory Impact Assessment: Terrorist Property* (2001), para 8.
65 See further Clive Walker, *Terrorism and the Law* (OUP 2011), 9.24-9.25.
66 *Ibid.*, 9.46-9.65.

Practice

5.8. The fundraising offences in sections 15-19 were the principal offence charged in 36 cases in Great Britain between 2001/2 and 2009/10, 10 of which ended in conviction.[67] This conviction rate of 20% is well below the average. No distinction is made in the statistics between the different offences. The two such cases tried in 2009/10 both ended in acquittals.[68]

5.9. 49 offences under sections 15-19 were charged in Northern Ireland between 2001/2 and 2009/10, 40 of them relating to fund-raising, none to money laundering and one to failure to disclose under section 19.[69]

5.10. No figures are available for charges or convictions under section 21A (disclosure by those working in the regulated sector) or section 21D (tipping off), though these are said to be rare. Nor do I have statistics regarding the operation of powers of forfeiture and cash seizure.

Conclusions

Utility of the law

5.11. Even spectacular acts of terrorism can be achieved without huge expense. Thus:

(a) The cost of the Madrid train bombings has been estimated in the region of $10,000, and the cost of the 7/7 bombings in London at about one tenth of that.[70]

(b) AQAP in an on-line magazine has identified the total cost of preparing and mailing two printer cartridge bombs from Yemen in October 2010 as $4,200.[71]

5.12. This does not mean, however, that pursuit of terrorist funding is a waste of time. Monitoring and intervention not only have the capacity to starve terrorist organisations of funds, but also to assist in the detection of their activities.

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67 HOSB 18/10, 28 October 2010, Tables 1.3(a), 1.10(a).

68 *Ibid.*, Table 1.9(a).

69 NIO Annual Statistics 2009/10, Table 5(a). The Great Britain and Northern Ireland figures are not directly comparable, as explained in section 1, above.

70 Evening Standard, 3 January 2006, drawing on BBC World Service and police sources.

71 *Printer cartridge bomb plot planning revealed*, BBC website 22 November 2010.

Operation of the law

5.13. I have made limited enquiries of practitioners in the field, but have received no representations of substance on the operation in 2010 of TA 2000 Part III, and have no specific recommendations to make at this stage in respect of it.

5.14. In the year ahead I should welcome my attention being drawn to any areas of particular concern. More generally, I would be interested in views on whether a terrorist financing regime distinct from the Proceeds of Crime Act 2002 is necessary at all, and if so whether the different features of the two regimes are themselves necessary and appropriate. Notwithstanding the presence of international obligations in the background, the principle that terrorist crimes should be treated like other crimes, in the absence of good reason to the contrary, might be thought to hold good in this area as it does in any other.

6. TERRORIST INVESTIGATIONS (TA 2000 PART IV)

Law

Terrorist investigations

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

Cordons

6.2. Sections 33 to 36 TA 2000 confer upon police officers (who save in cases of urgency must be of at least the rank of superintendent) the power to cordon an area if they consider it expedient to do so for the purposes of a terrorist investigation. A police officer may order persons and drivers to leave cordoned areas, and prohibit pedestrian or vehicle access. Cordons may not exceed 14 days in duration, but may be extended for up to 28 days in total, without the need for any judicial authorisation. Refusal to comply with an order is punishable by up to three months in prison.[72]

6.3. This statutory power to cordon supplements the common law power for the police to set up cordons for the protection of the public, and to maintain them for as long as is reasonably required in the circumstances.[73] Breach of such a cordon, or not complying with properly made police requests to move, may constitute the offence of willfully obstructing a constable in the course of his duty (Police Act 1996 section 89(2)), which is punishable by up to one month in prison.

Powers to obtain information.

6.4. Sections 37 to 38A TA 2000 give effect to three Schedules which give police powers to obtain information in terrorist investigations.

6.5. Schedule 5 empowers the police (in Scotland, the procurator fiscal) to apply to court for a warrant to search premises and to seize and retain material which the

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

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

police have reasonable grounds for believing is likely to be of substantial value to a terrorist investigation or which must be seized in order to prevent it from being concealed, lost, damaged, altered or destroyed. Application may be made in Northern Ireland, alternatively, to the Northern Ireland Office. A warrant may either specify particular premises or, in the case of an "*all premises warrant*", extend to all premises occupied or controlled by a specified person. There are protections for "*excepted material*" (excluded material, items subject to legal privilege and special procedure material) in similar terms to those applicable under the Police and Criminal Evidence Act 1984 **[PACE]**.

6.6. Schedule 6 empowers a senior police officer (in Scotland, the procurator fiscal) to apply to court for an order requiring one or more financial institutions to provide customer information as defined in paragraph 7 for the purposes of a terrorist investigation. Before making an order, the court must be satisfied that the tracing of terrorist property is desirable for the purposes of the investigation, and that the order will enhance the effectiveness of the investigation. Failure to comply with an order may expose officers of the financial institution to up to six months in prison. Customer information provided under Schedule 6 is not admissible evidence in criminal proceedings against the institution or any of its officers or employees.

6.7. Schedule 6A empowers a police officer (in Scotland, the procurator fiscal) to apply *ex parte* to a court for an account monitoring order of up to 90 days' duration. For the making of an order, similar criteria must be satisfied as in the case of an order under Schedule 6. The order will typically require a bank or other financial institution to provide the police with specified information concerning one or more accounts.

Offences of non-disclosure and tipping off

6.8. Part IV concludes with two important and far-reaching duties on the general public of disclosure, which resemble but go further than section 19 (above).

6.9. Section 38B, inserted by ATCSA 2001, requires all persons with information which they know or believe might be of material assistance in preventing the commission by another person of an act of terrorism, or in securing the apprehension, prosecution or conviction of another person, to disclose that information as soon as reasonably practicable to the police. There is a defence of reasonable excuse. The offence is punishable by up to five years in prison.

6.10. Sections 39(2) and 39(4) criminalise tipping off which is likely either to prejudice a terrorist investigation or to result in interference with material relevant to that investigation. To commit those offences, which are punishable by up to five years in prison, the tipper-off must know or have reasonable cause to suspect

either that an investigation is being or will be conducted (section 39(1)), or that a disclosure under sections 19 to 21B or 38B has been or will be made (section 39(3)).

Practice

Cordons

6.11. Cordons are typically set up to investigate a suspected package or to deal with the consequences of an explosion or series of arrests.

6.12. In Great Britain 43 cordons were imposed in 2009/10 under section 33 TA, by only three forces: 34 by the Metropolitan Police, 8 by the City of London Police and one by Merseyside Police.[74]

6.13. In Northern Ireland 128 cordons were imposed in 2009/10 under section 33 TA, a figure comparable to those reached in the early years of the decade but which exceeds the combined annual figures for 2006, 2007 and 2008.[75]

6.14. These statistics must be viewed with some caution, since the borderline between the use of section 33 for a terrorist investigation and the use of the common law cordoning power is not always clear. For example, as reported by Lord Carlile, the Metropolitan Police decided in 2008 that cordons for the examination of packages suspected of containing explosive or similar material were no longer to be regarded as having a terrorist connection.[76] This may account for the fact that not a single cordon was recorded in the Metropolitan Police Service area in that year.

6.15. Nonetheless, cordoning is doubtless more widely used in Northern Ireland than in Great Britain. That reflects not only the far greater number of "live" incidents in Northern Ireland, but also the fact that dissident republican groups, unlike al-Qaeda-inspired terrorists, often give warnings – a habit which allows them to use the disruptive technique of the hoax calls.

6.16. It seems that most section 33 cordons are quite short in duration. The figures for calendar year 2009 in Great Britain demonstrate that the great majority were in place for less than an hour.[77] The only one that lasted longer than four hours was the cordon in Liverpool accompanying the Operation Pathway arrests in April of that year, which lasted from two to five days.

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74 HOSB 18/10, 28 October 2010, Table 2.5.
75 *Northern Ireland Terrorism Legislation: Annual Statistics* 2009/10, NIO, Table 1.
76 *Report on the operation in 2009 of TA 2000 and Part 1 of TA 2006*, July 2010, paragraph 112.
77 Report on the operation in 2009 of TA 2000 and Part 1 of TA 2006, Annex D.

Powers to obtain information

6.17. In Northern Ireland, a total of 87 premises were searched under warrant pursuant to Schedule 5 during 2009-10, which was the lowest figure since TA 2000 came into force.[78] Equivalent figures for Great Britain are not collected.

6.18. No concerns have been expressed to me about the operation of Schedules 5, 6 or 6A during the year under review.

Offences of non-disclosure and tipping off

6.19. Nobody in Great Britain was charged or convicted of a "*principal offence*" in 2009-10 under either section 38B or section 39.[79] Nor was anybody charged under these sections in Northern Ireland.[80]

Conclusions

6.20. Each of the powers provided for in Part IV has a clear function and is, so far as I have been able to discern, relatively uncontroversial. I would however draw attention to two powers of more than ordinary scope.

Cordoning

6.21. The section 33 cordoning power is a strong one. A cordon may be set up when an officer considers it expedient to do so, whether or not he considers it necessary and regardless of inconvenience to local residents. It may remain in place for 14 days, extendable to an overall maximum of 28 days, without the requirement of regular review or of judicial authorisation. In the absence of any complaints, however, or any obvious reason why the police should be tempted to use cordoning in an excessive manner, there seems to be no reason to question the extent of the power.

6.22. It is not entirely clear to me why special cordoning powers should be required "*for the purposes of a terrorist investigation*" as defined in section 32. Whether a gunman or the person who planted a suspect package had a terrorist purpose is not something that the officers first on the scene can be expected to know or even surmise. Nor does the question of whether that person is motivated by an ideological desire to influence the government on the one hand or by a personal grudge on the other appear to have much bearing on the nature of the precautions that are necessary to protect the public, how such precautions are to be authorised or how long they can remain in place. It may be asked whether

78 NIO Northern Ireland Terrorism Legislation: Annual Statistics 2009/10, Table 2.
79 HOSB 18/10, 29 October 2010, Tables 1.3(a) (charge) and 1.10(a) (conviction).
80 NIO Northern Ireland Terrorism Legislation: Annual Statistics 2009/10, Table 5a.

the terror-specific cordoning power is an example, albeit a not particularly important one, of the overused mantra that "*terrorism is different*".

Obligation to disclose information

6.23. The requirement in section 38B to disclose information about acts of terrorism is a particularly broad one, not restricted – as is its section 19 equivalent – to people who gain their information through their work. Though little used recently, the section was used for convicting family members and associates of the 21/7 bombers and of Kafeel Ahmed, who died following the Glasgow Airport bombing of 2007. It imposes what is at first sight a startlingly broad duty on even the closest relatives of a terrorist to inform on him to the police.

6.24. A number of difficult legal issues arise under section 38B, particularly but not only when it is applied to the conduct of a subject during police interview. These include its interrelationship with the subject's privilege against self-incrimination, lawyer-client privilege, a journalist's duty to protect his sources and the laws allowing inferences to be drawn from silence in response to police questioning.[81]

6.25. In the absence of any representations, or indeed any use of the section in the year under review, I say no more about these issues here. Nonetheless, I propose to keep the operation of section 38B under careful review, together with the suggestions that it should be limited to information about listed serious offences, and/or accompanied by a code of practice to assist in dealing with the legal issues identified above.[82]

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

[82] *Ibid.*, 3.55.

7. ARREST AND DETENTION (TA 2000 PART V)

Law

Arrest

7.1. Section 41 TA 2000 empowers a police officer to arrest without warrant a person whom he reasonably suspects to be a terrorist.

7.2. It is a notably wide power of arrest, in particular because the arresting officer need have no specific offence in mind. It is enough, under section 40(1)(b), for there to be a reasonable suspicion that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism. The acts need not have been identified at the time of arrest.

7.3. The power is wide also in that it may lawfully be used in respect of people who, though suspected of terrorism, will never be charged under terrorist legislation. Every year a significant proportion of those arrested under section 41 are charged with offences under the ordinary criminal law, ranging from conspiracy to murder to possession of knives.

7.4. In other respects, however, section 41 is surprisingly selective. It may be used for arresting persons suspected of committing certain terrorist offences (e.g. membership and support of proscribed organisations, terrorist funding, direction, possession under TA 2000) but not others (e.g. publication and dissemination under TA 2006). The somewhat arbitrary nature of the list in TA 2000 section 40(1)(a) is evident from the fact that a section 41 arrest may be made on suspicion of weapons training (TA 2000 section 54) but not the similar offence of training for terrorism (TA 2006 section 6).

7.5. Section 42 TA 2000 permits a justice of the peace or sheriff to issue a warrant for the search of premises if he is satisfied that there are reasonable grounds for suspecting that a person whom the constable reasonably suspects to be a terrorist is to be found there.

Detention

7.6. A person arrested under section 41 may be detained for 48 hours without the intervention of a court.[83] A review officer must review detentions every 12 hours

[83] Though subject to the common law principle that "*where the police have reached the conclusion that prima facie proof of the arrested person's guilt is unlikely to be discovered by*

and may authorise continued detention only on specified grounds, including where it is necessary to obtain or preserve relevant evidence, or where it is necessary pending a decision whether the detained person should be charged with an offence.[84]

7.7. The maximum period of detention under TA 2000 stood at seven days until January 2004, 14 days until July 2006 and 28 days until 25 January 2011.[85] Attempts by the last Government in 2005 and 2008 to extend pre-charge detention limits further, first to 90 days and then to 42 days, were withdrawn after defeats in Parliament. Since 25 January 2011, the maximum period of detention has stood at 14 days. This compares to a maximum detention period of 96 hours under other legislation. In contrast to the position under PACE, there is no power to release on police bail.[86]

7.8. Part III of Schedule 8 to TA 2000 governs the extension of detention beyond 48 hours, by means of time-limited warrants of further detention which may be granted by a judicial authority[87] on application by a prosecutor or senior police officer. Such applications are on notice, with the detainee represented before the court. Extensions may only be granted for limited purposes: to obtain relevant evidence, to preserve relevant evidence or pending the result of the examination of relevant evidence. In addition, the judicial authority must be satisfied that the investigation is being conducted both diligently and expeditiously.

7.9. All powers of detention must be exercised consistently with Article 5 of the European Convention of Human Rights, given effect in the United Kingdom by the Human Rights Act 1998. Among the requirements of Article 5 are an obligation to give a detained person sufficient information for him to understand why he has been arrested, and a right to have the lawfulness of his detention decided speedily by a court.[88]

Treatment of detainees

7.10. The treatment of detainees under TA 2000 is governed by Part I of Schedule 8 to the Act. This governs such matters as the designation of detention places, identification and the taking of samples, recording of interviews, the right to have

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further inquiries of him or of other potential witnesses, it is their duty to release him from custody unconditionally": *Holgate-Mohammed v Duke* [1984] 1 AC 437, 443 G-H.

84 TA Schedule 8, Part II.

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

86 PACE Code H, paragraph 1.6.

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

88 Articles 5.2 and 5.4: see *Fox, Campbell and Hartley v United Kingdom* [1991] 13 EHRR 157.

a named person informed of the detention (otherwise known as the right not to be held incommunicado), the right to consult a solicitor and the circumstances in which a senior officer may authorise a delay in the exercise of those rights.

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

Changes to the law

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

7.13. Such emergency primary legislation was published and subjected to pre-legislative scrutiny by a Joint Committee chaired by Lord Armstrong of Ilminster. The Committee took evidence from a wide range of people, of whom I was one, and published its conclusions on 23 June 2011.[89]

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

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

7.15. Instead, the Joint Committee proposed:

(a) A new order-making arrangement whereby the maximum period available for pre-charge detention will remain at 14 days unless the Secretary of State makes an executive order, under powers conferred by primary legislation, that the maximum period be extended to 28 days for a 3-month period. That order-making power, created by amendment to the Protection of Freedoms Bill, could be exercised only if the Secretary of State was satisfied that exceptional circumstances applied and had obtained the agreement of the Attorney General. The power would be subject to annual renewal by Parliament, and the Secretary of State would be accountable to Parliament for its use.[90] Furthermore, any detention of more than 14 days would be subject to review by the Independent Reviewer (or a person appointed by the Independent Reviewer to conduct the review on his behalf).

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

7.16. The Secretary of State has not yet given her formal response to the Joint Committee's report.

Practice

Great Britain - statistics

Terrorism arrests

7.17. In Great Britain there were 173 "*terrorism arrests*" in the year to March 2010, under TA 2000 section 41 and other powers. This was at the lower end of a spectrum that has ranged since 2002/03 between 168 and 285 arrests.[91] In the calendar year 2010 there were only 125 "*terrorism arrests*".[92]

7.18. Those figures compare with a total number of arrests for recorded crime of almost 1.4 million in 2009-10, including some 457,000 for offences of violence

90 An additional safeguard for which no specific legislative provision would have to be made, mentioned in my evidence (QQ 256-257) but not in the Joint Committee's report, would be the availability of judicial review of the order. No doubt the circumstances in which courts were prepared to question the Home Secretary's exercise of the power (e.g., for improper purpose) would be extremely rare: but any claim for judicial review might be listed before the same High Court judge as was hearing the application for a warrant for further detention, thus enabling the judge to look at the position in the round.

91 HOSB 18/10, 28 October 2010, Table 1.1.

92 HOSB 14/11, 30 June 2011, Table 1.1.

against the person, 37,000 for sexual offences, 33,000 for robbery and 92,000 for burglary.[93]

7.19. A striking feature of 2009/10 is that for the first time, the 78 arrests under section 41 TA 2000 constituted a *minority* (45%) of all terrorism arrests.[94] In the calendar year 2010, only 42% of terrorist arrests were under section 41.[95] These percentages compare with figures of above 90% throughout the period 2003-2007, and reflect the fact that the section 41 power of arrest is not available in respect of some terrorist offences, including offences under TA 2006.

Schedule 8 detention

7.20. The power to detain, with judicial permission, for more than 14 days existed for four and a half years, between July 2006 and January 2011. In that time, 11 people were held for between 14 and 28 days, all in 2006-07, nine of them after Operation Overt (the airline liquid bomb plot).[96] Of those 11, three were released without charge and eight charged, of whom four were convicted (three for Terrorism Act offences).

7.21. In the calendar year 2010, in Great Britain:

(a) 62% of those arrested under section 41 (including 74% of those eventually released without charge) were detained for less than 48 hours.

(b) 38% of those arrested under section 41 (20 people) were detained for periods in excess of four days.

(c) 11 of those 20 were charged and nine released (in all cases before seven days had elapsed).

(d) One person was kept in pre-charge detention for longer than a week, being charged on the 14th day.[97]

(e) Nobody was kept in pre-charge detention for more than 14 days.

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93 HOSB 07/11, 14 April 2011, Table 1a.

94 The 2009/10 figure of 78 arrests under section 41 is the lowest since TA 2000 came into force, whereas the figure of 95 terrorism arrests under other provisions (mainly section 1 of PACE) is the highest: *ibid.*

95 HOSB 14/11, 30 June 2011, Table 1.1.

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

97 HOSB 14/11, 30 June 2011, Table 1.3.

Gender, age, ethnicity

7.22. As to the gender, age and ethnicity of those arrested for terrorism and charged with terrorism-related offences, over the period April 2005 to March 2010:

(a) 94% (of those arrested) and 95% (of those charged) have been male.[98]

(b) 89% (both categories) have been 21 or over, approximately half of those being over 30.[99]

(c) 41% (of those arrested) and 43% (of those charged) have been of Asian appearance, 20% and 23% of white appearance and 13% and 22% of black appearance.[100]

Charging rates

7.23. 34% of terrorism arrests in the calendar year 2010 resulted in charges, corresponding both to the 33% figure for the previous 12 months[101] and to the charging rate of "*about a third"* for arrests generally.[102] It should be noted however that of the 42 suspects who were charged, only 21 (50%) faced terrorism related charges, 14 of them under the Terrorism Acts and seven under other legislation. The equivalent figure for 2009 is 41%.[103]

Northern Ireland - statistics

Terrorism arrests

7.24. In Northern Ireland 167 people were detained under section 41 in 2009/10:[104] more than twice the total for Great Britain of 78 over the same period. The figure of 167 was typical of the past 10 years, in each of which (save for the 359 registered in 2003) there have been between 150 and 250 arrests.

7.25. Adjusting for relative population sizes, section 41 was used some 70 times more frequently in Northern Ireland than it was in Great Britain during 2009/10.[105]

7.26. No figures are collected in Northern Ireland for "*terrorism arrests*" more generally (the majority of which, in Great Britain, have recently been made under other powers, generally PACE section 1).

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98 HOSB 18/10, 28 October 2010, Table 1.4.
99 *Ibid.*, Table 1.5.
100 *Ibid.*, Table 1.6. 25% and 13% were classified as "*other*".
101 HOSB 14/11, 30 June 2011, Table 1.2.
102 *Ibid.*, p.11.
103 *Ibid.*, Table 1.2.
104 NI Annual Statistics 2009/10, Table 3.
105 The population of Northern Ireland in mid-2009 was estimated at 1.8 million and the population of the United Kingdom (including Northern Ireland) as 61.8 million: Office for National Statistics.

Detention beyond four days

7.27. Of the 167 people arrested under section 41 in 2009/10, only nine (5%) were detained for more than 48 hours, and three (2%) for more than four days. 95% were released within 48 hours. Nobody was detained for longer than a week.[106]

7.28. Fewer suspects were thus held for long periods than in Great Britain. It should be noted however that in the first quarter of 2009, 11 suspects were detained for more than a week, one of them being charged after more than 14 days.[107]

7.29. All 10 applications for extensions of detention beyond 48 hours were granted in 2009/10. Indeed remarkably, of the 165 applications made between 2001 and March 2010, it seems that only one (in 2001) has ever been refused.[108]

Gender, age, ethnicity

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

Charging rates

7.31. Of the 167 persons detained under section 41 in Northern Ireland during 2009/10, 36 (22%) were charged and the remainder released.[109] Just eight of those persons (5%) were charged under TA 2000, and none under TA 2006 or CTA 2008.[110] It is not clear what proportion of the other charges brought against section 41 detainees were terrorist related, though it is likely to have been appreciable since more than half of them were for murder, attempted murder, explosives and firearms offences.[111]

Comparison with Great Britain

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

106 *Northern Ireland Terrorism Legislation: Annual Statistics*, Table 7a.
107 *Ibid.*, Table 7a.
108 *Ibid.*, Table 3.
109 *Ibid.*, Table 6.
110 *Ibid.*, Table 5a.
111 *Ibid.*, Table 4.

(a) The TA 2000 arrest power is used far more extensively in Northern Ireland than in Great Britain, particularly when adjustment is made for population size.[112]

(b) On the other hand, and despite the almost invariable willingness of the Northern Ireland courts to grant warrants for further detention in cases where they are asked to do so, a far smaller proportion of TA 2000 detainees (at least in 2009-10) were held for longer than 48 hours, and hardly any were held for longer than the 96-hour maximum applicable to non-terrorist arrests.

(c) Those detained in Northern Ireland under the TA 2000 are appreciably less likely than in Great Britain to be charged, and relatively few of those charges are for terrorist offences.

7.33. Putting those facts together, it appears that section 41 arrests are sparingly used in Great Britain, but are more likely to result in lengthy periods of detention and charges for terrorist offences. In Northern Ireland, by contrast, the section 41 arrest power is frequently used but lengthy periods of detention, and charges for terrorist offences, are relatively rare.

7.34. A further difference between practice in England and in Northern Ireland, perhaps not unrelated, relates to the involvement of prosecutors. Charges can still be brought in Northern Ireland by the police, without the consent of the Public Prosecution Service **[PPS]** being required or sought. This contrasts to the English position, in which the Crown Prosecution Service **[CPS]** is not only responsible for the charging decision but is generally involved even at the pre-arrest stage, a practice whose desirability was emphasised by Lord Carlile.[113]

7.35. It has occurred to me to wonder whether the earlier involvement of the PPS in Northern Ireland might assist in reducing the number of section 41 arrests in cases which are eventually charged under provisions other than the terrorism legislation. It could also facilitate adoption (were this considered desirable) of the English practice whereby applications for further detention are made by CPS lawyers who are familiar with the process of building the case from the pre-charge stage, rather than, as currently in Northern Ireland, by counsel briefed by the police. I look forward to taking the views of the PSNI, the PPS and the Northern Ireland judiciary in the course of the year ahead.

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

113 *Operation Pathway – Report following Review*, 2009, paragraphs 86-90.

Case law

7.36. The compatibility of TA 2000 Schedule 8 with the European Convention on Human Rights was considered in cases headed by Sultan Sher[114] (one of those arrested in Operation Pathway) and Colin Duffy[115] (one of those accused of the Massereene Barracks shootings in Northern Ireland).

7.37. In *Sher*, the claimants argued that they were never told the basis on which they were detained in sufficient detail to allow them properly to challenge their continuing detention without charge. The High Court ruled, following *Ward*,[116] that applications to extend a warrant for detention could properly be heard in closed session, without the presence of a special advocate, as this enabled the basis of the application to be more rigorously explored by the Court.

7.38. In *Duffy*, a three-judge court in Northern Ireland rejected a wide-ranging challenge to the compatibility of Schedule 8 with Article 5 of the ECHR. It dealt with a number of criticisms including the supposed inability of the courts to consider the proportionality of and justification for continued detention, the absence of statutory provision for bail, the requirement for information to be disclosed and the contention that Article 5 requires a person to be charged well before the expiry of 28 days.[117] The Supreme Court has granted permission to appeal, and a hearing is awaited.

Conditions of detention

7.39. I have visited specialist terrorist detention centres in London, Govan, Leeds and Antrim (the first two when occupied by terrorist suspects), spoken to custody officers and medical officers, and closely observed the facilities and conditions of detention in each. In my report on Operation GIRD, published in May 2011 and available on my website, I gave a detailed account of the nature and conditions of detention in Paddington Green, based on my review of all relevant written records, interview transcripts and conversations with police officers, defence solicitors and detainees.

7.40. In anticipation of the entry into force of section 117 of the Coroners and Justice Act 2009, on a date yet to be announced, I want to start discussions on how best to discharge the responsibility of reviewing whether the protections of Schedule 8 to the 2000 Act and PACE Code H have been complied with in respect of persons detained for more than 48 hours under TA 2000 section 41.

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114 *Sultan Sher v Chief Constable of the Greater Manchester Police* [2010] EWHC 1859 (Admin).

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

116 *Ward v Police Service of Northern Ireland* [2007] UKHL 50.

117 [2011] NIQB 16, paragraphs 30-31, 35-36.

Conclusions and recommendations

Availability of the section 41 power

7.41. Section 41 is different from other arrest powers, in particular for the ability that it affords to arrest without suspicion of a particular offence, and the potential for detaining persons arrested under it, without the possibility of bail, for periods greatly in excess of the normal four days. The logic of extending that power to all those (but only those) suspected of certain types of terrorist activity is however somewhat approximate. Thus:

(a) The terrorist offences to which the power applies may be very serious; but so may other offences, in respect of which such powers do not apply.

(b) Suspected terrorists may well be too dangerous to be granted bail; but the same is true of many other categories of suspects, who are nonetheless entitled to apply for bail, and indeed to enjoy the presumption that they will get it.

(c) There are terrorist cases in which more than 96 hours are required to arrive at a charging decision: but that may be so in other cases too, as demonstrated by the speedy legislative reaction following the recent judicial decision that the 96 hours available for questioning in an ordinary case must, unless new evidence comes to light, be taken at once.[118]

(d) The special powers are allocated in a slightly curious manner. For example, those who are suspected of providing or receiving weapons training (TA 2000 section 54) may be subject to section 41, but not those suspected of providing or receiving training in making dangerous substances (TA 2006 section 6) – a very similar offence with the same maximum penalty.

7.42. Putting some forms of terrorism into a special category for the purposes of arrest and detention powers is at least a safeguard against those extended powers creeping into other areas of the criminal law. Vigilance is required towards the use of section 41, however, because of the broad range of offences to which it can apply. The extended periods of detention available under Schedule 8 may be needed when a large and complex plot is being unravelled; but it does not follow that it they are needed in other circumstances, simply by virtue of the fact that one element of the criminal behaviour under investigation may be capable of characterisation as a TA 2000 offence.

[118] *R (Chief Constable of Greater Manchester Police) v Salford Magistrates Court and Hookway* [2011] EWHC 1578 (Admin).

Use of the section 41 power

7.43. After a detailed review of the arrest and detention of six suspects during the Pope's visit to London in September 2010 (Operation GIRD), I recommended:

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

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

7.44. So far as Great Britain is concerned, the 78 arrests under section 41 in 2009/10 was the lowest figure since TA 2000 came into force, and the 53 arrests in the calendar year 2010 was lower still.

7.45. The 167 arrests under section 41 in Northern Ireland over the same period tell a different story, which is no doubt explicable in large part by the different nature of the security situation there. I have been struck however by the very low proportion of those arrested under section 41 who are subsequently charged under the Terrorism Acts: less than 5% (a total of 8 people) in 2009-10.

7.46. Of course there is no reason in principle why a section 41 arrest should not on occasion be followed by a charge for an offence under the ordinary criminal law. Terrorist offences are closely related to other crimes, and conspiracy to murder, explosives and firearms offences can and are properly used to tackle even the most serious terrorist incidents. It does not seem appropriate, however, for section 41 to be routinely used in relation to incidents which – even if arguably terrorist in their motivation – are always likely to be charged, if at all, under the ordinary law.

7.47. The use of section 41 in such circumstances gives the police the best of both worlds: the extensive powers of detention designed for the investigation of terrorism offences, without the need to prove the actual ingredients of a terrorist offence. But it scarcely seems within the spirit of TA 2000. Section 41 may be used only on the basis of a reasonable suspicion that a person is a terrorist, in the sense that he has either committed specified offences or been concerned in the commission, preparation or instigation of acts of terrorism. It is not desirable for that power to be routinely used without any subsequent attempt being made,

through the search and interview process, to establish the ingredients of terrorism.

Length of pre-charge detention

7.48. I endorse the proposals of the Joint Committee summarised above, which in many respects coincide with those which I put forward in my evidence before it. In particular:

(a) I am not persuaded of the need to provide in any circumstances for any period of detention in excess of 28 days.[119]

(b) While all would hope for a continuation of the position since 2007 in which it has not been necessary to apply for detention beyond 14 days, it is possible that this happy state of affairs may be attributable not only to improved resources and procedures, but to the absence since 2007 of any investigation as grave or as complex as the airline liquid bomb plot (Operation Overt).

(c) If one accepts (as, with reluctance, I do) that there may in the future be rare circumstances in which the complexity of a investigation or a multiplicity of simultaneous investigations require detention for between 14 and 28 days, it is necessary to have a means of reaching that point that is available 365 days a year and whose efficacy is not dependent on the vagaries of the parliamentary calendar. A mechanism such as that proposed by the Government, which relies upon the ability to enact primary legislation perhaps at very short notice, does not satisfy that test.[120]

(d) The preferable alternative is an annually renewable power vested in the Home Secretary to make orders of limited duration to extend the maximum period of detention that a judge may order to 28 days. By way of safeguard, the order-making power should be exercisable only with the agreement of the Attorney General, and after the triggering of a statutory test.[121] The Home Secretary could be held accountable for the exercise of this power by the courts and – once the risk of prejudicing any future trial has passed – by Parliament.

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119 Sue Hemming OBE, Head of the Counter-Terrorism Division at the CPS and described by the DPP as "*the most experienced counter-terrorism prosecutor in the country, very probably in Europe and possibly beyond*" (Q195), said in evidence: "*I have not been involved in a case where I would have made an application for a warrant of further detention past 28 days, had it been available*" (Q 221).

120 Nor, in my opinion as in that of the Joint Committee, does the Civil Contingencies Act 2004.

121 I said in my evidence (Q252): "*It may be that one could offer a trigger in the legislation itself whereby the Home Secretary could not make that order at her absolute discretion but would need to be satisfied, for example, that there were compelling reasons of national security and that the investigation on its own, or in conjunction with other investigations, was wholly exceptional in its scale and complexity, or something along those lines*." Some more detailed proposals were made by the Joint Committee at paragraph 135 of its Report.

Grounds for extension of time

7.49. Two suggestions have been made by Joint Committees:

(a) that the grounds for extension in Schedule 8 paragraph 32 should be amended so as to reflect more faithfully the case law as it emerges from cases such as *Duffy*; and/or

(b) that additional criteria should be added at the 14 day stage, so as to ensure that extension beyond this point is only granted in certain defined circumstances.

7.50. On the first point, the criteria in TA Schedule 8, paragraph 32 are limited: they relate only to the questions of whether further detention is necessary for relevant evidence to be obtained, preserved or analysed; and whether prosecutors and police have acted with reasonable diligence and expedition. I agree that in principle the criteria should reflect as fully as possible the requirements of Article 5 ECHR as explained in the case law of the United Kingdom courts. It might be premature however to seek amendment to the Schedule in circumstances where the *Duffy* case is pending before the Supreme Court. I recommend that the amendment of Schedule 8, paragraph 32 is revisited once judgment has been handed down in *Duffy.*

7.51. On the second point, I am on reflection not persuaded by the suggestion that the judge who would hear any application for detention beyond 14 days should need to be satisfied of different or additional matters than those to which he or she must have regard on earlier applications for warrants of further detention.[122] The period for which detention has already taken place and the further period for which it is sought will of course have an important bearing on the judgment to be made. It seems to me however that the questions the judge needs to ask are essentially the same at the stage of each application for further detention: was the person lawfully arrested; has he been told enough of the case against him; are there reasonable grounds for believing that further detention is necessary for evidential purposes; is the investigation being conducted diligently and expeditiously. Some of those questions may be more difficult to answer in the affirmative as time goes on: but this does not mean that they are the wrong questions, or that additional questions become necessary. It would be particularly undesirable to add new questions on which it could be difficult for a judge to take a view (for example, the nature of the national security threat, or whether it is "*exceptionally difficult*" for the CPS to make a charging decision).

[122] Joint Committee Report paragraphs 142-145; my evidence Q263.

Recommendations

7.52. **The section 41 requirement for reasonable suspicion in relation to each person arrested should be kept firmly in mind by all forces during future operations, particularly in view of the security pressures that are likely to attend the London Olympics.**

7.53. **Police should guard against too ready a recourse to section 41 arrest and detention in cases when the suspect is always likely to be charged, if at all, under laws other than the Terrorist Acts.**

7.54. **The mechanism for extending the period of pre-charge detention beyond 14 days in exceptional cases should not be primary legislation as proposed by the Government, but an order-making power conferred upon the Home Secretary, with safeguards, along the lines suggested by the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills in its Report of 23 June 2011.**

7.55. **The amendment of TA 2000 Schedule 8 so as to reflect on its face the requirements of Article 5 ECHR is desirable and should be considered in the light of the forthcoming judgment of the Supreme Court in *Duffy.***

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

Law

Section 43

8.1. Section 43 TA 2000 is an orthodox stop and search power,[123] which may be used to search a person who is reasonably suspected to be a terrorist to discover whether he has anything which may constitute evidence that he is a terrorist, and to seize and retain anything which he reasonably suspects may constitute such evidence.

8.2. It does not extend to the search of vehicles: thus, it is of considerably more practical use in an urban area than it is, for example, in rural parts of Northern Ireland where most travel is in vehicles.

Section 44

8.3. Section 44 is a more controversial provision, used during the first part of the year under review but no longer in force. In brief:

(a) A senior police officer could, if he considered it "*expedient for the prevention of acts of terrorism*", specify an area in which uniformed officers are authorised to stop and search vehicles and pedestrians: section 44.

(b) That power could be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, but could be exercised "*whether or not the constable has grounds for suspecting the presence of articles of that kind*": section 45.

(c) Authorisations had to be confirmed by the Secretary of State and could take effect for up to 28 days: section 46.

Gillan v UK

8.4. The European Court of Human Rights gave judgment on 12 January 2010 in the case of *Gillan and Quinton v United Kingdom.* The applicants were stopped and searched for less than 30 minutes while respectively demonstrating against and photographing an arms fair in London. Their claim that the powers used against them were illegal was unsuccessful in the High Court, Court of Appeal and Supreme Court. The European Court of Human Rights however held that the

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

searches amounted to an interference with their right to respect for their private lives, and that contrary to Article 8 of the ECHR, the powers of authorisation, confirmation and stop and search under sections 44-45 were "*neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse*".[124] No conclusion was reached in relation to their claims founded on Articles 5, 10 and 11, though the Court expressed the provisional view that the element of coercion inherent in the search was indicative of a deprivation of liberty.[125]

Section 47A

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

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

8.7. On 17 March 2011, the Home Secretary – believing there to be, for undisclosable reasons, an operational gap in the stop and search powers available to the police – laid before Parliament a remedial order under section 10 of the Human Rights Act 1998.[126] Section 10 is a "*Henry VIII clause*" which, where there are compelling reasons for doing so, allows primary legislation to be amended by order for the purposes of removing an incompatibility with the European Convention of Human Rights that has been demonstrated by the Strasbourg Court. The Order deprives sections 44 to 47 of the TA 2000 of effect and replaces them until the Bill is passed with a new section 47A-C and Schedule 6B, taken from the Bill and supplemented by a new Code of Practice.[127]

8.8. Under TA 2000 section 47A, as replaced by the remedial order, an authorisation for the use of the new stop and search power can only be given where the senior

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124 Judgment, paragraph 87.
125 Judgment, paragraph 57.
126 Terrorism Act 2000 (Remedial Order) 2011, SI 2011/631.
127 *Code of Practice (England, Wales and Scotland) for the authorisation and exercise of stop and search powers relating to section 47A of Schedule 6B to the Terrorism Act 2000*, March 2011.

police officer giving it "*reasonably suspects that an act of terrorism will take place*" and considers that the authorisation "*is necessary to prevent such an act*". The authorisation can last for no longer and cover no greater an area than he considers necessary to prevent such an act. These are very high thresholds, reflected in the fact that since its introduction, no authorisation has been made under section 47A in any part of the United Kingdom. If made, an authorisation ceases to have effect after 48 hours unless it has been confirmed by the Secretary of State.

8.9. In a recent report, the Joint Committee on Human Rights identifies what it considers to be inadequacies in the procedure for authorisation, and makes some suggestions.[128] These include, notably, an amendment to the statutory test so that reasonable belief would be required as to the necessity of an authorisation for the purposes of preventing an act of terrorism, and the introduction of a requirement of prior judicial consent for authorisations. These suggestions would raise still further an already high threshold for use of the section 47A power, and place a further barrier (or safeguard) in the way of its speedy exercise. As will be seen below, I make a recommendation of my own but in relation to a different aspect of the power: the criteria on which the power is exercised by individual officers once an authorisation has been given.

8.10. The Code of Practice provides that an authorisation under section 47A may only be made by an officer of ACPO or ACPOS rank (i.e. at least an Assistant Chief Constable, or Commander in the Metropolitan and City of London Police). So far as the decision to authorise is concerned:

(a) A general high threat from terrorism, and the vulnerability of a particular site or event, may be taken into account but may not form the sole basis of a decision to authorise.

(b) The Code expressly prohibits the giving of an authorisation on the basis that the use of the powers provides public reassurance, or that the powers are a useful deterrent or intelligence-gathering tool.

(c) The geographical extent of the power may take into account the fact that terrorist methods or targets may be changed, but must set out the necessity for each area included and the length of time for which the authorisation is given in each such area.

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

[128] 14th Report of 2010-12; HL Paper 155, HC 1141, 15 June 2011.

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

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

Practice

Section 43 searches

8.12. The Metropolitan Police searched 995 people under section 43 in calendar year 2010, down from 1458 in 2008-09.[129]

8.13. That marked decline in section 43 searches in the Metropolitan Police Area was attributable largely to a drop in the number of searches of those describing their ethnicity as White, Black or Black British and Mixed. Those describing themselves as Asians or British Asians constituted 22% of the total in 2009 and 30% in 2010 – though it is fair to point out that in absolute terms the number stopped still declined from 326 to 300.

8.14. I have not located equivalent figures for other police forces.

Section 44 searches – Great Britain

Authorisations

8.15. In 2010 as in previous years, the vast majority of authorisations under section 44 were made in London and by the British Transport Police **[BTP]**. There was however a significant change in the authorisation practice of the Metropolitan Police. Prior to 2009, the whole of the Metropolitan Police area had been effectively permanently designated on a rolling basis. With effect from September 2009, however, a more selective "*patchwork quilt*" approach was introduced, in which the Government Security Zone and Heathrow Airport were

[129] HOSB 14/11, 30 June 2011, Table 2.3. The equivalent figures for 2008-09 and 2009-10 were 1601 and 1224: HOSB 18/10, 28 October 2010, Table 2.3. Section 43 figures for England and Wales as a whole form part of a miscellaneous category covering more than 90,000 searches in 2009-10: HOSB 07/11, 14 April 2011, Table 2a.

always included, but authorisations were otherwise limited to critical national infrastructure **[CNI]** and iconic sites, with calendar variations to reflect VIP visits, sporting events and so on. The effect of this change was to limit the authorised area to approximately 10% of the Metropolitan Police area.

8.16. Between the change of policy in July 2010 and the effective repeal of section 44 in March 2011, rolling authorisations for vehicle searches on the basis of reasonable suspicion continued to be made, consistently with the Home Secretary's interim guidance, by the City of London Police. One authorisation for vehicle searches was made in a small part of the Metropolitan Police area over the New Year period. That authorisation appears to have contravened the guidance, since it allowed for searches to be made on a no-suspicion basis.

Searches

8.17. Between 2000 and 2007, the total number of searches under section 44 in England and Wales, excluding those performed by the BTP, never exceeded 50,000. The number then ballooned to 126,500 in 2007/08 and 210,200 in 2008/09[130] - 255,700 if the BTP and Scotland are included.[131] This marked increase in the use of section 44 flew in the face of Lord Carlile's warnings, in each of his annual reports from 2006 onwards, that "*section 44 could be used less and I expect it to be used less*".[132]

8.18. The figures for England and Wales fell sharply to 102,500 in 2009-10 and 9,600 in 2010-11 (nearly all prior to July, when the Home Secretary announced that she was curbing the use of section 44). The figures for calendar years 2009 and 2010 were 149,987 and 23,882 respectively.[133]

8.19. The vast majority of searches in 2009-10 (96%) were conducted by the Metropolitan Police, the BTP and the City of London Police. Only 12 of the 43 force areas in England and Wales used the power (as against 15 in 2008-09). It was not used at all in the North East Region, East Midlands Region, West Midlands Region or South West Region,[134] and barely used in Scotland.

Arrests

8.20. Of the more than 91,000 searches in 2009-10, only two (0.02%) resulted in arrests connected with terrorism. 436 (0.5%) resulted in arrests for other reasons. These figures compare with an arrest rate for recorded crime resulting

130 *Ibid.*, Table 2.1.
131 HOSB 18/10, 28 October 2010, Table 2.1.
132 The relevant passages were cited by the European Court of Human Rights in *Gillan*, judgment of 12 January 2010, paragraphs 38-43.
133 HOSB 14/11, 30 June 2011, Table 2.1.
134 HOSB 07/11, 14 April 2011, Table 2.04.

from stop and search under PACE section 1 and other legislation – for which reasonable suspicion is required – of 8% (16% in the Metropolitan Police area).[135]

8.21. A handful of charges for terrorist offences have followed from section 44 stops. It is, however, a striking fact that during its currency, none of the more than 600,000 stops in Great Britain under section 44 resulted in a conviction for a terrorist offence. This fact alone makes it difficult to characterise section 44 as a necessary or proportionate response to the terrorist threat. One of the advantages claimed for section 44 was deterrence: but as experience since its demise has shown, at least in Great Britain, other methods such as high-visibility patrols can also play a part in deterring wrongdoers and reassuring the innocent.

Ethnic breakdown

8.22. Figures broken down by self-defined ethnic groups now exist for stops and searches (excluding vehicle-only searches) in England and Wales.[136] Of those stopped and searched under section 44 in 2009/10, 60% were white, 17% Asian and 11% black. That compares to figures for all searches[137] of 64% white, 11% Asian and 16% black.

8.23. In the Metropolitan Police area, where the great majority of section 44 searches take place, the percentage of Asians stopped and searched under section 44 in 2009-10 (18%) was:

(a) more than the proportion of Asians subject to all searches in the same period (15%),

(b) more than the Asian population of London as a whole (13.2% in June 2009, though considerably more in some boroughs),[138] but

(c) less than the proportion of Asians stopped under section 43 on the basis of reasonable suspicion of involvement in terrorism (24% in 2009-10).[139]

All these proportions are, in turn, smaller than the 41% of those arrested for terrorism and the 43% of those charged with terrorism-related offences between 2005 and 2010 who were considered to be of Asian appearance.[140]

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135 *Ibid.*, Table 1c.

136 *Ibid.*, Table 2d. BTP stops are not included.

137 PACE section 1, Criminal Justice and Public Order Act 1994 section 60, TA 2000 section 44.

138 ONS Neighbourhood Statistics, 18 May 2011. I do not know whether section 44 searches were concentrated in boroughs with particularly high (or low) Asian populations. In England as a whole, Asians/British Asians constitute 6% of the population: *ibid*.

139 HOSB 18/10, 28 October 2010, Table 2.3.

140 *Ibid.*, Table 1.6. These figures apply to Great Britain as a whole, and are not London specific.

8.24. The claim has been made that in 2008-09, Asians were five times more likely to be stopped under section 44 than the white population of England and Wales.[141] It must be remembered, however, that more than 90% of all section 44 stops in England and Wales took place in London, where the proportion of Asians in the population is more than twice the national average. Once allowance is made for that, an element of "*disproportionality*" vis-a-vis the general population may be seen to have existed, but on a significantly lesser scale. Furthermore, in London and in 2009-10 at least, Asians made up a smaller proportion of those searched under section 44 than they did of those searched under the reasonable suspicion power, section 43. The proportion of Asians among those searched under section 44 appears also to have been considerably lower than the proportion of Asians among those arrested for or charged with terrorism. I return to the subject of ethnicity in relation to port and border controls, below.

8.25. What is beyond question is that by the end of its life, section 44 had become a source of friction in some communities. Both the Metropolitan Police and the BTP told me that they received very few complaints. However young male Muslims reported to Equalities and Human Rights Commission **[EHRC]** researchers that "*being stopped and searched in the streets, whether under s 44 or other policing powers, has become their most frequent and regular contact with police*".[142] Set against the limited policing dividend from use of section 44, such negative reactions are important and provide a further justification, albeit not a decisive one, for the abandonment of the power.

Section 44 searches – Northern Ireland

8.26. Additional stop and search powers exist in Northern Ireland pursuant to the Justice and Security Act 2007. Section 44 is closely bound up with the exercise of those powers, and with the particular security situation in Northern Ireland. Accordingly, and by agreement, the operation of section 44 in 2010 is dealt with not in this report but by Robert Whalley CB in his Third Report of November 2010[143] and his Fourth Report, to be published later this year.

Section 47A

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

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141 Choudhury and Fenwick, *The impact of counter-terrorism measures on Muslim communities*, EHRC June 2011, p. 32.

142 *Ibid.*, p. 41.

143 *Report of the Independent Reviewer, Justice and Security (Northern Ireland) Act 2007, Third Report: 2009-2010*, November 2010, paragraphs 97-111.

Conclusions and recommendations

A correction in favour of liberty

8.28. The repeal of section 44 was inevitable, given the ruling of the Court in *Gillan.* By choosing to replace it rather than simply to abandon the idea of a stop and search power without reasonable suspicion, the Government took the less bold of the two options that they considered.[144] Nonetheless, the replacement of section 44 by section 47A represents a real and substantial change, which certainly provides – as the Government intended – **"***a correction in favour of liberty*".

8.29. The extent of that correction can be demonstrated by a practical example. If section 44 had still been operational on 29 April 2011, the day of the Royal Wedding, it is practically certain that areas of central London, together with some or all of the national rail system, would have been authorised for stop and search without reasonable suspicion, and that those powers would have been extensively used. But since neither the Metropolitan Police nor the BTP could say that they reasonably suspected an act of terrorism would take place – let alone support such a statement in the detailed manner required by the Code of Practice – the section 47A threshold was not met and there were no authorisations, no stops and no searches.

The threshold test

8.30. Will the section 47A threshold ever be met, other than in the aftermath of a major terrorist incident, as protection is sought against predicted aftershocks? There could be difficulties in declaring it met on the basis of intelligence that a serious incident is being planned, since to do so would alert the conspirators to the fact that their plot had been rumbled.

8.31. Temptation to interpret the threshold down may well become apparent over the next 12 months. As the world's sports teams flock to London for the Olympics, closely followed by the world's VIPs, security scares are bound to surface. Police and Ministers may become worried; foreign governments may seek to exert pressure upon them.

8.32. All I can do as Independent Reviewer is to scrutinise any authorisations issued, together with the intelligence supporting them, and report in due course on whether section 47A has operated as intended. I would not exclude the possibility, in a controversial case, of reporting on the exercise of the power to authorise and/or to search under section 47A on an *ad hoc* basis, either at the

[144] *Review of counter-terrorism and security powers*, January 2011, pp. 17-19. The other option was to repeal section 44 without replacement.

invitation of the Home Secretary or on my own initiative, as recently recommended by the Joint Committee on Human Rights.[145]

Exercise of the stop and search power

8.33. Section 47A and its Code of Practice seek to address the objection from Strasbourg that the threshold of expediency was set too low.[146] That was, however, only one of the reasons why the Government lost the *Gillan* case. "*Of still further concern*", according to the European Court of Human Rights, was a matter that came into play only once an authorisation has been granted: "*the breadth of the discretion conferred on the individual police officer*", and the "*clear risk of arbitrariness*" that this implied.[147]

8.34. The House of Lords had not approved the use of section 44 to conduct random searches. Lord Brown thought it important that section 44 was "*targeted as the police officer's intuition dictates rather than used in the true sense randomly for all the world as if there were some particular merit in stopping and searching people whom the officers regard as constituting no threat whatever*".[148] Lord Bingham went further, suggesting that the purpose of the power was "*to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion*", and thus coming close to characterising it a power to be used in cases of subjective suspicion by the officer.

8.35. The European Court of Human Rights appeared to endorse that judicial distaste for stopping a person "*so obviously far from any known terrorism profile that, realistically, there was not the slightest possibility of him/her being a terrorist*" - which would be the inevitable consequence of any random search. It did not express any greater enthusiasm, however, for decisions "*based exclusively on the 'hunch' or 'intuition' of the officer concerned*", stating disparagingly of the old section 44 system:

> "Not only is it unnecessary for [the officer] to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched."[149]

Such comments have led distinguished commentators to advise that nothing short of a requirement of reasonable suspicion on the part of the officer selecting

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145 14th report of 2010-2012, 15 June 2011, paragraphs 94-95, 105.
146 *Gillen and Quinton v UK*, judgment of 12 January 2010, paragraphs 80-82.
147 *Ibid.*, paragraphs 83-86.
148 [2006] UKHL 12, paragraphs 35, 79.
149 Judgment of 12 January 2010, paragraphs 83-84.

for stop and search can provide a sufficient legal basis for interferences with the right to respect for private life under Article 8.[150]

8.36. I agree with the Joint Committee on Human Rights that it is not clear from the *Gillan* judgment that the European Court of Human Rights goes so far.[151] On the other hand, it does seem plain that irrespective of the position as regards the making of authorisations, the Court considered the breadth of the discretion conferred on individual officers under section 44 to be too great. Officers should have clear guidance, as close as possible to the latter end of the spectrum which stretches from "*random*" at one end to "*reasonable suspicion*" at the other.

8.37. In view of these judicial statements from both London and Strasbourg, and the central role in the downfall of section 44 of what was perceived as an over-broad discretion for officers, I would have expected to see more concentration on the issue in relation to section 47A. The Review of Counter-Terrorism and Security Powers begins, promisingly, with a recommendation that "*robust statutory guidance on the use of the powers should be developed to circumscribe further the discretion available to the police and to provide further safeguards on the use of the power*". Of the Code of Practice for section 47A, however, only two paragraphs (4.1.1 and 4.1.3) are devoted to the exercise of the officer's discretion; and those passages do little more than emphasise that so far as consistent with the parameters of his briefing, the officer should be able to choose between "*using indicators*" (such as behaviour, clothing and carried items) and "*selecting individuals 'at random'".* Random searches were spoken of with approval also by Lord Macdonald of Glaven in his report on the Review of Counter-Terrorism and Security Powers,[152] and in draft NPIA guidance which (no doubt with the alternative of section 43 in mind) exhorts officers to "*remember at all times that the search is random and should not be based on suspicion that the person being searched is a terrorist*".

8.38. I appreciate that the section 47A search, once authorised, is always likely to be a relatively blunt instrument: it would not be feasible, as in relation to Schedule 7 (below), to entrust it only to a specialist cadre of officers with behavioural training.[153] In its present form, however, the Code of Practice is uninformative on the issue of discretion, ineffective as a constraint on the arbitrary exercise of the individual officer's power and excessive in the opportunities that it offers for

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150 Rabinder Singh Q.C., Professor Aileen McColgan and others, as reported by the Joint Committee on Human Rights, 14th report of 2010-2012, 15 June 2011, paragraph 50.

151 *Ibid.,* paragraph 54.

152 Cm 8003, January 2011, p. 4: "*If, for example, the police received credible intelligence of a plot to car bomb Parliament Square, it would seem proportionate and reasonable to allow the police to carry out random 'without suspicion' searches of cars in that location for a limited period.*"

153 Though the Schedule 7 Code of Practice, *Examining Officers under the TA 2000* (2009) contains relatively full and helpful guidance on the factors that should inform the decision to select subjects for examination: pages 7-8.

random search, a concept which, in view of the judicial disapproval already expressed, will have to be more carefully defined and defended if it is wished to keep it available.

Recommendation

8.39. **The Code of Practice on TA 2000 section 47A should be revised so as to introduce full and proper guidance on the exercise of the officer's discretion to stop and search, so minimising the risk that the discretion will be used in an arbitrary manner. If it is wished to retain a power to retain random search as an option, notwithstanding the discouragement expressed judicially in *Gillan*, the circumstances in which it is appropriate will have to be carefully defined, and strong reasons advanced for why it can be preferable in those circumstances to searches based on suspicion, intelligence, risk factors or intuition.**

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

Law

9.1. TA 2000 Schedule 7, given effect by section 53, has existed in one form or another since 1974. It empowers police, immigration officers and designated customs officers to stop and question travellers at ports, airports or hoverports (collectively referred to as "*ports*").[154] No prior authority is required for the use of Schedule 7, and the power to stop and question may be exercised without suspicion of involvement in terrorism.[155] Questioning must be for the purpose of determining whether the person appears to be concerned or to have been concerned in the commission, preparation or instigation of acts of terrorism.[156] Persons, luggage and vehicles may be searched for the same purpose, and freight may be examined to determine whether goods have been used for terrorism.[157] Property searched or examined may be retained for seven days for examination.[158]

9.2. Any person questioned is obliged, on request, to hand over ID and any information in his possession.[159] He may be required to complete a standard form card (known as "*carding*").[160] He may also be detained for a period of up to nine hours beginning with the time when his examination begins.[161] At that point, Part I of TA 2000 Schedule 8 comes into play: at least where detained at a police station, the detained person acquires rights which he did not have prior to detention (e.g. to have a named person informed, and to consult a solicitor) but also obligations (e.g. to give fingerprints, non-intimate and intimate samples). Owners or agents of ships or aircraft may be required to provide specified information.[162] Reasonable force may be used to effect searches,[163] and failure to comply with a duty under the Schedule, including the obstruction of a search or examination, is an offence punishable by up to three months' imprisonment.[164]

9.3. The current Code of Practice[165] (required by TA 2000 Schedule 14) was issued in 2009 after a review of Schedule 7. That review, conducted against a backdrop of increasing counter-terrorism powers, did not result in any amendment to the

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154 Schedule 7, paragraphs 2, 6. Schedule 7 powers may also be exercised near the land border with Ireland and in the Channel Tunnel system.
155 *Ibid*., paragraph 2(4).
156 *Ibid*., paragraph 2(1).
157 *Ibid*., paragraphs 7-9.
158 *Ibid*., paragraph 11.
159 *Ibid*., paragraph 5.
160 *Ibid*., paragraph 16.
161 *Ibid*., paragraph 6.
162 *Ibid*., paragraph 17.
163 Schedule 14, paragraph 3.
164 *Ibid.*, paragraph 18.
165 *Examining Officers under the Terrorism Act 2000 Code of Practice*, Home Office, 2009.

Schedule itself. The Code of Practice is supplemented by Practice Advice from the National Policing Improvement Agency **[NPIA]**.[166]

9.4. The Code of Practice covers such matters as:

(a) who should perform Schedule 7 stops (police officers, save in exceptional circumstances)

(b) how to select persons for stops (selection should be based on the threat posed by the various terrorist groups active in and outside the United Kingdom, on the basis of informed considerations and not solely based on perceived ethnic background or religion)

(c) when the examination is deemed to begin (only after screening questions have been asked, or a person has been directed to another place for examination)

(d) procedures to be observed after one hour's examination, and again on detention (in particular, the service of specified forms and the giving of information).

The NPIA Practice Advice is slightly fuller, but to similar effect. Admirably, its first chapter is devoted to "*community engagement*" as a way of promoting public understanding of the purpose of Schedule 7 powers. I question however whether both a Code of Practice and an NPIA Practice Advice is required, particularly when so much of their contents are duplicative. It would be simpler if the necessary guidance could be contained either in a single document or in two documents whose purposes are distinct.

Practice

9.5. I have observed the operation of Schedule 7 powers at the Port of Stranraer, spoken to Special Branch officers from several small ports and airports about its application in practice and discussed national security, policy and operational issues relating to the power with officials. I have also spoken to a number of organisations, human rights groups and individuals about its perceived impact, particularly on Muslim communities. I am broadly familiar with the operation of port controls at Dover and at the Channel Tunnel, but have not yet witnessed the operation of Schedule 7 controls at these sites or at other major ports and airports.

9.6. Most stops are made on the basis of intelligence, which may range from highly specific information about an individual to the identification of trends at a

166 *Practice Advice on Schedule 7 of the Terrorism Act*, NPIA 2009.

particular port. Even the "*intuitive stop*" or "*copper's nose*" must according to the Code of Practice be based on "*informed considerations*". After a number of trials, and as consistently recommended by Lord Carlile, ports-specific training in the Behavioural Assessment Screening System **[BASS]** has been offered since April 2010. It is anticipated that by the end of 2011, 95% of all ports Special Branch officers and a proportion of airport dedicated uniformed police will have been BASS trained.

9.7. Because of its strong intelligence element, Schedule 7 is in practice operated overwhelmingly by Special Branch officers or their equivalents in other forces, and only rarely by UKBA and Border Force officers. It is used in relation to both arriving and departing passengers.

Frequency of use – Great Britain

9.8. In the year to 31 March 2010, 85,557 people were examined in a border area in Great Britain under Schedule 7 powers. Of those, 2,687 people (3%) were kept for over an hour, some of them detained.[167] There were 486 detentions in 2009/10.[168] A large majority of those detained are required to provide fingerprints.

9.9. Those figures understate the frequency of stops, in that they do not include the substantial number of people who are asked only "*screening questions*". In the words of the NPIA Practice Advice:

> "There is no requirement for examining officers to make a record of .. an encounter if it does not progress beyond initial screening questions. Initial screening questions may include, but not be limited to, those that seek to establish the identity, destination and provenance of the subject, details of their method of travel and the purpose of their travel.
>
> To avoid passenger or traffic congestion, a person or vehicle may be directed to another nearby place for screening questions. This does not constitute the beginning of an examination."

9.10. There are no data for total numbers of Schedule 7 examinations in previous years. Nor are there published data for Schedule 7 examinations in 2010-11. I understand the number to have declined in 2010-11, though comparison will be difficult in the absence of a clear and consistent interpretation of when "*screening questions*" end and examination begins.

9.11. Historical data do exist for numbers of examinations taking more than an hour. These increased in every calendar year between 2004 (1190) and 2008 (2473).

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167 HOSB 18/10, 28 October 2010, Table 2.4.

168 Office of the National Coordinator Ports Policing Performance Report, released by the Metropolitan Police 13 May 2011 in response to freedom of information enquiry.

Continuing the rising trend, the figure for 2009-10 was 2687 (3% of those examined). Of those, approximately 340 people (0.4% of those examined) were detained for between three and six hours, and approximately 40 (0.05%) were detained for between six and nine hours.

9.12. There are no centrally compiled figures for strip searches or for the taking of intimate samples, though I have been given to understand that these are rare.

Frequency of use - Northern Ireland

9.13. I have seen data for Schedule 7 stops and examinations in Northern Ireland during 2009-10. These data are unpublished and I am not entitled to release them. They indicate however that while Northern Ireland saw some thousands of examinations, very little use was made of the power to examine for more than an hour or of the power to detain. It is also my understanding, though I have seen no figures, that as in Great Britain, the number of examinations declined in 2010/11.

Ethnic origin

9.14. Only since 1 April 2010 has the collection of ethnicity data for Schedule 7 stops been carried out on the self-definition basis used for other police powers. The first data collected on that basis will be published in autumn 2011.

9.15. Officer-defined ethnicity data were collected in the year 2009-10. These are considered insufficiently reliable for publication in the Home Office Statistical Bulletin, but have recently been released pursuant to a freedom of information request made by the Federation of Student Islamic Societies **[FOSIS]**. For what it may be worth, officers described 45% of those examined for less than an hour as white, 25% as Asian, 7% as African/Caribbean, 2% as mixed race, 1% Chinese and 19% "*other*".[169]

9.16. Schedule 7 ethnicity data would be of greater value if they could be compared with the ethnic composition of the travelling public at the ports or airports where stops take place. Such data are not currently available, and it is not easy to see how they could be obtained.

9.17. Where the officer-defined data for 2009/10 may have some value is in relation to the relative length of examination and detention for people of different ethnic backgrounds. In particular:

[169] Percentages calculated from Office of the National Co-Ordinator Ports Policing Performance Report. The high percentage of "*other*" is a reason for caution.

(a) White people made up 45% of those examined for less than an hour, but only 19% of those examined for over an hour and 8% of those subject to detention.

(b) People of Asian appearance made up 25% of those examined for less than an hour, but 41% of those examined for over 1 hour and 44% of those subject to detention.

Once stopped and examined, in other words, a person considered by officers to be of Asian appearance is much more likely to be kept for over an hour, and much more likely to be detained, than a white person.

9.18. In the absence of self-defined ethnicity data for Schedule 7 examinees and for port travellers generally, reliable conclusions are elusive. It is plainly right, as set out in the Code of Practice and Practice Advice, that perceived ethnic background or religion should not be used, alone or in combination with each other, as the sole reason for selecting a person for examination.[170] It is also important to remember that al-Qaeda inspired terrorists are of various ethnic origins,[171] and that Northern Ireland related and far-right terrorism, whose perpetrators are generally white, pose credible threats of their own.

9.19. This does not mean, however, that an ethnic breakdown of Schedule 7 examinations needs to reflect, or aspire to reflect, the ethnic composition of the travelling public as a whole. Such a correspondence would be expected if examinations were either comprehensive (screening at airports) or truly random. But to use Schedule 7 in such a way as to reflect the ethnic balance of the travelling population would be the antithesis of intelligence-led policing. It could require members of a particular ethnic group to be stopped not on the basis of any risk factor but "*in order to produce a racial balance in the .. statistics*", a practice detected and rightly deplored by Lord Carlile in the past.[172]

9.20. It is of course necessary to remain perpetually alert to the possibility that figures for Schedule 7 examinations reflect an unconscious racial bias, on the part either of examining officers or those who direct their activities (for example, by requiring them to check a flight from Pakistan rather than a flight from Canada). Such a

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170 Cf. *R (Gillan and Quinton)* v *Commissioner of Police for the Metropolis* [2006] UKHL 12, per Lord Hope at paragraph 46.

171 Of the 133 persons convicted for "*Islamism inspired*" terrorist offences in the UK between 1999 and 2010, 50% were of "*south-central Asian*" and 4% of "*Western Asian*" origin. Eastern Africa (19%) and Northern Africa (15%) were the next most frequent regions of origin. 5% were of Caribbean origin, 3% of North European origin (all white British converts to Islam), 2% of Western African origin and 1% of South European origin: Simcox, Stuart and Ahmed, *Islamist Terrorism – The British Connections,* The Henry Jackson Society / Centre for Social Cohesion, 2nd edn. 2011.

172 In the context of section 44: *Report on the operation in 2008 of TA 2000 and TA 2006*, June 2009, paragraph 140.

conclusion cannot however be supported by a mere discrepancy between the ethnic breakdown of Schedule 7 examinations and the ethnic breakdown of the general population, or population using ports and airports. It would be supported only if there were a demonstrable discrepancy between the ethnic breakdown of those examined and the ethnic breakdown of the perpetrators of terrorism.[173] The proportionate application of Schedule 7 is surely achieved by matching its application to the terrorist threat, rather than to the population as a whole.

9.21. Of course, a marked "*disproportionality*" between numbers searched and the general population may give rise to a problem of perception, which may in turn feed resentment and reduce the overall effectiveness of Schedule 7. This is discussed below.

Complaints and community reaction

9.22. Schedule 7 is a long-established power which has not traditionally been the subject of campaigning or press interest, in the manner of section 44. Police and the Home Office both point to low numbers of complaints from travellers. On the other hand, it is only recently that figures have been produced demonstrating the large number of people who are examined under the power. The Federation of Islamic Student Societies **[FOSIS]** published a report in 2010, acknowledging the utility of Schedule 7 for disrupting terrorism while contending for limitations on its use.[174] The release of ethnicity figures under freedom of information legislation in May 2011 gave rise to critical comment from a number of NGOs and led Lord Ahmed, the Labour peer, to call for an independent review of the use of Schedule 7.

9.23. The Equality and Human Rights Commission ("EHRC") did not deal with Schedule 7 in its 2010 report on stop and search;[175] but it was the subject of comment in a recent report performed for it by researchers from Durham University.[176] They reported:

> "Non-Muslim participants in the focus groups did not recall any experiences of Schedule 7 stop at ports or airports. By contrast, the indications from Muslim participants across the focus groups and interviews with community groups and practitioners in the case study areas were that Schedule 7 stops at airports are perceived to have a widespread negative impact on Muslim communities."

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173 In that regard, it may be relevant that between 2005 and 2010 in Great Britain, 41% of the 1092 people arrested for terrorism and 43% of the 235 charged with terrorist-related offences were said to be of Asian appearance: HOSB 18/10, 28 October 2010, Table 1.6.

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

175 *Stop and think – a critical review of the use of stop and search powers in England and Wales* (EHRC, March 2010).

176 T. Choudhury and H. Fenwick, *The impact of counter-terrorism measures on Muslim communities* (EHRC, June 2011), citing police sources.

Negative experiences included repeated stops of the same individuals; the stress caused to the person stopped and to those travelling with them, as they worry about missing flights or losing baggage; the seizure of mobile phones and credit cards; intrusive and maladroit questions about religious beliefs and community activities; and a feeling they were being targeted as Muslims and used to build up profiles of Muslim communities. I heard similar stories myself from Muslim organisations and individuals.

Conclusions and recommendations

Utility of Schedule 7

9.24. Questioning under Schedule 7 may legitimately be performed only for the purpose of determining whether a person is involved in terrorism. The power nonetheless serves a variety of purposes including deterrence, information and intelligence gathering, questioning persons of interest or persons who may be of interest and recruiting informants.[177] Schedule 7 examinations have also been instrumental in securing evidence which was used to convict dangerous terrorists. Instances of this over the period 2007-10 include:

(a) Yassim Nassari, stopped at Luton Airport in on his return from Syria and Holland and sentenced to 3.5 years' imprisonment for possessing rocket-making instructions, contrary to TA 2000 section 58;

(b) Sohail Anjum Qureshi, stopped at Heathrow Airport in on his way to Pakistan and sentenced to 4.5 years' imprisonment for possession and preparation, contrary to TA 2000 sections 57 and 58 and TA 2006 section 5;

(c) Aabid Khan, stopped at Manchester Airport on his return from Pakistan and sentenced to 12 years' imprisonment under section 57 for possession of material that showed him to be a significant figure in promoting the cause of violent jihad in the English speaking world; and

(d) Houria Chentouf, stopped at John Lennon Airport and sentenced to 2 years' imprisonment for possession of documents contained on a USB pen drive that dropped out of her sleeve when she was stopped.

I have encountered other examples of the usefulness of Schedule 7 stops in disrupting or apprehending persons as to whom available intelligence, at the time of the stop, did not amount to a reasonable suspicion sufficient for arrest.

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

9.25. The utility of the power is therefore scarcely in doubt – though as against that must be weighed the negative impact that has been documented on some Muslim communities, illustrated by the community police officer who referred to Schedule 7 stops as something that is "*bubbling under the surface ... eroding trust*".[178]

9.26. Ports officers have underlined to me the difficulties in making the most effective use of Schedule 7 when little or nothing is known about passengers before their arrival at the port. Stranraer, for example, one of the busiest passenger ports in the United Kingdom, is used by third country nationals who fly to Dublin, cross the open border to Northern Ireland and then pay cash in Belfast for ferry tickets to Scotland. Within 10 minutes of disembarkation they can be boarding one of the daily or twice daily onward coaches to Glasgow, Edinburgh, Leeds, Birmingham or London. Schedule 7 is an important defence against terrorism on this back-door route into Great Britain: yet incomplete and uninformative manifests – which are the norm on this route – make it difficult for police to run advance checks on passengers and so to use Schedule 7 in as targeted and restrained manner as they would wish. Improvements could include:

(a) use of existing statutory powers to require passenger manifests on internal flights and ferry routes,[179] and

(b) exploring with the European Union the possibility of requiring advance passenger information on intra-EU journeys (on which the availability of manifests is currently very patchy, and dependent on the goodwill of carriers and other Member States).

There are questions also as to the sufficiency of freight manifests and as to whether the freight searching facilities at ports (for example, Stranraer and the new port under construction at Cairnryan) are adequate to allow effective use to be made of Schedule 7 paragraph 9.

9.27. What is not altogether clear to me is whether useful dividends flow from some of the more extreme manifestations of the power – the ability to detain for 9 hours, the powers to strip search, take intimate samples and so on. Ports officers have impressed upon me the time that may be needed to identify passengers, particularly groups of passengers operating under false documents. There are also logistical difficulties, particularly at remote ports, concerned with the obtaining of fingerprints and the availability of interpreters (though interpreter phones, which can call on the services of specialist interpreters worldwide, are mitigating this problem).

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178 *Ibid.*

179 Police and Justice Act 2006, section 14; Immigration and Nationality Act 2006, section 32; TA 2000 Schedule 7, paragraph 17.

Lawfulness of Schedule 7

9.28. Another imponderable is the possible implication of the *Gillan* judgment for Schedule 7. The European Court of Human Rights did express the view that "*the search to which passengers uncomplainingly submit at airports or at the entrance to a public building*" would be "*clearly justified on security grounds*", and added that the airport search could be distinguished from a section 44 stop on the basis that "*[a]n air traveller may be seen as consenting to such a search by choosing to travel*".[180] The Court appears however to have been thinking here of the routine security screening of all air passengers,[181] rather than the selective application of Schedule 7 powers with their extensive elements of compulsion (in particular, the requirement to answer questions in examination, on pain of prosecution, and the power of detention which no doubt encourages co-operation even if in cases where it is not used).

9.29. Liberty, which ran the *Gillan* case, was recently reported to be taking to the European Court of Human Rights the case of Sabure Malik, an investment banker who claims to have suffered intrusive questions under Schedule 7 about his religious beliefs when returning through Heathrow Airport from a pilgrimage to Mecca with his elderly mother.[182]

9.30. It does not seem beyond the bounds of possibility that Article 5 and/or Article 8 of the European Convention might be held to apply to the exercise of at least some of the Schedule 7 powers. To the extent that they do, the onus will be on the authorities to justify those powers as necessary in the interests of national security, proportionate in their application, "*sufficiently circumscribed*" and "*subject to adequate legal safeguards against abuse*".[183] In any event, and whether or not such requirements must be satisfied as a matter of law, they should surely be satisfied as a matter of good administrative practice and in the interests of good community relations.

Recommendations

9.31. In the short period I have so far spent as Independent Reviewer, it has not been possible for me to form as comprehensive a picture as I would have liked of the use of Schedule 7 at United Kingdom ports and airports. Accordingly, I make no detailed findings at this stage, but rather the following general recommendations.

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180 *Gillan and Quinton v United Kingdom*, judgment of 12 January 2010, paragraph 64. It is also true that the Schedule 7 powers are not dissimilar to powers used in an immigration context against foreign nationals: Immigration Act 1971, Schedule 2.

181 As was Lord Bingham in the House of Lords, whose words were here echoed by the European Court: [2006] UKHL 12, paragraph 28.

182 *Heathrow terror police 'shook Koran in Muslim's face'*, Sunday Times, 12 June 2011.

183 It was their failure to meet the latter requirements that caused the TA 2000 section 44 and 45 powers to violate Article 8 of the Convention: *Gillan* paragraph 87.

9.32. **There should be a careful review of the extent and conditions of exercise of the Schedule 7 power, involving the widest possible consultation with police, carriers, port users and public, with a view to ensuring that port and border controls are both necessary, sufficient to meet the threat, attended by adequate safeguards and proportionately exercised.**

9.33. **The consultation and review should cover at least the following questions:**

(a) Is there a need for a power to examine port and airport users without the need for reasonable suspicion, to require them to answer questions and to detain them if necessary against their will?

(b) Are measures needed to improve the availability of advance passenger information on flights and ferry crossings within the EU and the UK, so as enable the more effective deployment of Schedule 7 and to reduce delays?

(c) Are measures needed to improve advance freight information, and freight searching equipment at ports, in order to allow for the effective use of Schedule 7 paragraph 9?

(d) Is a power needed to intercept unaccompanied post and parcels under Schedule 7, and if so on what conditions?[184]

(e) Should Schedule 7 powers be reserved for ports officers, or BASS trained officers, and should exceptions be permitted?

(f) Can existing training and guidance be improved, as regards both the selection of persons for examination and the questions that are asked?

(g) What are the criteria that should distinguish initial screening questions from examination, and examination from detention?

(h) Should it remain a criminal offence to refuse to answer questions asked during examination?

(i) Should search powers extend to copying mobile phone records?

(j) Should the reasoned authorisation of a senior officer be required for all detentions, or all examinations beyond a particular time?

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184 There is a perceived conflict between Regulation of Investigative Powers Act 2000 section 1, which prohibits the interception of mail, and TA 2000 Schedule 7 paragraph 9 which allows for the examination of property. Lord Carlile took the view in July 2010 that "*post should be treated like all other freight and, if necessary, the law should be amended to provide certainty*": *Report on the operation in 2009 of TA 2000 and Part 1 of TA 2006*, paragraph 196.

(k) At what point should persons have the right to have a person advised of their whereabouts, the right to a legal adviser and the right to legal aid?

(l) Should rights and obligations be different depending on whether a person is detained at a port or a police station?

(m) Should the maximum period of detention be reduced from the current period of 9 hours after the start of examination?[185]

(n) Should powers to conduct strip searches and take biometric samples be retained, and if so on what conditions?

[185] The maximum period of detention was reduced from 12 hours under pre-TA 2000 powers. Lord Lloyd recommended in 1996 that it be reduced to six hours.

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

Law

10.1. Terrorists, even of the most serious and high profile variety, are often put on trial for ordinary criminal offences. Thus:

(a) The defendants in Operation Overt, the airline liquid bomb plot, were convicted between 2008 and 2010 of offences such as conspiracy to murder, conspiracy to cause explosions and public nuisance.[186]

(b) Roshonara Choudhry, the King's College student who admitted attacking Stephen Timms MP for political and religious reasons, was convicted in 2010 of attempted murder and possession of an offensive weapon.

10.2. There should be nothing surprising about this. Terrorists are first and foremost criminals. Where possible and as a general rule, they should be prosecuted under the ordinary criminal law, to underline the fact that no special laws are necessary for the purpose and to prevent them from glamorising or politicising their offences by concentrating their defence on such matters as whether the definition of terrorism is satisfied, and whether there was a "*reasonable excuse*" for their acts.[187] When defendants are convicted of specified offences falling outside the terrorism legislation, CTA 2008 sections 30-32 allow the courts in Great Britain to reflect any "*terrorist connection*" (as found by the judge, if necessary after a Newton hearing) in their sentences.

Specific terrorism offences

10.3. There is, however, widespread agreement that there should be a place in the statute book for certain specific terrorism offences. Some of those offences are required by international treaty. Additional justification for special terrorist offences has been found in "*the singular sense of horror and revulsion created by terrorist crime*" and the fact that "*terrorist crime is seen as an attack on society as a whole, and our democratic institutions*".[188] More pragmatically, and perhaps more persuasively, it is to be found in the particular operational demands of counter-terrorism policing. Those demands include the need to intervene before

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186 Public nuisance was not on the indictment, being added by the judge.

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

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

the public is in danger,[189] particularly in the case of al-Qaeda inspired terrorism where warnings are rare and civilian targets the norm. This may mean intervention at a stage before the orthodox criminal offences of incitement, conspiracy or attempt can be made out.

10.4. In a recent judgment the intention of Parliament in creating offences under TA 2000 and TA 2006, reflected also in the Council of Europe Convention on the Prevention of Terrorism, was described as:

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

(b) "*to prevent or at least drastically reduce the number of young men and women who would be 'radicalised' by propaganda of various kinds to believe that the commission of such offences is desirable and from there to begin to plan to carry out or to help others to carry out such acts*".[190]

10.5. Most of the specific terrorism offences in TA 2000 Part VI and TA 2006 Part I may be characterised as "*precursor crimes*".[191] Their effect is to extend the reach of the criminal law to behaviour which is or may be preparatory to acts of terrorism. Some have the additional or alternative effect of "*net-widening*", in the sense of catching persons whose connection with terrorist acts is at best indirect.[192] The principal offences are briefly summarised below.[193]

Incitement offences

10.6. TA 2006 section 1 penalises with up to seven years' imprisonment the publication of statements likely to be understood as a direct or indirect encouragement or inducement to the commission, preparation or instigation of terrorism. The defendant must either intend to encourage or induce, or be reckless as to whether members of the public will be encouraged or induced. It is not however necessary to show either that specific acts of terrorism are being encouraged, or that the encouragement was effective. Indirect encouragement

189 *Ibid.*, paragraph 30.

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

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

192 E.g. the offences of presence at a place used for training (TA 2006 section 8) and non-disclosure (TA 2000 sections 19, 38B). For the italicised phrases, as for so much else, I am indebted to Clive Walker's authoritative *Terrorism and the Law* (OUP 2011).

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

includes glorification, but only where members of the public could reasonably be expected to infer that they should emulate the conduct being glorified. Praise for past terrorist violence will thus only be an offence if it carries with it the message that such violence should be emulated in the future.

10.7. TA 2006 section 2 focuses not on the original publisher but on those who pass the publication on. It penalises (again with seven years' imprisonment) the dissemination of terrorist publications, for example through internet forums, either with the intention that they should directly or indirectly encourage acts of terrorism, or recklessly as to whether they will do so. In cases of recklessness only, it is a defence to show that the publication did not express the defendant's views and was not endorsed by him. The value of section 2 to the prosecutor is in catching disseminators of terrorist materials who did not go so far as to incite any terrorist offence. Breaches of section 2 are likely to be less serious than breaches of TA 2000 sections 57 and 58 (below).[194]

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

Training offences

10.9. TA 2000 section 54, originating in legislation applicable to Northern Ireland and punishable with up to 10 years in prison, provides for the offences of providing, receiving or inviting another to receive training in the making or use of firearms, radioactive material, explosives or chemical, biological or nuclear weapons. Underlining the terrorism-specific nature of these offences, it is a defence to prove that one's action or involvement was wholly for a purpose other than assisting, preparing for or participating in terrorism.

10.10. More frequently used, both in Great Britain and Northern Ireland, are TA 2006 sections 6 and 8, which carry the same maximum penalty. They penalise respectively training for terrorism and attendance at a place (whether in the United Kingdom or abroad) used for terrorist training. There is no requirement that training under these sections be with weaponry.

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

Possession for terrorist purposes

10.11. TA 2000 section 57, frequently used and (like section 58) derived from Northern Ireland, punishes with up to 15 years' imprisonment possession of an article in circumstances which give rise to a reasonable suspicion that possession is for a purpose directly connected with the commission, preparation or instigation of acts of terrorism. Other statutes apply to possession of firerarms and explosives; section 57 may catch even such articles as cars, which are not designed for terrorism. It is however a defence to section 57 if a non-terrorist related excuse is provided which the prosecution is unable to rebut beyond reasonable doubt.[195]

10.12. TA 2000 section 58 imposes the lesser maximum of 10 years' imprisonment for the collection or possession of information (including downloads) "*of a kind likely to be useful to a person committing or preparing an act of terrorism*". Remarkably, and in distinction to section 57, there is no requirement on the prosecution to show that the defendant had a terrorist purpose. The information however "*must, of its very nature, be designed to provide practical assistance*";[196] and it is a defence to the charge for the defendant to advance a reasonable excuse which the prosecution is unable to rebut. The CPS does not take the view that mere curiosity will always be a reasonable excuse: the curious must thus place their faith in the restrained exercise of prosecutorial discretion. The issue of whether acts of terrorism (including by way of self-defence) against a tyrannical regime can constitute a reasonable excuse has arisen in a number of cases including, most recently, *R v AY.*[197]

Eliciting information

10.13. TA 2000 section 58A criminalises the eliciting, publication or communication of information about the military, intelligence services or police, when that information is of a kind likely to be useful to a person committing or preparing an act of terrorism. There is a reasonable excuse defence and a maximum penalty of 10 years in prison. Section 58A overlaps with section 58, but is considered important especially in Northern Ireland, where attacks targeted on members of the police and security forces are much more common than in Great Britain.

10.14. Section 58A is principally controversial because of fears that it may be used, on its own or in conjunction with the section 44 stop and search power, in order to prevent photography of the police in public places (for example, on marches or at demonstrations). Since Home Office guidance,[198] and the discontinuance of the

195 Section 57(2), as interpreted in *R v G and J* [2009] UKHL 13, paras 63-68.
196 *R v G and J* [2009] UKHL 13, para 43.
197 [2010] EWCA Crim 762.
198 *Photography and Counter-Terrorism Legislation*, Home Office Circular 012/2009.

section 44 power in July 2010, much of the heat appears to have gone out of the issue and I have received no representations about misuse of section 58A for this purpose. In its Review of Counter-Terrorism and Security Powers, the Government recommended that section 58A be kept under close review but not repealed, and that guidance be improved.[199]

Acts preparatory

10.15. TA 2006 section 5 makes it an offence to engage, with the intention of committing or assisting the commission of acts of terrorism, in conduct in preparation for giving effect to that intention. The maximum penalty is life imprisonment. Preparatory conduct is a broad concept, which will often require more than mere possession of the type caught by sections 57 and 58.[200] However a submission that the concept of preparation was unlawfully imprecise was rejected by the Court of Appeal in 2010.[201] Section 5 has been applied to such matters as the assembly of bomb-making ingredients, the preparation for a beheading and the sending of equipment to terrorists fighting abroad.

Directing a terrorist organisation

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

Offences committed outside the United Kingdom

10.17. Many terrorist offences may in principle be prosecuted in the United Kingdom notwithstanding the fact that they may have been committed outside its borders, by persons unconnected with the United Kingdom, and directed towards foreign governments.[202]

10.18. Relevant in this respect are:

(a) TA 2000 sections 59-61, which render it an offence in the United Kingdom to incite people inside or outside the United Kingdom to commit certain acts of terrorism abroad

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

200 *R v Roddis* [2009] EWCA 585, paragraph 9.

201 *R v A* [2010] EWCA Crim 1958.

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

(b) TA 2000 section 62, which criminalises terrorist bombing outside the United Kingdom

(c) TA 2000 section 63, which criminalises terrorist financing outside the United Kingdom

(d) TA 2006 section 17, which criminalises the commission abroad of offences under TA 2006 sections 1-6 and 8-11 and TA 2000 section 54, and extends worldwide certain offences under the Explosive Substances Act 1883.

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

10.19. Viewed in the round, these provisions constitute a remarkable extension of United Kingdom jurisdiction, exceeding that which is required by international treaty. Some moderating influence is however supplied by the requirement in section 117(2A) TA 2000 of consent for prosecution. This is considered to apply not only to obvious plots against foreign countries, but to persons who have shown interest in violent jihad generally. If it is considered possible that this might involve travel to fight abroad, it potentially concerns the affairs of a country other than the United Kingdom and therefore requires consent: consent was granted 14 times in 2010.[203]

Practice – Great Britain

Charges under TA 2000 and TA 2006

10.20. Statistics are not available in Great Britain for all charges brought under terrorism legislation. The figures for *principal* offence charged suggest, however, that 2009/10 was a quiet year on the terrorism front. Only 10 suspects were charged with a principal offence falling under TA 2000 or TA 2006: of these, six were faced with preparation charges (TA 2006 section 5), three with collection of information charges (TA 2000 section 58) and one with a fundraising charge (TA 2000 sections 15-18).[204]

10.21. This compares with a yearly average of 34 persons charged over the previous four years with a principal offence under TA 2000 and TA 2006. In past years, those principal offences included also possession of an article for terrorist

[203] Figure supplied to me by Attorney General's Office.

[204] HOSB 18/10, 28 October 2010, Table 1.3(a). 29 people were charged in 2009-10 "*under all legislation but where considered terrorism related*": HOSB 04/11, 24 February 2011, Table 1.4.

purposes (TA 2000 section 57), membership (TA 2000 sections 11-13), non-disclosure and tipping off (TA 2000 sections 38b and 39), inciting terrorism overseas (TA 2000 section 59) and encouragement (TA 2006 sections 1 and 2).[205]

10.22. In addition to the four whose principal offence charged was under TA 2000 and the six whose principal offence charged was under TA 2006, two were charged with a principal offence under TA 2005 (breach of the conditions of a control order) and 13 with a non-specific terrorism offence which is deemed to be terrorism-related. Of the latter, four were offences under the Explosive Substances Act 1883[206] and most others are likely to have been conspiracies or firearms offences.[207]

Convictions under TA 2000 and TA 2006

10.23. In 2009-10 a total of three people were convicted for a principal offence under TA 2000, two for collection (section 58) and one for inciting overseas (section 59). Nobody was convicted for a principal offence under TA 2006.[208]

10.24. These figures were low by past standards: over the period 2006-09 there was an average of 23 convictions per year for a principal offence under TA 2006, with a particular emphasis on possession and collection, preparation, membership and fundraising.[209]

10.25. The number of convictions for TA 2000 and TA 2006 offences is likely to have been somewhat greater than is suggested by these figures, which are limited to the principal offences for which suspects were convicted. Thus, in 2009-10 a total of 11 persons were sentenced under TA 2000 and TA 2006, seven of them after a guilty plea.[210]

Conviction rates

10.26. Conviction rates specific to TA 2000 and TA 2006 offences are not published. Of the 28 defendant trials for offences "*under all legislation but where considered terrorism related*" that were completed in the calendar year 2010, 64% resulted

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205 HOSB 18/10, 28 October 2010, Table 1.3(a). Those figures relate to year of arrest rather than year of charge.

206 *Ibid.*, Tables 1.3(a) and 1.3(b),

207 Judging by the breakdown given for trials in 2009/10 at HOSB 18/10, 28 October 2010, Table 1.9(b), and the figures for past years in Table 1.10(b).

208 HOSB 18/10, 28 October 2010, Table 1.10(a). I am told that these include guilty pleas.

209 *Ibid*., Table 1.10(b).

210 *Ibid.*,Table 1.11(a).

in a conviction. The equivalent figures for the previous 12 months were 39 trials and 79%.[211]

10.27. Anecdotal evidence relayed to me from all sides of the trial process suggest strongly that it is more difficult to persuade a jury to convict when the offence has little or no connection with the United Kingdom.

Sentences

10.28. Of 18 offenders convicted "*under all legislation but where considered terrorism related*" in the calendar year 2010 (12 after a guilty plea and six after a not guilty plea), all were sentenced to at least a year's imprisonment. 13 received determinate prison sentences, of which 10 were for less than four years and one for more than 10 years, and four were imprisoned for life.[212]

10.29. As of 31 December 2010 there were 123 persons in prison for terrorist/extremist or related offences in Great Britain, down from 132 a year earlier.[213]

Practice – Northern Ireland

Charges under TA 2000 and TA 2006

10.30. In Northern Ireland as in Great Britain, there were few charges under TA 2000 (and none under TA 2006) during 2009-10. Eight individuals were charged with nine offences under TA 2000: four of membership (section 11), three of possession (section 57) and two of collection (section 58). This compares with a historic total, over the period 2001-2009, of 228 people being charged with 309 offences – the vast majority (over 85%) being charges under sections 11, 15, 57 and 58.[214]

10.31. The low number of charges under TA 2000 corresponds to the low number of offences under anti-terrorism legislation that are recorded in Northern Ireland: just seven in 2009-10 and 19 in 2010-11, out of a total of 1488 / 1243 "*offences against the state"* recorded over the same periods.[215] Regardless of the extent to which the continuing problems in Northern Ireland qualify as terrorism within

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211 HOSB 14/11, 30 June 2011, Table 1.5; see also HOSB 18/10, 28 October 2010, Table 1.8(a).

212 *Ibid.*, Table 1.6. The figure of six not guilty pleas seems low, given that 28 trials and 18 convictions "*under all legislation but where considered terrorism related*" are reported for 2010: HOSB 14/11, 30 June 2011, Table 1.5.

213 *Ibid.*, Table 1.7.

214 *Northern Ireland Terrorism Legislation: Annual Statistics 2009/10*, Table 5a.

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

the TA 2000 section 1 definition, the evidence does not suggest that they are generally characterised as such by the police, or that prosecutions under the terrorism legislation are perceived as a major part of the solution.

Convictions under TA 2000 and TA 2006

10.32. In 2009-10 one person was tried for a TA 2000 offence (section 58, collection of information), found guilty and sentenced to five years' imprisonment, to run concurrently with sentences for other offences.

10.33. In 2010-11 three persons were tried for a TA 2000 offence. One was convicted on five counts under sections 16 and 17 (terrorist financing), and two were convicted under section 57 (possession of articles for terrorist purpose).[216]

Conclusions and recommendations

10.34. The arsenal of terrorist offences is amply stocked. Neither police nor prosecutors (nor, for that matter, those entrusted with security preparations for the Olympic Games) suggested to me that further powers were needed in order to combat the existing or any foreseeable terrorist threat.

10.35. Relatively little use was however made of that arsenal in 2010 – particularly in Northern Ireland, where both terrorist violence and section 41 arrests were widespread. Sometimes that is because plots are disrupted at an early stage by security service or police, and never come within the criminal justice system at all. Of the major terrorist cases which do come to court, however, a high proportion across the United Kingdom tend to be charged primarily under the ordinary criminal law. The public abhorrence of terrorist crime seems adequately reflected in convictions for explosives offences or conspiracy to murder. Charges under TA 2000 and TA 2006 are brought too, especially in Great Britain, but they are useful extensions of the ordinary law rather than staple ingredients of the fight against terrorism.

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

(a) The controversial concept of "*glorifying terrorism*" survives in TA 2006 sections 1(3) and 2(4): but the fear that it would criminalise the writing of history has been addressed at least to some extent by the insertion during the parliamentary process of a condition ensuring that it is applied only when the public could reasonably be expected to infer that what is being glorified is

[216] Figures supplied to me by Courts and Tribunals Service of Northern Ireland.

being glorified as conduct that should be emulated by them in existing circumstances.

(b) Many of the "*reverse burdens*" in TA 2000 and TA 2006, which appear to require the defence to prove important elements of their case rather than the prosecution to disprove them, have either been circumscribed in statute as being evidential only – requiring the defence to produce an explanation which it is for the prosecution to disprove[217] – or have been so interpreted by the courts, in conformity with the Human Rights Act 1998.[218] I do not understand the CPS to contend that any of the reverse burdens to be found in the specific terrorist offences are to be interpreted as legal burdens (i.e. a requiring the defendant to prove the ingredients of the defence).

10.37. Other matters which I shall keep under review are:

(a) The complexity of TA 2006 sections 1 and 2, which makes them difficult to explain to juries, and their consequent potential to have a "*chilling effect*" on legitimate public discourse. As was aptly stated in a recent case:

> "The further back towards 'thought crime' the law goes, the greater the scrutiny required of the substantive law and the greater care that needs to be taken that such proceedings as are brought under sections like section 2 are conducted, so as to ensure that the undoubted interference that they represent with article 10 rights is not unacceptable."[219]

(b) The breadth of TA 2000 section 58, which requires no terrorist purpose, and in which considerable weight is thus likely to rest on the defence of reasonable excuse. The issues of whether curiosity on the one hand and taking up arms against a tyrannical regime on the other can constitute reasonable excuse demonstrate both the range of circumstances in which the offence may apply and the difficulties in its application.

(c) The application of TA 2000 section 58A, and the evolution of any guidance on its application.

(d) The exercise by the CPS of its discretion to charge in relation to cases whose connection with the United Kingdom is limited.

I hope that both prosecutors and defenders will continue to share their thoughts with me on these and any other controversial or problematic features of the terrorist offences provided for under TA 2000 and TA 2006.

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217 TA 2000 section 118.

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

219 *R v Ahmed Faraz*, ruling of 27 May 2011, per Calvert-Smith J at transcript p. 15.

10.38. I have considered whether to make recommendations for change, but decided against doing so at this stage. The responsible exercise of its powers by the CPS, coupled with the resourcefulness of counsel and the courts, particularly when armed with the strong interpretative duty in section 3 of the Human Rights Act 1998, seem to me to have combined to produce a workable code of terrorist offences, albeit with some rough edges. Furthermore, any inclination to criticise that code for over-breadth needs to be balanced by a realisation that criminal prosecution will always be preferable to the application of executive sanctions such as control orders or their replacements, and that it therefore has the potential to remove or at least reduce the need for such sanctions.

10.39. I will, accordingly, keep the position under review but make no specific recommendations under this head.

11. CONCLUSION

11.1. To inspect the counter-terrorism machine from the inside is to be struck not only by its sheer power, scale and professionalism – particularly in comparison to the somewhat haphazard nature of the threat to which it is directed – but by the extent to which it is conceived as something apart. There are formidable concentrations of expertise in OSCT, in MI5 and in other institutions such as JTAC and the National Ports Analysis Centre. In SO15 and in CTUs and CTIUs up and down the country, dedicated counter-terrorism police have their own priorities, their own facilities, their own ring-fenced budgets.

11.2. The fact that al-Qaeda related terrorism has scored only one victory on United Kingdom soil – albeit a particularly horrible one, with more than 50 lives lost – is without doubt attributable to the efficacy of that counter-terrorism machine, particularly in the years after 2005. To rank the number of terrorism-related deaths against the far greater number of deaths that are caused by transport accidents or non-terrorist crime is not a particularly meaningful exercise, especially given the risk that another "*spectacular*" such as 9/11 could leave thousands dead. However, the possibility that priorities may become skewed must always be acknowledged.[220] Any institution, whether a climate research institute or a medical research department, has an interest in exaggerating the threat that it exists to fight, even if only unconsciously, particularly when the threat seems to be in abeyance and a budget need to be defended. That is a tendency which those monitoring such institutions need to have constantly in mind.

11.3. The same two tendencies – treating terrorism as something apart, and the ever-present risk of authoritarian overkill – are observable also in the statute book whose operation it falls to me to review. Terrorists may have different motives from other criminals – but as charging behaviour demonstrates on both sides of the Irish Sea, their basic stock in trade of firearms, explosives and plots to kill is capable of being dealt with under the orthodox criminal law, supplemented only where operationally necessary by special procedures and additional criminal offences.

11.4. The courts have a proud record of curbing the unnecessary or counter-productive excesses of counter-terrorism law, whether detention without charge under ATCSA 2001 or the stop and search power under TA 2000 section 44.

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220 As Jonathan Evans, Director General of MI5, said in September 2010: "*In recent years we appear increasingly to have imported from the American media the assumption that terrorism is 100% preventable and any incident that is not prevented is seen as a culpable government failure. This is a nonsensical way to consider terrorist risk and only plays into the hands of the terrorists themselves.*" See link at fn 50, above.

More recently, the Review of Counter-Terrorism and Security Powers aimed "*where possible, to provide a correction in favour of liberty*".

11.5. I have concluded in this Report, based on the evidence that I have seen of the operation of TA 2000 and TA 2006, that:

(a) The rebalancing intended by the Review, where it falls within the scope of TA 2000 and TA 2006, is timely and appropriate.

(b) The methods that are proposed to give effect to that intention are however flawed, in relation to both stop and search powers and detention before charge, and should be improved.

(c) Other aspects of TA 2000 and TA 2006 should also be reviewed so as to ensure that they are both effective and proportionate.

11.6. My principal recommendations may be summarised as follows:

- There should be a full review of the TA 2000 Schedule 7 power, exercisable without reasonable suspicion, to examine and detain travellers at ports and airports to determine whether they are concerned in terrorism.

- Proscription of organisations should be time-limited, so that organisations can remain on the proscribed list only if the Secretary of State can satisfy Parliament that they should do so.

- The exceptional power for judges to permit more than 14 days' pre-charge detention should be triggered by an order made on strict statutory conditions, not by primary legislation as proposed by the Government.

- The new no-suspicion stop and search power in section 47A of the Terrorism Act 2000 should be used so far as possible on the basis of intelligence or risk factors rather than on a purely random basis, and the statutory guidance should be revised to reflect this.

11.7. I have also made some more specific recommendations, and identified provisions that I wish to keep under particular review over the year ahead.

11.8. More far-reaching consolidation and amendment of the terrorism law remains a project for the future. The law has grown quickly, and could benefit from a thorough review. It seems to me that in relation to any such amendment or consolidation, the four principles formulated by Lord Lloyd in 1996 have stood the test of time:

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

(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.[221]

11.9. Anyone with useful experience of the operation of TA 2000 and TA 2006 is encouraged to contact me through my website. I welcome contact also in relation to asset freezing under the Terrorist Asset-Freezing etc. Act 2010 and control orders under PTA 2005, which will form the subject of my next two regular reports.

[221] Rt. Hon. Lord Lloyd of Berwick, *Inquiry into legislation against terrorism* (Cm 3420, 1996) vol. 1, paragraph 3.1.

12. RECOMMENDATIONS

Statistics (Section 1)

12.1. **Efforts should be made, so far as possible, to co-ordinate reporting practice and the preparation of terrorism-related statistics in Great Britain and Northern Ireland in future years.**

12.2. **Statistics should be prepared both in Great Britain and in Northern Ireland recording the total number of charges and convictions for each offence under the terrorism legislation**.

Proscription (Section 4)

12.3. **Organisations which are no longer involved in terrorism should have a realistic chance of achieving deproscription without the need to embark upon POAC proceedings. This should be achieved by requiring that all proscriptions shall expire after a set period, the onus then being on the Secretary of State to seek the assent of Parliament if she wishes to reproscribe and to demonstrate (with reasons) that the conditions for doing so are made out.**

12.4. **The absence of an organisation said to be concerned in Northern Ireland related terrorism from the list of "*specified organisations*" under the Northern Ireland (Sentencing) Act 1998 should be given particular weight when the proscription of such an organisation is reviewed.**

Arrest and detention (Section 7)

12.5. **The section 41 requirement for reasonable suspicion in relation to each person arrested should be kept firmly in mind by all forces during future operations, particularly in view of the security pressures that are likely to attend the London Olympics.**

12.6. **Police should guard against too ready a recourse to section 41 arrest and detention in cases when the suspect is always likely to be charged, if at all, under laws other than the Terrorist Acts.**

12.7. **The mechanism for extending the period of pre-charge detention beyond 14 days in exceptional cases should not be primary legislation as proposed by the Government, but an order-making power conferred upon the Home Secretary, with safeguards, along the lines suggested by the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills in its Report of 23 June 2011.**

12.8. **The amendment of TA 2000 Schedule 8 so as to reflect on its face the requirements of Article 5 ECHR is desirable and should be considered in the light of the forthcoming judgment of the Supreme Court in *Duffy.***

Stop and search (Section 8)

12.9. **The Code of Practice on TA 2000 section 47A should be revised so as to introduce full and proper guidance on the exercise of the officer's discretion to stop and search, so minimising the risk that the discretion will be used in an arbitrary manner. If it is wished to retain a power to retain random search as an option, notwithstanding the discouragement expressed judicially in *Gillan*, the circumstances in which it is appropriate will have to be carefully defined, and strong reasons advanced for why it can be preferable in those circumstances to searches based on suspicion, intelligence, risk factors or intuition.**

Port and border controls (Section 9)

12.10. **There should be a careful review of the extent and conditions of exercise of the Schedule 7 power, involving the widest possible consultation with police, carriers, port users and public, with a view to ensuring that port and border controls are both necessary, sufficient to meet the threat, attended by adequate safeguards and proportionately exercised.**

12.11. **The consultation and review should cover at least the following questions:**

(a) Is there a need for a power to examine port and airport users without the need for reasonable suspicion, to require them to answer questions and to detain them if necessary against their will?

(b) Are measures needed to improve the availability of advance passenger information on flights and ferry crossings within the EU and the UK, so as enable the more effective deployment of Schedule 7 and to reduce delays?

(c) Are measures needed to improve advance freight information, and freight searching equipment at ports, in order to allow for the effective use of Schedule 7 paragraph 9?

(d) Is a power needed to intercept unaccompanied post and parcels under Schedule 7, and if so on what conditions?

(e) Should Schedule 7 powers be reserved for ports officers, or BASS trained officers, and should exceptions be permitted?

(f) Can existing training and guidance be improved, as regards both the selection of persons for examination and the questions that are asked?

(g) What are the criteria that should distinguish initial screening questions from examination, and examination from detention?

(h) Should it remain a criminal offence to refuse to answer questions asked during examination?

(i) Should search powers extend to copying mobile phone records?

(j) Should the reasoned authorisation of a senior officer be required for all detentions, or all examinations beyond a particular time?

(k) At what point should persons have the right to have a person advised of their whereabouts, the right to a legal adviser and the right to legal aid?

(l) Should rights and obligations be different depending on whether a person is detained at a port or a police station?

(m) Should the maximum period of detention be reduced from the current period of 9 hours after the start of examination?

(n) Should powers to conduct strip searches and take biometric samples be retained, and if so on what conditions?

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