

# The Independent Review of Terrorism Laws

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☞ Independent reviewing officers; Legislation; Terrorism

## The origins and history of independent review

Independent review of the operation of UK anti-terrorism laws fuses three concepts unremarkable in themselves, but radical in combination. A person is selected on the basis of independence from Government; given unrestricted access to classified documents and national security personnel; and his conclusions—favourable or otherwise—promptly published not just to Ministers but to Parliament and the general public.

Any Government that invites review on those terms deserves respect simply for doing so. Approval from an Independent Reviewer is worth having, because that person has a full understanding both of the threat and of the measures taken to combat it. But criticism has the potential to be devastating, for the same reasons. By accepting review of this kind, Ministers make it harder for themselves to use the age-old brush-off: “If you had seen what I have seen ...”. The Independent Reviewer *has* seen what they have seen and, unconstrained by the disciplines or loyalties of office, has every reason—unless he has gone rogue or gone native—to tell it as it is.

### *The forward thinkers*

The involvement of independent figures in the formulation of terrorism legislation had its origins at the height of the Troubles of the 1970s. In 1972—a year which saw 468 deaths from terrorism in Northern Ireland—a four-man Commission chaired by Lord Diplock, a serving Law Lord, was asked to report on what arrangements could be made “in order to deal more effectively with terrorist organisations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities ...”.<sup>1</sup> The well-known result was the establishment of the non-jury Diplock Courts for scheduled offences, which for limited categories of case continue to operate today. In 1974, a seven-person committee was convened “to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland”.<sup>2</sup> The Gardiner

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<sup>1</sup> *Report of the Commission to consider legal procedures to deal with terrorism in Northern Ireland*, December 1972, Cmnd.5185.

<sup>2</sup> *Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland*, January 1975, Cmnd.5847.

Commission, chaired by the former Lord Chancellor, made more than 40 recommendations in its report of January 1975. Prominent among them was the ending of Special Category Status for prisoners convicted of scheduled offences, a bold if controversial attempt to subject Irish republican terrorism to the constraints of normal criminal justice.

The purpose of the Diplock and Gardiner reports was not to conduct post-legislative scrutiny but to recommend the introduction of new procedures and law to deal with changes to the terrorist threat. Into the same category falls the 1996 report of Lord Lloyd, again a serving Law Lord, who was asked to consider the future need for specific counter-terrorism legislation in the United Kingdom, on the assumption that there would be a state of lasting peace in Northern Ireland.<sup>3</sup> Lord Lloyd's recommendations formed the basis of the Terrorism Act 2000, a permanent statute whose fortuitous timing gave it great influence over the explosion of post-9/11 legislation in other countries.<sup>4</sup>

### *20th century independent review*

Post-legislative review of the operation of existing terrorism laws, the subject of this article, is a distinct exercise. The spur for this form of independent review was the spread of Northern Ireland-related terrorism into Great Britain, closely followed by anti-terrorism laws. On November 21, 1974, the Birmingham pub bombings killed 21 people, doubling the IRA's death toll in Great Britain for the year. Eight days later, the first Prevention of Terrorism (Temporary Provisions) Act completed its parliamentary passage. Based on older precedents,<sup>5</sup> that Act proscribed the IRA and made display of support for it illegal. It enabled the making of exclusion orders restricting persons to the territory of either Great Britain or, more usually, Northern Ireland. It gave the police wide new powers of arrest and detention, and further powers—the origin of the present Sch.7 to the Terrorism Act 2000—to conduct security checks on travellers entering and leaving Great Britain and Northern Ireland. These powers were made subject to renewal by affirmative resolution of both Houses of Parliament, every six months at first, and then, after March 1976, every year.

Such renewal debates never resulted in repeal, and have fallen out of fashion in recent years.<sup>6</sup> But back in the mid-1970s, it was the need for annual renewal that provided the spur for independent review. The Home Secretary, Merlyn Rees, spoke in the renewal debate of March 1977 about the need to “reassure those who are not supporters of the IRA but who are concerned about civil liberties”, not by a “Gardiner-style report” but by the provision of “reassurance and information ... in an independent fashion.”<sup>7</sup>

In December of that year, Lord Shackleton, son of the Antarctic explorer and a former Labour Minister, was commissioned:

<sup>3</sup> Rt. Hon. Lord Lloyd of Berwick, *Inquiry into legislation against terrorism*, October 1996, Cm.3420.

<sup>4</sup> See generally K. Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (CUP, 2011).

<sup>5</sup> In particular, the Prevention of Violence (Temporary Provisions) Act 1939.

<sup>6</sup> Lord Carlile in evidence to the TPIM Bill Committee described them as “a bit of a fiction, to be frank”. Public Bill Committee, *Terrorism Prevention and Investigation Measures Bill* (June 21, 2011), Q70.

<sup>7</sup> *Hansard*, HC vol.927 no.65 col.1487 (March 9, 1977); vols 1567–1568 no.66 (Merlyn Rees MP).

“Accepting the continuing need for legislation against terrorism, to assess the operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976, with particular regard to the effectiveness of the legislation and its effect on the liberties of the subject, and to report.”

Lord Shackleton described his three main tasks as discussions with the police, the consideration of procedures in the Home Office and considering the views of interested groups and individuals—a pattern that was broadly followed by subsequent reviewers.<sup>8</sup> In his report of August 1978,<sup>9</sup> Shackleton concluded that some of the powers were “clearly much more valuable than others”. Some of his recommendations were accepted, including the reduction to seven days of the maximum period for which a person could be detained under port powers (for perspective, the maximum has recently been reduced from nine hours to six); the improvement of safeguards after arrest; the review of exclusion orders after they had been in force for three years; and—crucially for all subsequent reviewers—the publication of quarterly statistics.<sup>10</sup> One major recommendation was not adopted: that the offence of withholding information about acts of terrorism should be allowed to lapse in Great Britain.<sup>11</sup>

The next report was commissioned in 1982 and delivered in 1983 by Earl Jellicoe, a Conservative who had been Shackleton’s successor as Lord Privy Seal. Though not universally welcomed,<sup>12</sup> this was a painstaking effort which made more than 50 often technical and detailed recommendations.<sup>13</sup> Most were directed to improving or inserting safeguards into the operation of the law; but Jellicoe also recommended that arrest and port control powers be extended to “international, especially Middle Eastern terrorism”. A subsequent Independent Reviewer described the Prevention of Terrorism (Temporary Provisions) Act 1984 as “founded on the recommendations made by Lord Jellicoe”.<sup>14</sup> Sir George Baker’s report of 1984 was similarly influential on subsequent legislation.<sup>15</sup>

Lord Jellicoe had criticised the brief and perfunctory nature of the annual renewal debates,<sup>16</sup> suggesting that annual renewal be replaced by a periodic requirement for full re-enactment by Parliament. The 1984 Act was accordingly subject to a five-year sunset clause. But rather than abandon the yearly renewal debates, Government sought to breathe new life into them by placing independent review on an annual basis. As explained in Parliament by Home Office Minister Lord Elton, the function of the Independent Reviewer would be to “look at the use made

<sup>8</sup> He did not mention the intelligence agencies—unsurprisingly since they had no official existence at the time.

<sup>9</sup> Rt.Hon. Lord Shackleton K.G., OBE, *Review of the operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976* (London: TSO, August 1978, Cmnd.7324).

<sup>10</sup> For the extent to which the Shackleton Report was implemented, see *The Jellicoe Report on The Prevention of Terrorism (Temporary Provisions) Act 1976* (1983), Cmnd.8803, pp.10–12 paras 29–34. More specific in its scope, but also influential, was the *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland* (Cmnd.7497, March 1979), prompted by an Amnesty International report and chaired by H.H. Judge H.G. Bennett QC.

<sup>11</sup> Lord Jellicoe (in 1983) defended s.11 but Viscount Colville (in 1987) thought it unnecessary. An attempt to repeal it failed: *Hansard*, HL vol.449 cols 370–382 (March 8, 1984). Similar offences still exist, and are sometimes used: Terrorism Act 2000 ss.19, 38B.

<sup>12</sup> C. Walker, “The Jellicoe Report on The Prevention of Terrorism (Temporary Provisions) Act 1976” (1983) 46 M.L.R. 484–492.

<sup>13</sup> *The Jellicoe Report on The Prevention of Terrorism (Temporary Provisions) Act 1976* (1983), Cmnd 8803.

<sup>14</sup> Viscount Colville QC, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1984*, December 1987, p.1 para.1.1.1.

<sup>15</sup> G. Hogan and C. Walker, *Political Violence in Ireland* (Manchester University Press, 1989), p.28.

<sup>16</sup> *Jellicoe Report* (1983), p.6 para.14.

of the statutory powers relating to terrorism” and “consider whether, for example, any change in the pattern of their use needed to be drawn to the attention of Parliament”. The Independent Reviewer was to have access to all relevant papers, including sensitive security information and ministerial correspondence. He or she would not be a judge, but “a person whose reputation would lend authority to his conclusions, because some of the information that led him to his conclusions would not be published”.<sup>17</sup> These passages, often cited in later reports, are the foundational text of modern independent review.

The next 16 years saw annual reviews of the Terrorism (Temporary Provisions) Acts and the Northern Ireland (Emergency Provisions) Acts, conducted for 1984 and 1985 by Sir Cyril Phillips, for 1986–1992 by Viscount Colville QC and for 1993–2000 by John Rowe QC. These were supplemented by three wider-ranging reviews, their terms of reference modelled on those of Shackleton and Jellicoe, which were undertaken by the annual reviewers in advance of the expiry of particular Acts and published as command papers.<sup>18</sup> One contemporary commentator contrasted “Lord Colville’s nagging concern for civil liberties”, which had led him to recommend as early as 1987 that the power to make exclusion orders should be allowed to lapse and rendered him “a persistent nuisance to the Executive over many years”, with Rowe’s uncritical approach.<sup>19</sup> The latter, however, showed integrity when he stuck to his view that exclusion orders were “a useful part of the prevention of terrorism machinery”, even after the incoming Secretary of State had declared that he was minded to allow them to lapse.<sup>20</sup>

One cannot leave the 20th century without reflecting that while the labels have since changed, as has the identity of the communities from which terrorists are principally drawn, many of the observations of Independent Reviewers have a familiar feel. Pleas have long been made, largely in vain, for statistics to be recorded on the same basis in Northern Ireland as in Great Britain.<sup>21</sup> Now as then, the effect of proscribing organisations is described as “largely presentational”, and reviewers have discouraged “a spurious search for impartiality in condemnation”.<sup>22</sup> The politeness and good humour of port police are noted, as is their tendency to act on the basis of “somewhat naive stereotypes”—albeit that 30 years ago, that observation related not to ethnicity but to “what might be popularly supposed to be a ‘terrorist appearance’: people looking unkempt, casually dressed, long-haired and so on”.<sup>23</sup>

## *21st century independent review*

On the recommendation of Lord Lloyd, the Terrorism Act 2000 consolidated anti-terrorism powers into a single comprehensive code, and made them permanent.

<sup>17</sup> *Hansard*, HC vol.449 cols 405–406 (March 8, 1984).

<sup>18</sup> Viscount Colville QC, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1984*, December 1987 Cm.264; Viscount Colville QC, *Review of the Northern Ireland (Emergency Provisions) Acts 1978 and 1987*, July 1990 Cm.1115; J. Rowe QC, *Review of the Northern Ireland (Emergency Provisions) Act 1991*, February 1995 Cm.2706.

<sup>19</sup> C. Gearty, “The blinkered barrister”, *The Guardian* March 9, 1994 p.22.

<sup>20</sup> *Report on the operation in 1997 of the Prevention of Terrorism (Temporary Provisions) Act 1989*, February 1998, paras 31–33.

<sup>21</sup> Viscount Colville QC, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1984*, December 1987 Cm.264, 16.1.1.

<sup>22</sup> *Shackleton Report* (1978), p.39, paras 119–120.

<sup>23</sup> *Jellicoe Report* (1983), p.52, para.134.

This had been a long time coming: for as Lord Jellicoe had remarked as early as 1983, the description of successive statutes as temporary “rings increasingly hollow as the years go by”.<sup>24</sup> But the absence of any requirement for annual renewal,<sup>25</sup> or even of a sunset clause, was seen in some quarters as heightening rather than diminishing the need for regular independent review. The debates on the Bill contain frequent references to the continuing need for annual independent reports, in recognition of what the Government referred to as “the interest and concern in both Houses, and in the country more generally, in ensuring that these powers continue to be used fairly, proportionately and effectively”.<sup>26</sup> As John Rowe QC expressed it in his last report of 2001:

“[I]t is clear from the debates that there will be two terms of reference for the author of the report: first, a review of the past operation of this Act; second, an appraisal of the continuing need of the Act.”<sup>27</sup>

The first reviewer of the 2000 Act was the former Liberal Democrat MP, Lord Carlile QC. He was approached to take over the job, by a grotesque coincidence, on the morning of September 11, 2001. As he explained in his first report:

“... by the middle of that day, the terrible events at the World Trade Centre in New York City had occurred, and the breadth of the task in international as well as Northern Ireland terms was thus brought home to me.”<sup>28</sup>

Lord Carlile performed the role for more than nine years, coinciding with the most acute and prolonged threat from international terrorism that the United Kingdom has ever faced. That fact, coupled with his political acumen and his exceptional skills as a communicator, brought the post an unprecedented degree of recognition.

Lord Carlile had an enviable grasp of policing issues, and gave the intelligence agencies due credit as they struggled in the early years of the decade to match the new and deadly threat from domestically-based al-Qaida inspired terrorism. He gave qualified support to some controversial measures, from the indefinite detention of undeportable foreign terrorism suspects—eventually declared unlawful by the House of Lords—to Tony Blair’s proposal, defeated by Parliament, that the police be allowed up to 90 days to question arrested suspects. But because he was trusted, his criticisms were often heeded also. The police eventually responded to Lord Carlile’s observation that they were over-using the no-suspicion arrest power under s.44 of the Terrorism Act 2000, though too late to save the power from defeat in Strasbourg.<sup>29</sup> His principled recommendation of a two-year maximum duration for control orders, which he made in full knowledge of the secret files and thus of the dangers inherent in the release of controlled persons, became the most significant of the liberalising changes that marked the replacement of control orders by TPIMs in late 2011.

<sup>24</sup> *Jellicoe Report* (1983), p.7 para.18.

<sup>25</sup> Save in the case of Pt VII of the Act, now the Justice and Security (Northern Ireland) Act 2007.

<sup>26</sup> *Hansard*, HL vol.611 col.1433 (Lord Bassam of Brighton).

<sup>27</sup> J. Rowe QC, *Review of the operation in 2000 of the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996* (London: TSO, 2001), para.10.

<sup>28</sup> Lord Carlile QC, *Report on the operation in 2001 of the Terrorism Act 2000* (London: TSO, 2002), para.7.

<sup>29</sup> *Gillan and Quinton v United Kingdom* (4158/05) (2010) 50 E.H.R.R. 45.

The transition to a new Independent Reviewer in February 2011 coincided with an important policy watershed: the publication of the Coalition Government's Counter-Terrorism Review.<sup>30</sup> Billed as “a correction in favour of liberty”, this document announced a loosening of the legislative ratchet to a degree which is seldom fully appreciated. The first three years of the current Parliament saw the raising of the legal threshold for freezing terrorist assets, a reduction in the maximum pre-charge detention period from 28 to 14 days, the replacement of control orders by the less onerous TPIMs, the repeal of the s.44 stop and search power and the introduction of enhanced safeguards for the retention of biometric data. Contingency plans were made in case the reduced powers proved insufficient.<sup>31</sup> However none of those contingencies have so far been activated, even under the global pressure that attended preparations for that major potential target, the London Olympics.<sup>32</sup>

These five changes were far from insignificant, as may be illustrated by their practical consequences. Thus, for example:

- The s.44 power was used over 250,000 times during the year to March 2009, mostly in London and on the rail network: some 40 per cent of those stopped were non-white.<sup>33</sup> Since March 2011, not a single person has been searched on the streets of Great Britain under a no-suspicion counter-terrorism power; and in Great Britain (unlike Northern Ireland) there is no sign of stops being diverted to alternative legal bases.<sup>34</sup>
- The replacement of control orders by TPIMs predictably led, in the first two months of 2014, to the complete removal of constraints upon, among others, two men whom the Home Secretary and the High Court believed to have engaged in a viable plot to bring down multiple transatlantic airliners in 2006, but who had never been convicted for it.<sup>35</sup>

Two of the five changes—to biometric retention and to stop and search—were prompted by adverse judgments, in each case from the European Court of Human Rights.<sup>36</sup> A tendency to liberalisation may also have been encouraged by a growing sense of security, caused by the passage of several years since 2005 without a fatal terrorist attack in Great Britain. However, the main impetus for reform came from the political manifestos of the two parties comprising the Coalition Government, and from the appeal of those manifestos to the electorate. It is always useful to compare the efficacy of various methods of post-legislative scrutiny, and their

<sup>30</sup> *Review of Counter-Terrorism and Security Powers* (London: TSO, January 2011), Cm.8004.

<sup>31</sup> Bills were drafted, and subjected to pre-legislative scrutiny, that could enable the speedy reintroduction both of 28-day detention before charge and of “enhanced TPIMs”, with many of the characteristics of control orders. Section 47A of the Terrorism Act 2000 allows limited no-suspicion stop and search powers to be authorised, but only when a senior officer reasonably suspects that an act of terrorism will take place. See, generally, D. Anderson QC, *Terrorist Prevention and Investigation Measures in 2013* (London: TSO, March 2013) and *The Terrorism Acts in 2012* (July 2013), both freely available from <http://terrorismlegislationreviewer.independent.gov.uk> [Accessed April 26, 2014].

<sup>32</sup> D. Anderson QC, *The Terrorism Acts in 2012* (London: TSO, July 2013), para.3.12–3.16.

<sup>33</sup> *Home Office Statistical Bulletin 18/10*, (Home Office, October 28, 2010), tables 2.1 and 2d.

<sup>34</sup> D. Anderson QC, *The Terrorism Acts in 2011* (London: TSO, June 2012), para.8.25–8.26.

<sup>35</sup> D. Anderson QC, *Terrorism Prevention and Investigation Measures in 2012* (London: TSO, March 2013), para.11.33–11.38.

<sup>36</sup> *S. and Marper v UK* [2008] E.C.R. 1581; *Gillan and Quinton v United Kingdom* (4158/05) (2010) 50 E.H.R.R. 45.

capacity to bring about change. But talk of a managerial state can be easily exaggerated. The liberalisation of 2010–2012 is a striking example of the law responding not to the strictures of reviewers but to the popular will.

How the current Independent Reviewer has performed during this unusual period of liberalisation is for others to judge. The 10 reports produced since May 2011, comprising almost 800 pages of text and 73 recommendations, are all available on my website,<sup>37</sup> together with evidence given to parliamentary committees and other materials. Anyone who assumes that the Reviewer's function is to torment the Government, or conversely to defend it, will be disappointed. I have sought, like my predecessors, only to give an informed, considered and independent view.

## The work of the Independent Reviewer

### *Statutory and non-statutory functions*

The statutory functions of the Independent Reviewer have varied as laws have come and gone, but currently consist principally of the following:

- Reviewing and reporting annually to the Home Secretary on the operation of the Terrorism Act 2000 and Pt I of the Terrorism Act 2006.<sup>38</sup> This function was supplemented in 2012 by the addition of a power to consider whether the applicable rules have been complied with in relation to people detained under the Terrorism Acts for more than 48 hours.<sup>39</sup>
- Reviewing and reporting annually to the Home Secretary on the operation of the Terrorism Prevention and Investigation Measures Act 2011.<sup>40</sup> TPIMs replaced the system of control orders, which was itself subject to annual review throughout its six-year life.<sup>41</sup>
- Reviewing and reporting annually to the Treasury on the Terrorist Asset-Freezing etc. Act 2010.<sup>42</sup>

Other anti-terrorism statutes—most significantly the Counter-Terrorism Act 2008, now largely in force—are not presently subject to independent review.<sup>43</sup>

Further statutory functions may emerge in the future: advising whether the system of TPIMs should continue beyond 2016<sup>44</sup>; advising whether the system of enhanced TPIMs, if it is ever introduced, should continue for longer than two years after its introduction<sup>45</sup>; and producing or (should time not permit) commissioning

<sup>37</sup> Terrorism Legislation Reviewer at <https://terrorismlegislationreviewer.independent.gov.uk> [Accessed April 26, 2014].

<sup>38</sup> The 2000 Act perpetuates most of the anti-terrorism legislation that pre-dated it, and the latter consists largely of additional criminal offences enacted after the 7/7 London Transport attacks of 2005.

<sup>39</sup> Terrorism Act 2006 s.36, as amended by Coroners and Justice Act 2009 s.117(1)–(3). The function faintly echoes those of the Independent Commissioner for the Holding Centres and the Independent Commissioner for Detained Terrorist Suspects, performed in Northern Ireland by Sir Louis Blom-Cooper and Dr Bill Norris between 1992 and 2006.

<sup>40</sup> Terrorism Prevention and Investigation Measures Act 2011 s.20.

<sup>41</sup> Prevention of Terrorism Act 2005 s.14(6).

<sup>42</sup> Terrorist Asset Freezing etc. Act 2010 s.31.

<sup>43</sup> My recommendation that review be extended to the 2008 Act (*The Terrorism Acts in 2011* (June 2012), 1.13(d) and 1.34) has been accepted in principle: *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2011 by the Independent Reviewer of Terrorism Legislation* (London: TSO, March 2013, Cm.8494).

<sup>44</sup> Terrorism Prevention and Investigation Measures Act 2011 s.21.

<sup>45</sup> *Draft Enhanced Terrorism Prevention and Investigation Measures Bill* cl.9.

a report on any detention prior to charge for longer than 14 days, if the draft law to permit such detentions is ever adopted by Parliament.<sup>46</sup>

Other, non-statutory reviews may be conducted from time to time, at the request of Ministers or on the Independent Reviewer's initiative.<sup>47</sup> "Snapshot" reports have been produced on specific police operations.<sup>48</sup> Reviews have also been directed to broader issues: notably the definition of terrorism, on which Lord Carlile reported in 2007, and the policy of deportation with assurances, upon which I have been asked to report by the end of 2014.

### *Method of appointment*

I was offered the part-time post of Independent Reviewer by three strangers. They gained access to my Chambers by subterfuge, having told my clerks that their employer, the Home Office, sought my legal advice. Once in the conference room, they revealed their identities and conveyed the wish of the Home Secretary—to whom I had no connection or political affiliation—that I should accept the job. They knew, but did not seem to mind, that I was acting at the time for an alleged former associate of Osama bin Laden, whose assets had been frozen on the insistence of the British Government.<sup>49</sup>

That intriguing, if indefensible, method of appointment will not be repeated. In 2013, the post of Independent Reviewer was reclassified as a public appointment.<sup>50</sup> Under the applicable Code of Practice,<sup>51</sup> a panel will in future draw up a list of appointable candidates by an open, fair and merit-based process, from which Ministers will choose. Whether to re-appoint an Independent Reviewer at the end of their term of office will remain a decision for Government alone, subject to a ten-year limit on tenure.

My initial term of office was fixed at three years, and renewed for a further three-year period in February 2014.

### *Working methods*

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

I do not hold formal evidence sessions, but benefit from large numbers of informal meetings and conversations. My interlocutors are wonderfully various,

<sup>46</sup> Terrorism Act 2006 s.36.

<sup>47</sup> The latter point was confirmed by the Home Secretary in 2011: *JCHR 17th Report of 2010–2012*, HL Paper 192 HC 1483 (London: TSO, September 2011), para.40.

<sup>48</sup> See the reports on *Operation Pathway* (2010) and *Operation Gird* (2011).

<sup>49</sup> *Kadi v Council and Commission* (C-402/05 P) [2009] 1 A.C. 1225; [2009] 3 W.L.R. 872; [2010] All E.R. (EC) 1105; [2008] E.C.R. I-6351; *Kadi v Commission* (T-85/09) [2011] All E.R. (EC) 169; [2010] E.C.R. II-5177. On appointment, I ceased acting for Mr Kadi.

<sup>50</sup> *Public Appointments Order in Council*, April 2013.

<sup>51</sup> Code of Practice for Ministerial Appointments to Public Bodies, April 2012.

ranging from senior judges, intelligence chiefs, civil servants, watchdogs, prosecutors and police officers of all ranks to people who have been stopped at ports, arrested on suspicion of terrorism, imprisoned, placed in immigration detention or subjected to asset freezes, control orders and TPIMs. I am regularly briefed by MI5 in Northern Ireland and by the Joint Terrorism Analysis Centre (“JTAC”), whose assessments of the threat I can interrogate and use to inform my thinking and my reports. I communicate with NGOs, academics, human rights organisations and lawyers (including special advocates), both in person and via material that they share on twitter. I listen to mosque and community groups, forensic medical examiners and Prevent workers; and address security conferences, universities and schools. I attend, and contribute to, the training of police and independent custody visitors. When requested I brief journalists by referring them to my own reports or other open-source materials, in the hope, sometimes realised, of improving the accuracy with which domestic terrorism issues are reported.

The work takes me to all parts of the United Kingdom, visiting police counter-terrorism units, detention centres, community groups and specialist facilities such as the National Borders Targeting Centre in Manchester. I have observed the operation of port controls in 15 airports, seaports and rail terminals, from Coquelles to Cairnryan. Regular trips to Northern Ireland, some in conjunction with my counterpart under the Justice and Security (Northern Ireland) Act 2007,<sup>52</sup> allow me to be briefed by the security forces, prosecutors, lawyers and monitoring bodies, to observe police patrols, to talk to detainees, to hear the concerns of civil society organisations and to give evidence to the Northern Ireland Policing Board. I have made fact-finding trips to the European institutions, the United States, the Netherlands, Israel/Palestine and Jordan. I have attended the closed hearing of a control order case and discussed legal issues relating to terrorism with MPs at Westminster and with Justice Ministers in the devolved administrations. I have private meetings with Government Ministers (including the Home Secretary, Secretary of State for Northern Ireland and Security Minister) and, when requested, with their shadows.

Much of what I do is informed by the regular reading lists provided by my Special Adviser, Professor Clive Walker of the University of Leeds, alongside commentaries and reviews based on his own research. A junior Home Office official arranges trips, organises meetings within government and helps me negotiate the often boggy bureaucratic landscape. Helpful NGOs, academics, lawyers and others direct me to people or issues I should know about. Beyond that I am on my own. Undoubtedly this means that there are topics to which I fail to do justice. It also means that every conclusion I express, for better or worse, is based exclusively on my own reading and encounters.

I give occasional interviews to radio and TV channels in the United Kingdom, both mainstream and those with a specific ethnic or religious focus. This brings more benefits than I expected. It keeps the Government on its toes: attention is never more prompt than when it is known that I will be discussing sensitive issues in a public forum. It ensures attention from politicians, for whom media exposure

<sup>52</sup> It is to that Act that the provisions of what was Pt VII of the Terrorism Act 2000 migrated, as part of the normalisation process in Northern Ireland. The reviewers since 2007 have been Robert Whalley CB and, from February 2014, David Seymour CB.

is a highly-valued currency. Last but not least, live interviews allow the Reviewer to dispense information, reassurance or concern to an audience that pays for his work through its taxes but lacks time or inclination to look up his reports.

### *Australian comparisons*

Statutory references to the Independent Reviewer are scattered and uninformative. A more modern approach was taken in Australia, where the functions, powers, duties and immunities of the Independent National Security Legislation Monitor (INSLM), the Independent Reviewer's closest international equivalent, were meticulously set out in a 34-section statute.<sup>53</sup> The INSLM has extensive powers to gather information: failure to attend a hearing when summoned, or to produce a document requested, is punishable by up to six months' imprisonment.<sup>54</sup> The authority of the Independent Reviewer, by contrast, is anchored largely in trust and convention. In defence of the UK system, successive reviewers have in practice been given what they need; and as both sides are aware, the withholding of relevant information could in extremis be brought to the attention of Parliament or interested media. Full statutory underpinning, though logical, is therefore perhaps not pressing.

Sensitive issues in both countries are publication dates and Government responses. My reports have been published within three to six weeks of receipt, the intervening time being occupied by security checking, briefing of Ministers and preparation of the printed version. It was, however, necessary on one occasion to remind the Government (or its special advisers) of an undertaking given to Parliament to act with promptness.<sup>55</sup> The Government responds to each report, though not always in a timely fashion and in terms that have been criticised as insufficiently thorough.<sup>56</sup> As for Australia, the second report of the INSLM, submitted in December 2012, was released by the Prime Minister only in May 2013, on the day the federal budget was announced in Parliament<sup>57</sup>; and the INSLM himself noted with displeasure in a recent report that there had been "no apparent response" to any of his 21 detailed and thoughtful recommendations of the previous year.<sup>58</sup>

In March 2014, a Bill to abolish the office of the INSLM was placed before the Australian Parliament "as part of the Government's commitment to streamline government".<sup>59</sup> The Prime Minister was quoted as saying that the post was being abolished "because all relevant legislation has already been reviewed and the former government ignored all the Monitor's recommendations".<sup>60</sup>

<sup>53</sup> Independent National Security Legislation Monitor Act 2010.

<sup>54</sup> Independent National Security Legislation Monitor Act 2010 s.25.

<sup>55</sup> See D. Anderson QC, *The Terrorism Acts in 2011* (London: TSO, June 2012), 1.23–1.25.

<sup>56</sup> The Treasury always responds within weeks; by contrast, the 9-page Home Office response to my 140-page Terrorism Acts report of June 2012 was received only in March 2013. The JCHR criticised the quality of the Home Office's responses to my reports in its own TPIMs report of January 23, 2014, paras 20–23.

<sup>57</sup> J. Blackburn, "Power without Responsibility?" in D. Baldino (ed) *Spooked* (University of New South Wales Press, 2013), Ch.10 pp.282–283.

<sup>58</sup> INSLM, *Annual Report*, November 7, 2013 (Australian Government, 2013), p.4.

<sup>59</sup> Parliament of Australia, *Independent National Security Legislation Monitor 2010 Repeal Bill 2014*, Explanatory Memorandum.

<sup>60</sup> D. Hurst, "Abbott plans to scrap independent monitor of terror laws", <http://www.Guardian.com> March 19, 2014.

## Channels of influence

Such worth as independent review may have in the United Kingdom cannot be assessed by simply counting the recommendations accepted by Government. The absence of recommendations can itself be of value: where elements of the law work well and do not need substantial alteration, it is right (and may be reassuring) to say so. Of the recommendations that are made, not all are directed to Government, or require implementation by the authorities<sup>61</sup>; some are in the nature of long-term aspirations<sup>62</sup>; and yet others are made in full expectation of rejection.<sup>63</sup> It may also be difficult to tell, from a blandly-phrased response, to what extent a recommendation has been accepted: this is not an entirely negative comment, since more is sometimes done behind the scenes than is admitted to on the record.

### *Direct influence on Government*

There are areas, often technical and out of the public eye, in which a Reviewer can speak directly to Government and Government will simply do as it is advised. In that category belong the 12 recommendations that I made during my first term of office in relation to the procedures for operating the Terrorist Asset-Freezing etc. Act 2010, each of which has been promptly accepted and implemented by the Treasury.

Direct influence may also be exerted privately and so undisclosedly, for example through comments on a draft Code of Practice, discussions with intelligence chiefs or conversations with a Minister about the likely practical consequences of a clause being contemplated for inclusion in a Government Bill. Nor is such influence confined to Government; opposition spokespersons for example may quiz the Independent Reviewer in order to help inform their own policy positions, particularly on legal or operational issues with which they have little familiarity.

Closer to the coalface, it is a routine experience to see copies of the Reviewer's reports, sometimes freshly-printed but often well-thumbed, on desks in Whitehall and in police headquarters. The executive branch is no monolith, and the capacity for independent thought is not surrendered on entry to the public service. My base in the Home Office gives me valuable opportunities for informal discussions with civil servants; ideas that commend themselves to policy advisers within Government can achieve wider currency by that route.

### *Influence in conjunction with others*

Less direct but just as significant are the other, multiple channels through which influence can flow. Anti-terrorism law is the crucible for some of society's most

<sup>61</sup> See, e.g. the recommendations to the police in my *Operation Gird* report of May 2011, and the recommendation that those affected by the misuse of port powers should lodge complaints and contribute to the Government's consultation: D. Anderson QC, *The Terrorism Acts in 2011* (London: TSO, June 2012), 9.34.

<sup>62</sup> See, e.g. my hope for "a root-and-branch review of the entire edifice of anti-terrorism law, based on a clear-headed assessment of why and to what extent it is operationally necessary to supplement established criminal laws and procedures", cited approvingly by the Supreme Court in *R. v Gul (Mohammed)* [2013] UKSC 64; [2013] 3 W.L.R. 1207 at [34].

<sup>63</sup> See, e.g. my recommendation that those arrested under the Terrorism Act 2000 should be able to apply for bail: D. Anderson QC, *The Terrorism Acts in 2011*, (London: TSO, June 2012), 7.71–7.73. It was duly rejected, though the issue is currently before the European Court of Human Rights in *Duffy and Magee v United Kingdom* (29062/12 and 26289/12).

heated debates about the function of the state. The subject-matter can be emotive, and the stakes for liberty, security and community cohesion are high. On the central legal and policy issues, many people have a view; and the views of reasonable people can differ. The Independent Reviewer may legitimately hope that his own conclusions will be considered with particular care by Government: for his assessments are informed by full knowledge both of the threat and of the capacity available to counter it. But it cannot be presumed that his recommendations will simply be adopted by a Government which has the same knowledge and which is additionally subject to constraints of a financial and political nature.

Hence the advantage of working alongside other channels of influence. These include community groups, NGOs, lawyers, media, the courts and Parliament, the latter now developing increasing influence of its own thanks to the activities of high-profile and independently-minded committees such as the Home Affairs Select Committee (HASC) and the Joint Committee on Human Rights (JCHR).<sup>64</sup> Few of those channels have decisive influence in isolation, any more than does the Independent Reviewer: it is their inter-relationship with each other and with the Government that is crucial.

That comment may be applied even to the courts—on the face of it, the most powerful and direct of all channels of influence. When the judicial House of Lords declared the indefinite detention of undeportable foreign terror suspects to be incompatible with Convention rights, it was rightly hailed as an outstanding example of a court setting limits on what is acceptable in dealing with terrorism.<sup>65</sup> But as intended by the scheme of the Human Rights Act, the judgment functioned merely as an invitation to the Government to think again. It responded by devising control orders: severe and potentially indefinite inhibitions of another albeit lesser kind. A judgment from Strasbourg, at least, might appear to be an irresistible command; and such judgments have prompted significant changes to procedures for dealing with DNA retention, closed evidence, anti-terrorism stop and search and deportation with assurances.<sup>66</sup> But the European Court does not design replacement measures<sup>67</sup>; the domestic duty of the United Kingdom courts is only to take its judgments into account<sup>68</sup>; and the practical force of the international duty under art.46 of the Convention, once considered sacred even by Convention sceptics,<sup>69</sup> has been called into question by the prisoners' voting saga, by the comments of a former Lord Chief Justice<sup>70</sup> and by the Conservative Party's

<sup>64</sup> See R. Kelly, "Select Committees: Powers and Functions" and M. Hunt, "The Joint Committee on Human Rights" in A. Home, G. Drewry and D. Oliver (eds), *Parliament and the Law* (Hart, 2013), Chs 7 and 9.

<sup>65</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68. The judgment has been seen as a high-water mark: A. Tomkins, "National security and the role of the court: a changed landscape?" (2010) 126 L.Q.R. 543.

<sup>66</sup> See, respectively, *S. and Marper v United Kingdom* [2008] E.C.R. 1581, *A v United Kingdom* [2009] E.C.R. 301, *Gillan and Quinton v United Kingdom* (4158/05) (2010) 50 E.H.R.R. 45 and *Othman (Abu Qatada) v United Kingdom* [2013] EWCA Civ 277.

<sup>67</sup> Though it is becoming bolder: see P. Leach, "No longer offering fine mantras to a parched child? the European Court's developing approach to remedies" in A. Føllesdal, B. Peters and G. ULfstein (eds), *Constituting Europe: the European Court of Human Rights in a National, European and Global Context* (CUP, 2013), Ch.6.

<sup>68</sup> Human Rights Act 1998 s.2; *R. (on the application of Hicks) v Commissioner of Police of the Metropolis* [2014] EWCA Civ 3; [2014] H.R.L.R. 11 at [69]–[81].

<sup>69</sup> *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 A.C. 469 per Lord Hoffmann at [70].

<sup>70</sup> Lord Judge, "Constitutional Change: Unfinished Business", lecture at University College London, December 4, 2013, paras 44–48.

commitment to review the United Kingdom's relationship with the European Court of Human Rights.

Of course, the influence of the Independent Reviewer cannot compare with that of Parliament or of the courts—and nor should it. But the Reviewer may, independently of any influence that he may be able to exert in his own right, be able to contribute to the work of both. Thus:

- Opinions reached on the basis of the Independent Reviewer's interviews and researches, crucially including access to classified material, can influence the conclusions of parliamentary committees and the content of parliamentary debates — though less so in the case of the more politically charged debates, in which the Reviewer's reports, though often given prominence,<sup>71</sup> tend to be selectively brandished rather than used as a source of insight.
- The Independent Reviewer's ability to look at the operation of anti-terrorism laws in a non-contentious atmosphere, and without restricting himself to such cases as may happen to be brought and such facts as the parties to those cases may have chosen to place in evidence, can similarly be of assistance to the courts in forming or confirming their own conclusions.

The capacity to add value by either of these routes is naturally dependent on the Independent Reviewer being perceived to be thorough, trustworthy and sensible.

It would be an interesting piece of research to test these claims of influence over the past 35 years. The work of successive Independent Reviewers has often been referred to in Parliament, though comparisons are rendered difficult by the disappearance of annual renewal debates and the fact that some Independent Reviewers have been members of the Upper House. More than 30 court cases since 2003 have referred to statistics, evidence or opinions published by the Independent Reviewer, sometimes giving them considerable weight.<sup>72</sup> That reflects the increasing profile and judicialisation of anti-terrorism law, as well as the willingness of counsel to research and refer to the Independent Reviewer's work.

Two case studies from my own recent experience may demonstrate current practice. They show, each in their own way, how the work of the Independent Reviewer can affect the wider landscape. They also make the case for seeing different channels of influence not as competitors to each other but as subtly inter-related, often divergent but at their most effective when influencing and flowing alongside each other.<sup>73</sup>

<sup>71</sup> See, e.g. the opposition day debate in which the Independent Reviewer's 2013 report on TPIMs was cited for a variety of propositions by nine speakers including the Home Secretary, the Security Minister, their respective Shadows and two former Home Secretaries: *Hansard*, HC cols 221–263 January 21, 2014.

<sup>72</sup> Recent examples of such cases are *R. (on the application of Roberts) v Commissioner of Police of the Metropolis* [2014] EWCA Civ 69; [2014] H.R.L.R. 5 (ethnic bias in stop and search), *R. v Gul (Mohammed)* [2013] UKSC 64; [2013] 3 W.L.R. 1207 (definition of terrorism, as to which the Reviewer's concerns were said to “merit serious consideration” at [62]), *R. (on the application of Elostia) v Commissioner of Police of the Metropolis* [2013] EWHC 3397 (Admin); [2014] 1 W.L.R. 239 (access to solicitor) and *Beghal v DPP* [2013] EWHC 2573 (Admin); [2014] 2 W.L.R. 150 (port stops). The European Court of Human Rights has relied extensively on the reports of Lord Carlile (*Gillan and Quinton v United Kingdom* (4158/05) (2010) 50 E.H.R.R. 45), as did the High Court in numerous control order cases.

<sup>73</sup> Compare the approach of F. De Londras and F. Davis, “Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms” (2010) 30 *Oxford Journal of Legal Studies* 19.

### *Case study 1: secret evidence*

The potential of the Independent Reviewer to use access to classified material to inform the parliamentary debate and thus to influence its outcome is illustrated by the process that led to the Justice and Security Act 2013.<sup>74</sup> Among other things, that Act made available to the High Court a “closed material procedure” (“CMP”), for use both in deportation/exclusion judicial reviews and in damages claims against the organs of the State. In a CMP, evidence relating to national security can be adduced and taken into account by the judge despite it having been shown not to the affected individual or her lawyers but only to a security-cleared special advocate, instructed on the individual’s behalf but unable to take instructions once proceedings have entered their “closed” phase.

Progress towards the Act began with a Green Paper of October 2011. The subject-matter fell outside my statutory responsibilities but was tangentially relevant to them, in that similar closed material procedures already operated for legal challenges to control orders, asset freezes and proscription orders. Perhaps for that reason, the JCHR invited me to give evidence on the proposals in January 2012. Two issues arose which were dependent on access to secret information not available to members of the JCHR. The first was whether, as the Government asserted, there were civil cases for whose fair resolution a CMP was necessary. The second was whether the intelligence relationship with the United States was affected, as the Government again asserted, by UK courts having assumed the power to disclose into open proceedings US intelligence material to which the “control principle” applied and to whose disclosure the US objected.<sup>75</sup>

On the first issue, the briefings that I initially requested could not answer all my questions and were insufficiently full for me to express a definite view. As I told the JCHR, I was unsure whether this simply indicated excessive caution on the part of the security establishment, or whether, more concerning, the Government lacked the evidence to support its case.<sup>76</sup> These public comments appear to have galvanised the Government. I was given unfettered access to seven cases, reading all the secret material and discussing the issues both with Government departments and agencies and with the independent barristers representing them. I concluded, cautiously, that there was a small but indeterminate category of national security-related claims in respect of which it was preferable that the option of a CMP—for all its inadequacies—should exist.<sup>77</sup> That conclusion, though not uncritically accepted by the JCHR,<sup>78</sup> proved influential in the subsequent parliamentary debates.

On the second issue, I questioned agencies and prosecutors on their concerns about intelligence-sharing. I relayed my assessment to the JCHR, which remarked:

<sup>74</sup> See A. Tomkins, “Justice and Security in the United Kingdom” (2014) *Israel Law Review* (forthcoming: working paper available online via SSRN at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2274017](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274017) [Accessed April 26, 2014]).

<sup>75</sup> In particular, *R. (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin); [2009] 1 W.L.R. 2653 and [2010] EWCA Civ 65; [2011] Q.B. 218.

<sup>76</sup> D. Anderson QC, *Memorandum of 26 January 2012* (2012), paras 5–10; D. Anderson QC, *Supplementary Memorandum to the JCHR*, March 19, 2012, para.7.

<sup>77</sup> D. Anderson QC, *Supplementary Memorandum to the JCHR*, March 19, 2012, para.19.

<sup>78</sup> *JCHR Report on the Justice and Security Green Paper* (London: TSO, April 2012), paras 56–80; *JCHR Report on the Justice and Security Bill* (London: TSO, November 2012), paras 33–45.

“Without access to the relevant personnel or intelligence information, there is no way of testing what is said. We find ourselves wholly dependent in this respect on the Independent Reviewer of Terrorism Legislation, who does enjoy such access and who has given evidence to us about the answers he has received to the questions he has put in order to test the Government’s assertions.”<sup>79</sup>

Later, spurred on by sceptical NGOs and parliamentarians, I sought US views at first hand in Washington DC, where I spoke to senior lawyers and officials at the White House, National Security Council, Justice Department, State Department and intelligence agencies. After questioning me in detail on my return,<sup>80</sup> the JCHR again accepted my evidence that there was “nervousness on the part of intelligence partners about the risk of their shared intelligence being disclosed”.<sup>81</sup>

My conclusions on both these sensitive issues were largely helpful to the Government. In other respects, however, I believed that the Government was asking for too much. In particular, it seemed to me essential that judges should be able to decide whether a CMP was needed for dealing with secret evidence, without the answer being dictated to them by one party to the litigation. I also thought it important to acknowledge that non-governmental parties would sometimes have an interest in requesting a CMP. I expressed these views in public to the JCHR<sup>82</sup> and in private both to Ministers and Shadow Ministers. The JCHR agreed<sup>83</sup>; amendments to that effect were supported by the Opposition and, after some Government defeats and concessions, eventually became law.

Much of what I said on these policy issues originated elsewhere, in the headwaters of legal practice and academic study. But the Independent Reviewer was well placed to channel these powerful tributaries and direct them into Westminster. During the parliamentary debates on the Justice and Security Bill, 14 MPs and 17 members of the House of Lords made a total of 87 references to my evidence. Around half of those references related to my conclusions on classified matters, and half to other views that I had given at the request of the JCHR. The Shadow Justice Secretary acknowledged at report stage that the Opposition “has been influenced to a large extent by the views of the independent reviewer of terrorism legislation”<sup>84</sup>; and a sponsoring Government Minister, having nominated the Independent Reviewer for what he described as “the prize for the most quoted person in these debates”,<sup>85</sup> added that he had been “influential in persuading the Government to change their position on a number of issues”.<sup>86</sup>

This episode shows both how parliamentary committees can provide a platform for the Independent Reviewer, and how in return their own deliberations can be assisted by the close questioning of a Reviewer who has access to material that they do not.<sup>87</sup> The quality of scrutiny may thus be improved by a degree of

<sup>79</sup> *JCHR Report on the Justice and Security Bill* (London: TSO, April 2012), para. 152.

<sup>80</sup> *Oral Evidence of D. Anderson QC to the JCHR*, October 16, 2012, QQ 72–84.

<sup>81</sup> *JCHR Report on the Justice and Security Bill* (London: TSO, November 2012), para. 77.

<sup>82</sup> *Oral Evidence of D. Anderson QC to the JCHR*, June 19, 2012, QQ 6–15.

<sup>83</sup> *JCHR Report on the Justice and Security Bill* (November 2012), paras 46–62.

<sup>84</sup> *Hansard* HC March 4, 2013, col.687, Sadiq Khan MP.

<sup>85</sup> *Hansard*, HL, col.1843, (November 21, 2012), Lord Wallace.

<sup>86</sup> *Hansard*, HL, col.1061, (March 26, 2013), Lord Wallace.

<sup>87</sup> See D. Anderson QC, *Control Orders in 2011* (London: TSO, March 2012), Recommendation 7. My invitation to the JCHR to consider how I could best inform or assist them in keeping the TPIM system under parliamentary

co-ordination between the Independent Reviewer and select committees. With this in mind, the Independent Reviewer may speak at their request to parliamentary committees about how their terrorism-related reviews might be focussed, and how he might best assist.<sup>88</sup>

### *Case study 2: port powers*

Schedule 7 to the Terrorism Act 2000 empowers the police to detain travellers through a port for up to nine hours, for the purpose of determining whether they are terrorists. No suspicion has hitherto been required at any stage. Failure to answer questions is a criminal offence, and PACE-style safeguards are largely absent. Prized by the authorities, not least as an intelligence-gathering tool, Sch.7 did not feature in the Coalition Government's 2011 announcement of reforms. Legal challenges to the exercise of the power were few, and generally unsuccessful: in one 2011 case, permission to apply for judicial review was refused on the basis that:

“The legislation or its predecessor has been in existence since 1974. Its effectiveness and the need for its existence has been confirmed by the annual reports of Lord Carlile. I do not doubt that the claimant feels he has been wrongly and unfairly treated ... But the power is necessary in a democratic society and .. the contrary is not arguable.”<sup>89</sup>

Though since overtaken by events, the court's words are a reminder that the Independent Reviewer—like other forms of review—can be as useful in justifying the status quo as in making the case for change. Review can shine a searchlight but can also operate as a veil, shielding anti-terrorism powers from other forms of scrutiny.

Struck by the breadth of the power and the ill-feeling that it can engender, I recommended in my Terrorism Act reports of 2011 and 2012 that there should be a full public consultation and review of Sch.7. At that stage, the main pressure for reform came from Muslim groups such as the Federation of Student Islamic Societies, which made some successful freedom of information requests, and from Liberty which backed a challenge in Strasbourg. Eventually the Home Secretary agreed to the public consultation and review that I had twice recommended. That process was however tightly focussed on six proposed changes, for which parliamentary time was found in an omnibus Bill.<sup>90</sup> Though sensible, these changes did not touch on the major issues: the no-suspicion threshold, the compulsion to answer questions, the practice of proceeding with interviews without waiting for solicitors and the claimed power—first publicised in my reports, then taken up by the press—to download and retain the contents of travellers' mobile phones without the need for suspicion or warrant. I flagged my principal concerns to the JCHR in 2012.<sup>91</sup> The downloading issue was highlighted in my 2013 report,<sup>92</sup> and prompted

review was taken up, resulting in a detailed evidence session followed by the JCHR's post-legislative scrutiny report into the Terrorism Prevention and Investigation Measures Act 2011, published on January 23, 2014.

<sup>88</sup> Oral evidence was given to the JCHR on this basis, in a public hearing on March 26, 2014.

<sup>89</sup> *R. (on the application of K) v Secretary of State for the Home Department (10027)* [2011], Collins J.

<sup>90</sup> Now the Anti-Social Behaviour Crime and Policing Act 2014 s.148 and Sch.9.

<sup>91</sup> *Oral evidence to the JCHR*, of October 16, 2012, Q86.

<sup>92</sup> *The Terrorism Acts in 2012*, July 2013, 10.65–10.80.

the addition of a new Government amendment to the Bill. However, Sch.7 issues continued to attract only limited media or parliamentary interest.

In mid-August 2013, the pressure was raised by an unexpected event. The police detained under Sch.7 Mr David Miranda, who it was thought might be carrying through Heathrow Airport top secret material taken by Edward Snowden from the NSA. This was scarcely a typical use of the power; but interest in Sch.7 became intense, to the point where I was called upon 16 times in a single day to explain it to broadcasters from Britain and around the world. As so often, political interest fed off the media. The JCHR made recommendations on all the major issues, agreeing with my latest annual report that suspicion should be required for some manifestations of the Sch.7 power but not for the initial stop.<sup>93</sup> HASC expanded the scope of its investigation into counter-terrorism to take evidence on Sch.7.<sup>94</sup> A series of new amendments were tabled to the Bill. With the public encouragement of a Home Office Minister, members of HASC and other parliamentarians, I produced to HASC some recommendations, based on my own observations and discussions, for further amendment to Sch.7.<sup>95</sup> Perhaps as a consequence of the time I had spent observing operations at the port, those observations were in one respect—the level of suspicion to be required for exercise of the more advanced Sch.7 powers—less bold than those of the JCHR.<sup>96</sup>

As this was happening a new and powerful channel of influence began to open up, carved this time by the forces of litigation. In May 2013, the European Court of Human Rights declared admissible the challenge to Sch.7 that had been initiated two years earlier by Liberty.<sup>97</sup> In August 2013, Sch.7 was declared ECHR-compliant in *Beghal*<sup>98</sup>, but the Supreme Court made a critical reference to the power in October,<sup>99</sup> and granted Ms Beghal permission to appeal in February 2014. In November 2013, the High Court held in *Elosta*<sup>100</sup> that a person detained at a port has the right not only to consult a solicitor but to have the solicitor attend an interview, and that a reasonable delay might be required for this purpose. The reports of the Independent Reviewer were relied upon by all parties to each of the cases just mentioned, and feature also in each of the judgments. Mr Miranda's own claim for judicial review was determined in February 2014, in a judgment which amply demonstrates the breadth of the current statutory definition of terrorism.<sup>101</sup>

The High Court's judgment in *Elosta* has already prompted both a change in practice and a Government amendment to the Bill amending Sch.7. The recommendation of the Divisional Court in *Beghal* that a statutory bar should be placed on the use in criminal proceedings of answers given under compulsion has

<sup>93</sup> *Legislative Scrutiny: Anti-Social Behaviour Crime and Policing Bill* (London: TSO, October 11, 2013.), HL Paper 56 HC 713, Ch.4.

<sup>94</sup> My oral evidence was given on November 12, 2013, HC 231-iii, QQ70–72, 80–81.

<sup>95</sup> *Recommendations of the Independent Reviewer on Schedule 7 to the Terrorism Act 2000, supplementary written evidence to HASC*, November 20, 2013.

<sup>96</sup> The JCHR explained its differences with my approach to the suspicion threshold in a further report of January 6, 2014.

<sup>97</sup> *Malik v United Kingdom* (32968/11) (2013) 57 E.H.R.R. SE13, admissibility decision of May 28, 2013.

<sup>98</sup> *Beghal v DPP* [2013] EWHC 2573 (Admin); [2014] 2 W.L.R. 150.

<sup>99</sup> *R. v Gul (Mohammed)* [2013] UKSC 64; [2013] 3 W.L.R. 1207 at [64], referring to “the possibility of serious invasions of personal liberty”.

<sup>100</sup> *R. (on the application of Elosta) v Commissioner of Police of the Metropolis* [2013] EWHC 3397 (Admin); [2014] 1 W.L.R. 239.

<sup>101</sup> *R. (on the application of Miranda) v Secretary of State for the Home Department* [2014] EWHC 255 (Admin).

so far been less warmly received. But the imminent arrival of the Anti-Social Behaviour Crime and Policing Act 2014 will not be the last word on Sch.7. It remains to be seen what will be made of Sch.7 by the Court of Appeal, Supreme Court and European Court of Human Rights in the cases now pending before them.

Both these case studies show that streams of influence run through a variety of channels, intersecting and reinforcing one another. Whilst the Independent Reviewer is only one channel among many, the post is distinctive in its combination of broad perspective and access to secrets.<sup>102</sup> The Reviewer's ability to influence Government directly can thus be supplemented by parliamentary and judicial processes in which his observations and recommendations may be found helpful.

## Conclusion

The subject of post-legislative scrutiny has seen much debate in recent years,<sup>103</sup> but consistency of practice remains elusive. It is for consideration whether other areas of UK law, or indeed the anti-terrorism laws of other countries, might benefit from a similar type of scrutiny.<sup>104</sup>

There have been various suggestions for reform, though never so far as I am aware for abolition. The appointment of a review panel, first floated in 1984 (when it was rejected for security rather than financial reasons)<sup>105</sup> and revived by Professor Walker,<sup>106</sup> could bring greater diversity of approach and perhaps greater authority.<sup>107</sup> However, the division and delegation of work could lead to a diminution in the range and focus displayed by previous Reviewers; the strong personal relationships on which successful tenure of the post depends would be difficult for a panel to maintain; strong candidates for the current role might be less attracted by the idea of sitting on a committee; and reports might reveal differences or, worse, become the bland products of compromise.

Nor in my opinion should the post be made full-time: it is the ability to continue practising in an independent profession that has enticed strong candidates to accept the post in the past, and that provides the surest protection against the strong pressures encountered, sometimes from unexpected directions. But should the workload continue to increase, the assistance of a part-time, security-cleared junior will have to be considered. There may also be a case for replacing the Independent Reviewer's obligation to review the same selection of anti-terrorism laws every year with a power to choose, after annual consultation with the Home Secretary and the relevant parliamentary committees, which aspects of the law relating to terrorism should be reviewed in any given year.

<sup>102</sup> The powers and resources of Parliament's Intelligence and Security Committee, which also has access to classified material, were increased by the Justice and Security Act 2013. The scope of its oversight however remains limited to the intelligence agencies. I have recommended that more confidence be placed in trusted Members of Parliament, so as to enable more meaningful debates to take place on national security issues.

<sup>103</sup> The principal developments following the Constitution Committee's report of 2004 and Law Commission's report of 2006 are well summarised in the House of Commons library note "Post-Legislative Scrutiny" (Standard Note SN/PC/05232), May 23, 2013.

<sup>104</sup> The Shadow Home Secretary has suggested that the Independent Reviewer's "more public facing form of oversight" might be appropriate also for intelligence oversight: Yvette Cooper MP, "The challenges of a digital world to our liberty and security", speech to Demos, March 3, 2014.

<sup>105</sup> *Hansard*, HL vol.449 cols 397–408 (March 8, 1984).

<sup>106</sup> C. Walker, *Terrorism and the Law* (OUP, 2011), para.1.90.

<sup>107</sup> These factors speak in favour of a panel approach to future root-and-branch reviews of anti-terrorism law (though the authority and influence of Lord Lloyd's report of 1996 were not diminished by the fact that it bore his name alone).

The office of Independent Reviewer has been an unusual but durable source of scrutiny. It is peculiarly appropriate for an area in which potential conflicts between state power and civil liberties are acute, but information is tightly rationed. Successive Independent Reviewers have used their unique access to reassure the public, to inform the debate and where appropriate to raise the alarm. It is to be hoped that they will continue to do so.