

REPORT ON TERRORISM LEGISLATION AND PROTESTS

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**Overall conclusion**

1. My overall conclusion is that there is no need to legislate for any amendments to terrorism legislation now, and good reason for caution.
2. It is difficult to identify any real situations where a gap in terrorism legislation means that terrorist mischief cannot currently be addressed by arrest and prosecution. Given the number of pro-Palestine marchers, there have been plenty of opportunities for gaps to become apparent. There may well be other mischiefs (such as anti-Semitism) but those are not a subject for terrorism legislation.
3. It is possible to formulate hypothetical situations where certain words used might, arguably, fall outside terrorism legislation. However, to legislate for hypotheticals would be bad practice: the success of UK terrorism legislation is that it adapts in response to real terrorist harm. I am also conscious that if speculative examples were given by me (or during Parliamentary debates) of forms of words potentially falling outside terrorism legislation, it might inspire bad actors to use those forms of words, before amending legislation could be brought into force.
4. There is a general risk of legislating in response to one set of protests because of the risk of unintended consequences when new legislation comes to be applied to other protests.
5. Finally, I am conscious that real cases are currently before the courts. Where the edges of the current law are being tested out it would be premature to conclude that reform is necessary.

**Terrorism and the pro-Palestine Protests**

6. The terrorist attacks by Hamas in Southern Israel on 7 October 2023, and Israel's military response, provoked a series of demonstrations in the United Kingdom.
7. Hamas is a proscribed terrorist organisation under the Terrorism Act 2000. Its military wing, the Hamas-Izz al-din al-Qassem Brigades, was proscribed (banned) in March 2001<sup>1</sup>, and the entire movement was proscribed in November 2021<sup>2</sup>.

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<sup>1</sup> The Terrorism Act 2000 (Proscribed Organisations)(Amendment) Order 2001.

<sup>2</sup> The Terrorism Act 2000 (Proscribed Organisations)(Amendment)(No.3) Order 2021.

8. The attacks on 7<sup>th</sup> October 2023 met the statutory definition of terrorism under the Terrorism Act 2000<sup>3</sup>, in that they were actions involving serious violence against persons, and serious damage to property; they were designed to influence a government<sup>4</sup> and/or to intimidate the public<sup>5</sup>; and they were made for the purpose of advancing a political and/or religious and/or racial cause.
9. Direct or indirect references were made to the 7 October 2023 terrorist attacks by some individuals participating in the pro-Palestine demonstrations. These references appeared to be expressions of approval, and questions arise as to:
  - (a) what offences under terrorism legislation are potentially applicable; and
  - (b) whether terrorism legislation should go further.
10. Terrorism offences contain some of the most serious prohibitions in the criminal calendar. Suspicion can lead to extended pre-charge powers of arrest<sup>6</sup>, strong investigative powers<sup>7</sup>, and conviction result in long sentences including heavy post-release monitoring obligations<sup>8</sup>.
11. Since terrorism falls within the penumbra of national security, the precise nature of terrorism offences on the statute book is a clear indication of how members of the public are expected to regulate their conduct, at risk of counter-terrorist intervention.
12. For this reason alone, even if the authorities can be trusted to exercise their discretion to investigate and prosecute wisely, precision matters. Especially on political matters or questions of public interest, members of the public should not be daunted from exercising their freedom of expression and right of lawful assembly based on laws which are vague or which they cannot be expected to understand.
13. The law of unintended consequences applies to proposed new terrorism legislation as much as to any other legislative proposals, perhaps doubly so given the width of the definition of terrorism. The terrorism definition applies just as well to the anti-Apartheid actions of Nelson Mandela and the revolutionary battles of Scotland's William Wallace ('Braveheart'), as to the terrorist attacks on 7 October 2023. There are plenty of other examples. A general solution of prohibiting all reference to terrorists or terrorist acts at public marches can therefore be rejected at the outset.
14. At every stage I have also tried to identify what the mischief at which any criminal offence is or (if amended) should be directed. Lawyers find it useful to

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<sup>3</sup> Section 1.

<sup>4</sup> By section 1(4)(d) this includes any overseas government.

<sup>5</sup> By section 1(4)(c) this includes the public overseas, so the Israeli public.

<sup>6</sup> Under section 41 Terrorism Act 2000, for up to 14 days.

<sup>7</sup> Such as the imposition of counter-terrorism cordons under sections 33-36 Terrorism Act 2000.

<sup>8</sup> Counter-Terrorism Act 2008 Part 4.

identify the policy behind a penal statute in terms of the “mischief” that the offence is designed to prevent, as an aid to construction<sup>9</sup>.

- For example, the mischief at which the offence of persistently causing annoyance to another by use of a public electronic communications network (e.g. by posting on Twitter/X) is to prevent individuals from exploiting the system for no other purpose than to annoy (rather than merely to prevent them communicating ideas that offend)<sup>10</sup>.
- When considering terrorism offences, it is important to ensure that they prevent a terrorist mischief (rather than some other mischief, such as anti-Semitism), in addition to interfering no more than necessary with personal freedoms.

15. Prosecution of any of the terrorism offences considered below may in this context require the consent of the Attorney General. It depends on whether they would (if made out) be committed for a purpose wholly or partly connected with the affairs of another country<sup>11</sup>.

16. This Report considers four potentially relevant terrorism offences: three offences under the Terrorism Act 2000 connected with proscribed organisations, and the offence of encouragement under the Terrorism Act 2006.

### **Belonging to a Proscribed Organisation**

17. It is an offence under section 11 Terrorism Act 2000 if a person belongs or professes to belong to a proscribed organisation such as Hamas. The offence can be committed in public or in private. If the organisation was not proscribed when the person became a member, it is a defence if he has not taken part in any of the organisation’s activities since it was proscribed<sup>12</sup>.

18. It is not necessary to consider the “belonging” limb because none of the behaviour of any of the marchers proved that they were in fact members of Hamas.

19. This leaves the limb based on “professing to belong”. There is very little guidance on what this means. A case in 2004 concerned an individual who said, “I am Hamas”. He was ultimately acquitted. When the case was appealed to the House of Lords, Lord Bingham considered the word profess to be a “strange expression”, laden with uncertainty, and thought that if it was intended to catch

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<sup>9</sup> Dating back at least to the time of Elizabeth I: *Heydon’s Case* (1584) 76 Eng.Rep.637 (see further on this topic, Bray, S., ‘The Mischief Rule’, *Georgetown Law Journal*, Vol 109, p967). It remains in frequent use as an aid to construction, for example in *Pwr v Director of Public Prosecutions* [2022] UKSC 2 on the meaning of section 13 Terrorism Act 2000, considered below.

<sup>10</sup> *Scottow v Crown Prosecution Service* [2020] EWHC 3421 (Admin).

<sup>11</sup> Section 117 Terrorism Act 2000; section 19 Terrorism Act 2006. It has been reported that at least some of those charged in connection with the pro-Palestine marches had their cases referred to the Attorney General for consideration.

<sup>12</sup> Section 11(2).

“Walter Mitty” characters who were just making things up, it would be far too wide<sup>13</sup>.

20. Both limbs of the section 11 offence carry a maximum of 14 years’ imprisonment. Individuals convicted of section 11 may be dangerous, reflected in the sentencing options available (long maximum sentence, special sentences for offenders of particular concern, and extended sentences<sup>14</sup>) and arrangements for their release (restricted eligibility for early release, eligibility for polygraph measures, post-release reporting requirements<sup>15</sup>).
21. **Analysis:** Assuming the “professes to belong” limb is not intended to catch “Walter Mitty” characters, it appears to be directed at individuals who at least credibly claim to be members but who might if prosecuted argue that they are not actually members due to some technical internal reason (for example, failure to pay a membership fee).
22. The mischief at which the offence appears to be directed is simply **the continued functioning of an organisation after its proscription**. Section 11 is directed at degrading proscribed organisations by criminalising their personnel. The lengthy maximum sentence and associated measures suggest that the offence is designed to deal with potentially dangerous individuals, who are already committed to that proscribed organisation.

#### ***Does it apply to public order events?***

23. Yes, in principle. If the above analysis is correct, a person who credibly professes at a demonstration to belong to a proscribed organisation commits the section 11 offence; as does a person who became a member before the group was proscribed (for example, someone who joined Hamas’ non-military wing before November 2021), who then engages in a march organised by Hamas after that date.
24. However, in practice section 11 has little application to the recent marches. No individual is reported as having professed to belong to Hamas, in the sense of credibly claiming to be a member of that organisation.

#### ***Should it be adapted further?***

25. It would be possible to amend section 11 to make it clear that the offence applied to the act of “professing to belong”, whether the individual was a member or not, and whether anyone believed him or not. For example, it could be adapted to criminalise someone who used the chant, “We are all Hamas!”.
26. However, this would take the section 11 offence into quite different territory. Section 11 is concerned with the personnel of terrorist groups, not those who

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<sup>13</sup> *Sheldrake v Director of Public Prosecutions; Attorney General’s Reference (No 4 of 2002)* [2004] UKHL 43 at para 48.

<sup>14</sup> Sections 252A, 254 Sentencing Code.

<sup>15</sup> Section 247A Criminal Justice Act 2003, section 28 Offender Management Act 2007, Part 4 Counter-Terrorism Act 2008, respectively.

claim (however implausibly) to be a member. The conduct of a “Walter Mitty” character, or someone who says something stupid or in the heat of the moment, could not possibly justify a sentence of up to 14 years.

27. The mischief of an adapted offence would be quite different too. It would not be directed against its existing personnel, but really be directed at other people giving support to it. That is, however, already subject to other offences (see below).

28. I therefore recommend against reform of section 11.

### **Deliberately inviting support for a proscribed organisation**

29. Under section 12(1) Terrorism Act 2000, it is an offence to invite support for a proscribed organisation excluding money or other property<sup>16</sup>. The invited support can be intangible, and it need not be support that incites violence or encourages terrorism<sup>17</sup>. It can be committed in public or in private<sup>18</sup>.

30. The leading court case concerns expressions of support for the Caliphate declared by so-called Islamic State which (as jury found) in fact invited support for Caliphate<sup>19</sup>. Inviting someone else to provide encouragement to or intellectual support for a proscribed organisation, allowing it to grow stronger and more determined, was enough<sup>20</sup>.

31. Not covered are expressions of personal beliefs or personal approval for a proscribed organisation, or invitations to someone else to share that opinion or belief. This conduct, assuming it does not cross the line into inviting support, does not amount to the offence under section 12(1)<sup>21</sup>. Nor is it an offence oneself to give moral support for a proscribed organisation<sup>22</sup>.

32. As Professor Walker KC has also observed, the offence would not necessarily apply to a person who invites support for the leader of a proscribed organisation<sup>23</sup>. This may appear a rather subtle distinction but could genuinely arise for example if an individual merely invited support for an imprisoned terrorist leader against inhumane prison conditions<sup>24</sup>.

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<sup>16</sup> Section 12(1)(b). Money and other property are dealt with in other terrorist offences in Part III Terrorism Act 2000.

<sup>17</sup> R v Choudary and Rahman [2016] EWCA Crim 61 at paras 40, 46, 89. This was an interlocutory (pre-conviction) appeal.

<sup>18</sup> It is not necessary to consider the other limbs of section 12 (subsections (2) and (3)) concerned with arranging, or addressing, a meeting for the purpose of supporting a proscribed organisation.

<sup>19</sup> R v Choudary and Rahman [2017] EWCA Crim 1606.

<sup>20</sup> [2016] EWCA Crim 61 at para 46, Court of Appeal endorsing trial judge’s ruling.

<sup>21</sup> Ibid at para 48.

<sup>22</sup> This is one of the reasons why it is difficult to prosecute jihadi brides. I consider this in my forthcoming Terrorism Acts in 2022 report.

<sup>23</sup> Blackstone’s Guide to the Anti-Terrorism Legislation, 3<sup>rd</sup> edition, Oxford at para 2.32.

<sup>24</sup> Prosecutions for verbal support of terrorist group PKK leader Abdullah Öcalan have frequently led to convictions in Turkey, which the European Court of Human Rights have found to be inconsistent with Article 10 (freedom of express), see e.g. Yalçınkaya and Others v. Turkey (nos. 25764/09, 25772/09,

33. It is only an offence if the defendant knows he is inviting support<sup>25</sup>.
34. The maximum sentence is 14 years, and it carries the full range of sentencing and post-release measures outlined above<sup>26</sup>.
35. Analysis: If the section 11 offence is about degrading proscribed organisations, the mischief behind the section 12(1) offence is **recruiting new supporters (or potentially sustaining existing supporters) for proscribed organisations**. Those who commit the offence are likely to be already supportive. Someone who knowingly solicits support from others self-evidently commits a serious offence, which explains the high potential penalty.

***Does it apply to public order events?***

36. The section 12(1) offence could well arise in the context of protests. A person who deliberately used slogans or images which amounted to an invitation to provide support to Hamas would commit the offence.
37. Although in principle an invitation might be implied by words or images which did not expressly refer to Hamas, it might in that case be difficult to prove to the criminal standard that the words or images did in fact, and were known to, invite support for a specific proscribed organisation (as opposed to Gazans generally).
38. But there might be other indications that what was being invited was support for Hamas as an organisation (for example, if the words were accompanied by the use of well-known insignia).

***Should it be adapted further?***

39. As set out immediately below, Parliament has already enacted section 12(1A) as an alternative to section 12(1), with a lesser mental element and wider range of conduct. It is therefore difficult to see how the section 12(1) offence could be usefully adapted, in a way that is not already captured by section 12(1A).
40. I recommend against any change to section 12(1).

**Recklessly encouraging support for a proscribed organisation**

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25786/09 et al (judgment 1.10.2013). In *Silgir v Turkey* App.No. 60389/10 (29.4.2022) the Court held that a sentence of over 2 years' imprisonment for displaying a photo of Öcalan was disproportionate in the absence of a sufficient link to terrorism or violence.

<sup>25</sup> *Pwr v Director of Public Prosecutions*, supra, at para 44.

<sup>26</sup> Being in listed in Part 1 of Schedule 1 and Part 3 of Schedule 18 of the Sentencing Code; and Part 2 of Schedule 19ZA of the Criminal Justice Act 2003.

41. Section 12(1A) is a relatively new offence dating from 2019<sup>27</sup>. It was created in response to perceived limitations in the section 12(1) offence<sup>28</sup>.
42. It applies to an opinion or belief that is supportive of a proscribed organisation such as Hamas. It is not necessary for the proscribed organisation to be named. Implied support is in principle sufficient, and therefore an opinion or belief that was supportive of an act of terrorism committed by a proscribed organisation might also be supportive of the proscribed organisation which committed it.
43. However, the offence is only committed if the defendant has the required state of mind. He must be reckless as to whether a person to whom the expression is directed “will” be encouraged to support a proscribed organisation (meaning that he knows of the risk, and nonetheless goes on to take it)<sup>29</sup>. Since the word is “will” he must be aware of sufficient likelihood that encouragement will occur.
44. This inevitably means that the opinion or belief, even if not expressly supportive of the organisation (for example, praise for terrorist acts on 7 October 2023), must be known by the speaker and his audience to have sufficient connection to a proscribed group. Praise for an individual terrorist, such as the Christ Church mosque killer Brenton Tarrant, would never be sufficient for this offence, as proscription only applies to groups.
45. The offence can also be committed in public or in private. The maximum sentence, and related provisions, are the same as for the section 12(1) offence.
46. Analysis: like section 12(1), this offence is aimed at the mischief of **recruiting new supporters (or potentially sustaining existing supporters) for proscribed organisations**. The offence applies to any supportive belief or opinion, not only to invitations to support a proscribed organisation.
47. In addition, the section 12(1A) offence allows the prosecution of individuals who do not deliberately encourage support. It applies to a person who cannot be shown to intend to encourage support, but who is aware that of a sufficient likelihood that support may be encouraged.

### ***Does it apply to public order events?***

48. Section 12(1A) is certainly relevant to the public order context. An opinion or belief may be expressed that is supportive of a proscribed organisation, where the protester is conscious of the risk that a person to whom the opinion is directed will be encouraged to support that organisation.
49. It is not enough that someone who watches a protest on television may be encouraged to support a proscribed organisation, however in principle (although I am not aware of any such a prosecution) a supportive opinion or

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<sup>27</sup> Counter-Terrorism and Border Security Act 2019.

<sup>28</sup> See Explanatory Notes para 25, referring to the interpretation placed on section 12(1) in Choudary and Rahman [2016], supra.

<sup>29</sup> Section 12(1A)(b).

belief might be deliberately “directed” to a television audience if the individual knew they were being filmed.

50. As a matter of proof, it must be shown that the expressed opinion or belief is supportive of the proscribed organisation itself. It is an offence concerned with organisations not merely with actions carried out by them. So, for example, a demonstration expressing support for IRA weapons-decommissioning would not necessarily be an offence.
51. Similarly, the risk must be that a person at whom the expression is directed supports the organisation. Whether a particular sign or slogan might have that effect will depend on the circumstances. Direct reference to Hamas, or praise for events with which Hamas were obviously involved, might demonstrate a sufficient likelihood of encouraging support for Hamas as an organisation.

### ***Should it be adapted further?***

52. An adapted offence could penalise an opinion or belief that was supportive of a proscribed organisation, irrespective of the risk of encouraging support. This would be a severe and unjustifiable intrusion on free expression.
- It would prevent people from expressing the view that a group should not be proscribed. In fact, the Terrorism Act 2000 has a procedure for applying for deproscription, so it cannot be illegitimate to disagree with the Home Secretary’s decision to proscribe<sup>30</sup>.
  - It would apply to expressions that were not supportive of terrorism at all: for example, “Hamas has done the right thing to hand over the hostages!”.
53. Indeed, since the section 12(1A) offence can be committed in private, its impact would be even more unwarranted. It would intrude onto private discussions of world events even though no support was being encouraged.
54. The mischief behind such an amendment would also be unclear. If there is no risk of encouraging support, there would be terrorist harm. The real mischief, in the protest context, would appear to be one relating to public order including racial hatred.
55. An alternative would be to remove the mental element of recklessness. So, a person who expressed a supportive opinion or belief would commit an offence if it was likely that another person might be encouraged to support the proscribed organisation – whether he appreciated that risk or not.
56. Again, this would be a profound interference with freedom of expression. An individual who disagreed with proscription, or expressed support for hostage return, would have to worry that – even though they did not think there was a risk of encouraging support – the police or a prosecutor or a jury might conclude

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<sup>30</sup> Section 4 Terrorism Act. Immunity from prosecution only applies to things done for the purpose of an application for proscription, and court proceedings (see section 10).



otherwise. It raises the spectre of individuals having to self-regulate their expression in public and in private on topics of major interest and debate. They would risk prosecution as terrorists, subject to the major penalty that applies to section 12(1A), despite having no appreciation of any terrorist risk.

57. A further alternative might be to encompass words that are supportive of a terrorist individual or terrorist attack.

58. However, support for an individual would be a different type of support. Lone attackers such as Brenton Tarrant are either killed at the scene or in jail – they are not enduring groups which depend on support. This is not an issue arising from the pro-Palestine marches. As with praise for terrorist acts, the true mischief would be the risk of further terrorist acts by those encouraged. But this is already subject to a different offence (section 1 Terrorism Act 2006, considered below).

59. Breaking the link to proscribed organisations would create an excessively broad offence and invite legitimate “whataboutery” (Nelson Mandela, William Wallace, etc.). The link to proscription is essential because it creates a quality control on groups who may be praised, applying only to groups who have been assessed by the government to be concerned in terrorism at the time of proscription<sup>31</sup> and meriting proscription as a matter of discretion, subject to Parliamentary oversight<sup>32</sup>.

60. Finally, removing the requirement that any opinion or belief should be “supportive” could lead to criminalisation by omission. A person who neutrally discussed the actions of a proscribed organisation could fall within the offence merely because they did not disavow the group.

61. I therefore recommend against amending section 12(1A).

### **Wearing or displaying an article linked to a proscribed organisation**

62. Section 13 Terrorism Act 2000 makes it an offence to wear clothing (such as paramilitary garb) or display an article (e.g., a flag or placard) in a public place, if doing so in all the circumstances arouses reasonable suspicion that the person is a member or supporter of a proscribed organisation<sup>33</sup>.

63. There are associated seizure powers<sup>34</sup>. The offence has recently been adapted so that it also applies to publishing images in the online space<sup>35</sup>.

64. Because the threshold is “reasonable suspicion”, it is not necessary for the clothing or article to be unambiguous in its meaning. So, it is no answer that the clothing or article might conceivably relate to something not connected to a proscribed organisation.

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<sup>31</sup> Section 3(4).

<sup>32</sup> For a detailed explanation of proscription, see Terrorism Acts in 2018 at Chapter 3.

<sup>33</sup> Section 13(1).

<sup>34</sup> Section 13(4).

<sup>35</sup> Section 13(1A), inserted by the Counter-Terrorism and Border Security Act 2019.

65. In Great Britain public displays of the flag of the proscribed group the LTTE (Tamil Tigers) not infrequently lead to arrests under section 13. In Northern Ireland, the use, or non-use, of section 13 in connection with the flags of proscribed organisations is a matter of controversy<sup>36</sup>.
66. In a case concerning the display of the flag of the proscribed group the PKK (Kurdistan Workers' Party), the Supreme Court held that so long as the defendant knew he was carrying the article, he did not need to know that he was arousing suspicion that he was a member or supporter<sup>37</sup>. This means it is an offence of strict liability.
67. The offence is concerned with the effect on other people not the intention or knowledge of the defendant: it is designed to deny a proscribed organisation the oxygen of publicity or a projected air of legitimacy, and seeks to avoid people potentially becoming supporters, thereby stymying the operation of proscribed organisations<sup>38</sup>. It may also have a role in avoiding public disorder that might be provoked<sup>39</sup>.
68. The maximum sentence is 6 months, meaning that it can only be tried in the magistrates' court. None of the special sentencing or post-release measures apply. Unless the police have other suspicions, the stronger arrest power under section 41 Terrorism Act 2000 is not available, so ordinary (PACE) powers will be used.
69. Analysis: section 13 is a pure expression offence, although it is limited to expressions using clothing or articles. It is aimed at preventing the mischief of **positive publicity for proscribed organisations**.
70. It is not an offence merely to use words which arouse the relevant suspicion, although the words used by a flag-displayer could be relevant to what suspicion is reasonably aroused. It can be committed by the foolish, who do not realise the possible consequences of their actions, as much as by the malicious and therefore carries a much lower maximum sentence (typically, a conditional discharge is imposed).

### ***Does it apply to public order events?***

71. Section 13 certainly applies to public order events. It may only be committed in a public place and the conduct element of clothing and articles is particularly suited to marches and demonstrations. Although it may rarely be the case outside Northern Ireland that a person who wears clothing or carries an article arouses suspicion that he truly is a member of a proscribed organisation, it is sufficient that it gives rise to reasonable suspicion of being a supporter.

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<sup>36</sup> I cover this in Chapter 9 of my forthcoming Terrorism Acts in 2022 Report.

<sup>37</sup> Pwr, supra.

<sup>38</sup> At para 55.

<sup>39</sup> Ibid.

72. If a person carries a known flag of a proscribed organisation, the offence will generally be made out. But the offence might well apply to a person who carries a neutral article.

- For example, a person who carries a black flag with the Shahada (Islamic declaration of faith) and uses the finger-pointing gesture associated with members of Islamic State may well arouse reasonable suspicion that they are a supporter of that proscribed organisation.

73. However, section 13 does not apply to words alone. It does not apply to a person who merely shouts slogans, even if those slogans arouse suspicion that he is a member or supporter of a proscribed organisation. This may be because a display of visible support such as clothing or a placard is both more durable and effective at publicity than mere words, and because of the special need for caution in criminalising words alone.

74. Section 13 does not apply to a person who arouses reasonable suspicion that they are a supporter of a terrorist attack unless they also arouse reasonable suspicion that they support the proscribed group who carried it out. That will depend on the precise circumstances.

75. Section 13's utility is as much in permitting police to intervene to prevent displays (by arrest and seizure) as prosecuting individuals who, if convicted, generally face a minimal penalty.

### ***Should it be adapted further?***

76. Since section 13 is already an offence of strict liability, any adaptation must in principle relate to the conduct element or the reasonable suspicion element. I consider each of these possibilities below.

77. It is very difficult to see how the current section 13 could be adapted to mere speech in a public place without excessive damage to free expression. Unlike clothing or flags, speech is spontaneous and enables individuals to try out and debate ideas and propositions.

78. It would appear to forbid any verbal expression in a public place (whether at a march or not) that called for deproscription or supported hostage-return by a proscribed organisation. It would penalise someone who said in a public place "I don't support Hamas' violence, and I hope they will change, but I think they are the only tenable government for Gaza".

79. Tightening a speech element so that it applied to identified chants or slogans is a recipe for disaster. As demonstrated by the use of 'Pepe the Frog' by the far right<sup>40</sup>, or the variety of banners flown in support of Soldier F in Northern Ireland<sup>41</sup>, people are far too inventive to be stifled by particular word or symbol

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<sup>40</sup> "Pepe the Frog meme branded a 'hate symbol' (BBC News 28.9.16).

<sup>41</sup> See for example, "'People have a right to support Soldier F' - DUP's Sammy Wilson" (ITV News, 6.10.19).

bans. Imagine a scenario in which Parliament legislated that a particular phrase was unsayable: within hours people would be gleefully conjuring up alternatives. It has never been the tradition of UK law to make certain words unutterable in themselves<sup>42</sup>: the law looks at the consequence of words.

80. It is not on analysis plausible to amend section 13 to prohibit arousing reasonable suspicion that a person is a supporter of terrorist acts.

- As previously discussed, this would prohibit support for historic acts of terrorism which can be debated as being as justified (for example, actions taken by the African National Congress).
- This means the scope of the offence would have to be controlled in some way. It would be difficult to impose a date limitation (A 20-year cut off would exclude 9/11. Would the date range include the assassination of Indira Gandhi in 1984? The attack by the Irgun on the King David's Hotel, Jerusalem in 1946?).
- Limiting the offence to praising terrorist acts carried out by proscribed organisations would result in odd disparities. It would be an offence to display a placard praising 9/11 but not a placard praising the Christ Church mosque attacks.
- It would catch a person who aroused suspicion that they supported a terrorist attack by one terrorist group on another, for example an attack by the proscribed PKK on the proscribed Islamic State in North-East Syria. It would not be morally culpable to support such an attack.
- It would apply even if (in this example) the person was ignorant that it was the PKK as opposed to a non-proscribed group such as the YPG. In some cases, there may be genuine doubt about who carried out an attack (for example, Islamic State often claims that its 'soldiers' have carried out attacks although there is no connection to the group).
- In any event, a person who visibly supports a terrorist attack carried out by a terrorist group may well arouse "reasonable suspicion" that they also support the proscribed organisation who carried it out. In some cases<sup>43</sup>, praise for a terrorist act may amount to encouragement to terrorism contrary to section 1 Terrorism Act 2006 (see below).
- Finally, praising a particular attack may well be good evidence that the speaker is intending to stir up racial hatred under the Public Order Act 1986.

81. I recommend against amending section 13.

## **Encouragement of terrorism**

82. Section 1 Terrorism Act 2006 was enacted following the 7/7 attacks on the London Underground in 2005. It can be described as a pre-cursor offence that aims at reducing the future possibility that terrorist attacks will be carried out in response to words or images.

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<sup>42</sup> Especially because certain words including "jihad" can have benign and cherished meanings of personal significance to millions of people.

<sup>43</sup> E.g. 'Man who praised Samuel Paty murder found guilty of terrorism offences' (BBC News, 27.3.23).

83. It applies to any statement to members of the public which is “likely” to be understood as a direct or indirect encouragement to the commission, preparation, or instigation of “acts of terrorism”. Acts of terrorism essentially means attacks.
84. A statement can be made up of words or images or both<sup>44</sup> and how the statement is likely to be understood is context specific<sup>45</sup>. When individuals were travelling from the UK to Syria and Iraq to fight with so-called Islamic State, the likelihood that people might be encouraged to engage in acts of terrorism was real. That consideration might be relevant if people were travelling from the UK to commit terrorist acts in Israel or the Occupied Palestinian Territories.
85. There is no need for any connection to proscribed organisations.
86. No one must in fact be encouraged to carry out any act of terrorism, and it does not matter if the encouraged terrorism is a specific act or acts of terrorism in general<sup>46</sup>. It therefore goes further than encouraging a specific attack (such an individual could well be prosecuted as a principal<sup>47</sup>, or conspirator in<sup>48</sup> or encourager/assister of a terrorist attack<sup>49</sup>).
87. Liability is enhanced in some ways and restricted in others. By way of enhancement, a statement which “glorifies” the commission or preparation of any terrorist act is treated as a statement that is likely to encourage, if it fulfils a further condition. The condition (quite complex) is that it must be a statement from which members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances<sup>50</sup>. Glorification includes any form of praise or celebration<sup>51</sup>.
88. This careful enhancement basically operates as follows: if a person is implying that the attack should be copied, it is encouragement; but otherwise, not. So, whilst section 1 does not automatically apply to any glorification of historic attacks by the IRA in the 1970s, it would if this amounted to calling for those attacks to be emulated or copied today. This can be a fine distinction.
89. By way of restriction, no offence is committed unless the defendant who makes the statement in public either intends members of the public to be encouraged

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<sup>44</sup> Section 20(6).

<sup>45</sup> Section 1(4).

<sup>46</sup> Section 1(5).

<sup>47</sup> A person who aids, abets, counsels, or procures an offence may be prosecuted as a principal offender: section 8 Accessories and Abettors Act 1861.

<sup>48</sup> Criminal Law Act 1977.

<sup>49</sup> Under the Serious Crime Act 2007 Part 2. The fact that it is not an offence under this Act to assist/encourage the section 1 offence (see section 49(4) and Schedule 3) is not relevant here but is relevant to liability for AI chatbots.

<sup>50</sup> Section 1(3).

<sup>51</sup> Section 20(2).

or is reckless as to whether they will be (this means, is aware of the risk that they will be encouraged but nonetheless goes on and takes the risk)<sup>52</sup>.

90. It can be committed through online communication to members of the public, and in recent years is mainly prosecuted in relation to online activity.

91. The maximum sentence is 15 years. It carries the full range of sentencing and post-release measures outlined above<sup>53</sup>.

92. Analysis: section 1 Terrorism Act is designed to **reduce the possibility of terrorist attacks** by criminalising seriously culpable individuals who encourage members of the public to commit terrorist acts, know they are doing so, or deliberately risking doing so. There are a full range of sentencing options.

### ***Does it apply to public order events?***

93. Section 1 very much applies to protests and marches, as it specifically applies to encouraging members of the public. It applies to any statement made at a protest or march which is likely to be understood as encouragement to terrorism. For example, it might well apply to a person who led chants for “jihad” in the context of a march, especially if terrorist attacks had already been carried out in support of the speaker’s cause, and members of the public might reasonably see a chant of jihad as encouragement to carry out their own act of terrorism in the UK or overseas. Jihad has benign meanings but, in this context, would likely refer to violence.

94. However, encouragement to terrorism is regarded as a very serious terrorism offence. It is not a means of enforcing public order.

### ***Should it be adapted further?***

95. In short, it is not plausible to turn the encouragement offence into an offence of strict liability.

96. It might be suggested that the offence should apply to a person who makes a statement that is likely to be understood as encouragement to commit terrorist acts, whether they intend or are reckless about that encouragement, or not. But a person who makes such a statement is very likely to intend encouragement or be reckless about the effect of their words. Conversely a person who genuinely does not understand the effect of their words should not be prosecuted as terrorist.

97. It might therefore be suggested that it should be an offence merely to “glorify” acts of terrorism, without any prospect that members of the public should seek to emulate it.

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<sup>52</sup> Section 1(2). In the latter case there is a further defence that the defendant did not endorse, and did not appear to endorse, the statement himself.

<sup>53</sup> Being in listed in Part 1 of Schedule 1 and Part 3 of Schedule 18 of the Sentencing Code; and Part 2 of Schedule 19ZA of the Criminal Justice Act 2003.

98. I have already considered at paragraph 80 above the difficulties inherent in fashioning criminal liability merely for supporting terrorist acts (How far back in history? Would it cover arguably justified acts of terrorism?). The same difficulties would apply to an offence of glorifying terrorist acts. It is impossible to formulate a mere glorification offence within acceptable limits.
99. In any event, it would be unacceptable for a person to be convicted of a serious terrorism offence because of words used, without reference to their state of mind.
100. Finally, the practical implications of a glorifying offence should be considered:
- Section 1 applies to online encouragement. A mere glorification offence would apply to the thousands (if not millions) of people online whose sick pleasure it is to engage in competitive praise for, create artwork from, gamify, and generally indulge in transgressive glorification of violence including terrorist violence.
  - In a previous report I recommended that it would not be possible to make it a terrorist offence to possess violent terrorist propaganda, principally because of the number of people who would end up being prosecuted as terrorists<sup>54</sup>. The same point applies here.
  - It does no favours to the police, MI5, and His Majesty's Prisons and Probation Service to extend the pool of terrorist offences unnecessarily. Either the investigative authorities dramatically shift their resources or ignore new terrorist offences. If individuals are convicted and sentenced to terms of imprisonment, this has major resource implications for their management in prison and on release.
101. I therefore recommend against amending section 1 Terrorism Act 2006.

JONATHAN HALL KC

23 NOVEMBER 2023

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<sup>54</sup> Terrorism Acts in 2019 at 7.61 et seq.