



# **Memorandum to the Home Affairs Committee**

## **Post-legislative Scrutiny of the Counter-Terrorism Act 2008**

Presented to Parliament  
by the Secretary of State for the Home Department  
by Command of Her Majesty

March 2014



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# MEMORANDUM TO THE HOME AFFAIRS COMMITTEE

## POST- LEGISLATIVE SCRUTINY OF THE COUNTER TERRORISM ACT 2008

### 1. INTRODUCTION

1.1 This memorandum provides a preliminary assessment of the operation of the Counter Terrorism Act 2008 (the 2008 Act) and has been prepared by the Home Office for submission to the Home Affairs Select Committee. It is published as part of the process set out in the document *Post Legislative Scrutiny – the Government’s Approach*.

### 2. OBJECTIVES OF THE COUNTER TERRORISM ACT 2008

2.1 The purpose of this Act was to amend the law in relation to terrorism in a number of distinct ways and to provide those charged with the responsibility of investigating and prosecuting terrorist offences with a greater range of powers, both before and after arrest, charge and conviction. It includes provisions relating to:

- the gathering and sharing of information for counter-terrorism and other purposes, including the disclosure of information to and by the intelligence services;
- post-charge questioning of terrorism suspects;
- the prosecution of terrorism offences and punishment of convicted terrorists; notification requirements for persons convicted of terrorism-related offences;
- powers to act against terrorist financing, money laundering and certain other activities;
- reviews of certain Her Majesty’s (HM) Treasury decisions;
- inquiries dealing with sensitive information; and,
- a number of miscellaneous measures.

2.2 **Part 1 of the 2008 Act (powers to gather and share information)** contains provisions for powers relating to the removal of documents for examination in the context of a search under existing terrorism legislation. It provided a power for a constable to take fingerprints and samples from individuals subject to control orders and amended the law relating to the retention and use of fingerprints and DNA samples. This Part also includes provisions relating to the disclosure of information to and by the intelligence services and their use of such information.

2.3 **Part 2 (post-charge questioning of terrorist suspects)** provides that terrorist suspects may be questioned after they have been charged and requires that such questioning be authorised by a judge. Adverse inferences from the silence of the suspect during that questioning may be drawn by a court in England and Wales or Northern Ireland.

2.4 **Part 3 (prosecution and punishment of offences)** provides for specified terrorism offences committed anywhere in the UK to be tried in any part of the UK. It requires Attorney General or Advocate General for Northern

Ireland consent for prosecution of certain terrorism offences committed outside the UK. This Part also deals with sentences for terrorism cases tried under the general criminal law: the court is to treat a terrorist connection as an aggravating factor when considering sentence. It also extends the forfeiture regime applicable in terrorist cases.

2.5 **Part 4 (notification requirements)** makes provision for the notification of information to the police by certain individuals convicted of terrorism or terrorism-related offences, following their release from prison. When in the community, such individuals must provide the police with certain personal information; they must notify any subsequent changes to this information and confirm its accuracy annually. Under Schedule 5, a court may, on application, impose a foreign travel restriction order on an individual subject to the notification requirements, restricting that person's overseas travel.

2.6 **Part 5 (terrorist financing and money laundering)** confers powers on HM Treasury to direct persons operating in the financial sector to take certain actions in respect of transactions or business with persons in a country of money laundering, terrorist financing or proliferation concern.

2.7 **Part 6 (financial restrictions proceedings)** creates a statutory basis for a person affected by certain kinds of HM Treasury decision to apply to have the decision set aside. HM Treasury decisions to which this part relates are those made under (i) the UN Terrorism Orders, (ii) Part 2 of the Anti-terrorism, Crime and Security Act 2001, or (iii) Schedule 7 to this Act. It also provides for Rules of Court to make provision about such applications, in particular for the procedure which is to apply where the reason for HM Treasury's decision (or part of it) cannot be disclosed to the applicant because disclosure would be contrary to the public interest (i.e. it involves "closed source material"). Closed source material relevant to HM Treasury's decision would be considered at a closed hearing, for which a special advocate (who has been security-vetted) would represent the interests of the applicant, with the detailed procedure set out in Rules of Court made under this part.

2.8 **Part 7 (miscellaneous)** amends the Regulation of Investigatory Powers Act 2000 to allow intercept material to be disclosed in exceptional circumstances to counsel to an inquiry held under the Inquiries Act 2005 (in addition to the inquiry panel); it amends the definition of terrorism in section 1 of the Terrorism Act 2000 (and various other pieces of terrorism legislation) by inserting a reference to a racial cause. This Part also creates an offence of eliciting, publishing or communicating information about members of the armed forces, members of the intelligence services or constables which is likely to be of use to terrorists, and amends the offence of failing to disclose information about a suspected terrorist finance offence. It also includes some amendments to the control order system under the Prevention of Terrorism Act 2005, minor amendments to the provisions on pre-charge detention of terrorist suspects under the Terrorism Act 2000, amendments to provisions on forfeiture of terrorist cash, a new scheme for the recovery of costs of policing at gas facilities and a provision on the appointment of special advocates in Northern Ireland.

2.9 **Part 8** contains supplementary provisions.

### **3. IMPLEMENTATION AND AMENDMENTS**

3.1 A number of provisions of the 2008 Act have not been commenced or have been repealed and replaced by subsequent legislation. There are a number of reasons for this. In 2010, the Government reviewed the most sensitive and controversial counter terrorism and security powers. This review, which was published in 2011, sought to ensure that we are striking the right balance between safeguarding national security and protecting individual rights. A number of important changes have been made as a result, some of which have led to changes to the 2008 Act as set out below.

3.2 Following the Government's review of counter terrorism and security powers it was decided to overhaul a number of these powers. The Terrorism Prevention and Investigation Measures (TPIM) Act 2011 replaced the preceding control order scheme mainly contained in the Prevention of Terrorism Act 2005 – it provides a range of measures to protect the public from individuals who are believed to be involved in terrorism-related activity but whom it is not possible to prosecute or deport. The Terrorism Prevention and Investigation Measures (TPIM) Act 2011 also repealed and replaced a number of the 2008 Act provisions which related to control orders. Section 1(1)(e) of the 2008 Act relating to searches in connection with control orders has been superseded by Paragraph 5(2)(a) of Schedule 7 to the Terrorism Prevention and Investigation Measures (TPIM) Act 2011. Part 1 of Schedule 7 to this Act also supersedes sections 10 to 13 of the 2008 Act (relating to the taking of fingerprints and samples from persons subject to control orders) and sections 78 to 81 of the 2008 Act.

3.3 A number of amendments were also made by the Protection of Freedoms Act 2012. Through this Act, the Government has delivered on its commitment in the Coalition Programme for Government to reform police retention of DNA and fingerprint (biometric) material, providing for a new framework for regulating the retention, destruction and use of biometric material that strikes the right balance between public protection and individual freedoms. Part 1 of Schedule 10 to the Protection of Freedoms Act 2012 repeals section 14(4) – (6) and sections 16 and 17 of the 2008 Act, relating to the retention and use of fingerprints and samples. Section 18 of the 2008 Act relating to material not subject to existing statutory restrictions has been substituted by Part 3 of Schedule 1 to the Protection of Freedoms Act 2012.

3.4 Schedule 2 to the Terrorist Asset Freezing etc. Act 2010 repealed the following sections of the 2008 Act: Section 75(2)(d) of Part 7; Paragraph 5(2)(f) of Schedule 7; Paragraph 18(1)(d) and 18(2)(d) of Schedule 7; Paragraph 28(2) and 28(3) of Schedule 7; and Paragraph 39(2)(d) of Schedule 7.

3.5 Section 63(1) (aa) of the 2008 Act relating to the application to set aside financial restrictions decision was repealed by Part 1 of Schedule 2 to the Al-Qaida (Asset Freezing) Regulations 2011.

## 4. SECONDARY LEGISLATION

4.1 A full list of secondary legislation introduced under the 2008 Act is set out below at Annex B.

## 5. LEGAL ISSUES

5.1 There have been a number of legal challenges brought against particular aspects of the 2008 Act including:

- Section 34: power for a court to order forfeiture of property which was in the possession or control of a person convicted of a specified terrorist offence, at the time the offence was committed. Munir FAROOQI, who was convicted in September 2011 of terrorism offences, is challenging the forfeiture order sought against him by Greater Manchester Police (GMP) and the Crown Prosecution Service (CPS). On 30 September 2013, an appeal made by FAROOQI in relation to his conviction and sentence was dismissed at the Court of Appeal. At the time of publication, forfeiture proceedings are ongoing.
- Part 4: notification requirements. In October 2012 the Court of Appeal considered a challenge against the terrorist notification requirements (*R, on the application of Mohamed Irfan v The Secretary of State for the Home Department [2012] EWCA Civ 1471*). The Court dismissed the appeal and upheld the earlier finding of the High Court (CO/4638/2011) that the notification requirements do not constitute a disproportionate interference with Article 8 ECHR (right to respect for family and private life). The Court concluded that terrorism offences by their nature fall into a special category of offences; that this scheme is within the 'proper margin of discretion' of Parliament and that the requirements constitute a 'relatively modest intrusion' which cannot be said to be disproportionate. The appellant sought permission to appeal his case to the Supreme Court; however, on 28 October 2013 this was also refused.
- Schedule 7: A direction given to the financial sector under Schedule 7 to the 2008 Act was subject to legal challenge in the case of *Bank Mellat v Her Majesty's Treasury [2013] UKSC 39*. In October 2009, HM Treasury made a direction under Schedule 7 to the 2008 Act requiring all persons operating in the UK financial sector not to undertake any business relationships or transactions with Bank Mellat and the Islamic Republic of Iran Shipping Lines (IRISL). Bank Mellat challenged the Order under section 63(2) of the 2008 Act. During the course of the proceedings before the High Court, evidence presented by HM Treasury was heard in closed session. In June 2013 the Supreme Court found in favour of the Bank on its challenge to the 2009 Order, and in favour of HM Treasury on a procedural point relating to the ability of the Supreme Court to adopt a closed material procedure. An EU-wide asset freeze remains in place on Bank Mellat's assets.
- Bank Mellat has also challenged two further directions that were given by HM Treasury under Schedule 7 to the 2008 Act. These were contained in the Financial Restrictions (Iran) Orders of 2011 and 2012 which prohibited business relationships and transactions between UK financial and credit

institutions and Iranian banks, their branches and subsidiaries, and the Central Bank of Iran. These measures have since been superseded by similar restrictions at EU level. At the time of writing, dates for these court cases had not yet been set.

## **6. NON JUDICIAL REVIEWS AND REPORTS**

### **6.1 Counter Terrorism and Security Powers Review**

6.1.1 In 2010, the Government reviewed the most sensitive and controversial counter-terrorism powers to ensure that they struck the right balance between civil liberties and national security. The Home Secretary published the findings from that review in January 2011. As set out above, in relation to counter-terrorism powers, it recommended the end of control orders and their replacement with Terrorism Prevention and Investigation Measures (TPIMs) which came into force at the end of 2011. This review also resulted in a number of significant changes to some of the UK's most far reaching counter terrorism powers such as putting an end to the indiscriminate use of terrorism stop and search powers previously allowed under section 44 of the Terrorism Act 2000 and reducing the limit on pre-charge detention from 28 to 14 days. These changes have been introduced through the Protection of Freedoms Act 2012.

### **6.2 Independent Reviewer of Terrorism Legislation (IRTL)**

6.2.1 David Anderson QC, the incumbent Independent Reviewer of Terrorism Legislation (Independent Reviewer) produces independent reports on the operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006. One of the recommendations from his annual report published in June 2012 [<https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/report-terrorism-acts-2011.pdf>] was for the Counter Terrorism Act 2008 and the Anti-Terrorism Crime and Security Act 2001 to be subject to review by the Independent Reviewer. In the Government's response published on 14 March 2013, the Home Secretary agreed that these Acts should be examined with a view to extending Independent Reviewer's statutory functions to include the review of relevant sections of these Acts. The Government will seek to take this forward when a suitable legislative vehicle is available.

## **7. SCRUTINY BY JOINT COMMITTEE ON HUMAN RIGHTS (JCHR)**

7.1 The JCHR produced the following reports during the passage of the Bill which examine either specific provisions of the 2008 Act, or issues associated with it:

- Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill. Published 7 February 2008;
- Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008. Published 20 February 2008;
- Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill. Published 14 May 2008; and,

- Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill. Published 8 October 2008.

## **8. PRELIMINARY ASSESSMENT OF THE ACT**

### **Part 1 – Powers to gather and share information**

#### **8.1 Power to remove documents for examination**

8.1.1 Sections 1 to 9 of the 2008 Act made provisions for the removal of documents for examination in the course of a terrorist-related search in order to ascertain whether they are documents that could be seized. Sections 1 to 9 included provisions to deal with documents that are subject to legal privilege, making a record of removal, the time limit for the retention of documents, access to documents, photographing and copying of documents and provisions for the return of the documents.

#### Impact and Use

8.1.2 Sections 1 to 9 of the 2008 Act have not been commenced. Prior to 2007, similar powers existed only in respect of Northern Ireland (Part VII of the Terrorism Act 2000). These powers expired on 31 July 2007 as part of the programme of security normalisation announced by the then Secretary of State for Northern Ireland on 1 August 2005. Prior to their expiry the powers had been widely used in Northern Ireland and the 2008 Act sought to introduce these powers UK wide.

8.1.3 Given the lapse of time since similar powers were available for operational use, we will reexamine the operational case for and the necessity of these powers in consultation with operational stakeholders.

#### **8.2 Power to take fingerprints and samples from person subject to control order: England and Wales**

8.2.1 Sections 10 to 13 of the 2008 Act makes specific provision for the routine taking, use, storage and retention of fingerprints and non-intimate samples of individuals subject to a Control Order.

8.2.2 The 2008 Act powers relating to the fingerprints and samples of controlled individuals were never commenced as a result of the judgment of the European Court of Human Rights (ECtHR) in *S and Marper v United Kingdom* [2008] ECHR 1581 (*S and Marper*) which ruled that the 'blanket and indiscriminate' indefinite retention of such data where there had been no conviction was in breach of Article 8 ECHR. Under the Crime and Security Act 2010 the previous Government introduced different retention periods for various categories of material, one of which was biometric material taken from a person subject to a control order, and also introduced provisions allowing the retention of such material beyond the prescribed periods where necessary for national security purposes. However, these provisions of the Act were not commenced. New powers contained in the Protection of Freedoms Act 2012 replaced those in the Crime and Security Act 2010. The Protection of Freedoms Act 2012 fully implements the *S and Marper* judgment and

establishes a clear and proportionate framework for the retention and use of biometric material.

### Impact and Use

8.2.3 These provisions relate to the control order regime which is no longer in force and has been replaced by the new measures contained in the Terrorism Prevention and Investigation Measures (TPIM) Act 2011. Part 1 of Schedule 7 to this Act excludes sections 10 to 13 of the 2008 Act.

## **8.3 Retention and use of fingerprints and samples**

8.3.1 The powers to use fingerprints, DNA and footwear impressions (“samples”) for counter-terrorist purposes including by the security services are included in Sections 14 to 18 of the 2008 Act. These provisions allow the cross checking of security services material with ordinary crime (PACE) samples in England, Wales and Northern Ireland (Scotland does not have PACE); putting the retention and use of material not subject to existing restriction (mostly covertly acquired fingerprints and samples) on a statutory footing; and standardising the purposes for which fingerprints and samples can be used as between the Terrorism Act 2000, PACE and material not subject to existing statutory restrictions (section 18 of this Act).

### Impact and Use

8.3.2 The Government announced in January 2011 its intention to replace provisions in the Crime and Security Act 2010 with new provisions on the retention and use of biometric material and committed to ‘adopt the protections of the Scottish model’. Although the decision in *S and Marper* did not specifically address the issue of retention of biometric material for national security purposes, the Protection of Freedoms Act 2012 makes provisions broadly equivalent to those for PACE in respect of national security thus establishing for the first time a comprehensive retention and destruction regime which includes, in particular, material acquired for counter terrorism purposes.

8.3.3 Sections 14(4) – (6) to section 17 of the 2008 Act standardised the purposes for which fingerprints and samples taken under the Police and Criminal Evidence Act 1984 (PACE) and the Terrorism Act 2000 could be used. These provisions were repealed by Part 1 of Schedule 10 to the Protection of Freedoms Act 2012. They were replaced with new provisions at section 63T PACE (as inserted by section 16 of the Protection of Freedoms Act 2012) and paragraph 20H of the Terrorism Act 2000 (as inserted by Part 1 of Schedule 1 to Protection of Freedoms Act 2012). Section 18 of the 2008 Act, which provides for the retention and use of DNA samples and fingerprints that are not subject to existing statutory restrictions, was amended and has been substituted by Part 3 of Schedule 1 to the Protections of Freedoms Act 2012. New section 18 of the 2008 Act now provides for the destruction, retention and use of material held for the purposes of national security and which are not subject to existing statutory restriction (i.e. a narrower category of material).

## **8.4 Disclosure of information and the intelligence services**

8.4.1 Sections 19 to 21 of the 2008 Act were modelled on analogous provisions that had been made for the Serious and Organised Crime Agency in Serious Organised Crime Police Act 2005 (replicated for National Crime Agency in the Crime and Courts Act 2013). These sections make it clear that people can share information with the intelligence agencies in order for them to fulfil their functions without being in breach of their own legal obligations - and also make clear the agencies' ability to share information.

### Impact and Use

8.4.2 These provisions apply to the Secret Intelligence Service and Government Communications Headquarters as well as the Security Service, and do not affect the existing provision in section 2(2)(a) of the Security Service Act 1989 or the corresponding provisions in sections 2(2)(a) and 4(2)(a) of the Intelligence Services Act 1994. It follows that, in order for this disapplication provision to be triggered and in effect confer vires on the 'voluntary provider' to disclose the information in question, it will still be essential for the recipient Agency to satisfy the twin tests of necessity and proportionality in relation to the proposed acquisition of information.

8.4.3 The provisions of section 19 of the 2008 Act provide important legal comfort to prospective suppliers of information to the intelligence agencies. These powers are very useful to the intelligence agencies in helping them to secure and maintain access to the information they rely on in their investigations and operations and in the other work they carry out for the protection of the UK's national security.

8.4.4 Schedule 1 was mainly designed to deal with the repeal of various specific 'disclosure gateway' provisions that had previously been enacted to enable the Government Departments and public authorities concerned to disclose their information to the Security and Intelligence Agencies. The provisions were understood to be superfluous and repealed (because of the generic provisions in section 19 of the 2008 Act).

## **Part 2 – Post-charge questioning of terrorist suspects**

### **8.5 Post-charge questioning and recording of interviews**

8.5.1 Section 22 of the 2008 Act relates to post-charge questioning in England and Wales. Under this section a judge of the Crown Court has the power to authorise questioning of a person about an offence, for which they have been charged or have been informed that they may be prosecuted, where the offence was a terrorism offence or has a terrorist connection. In addition, this section makes provisions to specify the period of questioning including any conditions of this period, and, also provides for a suspect to be moved to another place for questioning. A judge can authorise post-charge questioning if it is necessary in the interests of justice, that the police investigation related to the suspect is being conducted diligently and expeditiously, and that it would not interfere unduly with the preparation of the person's defence to the charge in question or any other criminal charge.

8.5.2 Section 23 of the 2008 Act relates to post-charge questioning in Scotland, and, section 24 makes provisions for post-charge questioning in Northern Ireland. Provisions to allow post-charge questioning under sections 22 to 24 to be video-recorded with sound are contained in Section 25.

### Impact and Use

8.5.3 Sections 22, 23 and 25 (in so far as they extend to England, Wales and Scotland) of the 2008 Act were commenced on 10 July 2012. Before commencement of the provisions, the 2008 Act required:

- a) The Code of Practice issued under PACE on the detention of terrorists suspects (PACE Code H) to be amended to include provision about post-charge questioning
- b) A separate Code of Practice to be issued (section 25 of the 2008 Act) which requires the video recording of all post-charge questioning interviews

8.5.4 Both Codes were subject to public consultation by the Home Office between November 2011 and January 2012. CODE H - a revised Code of Practice in connection with the detention, treatment and questioning by Police Officers of persons in police detention under section 41 of, and Schedule 8 to, the Terrorism Act 2000 came into force on 10 July 2012. Alongside this, the Counter Terrorism Act 2008 (Code of Practice for the Video Recording with Sound of Post-Charge Questioning) Order 2012 (SI 2012/1793), issued under section 26(4) of the 2008 Act, and introducing the video recording Code of Practice, came into force. The Codes are available at: [gov.uk](http://gov.uk)

8.5.5 Section 24 which provides for the equivalent powers for authorising the questioning of a person after charge in Northern Ireland has not yet been commenced. For post charge questioning to be brought into force in Northern Ireland, NI PACE Code H must be amended. The amendments required must be approved by the Northern Ireland Assembly as responsibility for the PACE Codes is devolved. Amendments to PACE Code H that would have brought post charge questioning into force were debated by the Northern Ireland Assembly Committee for Justice in September 2012. These amendments were not accepted.

8.5.6 The power to question a suspect after charge in England, Wales and Scotland has not been used to date. This was always intended as an exceptional provision and not a power that would be routinely used. While we consider that this remains a useful power, circumstances have not arisen to date where it has been considered necessary for it to be used.

## **Part 3 – Prosecution and punishment of terrorist offences**

### **8.6 Jurisdiction**

8.6.1 Section 28 of the 2008 Act provided for UK-wide jurisdiction for specified terrorism offences, regardless of where in the UK the offence took

place. The purpose of this section is to remove the need to have separate trials for connected terrorist offences which occur in different jurisdictions within the UK.

8.6.2 *Subsection (6)* inserted a new *subsection (6A)* into section 1 of the Justice and Security (Northern Ireland) Act 2007. Section 1 of that Act allows for a non-jury trial in Northern Ireland where certain conditions are met.

#### Impact and Use

8.6.3 Section 28 of the 2008 Act was commenced in June 2009.

8.6.4 The Crown Prosecution Service has not yet used section 28. This is a useful provision, but circumstances have not arisen to date for this power to have been applicable.

8.6.5 The non-jury trial provisions in sections 1 to 9 of the Justice and Security (Northern Ireland) Act 2007 were due to expire, unless renewed for a further 2 year period, on 31 July 2013. The Secretary of State for Northern Ireland consulted with interested parties in advance of this and, having assessed their contributions as well as the facts surrounding non-jury trial, was minded to extend the provisions. Given the upsurge in dissident republican activity along with the continuing potential for juror intimidation in Northern Ireland, the Secretary of State felt there remained a need for non-jury trials to continue. The provisions were therefore extended for a further two years, and are due to expire on 31 July 2015.

8.6.6 These provisions are considered a vital element of the criminal justice system in Northern Ireland. They allow the perpetrators of terrorism to be brought before the law whilst providing protection to the public. Overall non jury trials represent a very small proportion of all criminal trials, for example, in 2012 less than 1.5% of all cases were conducted without a jury. But the number is still significant enough to merit the non jury trial provisions remaining in place.

### **8.7 Consent to prosecution**

8.7.1 Section 29 of the 2008 Act amended section 117(2A) of the Terrorism Act 2000 and section 19(2) of the Terrorism Act 2006 so that the consent of the Attorney General or the Advocate General for Northern Ireland is required before the Director of Public Prosecutions or Director of Public Prosecutions for Northern Ireland may consent to the prosecution of the offences to which those provisions apply, if it appears to the latter that the offence was committed outside the UK. The offences which require such consent are any offence under the Terrorism Act 2000 other than those listed in section 117(1) of the Terrorism Act 2000 or any offence under Part 1 of the Terrorism Act 2006. This amendment is based on recommendation 15 of Lord Carlile's January 2007 report on the definition of terrorism.

#### Impact and Use

8.7.2 Section 29 of the 2008 Act was commenced in June 2009.

8.7.3 The Crown Prosecution Service has used section 29 in all appropriate circumstances.

## **8.8 Sentencing**

8.8.1 Lord Carlile's January 2007 report on the definition of terrorism, recommended that a terrorist connection should be considered to be an aggravating factor in sentencing. Section 30 of the 2008 Act is included in response to this recommendation. Provisions to determine whether there was such a connection are contained in *subsections (1) to (3)*.

8.8.2 Powers for the court to consider a terrorist connection to be an aggravating factor in sentencing in Scotland are contained under Section 31. If the court imposes an aggravated sentence for an offence with a terrorist connection then it must state the extent and reasons for the difference between the sentence it has imposed and that it would have imposed if the offence had not had a terrorist connection.

### Impact and Use

8.8.3 Sections 30 to 33 of the 2008 Act were commenced in June 2009.

8.8.4 The Crown Prosecution Service does not record the use of this provision on the indictment results provided to the Home Office, but it is believed that this provision has been relied on when sentencing for a general offence with a terrorist connection. For example, in the case of *R v Munir Farooqi and others* (see paragraph 5.1 above), the judge was sentencing for a number of terrorism and solicitation to murder offences; although the judge did not specifically refer to section 30, he sentenced the defendants stating that the solicitation offences were aggravated by virtue of their terrorist connection.

## **8.9 Forfeiture**

8.9.1 Section 34 to 39 of the 2008 Act replaced section 23 of the Terrorism Act 2000 (forfeiture: terrorist property offences), which provides a court with the power to order the forfeiture of money or property from a person convicted of offences under sections 15 to 18 of that Act ("terrorist finance" offences), and provided for a number of related measures. The money or other property must have been used for terrorism purposes.

### Impact and Use

8.9.2 Sections 34 to 39 of the 2008 Act were commenced in June 2009.

8.9.3 The Crown Prosecution Service are using section 35 in *R v Farooqi and others*. This case relates to action taken by Greater Manchester Police and the Crown Prosecution Service under section 23A of the Terrorism Act 2000 (introduced by section 35 of the 2008 Act) which allows the court to order forfeiture of property or money used for the purposes of terrorism, which was in the possession or control of the convicted person at the time of the offence. Forfeiture proceedings are currently on going (see paragraph 5.1 above). This is the first time the power under this Act has been used.

## **Part 4 – Notification requirements**

### **8.10 Introductory**

8.10.1 Under Part 4 of the 2008 Act, an individual who is subject to the notification requirements is required to provide specified information to the police on an annual basis and to notify the police of any changes to that information, following their release from prison. The notification requirements apply to any person sentenced to 12 months' imprisonment or more for a specified terrorist offence, or an offence with a terrorist connection.

8.10.2 Sections 40 to 52 of the 2008 Act set out the key aspects of the regime, including the offences to which this Part of the Act applies, providing the Secretary of State with the power to amend this list of offences (subject to the affirmative resolution procedure), and setting out the nature of the requirements for initial notification, notification of changes and periodic re-notification amongst other requirements.

8.10.3 The length of time a person can be subject to the notification requirements is set out in Section 53 of the 2008 Act. Sections 54 – 56 deal with offences in relation to notification including the effect of absence abroad. Supplementary provisions which include foreign travel restriction orders are contained in sections 57 – 61.

#### Impact and Use

8.10.4 Part 4 of the 2008 Act was commenced in October 2009. The purpose of the requirements is to provide information about the whereabouts and identities of individuals who have been convicted of terrorist crimes, providing a helpful tool to the police in managing the risks that they may pose to public safety. These provisions are administered and maintained by the police in that they allow the police to maintain accurate records of individuals who have been convicted of terrorism and terrorism related offences. As such, they can play a part in deterring convicted terrorists from reoffending and ensuring that the police have accurate and up to date information to assist with terrorism investigations. The police consider this regime to be a useful counter-terrorism tool. According to the ACPO Counter Terrorism Coordination Centre (ACTCC), as at 30 September 2013, 58 individuals were required to comply with the Part 4 requirements.

8.10.5 The number of alleged breaches reported to the Crown Prosecution Service is small. Eight files have been received from the police for advice. None have resulted in prosecution. In one case advice was given that the offence should be dealt with by way of a caution. In two cases there was insufficient evidence to provide a realistic prospect of conviction. In five cases the evidence was sufficient but prosecution was not considered to be in the public interest. In none of the cases reported has the whereabouts or identity of the convicted terrorist become unknown to the police. In each case, soon after the alleged breach, the police have been able to contact the subject and seek an explanation.

8.10.6 The Part 4 notification requirements were recently the subject of a legal challenge (see paragraph 5.2). The Government welcomes the finding of the Court of Appeal in the case of *Irfan* that the notification requirements constitute only a 'relatively modest intrusion' (to private life) and are a proportionate and necessary response to the legitimate aim of the prevention of terrorism.

## **Part 5 – Terrorist financing and money laundering**

### **8.11 Terrorist financing and money laundering**

8.11.1 Section 62 introduces Schedule 7 to the 2008 Act which confers powers on HM Treasury to act against terrorist financing, money laundering and certain other activities. The schedule also makes provisions to impose civil and criminal penalties.

#### Impact and Use

8.11.2 Section 62 has been used on three occasions to direct the UK financial sector to cease dealings with Iranian entities linked to Iran's proliferation-sensitive nuclear and/or ballistic missile programmes – once in 2009, once in 2011 and again in 2012. The first two orders expired in accordance with the provisions in the Act; the 2012 Order was revoked following an EU regulation covering the same ground. The Schedule 7 power has helped HMG pursue its agenda to disrupt Iran's proliferation-sensitive programmes but has been challenged in the courts (see paragraph 5.3).

## **Part 6 – Financial restrictions proceedings**

### **Chapter 1 - Application to set aside financial restrictions decision**

#### **8.12 Application to set aside financial restrictions decision**

8.12.1 Section 63 of the 2008 Act relates to an application to set aside financial restrictions decision. This section applies to any decision of HM Treasury in the exercise of their functions under:

- a) The UN Terrorism Orders,
- b) Part 2 of the Anti-Terrorism, Crime and Security Act 2001, or
- c) Schedule 7 to this Act.

8.12.2 The statutory power for a person affected by such a decision to apply to have it set aside is covered by *subsection (2)*. The court can apply judicial review principles to any such application and have the power to grant relief if it concludes that a decision should be set aside.

8.12.3 UN terrorism orders are covered by Section 64.

## **8.13 Chapter 2 – Financial restriction proceedings**

8.13.1 Section 65 of the 2008 Act relates to financial restrictions proceedings which are defined as an application under section 63 or on a claim arising from any matter to which such an application relates.

## **8.14 Rules of court, disclosure and related matters**

8.14.1 Provisions about the rules of court for financial restrictions proceedings are contained in Section 66. This section requires regard to be given to both the need for a proper review of the decision subject to challenge, and the need to ensure that disclosures are not made where this would be contrary to the public interest.

8.14.2 Under Section 67 the rules of court must contain certain provisions relating to disclosure, including rules relating to applications by HM Treasury to withhold material from disclosure. HM Treasury has the opportunity to apply for permission not to disclose sensitive material; as such the court is required to grant permission if the disclosure would be contrary to the public interest. If the court do not grant such permission to HM Treasury to withhold sensitive material and choose not to disclose it anyway, rules of court must authorise the court to direct either that HM Treasury may not rely on the material or, if it adversely affects their case, to make such concessions as the court specifies.

8.14.3 A special advocate is appointed in financial restrictions proceedings under Section 68. The role of a special advocate is to represent the interests of a party to financial restrictions proceedings (including any appeal) in circumstances where that party and his own legal representative are excluded from the proceedings.

8.14.4 Section 69 of the 2008 Act amends section 18 of the Regulation of Investigatory Powers Act 2000 (c.23), to enable the disclosure of intercepted communications in financial restrictions proceedings. Under Section 17 of the Regulation of Investigatory Powers Act 2000 there is a general prohibition on the use of intercepted communications in legal proceedings; however, Section 18 of this Act lists this section as an exception to that prohibition.

8.14.5 Under Section 70 of the 2008 Act HM Treasury is not required to disclose under paragraph 11 of Schedule 3 to the Anti-Terrorism, Crime and Security Act 2001 any information which it would not be required to disclose under Part 6.

## **8.15 Supplementary provisions of Part 6**

8.15.1 Section 71 of the 2008 Act provides that financial restrictions proceedings should be allocated to the Queen's Bench Division.

8.15.2 Provisions for the Lord Chancellor to exercise the power conferred by sections 66 and 67 to make rules of court is created under Section 72.

## Impact and Use

8.15.3 Part 6 creates a closed material procedure (CMP) for decisions in relation to financial restrictions made by HM Treasury under Part 5 of Schedule 7 to this Act and for HM Treasury counter-terrorist asset freezes. Section 72 was a one-off power which allowed the Lord Chancellor to make the court rules, rather than waiting for the Civil procedure Rules to be amended by the relevant committee. It has been used in relation to a challenge to this Act's Schedule 7 power by Bank Mellat (see 5.3 above).

## **Part 7 – Miscellaneous**

### **8.16 Inquiries**

8.16.1 Section 74 of the 2008 Act amends section 18 of the Regulation of Investigatory Powers Act 2000 to allow disclosure of intercept material to a person appointed as counsel to an inquiry held under the Inquiries Act 2005, in addition to the panel of an inquiry. But the inquiry panel may not order the disclosure of intercept material unless it is satisfied that there are exceptional circumstances that make the disclosure essential (see section 18(8A) of the Regulation of Investigatory Powers Act 2000).

## Impact and Use

8.16.2 Although these sections are rarely used, we believe that that the power for an Inquiry to order disclosure of material, subject to the restriction at section 8A, remain necessary to ensure that cases can be properly considered.

### **8.17 Amendment of definition of 'terrorism' etc**

8.17.1 Section 75 of the 2008 Act gives effect to Lord Carlile's 12th recommendation in his January 2007 report on the definition of terrorism. This was that the definition of terrorism in section 1(1) of the Terrorism Act 2000 be amended to include the purpose of advancing a racial cause (in addition to a political, religious or ideological cause) in light of what he described as "*increasing debate in Western Europe about ethnic and religious customs (including modes of dress*" (The Definition of Terrorism (2007), paragraphs 66 and 86(12)). A similar amendment is made to paragraph 4(2)(c) of Schedule 21 to the Criminal Justice Act 2003 which makes provision in relation to the minimum term for mandatory life sentences. That paragraph provides that the starting point for a murder done for the purpose of advancing a political, religious or ideological cause will be life. Similar amendments are made to other pieces of legislation where these words appear.

## Impact and Use

8.17.2 The Crown Prosecution Service is of the view that the amendment of the definition of terrorism to include the purpose of advancing a racial cause has not, to date, had any impact on prosecutions. There have not been any cases where the Crown Prosecution Service has specifically averred 'racial' cause in the indictment. However, the Crown Prosecution Service consider that this is a useful and necessary part of the definition as there may, in

future, be cases where they need to aver to a “racial” cause in the indictment and if this element was removed they would not be able to include activity they believe should be prosecuted.

## **8.18 Terrorist offences**

8.18.1 Section 76 of the 2008 Act inserts a new section 58A into the Terrorism Act 2000 which creates a criminal offence. If a person either elicits or attempts to elicit information about a member of the armed forces or the intelligence services or a constable, which may be useful to a person committing or preparing an act of terrorism, or publishes or communicates such information then that person commits an offence under this section. However, if that person proves to have had a reasonable excuse for his actions then this can be used as a defence.

8.18.2 Section 77 of the 2008 Act amends section 19(1) of the Terrorism Act 2000 which makes clear that failing to disclose a belief or suspicion of an offence under sections 15 to 18 (a terrorist finance offence) applies to all persons in employment.

### Impact and Use

8.18.3 Sections 76 and 77 made amendments of a very specific nature to the existing section 58 offence. Circumstances have not yet arisen where it has been considered appropriate to bring a prosecution on these particular grounds.

## **8.19 Control Orders**

8.19.1 Sections 78 to 81 of the 2008 Act deal with control orders. Section 78 added three new sections after section 7 of the Prevention of Terrorism Act 2005. The new sections provided constables with the power to enter and search the premises of individuals subject to control orders who were suspected of absconding or of failing to grant access to premises when required to do so (Section 7A). In addition, under this provision a constable had the power to search the premises with a warrant to ensure compliance with a control order. This included the power to enter the premises with force if necessary under the inserted Section 7B (failure to grant access to premises). The power to monitor compliance with a control order was provided in new Section 7C.

8.19.2 Sections 79 to 81 had the effect of amending section 1(9) of the Prevention of Terrorism Act 2005 to ensure that only support for someone directly involved in terrorism-related activity would be captured by these provisions and also introduced provisions relating to applications for anonymity for controlled persons.

### Impact and Use

8.19.3 The new powers provided by section 78 of the 2008 Act were commenced but then repealed by the Terrorism Prevention and Investigation Measures (TPIM) Act 2011 which provided new powers of search and entry.

## **8.20 Pre-charge detention of terrorist suspects**

8.20.1 Section 82 of the 2008 Act made minor amendments to pre-charge detention, amending paragraph 9 of Schedule 8 to the Terrorism Act 2000 (direction that detained person may consult a solicitor only within sight and hearing of a qualified officer). This was a consequential amendment that rectified an oversight when that Schedule was amended by the Proceeds of Crime Act 2002. Paragraph 29(4) of Schedule 8 to the Terrorism Act 2000 was also amended to remove the words “after consulting the Lord Chancellor”. This paragraph defines “judicial authority” for the purposes of hearings extending pre-charge detention for up to 14 days – which may, as amended, be conducted in England and Wales by a District Judge designated by the Lord Chief Justice and in Northern Ireland, by a county court judge designated by the Lord Chief Justice of Northern Ireland.

### Impact and Use

8.20.2 N/A.

## **8.21 Forfeiture of terrorist cash**

8.21.1 Paragraph 3 of Schedule 1 to the Anti-Terrorism, Crime and Security Act 2001 in relation to detention of seized cash is amended by Section 83 of the 2008 Act and provides that only working days be taken into account when calculating the initial detention period for seized cash.

8.21.2 Section 84 of the 2008 Act substituted paragraphs 7 and new 7A in Schedule 1 to the Anti-Terrorism, Crime and Security Act 2001 relating to appeals against decision in forfeiture proceedings. Specific provision is made for the timing of appeals against a decision in forfeiture proceedings relating to “terrorist cash” where the forfeiture depends on the proscription of an organisation and the organisation in question is subsequently de-proscribed as a result of an appeal to the Proscribed Organisations Appeal Commission (POAC).

### Impact and Use

8.21.3 Section 83 of the 2008 Act brought the Anti Terrorism, Crime and Security Act 2001 in line with the Proceeds of Crime Act 2002. It has removed the demand for out-of-hours courts and reduced the burden on police time. Section 84 has not yet been used; there have been no applications for deproscription since 2009.

## **8.22 Costs of policing at gas facilities**

### Background

8.22.1 Sections 85 to 90 of the 2008 Act were concerned with costs of policing at gas facilities and introduced a power for the Secretary of State to require gas transporters to pay certain costs.

### Impact and Use

8.22.2 Sections 85 to 90 of the 2008 Act relate to provisions for the policing of gas facilities that are considered part of the UK's Critical National Infrastructure. Policing is deemed necessary at these sites as any disruption at, or loss of, these sites would have a catastrophic impact on the UK. This power has been in use since 2007 (the provisions apply to costs incurred from January 2007) and the police deployment at the gas sites is regularly reviewed to ensure that the deployment posture is proportionate to the threat and vulnerability of each gas site. The deployment was reviewed by Her Majesty's Inspector of Constabulary in 2012 and was renewed for another 2 years in March 2013.

8.22.3 As per the provisions in Sections 88 and 89 the recovery of costs for the deployment is also regularly reviewed by the Office of Gas and Electricity Markets and was again renewed in March 2013 for another two years.

8.22.4 Overall this power is actively used and is likely to remain in use for quite some time.

### **8.23 Appointment of special advocates in Northern Ireland**

8.23.1 Section 91 of the 2008 Act amended certain references to the Attorney General for Northern Ireland to the Advocate General for Northern Ireland. The aim of this was to transfer a number of functions of the Attorney General relating to the appointments of special advocates to the Advocate General.

### Impact and Use

8.23.2 N/A

### **8.24 Part 8 Supplementary provisions**

8.24.1 Part 8 of the 2008 Act dealt with supplementary provisions.

### Impact and Use

8.24.2 N/A

**ANNEX A: List of Commencement Orders issued under the Counter-Terrorism Act 2008**

Title	Date Order Made	Date In Force
<p><b>Counter-Terrorism Act 2008 (Commencement No 1) Order 2008 (SI 2008/3296)</b></p> <ul style="list-style-type: none"> <li>• Sections 19 - 21 (disclosure of information and the intelligence services)</li> </ul>	23 Dec 2008	24 Dec 2008
<p><b>Counter-Terrorism Act 2008 (Commencement No 2) Order 2009 (SI 2009/58)</b></p> <ul style="list-style-type: none"> <li>• Provisions listed in Article 2 -</li> <li>• Section 29 (consent to prosecution of offence committed outside UK);</li> <li>• Section 74 (inquiries: intercept evidence);</li> <li>• Section 75 (amendment of definition of “terrorism” etc);</li> <li>• Section 76 (offences relating to information about members of armed forces etc), together with Schedule 8 (offences relating to information about members of armed forces etc: supplementary provisions);</li> <li>• Section 77 (terrorist property: disclosure of information about possible offences);</li> <li>• Sections 78 to 81 (control orders);</li> <li>• Section 82 (pre-charge detention: minor amendments);</li> <li>• Sections 83 to 84 (forfeiture of terrorist cash);</li> <li>• Section 99 in so far as it relates to the entries in Schedule 9 mentioned in sub-paragraph (j)</li> <li>• The entries in Part 2 (disclosure of information and the intelligence services), Part 4 (financial restrictions proceedings), Part 5 (control orders) and Part 6 (pre-charge detention) of Schedule 9 (repeals and revocations)</li> </ul>	19 Jan 2009	16 Feb 2009
<p><b>Counter-Terrorism Act 2008 (Commencement No 3) Order 2009 (SI 2009/1256)</b></p> <ul style="list-style-type: none"> <li>• Section 28 (jurisdiction to try offences committed in the UK);</li> <li>• Sections 30 to 33 (sentencing), together with Schedule 2 (offences where terrorist connection to be considered);</li> <li>• Sections 34 to 39 (forfeiture), together with Schedule 3 (forfeiture: consequential amendments);</li> <li>• Section 99 in so far as it relates to the entries in Schedule 9 mentioned in sub-paragraph (e); and</li> <li>• The entries in Part 3 (forfeiture) of Schedule 9 (repeals and revocations).</li> </ul>	19 May 2009	18 June 2009

<p><b>Counter-Terrorism Act 2008 (Commencement No 4) Order 2009 (SI 2009/1493)</b></p> <ul style="list-style-type: none"> <li>• Sections 40 to 61 (notification requirements);</li> <li>• Schedule 4 (notification orders);</li> <li>• Schedule 5 (foreign travel restriction orders); and</li> <li>• Schedule 6 (notification requirements: application to service offences).</li> </ul>	16 June 2009	1 Oct 2009
<p><b>Counter-Terrorism Act 2008 (Commencement No 5) Order 2012 (SI 2012/1121)</b></p> <ul style="list-style-type: none"> <li>• Section 26 (issue and revision of code of practice – relating to post-charge questioning of terrorist suspects).</li> </ul>	19 Apr 2012	30 Apr 2012
<p><b>Counter-Terrorism Act 2008 (Commencement No 6) Order 2012 (SI 2012/1724)</b></p> <ul style="list-style-type: none"> <li>• Section 22 (post-charge questioning in England and Wales);</li> <li>• Section 23 (post-charge questioning in Scotland); and</li> <li>• Section 25 (recording of interviews) only in so far as it extends to England and Wales and Scotland.</li> </ul>	3 July 2012	10 July 2012
<p><b>Counter-Terrorism Act 2008 (Commencement No 7) Order 2012 (SI 2012/1966)</b></p> <ul style="list-style-type: none"> <li>• Section 27 (meaning of “terrorism offence”) only in so far as it extends to England and Wales and Scotland.</li> </ul>	25 July 2012	26 July 2012

**ANNEX B: List of secondary legislation issued under the Counter Terrorism Act 2008**

<b>Title</b>	<b>Date Order Made</b>	<b>Date In Force</b>
Act of Sederunt (Rules of the Court of Session Amendment No 6) (Counter-Terrorism Act 2008) 2008 (SSI 2008/401)	2 Dec 2008	4 Dec 2008
Act of Sederunt (Rules of the Court of Session Amendment No 6) (Terrorist Asset-Freezing etc Act 2010) 2010 (SSI 2010/459)	17 Dec 2010	21 Dec 2010
Civil Procedure (Amendment No 2) Rules 2008 (SI 2008/3085)	2 Dec 2008	4 Dec 2008
Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 (SI 2009/1059)	23 April 2009	24 April 2009
Counter-Terrorism Act 2008 (Designation of a Gas Transporter) Order 2009 (SI 2009/2195)	5 Aug 2009	3 Sept 2009
Counter-Terrorism Act 2008 (Foreign Travel Notification Requirements) Regulations 2009 (SI 2009/2493)	10 Sept 2009	1 Oct 2009
Financial Restrictions (Iran) Order 2011 (SI 2011/2775)	21 Nov 2011	21 Nov 2011
Counter-Terrorism Act 2008 (Code of Practice for the Video Recording with Sound of Post Charge Questioning) Order 2012 (SI 2012/1793)	9 July 2012	10 July 2012
Financial Restrictions (Iran) (Revocation) Order 2013 (SI 2013/162)	29 Jan 2013	31 Jan 2013

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