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Book chapter :
Macdonald, S. & Lord Carlile QC, (2018). *Disrupting terrorist activity: What are the limits to criminal methods of disruption?.* Beyond Human Rights and the War on Terror, (pp. 125-142). Abingdon: Routledge.

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Disrupting terrorist activity

What are the limits to criminal methods of disruption?

Stuart Macdonald and Lord Carlile[1]

Introduction

The UK's CONTEST strategy for countering the threat of terrorism emphasises that prosecution is the UK's preferred method of disrupting terrorist activity.[2] Whilst this prioritisation of prosecution has several benefits – including the fact that imprisonment is more protective of national security than other non-criminal methods of disruption and the level of censure communicated by conviction for a criminal offence – it should, we suggest, be understood as being rooted primarily in the procedural protections and safeguards of the criminal law.[3] Suspects charged with a criminal offence are tried in open court, they have the opportunity to see and respond to the evidence against them, and the burden of proof rests on the prosecution, who must prove their allegations beyond reasonable doubt. These features give the criminal sanction a unique moral authority and legitimacy that other methods of disruption lack.

In furtherance of this commitment to prosecuting suspected terrorists, the UK has enacted a large number of terrorism precursor offences. In this chapter we evaluate this use of the criminal sanction and suggest that there is a need for greater legislative restraint. We develop this argument, in the next section, by first examining three non-criminal methods of disrupting terrorist activity: Terrorism Prevention and Investigation Measures (TPIMs); asset-freezing; and proscription. Whilst each of these powers has been found to be necessary, we outline four sets of concerns about them that explain why they are regarded as less desirable in principle than prosecution. We then turn, in the following section, to terrorism precursor offences. Whilst agreeing that terrorism precursor offences are needed for the sake of prevention, we argue that the wide range of such offences currently in force in the UK go too far in pursuit of this objective. As a result, the same concerns that apply to the non-criminal methods of disruption apply also to terrorism precursor offences. We argue that this is counter-productive, for it risks undermining the very features of the criminal law that give it its unique moral authority and legitimacy. It is self-defeating to create offences in the name of prioritising prosecution if those same offences undermine the basis on which prosecution is prioritised in the first place.

Non-criminal methods of disruption

In some instances it is not possible to prosecute individuals suspected of involvement in terrorism-related activity; sometimes because there is insufficient admissible evidence (particularly given the UK's self-imposed ban on the use of intercept as evidence in criminal trials[4]); sometimes because there are cogent public interest reasons for not disclosing incriminating admissible evidence in open court (e.g. to retain the cover and ensure the safety of human agents); and, sometimes, because the individual has already been convicted, served

[1] The authors would like to thank Lowri Davies for her excellent research assistance during the production of this chapter.

[2] HM Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 9608, The Stationery Office, 2018).

[3] The 'priority of prosecution' is discussed further in Stuart Macdonald, 'Prosecuting Suspected Terrorists: Precursor Crimes, Intercept Evidence and the Priority of Security', in Lee Jarvis and Michael Lister (eds), *Critical Perspectives on Counter-terrorism* (Routledge, 2014).

[4] HM Government, *Intercept as Evidence* (Cm 8989, The Stationery Office, 2014).

his sentence, but is still assessed as posing a threat to national security. In such a situation, CONTEST advocates the use of other methods of disruption that sit outside the criminal justice process. One of these – deportation – applies only to foreign nationals. In this section we focus on three other methods of disruption that apply to domestic and foreign suspected terrorists alike: TPIMs; asset-freezing; and proscription.

Designed to be 'less intrusive, more clearly and tightly defined and more comparable to restrictions imposed under other powers in the civil justice system',[5] TPIMs replaced the previous system of Control Orders in December 2011. According to the Terrorism Prevention and Investigation Measures Act 2011 (hereafter 'TPIMA'), before issuing an individual with a TPIM notice the Home Secretary must first apply to the courts for permission to do so.[6] The permission hearing may take place without the individual concerned being present, without the individual having been notified of the application and without the individual having been given an opportunity to make representations to the court.[7] If permission is granted, a TPIM notice may then be issued and a review hearing is prescribed, at which a Special Advocate represents the interests of the individual concerned (see discussion below).[8] The TPIM notice may contain any of the twelve types of measure listed in schedule 1 of the Act that are considered necessary to prevent or restrict the individual's involvement in terrorism-related activity, such as an overnight residence measure, an exclusion and/or movement directions measure and an electronic communication device measure.[9] Once issued, the TPIM notice lasts for one year, at the end of which the Home Secretary may renew it for a second year if the statutory conditions are still met.[10] At the end of the second year, however, the Home Secretary may only issue a fresh TPIM notice if the individual has been, or is involved in new terrorism-related activity.[11] As of November 2017, there were seven TPIM notices in force.[12] TPIM notices have been used considerably less frequently than Control Orders. In response to the low number of TPIM notices in force in 2014 a number of amendments were made to TPIMA by the Counter-Terrorism and Security Act 2015 on the recommendation of the then Independent Reviewer of Terrorism Legislation.[13]

In UK law different powers exist for the freezing of terrorist assets.[14] Of these, the Terrorist Asset-Freezing etc. Act 2010 (hereafter 'TAFA') is 'the default option where the unilateral freezing of terrorist assets is concerned'.[15] This Act – which was enacted in response to the judgment of the Supreme Court that the Treasury had acted beyond its powers in seeking to provide for asset-freezing by Order[16] – implements the UK's obligations under UN Security

5 HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004, The Stationery Office, 2011) 41.

6 TPIMA, s 3(5)(a). An exception exists for cases in which the Home Secretary 'reasonably considers that the urgency of the case requires terrorism prevention and investigation measures to be imposed without obtaining such permission' (s 3(5)(b)).

7 Ibid. s 6(4).

8 Ibid. s 8(4).

9 Ibid. s 3(4). The other eight types of measure are: travel measure; financial services measure; property measure; association measure; work or studies measure; reporting measure; photography measure; and, monitoring measure.

10 Ibid. s 5(2).

11 Ibid. s 3.

12 Grahame Allen and Noel Dempsey, *Terrorism in Great Britain: the Statistics* (House of Commons Library, 2018).

13 Ss. 16–20; David Anderson, *Terrorism Prevention and Investigation Measures in 2013: Second Report of the Independent Reviewer on the Operation of the Terrorism Preventions and Investigation Measures Act 2011* (The Stationery Office, 2014).

14 In addition to the Terrorist Asset-Freezing etc. Act 2010 are part II of the Anti-Terrorism, Crime and Security Act 2001 and part 5 and schedule 7 of the Counter-Terrorism Act 2008.

15 David Anderson, *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (The Stationery Office, 2011) para. 2.3.

16 *HM Treasury v Ahmed* [2010] UKSC 2, [2010] 2 AC 534.

Council Resolution 1373. The Act stipulates a set of prohibitions relating to designated persons, including: dealing with funds or economic resources owned, held or controlled by a designated person;[17] making funds or financial services available to, or for the benefit of, a designated person;[18] and making economic resources available to, or for the benefit of, a designated person.[19] A person is designated either as an automatic consequence of appearing on the EU list drawn up pursuant to Regulation 2580/2001 or on the initiative of the Treasury.[20] Designations last for no more than one year, but may be renewed indefinitely as long as the conditions for designation continue to be met.[21] The Treasury may also make interim designations, which last for thirty days or until replaced by a final designation (whichever is earlier).[22] These powers are, however, 'lightly used'.[23] Indeed, former Independent Reviewer David Anderson urged that 'consideration continues to be given by all concerned to the greater use of TAFA 2010 as a way of disrupting persons who cannot be prosecuted but in respect of whom financial restrictions are necessary in order to protect the public from terrorism'.[24]

Under the Terrorism Act 2000 (hereafter 'TA 2000'), the Home Secretary may proscribe any organisation that is 'concerned in terrorism'.[25] The Act specifies that an organisation is concerned in terrorism if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise concerned in terrorism.[26] Seeking to clarify the last of these expressions, the Court of Appeal has held that an organisation that has 'temporarily ceased from terrorist activities for tactical reasons' may be said to be concerned in terrorism, whereas one that has 'decided to attempt to achieve its aims by other than violent means' may not – even if 'the possibility exists that it might decide to revert to terrorism in the future'.[27] If an organisation is concerned in terrorism, the Home Secretary has regard to five factors when deciding whether or not to exercise the discretion to proscribe: the nature and scale of the organisation's activities; the specific threat it poses to the UK; the specific threat it poses to British nationals overseas; the extent of the organisation's presence in the UK; and the need to support other members of the international community in the global fight against terrorism.[28] Once imposed, proscription lasts indefinitely. A proscribed organisation, or any person affected by the organisation's proscription, may apply to the Home Secretary for the organisation to be de-proscribed.[29] If unsuccessful, there exists a right of appeal to the Proscribed Organisations Appeal Commission (POAC).[30] The role of POAC is to determine whether the Home Secretary's refusal was 'flawed', applying the principles of judicial review.[31]

The former Independent Reviewers of Terrorism Legislation Lord Carlile and David Anderson both asserted the importance of these three methods of disruption. TPIMs 'are a useful tool for the protection of the public in the exceptional cases where a credible terrorist threat cannot be

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17 TAFA s. 11.
18 Ibid. ss. 12, 13.
19 Ibid. ss. 14, 15.
20 Ibid. s. 1.
21 Ibid. s. 4.
22 Ibid. s. 8.
23 David Anderson, *Fourth Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (The Stationery Office, 2015) para. 6.1. This report states that, as of 30 September 2014, there were a total of 68 designations and 59 accounts frozen in the UK. The value of the frozen assets was £61,000.
24 Ibid. para. 3.26.
25 TA 2000 s. 3(4).
26 Ibid. 2000 s. 3(5).
27 *Secretary of State for the Home Department v Lord Alton of Liverpool and others* [2008] EWCA Civ 443, [2008] 1 WLR 2341, [38].
28 David Anderson, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (The Stationery Office, 2012) para. 4.6.
29 TA 2000, s. 4.
30 Ibid. 2000, s. 5(2).
31 Ibid. 2000, s. 5(3).

dealt with by prosecution or deportation'.[32] Asset-freezing has a 'deterrent and disruptive effect'[33] and also fulfils the UK's international obligations. And, whilst proscription may have limited utility in terms of public protection, it is useful in dealing with lower level activity, it supports other countries in their counterterrorism efforts and it deters terrorist organisations from operating in the UK and disrupts their ability to do so.[34] At the same time, however, both have also warned against excessive reliance on these exceptional measures. TPIMs are 'restrictive measures [which] should be imposed only when unavoidable, and as a last resort'.[35] 'Asset-freezes, particularly when imposed on persons at liberty in the UK, are highly disruptive of everyday life; yet the process of judicial challenge, though designed to be as fair as possible, may in some cases be cumbersome, slow and imperfect.'[36] And proscription impinges upon the right of the organisation's members to freedom of expression and association,[37] can cause 'collateral damage' to individuals 'who are not members of the proscribed organisation, but merely of the ethnic community from which the organisation derives its support' and can be of 'propaganda value' to governments 'which seek to repress the organisation in question or the population that it claims to represent, perhaps by violent and unsavoury means of their own'.[38] There are four sets of concerns about these non-criminal forms of disruption that we wish to highlight for the purposes of this chapter. The first regards the preconditions for the exercise of each of the three powers. For the Home Secretary to issue a person with a TPIM notice and for the Treasury to designate a person for the purposes of TAFA, it must be shown both that the individual is, or has been, involved in terrorism-related activity and that the measure is necessary for purposes connected with protecting members of the public from terrorism.[39] This two-pronged approach – which involves a forward-looking evaluation of necessity as well as a backward-looking question of fact – is in keeping with Noorda's 'autonomy respecting model' of preventive measures, in that it requires 'an individualized and fact-specific assessment of risk' (as opposed to her 'security protecting model', which imposes preventive constraints 'on a category of persons defined by certain characteristics, premised on the probability that a member of this category will behave in a certain way irrespective of individual risk assessments').[40] By contrast, the sole requirement for an organisation to be proscribed is that it is concerned in terrorism.[41] This leaves the Home Secretary with an 'extraordinarily wide discretion',[42] particularly given the breadth of the statutory definition of terrorism.[43] Yet the possibility of introducing a necessity test, similar to the one used for TPIMs and asset freezes, has not been accepted.[44]

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32 David Anderson, *Terrorism Prevention and Investigation Measures in 2014: Third Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011* (The Stationery Office, 2015) para. 2.12.

33 Anderson, *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010*, para. 2.11.

34 Lord Carlile, *Report on the Operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (The Stationery Office, 2009) para. 51; Anderson, *The Terrorism Acts in 2011*, para. 4.48.

35 Anderson, *Terrorism Prevention and Investigation Measures in 2014* (n 32) para 2.12.

36 Anderson, *Fourth Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010*, para. 3.13.

37 European Convention on Human Rights, Arts 10, 11.

38 Anderson, *The Terrorism Acts in 2011*, para. 4.42. See also Lee Jarvis and Tim Legrand, 'Legislating for Otherness: Proscription Powers and Parliamentary Discourse' (2016) 42 *Review of International Studies* 558.

39 TPIMA, ss. 3(1), 3(3); TAFA, ss. 2(1)(a), 2(1)(b).

40 Hadassa Noorda, 'Preventive Deprivations of Liberty: Asset Freezes and Travel Bans' (2015) 9 *Criminal Law and Philosophy* 521, 524–25.

41 TA 2000, s. 3(4).

42 Anderson, *The Terrorism Acts in 2011*, para. 4.4.

43 TA 2000, s. 1. The breadth of the existing definition was criticised by the Supreme Court in *R v Gul* [2013] UKSC 64, [2014] AC 1260.

44 HM Government, *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2011 by the Independent Reviewer of Terrorism Legislation* (Cm 8494, The Stationery Office, 2013).

In addition to the preconditions themselves, the potential invasiveness of these measures has led to concerns being expressed about the required standard of proof. For both asset freezes and proscriptions the standard of proof that applies is that of reasonable belief.[45] This was also the standard that applied to TPIMs when they were first introduced, which marked an increase from the reasonable suspicion threshold that applied to Control Orders. However, following the Counter-Terrorism and Security Act 2015 (and in response to a recommendation of the then Independent Reviewer[46]), the Home Secretary may now only issue a TPIM notice if he is satisfied, on the balance of probabilities, that the individual is, or has been, involved in terrorism-related activity.[47] This increase from the previous standard of reasonable belief is significant since the balance of probabilities is recognised in formal legal terms as the standard of proof in civil litigation and, from a theoretical point of view, the change represents a movement from an approach based on the judgment of the executive to one based on the establishment of facts.[48] Whilst the practical impact of this change may be minimal,[49] adopting an approach based on the establishment of facts does go some way towards increasing the legitimacy of the TPIMs regime.[50]

This leads us to the second set of concerns, which focus on the roles of the executive and judiciary. There have been repeated suggestions that it should be the courts, not the executive, that issue TPIM notices.[51] Those who argue that TPIM notices should be issued by the courts emphasise the impact of TPIMs on an individual's liberty and the independence of the judiciary. Others assert that TPIMs are concerned primarily with national security, which is the responsibility of the executive, and emphasise that the Home Secretary is democratically accountable for the decisions he or she makes in this regard. The existing arrangement – in which the Home Secretary issues TPIM notices but only after first receiving the permission of the courts – is in effect an uneasy compromise between these perspectives. At the same time that he recommended increasing the standard of proof that applies to TPIMs to the civil standard, former Independent Reviewer David Anderson also recommended that the Home Secretary should be required, at a TPIM review hearing, to satisfy the court on the balance of probabilities that the person is, or has been, involved in terrorism-related activity.[52] But whilst this change was supported by the Joint Committee on Human Rights,[53] it was not accepted by the coalition government who reasserted that 'the Home Secretary is best placed to make the decision to impose a TPIM notice'.[54]

In respect of asset freezes and proscription, the courts' role is more limited still. There is no judicial involvement in the process for designating a person under TAFA or the process for

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45 TAFA, s. 2(1)(a); TA 2000, s. 3(4)

46 Anderson, *Terrorism Prevention and Investigation Measures in 2013*, paras 6.16–6.18.

47 TPIMA, s. 3(1).

48 Adrian Hunt, 'From Control Orders to TPIMs: Variations on a Number of Themes in British Legal Responses to Terrorism' (2014) 62 *Crime, Law and Social Change* 289.

49 In his final annual report on Control Orders, the former Independent Reviewer of Terrorism Legislation Lord Carlile stated that 'most' of the 48 individuals who received Control Orders between 2005 and 2011 would still have received one even if the standard of proof had been the civil standard instead of the lower threshold of reasonable suspicion (Lord Carlile of Berriew, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (The Stationery Office, 2011) para. 29). A similar conclusion was reached by David Anderson in respect of TPIMs (Anderson, *Terrorism Prevention and Investigation Measures in 2013*, para. 6.17).

50 Anderson, *The Terrorism Acts in 2011*, para. 4.60.

51 Stuart Macdonald, 'The Role of the Courts in Imposing Terrorism Prevention and Investigation Measures: Normative Duality and Legal Realism' (2015) 9(2) *Criminal Law and Philosophy* 265.

52 Anderson, *Terrorism Prevention and Investigation Measures in 2013*, paras 6.16–6.18.

53 Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill* (Fifth Report of Session 2014–15, The Stationery Office, 2015) paras 4.11–414.

54 HM Government, *The Government Response to the Report by David Anderson Q.C. on Terrorism Prevention and Investigation Measures in 2014* (Cm 9041, The Stationery Office, 2015).

renewing a designation.[55] Instead, designated persons have a right of appeal to the High Court.[56] All new designations and renewals are also reviewed by the Asset-Freezing Review sub-Group (AFRG).[57] According to David Anderson, this 'has been effective in focusing minds on whether the statutory tests are still met, and in clearing out dead wood'.[58] Similarly, in respect of proscription there is also no judicial involvement in the proscription process. As noted above, a proscribed organisation, or any person affected by the organisation's proscription, may apply to the Home Secretary for the organisation to be de-proscribed.[59] If this application is unsuccessful, there then exists a right of appeal to the Proscribed Organisations Appeal Commission (POAC).[60] Whilst section 5(3) of the TA 2000 states that the principles of judicial review apply at such a hearing, the Court of Appeal has insisted that POAC should apply an intense level of scrutiny to the Home Secretary's decision to proscribe.[61] This mirrors the position in respect of TPIM review hearings (and, previously, Control Orders).[62] In contrast to both asset freezes and TPIMs, however, there is no longer annual review of decisions to proscribe: the Home Secretary will consider de-proscription on application only.[63] This is an 'unsatisfactory situation' not merely because of the cost involved in applying for de-proscription and the fact that proscription lasts indefinitely, but also because some currently proscribed organisations do not appear to meet the legal threshold for proscription since they cannot be said to be currently concerned in terrorism.[64] Indeed, a few may be moribund or even obsolete.

The third set of concerns regards the use of closed material proceedings. During both a TPIM review hearing and an appeal to POAC the court may exclude the individual and his legal representative from the proceedings if doing so is necessary to ensure that information is not disclosed contrary to the public interest.[65] This must now be read in the light of the decision in *Secretary of State for the Home Department v AF* (hereafter '*AF (No 3)*'), in which the House of Lords held that the individual must 'be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations'.[66] The scope of this minimum disclosure requirement has been determined on a case-by-case basis. Whilst the terms of the Control Order in *AF (No 3)* involved significant restrictions on liberty, the High Court held that the minimum disclosure requirement also applied to light-touch Control Orders.[67] It will presumably therefore be held to apply to all TPIM review hearings. The judgment in *AF (No 3)* thus alleviates some of the unease about the use of closed material proceedings in TPIM proceedings, though it remains to be seen whether it will also be held to apply to POAC proceedings and appeals against asset freezes.

During closed sessions the individual is represented by a Special Advocate (a practitioner with security clearance appointed by the Attorney General).[68] The Special Advocate may make

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55 For an overview of these processes, see David Anderson, *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (The Stationery Office, 2013) paras 3.10, 3.13.

56 TAFA, s. 26.

57 This was introduced on the recommendation of the Independent Reviewer. See Anderson, *Third Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (n 55) para. 3.4.

58 Anderson, *Fourth Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010*, para. 3.2.

59 TA 2000, s. 4.

60 Ibid. 2000, s. 5(2).

61 *Alton* (n. 27).

62 *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, [2007] QB 415.

63 David Anderson, *The Terrorism Acts in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (The Stationery Office, 2014) para. 5.8.

64 David Anderson, *The Terrorism Acts in 2014: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (The Stationery Office, 2015) paras 4.11–4.13.

65 CPR 80.18(1); Proscribed Organisations Appeal Commission (Procedure) Rules 2007, r. 22(1).

66 [2009] UKHL 28, [2010] 2 AC 269, [59] (*per* Lord Phillips).

67 *Secretary of State for the Home Department v BC* [2009] EWHC 2927 (Admin), [2010] 1 WLR 1542.

68 CPR 80.19; Proscribed Organisations Appeal Commission (Procedure) Rules 2007, r. 9(3).

submissions and cross-examine witnesses on behalf of the individual.[69] A study of the relevant cases shows that judges have found the contribution of Special Advocates to be valuable and effective in the protection of the individuals whose interests they represent.[70] Yet the Special Advocates themselves have expressed misgivings about their role. Before the Special Advocate is shown the closed materials he may communicate freely with the individual and the individual's legal representative.[71] Once the Special Advocate has been served with the closed materials, the individual may still communicate with him (in writing and through his legal representative).[72] But the Special Advocate may no longer communicate with the individual, except in two circumstances: first, to acknowledge receipt (in writing) of any communication received from the individual;[73] and, second, following a successful application to the court for authorisation to communicate with the individual or his legal representative.[74] Before the court decides whether to grant authorisation, however, the Home Secretary must be notified of the request and given the opportunity to object.[75] The effect of this, according to evidence provided to the Joint Committee on Human Rights by a group of Special Advocates, was that

> the facility in the Rules to seek the Court's permission to consult with the controlled person was rarely used in practice, partly because such permission was unlikely to be forthcoming in practice if the purpose of the meeting was to discuss anything to do with the closed case, and partly because the Rules require any application for such permission to be served on the Secretary of State, which is not considered tactically desirable because of the risk that it might give away to the opposing party the parts of the closed evidence in relation to which the controlled person does not have an explanation.[76]

Furthermore, even if permission was sought, 'it would be very likely to be refused because any question that it would assist the Special Advocates to ask is likely to be one from which part of the closed case could be inferred'.[77] It is this restriction on the ability to communicate with the individual that the Special Advocates themselves have described as 'the most significant restriction on the ability of [Special Advocates] to operate effectively'.[78] This – in addition to other concerns including lack of funding and access to justice, the lack of any practical ability to call evidence and the practice of iterative disclosure – led a group of 57 Special Advocates to state that closed materials proceedings 'are inherently unfair; they do not "work effectively", nor do they deliver real procedural fairness'.[79] Yet, following the Justice and Security Act 2013, closed material proceedings may now be employed not only in appeals under TAFA as well as POAC proceedings and TPIM review hearings, but in all civil proceedings.

The final set of concerns regards the proximity of the suspect to an actual act of terrorism. In his report on the operation of TPIMs during 2013, David Anderson drew attention to the fact that the definition of terrorism-related activity in TPIMA was broader than the one in TAFA, and questioned

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69 CPR 80.20; Proscribed Organisations Appeal Commission (Procedure) Rules 2007, r. 9(5).

70 This is based on an examination of the relevant case files by one of the current co-authors (Lord Carlile).

71 CPR 80.21(1); Proscribed Organisations Appeal Commission (Procedure) Rules 2007, r. 10(1).

72 CPR 80.21(6)(a); Proscribed Organisations Appeal Commission (Procedure) Rules 2007, r. 10(6)(a).

73 CPR 80.21(6)(b); Proscribed Organisations Appeal Commission (Procedure) Rules 2007, r. 10(6)(b).

74 CPR 80.21(4); Proscribed Organisations Appeal Commission (Procedure) Rules 2007, r. 10(4).

75 CPR 80.21(5); Proscribed Organisations Appeal Commission (Procedure) Rules 2007, r. 10(5).

76 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 28 Days, Intercept and Post-Charge Questioning* (19th Report of Session 2006–07, The Stationery Office, 2007) para. 201.

77 Martin Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) 28(3) *Civil Justice Quarterly* 314, 322.

78 *Justice and Security Green Paper: Response to Consultation from Special Advocates* (2011) para. 27.

79 Ibid. para. 15.

> whether measures as strong as TPIMs need or ought to be available for use against a person whose connection with an act of terrorism could be as remote as the giving of support to someone who gives encouragement to someone who prepares an act of terrorism. That person is at three removes from terrorism – itself a concept that encompasses more than just politically-motivated violent acts.[80]

Whilst noting that TPIMs had not to that point been sought against 'peripheral figures', he pointed out that there might be a 'temptation to resort to the outer fringes of the [definition]', particularly in a case in which evidence of new terrorism-related activity needs to be found in order to justify issuing a new TPIM notice.[81] The Counter-Terrorism and Security Act 2015 accordingly narrowed the scope of the definition. The revised definition now encompasses: the commission, preparation or instigation of acts of terrorism; conduct that facilitates the commission, preparation or instigation of such acts (or that is intended to do so); conduct that gives encouragement to the commission, preparation or instigation of such acts (or that is intended to do so); and conduct that gives support or assistance to those who are known or believed by the suspect to be involved in the commission, preparation or instigation of acts of terrorism.[82] Some differences between TPIMA's revised definition of terrorism-related activity and the one used in TAFA do remain; in particular, the TAFA definition is still capable of encompassing individuals who are three steps removed from terrorist acts – such as someone [D1] who lends support to someone else [D2] who facilitates the instigation [by D3] of a terrorist act to be committed by someone else [D4].[83] A further difference is that TAFA's definition does not encompass conduct that gives encouragement to the commission, preparation or instigation of terrorist acts.

In contrast to both TPIMA and TAFA, the TA 2000 does not use the term terrorism-related activity. As explained above, it instead states that an organisation may be proscribed if it is 'concerned in terrorism'.[84] The definition of this term encompasses organisations that are committing, participating in, preparing for or are otherwise (actively) concerned in terrorism.[85] It also encompasses organisations that are promoting or encouraging terrorism, that is are one step removed from terrorist acts.[86] But, whilst it does not extend to organisations that are two or more steps removed, it is expansive in a different sense. Unlike TPIMA, the TA 2000's definition of encouragement mirrors the one used in the encouragement of terrorism offence,[87] and so includes the glorification of (past, present or future) terrorist acts.[88] As will be explained further below, the encouragement of terrorism offence has been criticised.[89] The nebulosity of the concept of glorification in particular gives both the encouragement of terrorism offence and the preconditions for proscription an uncertain and over-inclusive ambit.

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80 Anderson, *Terrorism Prevention and Investigation Measures in 2013* (n 13) para. 6.14.

81 Ibid. para. 6.15.

82 TPIMA, s. 4(1).

83 TAFA, s. 2(2).

84 TA 2000, s. 3(4).

85 TA 2000, ss. 3(5)(a), (b), (d); *Alton* (n. 27).

86 Ibid. s. 3(5)(c).

87 TA 2006, s. 1.

88 TA 2000, ss. 3(5A)–(5C).

89 John Burton (2008) 37 *Index on Censorship* 115; James Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (2010) 30 *Oxford Journal of Legal Studies* 725; Sterling A. Marchand 'An Ambiguous Response to a Real Threat: Criminalizing the Glorification of Terrorism in Britain' (2010) 42 *George Washington International Law Review* 123.

Disruption by prosecution: terrorism precursor offences

The criminal law has a preventative, as well as a punitive, function.[90] As Husak states, 'Statutes designed to prevent future harm are neither unusual nor deviant'.[91] In addition to the well-known inchoate offences of attempt,[92] conspiracy[93] and encouraging/assisting crime,[94] there are a number of offences that penalise conduct that creates a risk of harm (such as speeding, drunk-driving and dangerous driving) as well as what Ashworth and Zedner describe as 'substantive offences defined in the inchoate mode'.[95] Alongside these offences there exist a number of pre-inchoate – or precursor – offences. In the specific context of terrorism-related activity, the rationale of these precursor offences is twofold. The first is evidentiary. Offences such as conspiracy and encouraging crime are notoriously difficult to prove. Many terrorist groups observe good communications security, such that 'Clear, understandable exchanges that plainly inculpate those involved are very much the exception'.[96] And even if materials that have evidential value are available, there may be public interest reasons for not disclosing them in open court (such as not exposing other ongoing investigations or revealing agencies' capabilities[97]) and/or the UK's self-imposed ban on the use of intercept as evidence in criminal trials may apply.[98] The second reason is temporal. The offence of attempt only applies if the defendant has performed an act that is 'more than merely preparatory' to commission of the planned full offence.[99] This test has been interpreted to mean that the defendant is not guilty of a criminal attempt until he 'embarks upon the crime proper'.[100] When responding to would-be terrorists, this is regarded as leaving it too late. It is necessary to intervene at an earlier stage: in the words of David Anderson, it is necessary to defend further up the field.[101]

There are a large number of different terrorism precursor offences, found predominantly in the 2000 and 2006 Terrorism Acts. These include: membership of a proscribed organisation;[102] inviting support for a proscribed organisation;[103] wearing the uniform of a proscribed organisation;[104] fund-raising for terrorist purposes;[105] use or possession of money or other property for terrorist purposes;[106] failure to disclose information which might be of material

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90 R.A. Duff, *Criminal Attempts* (Clarendon Press, 1996); Andrew Ashworth and Lucia Zedner, 'Prevention and Criminalization: Justifications and Limits' (2012) 15 *New Criminal Law Review* 542.

91 Douglas Husak, 'Preventive Detention as Punishment? Some Potential Obstacles' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 185.

92 Criminal Attempts Act 1981, s, 1.

93 Criminal Law Act 1977, s, 1.

94 Serious Crime Act 2007, ss, 44–46.

95 Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in R,A, Duff and Stuart P, Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 284. One of the examples they offer is the offence of fraud by false representation (Fraud Act 2006, s. 2), which requires only that the defendant dishonestly made a false representation with the intention of making a gain or causing a loss. It is thus a conduct, not a result, crime since there is no requirement that anyone did in fact make a gain or suffer a loss.

96 *Privy Council Review of Intercept as Evidence* (Cm 7324, The Stationery Office, 2008) para. 52.

97 Ibid. para. 58.

98 HM Government, *Intercept as Evidence*.

99 Criminal Attempts Act 1981, s. 1.

100 *R v Gullefer* [1990] 1 WLR 1063, 1066.

101 David Anderson, 'Shielding the Compass: How to Fight Terrorism Without Defeating the Law' [2013] *European Human Rights Law Review* 233, 237.

102 TA 2000, s. 11.

103 Ibid. s. 12.

104 Ibid. s. 13.

105 Ibid. s. 15.

106 Ibid. s. 16.

assistance in preventing a terrorist act;[107] directing the activities of a terrorist organisation;[108] possession of an article for terrorist purposes;[109] collection of information or possession of a document likely to be useful to a terrorist;[110] encouragement of terrorism;[111] dissemination of terrorist publications;[112] preparation of terrorist acts;[113] training for terrorism;[114] and attendance at a place used for terrorist training.[115] A number of criticisms have been levelled at this wide range of offences, including: their often broad and ambiguous wording; the potential they create for intrusive and discriminatory methods of investigation; the severity of the accompanying sentencing powers; the level of overlap between the offences and whether all the offences are actually necessary; and the lack of evidence to support the empirical assumption that the offences have a preventative effect.[116] Our aim, however, is not to argue that terrorism precursor offences should be rejected. As explained above, this stratum of offences is necessary, though it is essential that its scope is carefully justified and circumscribed.[117] Rather, our aim is to draw attention to the potentially self-defeating nature of terrorism precursor offences. This section will show that the criticisms of the non-criminal methods of disruption identified above – the very reasons why those methods are not the option of first resort – may also be applied to the terrorism precursor offences (as currently constituted). This inconsistency threatens to undermine both the rationale for prosecution as the measure of first resort and the moral authority and legitimacy of the criminal law.

Whilst the criminal trial requires an individualised assessment of guilt, there are two respects in which terrorism precursor offences dilute the force of the requirement that the prosecution prove its case beyond reasonable doubt. First, some of these offences are intertwined with other, non-criminal methods of disruption, resulting in a degree of hybridity. For example, the offences of belonging to a proscribed organisation and making funds available to a designated person might equally be expressed as belonging to an organisation that the Home Secretary *reasonably believes* is concerned in terrorism and providing funds to a person that the Home Secretary *reasonably believes* (a) has been involved in terrorist activity, and (b) is someone against whom the public requires protection.[118] The civil law underpinning of these offences effectively means that some of the preconditions for a finding of criminal liability do not have to be established to the criminal standard. A similar point applies to the offence of breaching a

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107 Ibid. s. 38B.

108 Ibid. s. 56.

109 Ibid. s. 57.

110 Ibid. s. 58.

111 TA 2006, s. 1.

112 Ibid. s. 2.

113 Ibid. s. 5.

114 Ibid. s. 6.

115 Ibid. s. 8.

116 Lord Carlile QC and Stuart Macdonald, 'The Criminalisation of Terrorists' Online Preparatory Acts' in Thomas M Chen, Lee Jarvis and Stuart Macdonald (eds), *Cyberterrorism: Understanding, Assessment, and Response* (Springer, 2014); Ian Leader-Elliott, 'Framing Preparatory Inchoate Offences in the Criminal Code: The Identity Crime Debacle' (2011) 35 *Criminal Law Journal* 80; Manuel Cancio Melia and Anneke Petzsche, 'Precursor Crimes of Terrorism' in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge, 2015); Kent Roach, 'The Criminal Law and Its Less Restrained Alternatives' in Victor V. Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press, 2012); Clive Walker, *Terrorism and the Law* (Oxford University Press, 2011); Clive Walker, 'Terrorism Prosecution in the United Kingdom: Lessons in the Manipulation of Criminalisation and Due Process' in F. ni Aolain and O, Gross (eds), *Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative and Policy Perspective* (Cambridge University Press, 2013).

117 Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014); Peter Ramsay, 'Democratic Limits to Preventive Criminal Law' in Ashworth, Zedner and Tomlin (eds), *Prevention and the Limits of the Criminal Law*; A.P. Simester, 'Prophylactic Crimes' in G.R. Sullivan and Ian Dennis (eds), *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart Publishing, 2012).

118 TA 2000, s. 11; TAFA, s. 12.

TPIM notice.[119] Here the focus of the criminal trial will be whether it has been proven, beyond reasonable doubt, that the defendant violated his TPIM notice without reasonable excuse. The question whether the defendant is or has been involved in terrorism-related activity, which the Home Secretary determined was proven to the *civil standard* as part of the process for imposing the TPIM notice, will not be revisited. This use of orders made in civil law proceedings to justify the subsequent imposition of severe criminal penalties – a technique that has been adopted in a number of contexts[120] – led Ashworth to describe civil preventative orders like TPIMs as a 'Trojan horse'.[121]

Second, it is important to recognise that the content of substantive laws can undermine procedural rules in a more general sense.[122] When an offence is defined in very expansive terms, the probative burden that rests on the prosecution is diminished. Indeed, the *actus reus* of a number of precursor offences is defined so broadly that proving this part of the offence will inevitably be straightforward. For example, for the offence of use or possession of money or other property for terrorist purposes all that is required to establish the *actus reus* is that the defendant possessed money or other property.[123] Similarly, the *actus reus* of the offence of preparation of terrorist acts merely requires proof that the defendant engaged 'in any conduct'.[124] In these offences it is clear that the *mens rea* requirement will take centre stage – which gives rise not only to concerns about whether the *mens rea* of these offences is sufficiently stringent (whilst the latter offence requires proof of intention, the former requires only that the defendant had reasonable cause to suspect that the money/property may be used for the purposes of terrorism), but also the potentially invasive and discriminatory methods of investigation that might be employed in order to ascertain a defendant's thoughts in the absence of any overtly incriminating acts. A further example of how the substance of a law might undermine procedural rules is the offence of collection of information or possession of a document likely to be useful to a terrorist.[125] Even though the definition of this offence now has a narrower scope following the gloss added to it by the House of Lords in *R v G*,[126] it remains unnecessary to prove that the defendant had any terrorist purpose or connection.[127] The requirement of proof beyond reasonable doubt can have no bite if there is nothing to prove!

The second and third set of concerns about the non-criminal methods of disruption examined above focused on the limited role of the judiciary and the possibility of closed proceedings. Similar concerns have also been expressed about terrorism precursor offences, notwithstanding the fact that the trial of a defendant charged with such an offence will be held in a criminal court, before an independent judge, with no possibility of closed proceedings. As we have seen, the definitions of these offences are frequently over-inclusive, such that there is a discrepancy between the definition itself and the wrong that is in fact being targeted. The offence of encouragement of terrorism, for example, was targeted at extremists who promote a culture of hate, but is broad enough to also encompass North Korean exiles who criticise their native regime and those 'who express their ability to understand the actions of Palestinian suicide-

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[119] TPIMA, s. 23.

[120] A.P. Simester and A. von Hirsch, 'Regulating Offensive Conduct through Two-Step Prohibitions' in A. von Hirsch and A.P. Simester (eds), *Incivilities: Regulating Offensive Behaviour* (Hart Publishing, 2006).

[121] Andrew Ashworth, 'Editorial: In Favour of Community Safety' [1997] *Criminal Law Review* 769, 770.

[122] Victor Tadros, 'Justice and Terrorism' (2007) 10 *New Criminal Law Review* 658; Marianne Wade, 'Fighting Terrorism – the Unprincipled Approach: the UK, the War on Terror and Criminal Law' in Marianne Wade and Almir Maljevis (eds), *A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications* (Springer, 2010).

[123] TA 2000, s. 16(2).

[124] TA 2006, s. 5(1).

[125] TA 2000, s. 58.

[126] *R v G* [2009] UKHL 13, [2010] 1 AC 43.

[127] Jacqueline Hodgson and Victor Tadros, 'How to Make a Terrorist Out of Nothing' (2009) 72 *Modern Law Review* 984.

bombers'.[128] Moreover, terrorism precursor offences cannot be regarded as analogous to offences such as speeding or possession of weapons – i.e. offences of necessitous over-inclusion – since unlike these offences precursor crimes do not seek to guide all citizens away from all of the conduct they encompass. Rather, only some of those who fall within the offence definition will be selected for prosecution. This selection will presumably be based largely on whether the individual in question is deemed to pose a threat to national security. But at trial the issue will be whether the requirements set out in the offence definition are satisfied. The national security considerations that led to the decision to prosecute will sit in the background. So 'Even though the pursuit of security is central to the justification for the law itself, it is not open to challenge by the defendant with respect to his particular case'.[129] For this reason Edwards labels the terrorism precursor offences 'ouster offences',[130] since they deprive the trial court of the opportunity to adjudicate on the actions that the offences are targeting.
Lastly, terrorism precursor offences may encompass peripheral figures who are several steps removed from acts of terrorism.[131] Two features of these offences give them this expansive reach. First, a number of the precursor offences target not only would-be perpetrators of terrorists acts and accomplices who facilitate the acts of these would-be perpetrators. They also encompass those who facilitate the acts of accomplices. For example, the offence of encouragement of terrorism encompasses not only the individual (D1) who encourages another (D2) to commit an act of terrorism, but also the person (D1) who encourages another (D2) to instigate an act of terrorism to be committed by someone else (D3) and even the one (D1) who causes another (D2) to publish a statement that encourages another (D3) to instigate an act of terrorism to be committed by someone else (D4). So already the precursor offences may reach those who are up to three steps removed from an act of terrorism. Add to this the second feature, which is that many of the precursor offences can be committed in inchoate form (such as attempting to prepare an act of terrorism or conspiracy to provide training for terrorism) – and in some instances it may even be possible to place one layer of inchoate liability on top of another, so-called double inchoate liability – and at their most extreme the precursor offences may reach those up to five steps removed from a terrorist act![132] This gives them a significantly wider reach than the non-criminal methods of disruption outlined in the previous section.

Conclusion

The features of terrorism precursor offences that we have identified in this chapter create a danger of inappropriate convictions. Here, experience tells us that trial by jury is an important safeguard. For example, 29-year-old medical student Yousif Badri was found not guilty at Glasgow High Court of being involved in conduct with the intention of committing acts of terrorism. The case against him had been based on alleged contact with a terrorist organisation and possession of online materials and a tub of nails.[133] Also, 27-year-old Erol Incedal was convicted of possession of a five-page bomb-making manual but acquitted (following a retrial) on the more serious charge of plotting to mount a Mumbai-style attack on the streets of

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128 Edwards, 'Justice Denied', 730.

129 Tadros, 'Justice and Terrorism', 688.

130 Edwards, 'Justice Denied', 732.

131 Macdonald, 'Prosecuting Suspected Terrorists'.

132 Stuart Macdonald, 'Cyberterrorism and Enemy Criminal Law' in Jens David Ohlin, Kevin Govern and Claire Finkelstein (eds), *Cyberwar: Law and Ethics for Virtual Conflicts* (Oxford University Press. 2015).

133 'Aberdeen Student Yousif Badri Cleared of Terror Charges', *BBC News*, 9 October 2015, www.bbc.co.uk/news/uk-scotland-north-east-orkney-shetland-34485501 (last accessed 9 July 2016).

London.[134] And 18-year-old Waris Ali – who had been accused of possessing the *Anarchists' Cookbook* and researching bomb-making techniques online in order to blow up members of the British National Party – was acquitted of possessing an article for a terrorist purpose.[135] Moreover, in more general terms, it has to be remembered that, whilst generally faithful to judicial directions of law, juries have been known to use their verdicts to reject what they perceive as unfairness.[136] However, whilst the possibility of a jury returning a verdict of not guilty is a valuable safeguard, it is important to seek to ensure that those who are not guilty are not prosecuted wherever possible.

There have also been cases in which the appeal courts have demonstrated restraint, by limiting the overly broad interpretation of terrorism offences.[137] For example, the House of Lords used the interpretative obligation under the Human Rights Act 1998 to hold that a defendant pleading the section 11(2) defence on a charge of being a member of a proscribed organisation bears an evidential, not a persuasive, burden.[138] And in *R v G* the House of Lords narrowed the scope of the offence of collection of information or possession of a document likely to be useful to a terrorist, by refining the statute's statement of the offence's *actus reus* and reading into the offence two *mens rea* requirements (although the offence does still retain an overly broad ambit).[139] Examples such as these underscore the importance of legislative restraint when new offences are created. In particular, a high level of culpability should be required for terrorism precursor offences.[140]

Whilst offence definitions should be as clear and tightly drawn as possible, it is also important to recognise that it is not possible to neatly dichotomise rules and discretion. Discretion is heavily implicated in the interpretation and application of rules, and rules enter the exercise of discretion.[141] Indeed, as we have argued elsewhere, some proposed rewordings of terrorism precursor offences would be open to more than one possible interpretation, meaning that they might not only fail to narrow the scope of the offence in question but would also involve a sacrifice of legal certainty.[142] So in addition to encouraging greater legislative restraint, it is

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134 Ian Cobain, 'Student Cleared of London Terror Charge after Partially Secret Trial', *Guardian* 26 March 2015, www.theguardian.com/uk-news/2015/mar/26/student-cleared-london-terror-secret-trial-erol-incedal-not-guilty (last accessed 9 July 2016).

135 'Teenage Bomb Plot Accused Cleared', *BBC News*, 23 October 2008, http://news.bbc.co.uk/1/hi/england/bradford/7685636.stm (last accessed 9 July 2016).

136 For example: 'Even when my conscience tells me the jury have made a mistake in acquitting the criminal, even then I am triumphant. Judge for yourselves, gentlemen; if the judges and the jury have more faith in *man* than in evidence, material proofs and speeches for the prosecution, is not that faith in *man* in itself higher than any ordinary considerations?' (Anton Chekhov, *The Head Gardener's Story* (Eldritch Press, 1894)).

137 Cf. the judgment of the Supreme Court of Victoria in *Benbrika* [2007–8] Annual Report Supreme Court of Victoria 49–50, in which it was held that the mere viewing of violent extremist online materials demonstrated preparation for terrorism because the resources were used to motivate, desensitise and train members of the allegedly terrorist group. See further Keiran Hardy, 'Violent Extremism Online and the Criminal Trial' in Anne Aly, Stuart Macdonald, Lee Jarvis and Thomas Chen (eds), *Violent Extremism Online: New Perspectives on Terrorism and the Internet* (Routledge, 2016).

138 *Re Attorney General's Reference (No. 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264.

139 *R v G* (n. 126); Hodgson and Tadros, 'How to Make a Terrorist Out of Nothing'.

140 Carlile and Macdonald, 'The Criminalisation of Terrorists' Online Preparatory Acts'. More specifically, a person should only be held criminally liable for acts they have done, on the basis of what they might have gone on to do in the future, if it can be shown that they intended to do those future acts; and a person should only be held criminally liable for acts they have done, on the basis of what a third party might have gone on to do in the future, if it can be shown that they had some normative involvement in those future acts (see Ashworth and Zedner, *Preventive Justice*; A.P. Simester, 'Prophylactic Crimes' in G.R. Sullivan and Ian Dennis (eds), *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart Publishing, 2012).

141 Denis Galligan, *Discretionary Powers* (Clarendon Press, 1986); Keith Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Keith Hawkins (ed.), *The Uses of Discretion* (Clarendon Press, 1992).

142 Carlile and Macdonald, 'The Criminalisation of Terrorists' Online Preparatory Acts'.

also necessary to harness the restraining power of extra-legal constraints. In particular, the discretion not to prosecute – vested in the Director of Public Prosecutions or, in some instances, the Attorney General – is a significant procedural protection. Yet at present the exercise of this discretion in the context of terrorism precursor offences is both unpredictable and ill-defined. Guidance should be published that seeks not only to clarify the ambit of individual offences, but also explain how choices should be made between offences in situations where they overlap (especially given the important implications this may have in terms of the maximum applicable sentence).

To conclude, this chapter has highlighted the tension between, on the one hand, the role that terrorism precursor offences play in disrupting terrorist activity and protecting the public and, on the other hand, the temptation to take disproportionate refuge in yet more broadly couched and ill-defined criminal offences. In seeking to resolve this tension, it is essential to be mindful of the reason why we prioritise prosecution in the first place and to endeavour to respect those features of the criminal law that give it its unique moral authority and legitimacy.