# SHADES OF INDEPENDENT REVIEW

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## INTRODUCTION

Book and restaurant reviews are best written by people who were not responsible for the original product. By the same token, former holders of the office of Independent Reviewer of Terrorism Legislation (IRTL), a post that I held for six years until the end of February 2017, are wise to leave appraisals of their work to others. Indeed, '*Review of review*' has already begun to find a niche in the rich and varied landscape of academic counter-terrorism studies.[1] Perhaps the future will see further studies of the work of the IRTL, including comparisons with the work of the Australian Independent National Security Legislation Monitor, an office inspired by the IRTL and still its closest international comparator, and of partly comparable independent bodies such as the Privacy and Civil Liberties Oversight Board (PCLOB) in the USA and the Défenseur des Droits in France. But there may be value also in an insider account: not for an impartial assessment of how well the role of the IRTL has been discharged, but for the office-holder's insight into the constraints and opportunities that it offers.

In that spirit, as the first of my three-year terms drew to a close, I delivered a paper at the invitation of the Statute Law Society on the origins, history, functions and influence of the IRTL.[2] These functions include, principally, a statutory obligation to file annual reports on the operation (by police, prosecutors, Ministers and others) of various Acts of Parliament;[3] and a power to conduct ad hoc reviews at the request of Ministers or on the initiative of the IRTL. This chapter is of the nature of an update. It identifies the changes to the role of IRTL during my second term of office, from 2014 to 2017, and describes the increasingly varied types of review that I was asked to conduct during my second term. Though these remarks aspire neither to impartiality nor to scholarship, they offer an inside perspective on the various functions that independent review can perform. Perhaps this may help others to decide when it can be most useful, and the form that it should take.

## I. 2014: HALF-TIME REFLECTIONS

My paper of 2014 summarised the origin of the office in the 1970s, its history and its functions. Noting its unusual combination of 'broad perspective and access to secrets', I described the office of IRTL as 'an unusual but durable source of scrutiny ... particularly appropriate for an area in which potential conflicts between state power and civil liberties are acute, but information is tightly rationed'.[4] Basing myself on two case studies from my own first term – secret evidence and port powers under Schedule

[1] See, eg, J Blackbourn, 'Independent Reviewers as Alternative; an Empirical Study from Australia and the UK' in F Davis and F de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press 2014). See also, suggesting an analogous office for Canada, C Forcese and K Roach *Bridging the National Security Accountability Gap* (TSAS Working Paper Series No 16-04, 2016) Part V.

[2] Subsequently published as D Anderson, 'The Independent Review of Terrorism Laws' (2014) *Public Law* 403-420; shortened and updated in D Anderson, 'The Independent Review of UK Terrorism Law' (2014) *New Journal of European Criminal Law* 432-446. Subsequent citations are to the Public Law article.

[3] In 2014, annual review was required of the Terrorism Acts 2000 and 2006, the Terrorist Asset-Freezing &c. Act 2010 (TAFA 2010) and the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA 2011). The content of the statutory obligation to report has varied over the years, and indeed was varied again in 2015: see below.

[4] Anderson 'The Independent Review of Terrorism Laws' (n 2) 421.

7 to the Terrorism Act 2000 – I then sought to describe the various channels by which the conclusions of the IRTL can influence the law, practice and public perception of counter-terrorism in the UK.[5]

Influenced no doubt by the soggy English winter of 2013-14,[6] I visualised the influence of independent review in watery terms. Ideas originating in 'the headwaters of legal practice and academic study' became 'powerful tributaries' which the IRTL was well placed, via reports, evidence to Parliament, media and social media, to channel into Westminster and the public space.[7] In some respects, specified in my paper, changes to law and practice were the result. But the absence of recommendations could also be of value, particularly to the Government, for 'where elements of the law work well and do not need substantial alteration, it is right (and may be reassuring) to say so'.[8]

The process by which influence percolates through a complex democracy is rarely straightforward. Having described the constantly shifting preoccupations of NGOs, litigants, Select Committees and journalists (and without dwelling on the various personalities and inclinations of police and agency chiefs, civil servants, politicians and judges), I concluded from my case studies that 'streams of influence run through a variety of channels, intersecting and reinforcing one another'.[9] Those different channels of influence were to be seen not as alternatives but 'as subtly inter-related, often divergent but at their most effective when influencing and flowing alongside one another'.[10]

## II. CHANGES TO THE POWERS AND FUNCTIONING OF THE IRTL

The year 2015 saw significant change to the powers and functioning of the IRTL, reflecting to some extent recommendations that I had made in 2014.[11] Those changes had three principal elements, which will be discussed in this section.[12]

First, the IRTL was given responsibility for reviewing the operation of more statutory powers, including elements of the Anti-Terrorism Crime and Security Act 2001 (ATCSA 2001) and the Counter-Terrorism Act 2008 (CTA 2008) as well as the new passport removal and temporary exclusion order powers included in the Counter Terrorism and Security Act 2015 (CTSA 2015).[13] Though this extension was welcome, and meant that the jurisdiction of the IRTL extended to nearly all aspects of counter-terrorism legislation that might benefit from independent review, the category of reviewable laws was not drawn as widely as I had hoped. In particular, and with immigration-related powers in mind, I had requested that consideration be given to extending the powers of the IRTL not only to all counter-terrorism and national security legislation but to 'any other law to the extent that it relates to counter-

[5] Port powers, the subject of my second case study, continued to be subject to legislative and judicial change during my second term in office, summarised in D Anderson, *The Terrorism Acts in 2015* (Stationery Office 2016) ch 7. As recorded at 7.3, of the 14 elements of Schedule 7 that I recommended in 2011 should be subject to consultation and review, change had by 2016 been effected (by a variety of routes) in relation to all but one.
[6] 2013-14 was the wettest English winter since at least 1766, when the England and Wales Precipitation Series began: <https://www.metoffice.gov.uk/climate/uk/summaries/2014/winter> accessed 11 November 2017.
[7] Anderson 'The Independent Review of Terrorism Laws' (n 2) 417.
[8] Ibid 413.
[9] Ibid 415.
[10] Ibid 420.
[11] D Anderson, *The Terrorism Acts in 2013* (Stationery Office 2014), ch 11.
[12] Counter-Terrorism and Security Act 2015, ss 44-46.
[13] CTSA 2015, s 44(1)(2).

terrorism and national security legislation'.[14] That broader extension was refused:[15] to date, reviews by the IRTL of immigration powers have been the result only of specific requests by the Home Secretary.[16]

Secondly, and to help balance this increase in the scope of his powers, the IRTL was relieved of the obligation to report annually on the operation of statutes other than the Terrorism Act 2000 (in respect of which the annual reporting obligation remains). As I had said of the previous inflexible annual schedule:

> 'This is the legacy of the days, now gone, when anti-terrorism legislation was subject to annual parliamentary renewal, and a report was called for to inform the renewal debate. In some cases ... annual review may be entirely appropriate. In others it might be considered unnecessary and excessive, or at any rate a relatively low priority.'[17]

The IRTL must now inform the Home Secretary and Treasury, by the end of every January, which, if any, optional reviews it is proposed to conduct during the calendar year. My suggestion that the IRTL should be obliged first to consult the relevant parliamentary committees (the Home Affairs Select Committee (HASC) and Joint Committee on Human Rights (JCHR)) was not taken up in statute, though formal or informal consultation with these bodies could still take place if desired. The increased flexibility is welcome. But it is important that the press of other business – in particular, one-off reports for which time may not have been set aside in advance – does not cause important powers to go unreviewed for too long. My last reports on the operation of Terrorism Prevention and Investigation Measures (TPIMs) and terrorist asset-freezing were published in March 2015. Plans to review the exercise of these and other executive orders (passport removal, exclusion orders) before the expiry of my mandate in March 2017 were delayed as a consequence of other burdens, including the reports on citizenship deprivation and bulk powers discussed below. Almost three years have now elapsed since the executive orders were last reported on; and the two powers introduced by CTSA 2015 have not been reported on at all.

Thirdly, it was decided after the 2015 General Election to offer the IRTL more assistance in the form of an additional £50,000 budget, which I chose to allocate to work performed by an enlarged team of part-time Special Advisers. My earliest (and best) decision as IRTL was to secure the ad hoc services of Professor Clive Walker, who agreed in 2011 to take the title of Special Adviser to the IRTL. In that capacity he produced a fortnightly reading list or 'alerter', complete with copies of relevant materials from around the globe, from which I benefited immensely as, I hope, did the Home Office to which it was also sent. In addition, and without thought of payment, Clive responded with unfailing

[14] A formulation inspired by the (Australian) Independent National Security Legislation Monitor Act 2010, section 6(1). The same Act inspired the recommendation that consideration be given to making express statutory provision for access to classified information, information-gathering powers, the exclusion of sensitive information from reports and the time limit within which reports must be laid before Parliament: Anderson, *The Terrorism Acts in 2013* (n 11) 11.34.

[15] See *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2015 by the Independent Reviewer of Terrorism Legislation* (Cm 9489, 2017), pp. 4-5, warning of uncertainty as to the boundaries of the IRTL's function and the creation of 'an unhelpful precedent'.

[16] Eg for my reviews of citizenship deprivation (published April 2016) and deportation with assurances (published July 2017)

[17] Anderson, *The Terrorism Acts in 2013* (n 11) 11.24.

learning and wry humour to the myriad questions that I threw at him over six years. If as a newcomer to counter-terrorism law I ever gave the impression of historical or comparative knowledge, the credit belongs to him.

The additional budget enabled me to promote Clive Walker to Senior Special Adviser and take on two other Special Advisers: the Northern Irish barrister Alyson Kilpatrick and the English barrister and broadcaster Hashi Mohamed. Their security clearance came through in 2016, and the first fruits of their assistance may be seen in the last two reports that I prepared in office.[18] The system to which Clive contributed so much is not one that he would himself have designed. As I noted in my paper of 2014, he had advocated a panel of reviewers.[19] The Coalition Government, or at least the Liberal Democrat part of it, agreed with him at first. When its plans for change were announced, they included the abolition of the office of IRTL and its replacement by a Privacy and Civil Liberties Board (PCLB). By the time the CTSA 2015 reached the statute book, the IRTL had been reprieved, and the PCLB was to operate – more satisfactorily, in my opinion – under the direction and control of the IRTL.[20]

The Liberal Democrats were no longer in government after the General Election of May 2015, and the Home Secretary, Theresa May, opted not to bring the PCLB into force. The budget increase already referred to was her alternative solution to the overload that I had identified in previous reports. The section providing for the creation of the PCLB remains on the statute book, a dead letter for now but available for action should opinions change.

## III. SECOND TERM: ANNUAL REVIEWS

From 2014 to 2016 I continued to produce annual reviews of the operation of the Terrorism Acts and (until March 2015) of Terrorist Asset-Freezing &c. Act 2010 (TAFA 2010) and Terrorism Prevention and Investigation Measures Act 2011 (TPIMA 2011). Though from early 2015 the statutory requirement of an annual report applied only to the 2000 Act, I chose not to depart from my earlier practice of reviewing the operation of the 2006 Act at the same time. In my last annual report, published on 1 December 2016, I reviewed at the same time some aspects of the operation of CTA 2008. In order to vary the format and content of my annual Terrorism Acts reports, I included chapters in different years focusing on particular subjects. It was by that route that I stumbled into the world of counter-extremism.

[18] Clive Walker wrote a Guest Chapter on foreign terrorist fighters and UK counter-terrorism law in my last annual report (Anderson, *The Terrorism Acts in 2015* (n 5) Annex 2); and wrote the more substantial and learned part of my final report (submitted in February 2017), of which he was credited as a co-author: D Anderson and C Walker, *Deportation with Assurances* (Cm 9462, 2017).

[19] I have been less keen on the idea of a panel, citing the importance of a strong personal commitment by an IRTL to all aspects of the job, the need for emphatic positions to be taken, sometimes at very short notice, eg with parliamentary committees and the media; the need to make the post attractive to strong candidates; and the risk that reports might become the bland products of compromise. These factors led me to prefer the model of a single IRTL with adequate support staff.

[20] CTSA 2015 s 46. The twists and turns of the legislative process are described in D. Anderson, *The Terrorism Acts in 2014* (Stationery Office, 2015) 10.2-10.5.

*A. Counter-extremism and Prevent*

My 2015 report contained a chapter on counter-extremism, which did not form part of my statutory remit.[21] I nonetheless felt justified in addressing this issue, both because the Home Office, no doubt hoping for my public approval, had chosen to show me, in mid-2015, a draft of its Counter-Extremism Bill; and because of similarities between what was proposed in the draft Bill and the executive orders (TPIMs, asset freezes) which it was my responsibility to review. In my report, I posed 15 questions that I suggested Members of Parliament should ask were a Bill along these lines to be introduced. A private letter to the Home Office, written in August 2015, set out my concerns more directly and frankly. In a radio programme I later described the draft Bill, which would have introduced a variety of coercive orders for use against ill-defined 'extremist activity', as the single document that had alarmed me most during my time as IRTL.[22] In the end, though it had been flagged as part of the legislative programme in two successive Queen's Speeches, the Bill was ditched (having never been published), and replaced after the 2017 General Election by plans for the establishment of a Counter-Extremism Commission. I was relieved by this outcome but can claim no particular credit for it: my negative reaction to the draft Bill is likely to have been shared by others who were exposed to it.

Over the remaining period of my time as IRTL, both Parliament and Muslim communities expressed far more interest and concern to me about counter-extremism plans, and the Prevent strategy, than they did about the harsher provisions of counter-terrorism law. This was partly because the repeal in 2011 of the former no-suspicion stop and search power,[23] and the reform and reduction in use of Schedule 7 port powers,[24] diminished the sense of grievance that these measures had previously evoked in some quarters. But it was also because the application of Prevent – particularly after the introduction of a statutory duty on certain public authorities to have due regard to the need to prevent people from being drawn into terrorism[25] – was becoming increasingly controversial. The intensity of this interest would have made Prevent a difficult subject to avoid, even if I had wished to do so. Accordingly, having registered my interest in my 2015 report, I stepped up my engagement with Muslim groups, gave written and oral evidence on Prevent at the invitation of two parliamentary committees,[26] wrote an op-ed for a London newspaper[27] and – after my term of office came to an end – wrote and presented a radio programme on the subject.[28] The Home Office, observing my increasing involvement in the field, began cautiously to brief me on Prevent-related matters, and allowed me to set up meetings with Prevent providers and liaison groups. I always emphasised that I was beyond the edge of my strict remit where Prevent was concerned. But it did seem to me that an independent review of Prevent, equivalent to those performed by the IRTL, could have done much both to identify any excesses and to dispel some of the hostile mythology that had grown up around the strategy.[29]

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[21] Ibid, ch 9.

[22] BBC Radio 4, *Law in Action* (November 3, 2016), interviewed by Joshua Rozenberg: <http://defendfreespeech.org.uk/david-anderson-transcript/> last accessed November 15, 2017.

[23] Terrorism Act 2000, s.44. For the contorted tale of its repeal and replacement, see D Anderson, *The Terrorism Acts in 2011* (Stationery Office 2012) 8.6-8.19. See also Ch.* (Lennon) in this collection.

[24] See Anderson, *The Terrorism Acts in 2015* (n 5) ch 7.

[25] CTSA 2015 s 26(1).

[26] They reported as follows: JCHR, *Counter-Extremism* (2016-17, HL 39, HC 105); HASC, *Radicalisation: the counter-narrative and identifying the tipping point* (2016-17, HC 135).

[27] D Anderson, 'Prevent strategy can work against radicalisation … if it is trusted', *Evening Standard* (London, 15 February 2017).

[28] 'Understanding Prevent', BBC Radio 4, 30 July 2017: <http://www.bbc.co.uk/programmes/b08yp16m> last accessed November 15, 2017.

[29] Some of the necessary research was performed and written up in J Busher and others *What the Prevent duty means for schools and colleges in England* (Aziz Foundation 2017). More remains to be done.

Another of my constant recommendations – greater transparency around Prevent – seems to have fallen on more fertile ground.[30]

## IV. SECOND TERM: ONE-OFF REVIEWS

In contrast to my first term as IRTL, when my only report outside the usual sequence had been the examination of five arrests during the Pope's visit to London in 2010,[31] my second term featured five 'one-off' reviews. A common feature of those reviews is that they were commissioned as a way out of political conflict. But the context of each was different, and a variety of different working methods were employed. I give a brief account of each of them below.

### *A. Deportation and citizenship*

Two of the one-off reviews conducted in my second term – into deportation with assurances (DWA)[32] and the deprivation of citizenship[33] – concerned powers broadly related to immigration but in other ways resembled regular reviews into the operation of counter-terrorism laws. Each was commissioned as a way of defusing political controversy over the operation of a controversial power.

#### Deportation with assurances

As early as the 1990s, the case-law of the European Court of Human Rights had brought home to policy-makers that deportations could not lawfully be effected in cases where there was a real risk that the deportee would be subjected to torture or to inhuman and degrading treatment.[34] Accordingly, in 2005 and the years following, generic assurances were negotiated with six countries – Jordan, Libya, Lebanon, Algeria, Ethiopia and Morocco – which it was hoped would be sufficiently credible to allow deportations without infringing the human rights of the deportee. The possibility of an annual review of DWA was mooted in the Coalition Government's Review of Counter-Terrorism and Security Powers, published in January 2011, no doubt with a view to promoting confidence at home and abroad in a policy which it was hoped – in the first flush of the Arab Spring – would soon be more widely applied. But no review was commissioned until November 2013, after Abu Qatada – whose case had been litigated for many years – had safely departed the UK for trial in Jordan.[35] The terms of reference (on which I was not consulted) were narrow, and were criticised, only a little unfairly, for being 'designed solely to identify means of increasing the administrative utility of the DWA policy'.[36] Though I travelled to Jordan and Algeria in 2014, and hosted an invitation-only conference on DWA with Clive Walker in London that autumn, my review was then further delayed by two major one-off reports on investigatory powers, discussed below.

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[30] See, in particular, Home Office, *Individuals referred to and supported though the Prevent programme, April 2015 to March 2016* (Statistical Bulletin 3/17, Home Office 2017).
[31] D Anderson, *Operation GIRD: Report Following Review* (Stationery Office, 2011).
[32] Anderson and Walker (n 18).
[33] D Anderson, *Citizenship removal resulting in statelessness* (Stationery Office, 2016).
[34] *Chahal v United Kingdom* (1996) 23 EHRR 413 (App No 22414/93), upheld in *Saadi v Italy* (2008) App No 37201/06.
[35] BBC News, Abu Qatada deported from UK to stand trial in Jordan, July 7, 2013.
[36] Submission of JUSTICE to the DWA review, February 2014 para 7.

By the time the report was completed in February 2017, the strict conditions imposed on DWA by the European Court of Human Rights,[37] coupled with worsening human rights conditions and difficulties of verification in several of the countries which had given assurances, meant that the practice – far from expanding, as had been envisaged when a review was first contemplated – had halted altogether. Despite the hopes expressed in the terms of reference, I had no procedural short-cuts to suggest. If the report has any enduring value, it will lie largely in Clive Walker's carefully-researched section on international and comparative law and practice.

Citizenship removal

Regular review of citizenship removals resulting in statelessness[38] is required by statute[39] (though not reserved to the IRTL), in recognition of the unusual nature of the power and the parliamentary controversy that attended its revival in 2014. The power allows the Secretary of State to deprive a person of British citizenship resulting from naturalisation, notwithstanding that the person is rendered stateless. Such an order may be granted if the Secretary of State is satisfied that deprivation is conducive to the public good because the person has 'conducted himself in a manner which is seriously prejudicial to the vital interests of the United Kingdom', and if she has reasonable grounds for believing that the person is able to become a national of another country.[40] The power is comparable to one that existed in the UK prior to April 2003,[41] but has few international parallels in its application to people other than existing dual nationals.

My statutory review covered the first year (ending in July 2015) in which the power was in force. It was not, however, exercised during the period under review. Accordingly, in my 17-page report I could do no more than note the difficulties in giving effect to the popular desire for a power of banishment, summarise the evolution of the power under review and identify some of the likely legal and practical issues concerning its future operation. The next statutory review will cover the operation of the power during the three-year period to July 2018.

### *B. TPIMS: classified report*

The most urgent report of my six years as IRTL was commissioned by the Prime Minister, Deputy Prime Minister and Home Secretary on September 11, 2014, and delivered to them six days later. Like the two reports just mentioned, it was requested for the purposes of resolving a political deadlock within the Coalition Government of 2010-15. This report was highly classified, to the point where I failed to persuade the Home Office to publish even a sensibly redacted version as an appendix to my TPIMs report of March 2015. Uniquely among my reports as IRTL, it therefore remains unpublished in any form. This is regrettable, from the point of view both of the interested public and of the IRTL, who may need to be able to demonstrate that their advice was evidence-based and politically neutral.

[37] See, in particular, *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1 (App No 8139/09).
[38] Anderson *Citizenship removal resulting in statelessness* (n 33).
[39] Immigration Act 2014 (IA 2014) s 66(3), inserting a new section 40(4B) into the British Nationality Act 1981 (BNA 1981).
[40] IA 2014 s 66, inserting a new section 40(4A) into the BNA 1981.
[41] The power is consistent with the UK's ratification of the 1961 UN Convention on the Reduction of Statelessness because of a reservation entered by the UK to Article 8 of the Convention. The Council of Europe's 1997 European Convention on Nationality, by contrast, does not provide for the retention of a pre-existing domestic power to render someone stateless, but was not ratified by the United Kingdom.

Under the control order regime in force between 2005 and 2011,[42] 23 people suspected of involvement in terrorism were 'relocated', with their families if they so chose, to towns or cities up to two or three hours' travel from their home. Relocation was described by the NGO Liberty, in language evocative of the Gulag, as 'internal exile'.[43] But the courts for the most part upheld relocations as necessary and proportionate;[44] and as I reported in 2013, 'It was prized for national security purposes as much as it was resented by families'.[45] No control order subject absconded while relocated, perhaps because they lacked reliable networks in the towns where they were living, or because they could be more easily monitored there. Absconding had been a feature of the control order regime until relocation became commonplace in 2007; and the removal of the relocation power when TPIMs replaced control orders in 2011 was followed by the high-profile absconding of two TPIM subjects, Ibrahim Magag and Mohamed Mohamed, in 2012 and 2013, respectively. These abscondings shook confidence in the system; and Labour, which had opposed the shift to TPIMs, made political capital out of them. The consequence was a reluctance to make new TPIMs. By 2014, the advocacy group CAGE had remarked that 'those who want to abscond will',[46] and the Joint Committee on Human Rights (JCHR) was reporting that TPIMs 'may be withering on the vine as a counter-terrorism tool of practical utility'.[47]

In my annual TPIMs report of March 2014, I recommended that the time had come to revisit the issue of locational constraints, but advised that relocation should only be re-introduced if the power to impose exclusion measures (restricting a TPIM subject from entering a specified area or place) was insufficient to address the problem. Unable to agree a way forward, the Prime Minister, Deputy Prime Minister and Home Secretary asked me in September to report further on whether the power to impose exclusion measures was sufficient, or whether some form of relocation power was needed, and if so what form it should take. In the days that followed I worked intensively on this issue, questioning the Home Office, MI5 and the Metropolitan Police as well as listening to officers from regional forces and familiarising myself with internal Home Office reviews into the recent abscondings. I re-read all the High Court judgments on relocation (open and closed), as well as my notes of meetings with former control order and TPIM subjects and their representatives, and was briefed on the current and anticipated threat.

My conclusion was that while more aggressive use of exclusion zones could increase their efficacy, exclusion zones in the absence of relocation could do nothing to prevent a subject from meeting harmful associates on his home patch for the purposes of terrorist plotting, planning to abscond or simply maintaining links and networks. A power to relocate subjects away from their home areas should be re-introduced, subject to statutory limitations: it would be of real practical assistance to the police and MI5 in distancing subjects from their associates and reducing the risk of absconding. It would also facilitate monitoring, save money and could help restore faith in a TPIM regime that had become unused and unusable. My recommendation that relocation be restored was accompanied by a list of other recommendations, some of which were no doubt more palatable to the Liberal

[42] Prevention of Terrorism Act 2005.
[43] LIBERTY, *From 'War' to Law: LIBERTY's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010* (LIBERTY, 2010) pg.12.
[44] See, for example, *CD v SSHD* [2011] EWHC 1273 (Admin) (Simon J); *BM v SSHD* [2011] EWHC 1969 (Admin) (Calvert-Smith J).

[45] D Anderson, *TPIMs in 2012* (Stationery Office, 2013) 11.30.
[46] JCHR, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (2013-14, HL 113, HC 1014) para 56.
[47] Ibid 'Conclusions', para 15.

Democrat elements of the Coalition and to the JCHR. These included the introduction of a balance of probabilities test for involvement in terrorism-related activity (which was adopted, though not in the end extended to the courts, as I had suggested); a narrowing of the definition of 'terrorism-related activity' under TPIMA 2011 (whose wording I found myself negotiating, memorably at least for me, at a private meeting with the Cabinet Secretary);[48] the introduction of a power to require attendance at deradicalisation interviews during the currency of a TPIM; and the establishment of a judge-led working group to consider grievances raised by special advocates in the context of closed material proceedings. Until *A Question of Trust* (below), this was probably the moment at which my influence as IRTL was at its strongest. The Government seemed to think it important to be able to say that they had accepted each of my 10 recommendations. Though one or two were implemented only in part, they formed the basis of the 'Mk II TPIMs' that have been in use since 2015.[49]

In contrast with previous years, when the issue of relocation had sharply divided Government and Opposition,[50] the subject proved to be largely uncontroversial in Parliament. Even the JCHR, which had previously been consistently opposed to relocation, reluctantly accepted my judgement that the changing nature of the threat justified the reintroduction of the power, while looking to the Government to mitigate any resultant alienation or resentment.[51] The strong and direct influence that the IRTL was able to exert on the development of TPIMs during this period was partly explicable by the existence of a coalition government, and the fact that its component parts had long-standing and principled divisions that I was effectively asked to arbitrate. But such divisions could arise also within single-party governments. In such circumstances, there is no reason why further specific reviews should not be commissioned from the IRTL in order to ensure that policy-making is based on the best possible evidence.

### *C. Investigatory powers*

#### A Question of Trust

I share with Clive Walker a love of Scottish islands: so it was appropriate that I was asked to take on my most ambitious and time-consuming review, *A Question of Trust*,[52] while on a sea kayaking holiday in Shetland in July 2014. There was no mobile signal within several miles of our base: but my phone buzzed into life while driving back from a midnight trip to watch storm petrels roost in an Iron Age broch on the island of Mousa. Messages had been arriving throughout the day, beseeching me with increasing desperation to telephone the Home Secretary. When eventually Theresa May was put through to the land line in the remote bunk house where I was staying, it was to say that she hoped to announce to Parliament in a few minutes' time that I had agreed to perform a review of the law on investigatory powers. I accepted, with little notion of what this would involve. My first inkling of the size of the task came a few hours later, when I responded to a call from the Shadow Home Secretary, Yvette Cooper. She had pressed for my appointment, she said, wished me well with the work and hoped at the end of it to see 'a book'.[53]

[48] The solution we found is in CTSA 2015, s 20(2).

[49] For details of my recommendations and their implementation, including by the CTSA 2015, see D Anderson, *TPIMs in 2014* (Stationery Office, 2015) chs 3 and 4.

[50] Eg in the opposition day debate following the abscond of Mohamed Mohamed: HC Deb, 21 January 2014, vol 574, cols 623-674.

[51] JCHR, *Legislative Scrutiny: Counter-Terrorism and Security Bill* (2014-15, HL 86, HC859) 4.10.

[52] D Anderson, *A Question of Trust: Report of the Investigatory Powers Review* (Stationery Office, 2015).

[53] As she did: even without Annexes, *A Question of Trust* stretched to 306 pages.

This commission – like each of the other one-off reviews of my second term – had its genesis in political dispute. In April 2014, the Court of Justice of the EU had declared invalid the EU's Data Retention Directive, and with it the basis on which communications service providers (CSPs) in the UK could be required to retain the communications data relating to their customers' use of their services.[54] Police, and some other public authorities, relied heavily on data of this kind for the investigation of crime and of missing persons. As CSPs began to question the continued legal basis for requiring them to retain communications data, the Government determined that swift action was necessary to provide a legal basis in domestic statute. The consequence was the Data Retention and Investigatory Powers Act 2014 (DRIPA 2014), presented to Parliament as a matter of urgency and required to pass all its parliamentary stages within a matter of days.

In order to achieve this objective, the Home Secretary needed cooperation both from her Liberal Democrat coalition partners and from the Labour opposition. This gave those parties a degree of leverage, particularly given that the 2010 Parliament had already seen one botched attempt to legislate on communications data.[55] It was accordingly agreed on a cross-party basis that DRIPA 2014 would be limited in duration, sunsetting at the end of 2016, and that I would be commissioned to complete a review, by the start of May 2015, advising on the nature of the permanent replacement law.[56] Two overlapping reviews had already been commissioned: from the Intelligence and Security Committee of Parliament (ISC),[57] and from an ad hoc committee set up by the Deputy Prime Minister, Nick Clegg, under the chairmanship of Michael Clarke, Director of the Royal United Services Institute (RUSI).[58] I reported after the first and before the second, delivering *A Question of Trust* to the Cabinet Secretary on the day before the General Election, 6 May 2015. I resisted the temptation to take longer, in case it should be suggested that I had tailored my conclusions to whichever new government was elected.

My statutory terms of reference were as stunningly broad as the DWA terms of reference had been narrow. They required me to 'review the operation and regulation of investigatory powers'[59] and to consider, in particular:

(a) current and future threats to the United Kingdom,

(b) the capabilities needed to combat those threats,

(c) safeguards to protect privacy,

(d) the challenges of changing technologies,

(e) issues relating to transparency and oversight, and

(f) the effectiveness of existing legislation (including its proportionality) and the case for new or amending legislation.[60]

[54] *Digital Rights Ireland* Case C-293/12, ECLI:EU:C:2014:238.
[55] The Communications Data Bill 2012, which lost Liberal Democrat support and was withdrawn after a damning pre-legislative report from a parliamentary committee.
[56] My appointment was required by DRIPA 2014, s 7.
[57] ISC, *Privacy and Security: a modern and transparent legal framework* (2014-15, HC 1075).
[58] RUSI, *A Democratic Licence to Operate: Report of the Independent Surveillance Review* (RUSI 2015).
[59] DRIPA 2014 s 7(1).
[60] DRIPA 2014 s 7(2).

Wise heads in the Home Office counselled me to take a narrow view of my task, bearing in mind that parliamentary time was unlikely to be available for a substantial replacement Bill. But confronted with such a broad canvas, I determined not just to fill one corner of it but to attempt, however inadequately, to cover it all.

My report described the existing law as 'incomprehensible to all but a tiny band of initiates',[61] and advised that

> 'A comprehensive and comprehensible new law should be drafted from scratch, replacing the multitude of current powers and providing for clear limits and safeguards on any intrusive power that it may be necessary for public authorities to use.'[62]

Its central recommendations were vastly increased transparency, judicial authorisation of warrants, and the creation of a powerful and well-equipped oversight authority to replace the previous piecemeal arrangements. It did not recommend the creation of any new powers; but nor did it recommend the withdrawal of capabilities that were already used.

*A Question of Trust* found favour in policing and intelligence circles but also in the press, including The Guardian which had been a prime mover since 2013 in publicising Edward Snowden's revelations *of 'mass surveillance'* by GCHQ and others.[63] It was the subject of immediate oral statements followed by full debates in both Houses of Parliament.[64] A few days later, the RUSI report was published.[65] To a large extent, RUSI echoed my recommendations: the breadth of expertise on the RUSI panel, ranging from former intelligence agency chiefs to a campaigning journalist, thus gave them added legitimacy. The overwhelming majority of the 125 recommendations in *A Question of Trust* (one of them conveyed privately in a letter to the Prime Minister) were subsequently given effect in the draft Bill, itself the subject of exhaustive parliamentary scrutiny, and then in the Bill that became the Investigatory Powers Act 2016 (IPA 2016).[66] IPA 2016 turned out to be the most substantial piece of legislation to be enacted by the 2015-17 Parliament.

This is not the place to go into further detail of the report or its subject-matter. Two reflections may however be of broader relevance to reviews of this kind. First, much of the strength of the report came from the fact that the small, part-time team that I assembled to help me produce it consisted not of civil servants but of people who were both highly diverse and themselves independent. Among them were a retired securocrat, a human rights barrister in my own Chambers and a technically-inclined solicitor who approached me out of the blue when she read of my appointment. The often spirited debates within the team helped both to inspire my proposals and to road-test them. Allowing selected chapters to be read before publication by trusted and knowledgeable figures from the NGO

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[61] Anderson '*A Question of Trust*' (n 52) para.35.
[62] Ibid, para.10.
[63] M Kettle, 'Security v Privacy: Anderson offers the balance we've been seeking since 9/11' *The Guardian* (June 11, 2015).
[64] HC Deb 25 June 2015, vol 596, cols 1081-1142; HL Deb 8 July 2015, vol 764, cols 190-236.
[65] RUSI (n 58).
[66] The Bill differed in some respects from my proposals. Though Government accepted the principle that warrants should not enter into force without the approval of a senior judge, they opted (following RUSI) for a '*double lock*' under which authorisation by the Secretary of State continued to be required. A new power to require the retention of '*internet connection records*' was introduced, after the inadequate evidence presented to me was upgraded and produced to parliamentary committees. It may be questioned whether '*appropriately rigorous and rights-compliant procedures*' were in all cases introduced to govern access to communications data derived from bulk warrants, as I had recommended.

world and the Bar further improved their quality. That diversity of input was extended by trips to Brussels, Berlin, Ottawa, Silicon Valley and Washington DC, and by the Foreign Office, which organised a Wilton Park conference around the themes of my review. People from UK government and from global industry, academe and NGOs were marooned for a couple of days in a grand house in deep countryside, where there was little to do except talk to each other. It was here, as an ex-GCHQ engineer and a prominent privacy advocate bonded over dinner, that I realised for the first time that polarised as the privacy/security debate might seem, there was common ground on which people of good sense should be able to gather.

Secondly, when it came to breaking down that polarisation of opinion, transparency proved a remarkably powerful solvent. The post-Snowden environment was characterised by mutual mistrust between the privacy and security lobbies, often expressed in emotional accusations: of deceit, snooping and scorn for democracy on one side, lack of appreciation for the security forces on the other. At the root of this discord was an absence of reliable public knowledge about the true nature of intrusive capabilities that were exercised under vague and dated laws. The extensive disclosure that accompanied the draft Bill brought a measure of enlightenment to the debate. Those well-worn epithets, Orwellian and Kafkaesque, are still wheeled out from time to time, but serious commentators have moved on to serious questions: where is the operational case for this power; why should there not be further safeguards on that one. Continued and enhanced transparency, I am convinced, is the way to ensure that legislatures and courts across the world make sensible decisions in this highly contested area.

Bulk Powers Review

A sequel to *A Question of Trust* was commissioned in May 2016, as the Investigatory Powers Bill was nearing report stage in the House of Commons.[67] Provoked once again by the Labour opposition, the Government asked me to spend three months examining the operational case for the 'bulk powers' reserved to MI5, MI6 and GCHQ and contained in Parts 6 and 7 of the Investigatory Powers Bill. These included bulk interception, the newly-minted power of bulk equipment interference, the use of bulk communications data and the power to retain bulk personal datasets. I was asked to consider whether these capabilities were useful and whether they were necessary, in the sense that their results could not have been achieved through alternative investigative methods. But I was not asked to rule whether they were proportionate, and would have resisted if I had been. That judgement, as it seemed to me, was for Parliament. In such a highly contested and political field, the reputation of my office was best served by sticking to conclusions which could be demonstrated to follow from evidence, leaving broader value judgements to others.

Once again I assembled a diverse team, though my flexibility on this occasion was limited by the fact that all its members needed already to have developed vetting clearance. They comprised an independent security consultant with detailed technical knowledge of GCHQ's secret systems; a former Director of Intelligence at the National Crime Agency who was used to evaluating the utility of different sorts of lead; and a barrister, Cathryn McGahey QC, who as a special advocate had particular expertise in interrogating witnesses from the intelligence agencies.

Aware of the intense world-wide controversy that attended these capabilities, we determined to assess their utility as rigorously and by as many different routes as possible. I started by writing personally to the three agency chiefs, emphasising to them the need for full disclosure and

[67] D Anderson, *Report of the Bulk Powers Review* (Cm 9326, 2016).

cooperation if they were to discharge their burden of proving utility in the time available, and by agreeing with the agencies a framework for evaluating outcomes. The core of the team's work, led by Cathryn McGahey, was the questioning of 85 intelligence officials who presented to us the 60 case studies which are set out (in summary form) in the report, and reading the contemporaneous intelligence reports that verified what we were being told. We were shown electronic records, questioned analysts on their decision-making processes, and examined how often the powers were used, the incidence of negative outcomes and the utility of alternative approaches. In addition we studied documents, prepared for internal consideration at Board level, in which the utility of the powers under review had been considered, both in absolute terms and relative to other priorities. We reviewed past open and closed assessments of the powers by those responsible for their oversight in the UK, together with the assessments of similar powers conducted in the US by the PCLOB and National Academy of Sciences. We put to the agencies points that came out of the Snowden documents and that had been raised with us by NGOs and technical experts who had responded to our consultation or whom we had sought out.

The team agreed that there was a proven operational case for three of the bulk powers, and a distinct (though not yet proven) operational case for bulk equipment interference. We found that where alternative methods exist, they are often less effective, more dangerous, more resource-intensive, more intrusive or slower. Those conclusions were not challenged in Parliament, and the Bill proceeded accordingly. The report made a single recommendation, which was faithfully incorporated into IPA 2016: the creation of a Technology Advisory Panel of independent academics and industry experts to advise on the impact of changing technology, and on how the agencies could reduce the privacy footprint of their activities. This Panel, now established, will give vital technical support to the new and enlarged Investigatory Powers Commissioner's Office.

## V. POSTSCRIPT: INTELLIGENCE HANDLING

Four months after leaving post as IRTL, I was asked to assess and assure the quality of the internal reviews conducted by MI5 and Counter-Terrorism Policing into their handling of intelligence on the perpetrators prior to the four completed terrorist attacks of spring and summer 2017 (Westminster, Manchester, London Bridge and Finsbury Park). Intensive work by large teams at both MI5 and the police enabled nine highly classified reviews to be completed by the start of November, covering 1,150 pages. The reviews constituted a minutely detailed account of the intelligence picture prior to each of the attacks, together with 126 recommendations for operational improvement, some of them rather radical.

My role was not to lead the reviews, but rather to act, in the words of the Foreword, as 'a gadfly on the hide of the beast'.[68] I sought to influence the reviews by embedding myself for long periods of time within Thames House (the London home of MI5) and New Scotland Yard (from where Counter-Terrorism Policing is led), attending internal meetings, requesting internal documents, and generally making a nuisance of myself. As I wrote in my report, which was accompanied by a highly classified letter for the attention of the prime minister and others:

> 'I formed a positive impression of the integrity of the review teams both at MI5 and CT Policing, and found most of the work with which I was presented, even at an early stage

[68] D Anderson, *Attacks in London and Manchester, March-June 2017: Independent Assessment of MI5 and Police Internal Reviews* (December 2017) 'Foreword'.

> of the process, to be of a good standard. But given the request for assurance in my letter of instruction, it was necessary to test the product as rigorously as I could, and where possible to suggest improvements.
>
> Accordingly, on what must have been (in total) many hundreds of occasions I made specific comments on drafts, asked for proof of assertions, requested documents and briefings, identified issues to be confronted, asked for more thorough accounts, suggested the restructuring of reports, challenged assertions that errors were inconsequential, advised that sensitive material was relevant, discouraged complacency and generally sought to promote the value of self-criticism. On a limited number of issues I also made the case, sometimes forcefully, for the consideration of specific operational improvements or for further-reaching recommendations than previous drafts had been prepared to contemplate.
>
> Some of my suggestions or comments precipitated vigorous discussions, some were more appealing to MI5 than to the police or vice versa, and one or two proved controversial. But all were received with courtesy, many were taken up with enthusiasm, and every one was given effect wholly or in substantial part.'[69]

Would I recommend this kind of "independent assurance" as a model to others? Not in all circumstances. When large institutions are commanded to perform internal reviews, it is always possible that they will react by going through the motions, or digging defensive redoubts. Even when a window is opened to change, it can close again before long. An outsider who is there to comment rather than to direct an investigation risks being dismissed as a mere irritant by those whose conduct is being examined. Furthermore, association with a process managed by others risks damage to the reputation of the independent person—a danger of which I was acutely conscious.

But on this occasion, it seemed to me at least to work well. There were two reasons for this. First, the shock of successive multiple-casualty attacks had rendered the security services, for a time at least, genuinely open to the possibility of radical change. This enabled agreement to major reforms in relation to the setting of data-driven tripwires for former subjects of interest, the joint working arrangements of MI5 and CT Policing, the release of more knowledge derived from intelligence to local police and agencies, and the removal of outdated distinctions in the way that different types of terrorist threat are assessed and responded to. These and other changes are summarised, to the extent that it was open to me to do so, in my unclassified report.

Second, the fact that these recommendations were generated by MI5 and CT Policing caused both to be fully invested in implementing them—something that cannot always be said of external recommendations, which may be perceived within the organisations concerned as misguided or founded on an incomplete understanding of their operations. As an extra assurance, I was commissioned by the Home Secretary, after the publication of my report, to oversee and report upon its implementation.[70]

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[69] *Ibid.*, 4.22-4.24.

[70] Letter from the Home Office to the author, January 30, 2018: available at https://www.daqc.co.uk/wp-content/uploads/sites/22/2018/01/wrote-to-me-today.pdf (last accessed: March 6, 2018).

## VI. FULL TIME

The complex channels of influence that I described in my 2014 article[71] were still in place during my second term of office. Recommendations in the IRTL's regular or self-commissioned reports generally respond to concerns identified by the IRTL, not by government. This means that while some may be implemented directly, others find their way on to the Home Office agenda only once they have been picked up by lawyers or media and passed through force multipliers in the shape of courts or parliamentary committees. The evolution of the Schedule 7 port power between 2011 and 2017 provides a good example of change coming through a variety of such routes. The equation is different where the IRTL publishes one-off reports on topics specified by the Home Office or Prime Minister. This was not a feature of my first term, but happened five times between 2014 and 2017. In such cases, recommendations that are politically feasible should normally stand a good chance of being followed.

The timing is not always right. If by the time of the report the power under review has never been used, or has fallen into disuse, the IRTL may be able to do little more than educate the interested public and fire a warning shot: that was the case with my reviews of citizenship removal and DWA. Where however the invitation is effectively to arbitrate a difference between powerful people, the IRTL's influence is at its strongest and most direct. In that category were my reports on relocation under TPIMs (disagreement between parties to a coalition government) and the utility of bulk powers (informing opposition thinking on a major Bill).

If my spell as IRTL is remembered for anything in ten years' time, it will be for *A Question of Trust*. To be commissioned with cross-party agreement to plan a major new law in a controversial area is a rare and enviable task. But the decision to transform *A Question of Trust* into a Bill was no foregone conclusion. The proposal for judicial approval of warrants, in particular, could easily have rendered it unacceptable to the political figures who had previously been in sole charge of this vital function. Accordingly, the successful landing of *A Question of Trust* depended not only on the report itself but also on the lights that guided it on to the legislative runway: favourable media reception, a welcome by parliamentarians and judges, endorsement by stakeholders, approval by the broad-based RUSI panel and, of course, political calculation. So influence is a complex phenomenon. It is by a combination of the routes described – together with others, no doubt, yet to be travelled – that the IRTL may hope to contribute to the democratic control of powers used against terrorism.

[71] Anderson 'The Independent Review of Terrorism Laws' (n 2)