Written evidence submitted by Jonathan Hall KC, Independent Reviewer of Terrorism Legislation

Thank you for your letter of 21 December 2023, asking for my views on various topics relevant to the Home Affairs Committee's ongoing inquiry into the Policing of Protests.

I set out the questions posed in your letter, and my responses immediately below.

In your recently published note on terrorism and protests, in which you discussed whether reform is required in light of the pro-Palestine marches, you advised the Government against changes to terrorism laws, including those around glorifying terrorism. Can you expand on why you gave that advice, and what evidence you have based your advice on.

1. I published my Report ("Report on Terrorism Legislation and Protests", 23 November 2023) to inform public debate on the pro-Palestine marches that were held in London shortly after the Hamas attacks of 7 October 2023.

2. The Committee will recall that at one march on 21 October 2023, an individual was seen to lead chants of 'jihad', after which a statement was issued by the Metropolitan Police (dated 21 October 2023) stating that no offences had been committed. At other marches individuals were seen wearing articles or displaying banners associated with Hamas and their terrorist attacks on 7 October 2023. There were some displays of anti-Semitism by marchers, together with a general use of the slogan "From the River to the Sea", whose meaning and implication (whether it is a general call for Palestinian liberation, or a desire to see Israel destroyed) remains contested.

3. A tension was apparent between those who argued that the law was sufficient, but was not properly enforced, and those who suggested that police were constrained by inadequate laws which needed changing. At this time, I was often being asked to comment publicly on this tension. I thought the public (and Parliament, should it be asked to consider new legislation) would be best served by a detailed written report on the terrorism aspect of the law.

4. The report is a legal analysis not an evidential report. It draws on legal precedents (such as decisions of the Supreme Court, House of Lords and Court of Appeal on cases concerning domestic terrorism legislation) to understand the current application of the law. It gives historical and hypothetical examples to test how amended terrorism legislation might operate, and whether it would give rise to useful or, conversely, undesirable consequences.

What impact would any changes to terrorism legislation, if implemented, have on rights to free expression and free assembly?

5. In the absence of concrete proposals for change, my Report identified the most relevant terrorism offences under the Terrorism Act 2000 and the Terrorism Act 2006, considered how the offences might be changed in a way that would extend criminal liability, and then set out the likely consequences including the consequences for rights to free expression and free assembly, if those changes were made.

6. As a general point, terrorism offences apply more widely than at public protests. Sections 11 (professing membership), 12 (inviting support) and 12(1A) (supportive opinions) Terrorism Act 2000 can all be committed in public or in private. It is therefore necessary to consider the implications for free expression and free assembly in private as well as public settings.

7. Section 1 Terrorism Act (encouragement) can only be committed in relation to "members of the public", but public has an extended meaning[1] so that it applies in a wide range of circumstances, including to many online communications.

8. Section 13 Terrorism Act 2000 (clothing or articles) can only be committed in public, and is the terrorism offence most usually connected with public processions, but it is not limited to public processions. It applies to someone walking on their own on the street and, by a recent amendment[2], to online displays.

9. The short point is that any expansion of these offences would restrict current freedoms of expression and assembly.

10. In more detail:

- If section 11 (professing membership of a proscribed organisation) applied whether the person professing membership was intended to be taken seriously, it would penalise satire, irony and mere stupidity. In addition, members of the public talking (let alone, demonstrating) about current events would need to monitor their words carefully so that they were not seen (or accused, in good or bad faith) to be aligned with a proscribed organisation – even though there was no plausible basis to think that they were in fact members of such a group.

- If sections 12(1) or (1A) (inviting support for, or expressive supportive views of, a proscribed organisation) was extended so that an offence was committed whether or not there was a risk that someone might be induced to support the proscribed organisation, then the impacts would be severe. It would be practically impossible to express the view that a group should no longer be proscribed (even though the Terrorism Act 2000 enables members of the public to apply for description[3]). It would prevent neutral or justifiable views being expressed in public or in private (for example, "Hamas has done the right thing to agree to lay down its arms!"). Adapting the sections to apply to acts of individual terrorists, or terrorist acts, would be impossible given the

[1] Section 20(3) Terrorism Act 2006.
[2] Section 13(1A) Terrorism Act 2000 inserted by the Counter-Terrorism and Border Security Act 2019.
[3] Section 4 Terrorism Act 2000.

width of the terrorism definition under UK law, without applying equally to Nelson Mandela and the Gunpowder Plot.

- Section 13 Terrorism Act 2000 (wearing clothing or displaying articles, inviting reasonable suspicion that a supporter of a proscribed organisation) is already an offence of strict liability, but it does not apply to mere speech. If it was extended to supportive speech, the same objections considered in relation to sections 12(1) and 12(1A) above would apply.

- If section 1 Terrorism Act 2006 (encouragement of terrorism) applied to individuals who encouraged or glorified terrorism in circumstances where there was no reason to believe that anyone would end up being encouraged, it would again penalise satire (such as Christopher Morris's 2010 film, 'Four Lions'), irony and mere stupidity; and it would capture individuals who glorified historic terrorists such as William Wallace ('Braveheart'), and their actions.

11. Moreover, to extend liability would result, in many cases, in terrorism convictions of individuals who were by no stretch of the imagination terrorists (such as the 'Walter Mitty' character who claimed to be a member of Hamas in a famous case in the House of Lords[4]); and in circumstances where there was no identifiable terrorist risk (for example, a person who makes a supportive statement concerning a proscribed organisation even though no one is remotely likely to end up supporting the proscribed organisation). It would be difficult to justify any reduction in freedom of expression or freedom of assembly in these circumstances.

12. Finally, it would be undesirable in my view to broaden terrorism liability in a protest situation. Firstly, it would be difficult to define a protest situation (for example, if laws only applied to public processions under the Public Order Act 1986, they would not apply to static protests). Secondly, it would result in terrorism prosecutions where (for the reasons set out above) there was no identifiable terrorist risk.

In Dame Sara Khan and Sir Mark Rowley's 2021 report on hateful extremism, it was argued that there was a "gaping chasm" in the law allowing "extremists to operate with impunity". What assessment have you made of their conclusions? Should the law be tightened in a way, as recommended, that properly distinguishes between hateful extremism and legitimate exercise of freedom of expression and belief?

13. The premises of Dame Sara and Sir Mark's 2021 report are, firstly, that it is possible to identify a harm which they refer to as "hateful extremism", and secondly, that it is necessary to legislate against it.

14. They have correctly identified many instances of individuals using vicious, hostile, and malicious words and behaviour, online and offline, often with a view to undermining cherished freedoms and institutions. Some of this is contrary to existing terrorism and other legislation, but in some cases is not.

15. However, like others, they have not found it easy to define extreme conduct that merits special treatment under the law, at least when it comes to the sharper edges of legal

[4] Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002) [2004] UKHL 43.

enforcement through the creation of criminal offences, banning orders, and regulatory powers.

16. The Report's working definition of hateful extremism (page 8) uses imprecise language that could not possibly form the basis of a legal definition ("directed at", "out-group", "perceived as a threat", "in-group", "climate", "conducive", "erode"), because individuals would not know what the boundaries of acceptable speech or behaviour might be and it would imperil legitimate activities and speech.

17. By way of example, an Iranian political exile who supports the restoration of the Shah might protest outside the Iranian embassy and "direct" hostility at the current regime. He perceives supporters of the current regime (the "out-group") as a threat, and also intends to advance a political or religious ideology. He knows that pro-Iranian individuals are likely to attack him. His activity would appear to qualify under the definition because he intends, or deliberately takes the risk, that his activity will create a "climate conducive to…violence".

18. The definition also refers to conduct that attempts to erode or destroy fundamental rights and freedoms "as protected under Article 17 of Schedule 1 to the Human Rights Act 1998". In a vibrant democracy it must be permissible to argue in favour or against the precise content of human rights guarantees. The definition might inadvertently include legitimate political campaigning as extremism.

19. To be fair, the Report states (page 8) that the authors' definition is not a legal definition but a working definition. But even as a working definition it is not a basis for identifying legal measures that might be taken against "hateful extremists".

20. One of the difficulties, unless particular words or activities are specifically identified as prohibited (such as holocaust-denial or the works of Sayyid Qutb or religious text-burning[5]), is to formulate a viewpoint neutral definition that is nonetheless meaningful. In his book on extremism[6], the philosopher Professor Quassim Cassam identifies three useful modes for analysing extremism: methods extremism (such as the use of violence), mindset extremism (such as hatefulness), and ideological extremism (taking beliefs beyond the mainstream). However, none of this persuasive analysis provides the basis for a definition.

21. For my money, it is difficult to improve on my predecessor Lord Anderson KC's consideration in his lecture "Extremism and the Law"[7]. He concludes that just because extremism is a word does not mean it is a useful legal concept.

22. Next, although Dame Sara and Sir Mark's Report calls for a response to "hateful extremism" it does not go into full details of what the legal framework for this response should look like. Indeed, its first recommendation is that the government should commission a legal and operational framework. Unless a report sets out concrete proposals for the appropriate legal framework, it is very difficult to judge its practical utility and acceptability judged against rights and freedoms. As well as meeting the

[5] As, recently, in Denmark.
[6] Extremism: A Philosophical Analysis' (Routledge, 2021)
[7] Treasurer's Lecture, 18.3.19.

definitional challenge, any legal framework would need to demonstrate how, for example, civil banning measures would not simply end up criminalising legitimate speech by the backdoor.

23. The Report's second recommendation is to extend the stirring up offences under the Public Order Act 1986 to include the protected characteristic of sex (this does not seem relevant to the current topic) and improve enforcement generally. I refer below to one respect in which the 1986 Act appears to be underused.

24. Its third recommendation is to elevate hateful extremism to be a priority threat alongside terrorism and online child exploitation; and to implement the most robust proposals in the Online Harm White Paper. The latter recommendation is not relevant here (although I agree with much of it and will be responding in detail to OFCOM's current consultation on the implementation of the Online Safety Act 2023).

25. So far as prioritisation is concerned, in practice the report suggests that glorification, encouragement or possession of extremist content should be made illegal, in the same way that all child sexual offences are currently illegal.

26. The government has previously accepted my recommendation that it would be counter-productive to make possession of any terrorist propaganda (such as jihadi attacks) into a *terrorism* offence[8].

27. Given the volume of material that might potentially qualify as "extremist content", some of which is possessed and shared for its news value, some for reasons of sick or bizarre fascination with violence which has nothing to do with extremism, any offence would spread the net of criminal liability unacceptably wide. The fact that very significant safeguards would be required (so that, for example, it would be possible to read *Mein Kampf* and *Das Kapital* without committing an offence) illustrates the difference between "extremist content" (left undefined in the Report) and child abuse imagery. Other than for law enforcement purposes, it is never lawful to possess the latter type of material.

28. Finally, under 'Other recommendations' the Report invites the government to overhaul its 2015 Counter-Extremism Strategy and points to the need to respond sensitively in different cases. This does not seem to be relevant to the current topic.

The Committee would also welcome any thoughts you have on the impact of the protests on communities in the U.K, [and] the policing operation for these demonstrations.

29. I want to focus my response on the impact of the pro-Palestine protests on Jews in the UK. In doing so, I will comment with some diffidence on the application of the Public Order Act 1986. Although this is not terrorism legislation, I think I am justified in doing so because if public order legislation is deemed insufficient to deal with a perceived threat, then pressure may be put on terrorism legislation on the basis that "something must be done". As the Committee is aware, for the reasons given above and in my Report I think it would be undesirable to extend terrorism legislation because of the protests to date.

[8] Terrorism Acts in 2019 at 7.61.

30. As to impact on Jews in the UK, I refer to the presence of chants and banners that either were, or could reasonably be perceived to be directed against variously:

    - Israel as a political entity and its response to the 7th of October 2023 terrorist atrocities, or against its treatment of Gazans or Palestinians generally.
    - Israel as a territorial entity and its continued existence.
    - "Zionists".
    - (In a few cases expressly) "Yahudi" (Jews).

31. As to the word "Zionists", it can be a direct code-word for "Jews"[9]. More plausibly, as used in the pro-Palestine marches, it refers to those who support Israel's territorial extent. This could mean various things: for example, those who support Israel having any existence at all in the Middle East, or more narrowly those who support Israel's post-1967 borders, or simply those who support an Israel in which Palestinians do not have their own state. In all cases it would appear refer to those who support Israel by living there as citizens (other, perhaps, than the minority of Jews living in Israel who refuse to recognise the state of Israel on religious grounds).

32. However, I suggest that from the perspective of Jews in the UK, it is perceived as a reference to those who support Israel's very right to exist for two reasons.

33. Firstly, because that is how Hamas uses it[10].

34. Secondly, because Jews are highly likely to be conscious that Zionism is the nationalist project (championed by Theodore Herzl in the 19th Century) which ultimately led to the foundation of the state of Israel shortly after the end of the Second World War.

35. The vast majority of British Jews support Israel's right to exist and for them it plays an important or central part in their identity, even though many disagree with Israel's policies[11]. It follows that the word "Zionists" can be perceived by Jews as applying directly to them.

36. In these circumstances it is unsurprising that many Jews in the UK have referred to themselves as feeling unsafe or unwelcome on the streets or excluded, during pro-Palestine marches.

37. Turning to public order, the offences in Part 1 of the Public Order Act 1986 are concerned with the use or threat of actual violence (sections 1 to 3) or the use of threatening or abusive words which in summary causes fear of or provoke violence (section 4), or causes harassment, alarm or distress (sections 4A, 5), to a person who is present at the scene.

38. There are two observations to make about these offences.

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[9] As in Hamas's revised Charter: see Hoffman, B., 'Understanding Hamas's Genocidal Ideology' (Atlantic, 10.10.23). Bruce Hoffman is the United States' leading terrorism scholar.
[10] See for example, reference to "Zionist project", Hoffman.B, supra.
[11] Miller, S., M., Harris, M., Shindler, C., 'The Attitudes of British Jews Towards Israel' (Department of Sociology, School of Arts and Social Sciences, City University, London, 12 November 2015).

39. Firstly, care needs to be taken about the word "unsafe" when considering whether the 1986 Act is engaged in relation to threats or provocation of violence. Sometimes (for example during the transgender/ gender critical disputes) it appears to have been used metaphorically, where a person's physical safety is not in fact threatened. The true meaning appears to be "very uncomfortable or unhappy" because of strong disagreement with the point being asserted. If the Public Order Act 1986 was used to prevent all expressions that others strongly disagreed with it would profoundly damage freedom of expression and assembly.

40. On the other hand, deliberately going up to a Jew and shouting "Zionist" or doing so in a Jewish area, may well amount to the offence of intentional harassment (section 4A). Indeed, deliberately directing the phrase "Zionists" against Jews is strong evidence that "Zionists" is a hostile synonym for Jews.

41. But, secondly and importantly, all the principal offences depend upon the physical presence of individuals who may be provoked to violence, or conversely put in fear or harassed or distressed.

42. One can see how a sense of unfairness could be engendered here. It could be said that because Jews in the UK are likely to avoid areas where pro-Palestine marches are taking place, and are in any event unlikely to be provoked to violence, marchers can get away with conduct which – if Jews were more present, or more violent – would lead to arrests. But protestors might counter that Jews are not unsafe at marches, even if they disagree with them, and argue that the proposition that Jews are unable to go safely to the centre of cities during pro-Palestine marches has no basis in evidence. So far as objective safety is concerned, I think this is a reasonable point. The position might be different if evidence was available of routine targeting of visibly Jewish people (for example, wearing head-coverings or kippot) who did happen to be present where pro-Palestine marches were taking place.

43. Turning to policing of public demonstrations, this has been memorably described as the "brain surgery of policing"[12]. I am not qualified to comment on operational decisions that have been made, but I offer the following views on the application of public order legislation.

44. One of the difficult legal issues concerns how the impact of marches should be analysed, for example when considering in principle whether marches should be banned or subject to conditions under Part 2 of Public Order Act 1986. I have already referred to the difficulty of identifying impact by reference to subjective feelings of safety. The type of impact at issue is different from the deliberate use of obstruction as a protest tactic, which has led to some complexity in the courts[13] and recently the Public Order Act 2023.

45. A yet further difficulty with impact is cumulativeness. The government has recently amended some aspects of the Public Order Act 1986 relating to cumulativeness

[12] By Sir Tom Winsor, former HM Chief Inspector of Constabulary.
[13] Following Ziegler [2021] UKSC 2021 as considered in the Abortion Services Case [2022] UKSC 32.

(although the amending regulations are subject to legal challenge[14]). It could be said, with force, that the impact on Jews in the UK of repeated pro-Palestine marches with slogans concerning "Zionists" and "From the River to the Sea" is greater than the impact of an individual pro-Palestine march.

46. However, *on the assumption* that Jews are not in practice prevented from coming safely to the centre of cities, cumulative unhappiness is not a secure basis for limiting free expression. Everyone can think of some causes of sufficient importance that they might want to demonstrate every single day. There may or may not be other more concrete reasons for limiting repeated public protest[15] but subjective feelings that protesters are fundamentally hostile to British Jews is not, on balance, one of them.

47. I am fortified in this view because of measures available under Part 3 of the Public Order Act 1986 which deals with racial hatred. The purpose of prohibiting racial hatred is to prevent individuals being targeted because of their membership of a particular group. If a person uses threatening, abusive or insulting words (including written material) or behaviour which is likely to stir up racial hatred, they commit an offence[16]. No member of the targeted group needs to be present.

48. It is important to bear in mind two relevant aspects of "racial hatred", as defined by section 17. Firstly, it includes hatred against a group of persons defined by reference to race. Calls for the eradication or punishment of "Zionists" could be threatening, abusive or insulting and could stir up hatred against Jews.

49. But even if abuse of "Zionists" does not amount to stirring up hatred against Jews generally, racial hatred extends to hatred against a group of persons defined by reference to "nationality (including citizenship)". It is not lawful to stir up hatred against Israeli citizens. This may be uncomfortable for those who believe that Israel is illegitimate, but it is the law.

50. In conclusion, calls for eradication or punishment of "Zionists" could well amount to the stirring up of hatred against Jews generally, or Israelis in particular. Police have power to intervene to stop the type of conduct which is likely to make Jews in the UK feel most unsafe: the fear that pro-Palestine marches are stirring up hostility against them as Jews because of their connection to Israel.

51. If the conduct of individuals that amounts to stirring up racial hatred is properly recognised there is no need to ban protests, and there ought to be no pressure to extend terrorism legislation.

[A]nd what advice or interaction you have had with the Home Office on amendments to terrorism legislation following the protests. It is our understanding the Home Office is reviewing possible changes to the law, so we would be keen to know how involved you are with those discussions.

[14] Permission to apply for judicial review has been granted in a challenge to the Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023.
[15] For example, repeated closure of busy road bridges.
[16] Section 18(1)(b).

52. After the pro-Palestine marches began, and consistent with their general approach to me as Independent Reviewer, Home Office officials and I discussed potential areas in which terrorism legislation might be amended. I also met with the former Home Secretary to give my provisional views (this was prior to my Report 'Terrorism Legislation and Protests').

53. I am not aware of any worked-up proposals to change terrorism legislation. If there were any, I would expect these to have been drawn to my attention.

I hope this fully answers the questions posed in your letter of 21 December 2023. May I also wish you a Happy New Year.

January 2024