

Working Paper:

Terrorism, MAPPA Reform Recommendations, and The Police, Crime, Sentencing and Courts Bill 2021

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Key Terms:

MAPPA: Multi-Agency Public Protection Arrangements have existed since 2000. Through MAPPA mechanisms, Police, Prisons and Probation services collaborate with other agencies ('duty to cooperate' agencies) to manage the risks posed by released violent and/or sexual offenders. In 2009, MAPPA was extended to cover released terrorist offenders (Disley *et al.* 2016).

Police, Crime, Sentencing and Courts Bill 2021: A broad piece of proposed legislation, covering a wide variety of themes. At the time of writing, this Bill had reached the Committee Stage in the House of Lords after its Second Reading. While the Bill is approaching Third Reading, and then potential Royal Assent, it is still possible that amendments will be made. As such, this Working Paper identifies concerns with the proposed legislation at Second Reading in the Lords. Caution should be exercised by future readers, who should make sure the analysis still applies at the time the Bill becomes law.

Terrorist Risk Offenders: a new category which applies to offenders convicted of a non-terrorist crime, deemed radicalised in prison or identified as a terrorism risk. This new category will expose non-terrorist offenders *to levels of MAPPA supervision and restrictions currently applied to terrorist offenders*. The term originates in the Independent Reviewer of Terrorism Legislation's report on MAPPA reform (2020). The Home Office confirm that the reviewer's report on MAPPA reform has directly influenced passages within the Police, Crime, Sentencing and Courts Bill (Home Office 2021), and thus could soon become law.

Introduction

In the aftermath of the Fishmonger's Hall (2019) and Streatham (2020) attacks by recently released offenders, the UK Government commissioned the Independent Reviewer of Terrorism

Legislation (IRTL) to review MAPP Arrangements for terrorist offenders. The recommendations made in the Reviewer's report have directly influenced provisions in the Police, Crimes, Sentencing and Courts Bill 2021 (Home Office 2021; see also UK Parliament 2021: paragraphs 158-63), and are on their way towards becoming law.

This working paper highlights the implications of these terrorism-related provisions for:

- healthcare professionals;
- public protection officials;
- and for civil society organisations concerned with the securitisation of racialised groups and public service provision.

The paper is primarily concerned with the introduction of the new category of 'terrorist risk offender', which extends high level MAPPAs to non-terrorist offenders upon their release – on the basis of a perceived risk of radicalisation held by MI5, prison officials or police. MAPPAs management plans for offenders can include restrictions on residence upon release (including the requirement to live in 'approved premises' rather than return home), license conditions which ban the individual from entering certain areas or premises, and even covert surveillance in extreme cases. As such, the proposed extension of MAPPAs to 'terrorist risk offenders' (who have *not* committed a terrorist offence, may not have even committed a violent offence, but are presumed radicalised) is a pressing civil liberties issue. As will be detailed in the paper, the 'risk' posed by 'terrorist risk offenders' is not of verifiable nature – but based on securitised suspicion in the aftermath of the Fishmongers Hall and Streatham attacks.

The paper is also concerned with the apparent racialised binary which appears in the IRTL's MAPPAs reform report and a speech he gave on its recommendations. In both, the Reviewer draws a contrast between the limited level of MAPPAs supervision required to manage 'lonely', often autistic, terrorism offenders and the high level of supervision required by those feared to have radicalised/converted in prison, or whose family has attracted MI5 surveillance. This stark division in the documents is framed through the IRTL's own association of 'lonely, autistic' offenders with right-wing extremism. Given the precedent for the MAPPAs reform report was the Fishmongers Hall and Streatham attacks (both committed by racialised offenders), the documents often appear to racially code the most 'risky' offenders (who need high level supervision in the community) as racialised Muslims, and the 'lonely' offenders as white.

Finally, the report explores the deeper extension of counter-terrorism public protection arrangements into psychiatric hospitals from the moment of admission, and the recommendations for extending MAPPAs cooperation between Police, Probation, Intelligence Services and psychiatric professionals.

Extending MAPPAs powers: civil liberties concerns

The IRTL's report on MAPPA contains a significant number of recommendations for the public protection arrangements. Amongst these, police powers to recall released offenders (particularly those thought to pose a risk of terrorism) to prison are recommended to be extended, the resources and active case-management approach used in Prevent is recommended for MAPPA, and intelligence possessed by MI5 is recommended to be incorporated in MAPPA supervision of offenders thought to pose a terrorism risk (where such information exists). To facilitate this sharing of sensitive security information, the IRTL recommends that a representative of MI5 sits on relevant MAPPA case management meetings.

There are several civil liberties issues of concern, even before this working paper turns to the extension of severe restrictions to non-terrorist offenders thought to pose a risk to the public ('terrorist risk offenders'). Firstly, the recommendations which extend police powers to recall offenders to prison include a deterioration in mental health. Where mental health is associated with a risk of terrorism, the Report recommends that deteriorating mental health can be used as a pretext to recall offenders to prison for public protection reasons. The report states:

a sudden deterioration in the mental health of a terrorist offender may give rise to a significantly heightened risk of serious harm to the public, and could justify recall to prison despite the absence of any fault on the part of the offender (IRTL 2020: 23).

The justification for this recommendation is framed in terms of public protection and for removing the need for costly armed surveillance of an offender deemed to present a terrorism risk (Ibid: 24). The IRTL carefully explains that recall to prison on grounds of mental health deterioration is not a step to be taken lightly, because the offender's right to appeal will require the authorities to present their reasons for recall. In this situation, the IRTL recommends that authorities tread carefully and prepare a 'gist' of intelligence which can be presented to the parole board – without disclosing the covert mechanisms by which this information was obtained. As such, the civil liberties concerns associated with recalling an offender on mental health grounds are circumvented, in favour of a description of protecting the intelligence services from the effects of disclosures.

Secondly, the IRTL's report also recommends the involvement of MI5 on MAPPA case management where relevant. Currently (i.e. prior to the PCSC Bill), terrorism risk assessment is measured according to the ERG22+ scale – likely to be applied to offenders in a prison setting. The IRTL identifies an 'over-reliance' on the ERG22+ and OASys¹ in MAPPA's assessment of terrorism risk and instead recommends that MI5 are involved in active case management of released offenders (to share intelligence relating to the activities of family members) as well as the use of polygraph testing. Polygraph testing of terrorist offenders is recommended so that breaches of license conditions, such as consuming alcohol or drugs, can be identified and used to justify recall to prison (Ibid: 11). The IRTL notes the inadmissibility of polygraph test results in

¹ This is a risk assessment tool which predicts the likelihood of violence.

court but positively assesses the Government's plans to use lie-detector tests to facilitate the recall of offenders for breaches of licensing conditions.

The IRTL is very critical of the current mechanisms for assessing the risk of violence and terrorism because, he states, they present an 'optimism bias' which focuses on the protective factors which reduce risk, rather than explicitly tackling the potential 'imminence' of the offender committing an attack (Ibid: 6-7). As the application of an ERG22+ assessment would not have access to sensitive information possessed by the security services, and an ERG22+ assessment cannot take into account the effect of international 'trigger' events (like the establishment of an ISIS caliphate), the Reviewer recommends that security services are positioned on active case management through MAPP – to aid the sharing of sensitive information (Ibid: 7-9). In this way, the IRTL argues, the prediction of 'terrorist risk' can be made more dynamic and responsive.

Finally, the IRTL report recommends that a new statutory power of arrest is created – such that judicial approval to recall an offender to prison can be side-stepped, in the event that a police officer suspects recall will (in future) be implemented and that terrorist risk is imminent (Ibid: 24). In this manner, arrest can be justified (without advance court approval) where a license breach *may* have occurred and a *future* criminal offence is suspected. This recommendation imagines a power to arrest based upon police suspicion of future crime, justified by the anticipation of both that future terrorist attack and a pending court approval for recall. This is a significant departure from current powers of arrest which can be based upon suspicion of involvement of crime in the recent, or distant, *past*. It is unclear how sufficient oversight of these new powers will be implemented.

In all the recommendations, a greater securitisation of released offenders is evident – based on risk assessment of what they might do in future, the possible local effect of developments in International Politics, attempts to discover licensing breaches through polygraph testing, and information possessed by the security services on a person's – and their family's - activities. There is no approved method for quantifying these factors and assessing their impact upon risks posed by terrorist offenders; instead, a reformed MAPP will make subjective judgements under the powerful influence of members from MI5 and counterterrorism police forces. The calculation of these factors as risks (and the implementation of strict licensing conditions to protect the public) becomes even more concerning when the reformed MAPP Arrangements are applied to non-terrorist offenders, through the new category of the 'terrorist risk offender'.

MAPP and the new category of 'terrorist risk offenders'

We all understand what a terrorist offender is. If an offender is convicted for breaching the Counterterrorism Act 2008, then they are a terrorist offender. Terrorist offenders are released into the community under Level 3 MAPP arrangements. MAPP Levels 2 & 3 both involve active participation by a number of local and national agencies. These offer more intensive case management than Level 1 MAPP arrangements (which are reserved for registered sex

offenders). Level 3 MAPPA case management involves the presence of senior officers who can authorise additional budgetary resources when required and respond to the potential for significant media coverage of the offender.

However the IRTL's report on MAPPA reform, and the PCSC Bill 2021, introduce new terminology of the 'terrorist risk offender'. They define this profile as:

Terrorist Risk Offender refers to any offender, convicted of any offence, who is assessed to present a risk of committing an act of terrorism. It therefore includes those convicted of Terrorism Offences and Other Dangerous Offenders...**Other Dangerous Offender** is an offender whose terrorist risk does not derive from their offence. It would include a person convicted of fraud, who is later radicalised in custody. This category is sometimes referred to as 'of concern' (IRTL 2020: 4)

This is a very worrying development for civil liberties, as it exposes potentially non-violent offenders (such as the fraudster, described in the IRTL's report above) to MAPPA supervision upon their release. Previously, only sex offenders, violent offenders and terrorist offenders have been made subject to MAPPA. The concept of a 'terrorist risk offender' stretches to *anyone* convicted of a crime, who is then suspected of being radicalised in prison (UK Parliament 2021: paragraph 163). Given the racialisation of radicalisation discourse, this primarily exposes non-violent racialised offenders to the restrictions of MAPPA supervision.

Indeed, the IRTL explicitly recommends that new powers are created to allow Police a warrant to search the premises of 'terrorist risk offenders' to check their compliance with licensing conditions – just like terrorist offenders. These searches would be designed to discover 'possession of a phone in violation of license conditions' (IRTL 2020: 20; see also UK Parliament: paragraph 160). The justification for searching non-terrorist offenders' premises is based entirely on the potential terrorist threat (such as being in contact with a terrorist network) posed by the non-terrorist offender. Similarly, the Reviewer recommends that Parole Boards vary their practice so that urgent changes to license conditions are accepted for terrorist-risk offenders (i.e. non-terrorists) (Ibid: 21-22). He specifies that exclusion from particular areas is such a change that should be considered, given that more specific license conditions (such as: 'you must not communicate with person X') would risk 'revealing intelligence' to the offender. The Reviewer gives the justification of preventing copy-cat attacks for this adaptation of Parole Board practice.

A great many of the existing MAPPA powers for terrorist offenders (such as requiring the released offender to not return home but instead live in approved premises) will also become applicable to 'terrorist risk offenders'. But, *terrorist-risk offenders have never been convicted of a terrorist offence* so the application of a restrictive regime of licensing conditions becomes a civil liberties issue. In effect, the changes to MAPPA (proposed in the PCSC Bill, paragraph 163) replicate several components of TPIM's – which also restrict the civil liberties of persons in the community, where sufficient evidence is not available to prosecute.

Racialising Terrorist Innocence and Risk: The Unbearable Whiteness of Being (Autistic)

In the pre-emptive discourse of ‘terrorist risk offenders’, it becomes especially important to pay attention to the racialisation encoded within both ‘innocence’ and ‘risk’. Applying licensing restrictions to non-terrorist offenders on the grounds of subjectively calculated ‘risk’ alone (such as information service that a non-violent offender has shown radicalised tendencies while incarcerated) introduces a dangerous potential for discriminatory decision-making.

The IRTL’s report on MAPPA reform, and his speech to the Forensic Network Scotland in June 2021, both introduce a profound distinction between ‘naïve and innocent’ terrorist offenders and their counterparts who pose a substantial risk of harm to the public. Returning to the Reviewer’s comments on the limits of OASys and ERG22+ within MAPPA, he situates the innocence/risk binary not in the protective factors which can be fostered with offenders – but in the ‘imminence’ of their risk to the public. As such, one can be a convicted terrorist offender (perhaps the offence was downloading banned images) but be framed as very low risk, but the Reviewer also conceives of *non-terrorist offenders* who must be placed under the highest levels of MAPPA supervision because of a perceived risk to the public. How is this possible?

The Reviewer spends significant time disentangling the categories of ‘terrorist offence’ and ‘risk’ to support this perspective. He expresses significant disappointment that current MAPP Arrangements treat all terrorist offenders as presenting the same level of risk – given their offences. He would prefer if the risk to the public was disaggregated from the index offence, such that – in some cases – non-terrorist offenders (potentially convicted of a non-violent offence like fraud) could be treated as a higher threat than some terrorist offenders.

Primarily, he bases this argument (and his recommendations for MAPPA reform, now formulated within the PCSC Bill 2021) on the ‘innocence’ of many autistic or mentally ill terrorist offenders. In the MAPPA reform report, he states:

Care is also needed to avoid overstating the harm caused by individual Terrorist Offenders. A loner with poor mental health may develop a fixation with prohibited online materials and may commit the offence of collecting information useful to terrorists. They have committed a terrorist offence but there may be no risk of them proceeding to violence, or inspiring others to violence. To conclude that this terrorist offender necessarily presents the same degree of harm as any other terrorist offender may proceed from a perfectly understandable organisational anxiety when dealing with this cohort, but it is a flawed approach... A fixated individual may well present a risk of downloading further prohibited online materials, and therefore committing a further terrorist offence. But the key issue is whether this may result in them causing serious physical or psychological harm to members of the public, for example by carrying out an attack himself, or by disseminating the material so as to inspire others (IRTL 2020: 10-11).

The report goes on to highlight the ‘emerging profile’ of Terrorist Risk Offenders as ‘lonely, vulnerable, self-radicalised individuals who are drawn to extreme views, usually encountered and reinforced online, many with poor mental health. These offenders are often convicted of possession of prohibited terrorist material and it is often difficult to distinguish the extent to

which this is a type of obsession or a deeper attachment to a particular cause that could lead to acts of violence’ (Ibid: 30).

In case the allusions are not clear, the Reviewer more directly specifies that he means offenders on the autistic spectrum in his 2021 speech in Scotland. Speaking to forensic health practitioners, he identified an “extraordinary rise in the phenomenon of young men, frequently suffering from poor mental health or on the autistic spectrum, who are drawn to expressions of support for violent ideologies” (IRTL 2021: 1; see also IRTL 2020: 30). Immediately, when outlining this ‘emerging profile’ of neurodiverse individuals and those with poor mental health, the Reviewer appeared to racialize the category as white; saying:

I get contacted whenever someone is detained as a suspected terrorist. It is almost banal for me to hear that they are young, male, diagnosed with or suspected of autism spectrum disorder and despite their age and vulnerability suspected of being Right Wing Terrorists (IRTL 2021: 1).

The Reviewer went on to say that not all such offenders were linked to right-wing causes, but still, the association was powerful enough for him to make this generalized statement. This implicit racialization of mentally ill and autistic offenders is important, because the Reviewer frames such terrorist offenders as often being a low risk to the public. He even goes so far as to frame them as naïve and lonely, requiring social support to occupy their time rather than the harsher licensing conditions applied to others. Framing the obsessive pursuit of terrorist-linked content online as the behaviour of lonely, harmless people, and then racializing them as white by linking them to right-wing extremism, sets up an extremely problematic binary with those who are not deemed so innocent (even if they have not committed a terrorist offence).

For the “lonely, vulnerable, self-radicalised individuals who are drawn to extreme views” (IRTL 2020: 30), the Reviewer recommends that MAPPA gain access to resources and structures currently associated with Prevent – such as assessment by Vulnerability Support Hubs. Here those with poor mental health and Autistic Spectrum Disorder might receive care which mitigates their risk of committing another terrorist offence². Compare this with the Reviewer’s extension of MAPPA supervision, and the recommendations made for new Police powers, to deal with *non-terrorist offenders* who are simply suspected of radicalisation.

A powerful contrast between ‘innocent and lonely’ offenders against those who pose ‘a high risk to the public’ is created. Unfortunately, one is predominantly (but implicitly) racialized as white through the association with right-wing extremism, whereas the remainder are implicitly racialized as black, brown and Muslim – given that the MAPPA reform report was directly provoked by the attacks of Usman Khan and Sudesh Amman. If the actions of these racialized Muslims provoked the Report, then we can be assured that most of the recommendations contained within are implicitly intended to deal with the danger posed by other such racialized Muslims; except where the reviewer offers a new categorization of the ‘lonely, vulnerable and

² However, Aked et al. (2021) show that the IRTL’s confidence in Vulnerability Support Hubs is misplaced, as the Hubs rarely put anyone in contact with Mental Health services who is not already receiving treatment.

obsessive' offenders, often linked to the ideology and iconography of the far-right. Promoting such a disparity in treatment, after release from prison, is unacceptable and unbecoming of any state – let alone one that purports to provide equal opportunities for all.

The integration of MAPPA within Psychiatric Hospitals

The IRTL report into MAPPA reform contains an Annex specifically dedicated to 'terrorist risk offenders' (i.e. non-terrorist offenders) who are detained in a hospital setting under the Mental Health Act. The consideration given by the IRTL extends to offenders who are detained in hospital in accordance with a court decision, or those serving sentences in prison who are later transferred to hospital.

Currently (i.e. prior to the implementation of PCSC Bill 2021), the Reviewer is highly critical of arrangements for the sharing of information regarding terrorist risk. The Joint Extremism Unit, together with counterterrorism police, share information regarding terrorist risk with the Mental Health Casework section (Ministry of Justice) – so that any leaves of absence from hospital, or transfers between hospitals, can be accommodated without a gap in information sharing. However, the Reviewer strongly criticizes this practice, because no member of staff in the Mental Health Casework section has a sufficient level of security clearance to be appropriately briefed on the most sensitive security information (IRTL 2020: 61). As such, sensitive security information has to be 'gisted' by the Joint Extremism Unit and counterterrorism police, rather than explicitly informing decisions made by the Secretary of State (through the Mental Health Casework section).

The Reviewer identifies that this set-up potentially compromises decisions taken on the offender's location within the hospital, their conditions of detention, their access to leave of absence, considerations regarding discharge, and decisions following release (Ibid: 62). As such the Reviewer recommends that MAPP Arrangements (including the presence of counterterrorism police representatives and MI5, where necessary) are *extended into the hospital* – so that pre-release planning, sensitive information sharing and patient management can take place from the moment of admission:

Direct contact between responsible clinicians and counter-terrorism police should take place under MAPPA arrangements in every case... However, in contrast to ordinary MAPPA arrangements, I recommend that MAPPA arrangements should begin at the point of admission to hospital (or when the terrorist risk becomes apparent for those already admitted) rather than, as with custodial sentences, 6 months before anticipated release. This is because the decision points at which terrorist risk should be taken into account include questions of location, conditions and leave of absence which could arise at any point during admission (Ibid: 62-3).

Furthermore, the Reviewer recommends that those terrorist offenders (or terrorist-connected offenders) who take temporary leave outside psychiatric hospitals are not relieved of their notification requirements to police. That means that a seriously mentally ill patient, enjoying a

period of temporary leave from hospital, is placed under the burden of registering their address with police or face breaching those legal requirements. Is this a reasonable requirement that someone enjoying a temporary visit home, from a psychiatric hospital, could perform?

Problematically, this recommended cooperation between intelligence and security officials with psychiatric professionals, through reformed MAPPA structures, brings the intelligence services into the hospital – allowing them to influence the location and conditions of someone’s treatment in a healthcare facility. These recommendations, if accepted and implemented, will pose a significant risk to the separation of healthcare and security services in liberal society and could compromise the independence of psychiatric professionals in pursuing a treatment goal.

These concerns must also be viewed alongside other licensing conditions supervised by MAPPA, such that some ‘terrorist risk offenders’ must reside in approved premises upon release rather than returning home. This is applied, in general, to all released terrorist offenders – to prevent them living near terrorist associates. However, if, upon information from MI5 or counterterrorism police, a ‘terrorist risk offender’ were recommended to reside in approved premises upon release from hospital, this could result in a deterioration in their mental health. Not being able to return home to family support, upon release from hospital, could conceivably increase the risks to such a person’s safety.

References

Aked, Hil; Tarek Younis & Charlotte Heath-Kelly (2021) *Racism, Mental Health and Pre-Crime Policing: The Ethics of Vulnerability Support Hubs* (London: MedAct). Available from https://stat.medact.org/uploads/2021/05/Racism_mental_health_pre-crime_policing_Medact_Report_May_2021_ONLINE.pdf

Disley, Emma; Mafalda Pardal; Kristin Weed & Anais Reding (2016) *Using Multi Agency Public Protection Arrangements to manage and supervise terrorist offenders: Findings from an exploratory study*, RAND Corporation Report RR-441-RE. Available from https://www.rand.org/pubs/research_reports/RR441.html

Home Office (2021) *Police, Crime, Sentencing and Courts Bill 2021: Management of Terrorist Offenders Factsheet*, Policy Paper, 7th July 2021. Available from <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-management-of-terrorist-offenders-factsheet>

Independent Reviewer of Terrorism Legislation (2020) *Terrorist Risk Offenders: Independent Review of Statutory Multi-Agency Public Protection Arrangements*, May 2020, available from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913983/supervision-terrorism-and-terrorism-risk-offenders-review.pdf

Independent Reviewer of Terrorism Legislation (2021) *Mental Health Practitioners and Terrorist Risk*, Talk at Forensic Network Scotland, 29 June 2021. Available from <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2021/06/Mental-Health-Practitioners-and-Terrorist-Risk.pdf>

UK Parliament (2021) *Police, Crime, Courts and Sentencing Bill 2021*, available from: https://publications.parliament.uk/pa/bills/lbill/58-02/040/5802040_en_1.html