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WORKING PARTY ON FURTHER MEASURES TO CURB TERRORISM

It appears that owing to machine reprographic failure, circulation of the final report from the Working Party was not complete in all cases and that additionally, a few addressees even received texts of earlier drafts.

2. The text of the report is now re-circulated and I should be grateful if addressees would make any necessary substitutions.



R J Davies

R J DAVIES
LOB

26 June 1984

KW

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REPORT OF THE WORKING PARTY
ON FURTHER MEASURES
TO CURB TERRORISM

JUNE 1984

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Working Party

Mr A J E Brennan	NIO Chairman
SACC J Whiteside	RUCHQ
Col D Eking	HQNI - to April 1984
Lt Col T Glynn	
Lt Col P Norris	from April 1984
Mr F Edgar	NI Court Service
Mr A Hammond	NIO Legal Adviser
Mr A Fraser	Office of the DPP
Mr S Boys-Smith	NIO
Mr J Pilling	Home Office - to March 1984
Mr C Birt	Home Office - from April 1984
Mr P Buxton	NIO
Mr P Coulson	NIO
Mr J Durling	NIO
Mr D Haggan	Law Officers Department
Mr R Davies	NIO Secretary

Sub-Group

Mr P Buxton	NIO Chairman
Det Supt D Mellor	RUCHQ
Col D Eking	HQNI
Mr A Fraser	Office of the DPP
Mr F Edgar	NI Court Service
Dr J Alford	CJB, NIO
Mr R Davies	NIO Secretary

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WORKING PARTY ON FURTHER MEASURES TO CURB TERRORISM

Background

Just before Christmas 1983, Ministers had given consideration, at the highest level, to the question of whether or not Sinn Fein should be proscribed. On balance, they had concluded against proscription. However they had asked that a thorough examination be conducted into the possibilities of limiting Sinn Fein's activities by other means with special reference to the law on incitement. Since the law was of general application, it was axiomatic that account should be taken of all those who openly supported terrorism yet kept within the law. The Secretary of State for Northern Ireland had indicated his wish that the work be carried forward as a matter of urgency. The Working Party was established to focus principally upon the legal aspects of this activity and with a view to providing an early report.

2. At its inception the Working Party was conscious that terrorists' tactics had changed over the years and that the overall incidence of terrorist violence within the Province had declined. Yet it was also clear that the public perceived much republican terrorist violence to be conducted in well planned and selective fashion. In addition, the political fortunes of Sinn Fein had improved. Their ability to indicate approval for terrorism without breaching the law undoubtedly caused widespread offence. So whilst terrorist violence continued to decline, domestic apprehension about it and international assumptions about its effects in Northern Ireland seemed to be worsening. Indeed for relatively small investments in violence terrorists were able to command apparently greater advantage in terms of public anxiety both about Sinn Fein's engagement in the political process, and about the extent to which this very activity might foster terrorist violence itself. The particular form of security incidents at the end of 1983 and in the early

part of 1984 had enhanced these concerns. There had been the murders of 3 church elders at Darkley, and of Edgar Graham. The bomb at Harrods had been given enormous publicity: and the shootings of members of the security forces in Northern Ireland and of two members of the security forces in the Republic, had all contributed to a marked rise in the emotional temperature within the Province. This had been greatly exacerbated by the public reception of speeches made both in Northern Ireland and in the Republic by leaders of Sinn Fein. A 'World in Action' programme about Adams had itself stirred up interest in the possibility of tightening the law against incitement to violence. This interest was not confined to the United Kingdom: an independent survey in the Republic of Ireland suggested that a majority of those polled wished to see legislation making public statements in support of political violence subject to the criminal law.

3. It was quickly evident that the Working Party could not carry this work forward comprehensively or effectively by limiting consideration to the jurisdiction of Northern Ireland alone. Accordingly, the membership of the Group was drawn from the Home Office as well as from the Northern Ireland Office, the Law Officers' Department, and the Northern Ireland Court Service together with representatives from the Office of the DPP, the RUC and the Army. The Group took particular account of previous interdepartmental work on the law relating to terrorism and took cognisance of the publication of Sir George Baker's Review of the Northern Ireland (Emergency Provisions) Act 1978 (EPA). In considering the extent to which the criminal law already provided the means to constrain the actions and statements of Sinn Fein members, in identifying any points upon which it might be deficient and in attempting to define remedial measures, the Group analysed existing law in depth and, where relevant, took stock of legislation currently being proposed to Parliament. Where appropriate, the Working Party examined existing and proposed legislation of the Republic of Ireland and took note of any points which appeared to justify further enquiry in the course of intergovernmental contacts. Quite apart from examining possible developments in the existing criminal

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law, the Working Party also focused upon procedures in the judicial process in so far as any potential bottlenecks seemed likely to be exploited by apologists for terrorist violence. A separate sub-group of the main Working Party was established to deal with these matters. Their report is given in an Appendix to this paper.

The source of public unease

4. In order to identify how and in what ways the existing law was inadequate to deal with apologists for terrorist violence, the Working Group sought to analyse and identify the means by which apologists for violence were able to evade existing law. In particular, the Working Party analysed the character, implicit intention and likely effects of recent public statements made by leading members of Sinn Fein. It was clear that in many cases Sinn Fein spokesmen achieved their effect by expressing general understanding, support and encouragement for violence. Implicit in their statements was an ideology of resistance and of insurrection supposedly justified by the pretended absence of any other form of protest. Apologists of this sort stopped short of any claim to personal membership of the IRA - or indeed of any proscribed organisation. They generally avoided giving approval for any particular terrorist incident; and issued no injunction to any readership or audience that they join a proscribed organisation or take part in criminal violence. Thus Adams (Sinn Fein), is reported to have said:-

"The responsibility for the problems in Ireland is a British responsibility. Those who resist that have my support. I would defend their right to resist it; I will debate it with anyone; they have the right just as much as an English person would have the right to rise up and resist foreign oppression in England."

Again after an attack on Adams' life early in 1984, McMichael (UDA) apparently said:-

"I do understand an organisation who believe they must fight a direct war with the Provos and the INLA," and:-

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"I find it very difficult to condemn people who feel there is a war going on and feel they are justified in fighting with opposing combatants."

5. The words or behaviour used seems designed to have the maximum propaganda effect by the mere withholding of a refusal to condemn terrorist violence with the aim of encouraging generalised emotional support and acceptance of such action as being 'legitimate'. Further examples are given at Annex A to this note. The effect is achieved by the deft, sometimes enigmatic, manipulation of symbolic language or action. This is precisely the kind of manipulation that is most difficult to counter by law.

Remedies: the existing law

6. None of the existing criminal offences are really apt to cover the kind of generalised support for, or encouragement to participate in violence, which Sinn Fein spokesmen indulge in. It is, at common law, an offence to incite another person to commit a criminal offence. But, for an offence of incitement to be substantiated, it would be necessary to prove that the statement in question constituted an invitation to commit a specific offence, and evidence of that degree of specificity is not forthcoming. The same difficulty arises with the offence, which exists in both England and Wales and Northern Ireland, of issuing a threat to kill someone. A threat to injure a person, which falls short of a threat to kill, is not in itself, a criminal offence at common law.*

7. In some respects the statements of Adams and other Sinn Fein leaders come close to the offence of sedition. But this antique offence has largely fallen into disuse; there is some uncertainty about its precise extent - it probably requires proof of a direct tendency to provoke public disorder, (which would not be easy to obtain). In any event the Law Commission have proposed that

*It is however an offence under the archaic Tumultuous Risings (Ireland) Act 1831 - though there is no evidence of it having been prosecuted in living memory.

it should be abolished. At present, sedition is not a scheduled offence and the last place to try sedition in Northern Ireland would be before a jury. Use of the offence, even if it could be proved, would excite a strongly political reaction that could, for example, make the policies of some constitutional parties vulnerable to the criminal law. For all these reasons the Working Party concluded that sedition and related offences such as seditious libel would not be appropriate to deal with the problem which is at issue.

8. There are two other statutory offences which the Working Party have considered but which do not seem to be apt to cover the situation. It is an offence under Section 21(1) of the EPA to solicit or invite financial or other support for a proscribed organisation. In later paragraphs of this report, consideration is given to the possibility of extending the scope of Section 21 in certain respects. But it should be noted here that this particular offence is inadequate in that for example, Sinn Fein spokesmen are careful not to identify themselves with the IRA as such, which means that it is not possible to prove that support has been solicited or invited for a proscribed organisation. Second, it is a criminal offence under the Public Order (Northern Ireland) Order 1981 to publish or distribute threatening, abusive or insulting material, or to use words at a meeting which are threatening, abusive or insulting with the intention of stirring up hatred against, or fear within, a section of the public identified by its religious beliefs, colour, race or ethnic origin. This offence, which is triable by jury, is aimed, not at terrorists as such, but at people who provoke sectarian hatred. Even if the offence were amended to remove the requirement of 'intent', (which would be controversial), it is not really apt to catch expressions of support for terrorist activity aimed at the overthrow of the state or constitutional government.

A new offence of incitement of and support for terrorism

9. Having defined the principal source of public disquiet - and that upon which the present law was silent, the Working Party turned to the detailed and technical questions of 'offence making'.

Although this work has a detailed and somewhat technical aspect, it nonetheless raised issues of very considerable difficulty and political sensitivity. The Group attempted to define an offence as clearly as possible, rather than produce a vague 'catch-all' relying upon the selective judgement of the prosecuting authorities as to which cases should then be brought to trial. Conversely, it was recognised that if an offence were to be drawn very restrictively to bear on a speaker's own intentions or on the effects of his statements, there could be major difficulties of proof. The coded language of apologists for violence would quickly become too diffuse to support prosecution. Indeed, the more precisely an offence were to be drafted, the easier might it be to evade.

The Options

10. However the Working Party concluded that it would be technically possible to formulate an offence in various ways so as to bear upon generalised statements of support for terrorism. In essence the options are as follows:-

- (a) The first option consists of a very general provision bearing upon support for terrorism which amounts to condonation.
- (b) The second option would be narrower, to the extent that it might be focused not upon generalised support for terrorism but rather upon words used to show active support or else some effort of promotion for terrorist violence.
- (c) The third option would focus upon statements that denote, whether actively or passively, some support for particular proscribed organisations rather than generalised support for terrorism.

11. In order to help in formulating the provisions for dealing with the basic mischief identified by the Working Party, the Group listed the elements of the offence in serial form. The

results of this systematic approach are shown at Annex B. This also features the separate elements of the first and second options discussed here. The Group's approach was not designed to usurp the function of the Parliamentary Draftsman: his advice would only be available once legislation were formally to be proposed in any case: rather it was adopted to show that it would be possible to devise a new offence, at least in theory.

12. Option 1. So far as the first of these options is concerned the Working Group envisaged a provision that would make it an offence to issue any public statement condoning or commending terrorism in the United Kingdom, or any statement likely to encourage, approve, or demonstrate acceptance of terrorism. An offence of condoning terrorism seems to bear very closely upon the language of apologists. The offence would be committed by things said or written publicly, in all contexts, including those of meetings which though ostensibly closed, had a public purpose. The offence would cover any such statement made in the UK or the Republic of Ireland - otherwise Adams and his like, would be able to cross the border and issue statements from there.

13. The difficulties. However, as it is, the following fundamental problems remain:-

- a. First, it is doubtful that the originator of an offensive statement would often be caught in the act. If the new offence were to be broadly effective, then any reporting of factual statements in the context of a presentation which indicated support for terrorism should also be caught. There is a need to deal not only with the originator of an offensive statement, but also with its mode of transmission. Yet on the face of it, there could be no difference between the bald publication of an offensive statement by the reputable media. (The Times, for example), and its publication in journals of apology for terrorism, (like An Phoblacht/Republican News). It would be out of the question to catch the reputable media: it would very probably be

judged wrong in principle to stop the public learning just what the apologists for terrorism are like, since to a large extent an effective counter to terrorism depends upon widespread public understanding of, and abhorrence for, its character. It seems to be almost impossible to draft the offence in such a way as to prevent the publication of an offensive statement in a AP/RN, and to allow it in The Times. Differences of context may be quite stark in the case of The Times and AP/RN - but they may not be so clear in the case of other journals. It would thus be necessary to fall back upon prosecutorial discretion of a kind which is difficult to exercise: and that is bound to condition the degree to which any legislation is likely to find acceptance in Parliament.

- b. Second, a general offence of condonation for terrorism would be criticised as representing an attack on free speech. It would be represented as a clearly 'political' offence, likely to breach our international obligations, for example, under Article 19 of the International Covenant on Civil and Political Rights. On one plane, inhibiting freedom of expression or public debate (which has no really clear link to specific acts of terrorist violence), runs counter to the Government's insistence that the rule of law be applied regardless of the motives of particular criminals, or of their beliefs. On another, it might be said that if the public statements of spokesmen for any organisation incline the Secretary of State to believe that it is concerned in terrorism, or in promoting or encouraging it - then the organisation itself should be proscribed.
- c. The creation of a new offence of the kind envisaged, might itself prompt a mass challenge to the law that would be difficult to handle operationally, and could well detract from broader and more productive efforts to enforce the rule of law. Being of general application the offence would apply to loyalist and republican alike. Such a demonstration of the

even-handedness of the law could be very desirable, but it would not lessen the enforcement difficulties. So there must remain doubts about the extent to which the offence could or would be used in practice. There is even a possibility that any legislation to enact this measure could have a counter-productive effect: the malevolent might contrive to challenge the new law on their own ground, and on such occasion as to be pretty sure either of acquittal or else of derisory penalty. Either way the legislation would be 'shown up' as a deliberate attempt to intimidate particular individuals, whose hands could only be strengthened as a result. The proper slowness of the judicial procedure might well add to the difficulties here, in elongating the process and in strengthening public perception of impotence in the criminal justice system.

- d. There is then the danger of penalising those who might become involved in the commission of an offence unintentionally. It would be very difficult to draw the offence in such a way as to distinguish between a broad expression of 'understanding' for the motives and actions of terrorist organisations and condonation for those actions. There are obvious problems in defining an offence in a proscriptive way that could incidentally inhibit public discussion of hypothetical situations in which conscience and values may be held to conflict with the law. Respect, for example, for the assumed 'idealism' of the IRA, for the 'conviction' of those prepared to break the law or use violence in furtherance of an industrial dispute or in defence of minority group interests, is often loosely given. It is frequently intended to demonstrate a certain degree of 'reasonableness' on the part of the speaker. It would be a harsh law indeed which made honest expressions of opinion about the use of terrorist violence simply criminal. By way of complication, an offence of the kind envisaged might

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also bear upon loose public comment of the sort made recently in Great Britain by elected representatives, to the effect that the IRA is not a terrorist organisation at all.

- e. Inevitably therefore a general offence will present the prosecuting authorities and the Courts with very substantial problems. They will be asked in particular cases to decide whether given statements were likely in all the circumstances to amount to condonation or commendation for terrorism. They would have to decide how to apply the law to language that is very much a part of the current coin of debate throughout Northern Ireland. Inevitably the offence would be of wide reach: for example it could bear upon the priest who gave the address at the funeral of Richard Quigley a PIRA member killed by his own bomb. He was described as "numbered among the Saints of heaven. (Who) whether we like it or not is part of what is happening today Those of us who loved Richard will remember him as one who was a joy, kind and considerate; an example to others" There is bound to be difficulty in maintaining consistency of approach without hazarding support for the very way in which the offence is used. An apparent inconsistency of approach to outwardly similar offences committed by major loyalist or republican spokesmen might be entirely justifiable in terms of law and prosecutorial discretion. But it is hardly likely to be acceptable to public opinion - or indeed, in the end, to the Government. In essence, the offence envisaged is bound to become almost wholly political. Moreover even if that were not to be the case there must be doubt about the willingness of the Courts to convict in particular cases. The precedents for legislation in which reliance has been placed upon 'tendencies' (as in the law on obscenity), 'likelihoods' and

'relevant circumstances' are not encouraging.

- f. In consequence, whilst a new offence might be designed to bear upon apologies for terrorism and upon disreputable reporting in support of terrorism, it can only do so in a way that will leave uncertainty in the minds of the public, and particularly in the minds of journalists, about their liabilities at law. Indeed, media professionals would certainly criticise a new offence as a kind of backdoor censorship by a Government afraid to ban disreputable publications: this could make the passage of a new offence through Parliament even more difficult than it is likely to be in any case. It is possible that the new offence might even be criticised by those who believe that the open banning of publications would be preferable to any measure that put media professionals in doubt about their obligations. But given the speed, flexibility and internationalism of mass communication, (not to speak of the difficulties involved in identifying those directly responsible for a journal like An Phoblacht), the Working Group concluded that crude 'blanket' restrictions would be quite ineffective. Again, any attempt to suppress An Phoblacht would be represented as an effort to repress republican views, and that would make it even more likely that the journal would re-emerge in some new format very speedily.
- g. Taking all these points into account, it is to be expected that any new offence would itself be formidably difficult to defend in Parliament, not least because measures which inhibit free reporting and free speech are widely unpopular. The statements in question would probably have less impact at Westminster so the desirability of stopping them could well be less apparent than in

Northern Ireland. It would be difficult, if not impossible to show that less violence would ensue from stopping them, and perhaps hard to argue that the prevention of offence to the wider public warranted a measure of this kind. In addition, the effectiveness of the offence would be reduced to the extent that the jurisdiction of the Irish Republic could be used to issue statements caught by any new offence even if such statements were made actionable before the Northern Ireland Courts. But there could be no guarantee that the Republic would be willing to legislate on a reciprocal basis.

14. Option 2. The Group then considered whether a narrower version of the offence might be devised that would substantially avoid the problems identified above whilst bearing to a significant degree upon the mischief already identified. Up to now the focus has been upon those statements which contain an implicit condonation of terrorism. But there could well be others which might be regarded as rather more explicit in articulating the promotion of terrorism. These might incline the prosecuting authorities and the Courts to give greater weight to the actual effects of such statements, which in turn, might make the offence more publicly acceptable. Thus, a statement which sought to promote, incite, encourage support for, or directly invites terrorism might be held to be more active - and thus even less justifiable than the more inchoate expressions of understanding which are implicit in statements caught by the first option. (See the elements of the new offence at Annex B).

15. However, the effect of this narrow and second option would be to reduce the apparent harshness of the first to a very small degree whilst making it much more difficult to catch the target of public concern. The technical problems of drafting this form of offence are likely to be quite as considerable as those of the first. The practical and political implications are probably only marginally less problematic than those of the first. But in addition there are substantial evidential problems necessarily created by a rather more narrow offence.

The greater the need to show a casual linkage between words and subsequent events - makes the prospect both of prosecution and of conviction still less certain. It therefore puts the value of the offence and of the political capital invested in its creation, in doubt.

16. Option 3. There is a still more limited third option. This rests upon the presumption that the difficulties of giving effect to any new offence of the kind outlined above might prove very nearly insuperable, and the adverse consequences out of all proportion to the possible benefits. On that view, any new offence could only have a chance of reaching the statute book if its effect was likely to be presentational rather than practical. The Working Party noted that Section 21(1) of the Emergency Provisions Act did not contain an offence of making a public statement which indicated support for, or approval of, a proscribed organisation; or was likely, having regard to the circumstances, to encourage people to support a proscribed organisation. An offence of this type might have slight indirect benefits in reassuring the public of the Government's determination to act where it can against apologists for terrorism. It might also complicate the calculations of apologists for terrorism in the very short term. But the disadvantage of a limited offence of this character is that most apologists for terrorist violence avoid any implicit or explicit support for the criminal activities of a named proscribed organisation. Publicists for proscribed organisations need not issue statements on the latter's explicit behalf to achieve a desirable effect from their point of view. On the other hand, the Working Party considered that it would be as well not absolutely to disregard the possibility that a proscribed organisation might start to issue statements - or that agencies of theirs might begin to do so explicitly on its own behalf. At the very least, it might be said that in presentational terms the law ought to be in a condition to cope.

17. Conclusion. The Working Party concluded that if Ministers were prepared to go forward to enact a new offence, despite the difficulties outlined above, then there would be nothing to be

gained in practice by narrowing the offence to that described as option 2, though they recognised that the wider the offence the greater the difficulties the prosecuting authorities face in exercise of discretion to prosecute. Indeed, the Working Party considered that neither the first nor the second option alone, dealt adequately with the full range of statements in support of terrorism which are at the root of the current mischief. The public outcry if any decision to legislate were to be announced would not be diminished by fine tuning: the combination of both options 1 and 2 (if enacted), would probably be necessary to catch every kind of apology for terrorism, from the most to the least specific. The alternative to this course is to bring forward a provision which is likely to have little or not practical effect, the rationale for which would be hardly more than precautionary. This might well arouse expectations that could not be fulfilled - giving rise to derision from some, and frustration at 'cosmetic' manipulation from others.

Evidence

18. The Working Party then turned to consider whether apologists for terror might be usefully inhibited by measures to clear up some apparent difficulties in obtaining and using evidence of, or relating to, crime and held by the media. There are two aspects to this:-

- (i) the acceptability to the Courts of photographic video or other recorded evidence without the need to produce in Court all the technicians who processed it in order to show that it had not been tampered with;
- (ii) the possibility of enabling the RUC to obtain evidence in the form, for example of TV news film of illegal action or remarks. To be effective the measure would need to allow the police to require the production of any such journalistic material (which may be evidence of an offence) or, in an emergency, to seize it.

19. Acceptability. In the first place there is a question about the status, as evidence of photographic, video or other recordings made by the media. The prosecuting authorities in Northern Ireland usually take the view that where such evidence was not strictly

or satisfactorily proved, (for example by calling the relevant cameraman or recording technician), the judges might well conclude that the prejudicial nature of the evidence might exceed its probative value. They would then either decline to admit the evidence or else attach little weight to it. That said, the Working Party took note of a case which had come before the Court of Appeal in England, (High Court of Justice: Queen's Bench Divisional Court: March 10 1982 - Kajala v Noble). In that case it was held that the Court was not confined to the best evidence, but could admit all relevant evidence. The goodness or badness of it went to weight rather than to admissibility. The Courts had allowed not only the admission of tapes or films, but also the use by the prosecution of a film copy whose authenticity had been satisfactorily established. The Court also allowed the identification of this copy by an assistant editor, (the original film crew being absent overseas on assignment).

20. This seemed to offer an encouraging precedent for the Courts in Northern Ireland.* However, the Working Party acknowledged that judges in the Province applied the law in circumstances where an accused person's rights had been somewhat altered. Having regard to that, judges quite properly required a very high standard of proof from the prosecuting authorities. In Kajala no attack had been made upon the integrity of the film or indeed upon the process of validation itself: indeed a decision had been reached in the absence of evidence from the accused. Neither circumstance seemed likely to apply in Northern Ireland.

21. Whilst the Working Party agreed that there was a speculative quality about this analysis, it might well be worth some further deliberation quite apart from a test before the Courts. In any event Sir George Baker's Report recommended that unless there were strong reasons to the contrary any new Emergency Provisions Act should provide that photographs, films and video recordings

*Further encouragement as to the admissibility of photographs issued from the Court of Appeal in Regina v Dobson and Regina v Williams - 12 April 1984. But the Court of Appeal also decided (in Foden v White 1982 CLR Page 588), that whilst there was no difference between photographs, videos and other recordings as regards admissibility their prejudicial value might outweigh their probative value. It is easy to establish a person's identity from a photograph where there is no dispute - but very difficult when there is.

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should be admissible as evidence without the necessity of calling the photographer. The Working Party concluded that in the light of Sir George's recommendation, it might be helpful if the Lord Chief Justice were to be addressed with a view to explaining the Working Party's own assumptions and understanding about the admissibility of photographic evidence; to review the desirability or otherwise of legislation; and to invite the Lord Chief Justice's reaction. That might have beneficial results - not least in enabling the police to judge the extent to which they should devote resources to enabling photographic and other evidence to be made available to the Courts.

22. Search and Seizure. The second problem is related to the first. If the Courts in Northern Ireland were prepared to admit photographic and other recorded evidence in line with Kajala, then there would be occasions upon which the police would wish to ensure that the evidence was produced at trial, or else that they had search and seizure powers that might be used in cases of urgency on a simple warrant to ensure that it was made available to the Crown. Sir George Baker had so recommended. The power would be of particular relevance if a new offence on incitement and support for violence were to be enacted. It sometimes happens even now that the police wish to ensure that photographic and other recorded evidence which either has or has not been broadcast should be made available to the Courts. From time to time, their efforts to obtain this evidence have been frustrated either on grounds of property right or else because highly mobile media professionals possessed of material relating to the commission of a scheduled offence have already left the jurisdiction. Accordingly the Working Party gave extended consideration to legislation embodying production orders, (either extant or proposed) and to the powers of search and seizure in respect of evidence possessed by the police and other public authorities. In particular, the Working Party examined the provisions of the Police and Criminal Evidence Bill (PCEB) currently before Parliament. This contains very much more general powers of search and seizure in respect of journalistic material than exist elsewhere in the law. However, the exercise

of even these powers were subject to a number of very significant conditions and it was doubtful that these hurdles could be cleared by the police in the context of Northern Ireland in any timescale that would enable them to act effectively to search and seize journalistic material in the hands of highly mobile and freelance media professionals.

23. That is not to say that the wider powers of search and seizure contained in the Police and Criminal Evidence Bill# would be of no practical value in Northern Ireland as in Great Britain. It might well be the case that the powers envisaged in the PCEB might be made to bear upon some of the problems presented by Sinn Fein's activities. In dealing with those there were presentational advantages in building upon the normal law, rather than upon emergency legislation. This indicated that if the PCEB were to be enacted, then legislative action for Northern Ireland should follow. The Working Party provisionally agreed that once the PCEB had been enacted, then consideration should be given to enactment of corresponding provisions in an Order in Council for Northern Ireland with any suitable adaptation.

24. The Working Party then considered the implications of a very much more general power even than that in the PCEB to search and seize evidence. It was clear that any such power would take its place in the emergency law rather than in any other. It was also clear that the more flexibility and operational effectiveness that was built into the power for the police, then the more controversial was the proposal likely to become. So far as media and journalistic material were concerned, there would be grave anxieties about the way in which an extensive power might inhibit freedom of expression and 'responsible' journalism. Opposition was likely to be strong even if the provision were to be drafted in such a way as to exclude any possibility of censorship. Against that background, the Working Party noted that the new Cable and Broadcasting Bill would enable a police officer of or above superintendent rank to serve notice on programme makers to require the delivery or production of

Relevant extracts from the PCEB are shown at Annex C.

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relevant scripts, or of visual or sound recordings to a court if he believed that transmission was likely to breach the law in respect of obscenity or racial hatred. Failure to make the submission would be a criminal offence. The Working Party considered that a production order process of this kind clearly had presentational advantages over extensive new search and seizure powers. Apart from anything else current Government policy discouraged a proliferation of search and entry powers. It is possible that in certain circumstances international obligations (under the European Convention on the Protection of Human Rights and the UN (Covenant on Civil and Political Rights) could inhibit the creation of general powers notably if UK derogations from (respectively) Articles 8 and 17 were to be lifted. However the provisions of the Cable Bill were related to criminal offences that might be committed by programme makers themselves: they were not connected to the production of evidence relating to or of use in the investigation of any crime. The measure was also confined to material that had been broadcast or was likely to be - not to any transmitted or untransmitted material. The Bill would apply only to cable broadcasting - not to the television and radio authorities.

25. Accordingly the Working Group commissioned separate consultations with Broadcasting and other departments of the Home Office to see whether there might be a way of reconciling the need to obtain any evidence of scheduled offences held by the media, with the requirement to avoid infringing free speech or for giving any ground to the charge of media censorship or harassment. These consultations pointed up the dangers of any measures that might effectively turn the media into perceived agents of the security forces, as for example 'police photographers'. Not only would this be extremely unpopular amongst journalists, it would be strenuously resisted by broadcasting institutions themselves. The Police Criminal Evidence Bill had caused a major reaction even in respect of its very limited provisions: new, more stringent powers might have the effect of ensuring that the media were denied access by meeting organisers to events they now witnessed so that they

would not be in a position to gather evidence in any case.

26. Again, given the outcry over the PCEB and from the viewpoint of Parliamentary tactics, it was unlikely that the Government would be able to bring forward more stringent measures as regards evidence of terrorism for the whole UK. Any legislation could probably only be undertaken for Northern Ireland alone. Moreover, there were evident dangers in any measure that appeared to limit journalistic discretion under the Broadcasting Acts about what material to use and what to discard. Much material was often discarded specifically to preserve future journalistic activity and confidence. If it were proposed that access be given to the 'cutting room floor' as well as to what was transmitted or published, there would be very grave opposition. It would be necessary to persuade Home Office Ministers of the value of such powers: and the Working Party noted that this would not necessarily be easy. It was acknowledged that there would be serious difficulties about making progress on new evidential powers without running up against cherished conventions of journalists' independence which carry such weight at Westminster. If it were decided to press ahead those problems would have to be squarely faced. The Working Party agreed that they should be dealt with at the same time as the enactment of the Police Criminal Evidence Bill to Northern Ireland was considered.

Particular modifications to existing law

27. Aside from the consideration of new offences as suggested by the Working Party's thorough examination of existing and proposed legislation, the Group also considered more minor and in some respects less controversial adjustments to the existing law. Action on these items, and perhaps also in respect of the new measures already described would, of course, have to await a suitable legislative vehicle. In general, the specific measures that take their place in the ordinary criminal law for Northern Ireland would be appropriate for enactment by primary legislation, (either by Order in Council or statute). Where the measure was designed as a special and temporary expedient for dealing with terrorist crime, then it would only be possible

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to proceed by statute. In theory, it would be possible to enact a new criminal offence by Order in Council, and then to add that offence to the list of scheduled offences under the Emergency Provisions Act, by order of the Secretary of State. But it was unlikely that the new measures under consideration would be effective if confined to the jurisdiction of Northern Ireland alone. This difficulty applied to any legislation that might follow the publication of Sir George Baker's review of the Emergency Provisions Act. In theory it was possible to extend that legislation to the whole of the United Kingdom. But there would be very considerable tactical problems in handling such a Bill's passage through Parliament. The Working Party concluded that the choice of legislative vehicle would therefore need further consideration, in each case.

28. So far as adjustments to the existing law are concerned the Working Party provisionally concluded that action should be taken on the following measures:-

a. Threats of violence

The fourteenth report of the Criminal Law Revision Committee recommended that Section 16 of the Offences Against the Person Act 1861 should be extended to cover threats to cause serious injury. For a variety of reasons the several recommendations in the Report had not been implemented, and there appeared to be no likelihood of implementation in England and Wales for the foreseeable future. However the Working Party noted that there was no reason why this gap in the ordinary law should not be filled in Northern Ireland. Proof of the offence would not always be easy but there could equally be advantage in providing for a wider range of offences: if a threat to murder could not be proved, a threat to injure might be. There were also presentational advantages in closing an anomalous gap in the existing law. The Working Party therefore agreed that further consideration should be given to the creation of a new offence to cover threats to cause serious injury in the context either

of an Emergency Provisions Bill, or else of the ordinary development in Northern Ireland criminal law.

b. Extension of Section 1(1)(c) of the Prevention of Terrorism Act to Northern Ireland

Section 1 of the Prevention of Terrorism Act (which does not extend to Northern Ireland) contains the following paragraph:-

"..... if any person - arranges or assists in the arrangement or management of, or addresses, any meeting of 3 or more persons (whether or not it is a meeting to which the public are admitted) knowing that the meeting -

- i. is to support a proscribed organisation;
- ii. is to further the activities of such an organisation; or
- iii. is to be addressed by a person belonging or professing to belong to such an organisation - he shall be guilty of an offence."

Some of the mischief caught by this section would be covered if a form of new offence outlined at Annex B were to be enacted. The Working Party doubted whether Section 1(1)(c) would be of great value in Northern Ireland because it was unlikely that there would be any evidence that a meeting had been for anything other than a lawful purpose - or indeed that anyone had 'knowingly' arranged, assisted or addressed the meeting with anything else in mind. On the other hand it seemed anomalous for the Section not to apply in the very part of the United Kingdom where the likelihood of meetings to further the purposes of proscribed organisations was the greatest. Sir George Baker had recommended extension. Accordingly the Working Party provisionally agreed that while special legislative action would not be appropriate on this matter alone, were a suitable legislative vehicle to

become available then an extension of Section 1(1)(c) might be included. Whether the Section would need to be adapted for conditions in Northern Ireland would be a matter for further consideration.

c. Making Sections 25 and 26 of the Emergency Provisions Act hybrid

These Sections are concerned with dressing or behaving in a public place like a member of a proscribed organisation and with the wearing of hoods etc, in public places. The Working Party noted that the conduct contemplated by these Sections was often associated with more serious crime such as the possession of firearms at a paramilitary funeral. Yet both offences were triable summarily. This meant that the Sections were rarely used simply because the conduct addressed was so often associated with more serious offences. However, hybridity would give the prosecuting authorities much greater flexibility and enable the Sections to be made useful on a wider range of occasions. Sir George Baker had recommended legislative change to enable offences under Sections 25 and 26 to be hybrid. The Working Party agreed that consideration of the point be carried forward in anticipation that a suitable legislative vehicle might become available.

29. After careful consideration of measures considered by a previous Working Party (some mentioned in part by Sir George Baker), the Working Party decided against recommending the following items:-

(a) Road closures

It is not an offence to use a closed border road crossing, or else to by-pass a border crossing road block. However, even if new offences were to be created, in present circumstances there were no practicable arrangements that could make them enforceable. There was no particular security advantage to be gained by any new offence. The Working Party

therefore agreed to recommend no amplification to the existing law.

(b) An offence of terrorism

At various times in the past it has been suggested that 'terrorism' should be made a separate criminal offence. However, an offence of this kind would make it necessary to prove not only the facts of the case, but also intent or motivation. Matters of proof would thus become doubly difficult and that would not make the law any more effective in dealing with terrorist violence. There were no grounds for giving a terrorist a platform for their own ideology, or for an attack on the Courts.

(c) Admissibility of statements by co-accused

At one time it had been suggested that statements of those accused of scheduled offences should be admitted as evidence at the trials of their co-accused, even if the former refused to give evidence in court in person. A similar provision of more general application had been recommended by the Criminal Law Revision Committee in their eleventh report. The Working Party's preliminary view upon this proposal was that to pursue it would arouse undesirable comment about the use of accomplice evidence, without any tangible benefit. The prosecuting authorities would find it very difficult to direct purely on the basis of a statement from an accomplice, when the latter refused to go into the witness box to speak to it. At the present time in particular there was a real danger of fuelling attacks (albeit unjustified), on the criminal justice system in Northern Ireland. Moreover, it would not be desirable to select one recommendation from what had been a package of proposals in the Criminal Law Revision Committee's Report which had been concerned principally with adjustments to the

technical rules on hearsay evidence. There was no prospect of any legislation coming forward for England and Wales on the point, or indeed upon the whole package, in the immediate future. The DPP would not advocate any procedural changes anyhow. It was unlikely that the Courts would be prepared to convict when the main piece of Crown evidence was not subject to cross-examination. Whilst some members of the Working Party saw merit in the CLRC recommendation they agreed that it would not be fruitful to pursue it in the context of Northern Ireland at this stage.

Discussions with the Republic of Ireland

30. In passing, the Working Party examined provisions of the Republic's Criminal Justice Bill presently before the Dail. This Bill was concerned both with the particular conditions prevailing in the Irish Republic and with the ordinary criminal law. Some of its provisions would bring the Republic's law more closely into line with that in England, Wales and Northern Ireland. However, the implications of certain of its provisions - for example those relating to the withholding of evidence - did seem to merit a further enquiry in the course of already established intergovernmental contact. The Working Group separately took note of reports from the Irish Republic which indicated that their draftsmen had found it almost impossible to find effective wording to strengthen their existing law on incitement. It was agreed that in the light of Ministers' reaction to the Working Party's own provisional report, careful consideration should be given to the possibility of giving the authorities in the Republic some intimation of the Group's own progress. Any opportunity to take stock of the Republic's views in their field should be taken.

Conclusions

31. The Working Party's conclusions may be summarised as follows:

- a. the difficulties in the way of dealing with the statements of apologists for terrorism are very considerable;

- b. a form of offence can be described for tackling the mischief which causes so much public offence: legislation might be contemplated if Ministers were prepared to confront the very significant problems implicit within it;
- c. if Ministers were to conclude that this course would be counter-productive then there remains only a very much more limited option involving amendment to Section 21(1) of the Northern Ireland (Emergency Provisions) Act 1978. This might be presentationally attractive, but is unlikely to have practical effect.
- d. the possibility of giving the authorities in the Republic some intimation of the Group's own progress should be kept under review. Any opportunity to take stock of the Republic's views in this field should be taken.
- e. the NIO should address the Lord Chief Justice with a view to explaining the Working Party's assumptions and understanding about the admissibility of photographic evidence, to review the desirability or otherwise of legislation, in the light of Sir George Baker's report, and to invite comment.
- f. once the Police Criminal Evidence Bill had been enacted, consideration should be given to the re-enactment of corresponding provisions in an Order in Council for Northern Ireland with any suitable adaptation.
- g. so far as police search and seizure powers in respect of photographic or documentary evidence and additional to those of the PCEB are concerned, the work at (e) above should review the options with the greatest care.
- h. the following modifications to existing law should be considered as suitable legislative vehicles arise:-

Later in the same article he said:-

"The lessons of history show that the only effective campaign is that of armed struggle. Even if Sinn Fein was in Government in Dublin and even if Sinn Fein were to become the undisputed nationalist representatives in the North, Britain would still refuse to go and the Loyalists would still have a veto over Irish unity."