



X index
on censorship

Art and the Law

A guide to the legal
framework impacting
on artistic freedom
of expression

CHILD PROTECTION

OBSCENE PUBLICATIONS

PUBLIC ORDER

RACE AND RELIGION

COUNTER TERRORISM



Vivarta

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Five areas of law covered in this series of information packs

Counter Terrorism

Child Protection

Obscene Publications

Public Order

Race and Religion

They can all be downloaded from indexonensorship.org/artandoffence or order a print copy from info@indexonensorship.org – postage will be charged.

Editors' note

As with the other documents in this series, this booklet is intended as an introduction to the legal framework that underpins the qualified right of freedom of expression enjoyed by artists and arts organisations in the UK. We hope that it will be of some assistance to artists, artistic directors, curators, venue management and trustees and others who seek to protect and promote artistic freedom of expression, especially when planning to programme challenging and controversial works.

This pack is not a substitute for legal advice.

If you are unsure about your responsibilities under the law at any time, you must obtain independent specialist legal advice. Some of the lawyers at work in the sector at time of publication are listed on the website.

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Nemesis, produced by 'A' Team Arts, a youth arts service for 13-19 year olds, at the Brady Arts Centre London. The play looked at accounts of terrorism and repression. Photo courtesy of Tower Hamlets Council © Rebekah Bainbridge



Preface

Freedom of expression is essential to the arts. But the laws and practices that protect and nurture free expression are often poorly understood both by practitioners and by those enforcing the law. The law itself is often contradictory, and even the rights that underpin the laws are fraught with qualifications that can potentially undermine artistic free expression.

As indicated in these packs, and illustrated by the online case studies which can be found at indexonensorship.org/artandoffence, there is scope to develop a greater understanding of the ways in which artists and arts organisations can navigate the complexity of the law, and when and how to work with the police. We aim to put into context the constraints implicit in the qualified rights set out in the European Convention on Human Rights and address unnecessary censorship and self-censorship.

Censorship of the arts in the UK results from a wide range of competing interests – public safety and public order, religious sensibilities and corporate interests. All too often these constraints are imposed without clear guidance or legal basis.

These law packs are the result of an earlier study by Index on Censorship: Taking the Offensive, which showed how self-censorship manifests itself in arts organisations and institutions. The causes of self-censorship ranged from the fear of causing offence, losing financial support, hostile public reaction or media storm, police intervention, prejudice, managing diversity and the impact of risk aversion. Many participants in our study said that a lack of knowledge around legal limits contributed to self-censorship.

These packs are intended to tackle that lack of knowledge. We intend them as “living” documents, to be enhanced and developed in partnership with arts groups so that artistic freedom is nurtured and nourished.

**Jodie Ginsberg, chief executive,
Index on Censorship**

US National Security Agency (NSA) HQ Fort Meade in Maryland. Photographer Trevor Paglen wrote: “My intention is to expand the visual vocabulary we use to “see” the U.S. intelligence community... If we look in the right places at the right times, we can begin to glimpse America’s vast intelligence infrastructure.”

© Trevor Paglen / Public Domain



Forward by Xenofon Kawvadias

We are only as free as the law allows us to be.

In post-World War II Western societies, the welfare state, prosperity, stability, social equality and liberty were the main pillars of a liberal democracy. They were proposed to the population in opposition to totalitarian regimes. With the demise of the totalitarian threat, these pillars are fast eroding, giving way to a new world of austerity, severe inequality, dismantling of the welfare state, of war on terror, surveillance, and market fundamentalism.

Against this backdrop, counter-terrorism legislation creates an all-encompassing criminalisation. This implicates a huge number of possible offenders from across many ideologies that it would be impossible and unacceptable to bring to justice. It allows for the arbitrary implementation of the law, focusing on the current foe, while maximising generalised control and stifling dissent.

For me, the sorry state of civil liberties in general and the counter-terrorism legislation in particular, acts as an absolute incentive to adopt the unique role of the artist as an informal, independent and privileged agent of social change and moderator of state power.

In this role, my quest for an understanding of freedom blurs my identity as an artist and I become journalist, activist, law-researcher, historian, politician. Freedom becomes both the subject and the goal of the work.

Artists are no more innocent or impartial than the rest of the population in the struggle between freedom and control. Working on issues of freedom of expression for me means trying to identify the precise point where speech becomes criminalised. If I prepare thoroughly, stay open and honest and take just the right amount of risk, I believe the work will shine light on the state of civil liberties and I will avoid legal problems. I don't want to be prosecuted, but I do want to know exactly what I have to do to avoid being prosecuted. I don't try and claim any sort of artistic license. I believe in what I am doing and I am prepared and able to defend it.

Xenofon Kavvadias is a fine artist working in London



Freedom of expression

Freedom of expression is a UK common law right, and a right enshrined and protected in UK law by the Human Rights Act¹, which incorporates the European Convention on Human Rights into UK law. The most important of the Convention's protections in this context is Article 10.

ARTICLE 10, EUROPEAN CONVENTION ON HUMAN RIGHTS

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

It is worth noting that freedom of expression, as outlined in Article 10, is a qualified right, meaning the right must be balanced against other rights.

Where an artistic work presents ideas that are controversial or shocking, the courts have made it clear that freedom of expression protections still apply. As Sir Stephen Sedley, a former Court of Appeal judge, explained: "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having." (*Redmond-Bate v Director of Public Prosecutions*, 1999)

Thus, to a certain extent, artists and galleries can rely on their right to freedom of expression under Article 10 of the European Convention on Human Rights: the right to receive and impart opinions, information and ideas, including those which shock disturb and offend. As is seen above, freedom of expression is not an absolute right and can be limited by other rights and considerations. While the Crown Prosecution Service and police have a positive obligation to promote the right to freedom of expression, in the context of counter-terrorism legislation, they are also required to balance this right against risks to national security.

The following sections of the pack look at one element of the law that may be used to curtail free expression: counter-terrorism legislation.

¹ At the time of writing (June 2015), the government is considering abolishing the Human Rights Act and introducing a British Bill of Rights. Free expression rights remain protected by UK common law, but it is unclear to what extent more recent developments in the law based on Article 10 would still apply.



The Beacon Frame developed by Julian Oliver and Danja Vasiliev was inspired by the PRISM surveillance system. Edward Snowden's leaked files included the revelation that the NSA was monitoring German Chancellor Angela Merkel's phone. Julian Oliver, Danja Vasiliev, The Beacon Frame © julianoliver.com

Counter-terrorism offences explained

Counter-terrorism is a complex and controversial area of the law, not least because the offences are often very widely drafted. The relevant legal definition of terrorism, contained within the Terrorism Act 2000 (and further extended in 2006), is very broad and potentially covers a very wide range of acts beyond those that are widely understood to be “terrorist” in nature. Artists, and the staff and directors of arts organisations, commit a criminal offence if publications in any medium, including images, which are likely to directly or indirectly encourage terrorism, are shown or displayed. The dissemination of any publication containing such a statement or image is also an offence.

The UK laws applicable to arts organisations and artists include:

- **The Terrorism Act 2000 (TA 2000)** (as amended by Section 34 of the Terrorism Act 2006), which provides a definition of terrorism <http://www.legislation.gov.uk/ukpga/2000/11/contents>
- **The Terrorism Act 2006 (TA 2006)** which creates the offence of publishing (or causing to be published) a statement directly or indirectly encouraging or otherwise inducing terrorism or disseminating a publication containing such a statement. For the purpose of these offences, indirect encouragement includes the glorification of terrorism now or in the past. <http://www.legislation.gov.uk/ukpga/2006/11/contents>
- **Police and Criminal Evidence Act 1984 (PACE)** <http://www.legislation.gov.uk/ukpga/1984/60/contents>

Not only are the definitions of terrorism broad and wide-ranging, but terrorism offences are themselves often vague and unclear. This complexity and lack of clarity can lead to the subjective and inconsistent application of the law, which in turn can have a chilling effect on freedom of expression. In most instances involving the professional arts sector, a successful prosecution is unlikely, particularly because a prosecution cannot be brought without the consent of the director of public prosecutions (DPP). To date, no artist has been convicted under counter-terrorism legislation.

Under Section 1 of the Terrorism Act 2006, it is a criminal offence to either publish a statement or disseminate a publication that is “likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism”.

In general terms, the “statement offence” catches those who are responsible for publishing prohibited statements, whereas the “dissemination offence” catches those who further disseminate such material. Both offences are punishable by up to seven years imprisonment.

The work in question may be seized (for more information, see below: The powers of the police and prosecuting authorities), and the directors and senior and decision-making staff of the arts organisation and the artist may risk arrest and/or prosecution.

“Statement” covers a communication of any description, including a communication without words, consisting of sounds or images, or both. Similarly, a “publication” can be in any form, and may include visual images without any accompanying text.

The act makes it clear that indirect encouragement includes “glorification”, which is defined “as including any form of praise or celebration” of acts of terrorism, provided the members of the public could reasonably be expected to infer that “what is being glorified is being glorified as conduct that should be emulated by them”. This applies both to glorification now or glorification of what has happened the past. It is not relevant whether any person was in fact encouraged or induced by the statement to commit a terrorist act and it is not necessary that this was even a likely consequence of the “publication”.

Similarly, it is not necessary to intend to encourage or otherwise induce members of the public. Recklessness is sufficient. However, where the offence is committed recklessly, it is a defence to show that the statement or publication in question did not express the defendant's views and did not have his/her endorsement, and this was clear in all the circumstances of the case, including the way in which the statement was presented.

The motivation of the artist or arts organisation is relevant in relation to the available defences. Providing the offence has been committed recklessly (rather than with an intention to encourage terrorism), it is a defence to show that the statement or publication in question did not express the artist's or arts organisation's views and did not have his/her/their endorsement, and this was clear in all the circumstances.

If you are to defend successfully your position and exhibit works that are controversial but do not fall foul of the provisions of the Terrorism Act 2006, you need to recognise this potential problem in advance. Take clear steps to contextualise the works and be ready to demonstrate why they should not be treated as encouraging or glorifying terrorism.

The offences contained within Sections 58 and 58A of the Terrorism Act 2000 are similar, and in practice are unlikely to cause any problems for arts organisations or artists because the type of information captured by these offences is narrowly defined. In order for Section 58 to apply, the information in question must be of practical assistance to a terrorist, or potential terrorist.

Some examples of the type of material covered by Section 58 include information on how to build explosives, or information on military operations, or guidance on how to avoid surveillance and detection.

PROSCRIBED ORGANISATIONS

Statements, documents or artworks in support of proscribed organisations can attract investigation and charges. The secretary of state may make an order (adding or removing) a group from the "proscribed" list in Schedule 2 to the Terrorism Act 2000. Such orders require the approval of both Houses of Parliament. A group can only be proscribed if the secretary of state believes it is "concerned in terrorism" pursuant to the definition of terrorism provided by the act. A group is concerned in terrorism if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise concerned in terrorism.

Although some people have been concerned that Section 58A may be used to stop people taking photographs of buildings or people, the legislation does not prevent artists or photographers taking pictures of public spaces, or of police officers in the course of normal policing, such as at protests or demonstrations. In order to arrest someone under Section 58A for photographing a police officer, there must be a reasonable suspicion that the image is likely to be useful to a terrorist. For example, information about the person's house, car, routes to work and other movements may be useful to terrorists.

Importantly, it is a statutory defence for a person to prove that they had a reasonable excuse for eliciting, publishing or communicating the relevant information in respect of Section 58A or for collecting or recording the information in respect of Section 58. Legitimate journalistic or artistic activity is likely to constitute such an excuse.

If an artist or arts organisation is prosecuted for any of the offences in the Terrorism Act 2006 and/or the Terrorism Act 2000, the consequences could be very serious for him or her personally and for freedom of expression more widely.

For all these reasons, it is advisable to prepare well and ensure you have thought about any potential challenges early on.

The powers of the police and prosecuting authorities

The police have the right to enter and search galleries, museums and theatres and to seize artworks in certain defined circumstances.

Under Section 8 of the Police and Criminal Evidence Act, a magistrate may issue a warrant to search premises if a serious arrestable offence has been committed. Under Section 19 of the same act, police may seize anything that is on the premises if he/she has reasonable grounds for believing that it has been obtained in consequence of, or is evidence of an offence.

The police must be on the premises lawfully, on public property – as most galleries, museums and theatres are – either with a warrant or having been invited in. Under Section 28 of the Terrorism Act 2006 a judge may issue a warrant authorising the police to enter and search premises and seize any articles that are likely to be covered by the dissemination offence.

Police can seize an art work and recommend it be removed without having established a watertight case. All that needs to be established is reasonable grounds for believing the relevant crime has been committed. In some cases the advice or presence of the police may put pressure on the museum or gallery or theatre to remove an artwork voluntarily. However, an arts organisation is not obliged to remove an art work because the police have merely advised it to do so (rather than seizing the work). The police may be taking an overly conservative approach and their interpretation of the law may be wrong. The arts organisation should therefore seek independent legal advice before permanently removing artworks, and inform the police that they are doing so.

Prosecutions under the Terrorism Act require the consent of the Director of Public Prosecutions. In all cases the Crown Prosecution Service (CPS) will adopt a three stage approach before deciding whether or not to prosecute. First, they will consider whether or not an offence has been committed. Secondly they will consider whether there is a realistic prospect of conviction. If there is enough evidence, the Crown Prosecution Service will proceed to the third stage and consider whether it is in the public interest to prosecute taking into consideration the competing rights of the artist or arts organisations and the protection of national security.

The Beacon Frame viewed from above. Exhibited at Transmediale 2014 in Berlin, the work covertly harvested the numbers of exhibition visitors' mobile phones and sent each a subversive SMS. Technicians shut it down a day later and threatened to report the artists to police.

**Julian Oliver, Danja Vasiliev, The Beacon Frame
© julianoliver.com**



Practical guidance for artists and arts organisations

If you are exhibiting any specific photographs, images or installations, or presenting other artistic works including plays or performances that may be likely to be understood as encouraging or glorifying terrorism you should take the following steps. You can show the police your record of your decision-making process. If you have good relations with the local police, it can be helpful to discuss issues arising in relation to specific work in advance.

The issues to consider include:

- Making your motivation and reasons for making or displaying the work clear, why you consider the work to have artistic merit, and the steps you have taken to mitigate any potential risk of it being misunderstood by the public or certain groups - see Appendix I for sample text "Documenting a decision".
- Providing the context for the work, what the artist is seeking to achieve, their previous work, the role of controversy in their work etc. If the artist does not have a substantial body of work, put the work and the artist in a wider context.
- Considering the public interest in this work and how it contributes to a wider debate in society.
- Considering how the work is likely to be perceived by the public as a useful way to contextualising the work.
- Being aware that the right to freedom of expression includes the right to express ideas and opinions that shock, offend and disturb. You might draft a free speech statement for your organisation.
- If the art work includes opinions of others that may be construed to glorify violence (for example), be sure to make it clear that the opinions of others included in the work do not represent the artist's or producing organisation's views and does not have their endorsement.

SAMPLE FREE SPEECH STATEMENT FOR THOSE PRESENTING ARTWORKS

To exhibit a work of art is not to endorse the work or the vision, ideas, and opinions of the artist. It is to uphold the right of all to experience diverse visions and views. If, when controversies arise from the exhibition of a work of art, we welcome public discussion and debate with the belief that such discussion is integral to the experience of the art. Consistent with our fundamental commitment to freedom of speech, however, we will not censor exhibitions in response to political or ideological pressure.

National Coalition Against Censorship guidelines
www.ncac.org

- Taking into account the factors to be balanced against the right to freedom of expression as discussed above.
- Demonstrating an awareness of similar work that has been successfully presented and keeping abreast of reactions to similar works.

You may decide to inform the police of your plans to present work, but do not seek "permission" to exhibit, which they cannot grant anyway. If you think the work may be borderline or cross over the line, it is best to take legal advice on the level of risk.

Advance preparation should bear in mind the principal legal standard of “reasonableness”. The factors relevant to demonstrably meeting that standard may include:

- The artistic purposes of an organisation or an individual, both to invoke Article 10 and to refute suggestions of other motivations.
- Engagement with the authorities. Making early contact could make it easier for them to protect your right to freedom of expression.
- Engagement with the press and individual complaints. (See work done by National Coalition Against Censorship on Best Practice for Museums <http://ncac.org/resource/museum-best-practices-for-managing-controversy/>).
- An openness to managing the risk of disorder, at least in principle, and subject to the imperative of ensuring that the artistic work is not unduly constrained.

Challenging a decision to investigate, seize work or prosecute will require specific legal advice and so is beyond the scope of this guidance. But in summary you *may* be able to:

- Argue that a police investigation, or a decision to seize works is a disproportionate interference with the right to freedom of expression and, if appropriate, institute judicial review proceedings so that a court can determine the lawfulness of the decision or decision-making process.
- Argue that a decision to prosecute is a disproportionate interference with the right to freedom of expression, and/or a breach of the Prosecutors Code or otherwise unlawful and, if appropriate, issue judicial review proceedings.
- Argue that the decision to prosecute or charge is not in the wider public interest, or that the work is not in fact likely to be understood as encouraging or glorifying terrorism.



From Xenofon Kavvadias' exhibition *The Law Is No Less Conceptual Than Fine Art*. Books ruled illegal under UK terrorism law were burnt and put in hand blown glass vessels. The vases were inspired by the work of 16th century painter Paolo Veronese, said to have told the Inquisition that "sometimes painters take liberties like poets or madmen".
© Xenofon Kavvadias. Published with artist's permission.

Questions and answers

Q. What is the difference between Article 10 of the European Convention on Human Rights and Article 19 of the UN Declaration on Human Rights?

A. Freedom of expression, as outlined in Article 10, is a qualified right, meaning considerations regarding its protection must be balanced against other rights and interests. Article 19 of the UN Declaration on Human Rights, which also addresses freedom of expression, is less qualified: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. Nevertheless, even within the UN Declaration there are provisions which contemplate some qualification of the freedom expressed in Article 19. It is the European Convention on Human Rights which is currently relevant to UK law.

Q. Can I challenge a decision by a local authority or police body?

A. Yes. The usual way of doing so would be via judicial review. You should seek specialist legal advice before bringing your claim. Be aware that you must bring your claim as soon as possible and in any event no later than three months after the decision you wish to challenge. Judicial review is not ordinarily an effective means of overturning decisions quickly. Claims often take many months to be heard. However, it is possible to apply for a claim to be heard quickly if there are good grounds to do so. Even if you succeed you will not usually recover damages: they are awarded at the court’s discretion. The court might quash the decision under challenge, and/or require the public authority to adopt a different procedure in its decision-making.

Q. Can the police seize an art work, as opposed to “advise the removal” of an art work, only when they have a warrant from a judge?

A. Police officers who are lawfully on any premises may seize anything they have reasonable grounds for believing is evidence in relation to any offence, which means an art work may potentially be seized in circumstances where the police have not obtained a warrant.

However, in practice, they are more likely to obtain a warrant in advance.

Q. Does the level of “state of alert” have any impact on the likelihood of police intervention?

A. In practice it is probably unlikely to make a discernable difference. Police intervention is more likely to be driven by complaints from members of the public or press viewing the work.

Q. Can a person or group commit an offence if they are making a statement that has been construed as incitement but doesn’t intend to encourage terrorism?

A. Yes, the offence can be committed recklessly, which is to say that the person making the statement did not intend to encourage terrorism by the statement but has nevertheless been construed as doing so.

Q. What is the situation regarding taking photographs of anything that might be useful to someone committing or preparing an act of terrorism, if the photographer can demonstrate that his/her motivation is purely artistic?

A. Legitimate artistic activity is likely to be a complete defence.

Q. What is the impact on artistic freedoms more generally of the Civil Contingencies Act 2004, which allows a minister, whenever there is the threat of terrorism, to make emergency regulations that could temporarily override almost all other legislation?

A. Although the Civil Contingencies Act is wide-reaching, the Human Rights Act 1998 cannot be amended by emergency regulations under this Act. Therefore, freedom of expression rights cannot be eroded by this legislation, even in times of emergency. This may change if the Human Rights Act is abolished.

Q. Does the new legislation contained in the Counter-Terrorism and Security Act 2015 make any difference to the situation for artists and arts venues?

A. No, the provisions of that act do not have any specific relevance to artists or arts venues except where they are a specified authority contained in Schedule 6 of the act, which includes many educational establishments.

Q. Does the information in this pack extend to educational contexts as well as arts organisations, e.g. arts and humanities departments in Higher Education?

A. Yes, although they would also be under an additional obligation to prevent people being drawn into terrorism pursuant to the Counter-Terrorism and Securities Act 2015.

Q. What are the implications for artists and arts organisations of the broad definition of “terrorism”?

A. The fact that the definition of terrorism is broad and vague means a lot of things can potentially be brought under the umbrella of “terrorism”. Plainly, this has the potential to allow counter-terrorism controls to expand into broader areas of public life and there is certainly concern that there has been an increase in the use of anti-terror laws to stifle legitimate political and social protest. David Anderson QC, the UK’s Independent Reviewer of Terrorism Legislation (see Appendix III), has also criticised the broad definition of terrorism and pointed out that there

has been a degree of “mission creep” over the years. However, in most instances involving the professional arts sector, a successful prosecution is unlikely, particularly because a prosecution cannot be brought without the consent of the director of public prosecutions (DPP). To date, no artist has been convicted under counter-terrorism legislation.

Q. What are the guarantees that organisations will not be unfairly deemed “proscribed”?

A. The Terrorism Act 2000 provides an appeal procedure for proscribed organisations or individuals affected by a proscription.

Q. Is there a contradiction between the defence of motivation in the case of recklessness and advice to contextualise/prepare in advance? If you recognise the problem in advance can you claim that “the offence has been committed recklessly”?

A. It is perfectly possible to recognise the problem in advance, take steps to avoid the problem and still end up committing the offence recklessly. You could have been of the view (erroneously) that the steps you took in advance had removed that risk.



Q. Do I have to give the script of a play or images I intend to exhibit to the police or local authority prior to the show opening if requested?

A. You only have to provide a copy of a script (or any document or property) if the police or local authority has a legal power to view and seize that material. Accordingly, if a local authority or the police ask to see particular artistic material you should ask them to clarify whether they are demanding that you hand over the material, or whether they are simply asking for your voluntary co-operation. If they are demanding that you provide the material, ask them to identify the legal power that gives them the right to do this. You should make a contemporaneous note of their answers. If the police are simply seeking your voluntary co-operation then you do not have to give them anything. If in doubt about the scope of their powers, consult a lawyer.

Q. The law says that if there is a statement that may be perceived by a member of the public as glorification then you may be liable for prosecution. How can an artist safeguard their expression from such an accusation?

A. Such a situation is an example of the offence under the Terrorism Act 2006 being committed recklessly. It would be a defence to show that the statement or publication in question did not express the defendant's views and did not have his/her endorsement, and this was clear. So artists should take steps to make sure that they can demonstrate this in all the circumstances of the case, including the manner in which the statement has been presented.

Q. If the police consider that the law has been broken, is it the case that all staff in the organisation risk arrest or only curatorial and senior management?

A. It depends on their level of involvement, however in most circumstances it is likely that only those members of staff who played a decision-making role are likely to face prosecution.

Q. When a cultural work or process or action is quoting or appropriating material that could be considered inflammatory, for example as parody, to what extent is it protected by the Terrorism Act 2000 and the Terrorism Act 2006? (A corollary in copyright law would be "Fair Use")

A. Again this would be an example of recklessly committing the Terrorism Act 2006 offence, and it would be a defence to show the view expressed was not the view of the artist, which in the situation described would, in all likelihood, be quite straightforward.

Q. There have been instances where police have acted pre-emptively in the name of counter-terrorism, i.e. before complaints have been made or before terrorist provocation has been evidenced. How can cultural organisations and individuals respond to pre-emptive force, or find protection from it?

A. Issues may be resolved by good communication with the relevant police force. If you have good relations with the local police, it may be helpful to discuss issues arising in relation to specific work in advance. However, the police can seize work on the grounds of reasonable suspicions even before a terrorism offence has been proved. Organisations can further protect themselves by making sure they understand the constraints of the offences created by counter-terrorism legislation and have taken steps to, as far as possible, contextualise the work to avoid misinterpretation and falling foul of the legislation.

Q. Would a UK arts organisation be subject to the Terrorism Act 2000 or the Terrorism Act 2006 if they presented a work by a non-UK artist previously presented in a non-UK context?

A. Yes – if they publish something they are potentially responsible, regardless of the nationality of the artist or the fact that it may have been exhibited elsewhere previously. In some cases, the fact that the work has been shown successfully elsewhere can be used to advantage in defence, but this is not always the case and should not be relied on.

Q. Do all prosecutions under counter-terrorism legislation have to have the consent of the director of public prosecutions? If not who else can give consent? Would the attorney general's consent be needed if an artistic work is involved?

A. The relevant offences under the Terrorism Act 2000 and the Terrorism Act 2006 require the consent of the director of public prosecutions before a prosecution can be commenced. Where it appears to the director of public prosecutions that the offence has been committed for a purpose wholly or partly connected with the affairs of a foreign country, the director of public prosecutions shall not give consent without the prior permission of the attorney general.



Alexander Hanson and Chipu Chung in *Talking to Terrorists* by Robin Soans, produced by Out of Joint and the Royal Court Theatre. The play is based on verbatim texts of interviews with people involved in or affected by terrorism. Photo © Geraint Lewis

Appendix I: Documenting and explaining a decision

Please note: Appendices are examples only and not a substitute for legal advice.

Example: An artist wants to make a body of work exploring graffiti propaganda from an anti-Western perspective. She is collecting imagery from around the world and planning to display them in the UK. In order to begin discussions with a gallery she documents the reasons for the work.

Reasons for the decision

1. My interest is to explore anti-Western graffiti as a propaganda tool and contextualise it within the UK's war on terror and counter-terrorism legislation.
2. The work uses visual imagery to contribute to our understanding of propaganda in general and perceptions of the West.
3. The work is part of a body of work that I have undertaken based on images of propaganda used in historical ideological conflicts.
4. The work deliberately sets out to stimulate legitimate debate about representation and identity in this case.
5. It responds to a debate of public interest, the intersection between religion and politics and how this is shaping society's attitudes towards resistance, dissent, propaganda.
6. There is public interest in participating in a critical debate about the interface between religion, politics and identity.
7. There is a public interest in freedom of artistic expression itself and I consider that this is work of value which should be seen to further the important public debate.
8. My previous work has been exhibited/I have sold numerous copies of previous works, which have been positively reviewed.
9. The work forms part of a broader project/exhibition designed to educate or stimulate discussion on an important issue.

Appendix II: Sample letter for approaching the police

Dear xx Police Force,

For the attention of xx Counter Terrorism Team

We are xx, a local gallery who specialises in presenting contemporary political artwork.

We are writing to inform you that we are programming an exhibition from xx to xx by an established/emerging artist.

The exhibition will show an important body of work that includes imagery of xx.

We consider the exhibition xx to be a valuable contribution to the public debate concerning xx.

We consider it to have genuine artistic merit and that the artist is serious and committed and the work carefully and accurately researched.

In the light of recent media accusing work that seeks to engage with this highly sensitive area of contemporary life in the UK as glorifying terrorism, we have asked a lawyer to look at the work. S/he confirms our view that the work is not in breach of counter-terrorist legislation.

When the show opens to the public we will make it clear through signage that the work on display does not express the views of the artist or the gallery, that we do not endorse the violence portrayed.

We have scheduled a public debate on xx which will allow people of different views in this area to express their views.

Yours sincerely,

Appendix III: Commentaries on UK terrorism legislation

1. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 2005

On October 2005 the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism “drew the government’s attention to related issues concerning the draft Terrorism Bill 2005, (TA 2006) indicating that, although many elements of the draft bill appeared to comply with article 15 of the International Covenant on Civil and Political Rights as the proposed provisions were sufficiently precise and the criminalisation of certain acts was legitimate, other proposed offences might not be. In particular, clauses 1 (encouragement of terrorism), 2 (glorification of terrorism) and 3 (dissemination of terrorist publications) might be of concern because of their broad nature. According to the draft bill, these offences would require neither that the person expressing utterances or disseminating a publication had any subjective intent of inciting others to commit terrorist acts, nor that the person’s conduct resulted in an objective danger that one or more such offences would be committed. Instead, a broad test of how other persons could reasonably be expected to understand the utterances or publications would determine whether certain conduct was punishable. It appeared that the provisions might affect the legitimate exercise of the freedom of expression, such as fiction or non-fiction writings about real or imagined acts of terrorism (clause 2) or maps, glossaries, technical handbooks, or timetables of public transport (clause 3).”

2. Report of the Eminent Jurists Panel on terrorism, counter-terrorism and human rights, 2009

In 2009 the International Commission of Jurists presented a report from its Eminent Jurists Panel on changes to the legal landscape internationally in the wake of the September 2001 attacks. It concluded: “Many participants at the UK hearing raised concerns that the breadth and the ambiguity of the offence of “glorification” create a risk of arbitrary and discriminatory application. The risk of such abuse is exacerbated by the fact that the offence applies also to past acts of terrorism and to terrorist acts occurring in other countries. Witnesses expressed concern that such wide-ranging laws reduce legitimate political debate, particularly within immigrant or minority communities.”

3. Report of the independent reviewer on the operation of the Terrorism Act 2000 and part 1 of the Terrorism Act 2006 by David Anderson QC

Highlights from the report:

4. Definition of terrorism

- 4.1. Though the United Nations required all States in the days after 9/11 to “take the necessary steps to prevent the commission of terrorist acts”, there remains no agreed international concept of terrorism. In those circumstances the UK’s definition, based on a recommendation by Lord Lloyd who was in turn inspired by an FBI working document, has strongly influenced the formulations of others, particularly in the Commonwealth but also at the level of the European Union.
- 4.2. There are three cumulative elements to the UK’s current definition:
 - (a) The actions (or threats of actions) that constitute terrorism, which encompass serious violence against a person; serious damage to property; and actions which endanger life, create a serious risk to health or safety, or are designed seriously to interfere with or seriously to disrupt an electronic system;

(b) The target to which those acts must be directed: they must be designed to influence a government or international organisation, or to intimidate the public or a section of the public; and

(c) The motive that must be present: advancing a political, religious, racial or ideological cause.

The second of those elements (the target requirement) is a less effective filter than it might appear: “the government” means the government of any country in the world; and the target requirement need not be made out at all when the use or threat of action involves the use of firearms or explosives.

4.3. The TA 2000 [Terrorism Act] definition is an easy target for criticism. In particular:

(a) It is longer and more complex than its predecessor.

(b) Its international reach renders it remarkably broad – absurdly so in some cases. Particularly striking is its indiscriminate criminalisation of those attacking “countries which are governed by tyrants and dictators– including, subject possibly UN sanctioned use of force against military targets.

(c) The effect of that breadth is to grant unusually wide discretions to all those concerned with the application of the counter-terrorism law, from Ministers exercising their power to impose executive orders to police officers deciding whom to arrest or to stop at a port and prosecutors deciding whom to charge.

(d) Those discretions become wider still when conduct ancillary in only the broadest sense to terrorism is criminalised, and when dubious expansionary phrases such as “terrorism-related” and “terrorist or extremist” are allowed on to the statute book or into the statistics.

Those criticisms are only partly blunted by my own observation that the wide discretions appear for the most part to be responsibly exercised, and by the general perception, endorsed by Lord Carlile in his essential report on the subject, that the UK definition is “useful and broadly fit for purpose”.

4.4. More fundamentally, it has been questioned:

(a) Whether a single definition of terrorism is even appropriate for all the various purposes to which it is currently applied; and whether the definition might be more soundly based on a “scheduled offence approach” akin to that used in some other European countries and in Council of Europe Conventions. These ideas draw force from the view (which I unhesitatingly share) that terrorism is first and foremost crime; and that if special legal rules are to be devised in relation to it, they should be limited in their application, and justified on the basis of operational necessity.

4.7. The current definition of terrorism contains no express exemption for acts carried out overseas that constitute lawful hostilities under international humanitarian law. One result (subject to the possible intervention of the Supreme Court) has been to criminalise Mohammed Gul for posting videos on YouTube showing attacks on coalition forces in Iraq and Afghanistan. Other consequences are the indiscriminate characterisation as “terrorism” of nationalist and separatist acts of violence, even in the context of a civil war, and notionally at least, the potential application of the Terrorism Acts even to UK forces engaged in conflicts.”



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