HM Government

Memorandum to the Home Affairs Committee

Post-legislative scrutiny of the Counter-Terrorism and Security Act 2015

June 2021

CP 455

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Presented to Parliament
by the Secretary of State for the Home Department
by Command of Her Majesty

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MEMORANDUM TO THE HOME AFFAIRS COMMITTEE

POST-LEGISLATIVE SCRUTINY OF THE COUNTER-TERRORISM AND SECURITY ACT 2015

Introduction

1. This memorandum provides an assessment of the Counter-Terrorism and Security Act 2015 (CTSA) and has been prepared by the Home Office for submission to the Home Affairs Committee. It is published in accordance with the guidance document 'Post-legislative Scrutiny – The Government's Approach'[1].

2. On 29 August 2014, the independent Joint Terrorism Analysis Centre (JTAC) raised the UK national terrorist threat level from SUBSTANTIAL to SEVERE. This means that a terrorist attack is "highly likely". At that time, nearly 600 people from the UK who were of interest to the security services were thought to have travelled to Syria and the region since the start of the conflict, and the security services estimated that around half of those had returned. The then Prime Minister announced that legislation would be brought forward to stop people travelling overseas to fight for terrorist organisations or engage in terrorism-related activity and subsequently returning to the UK, and to deal with those already in the UK who pose a risk to the public.

Objectives of the Counter-Terrorism and Security Act 2015

3. In the context of the threat level at the time, the provisions in the CTSA looked to strengthen the legal powers and capabilities of law enforcement and intelligence agencies to disrupt terrorism and prevent individuals from being radicalised.

4. In summary, the CTSA provides for:

- powers that place temporary restrictions on travel where a person is suspected of involvement in terrorism, such as Temporary Exclusion Orders, and powers to seize travel documents;
- enhancement of existing Terrorism Prevention and Investigation Measures (TPIMs) to monitor and control the actions of individuals in the UK who pose a threat;
- enhancement of law enforcement agencies' ability to investigate terrorism and serious crime by extending the retention of relevant communications data to include data that will help to identify who is responsible for sending a

[1] https://www.gov.uk/government/publications/post-legislative-scrutiny-the-governments-approach

communication on the internet or accessing an internet communications service;

- strengthening of security arrangements in relation to the border and to aviation, maritime and rail transport;
- enhancement of programmes that combat the underlying ideology which supports terrorism through improved engagement from partner organisations and consistency of delivery through mechanisms such as the Prevent Duty;
- amendment of existing terrorism legislation to clarify the law in relation to insurance payments made in response to terrorist demands and the power to examine goods under the Terrorism Act 2000 (TACT 2000); and
- strengthening of the independent oversight arrangements for UK counter-terrorism legislation by extending the statutory remit of the Independent Reviewer of Terrorism Legislation (IRTL) and enabling a more flexible reporting schedule, and by providing for the creation of a Privacy and Civil Liberties Board to support the IRTL to discharge their statutory functions.

5. The CTSA is split into seven parts, and includes powers associated with government departments and agencies other than the Home Office. This memorandum deals with each part of the CTSA in turn and provides post-legislative scrutiny for each set of related powers as set out in Table 1:

Table 1: Organisation of this post-legislative scrutiny memorandum

PART 1 – TEMPORARY RESTRICTIONS ON TRAVEL

Chapter 1: Powers to seize travel documents

Section 1 and Schedule 1 (Seizure of passports etc from persons suspected of involvement in terrorism)

Introduction

6. Part 1 of the CTSA introduces Schedule 1, which allows for the seizure and temporary retention of passports at a UK port or border from persons who are suspected of travelling to engage in terrorism-related activity. The schedule is divided into various sections including:

    - definitions of a port, travel document, senior police officer and the jurisdiction of the power;
    - powers of search and seizure, including which lawful authority can exercise these powers;
    - retention or the return of travel documentation seized;
    - detention of the document for criminal proceedings;
    - extension of the 14 day period;[2]
    - persons unable to leave the UK; and
    - offences.

7. The provisions allow for passports to be seized from both UK or foreign nationals and retained for 14 days; after this period the passport must either be: (i) returned to the individual from whom the passport was seized; or (ii) referred by a senior police officer (at least the rank of Superintendent) to a judicial authority for an extension of the 14 day period.

8. If, after 14 days, the police apply to a judge for an extension, the individual who had their passport seized is entitled to be legally represented at the hearing.

9. The CTSA makes provision for the Secretary of State to make whatever arrangements they consider to be appropriate in relation to individuals whose passport has been seized and cannot leave the UK.

10. In addition, the CTSA identifies offences of: (i) failure to hand over all travel documents in a person's possession without reasonable excuse; and (ii) seeking to intentionally obstruct or frustrate a search. A person guilty of such an offence is

[2] Passports can be seized and retained for 14 days; after this the passport must be returned unless extended by a senior police officer.

liable on summary conviction to a sentence of up to six months' imprisonment or a fine or both.

11. The temporary seizure of travel documents provides the security services with time to investigate subjects of interest further. This has allowed for the implementation of longer-term disruptive action, such as prosecution, exercising the Royal Prerogative to cancel or refuse to issue a British passport, or making a person subject to a TPIM order.

Implementation

12. Section 1 has been implemented fully and there are no unused elements of Schedule 1 to the CTSA.

13. Counter-Terrorism Policing has made use of the following provisions: authorisation of a senior police officer to retain seized documents; a review by a senior officer after 72 hours; the involvement of a judicial authority after 14 days; a maximum time limit for retention of 30 days; and a requirement to comply with a mandatory Code of Practice.

Secondary Legislation

Section	Related legislation/guidance	Purpose	Date of issue
1	Code of Practice for Officers exercising functions under Schedule 1 to the Counter-Terrorism and Security Act 2015 in connection with seizing and retaining travel documents	Outlines procedure under which the Secretary of State may designate immigration officers and customs officials to exercise functions under Schedule 1	February 2015

Preliminary Assessment

14. Up until the end of 2020, the Schedule 1 power had been used 59 times; of these, 39 passports were seized for the maximum period of 30 days. This power is sometimes used in conjunction with the Royal Prerogative where persons may be refused a British passport or may have their existing passport withdrawn on a number of grounds, including:

"Where a person's past or proposed activities are so demonstrably undesirable that the grant or continued enjoyment of passport facilities would be contrary to the public interest"[3]

15. The legislation has been used to disrupt those who intended to travel to Syria. Without this power British citizens would have been free to travel and take part in terrorism-related activity or receive terrorist training to implement on their return to the UK.

16. Since 2018, there has been a decline in the use of Schedule 1. This can be attributed to the decline in the number of foreign terrorist fighters travelling to Syria (and similar theatres) and since 2020 the COVID-19 pandemic curtailing international travel.

Assessment from Operational Partners

17. Counter-Terrorism Policing and the Security Service have found the use of these powers to be critical in the prevention of persons leaving the country in order to participate in terrorism-related activity, particularly in emergency situations. This includes instances when the withdrawal of travel documents through the Royal Prerogative could not be undertaken in time or when the nature of activity falls short of the threshold required to trigger the power of arrest in section 41 TACT 2000.

18. There is a substantial amount of police oversight of the authorisation and review of seized documents. The minimum authorisation and review levels – authorisation: Superintendent; review: Chief Superintendent – are consistent with the level of authority required in order to ensure the necessary and proportionate use of these powers. In any consideration for authorisation of removal, the implications of taking the travel documents and the subject remaining in the UK, both in terms of national security and the subject's wellbeing, have been considered.

[3] The Royal Prerogative is the means by which some of the executive powers of government, possessed by and vested in a monarch with regard to the process of governance of their state, are carried out: https://hansard.parliament.uk/commons/2013-04-25/debates/1304200024/Passports.

Chapter 2: Temporary exclusion from the United Kingdom

Sections 2-15 and Schedules 2 (Urgent temporary exclusion orders: reference to the court etc), 3 (Temporary exclusion orders: proceedings) and 4 (Temporary exclusion orders: appeals against convictions)

Introduction

19. The CTSA provided for the power to impose a Temporary Exclusion Order (TEO). TEOs allow the Government to disrupt and manage the return to the UK of citizens suspected of involvement in terrorism-related activity abroad. They require the individual on whom a TEO is imposed not to return to the UK unless their return is in accordance with a permit to return issued by the Secretary of State before the individual began the return, or the return is the result of the individual's deportation to the UK. They make it an offence for individuals subject to TEOs to return to the UK without first engaging with UK authorities.

20. At the time a TEO comes into force, any British passport held by the excluded individual is invalidated. The TEO also allows for the imposition of certain requirements on the individual once they return to the UK. Upon return, an individual will still be subject to the obligations under a TEO whilst it remains in force and has not been revoked, and it is an offence to fail to comply with the obligations unless the individual has a reasonable excuse.

21. Sections 2-15 (Chapter 2) and Schedule 2 to the CTSA relate to the creation and operation of TEOs. Chapter 2 is divided into the following sections which provide for:

- the imposition and conditions of TEOs;
- obtaining permissions from the courts;
- the validity and issue of notice for a TEO;
- issuing permits of return;
- obligations after return to the UK;
- various offences and penalties for individuals subject to a TEO; and
- the review process of decisions relating to TEOs.

Implementation

22. A TEO is imposed by providing a written submission to the Secretary of State which recommends the imposition of a TEO, the reasons for doing so and an assessment as to whether the conditions at sections 2(3) to 2(7) are met. If the Secretary of State agrees to the imposition of a TEO, an application is then made to the court on behalf of the Secretary of State, in order to satisfy the requirement at section 2(7). If the court agrees, the TEO notice is then served on the subject

via a method set out under the Temporary Exclusion Orders (Notices) Regulations 2015.

23. Sections 2-15 of the CTSA were implemented fully in July 2015. The power came into force in the second half of 2015.

24. Section 2(8) of the CTSA requires that the Secretary of State must keep under review whether condition B is met: that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public in the UK from a risk of terrorism, for a TEO to be imposed on the individual. The Home Office therefore holds regular reviews with stakeholders to ensure that this requirement is complied with. The Home Office will communicate any changes to the TEO or associated obligations to the subject as soon as possible after being reviewed.

25. Section 9(4) of the CTSA permits the Secretary of State to vary or revoke notices that require TEO subjects to meet the in-country obligations of a TEO. The Home Office has a variation request process in place that allows TEO subjects to request temporary or permanent variations to their obligations.

26. TEO subjects are informed of this process, as well as other matters, by way of a guidance document that is provided to them with their TEO documents. TEO subjects may make variation requests in writing to an email inbox, by post or by calling a dedicated telephone number and leaving a voice message. Upon receipt, variation requests are acknowledged by the Home Office within two working days and a full response issued as soon as possible after that.

27. TEO subjects are also invited to inform the Home Office of any information or personal circumstances that they wish to be taken into consideration in deciding the obligations that are imposed on them, or the details of those obligations. For example, TEO subjects might wish to make the Home Office aware of any caring responsibilities that they have, mental or physical health issues, or other matters that might affect their ability to comply with obligations.

28. Under section 4 the Home Office is required to give notice to an individual subject to a TEO. The Home Office aims to serve the TEO notice on the subject in person where possible, however the overseas location of a TEO subject has in practice made this challenging. Where this is the case, alternative methods within the scope of the CTSA have been pursued, such as serving the notice to the subject's legal representatives, to their last known UK address or to their email address, as detailed in section 3 of the Temporary Exclusion Orders (Notices) Regulations 2015.

29. Under section 5 of the CTSA, permits to return are issued in the form of a Home Office Emergency Travel Document (ETD) given that it is recognised globally. To ensure that an ETD complies with the requirements of the CTSA, the Home Office ETD incorporates the requirements for a permit to return under the CTSA.

30. In cases where the subject is being deported to the UK, the ETD explains that, in accordance with section 7 of the CTSA, the Secretary of State has issued the ETD under section 5 of the CTSA. The ETD also sets out the details of the permitted return journey and requires the subject not to return to the UK other than in accordance with its terms. Further, an accompanying guidance note for TEO subjects explains that returning to the UK without permission or reasonable excuse to do so may result in prosecution, which on conviction may result in a term of imprisonment or a fine, or both.

31. Section 10(3) of the CTSA establishes that an individual is guilty of an offence if, without reasonable excuse, they fail to comply with the obligations contained within their notice. The guidance issued to TEO subjects informs them that they should notify the TEO Contact Officer via the methods provided if they are unable to meet their obligations. If a breach occurs without prior notification to the TEO Contact Officer, the police will investigate before deciding whether the breach should be referred to the Crown Prosecution Service (CPS).

32. Schedule 3 provides a power for rules of court to be made relating to TEO proceedings, and for the appointment of special advocates in those proceedings. Part 88 of the Civil Procedure Rules has been introduced to create the rules of court in TEO proceedings, as envisaged by Schedule 3.

Secondary Legislation

Section	Related legislation/guidance	Purpose	Date of issue
13	The Temporary Exclusion Orders (Notices) Regulations 2015	Makes provision about the giving of notice in connection with TEOs	March 2015

Preliminary Assessment

33. From 1 January 2017 to 31 December 2017, nine TEOs were imposed. From 1 January 2018 to 31 December 2018, 16 TEOs were imposed. From 1 January

2019 to 31 December 2019, nine TEOs were imposed. From 1 January 2020 to 31 December 2020, one TEO was imposed.

34. The first TEO was imposed in April 2017. The two-year period from the date of the CTSA coming into force and the first TEO being imposed was due to establishing and developing the administrative process needed for making TEO applications to court, as set out in the CTSA under section 3, during which time there were no referrals to the Home Office by the Security Service.

35. Several TEO provisions introduced in the CTSA have yet to be implemented as the circumstances in which they can be used have not occurred. They include:

- section 2(7)(b) which in urgent cases allows the Secretary of State to impose a TEO without first obtaining permission from the court;
- section 3(9) which allows the Secretary of State to make an appeal against a determination of the court;
- section 6(2) which allows the Secretary of State to refuse to issue a permit to return;
- section 8 which allows the Secretary of State to vary or revoke a permit to return;
- section 10(1) which makes it an offence for an individual subject to a TEO to return to the UK without a reasonable excuse;
- sections 11 and 12 which allow for reviews and appeals by the courts on decisions relating to TEOs; and
- section 13 which concerns making regulations of giving notice and legislation relating to passports.

Assessment from Operational Partners

36. Counter-Terrorism Policing and the Security Service have found TEOs to be highly effective in safely managing the return of individuals. They have, however, identified several aspects of the process which make it difficult to implement operations.

37. They note that the notification of change of address obligation in section 9(2)(b) does not extend to cover short holidays or temporary moves, and with the notification only required within 72 hours of the change Counter-Terrorism Policing has indicated that this obligation provides limited assurance in such circumstances.

38. Counter-Terrorism Policing also considers that the requirement at section 2(5) that the subject must be outside of the UK can in some cases provide a limited time frame to make an assessment as to whether the case for a TEO meets the legal threshold. The process takes a long time with a police operational team

needing to be briefed to receive and manage the TEO subject and the Home Office to write and arrange for a submission to be put before the Secretary of State and subsequently a court. Counter-Terrorism Policing acknowledges that the emergency provision can be engaged (as in section 2(7)(b)). However, Counter-Terrorism Policing has commented that this does not address all the preparations required for imposing a TEO and the return of a TEO subject. Counter-Terrorism Policing is therefore of the view that in urgent cases, there is an inevitable pressure to expedite the TEO process due to the concern that if the individual returns to the UK before the TEO can be imposed benefits such as the managed return and in country obligations are lost.

39. The Security Service notes that individuals subject to a TEO are only required to abide by obligations within the two-year time period from when the TEO is in force, and that the TEO comes into force when served on an individual who is outside the UK. The Security Service suggests that a preferable arrangement would be for the TEO obligations to come into force separately following a subject's return to the UK and provide the option to mandate in-country obligations for a full two years. The Home Office is currently undertaking exploratory work with the view to establishing any necessary further changes to this legislation.

PART 2 – TERRORISM PREVENTION AND INVESTIGATION MEASURES

Sections 16-20

Introduction

40. Sections 16-20 of the CTSA amended the Terrorism Prevention and Investigation Measures Act 2011 (the TPIM Act). Schedule 1 to the TPIM Act sets out a list of the types of measures which may be imposed on an individual served with a TPIM notice.

41. The amendments to the TPIM Act were made following recommendations by the then IRTL, Lord Anderson of Ipswich QC, in the third annual review of the TPIM Act[4] and were as follows.

42. Section 16 introduces a power to relocate TPIM subjects. Subsections (1) to (5) amend paragraph 1 of Schedule 1 to provide that the Secretary of State may either agree with a TPIM subject a locality in which they must reside or require them to live in a residence in a locality that the Secretary of State otherwise considers appropriate. If there are premises that are the individual's own residence at the time when the TPIM notice is imposed, the Secretary of State may only require the individual to live in a residence that is less than 200 miles from those premises, unless they are in an agreed locality. Subsection (5) reproduces an existing provision in paragraph 1 of Schedule 1 to the TPIM Act to the effect that the specified residence may be provided by the Secretary of State. There is no requirement that it must be.

43. Section 17 amends certain provisions in the TPIM Act relating to travel measures. Subsection (2) amends section 2 of the TPIM Act to provide that the Secretary of State must publish factors that he or she considers are appropriate to take into account when deciding whether to impose travel restrictions under paragraph 2 of Schedule 1 to the TPIM Act. On 12 February 2015, the Government laid a Written Ministerial Statement confirming that the following factors were appropriate to take into account when deciding to impose restrictions:

- the need to prevent or restrict a TPIM subject's involvement in terrorism-related activity;
- the personal circumstances of the individual;
- proximity to travel links including public transport, airports, ports and international rail terminals;

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/411824/IRTL_TPIMs_2014_final_report__web_.pdf

- the availability of services and amenities, including access to employment, education, places of worship and medical facilities;
- proximity to prohibited associates;
- proximity to positive personal influences;
- location of UK resident family members; and
- community demographics.[5]

44. Subsections (3) and (4) amend section 23 of the TPIM Act, which makes it an offence, without reasonable excuse, to contravene a measure. Subsection (3) provides that an individual subject to a travel measure under paragraph 2 of Schedule 1 to the TPIM Act who leaves the UK or travels outside the UK will not be able to rely upon a defence of "reasonable excuse". Subsection (4) increases the maximum penalty for contravening the travel measure from a term not exceeding five years' imprisonment to one not exceeding ten years' imprisonment.

45. Subsection (5) amends paragraph 2 of Schedule 1 to the TPIM Act. Under the TPIM Act prior to its amendment by this provision, the Secretary of State could, under the travel measure, impose a restriction on a person from leaving a specified area which could be Great Britain, Northern Ireland or the UK. The amendment allows the Secretary of State to impose restrictions on an individual from leaving a specified area which may be either the UK or any area within the UK in which the individual's place of residence is located. Restrictions imposed may include a requirement not to leave the specified area without receiving permission from or, as the case may be, giving notice to the Secretary of State.

46. Section 18 allows the Secretary of State to impose on an individual subject to a TPIM notice a prohibition on making an application for a firearm or shot gun licence, a prohibition on possessing an imitation firearm and a prohibition on possessing offensive weapons or explosives.

47. Section 19 allows the Secretary of State to require an individual to attend meetings with such persons as the Secretary of State may specify, at such locations and at such times as the Secretary of State may by notice require. The specified person(s) may also choose the time and place of the meeting.

48. Section 20 makes miscellaneous amendments to the TPIM Act. Subsection (1) amends section 3(1) of the TPIM Act so that, before imposing a TPIM notice, the Secretary of State must be satisfied on the "balance of probabilities" (rather than that he or she must "reasonably believe") that an individual is, or has been, involved in terrorism-related activity. Subsection (2) amends section 4 of the TPIM Act so that for the purposes of that Act, involvement in terrorism-related

[5] https://questions-statements.parliament.uk/written-statements/detail/2015-02-12/HCWS287

activity does not include conduct which gives support or assistance to individuals who are known, or believed by the individual concerned, to be involved in conduct which facilitates or gives encouragement to the commission, preparation or instigation of acts of terrorism.

Implementation

49. All provisions under Part 2 of the CTSA have been brought into force.

50. Whether to make use of the additional powers provided by the amendments made to the overnight residence measure and travel measure, or the addition of the weapons and explosives measure and the appointment measure, is determined by necessity and proportionality and considered on a case by case basis. Each of these measures has been applied since the CTSA was brought into force.

51. All paperwork that is served on the TPIM subject, submitted to the courts and provided to the Home Secretary for decision making purposes has been updated to reflect the amendments.

Legal issues

52. The imposition of the overnight residence measure (i.e. the ability to relocate an individual) has specifically been challenged on two occasions: firstly on 17 February 2017 and secondly on 18 December 2017. Challenges were made by TPIM subjects in the form of modification appeals under section 16 of the TPIM Act 2011. Both challenges were dismissed and the measure upheld.

Other Reviews

53. In addition to producing annual reporting on the operation of the Terrorism Acts, the IRTL is responsible for independent oversight of the TPIM Act. In the IRTL's annual legislative review published in October 2018 Max Hill QC commented:

> "In all current TPIMs [at the time of writing], almost all of the available measures are in use' and that 'the TPIM regime, although controversial when introduced, continues to survive robust scrutiny as to the necessity and proportionality of the many interferences with the rights of TPIM subjects which go hand in hand with every measure made."[6]

[6] https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/10/The_Terrorism_Acts_in_2017.pdf

Preliminary Assessment

54. Since the CTSA received Royal Assent in February 2015, the Home Office has relocated 12 individuals. This does lead to an increase in costs for the Home Office and so the budget for managing TPIMs increased to cover this expenditure. In addition, since receiving Royal Assent the appointment measure has been used on all TPIM subjects who have been served with their notice, with the most common use of the measure for the purposes of requiring someone to attend appointments with a mentor to support their rehabilitation and disengagement from terrorism-related activity.

55. The application of the additional measures introduced under the CTSA have been used proportionately to mitigate risk from TPIM subjects by restricting their ability to engage in terrorism-related activity.

Assessment from Operational Partners

56. Counter-Terrorism Policing and the Security Service have assessed that the TPIM Act supports the effective risk management of individuals of terrorism concern whom they are unable to prosecute.

57. Counter-Terrorism Policing assesses that the amendment to the overnight residence measure, to allow individuals to be relocated, is useful in separating individuals from negative influences and has allowed the possibility for the police to present alternative positive influences.

58. Counter-Terrorism Policing views the appointments measure positively, maintaining that the measures can, if used appropriately and flexibly, meet police needs, as well as other partners working to manage the national security risk. Additionally, Counter-Terrorism Policing assesses that introducing travel restrictions has been a sensible step, given the acute risk TPIM subjects pose.

59. In the view of the Security Service the implementation of section 20 to increase the standard of proof from ‘reasonable belief’ to ‘satisfaction on the balance of probabilities’ has not impacted the number of TPIMs being imposed. The TPIMs imposed against the higher threshold would have also been imposed against the lower threshold, and to date there have been no TPIMs that the Security Service wanted to impose but were prevented from so doing because of the higher threshold. However, the higher threshold has made the process more onerous and requires increased disclosure of sensitive material. In this sense, the burden has increased but the higher standard of proof has not changed outcomes.

60. In May 2020, the Government introduced the Counter-Terrorism and Sentencing Bill to Parliament and on 29 April 2021 it received Royal Assent. The Counter-

Terrorism and Sentencing Act 2021 represents the second phase of the Government's legislative response to the attacks at Fishmongers' Hall and in Streatham. The Act includes measures to improve the risk management and disruptions toolkit available to Counter-Terrorism Policing and the Security Service, including by amending the TPIM regime. The Act's measures increase the utility and benefits of TPIMs as a public protection tool, including by ensuring that new TPIMs can last up to five years provided there is an enduring risk and it is necessary and proportionate for them to do so. The Act's measures were developed in consultation with Counter-Terrorism Policing and the Security Service.

PART 3 – RETENTION OF RELEVANT INTERNET DATA

Introduction

61. Part 3 of the CTSA amended the Data Retention and Investigatory Powers Act 2014 ('DRIPA') to give the Secretary of State the power to require specific telecommunications operators (TOs) to retain data that would allow relevant authorities to identify the individual or the device that was using a particular IP (internet protocol) address at a given time.

62. Part 3 of the CTSA was repealed by the Investigatory Powers Act 2016 (IPA). The IPA was introduced to bring together almost all data acquisition and retention powers already available to law enforcement and the security and intelligence agencies. It was designed to make these powers and the safeguards that apply to them clear and understandable.

Implementation

63. The provisions of Part 3 were fully implemented before being repealed by the IPA on 30 December 2016.

Secondary Legislation

64. In March 2015, a Retention of Communications Data Code of Practice[7] was published by the Government and brought into operation by regulations. On introduction of the IPA, this was replaced by the current Communications Data Code of Practice[8], the last revisions to which were brought into operation by regulations in November 2018.

Preliminary Assessment

65. As Part 3 of the CTSA has been repealed, it is the IPA that now provides the legal basis for equivalent provisions formerly consolidated under CTSA.

66. Part 3 of the IPA provides that specified public authorities may acquire communications data from a telecommunications or postal operator where it is both necessary and proportionate to do so, for specified purposes.

67. Part 4 of the IPA provides that telecommunications and postal operators may be required by the Secretary of State to retain communications data – the who,

[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/426249/Retention_of_Communications_Data_Code_of_Practice_March_2015.pdf
[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/757850/Communications_Data_Code_of_Practice.pdf

where, when, how and with whom of a communication, but not what was written or said (which amounts to 'content data'). It applies where it is considered necessary and proportionate to do so for one or more of the statutory purposes for which it can be acquired, for a maximum period of 12 months, and where the decision to impose such a requirement has been approved by a Judicial Commissioner.

68. Part 4 of the IPA:

- sets out several factors that the Secretary of State must take into account before giving a retention notice to a TO including, for example, whether it is necessary and proportionate, the likely benefits of giving the notice and the technical feasibility of complying with it;
- permits the recipient of a retention notice to refer the notice back to the Secretary of State for a review;
- sets out the test that the Judicial Commissioner must apply when considering whether to approve a decision by the Secretary of State to give or vary a retention notice, or when confirming the effect of a notice following a review of that notice;
- sets out security requirements and other protections for retained communications data;
- provides that TOs must put in place adequate security procedures governing access to communications data;
- provides for the Secretary of State to vary a retention notice;
- requires TOs to comply with a retention notice; and
- provides that TOs based outside the UK but providing services to persons based within the UK can be required to retain relevant communications data related to such persons.

Legal Issues

69. There are various ongoing legal challenges to the IPA, mainly by civil liberties groups such as Liberty, Privacy International and Big Brother Watch. The IPA has been subject to various legal challenges at the Investigatory Powers Tribunal, UK High Court, the Court of Justice of the European Union, and the European Court of Human Rights. One of the most significant cases in the area of data retention was *Tele2/Watson,* the judgment of which, in 2016, ruled that retention of communications data should not be 'general and indiscriminate', that requests for traffic and location data should relate to serious crime only and that requests for the acquisition of communications data must have prior judicial or independent authorisation. In light of the *Tele2/Watson* judgment, the Home Office set up the Office for Communications Data Authorisations (OCDA) to provide that

independent authorisation and made changes to Part 3 of the IPA to introduce a serious crime threshold for acquisition of traffic and location data.

PART 4 – AVIATION, SHIPPING AND RAIL

Sections 22-25 and Schedule 5 (Aviation, maritime and rail security)

Introduction

70. The provisions in Part 4 of the CTSA enabled the Secretary of State to introduce authority to carry schemes which replaced the pre-existing inbound arrangements with broader inbound and outbound arrangements. The provisions amended pre-existing legislation to enhance passenger, crew and service information; provided that carriers may be required to use passenger information systems capable of receiving directions when authority to carry is refused or specific security measures are required; and enabled enforceable standing requirements for passenger, crew and service information to be imposed on specified categories of incoming and outgoing non-scheduled traffic.

71. Part 4 also provides for amendments to the pre-existing provisions for directions relating to aviation, shipping and rail, strengthening the Secretary of State's ability to impose security measures on aircraft and rail operators as a condition of their operation to the UK and on shipping operators as a condition of their entry into UK ports and, in respect of aviation, gave powers to establish a civil penalty for failing to provide requested information or to comply with a direction.

72. Schedule 5 made several amendments to the Immigration Act 1971 and the Immigration, Asylum and Nationality Act 2006.

Authority to Carry Schemes

73. Sections 22 and 23 of the CTSA provide for the Secretary of State to introduce Authority to Carry Schemes, while section 24 provides that regulations may be made imposing penalties for breaching the requirements of an authority to carry scheme.

74. The Authority to Carry Scheme 2015 was made under section 23 of the CTSA. The Scheme requires that a carrier seek authority from the Secretary of State to carry all persons on aircraft, ships or trains which are arriving (or expected to arrive) or leaving (or expected to leave) the UK. The 2015 Scheme replaced the Security and Travel Bans Authority to Carry Scheme 2012 made under section 124 of the Nationality, Immigration and Asylum Act 2002 – a provision repealed by section 22(10) of the CTSA.

75. Where the 2012 Scheme applied only to foreign nationals arriving (or expected to arrive) by aircraft, the 2015 Scheme applies to individuals of all nationalities, intending to arrive or depart by aircraft, ships and trains. The classes of individual

in respect of whom authority to carry may be refused was widened in the 2015 Scheme.

76. In April 2021, the Authority to Carry Scheme 2021 was made. The 2021 Scheme takes account of the end of the EU exit transition period and has replaced and built upon the Authority to Carry Scheme 2015.

Amendments to the Immigration Act 1971

77. Paragraphs 27 and 27B of Schedule 2 to the Immigration Act 1971 ('the 1971 Act') provide that requirements may be placed, in writing, on carriers to supply crew and passenger data to the Secretary of State or an Immigration Officer.

78. Paragraph 1 of Schedule 5 to the CTSA amended two paragraphs and inserted two new paragraphs in Schedule 2 to the 1971 Act.

79. The amendments inserted sub-paragraphs 27(5)(BA) and 27B(8A) which provided that a responsible person or a carrier may be required to be able to send and receive communications from the Secretary of State or an immigration officer in a form and manner specified in regulations – in practice this means that a carrier be able to send and receive interactive messaging about the crew and passengers they are intending to carry to or from the UK.

80. The new paragraphs are 27BA and 27BB. Paragraph 27BA provides for making regulations that require information from responsible persons regarding ships or aircraft which have arrived or are expected to arrive in or have left or are expected to leave the UK without written notice. This new paragraph enables a standing requirement for information about flights, voyages and persons on board to be imposed on specified categories of aircraft and shipping operators. This requirement is intended to apply to non-scheduled traffic, such as General Aviation and General Maritime where it is impractical to serve a written notice on pilots, owners or operators of international General Aviation flights or General Maritime voyages. Paragraph 27BB provides for the Secretary of State to make regulations imposing a penalty on a carrier for failure to comply with requirements to provide passenger, crew or service information under paragraphs 27(2), 27B or 27BA of Schedule 2 to the 1971 Act.

81. Paragraph 1 of Schedule 5 to the CTSA also amended section 27 of the 1971 Act to ensure that criminal proceedings could not be instituted for a failure to comply with those same requirements where a penalty had been paid for the same conduct under the new paragraph 27BB, section 32B of the Immigration, Asylum and National Act 2006 ('the 2006 Act') or section 24 of the 2015 Act or where criminal proceedings had been instituted under section 34 of the 2006 Act.

Amendments to the Immigration, Asylum and Nationality Act 2006

82. Paragraphs 6 to 8 of Schedule 5 to the CTSA make amendments to the 2006 Act mirroring the amendments to the 1971 Act. Section 32 of the 2006 Act provides powers for the police to require, in writing, information in respect of ships or aircraft arriving (or expected to arrive) or leaving (or expected to leave) the UK. Paragraph 6 amended the 2006 Act to provide that an information requirement may include a requirement that a carrier be able to receive communications relating to the required information.

83. Paragraphs 7 and 8 inserted new sections 32A and 32B into the 2006 Act. Section 32A provides a power to make regulations requiring information for police purposes from responsible persons in relation to ships or aircraft (defined at section 32A(7)) which have arrived or are expected to arrive in or which have left or are expected to leave the UK without a written requirement. Section 32B introduces a power to make regulations imposing penalties for failure to comply with requirements to provide passenger, crew or service information under section 32(2) of the 2006 Act or by virtue of regulations made under section 32A of the 2006 Act.

Implementation

84. On 15 February 2015, sections 22-24 of the CTSA were commenced in full on the date of Royal Assent, save for s.22(10) which was subsequently commenced on 31 March 2015[9].

85. Since March 2015, written requirements for passenger, crew and service information made under paragraphs 27 and 27B of Schedule 2 to the 1971 Act have, for air carriers, included the requirement to submit passenger information messages in an interactive format which allows automated messaging between the Government and carrier systems. The form and manner for this requirement were specified in the Immigration (Form and Manner of Passenger Information) Direction 2015, which has been superseded by the Immigration (Form and Manner of Passenger Information) Direction 2018.[10]

86. Regulations have yet to be made under paragraph 27BA of Schedule 2 to the 1971 Act or section 32A of the 2006 Act. Such regulations are reliant on an effective, free-to-use online portal enabling persons responsible for aircraft and ships (owners, operators or pilots) to submit advance information about flights, voyages and persons on board. In March 2019, the Government launched an

[9] The Counter-Terrorism and Security Act 2015 (Commencement No 1) Regulations 2015 (SI 2015/956)
[10] https://www.gov.uk/government/publications/the-immigration-form-and-manner-of-passenger-information-direction-2008--2

online portal for the General Aviation sector. It is expected that a public consultation on regulations to require the online submission of data will take place later this year.

87. The Passenger, Crew and Service Information (Civil Penalties) Regulations 2015 (SI 2015/961) were made under the powers in new paragraph 27BB of Schedule 2 to the 1971 Act and new section 32B of the 2006 Act.

Secondary legislation and guidance associated with sections 22-24 of the CTSA

Section	Related legislation/guidance	Purpose	Date of issue
22	Authority to Carry Scheme 2015	The statutory Authority to Carry Scheme laid before Parliament and given effect by SI 2015/997.	31 March 2015. The Scheme has been replaced by the Authority to Carry Scheme 2021.
	Authority to Carry Scheme 2021	The statutory Authority to Carry Scheme laid before Parliament and given effect by SI 2021/323 and replacing the Authority to Carry Scheme 2015.	6 April 2021
23	Counter-Terrorism and Security Act 2015 (Authority to Carry Scheme) Regulations 2015 (SI 2015/997)	These regulations brought into force the Authority to Carry Scheme 2015.	The regulations came into force on 31 March 2015 and cease to have effect on 6 April 2021.
	The Authority to Carry Scheme and Civil Penalties Regulations 2021 (SI 2021/323)	These regulations brought into force the Authority to Carry Scheme 2021.	The regulations revoke SI 2015/997 and came into force on 6 April 2021 and will cease to have

			effect on 6 April 2028.
24	Authority to Carry (Civil Penalties) Regulations 2015 (SI 2015/957)	These regulations set out the civil penalty regime for the purposes of authority to carry schemes made under section 22.	The regulations came into force on 31 March 2015 and will cease to have effect on 6 April 2028.

Secondary legislation and guidance associated with Part 1 of Schedule 5 to the CTSA

Paragraph(s)	Secondary legislation/ Related guidance	Purpose	Date of issue
1(2) and 1(3)	Immigration (Form and Manner of Passenger Information) Direction 2015	Directed that passenger and service information must be provided in an electronic form compatible with the technology used by the Home Office and by means of a system which enables the carrier to send and receive communications relating to the information.	The Direction came into force on 23 March 2015 and was revoked with effect from 25 May 2018.
1(2) and 1(3)	Immigration (Form and Manner of Passenger Information) Direction 2018	Specifies form and manner in respect of Passenger Name Record data and of passenger and service information other than Passenger Name Record data.	The Direction came into force on 25 May 2018.

1(4) and 7	Passenger, Crew and Service Information (Civil Penalties) Regulations 2015 (SI 2015/961)	These regulations set out the civil penalty regime that applies for failure to comply with requirements in paragraph 27 or 27B of Schedule 2 to the Immigration Act 1971 or section 32 of the Immigration and Nationality Act 2006 to supply or receive information.	The regulations came into force on 31 March 2015.

Legal Issues

88. There have been no legal challenges to sections 22-24 of the CTSA or to the Schedule 5 amendments.

Preliminary Assessment

89. The implementation and operation of the 2015 Scheme has been successful. In the six years of its operation, the Authority to Carry Scheme 2015 was used to refuse carriers authority to carry individuals seeking to travel to the UK on more than 8,200 occasions. This included around 200 individuals excluded from the UK, around 3,300 individuals previously deported from the UK, and more than 4,700 individuals using invalid, lost, stolen or cancelled travel documents. It also included subjects of international travel bans. These were individuals who would otherwise have arrived in the UK and been refused leave to enter by Border Force officers. The carrier would have been required to remove them and, in some cases, meet their detention costs. The ability to prevent those who are a threat from travelling to or from the UK remains a crucial component of the Government's national security response.

90. While prosecution and conviction of those individuals suspected of terrorism-related activity remains the Government's priority, the CTSA continues to provide appropriate, proportionate and effective powers for dealing with the risk posed by a small number of people in this country who are assessed to pose a terrorism-related threat to the public.

91. The 2015 Scheme covered individuals: travelling inbound to the UK who are subject to exclusion or deportation orders, or to whom the Secretary of State is in the process of making subject to a deportation or exclusion order; listed by the

UN or EU as subject to travel restrictions; using invalid travel documents; or those that present a known national or aviation security threat.

92. The 2015 Scheme covered individuals: travelling outbound from the UK that are linked to terrorism-related activity, including children whom the Secretary of State has reasonable grounds to believe are intending to leave the UK for the purposes of involvement in terrorism-related activity; listed by the UN or EU as subject to travel restrictions; whose passport has been cancelled or who have been refused passport services by the Secretary of State; and that present a known national or aviation security threat.

93. Since the Authority to Carry (Civil Penalties) Regulations 2015 have been in force, there have been 51 cases where a breach of a requirement of the Authority to Carry Scheme has occurred.

94. A total of 18 civil penalties have been issued totalling £186,250. When determining a civil penalty for a breach of the Authority to Carry Scheme, various mitigations are considered: the nature of the breach; the previous conduct of the carrier; and any subsequent steps taken by the carrier to prevent further breaches. Of the 51 breaches that have occurred to date, there have been 33 cases where the Home Office has not issued a civil penalty as the carrier met some or all of the mitigating criteria and the Home Office established that a civil penalty was not appropriate in those circumstances.

95. A summary of the number of occasions the regulations have been used and the number of penalties issued is shown in the table below.

Authority to Carry (Civil Penalties)						
Year	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**
Notices of potential liability	17	11	8	6	4	5
Warning notices	3	6	5	4	0	0
Penalty notices	0	4	3	2	4	5
Carrier engagement to address underlying data or operating issues[11]	14	1	0	0	0	0

[11] In the first year of operating the Scheme, carrier engagement focused on collaboration to secure earlier transmission of passenger information, providing more time to NBTC and carriers to act on refusals of authority to carry effectively.

96. On 28 January 2021, the Government laid draft regulations before Parliament to replace the Authority to Carry Scheme 2015 with the Authority to Carry Scheme 2021. In March, these regulations were approved by Parliament and on 6 April they came into force.

Schedule 5: Amendments to aviation, maritime and rail security

97. The Immigration (Form and Manner of Passenger Information) Direction 2015 provided that carriers may be required to send and receive interactive messages relating to passenger and service information. Border Force commenced a substantial and successful programme of engagement with scheduled aviation carriers and system providers to move the carriers onto an interactive messaging platform. This rollout is continuing, there are now 141 air carriers (out of 163) which are currently live for interactive Advance Passenger Information for some or all of their routes, and 98% of all scheduled air passenger information (in contrast with 0% in 2014) is provided using interactive messaging as a result of the implementation of the CTSA.

98. To date, no penalties have needed to be imposed under the Passenger, Crew and Service Information (Civil Penalties) Regulations. Border Force has undertaken concerted effort to monitor carrier compliance in respect of data requirements, and a collaborative approach has been taken to encourage data improvements as opposed to penalising carriers for non-compliance. The threat of imposition of penalties has, thus far, been effective in ensuring carriers address failures to comply with requirements.

PART 5 – RISK OF BEING DRAWN INTO TERRORISM

Chapter 1 - preventing people being drawn into terrorism

Introduction

99. Provisions in Part 5 of the CTSA underpin the Home Office Prevent programme. The purpose of the Prevent programme is fundamentally about safeguarding and supporting vulnerable individuals to stop them becoming terrorists or supporting terrorism of any kind. Effective delivery relies on co-operation of many organisations, and the intention of the legislation was to ensure the delivery of Prevent was more effective.

100. Chapter 1 sought to bring consistency to co-operation amongst authorities by making it a legal requirement across Great Britain to give due regard to the need to prevent people being drawn into terrorism when carrying out their functions. Whilst it was intended that emphasis should be placed on those areas where terrorism is of concern, it set the minimum standard that all authorities understand the local threat and judge whether current activity was sufficient to tackle it.

101. Section 26 places a general duty on specified authorities to have due regard to the need to prevent people from being drawn into terrorism. This “Prevent Duty” ensures that all specified authorities in Schedule 6 to the CTSA participate fully in work to prevent people from being drawn into terrorism. Sections 27-28 allow for the specification of authorities.

102. Section 29 provides the Secretary of State with the power to issue guidance on the exercise of the Prevent Duty. It determines that such guidance must be issued and brought into force by statutory instrument, a draft of which must have been laid before and approved by resolution of each House of Parliament. Section 30 provides for the Secretary of State to issue directions where specified authorities have failed to discharge the duty.

103. Sections 31 to 33 focus on the implementation of the duty for higher and further education institutions. They provide for the protection of freedom of speech and establish a monitoring body for higher and further institutions to check compliance with the duty. They also allow the Secretary of State to give directions if higher and further education institutions have failed to provide information to the monitoring authority.

Implementation

104. On 1 July 2015, the Prevent Duty commenced for the authorities specified in Schedule 6, with the exception of the higher and further education institutions, for which it commenced on 18 September 2015.

105. Under sections 27 and 28, the Secretary of State has amended Schedule 6 in respect to providers of education or training which are in receipt of funding[12], and through addition of a separate part relating to specified authorities in Scotland[13]. There has also been a change of name in the case of the Office for Students (resulting from the Higher Education and Research Act 2017), for which a regulation by statutory instrument is not necessary.

106. There has been no requirement for the Secretary of State to issue direction under sections 30 or 33 and subsequently no requirement for enforcement by any mandatory orders under those sections.

107. Under section 32, the Secretary of State has delegated the function of monitoring performance of further and higher education bodies relating to the Prevent Duty to Ofsted and the Office for Students. In Wales these functions were, after consultation with the Welsh Government, delegated to Estyn and the Higher Education Funding Council for Wales.

108. Since the introduction of the Prevent Duty, the Home Office annually reviews and prioritises a number of local authorities in England and Wales and provides funding to support the delivery of the Prevent programme. This prioritisation is based predominantly on an assessment of the radicalisation risk in these areas. This funding contributes to the employment of a Prevent Coordinator, a Prevent Education Officer (to work with schools in the local authority area) and civil society projects to build individual and community resilience to radicalisation. This process does not include Scotland.

109. The Department for Education employs a Higher and Further Education Regional Prevent Coordinator Network in England to advise and support these sectors in their delivery of the Prevent programme and their compliance with the Prevent Duty. The schools sector is supported in Prevent priority areas by the Prevent Education Officer Network. Both networks allow the Home Office to monitor and evaluate the sectors' performance and activity.

[12] http://www.legislation.gov.uk/ukpga/2015/6/schedule/6#reference-key-1d24e656c65acb3d7b71b08c981374f0
[13] http://www.legislation.gov.uk/ukpga/2015/6/schedule/6#reference-key-ec79bafe83b3540a6da16b893493f53f

110. In the health sector, NHS England has established a network of Contextual Safeguarding Leads to advise and support NHS Trusts and Foundation Trusts in England in their delivery of the Prevent programme and their compliance with the Prevent Duty. This network allows the Home Office, alongside the Department of Health and Social Care, to monitor and evaluate the sector's activity and performance. For the health sector, only NHS Trusts and Foundation Trusts are listed in Schedule 6. A proportion of health provision is delivered by non-NHS providers; where these providers are commissioned or employed by local authorities, the principles of the duty should be written in to those contracts in a suitable form.

111. Scotland has established a Prevent network across specified authorities. A strategic lead represents each sector in engaging Scottish Government.

112. In Wales, both education and health policy are devolved to the Welsh Government. In Scotland, education, health and social care services, local government, and law and order are devolved to the Scottish Parliament. Counter-terrorism policy remains reserved to the UK Government. Various sections of the CTSA require that Scottish and Welsh Ministers must be consulted, for example before guidance or direction is issued that applies to a Welsh or Scottish authority under Schedule 6. Prevent being delivered through devolved authorities has presented some additional challenges in the delivery compared to that in England. Some of these challenges have included:

- delivering Prevent in devolved sectors in Scotland and Wales without dedicated Prevent coordinator network(s); and
- disparity in the funding provided for local authorities, resulting in more limited capacity and resource.

113. The CTSA does not impose any requirement on specified authorities in their compliance with the Prevent Duty, to ensure parties to whom they contract services also "pay due regard to the need to prevent people from being drawn into terrorism".

Secondary Legislation

114. The Prevent Duty Guidance: for England and Wales and the Prevent Duty Guidance: for Scotland were published under section 29 and brought into force by regulations made by statutory instrument. The purpose of these pieces of guidance was to assist authorities in deciding how to place an appropriate amount of weight on the need to prevent people being drawn into terrorism, as per the duty under section 26. In March 2015, they were approved by resolution in each House of Parliament. In July 2015, both documents were revised and re-issued, together with a further four pieces of new stand-alone guidance relating

specifically to the Prevent Duty in Further and Higher Education institutions in England and Wales and in Scotland. In September 2015, the four new guidance documents came into effect.

115. Since the introduction of the Prevent Duty, various training resources have been published, including those bespoke to particular cohorts.

116. In early 2014, the Workshop to Raise Awareness of Prevent (WRAP) training package was last updated. These updates have endured including after the CTSA came into force. This face-to-face training package, developed by the Home Office, is designed to allow distributed training amongst specified authorities to enable front line delivery. In 2021, it will be refreshed again as part of the overall development of the Home Office training packages.

117. In March 2016, e-learning was introduced for individual training after being developed by the Home Office. It is designed to increase awareness of the programme, inform practitioners, and inform interaction with the Channel process. It is divided into the following three modules:

- Prevent Awareness Training;
- Prevent Referrals Training; and
- Channel Awareness.

The e-learning package is currently undergoing a redevelopment, which is due to go live later this year.

118. In November 2017, NHS England published Prevent Mental Health Guidance and bespoke training. It intends to support providers of NHS mental health services to exercise their statutory and professional duties to safeguard individuals at risk of radicalisation.

Section(s)	Related legislation/guidance	Purpose	Date of issue
n/a	Workshop to Raise Awareness of Prevent	Face to face training package to increase audience awareness of Prevent programme.	2014
26	Prevent Duty Guidance: for England and Wales and Prevent Duty Guidance: for Scotland	To assist specified authorities in fulfilling their duty to place an appropriate amount of weight on	March 2015

		the need to prevent people being drawn into terrorism.	
29	Revised Prevent Duty Guidance: for England and Wales and Revised Prevent Duty Guidance: for Scotland	Updated with the sections relating to further and higher education institutions removed.	July 2015
29, 31	Prevent Duty Guidance: for further education institutions in England and Wales and Prevent Duty Guidance for further education institutions in Scotland	Stand-alone sector specific guidance for further education institutions	September 2015
29, 31	Prevent Duty Guidance: for higher education institutions in England and Wales and Prevent Duty Guidance for higher education institutions in Scotland	Stand-alone sector specific guidance for higher education institutions	September 2015
n/a	Prevent e-learning package	Accessible learning resource for front line staff to: •increase awareness of the programme; •inform practitioners; and •inform interaction with the Channel process.	March 2016
	Prevent Mental Health Guidance and Training Package	Issued by NHS England to support providers of mental health services.	November 2017
n/a	Prevent Awareness Training, Prevent Referrals Training and Channel Awareness Training	Update to March 2016 e-learning package into three modules.	November 2018

Legal Issues

119. The following are some of the legal issues and proceedings that are determined to have arisen as a result of the implementation of the provisions of Part 5 of the CTSA.

120. In 2016, a judicial review claim was brought by Dr Salman Butt in relation to the Home Secretary's guidance issued under section 29 in Chapter 1 and the accompanying Government press release. Three grounds of appeal related to Part 5 of the CTSA. Dr Butt argued that:

- The Prevent Duty Guidance (PDG) and the Higher Education Prevent Duty Guidance (HEPDG) were *ultra vires* in that they required Relevant Higher Education Bodies (RHEBs) to take steps to prevent people being drawn into "non-violent extremism", where "extremism" is defined as "opposition to fundamental British values".
- When issuing the guidance, the Secretary of State failed to comply with their duty under section 31(3) of the CTSA to have a "particular regard to the duty to ensure freedom of speech". Section 31(2) requires RHEBs, in the discharge of their duty under section 26(1), to "have particular regard to the duty to ensure freedom of speech", and the Secretary of State in promulgating guidance under section 29 "must have particular regard to the duty to ensure freedom of speech, in the case of authorities that are subject to that duty".
- The PDG and the HEPDG breached common law and Article 10 Convention rights in relation to free speech. It was acknowledged that this ground turned on the same alleged flaws in the Guidance already identified: the over-broad definition of "extremism" and the mandate to RHEBs to prevent speakers from attending events "where RHEBs are in any doubt that the risk cannot be fully mitigated", thus interfering with the speaker's right to freedom of speech.

121. The Court of Appeal in 2019 found that the guidance was <u>not</u> *ultra vires* due to the references to "extremism", as the guidance only extended to "extremism" to the extent that it drew people into terrorism.

122. The Court of Appeal also found that Dr Butt's common law and Article 10 rights to freedom of speech were not breached as Dr Butt could not demonstrate that the guidance had had any concrete impact on him.

123. The Court of Appeal did however find that paragraph 11 of the HEPDG was unlawful, as it was concluded that the Home Secretary had, when promulgating

the guidance, failed to comply with her duty under section 31(3) of the CTSA to have a "particular regard to the duty to ensure freedom of speech". Section 31(2) requires RHEBs, in the discharge of their duty under section 26, to "have particular regard to the duty to ensure freedom of speech", and the Secretary of State in promulgating guidance under section 29 "must have particular regard to the duty to ensure freedom of speech, in the case of authorities that are subject to that duty". The Court of Appeal found that paragraph 11 was drafted in terms which did not sufficiently balance the duty under section 26(1) with the competing duty to ensure freedom of speech under section 31. The Home Office responded by publishing the relevant section of the judgment of the Court of Appeal alongside guidance relating to the Prevent Duty, and emphasising that, apart from paragraph 11, the remainder of each of the guidance documents should continue to be read as before.

124. The Home Office plans to update the Prevent Duty Guidance for England and Wales, and the Prevent Duty Guidance in Scotland (in consultation with Scottish Ministers) and will consider the finding of the Court as advised. The Office for Students reports that it does not have cause to believe that any RHEBs, in their execution of their Prevent Duty, have failed to pay particular regard to their duty to ensure freedom of speech.

125. In 2015, soon after the introduction of the Prevent Duty Guidance, an application was made for permission to apply for judicial review on the grounds that the Prevent Strategy is "unlawful because it is more likely that concern may be directed to children of Muslim faith". Permission was refused on 29 October 2015 on several grounds, the final ground of which is of particular note: that the "proposition is wholly unarguable where the context is present concern about the effect of propaganda activity of extremists who are purportedly Islamic in faith".

Other Reviews

The 2011 Prevent Strategy

In 2011, the Prevent Strategy was published. It reviewed the existing framework at the time and set out a new strategy so a more effective programme could be delivered in the future. The strategy set three main objectives:

- tackle the causes of radicalisation and respond to the ideological challenge of terrorism;
- safeguard and support those most at risk of radicalisation through early intervention, identifying them and offering support; and
- enable those who have already engaged in terrorism to disengage and rehabilitate.

126. The vision set by the 2011 strategy called on organisations to work together to support the programme. Key features were the recognition that Prevent should deal with all forms of terrorism, the requirement to challenge extremist ideologies as a precursor to terrorism, the requirement for integration for successful implementation, and for funding to be more closely managed. Whilst the CTSA provided statutory footing in several areas, as it applied to the parties under Schedules 6 and 7 respectively, successful implementation of the policy as laid out in CONTEST requires the cooperation and effort of various other parties. Whilst there is no doubt that making clear the parties to whom the CTSA applies has benefited the Prevent programme, it has focused energy and funding on these areas, potentially at the expense of others. This may have delayed efforts and resource reaching other less easily accessible but equally important areas such as our Armed Forces, private business and the third sector.

The Independent Review of Prevent

127. On 12 February 2019, the Counter-Terrorism and Border Security Act received Royal Assent. It included a legislative commitment for an independent review of the Prevent programme to be conducted. On 12 August 2019, Lord Carlile of Berriew QC was appointed Independent Reviewer of Prevent and in December 2019 he stepped down from the role. On 26 January 2021, William Shawcross was subsequently appointed as the new Independent Reviewer of Prevent.

128. The Counter-Terrorism and Sentencing Act 2021 removed the statutory deadline for the Independent Review of Prevent, while maintaining the legislative commitment to undertake it. This is to ensure the Mr Shawcross has sufficient time to complete the Review. The Government is committed to the Independent Review of Prevent. On 22 March 2021, revised Terms of Reference for the Independent Review of Prevent were published[14], including a new deadline for the Home Secretary to lay the Independent Reviewer's report and the Government response in both Houses of Parliament by 31 December 2021.

Preliminary Assessment

129. The legal basis of the Prevent Duty has allowed greater certainty around resource allocation to the programme, encouraged those that had been reluctant to realise its benefits, and allowed partners to overcome certain barriers such as effective sharing of information. This has driven greater collaboration amongst the specified authorities – a key takeaway from the Prevent Strategy 2011. Since the introduction of the Prevent Duty, the Government has annually published

[14] https://www.gov.uk/government/publications/independent-review-of-prevent-terms-of-reference

statistics in the reports titled ‘Individuals Referred to and Supported through the Prevent Programme’.[15]

130. Critical voices to the Prevent policy have suggested that the Prevent Duty focuses unduly on particular groups or ethnic minorities. “Terrorism” in the CTSA has the meaning set out in section one of the Terrorism Act 2000 and Part 5 therefore deals with the risk of being drawn into all forms of terrorism, regardless of ideology. The threat-agnostic nature of the Prevent Duty is further qualified by the 2011 Prevent Strategy and the Prevent Duty Guidance of 2015, which refers to terrorism associated with the far-right as well as terrorist organisations in Syria and Iraq, for example. These concerns will be covered as part of the Independent Review of Prevent which will look at the effectiveness of the Government’s strategy to protect vulnerable people from being drawn into all forms of terrorism.

[15] https://www.gov.uk/government/collections/individuals-referred-to-and-supported-through-the-prevent-programme-statistics

Chapter 2 - Support etc for people vulnerable to being drawn into terrorism

Introduction

131. Channel is a programme in England and Wales which focuses on providing support at an early stage to people who are identified as being vulnerable to being drawn into terrorism. The programme uses a multi-agency approach to protect vulnerable people by:

- identifying individuals at risk;
- assessing the nature and extent of that risk; and
- developing the most appropriate support plan for the individuals concerned.

132. In Scotland the Channel process is referred to as Prevent Multi-Agency Panels (PMAP) and largely follows the same process. Due to the nature of the threat and the geography of Scotland there is some nuance in the delivery, which is more entrenched within existing safeguarding arrangements.

133. Sections 36-38 of the CTSA underpin the existing Channel arrangements in England and Wales (and those for PMAP in Scotland) to ensure multi-agency co-operation can be effective in each local authority area. They require each local authority to establish a panel of various organisations to discuss and, where appropriate, determine the provision of support, including the nature and circumstance, for people who have been identified as at risk of being drawn into terrorism. Section 36(7) establishes that panels and partners, as listed in Schedule 7 to the CTSA, must have regard to statutory guidance issued by the Secretary of State.

134. Section 39 provides the Secretary of State with the power to amend the definition of “local authority” and to amend Schedule 7 by way of regulations.

Implementation

135. The Channel (and PMAP in Scotland) process was given a statutory basis by the CTSA as a mechanism by which individuals vulnerable to being drawn into terrorism could be offered support and, with their consent, could receive such support. On 12 April 2015, these sections of the CTSA came into effect. Each local authority has a mechanism by which it will convene a panel to discuss referrals relating to individuals about whom there is a concern of vulnerability to radicalisation. During the passage of the Counter-Terrorism and Border Security Act 2019, the CTSA was amended to give local authorities, as well as Counter-Terrorism Policing, the authority to make referrals to panels. The Home Office designates the local authorities which use this additional function.

136. The case management for Channel is conventionally the responsibility of Prevent Policing under section 36, under the authority of the Counter-Terrorism Policing Unit of each regional command. However, since the introduction of Project DOVETAIL[16] this responsibility has been with the relevant local authorities in England and Wales as a pilot including Kirklees, Swansea, Luton, Croydon, Haringey, Kent and Brighton. Further, the North West region has also been included since January 2019 with Liverpool City Council, Manchester City Council and Blackburn with Darwen becoming responsible for Channel case management delivery in Merseyside & Cheshire, Greater Manchester and Lancashire & Cumbria respectively. This is possible through the amendment of section 36(3) by the Counter-Terrorism and Border Security Act 2019.

Secondary Legislation

137. On 13 April 2015, the Home Office published the Channel Duty Guidance to panel members and partner persons and bodies in Schedule 7 to enable their support function. This statutory guidance was issued by the Home Secretary. The CTSA does not require guidance issued under Chapter 2 to be approved by Parliament. On 2 November 2020, an updated version of this guidance was launched.

Section(s)	Related legislation/guidance	Purpose	Date of issue
36	Channel Duty Guidance: Protecting vulnerable people from being drawn into terrorism[17]	To support and advise panel members and partner persons and bodies under Schedule 7 to fulfil their statutory function as part of the Channel process.	**April 2015** Channel guidance updated 2 November 2020 PMAP guidance launched 22 February 2021

138. Whilst guidance was not produced for PMAP in 2015, the Scottish Government has been working with the Home Office to produce parallel guidance for Scotland which was launched on 22 February 2021. Whilst similar to that for Channel this accounts for the different context, terminology and legislative environment in Scotland.

Legal Issues

[16] Project DOVETAIL was a new approach for administering Channel which saw some responsibilities transferred from the police to local authorities.
[17] https://www.gov.uk/government/publications/channel-and-prevent-multi-agency-panel-pmap-guidance

139. There has been no relevant litigation relating to the implementation of the provisions of Chapter 2.

Preliminary Assessment

140. Channel was a key element of the Prevent Strategy published in 2011, under the second objective of protecting vulnerable people. This signified a marked expansion from the 2007 Prevent Strategy. The review of the strategy in 2011 demonstrated that Channel covered about 75 local authorities and 12 police forces. The purpose of the CTSA was to make it clear that all local authorities, police forces, and other partners listed under Schedule 7 had a duty to give regard to the need to prevent people from being drawn into terrorism with the aim of ensuring they were all implementing the Channel programme effectively.

141. In 2019/20, following 6,287 referrals to the Prevent programme in England and Wales, 1,424 individuals were discussed by Channel panels, of which 697 were adopted as a Channel case to receive support. Of the 697 adopted Channel cases, 30% were linked to Islamist extremism concerns and 43% to right wing extremism.

142. In 2019/20, there were 100 referrals to the Prevent programme in Scotland and 49 cases were discussed by PMAP. Of the 100 referrals, 12% related to Islamist extremism concerns, 35% related to right wing extremism, and 33% related to a mixed or unclear ideology, with 20% related to other types of extremism (e.g. anti-Semitic and anti-Muslim concerns).

PART 6 – AMENDMENTS OF OR RELATING TO THE TERRORISM ACT 2000

Section 42

Introduction

143. Section 42 of the CTSA reinforces the legislation that was put in place under TACT 2000 to prohibit payments to terrorist groups. It was introduced to close a loophole, where prior to implementation of the CTSA, it was not explicit that insurance companies that paid out for terrorist demands in other countries and then claimed money back from underwritten insurers in the UK would be committing an offence. The legislation makes it an offence for an insurer to make a payment under an insurance contract in response to a demand that is made wholly or partly for the purposes of terrorism. It applies where the insurer or person authorising the payment on the insurer's behalf has reasonable cause to suspect that the money or other property has been, or is to be, handed over in response to such a demand.

144. If a person is found guilty of the offence and convicted on indictment, the maximum penalty is a prison term of 14 years and/or a fine. If found guilty on summary conviction, the maximum penalty is a prison term of six months and/or a fine. In addition, section 23(5A) TACT 2000 gives the courts the power to order the forfeiture of the amount paid, or purportedly paid, under the insurance contract. Detailed provisions regarding the implementation of such an order are set out in Schedule 4 to TACT 2000. The offence has an extra-territorial effect in accordance with section 63 TACT 2000, such that if an insurer does anything outside the UK which would have constituted the commission of an offence under section 17A of the same Act, it shall be guilty of the offence.

145. Although in most circumstances the reimbursement of terrorist ransoms by insurers is covered by the existing 'funding arrangements' offence in section 17 TACT 2000, section 17A explicitly prohibits the reimbursement of a payment which insurers know or have reasonable cause to suspect has been made in response to a terrorist demand. The intention of section 42 of the CTSA was to mitigate the small risk that individuals or companies with kidnap and ransom insurance could exploit a lack of clarity in UK legislation around reimbursement of terrorist ransoms. The then Home Secretary explained the amendment as a means of putting it "beyond doubt that UK insurance firms cannot reimburse payments made to terrorists in response to ransom demands".

Implementation

146. Section 42 of the CTSA came into force on 12 February 2015. Under section 42(3), section 17A TACT 2000 applies to any payment made by an insurer on or after the day on which the CTSA was passed even if made under, or purportedly

under, a contract entered into before that day, or in respect of money or other property handed over before that day. However, under section 42(4), section 17A TACT 2000 does not apply to a payment made in respect of money or other property handed over before 27 November 2014.

147. The CTSA's provisions have been brought into operation primarily through the Suspicious Activity Report (SAR) protocol. This cross-Government protocol is instigated by the National Crime Agency (NCA) where there is a reasonable suspicion that there is a terrorism element to a kidnap case and an insurance company is involved. The NCA will request that the Cabinet Office commissions written submissions from a number of Government departments and other relevant bodies that have expertise, including but not limited to, Counter-Terrorism Policing, the Foreign, Commonwealth and Development Office, HM Treasury, Home Office, CPS, and JTAC prior to making a decision. Following written submissions, the Cabinet Office may convene the necessary departments to a Cabinet Office chaired meeting to come to an agreed UK position. The NCA is operationally independent and following the meeting will make the final decision. The insurance company will then be informed of the outcome.

Preliminary Assessment

148. To date, no one has been prosecuted for an offence under section 17A offence TACT 2000, as introduced by section 42 of the CTSA. However, since 1 April 2015, 19 SARs have been submitted under TACT 2000 for piracy or kidnap for ransom cases. They were submitted formally under TACT 2000 but are pertinent to post-legislative scrutiny given the crossover to the CTSA. 16 of these were requests for a decision and three were SARs submitted for information only where the insurance company had decided not to pay as there was a terrorist link. As far as the NCA is aware, there has been no UK law enforcement investigation into any offences in respect to section 42 since the CTSA came into force.

149. Although this legislation has not been fully tested in operation, it has added deterrence value by making it explicit that insurers cannot reimburse payments made to terrorists in response to terrorist demands. Additionally, it has helped ensure insurers abide by obligations under the SARs protocol to further safeguard and prevent payments being made to terrorists. Since the CTSA's implementation, operational partners have not identified any instances of overseas insurance companies claiming money back from any underwritten UK based insurers. Furthermore, the submission of SARs in kidnap for ransom cases demonstrates that insurers are carrying out the necessary due diligence.

Section 43 and Schedule 8 (Port and border controls: power to examine goods)

Introduction

150. Section 43 of the CTSA introduces Schedule 8 which amends Schedule 7 to TACT 2000. The amendments put beyond doubt the legal basis for the examination of goods under Schedule 7. This is for the purpose of determining whether the goods have been used in the commission, preparation or instigation of acts of terrorism where these are located outside the immediate boundary of a port or consist of postal packets.

151. The amendments were introduced following a recommendation by the then IRTL, Lord Anderson of Ipswich QC. In the 2010-2012 annual reports on the Terrorism Acts, Lord Anderson highlighted the need for legal clarity on goods which are postal items and on the examination of goods outside port boundaries. These changes made clear the locations at which an examination of goods may lawfully take place to enhance certainty around use of the powers and safeguard against their misuse.

Implementation

152. Powers to examine goods under Schedule 7 were available prior to the implementation of the CTSA and continue to be exercised where necessary and proportionate. The CTSA amendments provided important clarity to the application and use of the existing legislation rather than introduce any new powers.

Secondary Legislation

Section	Related legislation/guidance	Purpose	Date of issue
43	Code of Practice for Examining Officers and Review Officers Under Schedule 7 to the Terrorism Act 2000[18]	This Code of Practice was issued under paragraph 6 of Schedule 14 to TACT 2000. The Code was amended in March 2015 to reflect the clarifications made to Schedule 7 powers to examine goods	August 2020

18 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417105/48256_Code_of_Practise_Schedule_7_accessible.pdf

		through provisions in the CTSA. The current version of the Code came into force in August 2020 and includes those changes to the examination of goods originally made through the CTSA.	

Preliminary Assessment

153. The amendments to Schedule 7 clarified the law on existing practices, and so the changes have had a low impact on operational practice. Goods examinations are a well-established and important capability to counter the terrorist threat. The total numbers of checks by year can be found below.

Year Ending 30 June	**2015**	**2016**	**2017**	**2018**	**2019**
Air Freight	1,179	3,867	2,643	2,498	1,286
Sea Freight	1,664	6,423	6,628	6,339	4,931

PART 7 – MISCELLANEOUS AND GENERAL

Sections 44-46 CTSA

Introduction

154. Part 7 of the CTSA made several changes to the oversight responsibilities of the Independent Reviewer of Terrorism Legislation (IRTL). They expanded the IRTL's remit and provided greater flexibility on the publication of IRTL reporting.

155. Section 44 makes changes to the statutory remit of the IRTL to include: Part 1 and Part 2 (insofar as the power to make a freezing order is used to deter terrorism) of the Anti-terrorism, Crime and Security Act 2001 (ATCSA); the Counter-Terrorism Act 2008 (CTA); and Part 1 of the CTSA.

156. Section 44 also introduces the IRTL workplan. It provides that the IRTL must notify the Secretary of State at the beginning of each calendar year of any matters within this section which they intend to review in the following 12 months and requires the IRTL to provide a report on the outcome of any such review to the Secretary of State as soon as reasonably practicable after its conclusion.

157. Section 45 amends the statutory remit of the IRTL, to allow for reporting to be more flexible. It removed the requirement for the IRTL to produce annual reporting on Part 1 of the TACT 2006, the Terrorist Asset Freezing Act (TAFA) 2010 and the TPIM Act 2011. As with the section 44 workplan, it provides for the IRTL to review the legislation and notify the Secretary of State at the beginning of each calendar year of any intended reporting.

158. Section 46 provides for the creation of a Privacy and Civil Liberties Board (PCLB) to advise and support the IRTL and operate under their direction.

Implementation

159. Since the changes were introduced under the CTSA, the IRTL reporting schedule has changed. Prior to the introduction of the CTSA, the IRTL published three reports annually on TACT 2000 and 2006, TAFA and the TPIM Act. Reports published since February 2015 are listed below.

Publication Date	Report Title	Principal Legislation Reviewed
March 2015	TPIMs in 2014	TPIM Act 2011
March 2015	Terrorist Asset Freezing in 2013/2014	TAFA 2010
June 2015	A Question of Trust – Report of the Investigatory Powers Review	DRIPA 2014

September 2015	The Terrorism Acts in 2014	TACT 2000, TACT 2006
April 2016	Citizenship removal leading to statelessness	Immigration Act 2014
August 2016	Bulk Powers Review	IPA 2016
December 2016	The Terrorism Acts in 2015	TACT 2000, TACT 2006, CTA 2008
January 2018	The Terrorism Acts in 2016	TACT 2000, TACT 2006
March 2018	The Westminster Bridge terrorist attack: a report on the use of terrorism legislation	TACT 2000
October 2018	The Terrorism Acts in 2017	TACT 2000, TACT 2006, TPIM Act 2011, TAFA 2010
March 2020	The Terrorism Acts in 2018	TACT 2000, ATCSA 2001, TACT 2006, CTA 2008, TPIM Act 2011, CTSA 2015
March 2021	The Terrorism Acts in 2019	TACT 2000, ATCSA 2001, TACT 2006, CTA 2008, TPIM Act 2011, CTSA 2015

160. On 11 February 2015, a public consultation on the creation of the PCLB was completed and an impact assessment produced. After the General Election of May 2015, it was decided not to establish the PCLB but instead to provide the IRTL with extra support. This includes an additional £50,000 per annum for specialist legal assistance.

Preliminary Assessment

161. Since the implementation of the CTSA, the frequency and content of IRTL reporting has reflected the updated oversight responsibilities. TACT 2000 and TACT 2006 have continued to be reviewed annually, while formal reporting on the TPIM Act and terrorist finance legislation has become more ad hoc. Additionally, IRTL reporting since the introduction of the CTSA has included scrutiny and reference to legislation added to their remit through the CTSA amendments, including the CTA 2008.

162. Direction from parliamentary committees and the Secretary of State has also influenced IRTL reporting and this has included scrutiny of legislation and powers outside the IRTL's immediate remit; examples include the Bulk Powers Review (published August 2016), a report on citizenship removal resulting in statelessness (published April 2016), and most recently the review of Multi-Agency Public Protection Arrangements used to supervise terrorist and terrorism-risk offenders (published September 2020).

163. Home Secretaries have been made aware of IRTL workplans, which have been delivered in the form of letters. On 19 January 2021, the current IRTL, Jonathan Hall QC, provided his workplan for 2021.

164. IRTL reporting remains responsive to current affairs and the introduction of new legislation. In recognition of the changes being made to the TPIM regime, the Counter-Terrorism and Sentencing Act 2021 reinstates a requirement for an annual review of the TPIM Act 2011 by the IRTL. This requirement, which provides assurance of independent oversight, applies for a period of five years beginning with 2022, with reviews at the discretion of the IRTL after that point.

165. The decision not to establish the PCLB has meant that provisions in section 46 have not been implemented. Given the additional financial support that is provided to support the IRTL in his role, there is currently no intention of establishing the PCLB.

Sections 47-53 CTSA

166. Section 47 of the CTSA closed a gap in the law, introduced under the Justice and Security Act 2013, relating to decisions to refuse to issue certificates of naturalisation to British Overseas Territories citizens.

167. The successful introduction of section 47 has ensured that these decisions can be certified by the Secretary of State so that any challenge to that decision is by way of an appeal to the Special Immigration Appeals Commission (SIAC). The effect of such certification is to confirm that the Secretary of State took the decision either wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be publicly disclosed on the grounds of national security, in the interests of the relationship between the UK and another country, or because it is otherwise not in the public interest to disclose the material.

168. Sections 48–53 are largely technical provisions. Amongst other things they concern financial matters, interpretation of the CTSA and enable the Secretary of State, to make provision consequential on the CTSA.

CONCLUSION

169. The CTSA was enacted to ensure that law enforcement and intelligence agencies have the powers they need to keep us safe. In line with the increased threat from people travelling abroad to fight for foreign terrorist organisations it gave law enforcement agencies new powers to disrupt their travel and manage the control of returnees. The threat the UK continues to face from terrorism is serious, complex and sustained. It is clear from the assessment in this memorandum that, overall, the tools introduced in the CTSA are being used as was intended to tackle the threat.

170. The Government will continue to work closely with the police, the Security Service and other partners to ensure that the tools needed to counter the evolving terrorist threat are kept under review and up to date, whilst also ensuring that a proper balance is struck between robust powers and civil liberties.

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