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The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2015 by the Independent Reviewer of Terrorism Legislation

July 2017

Cm 9489

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

July 2017

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Home Office

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Dear Mr Anderson

REVIEW OF THE OPERATION IN 2015 OF THE TERRORISM ACTS

Thank you for your report on the operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 in 2015, which was published on 1 December 2016. As this was your last such annual report as Independent Reviewer, I would also like to take this opportunity to place on record my thanks for your service and for the very great contribution you have made in the role.

Out of a total of 47 recommendations you have made on the Terrorism Acts during your six years as Independent Reviewer, there are just six which the Government has rejected and which you now maintain, and a further four which have not been rejected but which have not yet been implemented.

Your report reflects, as ever, an extremely thorough, professional and detailed review. As well as making a number of new recommendations on issues that have arisen in the course of this year's review, it helpfully recounts your position and that of the Government on a number of issues you have previously addressed during your tenure, providing a useful framework for your successor to consider. I am confident that this report, like your previous reports, will provide the Government, Parliament and the public with an important and helpful source of independent analysis on the operation of the UK's core terrorism legislation.

The threat from terrorism has continued to evolve since 2015, and in recent months it has escalated significantly. Serious plots have continued to be disrupted in the UK and, tragically, four have recently come to fruition in London and Manchester, as well as a number of other recent attacks in Europe and elsewhere. This highlights the need to keep our legislation under continuous review to ensure it provides strong and effective powers that protect the public, to ensure that those powers are fair and proportionate, and to ensure that that they are operated in a way that is balanced. I welcome your conclusion that we had such a legislative framework in respect of the threat at the time your report was published. As the Prime Minister announced following the recent attacks, we are reviewing our counter-terrorism powers and capabilities in the light of the current threat picture.

I look forward to working with your successor as Independent Reviewer, Max Hill QC. I am sure that he will find your legacy of robust and challenging independent review a helpful platform on which to build his own work.

The Threat Picture

A clear appreciation of the threat picture is vital to understanding the context in which our counter-terrorism laws operate. Your report provides an accurate assessment of the threat at the time it was published, both globally and domestically, which I am sure will be of assistance to readers.

For most of the period since I responded to your previous annual report, the overall threat level for the UK has remained at Severe, meaning that an attack is highly likely. The threat level was temporarily raised to Critical following the Manchester attack, meaning that an attack was expected imminently. Daesh continues to present the most significant terrorist threat, both globally and to the UK and our interests. Although the global coalition's military campaign has degraded Daesh's battlefield capabilities and reduced its territory within Syria and Iraq, the group retains operational control over some areas and continues to pose a threat to the UK and elsewhere from those strongholds.

Approximately 850 UK linked individuals of national security concern have travelled to engage with the Syrian conflict. Of these, approximately 15% have been killed while overseas and just under 50% have returned to the UK. Many of the most dangerous individuals remain overseas. These individuals pose significant challenges for our security and intelligence agencies, and for the police.

Terrorist groups have also shown an increasingly sophisticated grasp of modern media and messaging as propaganda tools, which allow them to reach out to individuals in their countries of residence. These groups, including Daesh, increasingly use online networking platforms to communicate, recruit and to plan attacks, or to seek to inspire attacks. End to end encryption technology, where the company providing the service does not maintain the ability to decrypt communications between users, is widely available and affordable and makes this more difficult to detect and counter. We remain committed to ensuring that there are not guaranteed safe spaces online in which terrorists and other serious criminals can communicate beyond the reach of law enforcement, and we will continue to press industry to work with us on this crucial shared challenge.

In addition to Daesh, Al-Qaeda and its affiliates, notably those in Syria and Yemen, as well as other Islamist extremist groups, continue to aspire to attack the UK, our interests and our allies.

As your report notes, Islamist extremism is of course not the only terrorist threat we face. The threat level from Northern Ireland Related Terrorism (NIRT) is Severe in Northern Ireland, indicating an attack is highly likely, and in Great Britain it remains at Substantial (having been raised from Moderate in May 2016), meaning an attack is a strong possibility.

We also assess that there is a continuing threat of violence and terrorism from groups or individuals associated with the far and extreme right wing. While this threat may be fragmented and less acute, we will not ignore it, and where appropriate we and the police will take robust action to tackle it. The imperative to do so has been tragically highlighted by the murder of Jo Cox MP in June 2016 by Thomas Mair, who was motivated by such ideology and who is now serving a whole-life sentence, and by the Finsbury Park attack following which Darren Osborne has been charged with murder and attempted murder, alleged to be motivated by hatred of Muslims. In December 2016 National Action become the first extreme right-wing group to be proscribed, following its move from extremism into terrorism. We continue to keep organisations of concern under review, and where any are concerned in terrorism we will take steps to proscribe or otherwise disrupt them.

The Government, Law Enforcement, and Security and Intelligence Agency Response

Your report provides a helpful and comprehensive overview of the resources the Government is making available for counter-terrorism. This includes: a real terms increase in the counter-terrorism policing settlement to £670m for 2016/17; an additional £34m of transformation funding to support uplift in armed policing which will be managed through the Counter-Terrorism Policing Grant; an additional £2.5 billion of investment in staff and capabilities for the security intelligence agencies,

more than half of which will be for counter-terrorism and which will support the recruitment and training of over 1,900 additional staff across the agencies; and an overall increase for counter-terrorism resources of 30% over the Strategic Defence Spending Review period from £11.7bn to £15.1bn.

The Home Office remains committed to ensuring the Counter-Terrorism Policing Network has the capabilities it needs to tackle the threat from terrorism. In addition to this increased spending, an ambitious programme of efficiencies and investments in counter-terrorism policing will further enable growth in key capabilities such as digital exploitation, Counter-Terrorism Police Liaison Officers, Protect and Prepare overseas, biometrics, and the response to marauding terrorist firearms attacks. This includes, as part of the Strategic Defence and Security Review, a commitment to finding £233m of savings over the period.

We continue to value our international cooperation and information sharing through EU security and law enforcement measures, to tackle cross-border crime and terrorism. The UK will continue to participate in these measures while we remain a member of the EU. And the PM has made clear that one of our twelve objectives for the negotiations now underway will be to establish a new relationship which enables the UK to continue this practical cooperation with our European partners. Of course it would be wrong to set out unilateral positions on specific measures while negotiations are ongoing, but I am clear that we will do what is necessary to keep the public safe.

Statistics

I support the principle of publishing as much data as possible about the operation of sensitive police powers. Indeed the Government published on 23 February 2017 the second Annual Transparency Report, which provides to the public, and brings together in one document, more information than ever before about the use, regulation and oversight of a wide range of disruptive and investigatory powers that are crucial to protecting the public from those that would do us harm. The Home Office also, of course, continues to publish statistics regarding the operation of police powers under the Terrorism Act 2000 and subsequent legislation on a quarterly basis.

On the first of your four recommendations in this area, data is held by the National Counter-Terrorism Policing Operations Centre (NCTPOC) on the number of applications for a warrant for further detention under Schedule 8 to the Terrorism Act 2000. NCTPOC have provided the following statistics covering the last five years, and are happy to provide data for future years to your successor, for publication in his reports if he wishes.

Year	2012	2013	2014	2015	2016
WFD applications	41	18	72	40	41

The success rate for these applications is not currently recorded by the police, and could not be recorded without making changes to processes and systems. Neither the number nor the success rate of applications is currently collected and published by the Home Office. While I agree that the data is of interest, I do not feel that it is of sufficient interest to justify the additional cost and burden on the police, or to justify prioritising it over other statistics for inclusion in data requirements on the police and for subsequent publication by the Home Office. However I hope the above information is helpful.

In line with your second recommendation, the Home Office has investigated whether it would be feasible to publish data on refusals of access to solicitors in Great Britain under Schedule 8. This is an exceptional power which will only be used in a small number of cases where there is a compelling reason to do so, and its use is recorded on the paper custody records in each individual case, but

is not collated centrally. To capture this data retrospectively would require police to review manually every hard copy custody record; and to record and publish it in future would require police forces to introduce potentially significant system changes. While I agree that this data is of interest, given the small number of cases anticipated I have concluded that the benefits are likely to be disproportionate to the cost and burden of collecting it, and do not justify its prioritisation for inclusion in future data requirements potentially at the expense of other data.

On your third recommendation I agree that it would be helpful for the published statistics on police counter-terrorism powers to reflect the updated 2011 census ethnicity categories. To implement this change would require extensive and potentially costly changes to police forms, processes and electronic systems. As this is an issue that is relevant across all police statistics where ethnicity categories are used and is not limited to counter-terrorism, the Home Office is working with data providers to investigate the scale and feasibility of the work that would be required, so as to ensure that any changes deliver benefits across the full range of relevant statistics and deliver value for public money.

Finally I am pleased to confirm that, in line with your fourth recommendation, the Home Office will from 2017/18 publish statistics for use of the stop and search powers at sections 43 and 43A Terrorism Act 2000 across all police forces nationally.

Ambit of Independent Review

The role of Independent Reviewer is vitally important in providing both the public and Government with assurance about the effectiveness and fairness of our terrorism legislation. Central to the effective performance of that role is a remit that strikes the right balance between being sufficiently broad and being clearly defined.

With this in mind I have carefully considered your recommendations in this area, one of which is new and one of which was previously rejected by the then Home Secretary in her response to your 2013 report.

I have concluded that it would not be appropriate to expand the remit of the Independent Reviewer to include any law to the extent that it relates to counter-terrorism. While I am clear that the remit should ensure robust and overarching oversight of our terrorism legislation, I am concerned that to expand it in a more loosely defined way may dilute the core role of the Independent Reviewer, would introduce uncertainty as to its boundaries, and would risk including matters that properly fall within the remit of other independent oversight bodies. Of course it remains the case that the Government can ask the Independent Reviewer to undertake ad hoc reviews on areas falling outside of the statutory remit.

In relation to oversight of the Royal Prerogative powers, all British passports are issued and cancelled under these powers which are vested in the Home Secretary. This is not a statutory power, but a residual power of the Crown. In the national security context the Royal Prerogative can be used to refuse a passport application, or to cancel an existing passport, under the public interest criteria. I consider that including non-statutory powers within the Independent Reviewer's remit would again risk diluting the clarity of that remit, and may set an unhelpful precedent given that Prerogative powers are also used in a range of other contexts across Government. Furthermore, not all refusals of passports under these criteria may necessarily be on the grounds of terrorism-related activity, risking uncertainty as to which cases should be considered by the Independent Reviewer and which should not.

A decision to exercise the Royal Prerogative in relation to national security can be subject to judicial review proceedings, and I believe that this provides an appropriate mechanism to ensure that the use of the power is effective, fair and proportionate.

Definition of Terrorism

Your report restates two of your earlier recommendations aimed at narrowing the statutory definition of terrorism (a third having been implemented by the Government in 2015), commenting that this is not in the expectation that they will be accepted, but as a marker of your position at the end of your term as Independent Reviewer. As you note, my response to your 2014 report rejected these recommendations, maintaining the approach taken by the then Home Secretary in response to your 2013 report. I considered that it was not the right time to make further changes to the statutory definition, and that in the face of a complex and fluid terrorist threat it was important to maintain a flexible statutory framework, of course with appropriate safeguards.

I agree that activity clearly falling outside the common-sense definition of terrorism should not be caught by terrorism laws, and that we should guard against a chilling effect on legitimate journalism and activism. However I am satisfied that the current statutory definition has not so far had this effect. It seems to me that it has operated successfully and has been interpreted sensibly by the courts in a range of contexts, as well as sensible prosecution and evidential decisions being taken by the Crown Prosecution Service. Having considered all of this, and the Government's longstanding cautious approach to this matter, I maintain the view that it would not be appropriate to make changes to the statutory definition at this stage. However I will keep this under review and, if persuasive evidence emerges that the current definition is leading to perverse or unintended outcomes, I will revisit my position.

Proscribed Organisations

Thank you for your detailed consideration of the proscription regime, and your helpful summary of proscription decisions in 2015 and 2016. In addition to the three proscription orders your report lists, one further order has been made which was in force from 16 December 2016 and which added the far-right extremist group National Action to the list of proscribed organisations.

I note that you maintain your longstanding recommendations in this area, which the Government has previously rejected, as well as raising a number of new ones in relation to the process for applying for deproscription and any subsequent litigation before the Proscribed Organisations Appeals Commission (POAC). The Government keeps the proscription system under review to ensure it is effective in ensuring that the right groups are proscribed and that the public is protected. However I maintain a cautious approach to making changes to the proscription regime, and I am not prepared to make changes at this stage. I am unconvinced that regular reviews of past proscription decisions would in practice prevent any injustice, while they could lead to perverse outcomes, and would have considerable practical and financial disadvantages.

On your new recommendations, I agree that the Government should respect the statutory time limits for considering deproscription applications, and it is unfortunate that in the International Sikh Youth Federation case the time limit was missed due to an administrative error. The Government will always endeavour to provide the fullest possible reasons for the refusal of any deproscription application, and this will be determined on a case-by-case basis, however there will be limits to the amount of information that can be disclosed publicly. In particular, it would not be in the public interest to disclose sensitive information obtained from the intelligence agencies, which will often be central to determining whether a group is engaged in terrorism.

Finally, I note your recommendations around respecting the requirements of the statutory test for proscription, and around handling litigation in POAC. Of course the Government must act reasonably and within the law. In individual cases it is for me to determine whether the statutory test is met in a particular case, subject to the important safeguard that my decisions can be reviewed by the courts. And it is also for me to determine how best to conduct such litigation. You will appreciate that I am not prepared to comment on decisions in individual cases.

Port and Border Controls

Your report summarises your comprehensive and helpful work on Schedule 7 during your time as Independent Reviewer. As you have consistently reported, the value of Schedule 7 far exceeds that which is measurable in terms of arrests, seizures and evidence usable in court. Schedule 7 yields valuable intelligence relevant to the terrorist threat, as well as intelligence to inform the planning of disruptions and the recruitment of informants. It also has a helpful deterrent effect for those tempted to travel overseas for terrorism-related activities.

You confirm that the power is used relatively sparingly. As you report, where some 256 million passengers transited UK eligible ports in 2015/16, barely one hundredth of 1% of those travellers was subject to a Schedule 7 examination. Moreover, I welcome the reiteration of your finding that Schedule 7 powers are not being used in a racially discriminatory manner.

You recommend that the desirability of requiring objectively demonstrated grounds for the exercise of enhanced Schedule 7 powers should be kept under review in the light of dicta in *Beghal v DPP*. While the Home Office will continue to keep this issue under review, my view remains unchanged that introducing a requirement of suspicion would fundamentally undermine the utility of the power. In this context I note that the Supreme Court found Schedule 7 as applied in the *Beghal* case to be lawful and compatible with the European Convention on Human Rights.

I note your recommendations, building on those you made in your 2014 report in this area, that any policy on the retention of electronic data must fully comply with the applicable legal constraints, and there must be effective guarantees of the proper implementation of whatever guidelines are applied. I can confirm that the police will shortly complete their review of the Digital Downloads at Ports policy, and following this the Home Office will work with the police to ensure that there is guidance in place which fully complies with the law and that is properly implemented.

On your recommendation that there should be a statutory bar to the introduction of Schedule 7 admissions to a subsequent criminal trial, I agree that it should be clear that such material is inadmissible, and will consider legislating accordingly when there is an appropriate opportunity to do so.

You also recommend that certain requirements in relation to screening questions are incorporated into the Terrorism Act 2000 and the Schedule 7 Code of Practice. I do not consider it necessary to incorporate requirements in relation to screening questions into primary legislation, but will consider including this in the next revision of the Code of Practice.

I agree with your view that the Schedule 7 powers should only be used for their lawful purpose, and would expect that this should always be the position. It would of course be a matter for the courts to determine if the powers had been used unlawfully in any particular case. We will keep under consideration whether there is a requirement for further powers for national security purposes.

I am clear that questions about private religious observance, such as prayer, should only be asked in a Schedule 7 examination, if at all, in highly exceptional circumstances where there is a clear and objective reason for doing so. However, questions about public religious observance, such as attendance at places of worship, in combination with other information, may well be appropriate in a Schedule 7 examination. The Home Office will explore with the police whether the current guidance is sufficient on this important issue.

On the quality of manifest data at seaports and on the international rail network, since Exit Checks were introduced in April 2015, on-departure data is received for all passengers from international rail and maritime carriers operating scheduled commercial routes from the UK (other than those routes within the Common Travel Area). For international rail passengers travelling to the UK, 100% of those passengers must present to a juxtaposed immigration control in Belgium or France where they are subject to counter-terrorism watchlisting. Similarly 59% of all maritime passengers must present to a juxtaposed immigration control in France and be subject to checks before they arrive in the UK. Only 5% of all international maritime passengers arrive in the UK without any pre-arrival notification or examination.

In line with your recommendation we are taking steps to improve the quality of manifest data available. Engagement is underway with the rail and maritime operators to provide information about pre-booked passengers in advance of travel, and with the Governments of Belgium, France and the Netherlands to place consistent requirements on the Cross Channel operators. In relation to the Common Travel Area (CTA) our approach is to maintain the CTA and seek to strengthen its external border. Engagement is ongoing with carriers operating within the CTA to explore the availability of data about their passengers in advance of travel.

Arrest and Detention

Your report restates a number of previous recommendations in this area, as well as making one new recommendation, that PACE Code H be reviewed in line with the judgment of the Grand Chamber of the European Court of Human Rights in *Ibrahim and others v UK*. As your report sets out, in that case the Grand Chamber dismissed the cases of three of the four claimants who had been subject to 'safety interviews' without access to a lawyer and who argued that this (and the use of the resulting statements at their trial) breached their Article 6 rights. But it found in relation to the fourth claimant, who unlike the others was interviewed as a witness initially, that he should have been cautioned at the point when he started to incriminate himself.

The Home Office has worked with the police to review whether any legislative, policy or procedural changes are required in light of the judgment, including any changes to Code H, and we have concluded that they are not. The Grand Chamber found that there had been an operational failure to comply with the requirements of the PACE Code in this individual case, whereby the investigating officers had acted outside of their powers, rather than that Schedule 8 to the Terrorism Act 2000 or Code C (which was in force at the relevant time but which has since been superseded by Code H) were deficient. I am satisfied that Code H does properly reflect the approach taken by the Grand Chamber, in particular as paragraph 10 is clear about the circumstances in which cautions must be given, and covers circumstances such as in this case.

In my response to your 2014 report I undertook to consider legislating, when an opportunity arises, to implement your recommendation that Schedule 8 be amended so that the detention clock can be paused for pre-charge detainees who are admitted to hospital. Although no suitable opportunity to legislate has yet arisen, I am happy to reaffirm that commitment.

However I maintain the view that the suggested amendments to paragraph 32 of Schedule 8 are not necessary, and may be unhelpful. The inherent purpose of court hearings in relation to warrants for further detention includes establishing whether the arrest was lawful, and considering whether ongoing detention is proportionate, and it would be surprising if a court issued such a warrant if it was not satisfied on these matters. As part of this consideration, courts will consider the requirements of relevant case law and of the European Convention on Human Rights on what a suspect must be told about the reasons for their arrest and the charges they may face, including at what time and in what level of detail. Furthermore, Code H is clear on these matters, and detainees are able to complain to the courts if they believe they have been denied their rights under the Code. I am therefore not persuaded that amendments to Schedule 8 are necessary in order to secure the consideration of these matters by judges.

Furthermore, where the purpose of an investigation is to uncover evidence, it may not always be possible to meet the threshold of establishing in advance a 'real prospect' of that evidence emerging during the period of further detention, even though police may reasonably suspect that it is present. Therefore to introduce such a requirement for the authorisation of a warrant for further detention could have the unintended consequence of undermining the purpose of the power, which is to facilitate investigation and the gathering of evidence while the suspect remains in detention (and the public therefore protected), in the more complex investigations that can occur in terrorism cases.

Finally, on your longstanding recommendation that bail be introduced for suspects detained under Schedule 8, as you are aware the Government has taken a cautious approach. My view, and that of the former Home Secretary, has been that this would not be appropriate and could put the safety of the public at risk. Of course it is right to retain an open mind and to keep long held positions under review, and the Home Office has carefully considered with operational partners whether our existing approach continues to meet operational needs, and whether it remains the appropriate response to the current threat picture. Following this consideration we have concluded that our existing approach remains the right one, and I therefore remain not prepared to introduce bail for those arrested under the Terrorism Act 2000.

Criminal Proceedings

Your recommendation of further dialogue between the government and international NGOs builds on one from your 2013 report, which I am happy to confirm the Government has implemented. Dialogue has been ongoing with the NGO sector for some time now, and the Government continues to engage with charities on a bilateral and multilateral basis to understand the operational realities they face. Recent engagement has highlighted areas where NGOs themselves could do more to embed compliance with counter-terrorism legislation within their due diligence and risk assessment programmes. We are supporting this, in addition to keeping existing guidance for NGOs under review.

On the second recommendation you make in this area, I am happy to confirm that we will consult widely on any new powers to tackle extremism before they are introduced. This will include looking at all the options that might be used to disrupt the activities of extremists, including making use of, amending or clarifying existing powers.

Foreign Terrorist Fighters

I am grateful to Prof. Emeritus Walker for his work on this issue, and for the observations and recommendations in his guest chapter, which the Government will carefully consider as we develop our approach in this area.

UK-linked individuals who travel to fight in Syria and Iraq pose a clear threat to our country's security, and we continue to work at a national and international level to mitigate the risk they pose. Our Prevent strategy includes work through the Channel program to dissuade people who may wish to travel, as well as challenging the beliefs of some of those individuals who have already returned from the region. This program has supported over 1,000 people at risk of being drawn into terrorism since 2012. Our work also includes efforts to protect and safeguard the children of concerned individuals, and in 2015 family courts safeguarded approximately 50 children from travel to Syria.

For those who nonetheless still aspire to travel to the region and engage in terrorism-related activity we have a range of tools to disrupt their travel and to manage their return. This includes using the Royal Prerogative to remove passport facilities, using Temporary Exclusion Orders to manage their return, or when they are in the UK imposing travel restrictions and other measures through Terrorism Prevention and Investigation Measures. Anyone who returns from the region must also expect to be examined by the police to determine if they have committed criminal offences, and there have already been several successful prosecutions for those who have returned.

Whether or not returners are prosecuted, we will take further action to understand and mitigate the risks they pose. This could include providing intense mentoring and psychological support through a de-radicalisation programme.

We have now seen the flow of British citizens travelling to join Daesh and other extremist groups reduce, falling in successive quarters since the start of 2015, and we will continue to challenge and support those who need it in order to help keep the UK public safe. We must of course keep our approach under continuous review, and Prof. Walker's work provides a useful contribution to this.

I will, as usual, be publishing this response on the Government's website and placing copies in the Vote Office.

The Rt Hon Amber Rudd MP

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