



HM Government

# The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2016 by the Independent Reviewer of Terrorism Legislation

September 2018

Cm 9704



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

September 2018

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Home Office

Mr Max Hill QC  
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Dear Mr Hill

### **REVIEW OF THE OPERATION IN 2016 OF THE TERRORISM ACTS**

Thank you for your first report as Independent Reviewer of Terrorism Legislation (IRTL), on the operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 in 2016, which was published on 25 January 2018.

Whilst there were no substantive changes in 2016 to the laws that you maintain oversight of, this was a year in which trends emerged in the nature of the terrorist threat which have since gone on to become more prominent. These include the growth of individuals carrying out attacks having been inspired by other attacks, an increase in the use of low sophistication attack methodologies, and the increasing prevalence of modern social media and online messaging platforms in the spread of terrorist propaganda and the radicalisation of individuals, which can increasingly take place in isolation and sometimes at considerable pace. Recognising that the threat had developed in 2016 and continued on this trajectory throughout 2017, the Director General of MI5 said in October 2017 that its scale and pace is unlike that which we have seen before.

In these circumstances it is right that we should ensure we have the legislation we need to keep the public safe, and the Prime Minister announced following the London Bridge attack last year a review of the laws and powers available to the police and security services, and of the sentences available for terrorism offences. In October 2017, the former Home Secretary announced as an initial conclusion of that review that the Government would be taking forward legislation to strengthen the offence of possessing information likely to be useful to a terrorist, so that it applies to material that is viewed repeatedly or streamed online, as well as increasing the maximum sentence for this offence. Subsequently, this and a range of other measures have been introduced in the Counter-Terrorism and Border Security Bill, to ensure that the police and security services have the powers they need to address the threat from terrorism and keep the public safe.

Equally, during such times of heightened threat, independent oversight of terrorism laws is essential to ensure that our response is both proportionate and effective. I am therefore very grateful for your input into the review process, and for your ongoing contribution to the debate as the resulting legislation is considered by Parliament.

I would like to thank you for your work and the contribution you have made as IRTL, in what can only be described as a particularly difficult and challenging year. I would also like to congratulate you on your appointment as Director of Public Prosecutions. I look forward to engaging with you for the remainder of your time as IRTL, and with your successor when appointed, as we take forward our work to ensure that UK terrorism laws continue to be effective, fair and proportionate.

## **Threat picture**

Your report provides an assessment of the terrorist threat in 2016, which I am sure will be of assistance to readers.

The UK threat level for international terrorism remained at Severe throughout 2016, meaning that an attack was highly likely. Daesh continued to represent the most significant international terrorist threat to the UK, but was by no means the only one. It is thanks to the hard work and dedication of the police and security services in disrupting these threats that no such attack plot came to fruition in 2016. You are of course correct to highlight that in any assessment of the threat to the UK it is important to consider the international context, and your report provides helpful data and insightful analysis in this respect, serving as a stark reminder that terrorism is a global issue affecting people of all backgrounds and religions.

As your report highlights, international terrorism is not the only source of terrorist threat, and 2016 brought a number of reminders of this. We have seen an ongoing and resilient threat from Northern Ireland Related Terrorism. Within Northern Ireland the threat level was assessed as Severe throughout 2016, and remains so today, meaning that an attack is highly likely. The threat level for Great Britain from the same source was raised in May 2016 to Substantial, meaning that an attack is a strong possibility. It remained at that level for the rest of the period covered by your report; it was reduced back to Moderate in March 2018, which means an attack is possible, but not likely.

We have also seen a number of indicators of an ongoing threat from far and extreme right-wing terrorism. In June 2016 we saw the tragic murder of Jo Cox MP by Thomas Mair, who was motivated by extreme right-wing ideology (as was Darren Osborne who carried out the Finsbury Park attack in June 2017). The Government and the police are absolutely clear that terrorism laws, and the wider criminal law, apply equally to such activity as they do to other forms of terrorism, and that we will take robust action to tackle it. In December 2016 National Action became the first extreme right wing group to be proscribed under the Terrorism Act 2000, for its glorification of terrorism, with Scottish Dawn and NS131 (National Socialist Anti-Capitalist Action) subsequently recognised as alternative names for the group in 2017. We continue to keep organisations of concern under review, and where any are concerned in terrorism we will take steps to proscribe and/or otherwise disrupt them. Although outside of the period covered in your report, individuals linked to National Action have been arrested on suspicion of terrorism or public order offences in 2017 and 2018.

It is in this context that I am happy to support your recommendation that the independent Joint Terrorism Analysis Centre (JTAC) should consider extending its

remit to include assessing the threat from domestic extremism. Work on this has begun, and I can confirm that JTAC will work with the police and MI5 over the coming year to ensure that its assessments take account of the terrorist threat from domestic extremists. This will ensure that such assessments are balanced, well-informed, and properly reflect the full range of the terrorist threat we are facing. Your recommendation is also reflected in the internal police and MI5 reviews following the 2017 terrorist attacks in London and Manchester, which reached a similar conclusion.

## **Port and Border Controls**

Thank you for your initial views on this important area of our terrorism legislation. I join you in commending your predecessor for his contribution to the scrutiny and improvement of our port and border powers, and I look forward to considering the more extensive review which you intend to provide in your next annual report. While the Government did not always agree with Lord Anderson's recommendations in this area, I am in full agreement with his consistent reporting of the value of Schedule 7 and its contribution to the UK's overall approach to countering terrorism. As a consequence of its utility to detect, disrupt and deter terrorist activity, this important power has led to a number of convictions for terrorist related offences, and contributes daily to helping keep the British public safe.

Your report highlights the continuing decline in the number of port stops under the Schedule 7 powers (from 61,000 in 2012 to 17,000 by mid-2017), and suggests that consideration be given to the question of what would be the right number of stops, and what number would be too many. The Home Office and police are working to identify possible reasons for the ongoing decline in numbers of examinations, such as better targeting and improved access to advance passenger data. It is of course desirable that the Schedule 7 powers should be used as sparingly as possible, and we can say with some confidence they are being used increasingly sparingly, affecting only a fraction of a percent of those travelling through UK eligible ports, with this proportion continuing to decrease. However I do not consider that it would be possible, or would be appropriate, to put a number on this. Rather, in my view, the number of Schedule 7 examinations should be no more and no less than is necessary for ports officers to conduct their lawful duty to protect the British public from those concerned in the commission, preparation or instigation of acts of terrorism.

Your report also highlights that there are some communities who feel disproportionately targeted by the operation of Schedule 7 powers. As you state, the selection of a person for examination must not be arbitrary or based on ethnicity alone, and I strongly endorse this. However I am unable to support your recommendation of introducing a new threshold to require those who exercise the powers to demonstrate their non-arbitrary use. Although I appreciate that this is a different recommendation to that of introducing a requirement of suspicion, which the Government has consistently rejected, my view remains unchanged that to introduce a new or heightened threshold for exercise of the powers would risk fundamentally undermining their utility, which derives from their current no-suspicion status (subject of course to requirements of the statutory Code of Practice). It is worth recalling that

the Supreme Court in the *Beghal* case found that Schedule 7 in its current form is compatible with the European Convention on Human Rights.

I am not persuaded that the legal test suggested would provide additional safeguards, given that examining officers must already apply the criteria in the Code of Practice, and that individuals are already able to challenge the exercise of the powers if they believe this was not in accordance with the Code. I also consider that, as a relatively technical change which may not be easily understood, it may do little to reassure those who feel disproportionately targeted by the powers or to alter the negative community perceptions which you highlight. But I am concerned that to introduce a novel legal test would risk creating uncertainty as to how it should be interpreted both in operation and by the courts, which could risk undermining the utility of this important power and ultimately impacting on its use to keep the public safe.

The Home Office will, however, seek to address the concern you raise through considering where we can offer further clarity and assurance on the criteria for selection in the Code of Practice, which we will review before issuing an updated version in due course. We will also carefully consider our messaging and language in any public communications or notices that provide an explanation of the power, in order to ensure that these provide similar clarity and assurance.

## **Arrest and Detention**

I agree that it is helpful to have clarity on the powers of arrest and detention that are available to the police in terrorism cases, including the circumstances in which each power might be used and, in the case of the general power of arrest under PACE, the circumstances in which such an arrest might be categorised as terrorism-related.

These are operational matters and the Home Office has engaged with counter-terrorism policing to explore the approach to them. I hope that the following provides helpful clarity in this area.

### *Categorisation of terrorism-related arrests*

The decision on whether to categorise a particular arrest as terrorism-related is an operational matter for the police. This is a distinction that is made for the purpose of compiling more accurate and informative statistics, as well as certain operational matters such as how the individual may be managed in prison if they are convicted, but it is without prejudice to the exercise of the power of arrest itself or to the subsequent rights of the detainee. I consider it important to preserve this operational independence and flexibility.

Counter-terrorism policing will record an arrest as terrorism-related if:

- it is made under TACT on suspicion of being a terrorist;
- it is made under the general power of arrest in PACE on suspicion of a terrorism offence; or if
- it is made under PACE on suspicion of a non-terrorism offence, and if the suspect is a subject of interest in a counter-terrorism investigation.

This third category might be applicable where there is actionable evidence that an individual is involved in criminality, and where they are also believed from intelligence to be involved in terrorism-related activity, but it is not yet possible to prove evidentially that they have committed a terrorism offence. Or in such a case it may potentially be possible to arrest for a terrorism offence, but there may be operational or source-protection reasons why the police do not wish to reveal their knowledge of the individual's terrorism-related activity. The police may instead, quite appropriately, choose to arrest on suspicion of the general criminality at that stage. The arrest, and any subsequent prosecution, will be likely to have a beneficial effect in disrupting the individual's involvement in terrorism even if the criminality is not directly related to or in support of that involvement, and I consider it appropriate in these circumstances for the arrest to be recorded as terrorism-related.

### TACT and PACE arrest and detention powers

It is open to Senior Investigating Officers to decide which power of arrest it is most appropriate to use, based on all the circumstances of the investigation and the operational context, and the evidence available at the time of the arrest. I consider it important to retain this operational flexibility.

As your report highlights, a key difference between the two powers is that an arrest can be made under section 41 of the Terrorism Act 2000 on suspicion that a person is a terrorist, which includes where they are suspected of being concerned in the commission, preparation or instigation of acts of terrorism generally, whereas an arrest under PACE must be on suspicion of a particular offence. This allows the police to use the TACT power to respond swiftly and flexibly in the period immediately following an attack or other serious terrorist incident, where there may be evidence to reasonably suspect that individuals are involved but the police do not yet fully understand the nature of their terrorist activity or what specific offences they may have committed. In these circumstances there are likely to be good operational reasons to make immediate arrests and to continue the investigation with the suspect in police detention, in particular to protect the public from an immediate risk of harm, as well as potentially to prevent other harms arising such as the destruction of evidence or the tipping off of accomplices.

There are further key differences between the two detention regimes. Schedule 8 to TACT provides a number of powers which support and complement the use of the section 41 arrest power in these urgent circumstances, in particular the power to detain suspects for up to 14 days (with judicial authorisation) and the corresponding prohibition on bail, so that the risk they may pose can be fully investigated before they must be charged or released. Schedule 8 also offers the power to delay access to legal advice or informing a third party of the detention, where this is necessary for example to avoid a risk of tipping off suspects still at large or of evidence being interfered with, or to obtain information that could protect the public from a risk of harm through conducting an immediate 'safety interview'.

By contrast, the detention regime associated with the PACE power of arrest on suspicion of a particular offence has a shorter period of pre-charge detention and the possibility of bail, and does not provide the power to delay providing detainees with their normal rights in exceptional circumstances. It is generally more suited to



planned arrests as part of a long-running investigation where evidence may already have been gathered to support a charge, or to more urgent circumstances where there is evidence available at the time of arrest on which to suspect the commission of a particular offence, and where there is not judged to be an immediate risk to the public.

I consider it appropriate that the police will generally reserve the use of the more exceptional powers under TACT for cases where there are operational reasons to justify their use, and will otherwise rely on the general powers of arrest and detention in PACE. This measured approach is reflected in the statistics highlighted in your report, which suggest that a minority of terrorism-related arrests are made under the TACT powers.

Finally, as your report identifies, it is permissible for the police to release a person under one power and then to immediately re-arrest them under another. In the case you highlight as an example it would appear that this was the most appropriate and proportionate course of action in all the circumstances, and I am satisfied that this operational flexibility should be available to the police where appropriate.

#### *Independent Custody Visitors in Northern Ireland*

The work of the Independent Custody Visitors Association (ICVA) is important in protecting the rights of detained persons, and the cadre of specially trained TACT Independent Custody Visitors (ICVs) provides an invaluable and unique means of monitoring and reporting on the wellbeing and overall detention conditions of detainees in TACT custody suites.

I agree that steps should be taken to address any reluctance of TACT detainees in Northern Ireland to consent to ICV visits, and to promote understanding of the organisation's independence of the police and the criminal justice system. Home Office officials have discussed this issue with the Police Service of Northern Ireland (PSNI), and with the independent Northern Ireland Policing Board (NIPB) which administers the ICV scheme in Northern Ireland, and I understand that you have also engaged directly with the NIPB.

The NIPB has identified some initial steps which it plans to take. Firstly, they intend to engage with solicitors and legal representatives to highlight the role of the ICV, to seek to challenge any perception that ICVs are not independent of the police, and to promote their role in safeguarding detainees' welfare and human rights; and secondly a review of the TACT detention process, including the process for introducing detainees to the role of ICVs and the information provided to them. Whilst this work is ongoing, a number of process improvements have already been identified. The NIPB has committed to take this forward over the coming year in partnership with PSNI, and will be monitoring the issue closely.

#### TACT detention conditions

Your report repeats a number of recommendations made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or

Punishment, in the Committee's report on its April 2016 visit to the UK. The Government's formal response to the Committee's report, including these recommendations, was published on 23 January 2018, and I would refer you to its contents (<https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-publishes-response-of-the-uk-authorities>).

### Rousing of sleeping detainees in Scotland

Thank you for highlighting this issue, and for your recommendation that a uniform approach be adopted across the UK to rousing sleeping TACT detainees in order to monitor their welfare. While this is an operational matter for the police, I agree that a consistent approach should be taken and I am happy to support this recommendation. I am therefore pleased to confirm that Home Office officials have discussed it with Police Scotland, who also agree that uniformity is desirable, and who have committed to amend their Custody Care and Welfare standard operating procedures to make clear that it is not necessary to wake a sleeping detainee if no foreseeable risk is identified in the risk assessment.

### **Criminal Proceedings**

Thank you for your suggestion that consideration be given to repealing certain terrorism offences. In line with your suggestion I have given careful consideration to this myself, and I am pleased that the Home Office has been able to facilitate discussions between yourself and the police, CPS and MI5 to explore this issue in detail, which I hope you have found helpful. This has also been considered by the Home Office, together with a wide range of operational and Government partners, in the course of the review of counter-terrorism laws and powers which was announced by the Prime Minister in June 2017.

On balance I have concluded that it would not be appropriate to repeal any terrorism offences at this stage.

In reaching this view I have found particularly compelling the strong views of operational partners that there is an ongoing need for the offences you highlight to be available to bring prosecutions where appropriate. Although they have been used less frequently than some other offences, there have nonetheless been a number of recent cases in which charges have been brought using them, including some currently before the courts. These include:

- Samata Ullah, charged under section 56 TACT 2000 (directing terrorist organisations) with directing others to hack military targets and Daesh opponents. Ullah denied this charge, but pleaded guilty to a number of others including two counts under section 57 TACT 2000 (possessing an article for terrorist purposes), and in May 2017 received an eight year custodial term and a five year extended licence period. In view of this, the section 56 charge was not proceeded with.
- Mohammed Abdallah, convicted under section 57 TACT 2000 of possessing an item for terrorist purposes (an AKM assault rifle he acquired after travelling

to Syria in 2014 to join Daesh). Abdullah was sentenced in December 2017 to eight years' imprisonment with an extended licence period of five years.

- The British teenager who was convicted under section 59 TACT 2000 (inciting terrorism overseas) for his role in planning and inciting the 'Anzac Day' plot to attack Australian police officers, and who was sentenced in October 2015 to life imprisonment with a minimum term of five years.
- Aidan James, the anti-Daesh fighter, charged with two counts under section 8 TACT 2006 of attending a place used for terrorist training, having allegedly received weapons training in Iraq and Syria before fighting against Daesh in Syria (James is also charged under section 5 of the 2006 Act in relation to this). The trial is expected to take place in December 2018.

It is important to ensure that the police and CPS have the flexibility to bring the most appropriate charges based on the circumstances of each case and the evidence available. While there may be a degree of overlap in some circumstances, I am not persuaded that the same range of terrorist activity would be fully covered by other offences if these were to be repealed, and this would therefore risk creating a gap in our ability to prosecute suspected terrorists.

I am also mindful that the terrorist threat has evolved rapidly in recent years, with the growth of Daesh and the shift from more complex attacks involving slower and more detailed planning, to more rapidly-planned and lower-sophistication attack plots involving lone or inspired actors who may have become radicalised very quickly. The threat picture is currently in flux as the situation in Syria and elsewhere in the world develops, and it is likely to continue to evolve in potentially unpredictable ways in the coming years. In this context it is important to preserve the ability of the police and CPS to respond flexibly to the threat we face both now and in the future, and I am concerned that it may be precipitate to repeal offences now on the basis that they have recently been used less frequently than others.

Finally, as your report notes, the UK's compliance with certain international agreements on tackling terrorism is in part dependent on these offences being in force. In particular, section 59 of the Terrorism Act 2000 reflects the requirements in the EU Directive on Combating Terrorism, and the Council of Europe Convention on the Prevention of Terrorism (and its Additional Protocol), to criminalise 'public provocation to commit a terrorist offence', and for participant states to take extra-territorial jurisdiction over their nationals who commit this offence outside of their territory. As the law currently stands, there is no other offence which would entirely fill the gap if section 59 were repealed. And section 6 of the Terrorism Act 2006 implements the requirements of the Directive and Convention to criminalise providing or receiving terrorist training; again, if this offence were repealed other offences would not entirely fill the gap.

I do, however, recognise that this is a uniquely sensitive area of legislation, and I support the principle of ensuring that our terrorism laws remain necessary. I will be happy to return to this matter in the future should there be an enduring change in the situation, such that we can be confident that these (or other) offences are no longer necessary and are unlikely to become necessary in the foreseeable future.

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

A handwritten signature in black ink, appearing to read 'S. Javid', with a small comma at the end.

**The Rt Hon Sajid Javid MP**

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