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The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2018 by the Independent Reviewer of Terrorism Legislation

October 2020

CP 310

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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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Mr Jonathan Hall QC
Independent Reviewer of Terrorism Legislation

22 October 2020

Dear Jonathan,

Review of the Operation of the Terrorism Acts in 2018

Thank you for your first report as the Independent Reviewer of Terrorism Legislation (IRTL). I am grateful for the work you have undertaken since becoming IRTL. Your independent oversight of our counter-terrorism legislative framework is helping to shape the debate on its operation.

The terrorist threat we face remains complex, diverse and rapidly changing. The recent horrific attacks at Fishmongers' Hall, Streatham and Forbury Gardens were a tragic reminder of this.

The attacks at Fishmongers' Hall and Streatham were committed by a known terrorist offender who had been automatically released from custody at the halfway point of their sentence. The Government acted swiftly to introduce the Terrorist Offenders (Restriction of Early Release) Act 2020, which ended the automatic early release of terrorist offenders in England, Wales and Scotland in order to protect the public. This meant that around 50 terrorist prisoners saw their automatic release halted.

The next stage of our legislative response, the Counter-Terrorism and Sentencing (CTS) Bill, strengthens every stage in the process of dealing with terrorist offenders across the UK, from sentencing and release through to monitoring in the community. It will ensure that serious and dangerous terrorist offenders spend longer in custody and will also improve our ability to monitor and manage the risk posed by terrorist offenders and individuals of terrorism concern upon release from custody. I welcome your ongoing scrutiny of its measures once the Bill has received Royal Assent. I am confident that you will continue to provide the necessary oversight to ensure our counter-terrorism legislation remains proportionate and effective in tackling terrorism.

As we respond to the evolving threat, your annual report provides a detailed commentary on the use of our counter-terrorism powers and will inform our thinking for future policy changes. Your report makes twenty-eight recommendations. We have considered all of these at length and discussed them with operational partners. We have accepted fifteen of those recommendations, rejected nine, are further considering three, and have partially accepted one. I have set out our response below.

Threat picture

Throughout 2018, the UK national threat level for international terrorism was set at SEVERE by the independent Joint Terrorism Analysis Centre, meaning that an attack was highly likely. The threat level set by MI5 for Northern Ireland Related Terrorism (NIRT) in Northern Ireland was also SEVERE. While the threat from NIRT in Great Britain was SUBSTANTIAL, meaning an attack was a strong possibility, until 1 March 2018, when it was reduced to MODERATE, meaning an attack was possible but not likely.

The threat from Islamist terrorism remains most significant. Most Islamist terrorism in the UK is connected with Daesh, its narrative having emerged as the main extremist ideology behind radicalisation in the UK. Al Qa'ida continues to attempt to attract and inspire UK nationals to act in support of their global agenda. As your report highlights, the threat from right-wing terrorism has evolved in recent years and is growing. As of 30 June 2020, 19% of terrorist prisoners were categorised as holding right-wing extremist ideologies. NIRT also remains a serious threat. Despite the significant political progress in Northern Ireland in the last twenty years, some dissident republican terrorist groups continue to carry out terrorist attacks.

2018 was also a reminder that the UK remains a target of hostile state actors. Following the Novichok poisoning in Salisbury, new powers were introduced by the Counter-Terrorism and Border Security Act 2019 to allow specially trained police officers to stop, question, and when necessary detain and search individuals travelling through UK ports to determine whether they are involved in hostile state activity. The police will bring the powers into operation now that they have been successfully passed by Parliament and have come into effect. These new powers send a very clear message that this Government has zero tolerance for those acting against British interests. I am clear, however, that more must be done and we are developing new legislation to bring our laws up to date and create new ones to stay ahead of the threat from hostile state activity.

As you note, technology continues to pose particularly difficult problems. The CONTEST Strategy states that "evolving technology, including more widespread use of the internet and evermore internet-connected devices, stronger encryption and cryptocurrencies, will continue to create challenges in fighting terrorism. Data will be more dispersed, localised and anonymised, and increasingly accessible from anywhere globally." The Government has taken legislative action in recent years to help address these issues and will continue to do so to ensure that the police, intelligence agencies and courts have the powers they need to respond to this evolving aspect of the terrorist threat.

I appreciate your comment that "after 20 years of observing and arguing about official decisions, I can say that the decisions entrusted to counter-terrorism police and the Home Secretary (on the advice of officials) are among the most difficult". It is on these

decisions that the safety of the public rests. Police and intelligence services require a robust and up-to-date legislative framework which makes it vitally important that we have counter-terrorism legislation that is both proportionate and effective.

Terrorist Groups

I welcome your thorough analysis of proscription. As you say, it is a "powerful tool" and a "pre-emptive mechanism which addresses structures and capabilities rather than waiting for harms to be caused." It sends a strong message that terrorist organisations are not tolerated in the UK and deters them from operating here.

I note your concerns about the proscription regime. You suggest moving to a system where proscription orders would automatically lapse after a set period, unless renewed. One of your predecessors, Lord Anderson QC, made a similar recommendation when he was the IRTL, which the Government rejected. The Government's position on this issue remains unchanged. It is right that the Government takes a precautionary approach in relation to maintaining proscriptions and removing groups from the list of proscribed organisations. The current regime provides that any person affected by the proscription of an organisation can submit an application for me to consider whether that organisation should be deproscribed. I will also give serious consideration as to whether an organisation should be deproscribed if new information casts doubt on whether proscription remains appropriate, regardless of a whether a deproscription application has been submitted. I have not received any deproscription applications since becoming Home Secretary. I understand that five such applications have been received by my predecessors since 2015 and, as a result, three groups have been deproscribed.

I am grateful for your analysis on the operation of overseas aid agencies and acknowledge your comments on the challenges experienced by those delivering humanitarian aid in territories controlled by proscribed groups. As you have noted, the Government has published Q&A on this issue as part of its publicly available list of proscribed organisations, as well as an information note on 'Operating within Counter-Terrorism Legislation' which provides greater clarity to Non-Governmental Organisations. We routinely engage with charities and financial institutions through the Tri-sector Working Group and will continue to work collaboratively with stakeholders to ensure they understand their responsibilities under counter-terrorism legislation.

The Government is confident that existing counter-terrorism legislation does not prevent organisations, including aid agencies, operating in high risk jurisdictions overseas. Our counter-terrorism legislative framework is deliberately widely drawn to capture the ever-diversifying nature of the terrorist threat that we face. There are inherent risks for any organisation operating in high risk jurisdictions; the risk of prosecution for a terrorism offence as a result of involvement in legitimate humanitarian efforts is however low.

I have accepted your recommendation to invite the Attorney General to consider issuing prosecutorial guidance on overseas aid agencies and proscribed groups, and have written to her inviting her to discuss the issue with the Director of Public Prosecutions.

Terrorist Investigations

I appreciate the attention you have paid to terrorist investigations. I agree that the Government has at its disposal a "very wide umbrella for the exercise of…powers in the Terrorism Act 2000". There are currently record high numbers of ongoing Counter-Terrorism Policing investigations, which allow us to respond swiftly and decisively to terrorist incidents.

I agree that consideration should be given to providing guidance on the use of stop and search powers in exceptional circumstances, under section 47A of the Terrorism Act (TACT) 2000. The police will provide the relevant officers with additional training and work as necessary to develop a central narrative to ensure consistency, necessity, justification and proportionality are addressed.

I accept your recommendation that paragraph 3 of Schedule 5 to TACT 2000 should be amended so that the power to authorise searches of premises within cordons should only be exercised in urgent cases. There is no strong operational need for a power of search where an urgency condition is not met. The legislation will be amended at the next available opportunity.

Arrest and Detention

Thank you for your work on this area, both concerning the details of the relevant legislation and its operation in practice. I welcome your conclusion that "it is clear…from my own experiences that considerable pride is taken in the operation of [terrorism] suites".

You will be aware of the changes made to the form in Appendix 2 of the Independent Custody Visitors Association (ICVA) training manual subsequent to your recommendation on this issue. This contains additional information to be recorded at your request and is now being used by almost all independent custody visitors.

The Northern Ireland Policing Board is currently undertaking a detailed review of the capture and reporting of custody visiting statistics. This review will consider the feasibility of independent custody visitors using the ICVA recommended form during visits of those detained under the TACT 2000.

The police will reassess College of Policing guidance with respect to your question of whether the practice of remote night-time monitoring is unsafe. Monitors worn on the wrist which measure breathing and pulse are available and could be beneficial to detainees.

I understand the reasoning for your recommendation that section 41 of TACT 2000 should be amended so that the effect of prior arrest under the Police and Criminal Evidence Act 1984 (PACE) for any specified terrorism offence is to include the initial period of detention authorised under Part 4 of PACE within the maximum detention period permitted under Schedule 8 to TACT 2000. As you say, this is already good practice in some areas. However, the flexibility to see out the entire 14 days of detention under TACT may be proportionate and necessary in some circumstances, particularly if the investigative work under the PACE arrest was not directly relevant to that under the TACT arrest. We will undertake further work with the police to fully understand the legal and operational complexities of making this change.

Ports and Borders

I am grateful for the extensive review you have undertaken as part of your report into the operation of Schedule 7 powers. I am convinced of the continuing value of these important powers. As you note in your report, their utility goes far beyond what can be measured in terms of arrests, seizures and gathering admissible evidence. These powers are vital in our efforts to detect, investigate and disrupt terrorist activity, to keep our citizens, residents and country safe from those who would do us harm.

Fundamental to the Schedule 7 powers are the frontline officers who exercise them. I agree that frontline officers must be empowered and supported in their use of the powers by effective and efficient operational processes. This includes the provision of access to information and intelligence.

The guidance provided to examining officers on biometric capture has been reviewed and amended to provide frontline officers clearer individual responsibility in deciding whether to take a detainee's biometrics. Guidance is provided to officers on several potential areas for questioning, including about private religious observance, but examining officers are always afforded the discretion to decide which lines of questioning they pursue.

I agree that, where appropriate, data recorded and managed by individual police forces should be available to frontline counter-terrorism border officers. Counter-Terrorism Border Policing has commenced engagement to ensure that access to relevant systems and the future reporting of data is available nationally. Linked to this, you recommend that the previous number of stops is considered before deciding whether to exercise Schedule 7 powers. I agree that this information would in many cases be relevant to an officer's decision, and the Home Office and police have considered the issue. We are content that officers are already able to obtain this information and incorporate it into their operational decision-making process, where it is relevant.

As you note, paragraph 17 of Schedule 7 could be used to require advance passenger data from carriers who do not routinely process it, because they operate domestically or within the Common Travel Area (CTA). Frontline officers should have access to

relevant information when exercising the powers, including advance passenger data. The Home Office, together with operational partners, is continuing to work with aviation and maritime operators to improve data collection on international routes, including within the CTA, and as the EU exit transition period ends we will consider the potential benefits and implications of acquiring data on domestic routes.

The Home Office will, in partnership with the police, review the detention process under Schedules 7 and 8. In addition, the latest version of the Code of Practice, which came into force on 13 August, addresses our shared concern around the need for clarity regarding lawful access to confidential material in the possession of persons examined under Schedule 7. I am grateful for your engagement and scrutiny as this version of the Code was developed.

I have considered your recommendation to remove the power to designate customs and immigration officers as examining officers. The Government does not feel it is appropriate to take such action before we have taken the opportunity to learn from operational issues that have arisen during the Covid-19 pandemic.

Civil Powers

You have comprehensively considered other counter-terrorism civil powers. I appreciate your emphasis that the "'disruptive' response to an individual assessed to be a threat is selected from what officials like to refer to as the 'toolkit'". It is vital that we have a range of tools at our disposal to disrupt and manage the risk posed by those who wish to engage in terrorism-related activity and to counter the threat faced from people travelling for terrorism-related purposes.

As when the issue was raised by your predecessors, having carefully considered the matter, I have concluded that it remains the position that it would not be appropriate to expand the remit of the IRTL to include any immigration power 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 IRTL, would introduce uncertainty as to its boundaries, and would risk including matters that properly fall within the remit of other independent oversight bodies. In addition, I would like to emphasise that immigration powers are threat agnostic, meaning it would be inappropriate to review them from only a counter-terrorism perspective. Of course, it remains the case that the Government can invite you, as the IRTL, to undertake ad hoc reviews on areas falling outside of the statutory remit.

I accept your recommendation that the Counter-Terrorism and Security Act 2015 should be amended so that a Temporary Exclusion Order (TEO) expires two years after the individual's return to the UK. This will address the shortcomings of the current provisions and ensure every individual can be subjected to in-country obligations for the full two-year validity of the Order. It will be included in legislative changes when the next suitable opportunity arises.

I am continuing to consider your suggestion that the TEO power should be extended to individuals who are not British citizens. Exclusion and deportation are considered more effective approaches for non-British citizens. However, your suggestion may be helpful for those non-British citizens with leave to remain in the UK who manage to return to the UK after engaging in terrorism-related activity abroad and who cannot be deported. Other tools are already available, including TPIMs which will be considered in relation to the highest risk individuals.

I note your recommendation that consideration should be given to establishing a means to review registered terrorist offender notification requirements. Having consulted with Counter-Terrorism Policing, I do not agree that such a review mechanism is necessary. The notification requirements apply only to those convicted of sufficiently serious terrorism-related offences and sentenced to terms of imprisonment of 12 months or more. The requirements do not last indefinitely and the period for which they apply is proportionate to the length of the sentence the terrorist offender received: the maximum duration of 30 years only applies for the most serious offences resulting in sentences of 10 years or more, such as preparation of a terrorist act.

The notification requirements regime does not place unduly onerous obligations on offenders and does not restrict their activities. The regime provides a real benefit to the police as a relatively light-touch but effective means of managing the ongoing risk posed by a registered terrorist offender over an extended period of time. The Government believes that the current regime strikes the right balance. The limited imposition resulting from the notification requirements is considered proportionate to the benefits they provide in managing risk, given the likelihood of serious harm should the individual re-engage in terrorism-related activity.

You recommended that I and Counter-Terrorism Policing should consider whether it would be practicable to apply for Serious Crime Prevention Orders (SCPOs) to be imposed on returning Foreign Terrorist Fighters.

Prosecution is always the Government's preferred method of disrupting those involved in terrorism-related activity. Those who have fought for or supported terrorist organisations overseas should wherever possible face justice for their crimes in the most appropriate jurisdiction, which will often be in the region where their offences have been committed. Where prosecution is not possible, we are committed to ensuring that Counter-Terrorism Policing and MI5 have effective tools at their disposal to support their vital work of keeping us all safe. That is why we are making changes through the CTS Bill to improve the disruption and risk management toolkit, and to support operational partners in the use of these vital powers in a broader range of circumstances.

I agree that SCPOs have the potential to be a valuable risk management tool in the context of terrorism cases. The CTS Bill looks to support their use by enabling

Counter-Terrorism Policing to apply directly to the High Court for an SCPO, which will streamline the application process. Through the Bill we are also making changes to TPIMs to enhance the value of the tool for public protection and support its use in a wider variety of circumstances, which could include returning Foreign Terrorist Fighters where appropriate. It will remain primarily a matter for operational partners to decide which tools should be applied depending on the specific circumstances in question.

Statistics

I value the particular importance you place on statistics. You are right that "more data, more statistics, more analysis can only be beneficial in ensuring that terrorism laws are up to scratch". Equally, these statistics are crucial in enabling us to be successful in countering terrorist activity on a day-to-day basis.

You have mentioned in your report a number of possible factors for the statistical decline in Schedule 7 examinations. Whilst I am clear that Schedule 7 remains an important and valuable tool, it is clearly important to understand the factors influencing the use of examinations. The Home Office has commenced research in this area which should begin to provide analysis during 2021.

We will also look to include the number of biometric samples taken in the quarterly Home Office statistics beginning in April 2021. However, with regards to statistics on 'carding', this information is not routinely recorded by frontline officers in the same way. Having considered this request, I am unconvinced that the resource required to collect and publish this data would be justified by the resulting benefit.

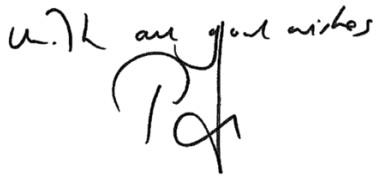
As you suggest, going forward publication will be made of: i) the number of successful applications for warrants of further detention, all of which are made under Schedule 8 to TACT 2000; ii) additional ethnicities of those subjected to powers under the Terrorism Acts, eighteen for Great Britain rather than the current five and pending practicalities concerning police databases; and iii) the use of cordons on a calendar year basis.

I am continuing to consider whether it is feasible to publish data on the number of refusals of access to solicitors and the length of any delays under section 41 of TACT 2000 and statistics on a calendar year basis for Northern Ireland. Further work will be done with the police and prosecution agencies to determine the practicalities of gathering this data.

I have decided against publishing additional data on offences in multi-conviction cases aside from the principal one. The existing practice is consistent with that across most police statistics and making changes would be disproportionately expensive at this time.

I would like to reiterate my thanks for your report and thorough analysis it contains.

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



Rt. Hon. Priti Patel MP

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