HM Government

The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2019 by the Independent Reviewer of Terrorism Legislation

February 2022

CP 623

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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

24 February 2022

Dear Mr Hall QC,

Review of the Operation of the Terrorism Acts in 2019

Thank you for your second report as the Independent Reviewer of Terrorism Legislation (IRTL). You continue to bring an enormous amount of expertise and dedication to this vital role, and have informed and shaped public debate on the most pressing issues in the field.

The last year has sadly provided painful reminders of the continued threat that we face from terrorism. The horrific murder of my colleague and friend Sir David Amess MP and the shocking attack in Liverpool demonstrate the importance of keeping under continual review our response to terrorism. The attacks at Fishmongers' Hall, Streatham and Forbury Gardens also continue to weigh heavily on our minds, while following the evacuation from Afghanistan we must continue to remain vigilant and will need to work hard to mitigate new or emerging threats.

The attacks we suffered in 2019 and 2020 highlighted the work that remained to be done in handling known terrorist and terrorist risk offenders. In response, the Government secured Royal Assent of the Counter-Terrorism and Sentencing Act in April last year, implementing the largest overhaul of terrorist sentencing and monitoring in decades. The Act gives the courts, probation service, Counter-Terrorism Policing and the Security Service greater powers to protect the public and keep our streets safe. As well as ensuring terrorist offenders spend longer in prison and on licence, it strengthens the tools to manage the risk posed by terrorist offenders and individuals of terrorism concern in the community. Your views on this legislation were often the first port of call for Members involved in the parliamentary process, and I welcome your ongoing scrutiny of the measures as operational partners put them into practice.

In March last year, we introduced the Police, Crime, Sentencing, and Courts Bill, which contains provisions to strengthen the management of terrorist and terrorist risk offenders, following your review of Multi-Agency Public Protection Arrangements (MAPPA). These will improve the ability of operational partners to manage the risk posed by offenders of terrorism concern and safeguard themselves and the public

from terrorism-related activity. This is just one example of the invaluable contribution you have made through bespoke work beyond your annual report on the Terrorism Acts. On which note, I am grateful for the work you have undertaken to review terrorism in the prison estate in England and Wales, the report for which will be published in due course alongside your next annual report.

The Government has provided a response to the matters of concern raised by the Coroner in his prevention of future deaths report arising from the Fishmongers' Hall inquest. We provided a progress report to the Manchester Arena Inquiry against the monitored recommendations made by Sir John Saunders in his Volume 1 report. We continue to make progress against the recommendations and will also consider further recommendations in the forthcoming two volumes of his reports.

Your report on the operation of the Terrorism Acts in 2019 makes thirteen recommendations. We have considered all of these at length and discussed them with operational partners and other Government departments where appropriate. Eleven of those recommendations have been accepted, one is being further considered, and one has been rejected. Furthermore, of three recommendations you helpfully made in your 2018 report which I said we needed further time to consider, two have been accepted and one rejected.

Threat picture

In 2019, the UK national threat level for international terrorism was set at SEVERE by the independent Joint Terrorism Analysis Centre (JTAC), meaning an attack was highly likely. The threat level to Northern Ireland from Northern Ireland-related terrorism (NIRT) was also SEVERE, meaning an attack was highly likely. Threat levels are kept under constant review and are based on the latest intelligence, considering factors such as capability, intent and timescale.

As you note, in 2019 Islamist terrorism continued to be the most prominent threat in the UK. There was an ongoing threat from extreme right-wing terrorism and to a lesser extent from left-wing, anarchist and single-issue terrorism. The most likely perpetrators of a UK based terrorist attack were self-initiated terrorists and the most likely methodologies to be used were low-sophistication, such as bladed and blunt force weapons and vehicles. The threat to the UK was driven by a number of factors which affect terrorist intent and capability, with a number of suppressive factors affecting the threat at the time. In 2019, these included domestic and international counter-terrorism efforts such as the coalition response to Daesh, which significantly degraded its capability and reduced the territory under its control. Additionally, there was a reduction in external operations directed against the UK by Daesh and other terrorist groups; a loss in momentum of attacks since 2017 and a lack of events that might galvanise self-initiated terrorists into action in the UK. On 4 November 2019, the national threat level was reduced from SEVERE to SUBSTANTIAL, meaning an attack was likely. SUBSTANTIAL continued to indicate a high level of threat as terrorism remains one of the most direct and immediate risks to our national security.

An extensive Operational Improvement Review of the country's approach to counter-terrorism following the attacks in 2017 resulted in changes to the threat level system that were implemented in July 2019, including the introduction of a single national threat level describing the threat to the UK. The threat from NIRT in Northern Ireland remained separate. JTAC also implemented the recommendation to take an increased role in assessing all forms of terrorism, irrespective of the ideology that inspires them. This decision was taken as the old system, which assessed the 'Threat from International Terrorism', was regarded as outdated because it narrowly focused on Islamist ideology. This ideology has both an international and domestic dimension, and extreme-right wing terrorism also exists in the international domain and can be home-grown. The new system considers all forms of terrorism, irrespective of ideology and origin overseas or in the United Kingdom. In addition, to ensure clarity and consistency in the threat level system the definitions of the LOW, SUBSTANTIAL and CRITICAL threat levels were changed. Further details of the new definitions can be found on www.mi5.gov.uk/threat-levels.

I am interested in your comments on the increasing threat coming from mixed, unstable or unclear ideologies, including lone actors and incels. I am clear that CONTEST is a strategy for countering all forms of terrorism, irrespective of the ideology that inspires them, and I am pleased we agree that the Terrorism Act (TACT) 2000 definition of terrorism remains "practical and effective". This is important given the changing nature of the threat and the variety of forms terrorism can take. As you note, the application of the definition is also crucial, including as part of investigatory work and particularly during the course of prosecution, and I am glad that you detect a sense of balance in the application of the definition by operational partners and prosecuting bodies when you say that you "detect no rush to overclassify behaviour as terrorism".

Terrorist Groups

I welcome your continued analysis on the risks and burdens faced by overseas aid agencies operating in high risk jurisdictions. The Government remains committed to ensuring that counter-terrorism legislation and regulations are applied in a clear, effective and proportionate manner and in such a way that does not compromise other Government priorities or unnecessarily impede legitimate, often life-saving, activities overseas. I also note your acknowledgement of recent progress in the Tri Sector Working Group (TSWG) following a restructure of its governance in 2020. The TSWG is in the process of implementing the second phase of its restructure which will continue to focus on the production of valuable tangible outputs.

The application of section 21ZA of TACT 2000 has been a matter of active consideration for the TSWG and has now been established as a formal workstream. I am pleased to report that, as per your recommendation, my officials hosted a workshop in April 2021 which was attended by TSWG members, Government departments and operational partners, including the National Crime Agency (NCA).

Further work is being undertaken to explore how 21ZA can best be used in practice to support the delivery of humanitarian aid. Although applications will always be treated on a case by case basis, the workstream aims to provide non-governmental organisations (NGOs) with a degree of clarity regarding the application of section 21ZA in practice, the decision-making process that the NCA undertakes in response to applications submitted, and best practice advice for NGOs when submitting applications.

Terrorist Investigations

I am grateful for this section of your report, which helpfully builds on themes from last year and also highlights important additional issues including technology, journalistic material, and post-charge questioning. I agree that "the government's counter-terrorism strategy CONTEST 3.0 correctly identifies that…technology creates both dangers and opportunities." We will continually assess the effectiveness of our actions, and we will be flexible in adapting our approach as the counter-terrorism landscape changes.

The Ministry of Justice (MoJ) has considered your recommendation that the Government should make arrangements, in consultation with the judiciary, to publish all first instance judgments on applications for journalistic material under Schedule 5 to TACT 2000; and, where publication has to be delayed on the grounds of prejudicing a forthcoming trial, to ensure that judgments are available for use in other cases. The MoJ is currently in the process of implementing long-term changes to the publication and storage of judgments more widely, with responsibility being transferred to The National Archives. From April, legally significant court judgments for England and Wales and UK tribunal decisions will be published on The National Archive's website, and the transition provides the necessary infrastructure to expand publication and coverage beyond that of legally significant judgments in the future.

As part of the transition, the MoJ will be implementing streamlined and improved processes for transferring decisions from the courts and publishing them, which may positively impact on the ability to accept your recommendation. For example, existing HM Courts & Tribunal Services case management systems do not automatically identify the specific cases in scope of your recommendation, meaning these would need to be manually identified by staff, increasing the administrative burden and cost. Taking these factors into account, the MoJ will give further consideration to your recommendation once this wider transition process is complete.

I am grateful for your analysis on the operation of section 49 of the Regulation of Investigatory Powers Act 2000 and I note your concerns in relation to the infrequent use of the power for counter-terrorism investigations. I agree that encryption is a constant challenge for our law enforcement agencies and I accept your recommendation to give consideration to whether new or amended powers are needed for CT Policing to compel disclosure of encryption keys in counter-terrorism investigations. The Home Office is currently discussing these issues with law enforcement partners to assess where improvements can be made to the current

process, such as through increased training and updated guidance, or whether more extensive changes are required. We expect this work to conclude shortly.

Arrest and Detention

Thank you for your work on this area, which pays considerable attention to both legislative and operational detail. I welcome your comment that “it is clear… that the standard of preparation and presentation of applications for warrants of further detention is high”.

You have made recommendations in each of your annual reports relating to the detention clock for arrests under section 41 of TACT 2000. Following further consultation with CT Policing and the Crown Prosecution Service (CPS), I have accepted your recommendation that section 41 TACT 2000 should be amended so that the "relevant" time includes the time of arrest under the Police and Criminal Evidence Act 1984 (PACE) for specified terrorist offences. As you note, it is already standard practice within CT Policing operations that any initial period of detention under PACE for a terrorism offence is incorporated into the TACT detention clock calculation if a suspect is subsequently re-arrested under TACT. Your recommendation would formalise this approach in legislation. My officials will work through the detail of this change, taking account of the need for CT Policing to make in-time applications to the Court for warrants of further detention, which are required to detain individuals beyond 48 hours under TACT 2000.

I also accept your recommendation to amend section 41 TACT 2000 so that the detention clock does not start to run when an individual is arrested in hospital. As you highlight, “a situation might arise in which, following an explosion in which numerous persons were injured and taken to hospital, the suspected bomber is not identified until after they have already started receiving treatment”. This change will provide CT Policing with the option to use a TACT arrest if deemed the most appropriate power, instead of having to rely on their arrest powers under PACE, and will ensure greater consistency with how the PACE detention clock operates in such circumstances. The legislation will be amended to make both of these changes at the next available opportunity. I am grateful for your detailed review of these issues, which provides another example of the valuable contribution you have made to ensuring our legislative framework remains fit for purpose.

I can confirm that CT Policing has accepted your recommendation to modify the forms completed by arresting officers so that any use of the power under paragraphs 8 and 9 of Schedule 8 to TACT 2000 is clearly recorded, and the data gathered. The paragraph 8 power enables a police superintendent in certain limited circumstances to delay the exercise by the detained person of the right to have someone notified and to consult a solicitor, or to require the detained person to consult a different solicitor of their choosing. The paragraph 9 power enables a commander or assistant chief constable to require consultation with a solicitor within sight and hearing of

another officer. I agree that these are strong powers, necessarily so in the fight against terrorism, and that it should be possible to measure how they are used in practice. CT Policing has instigated a full review of the forms via its TACT Custody Board and Working Group.

Ports and Borders

I welcome the detailed oversight you continue to provide in relation to Schedule 7 powers. You made numerous helpful recommendations in this area in your previous report, and I am pleased to see that you have noted the substantial impact many of these are already having. You rightly comment on “the recent and welcome creation of a joint team of CT Borders Policing and MI5” and “CT Borders Policing's policy on Biometric Capture at Borders [which] puts fuller emphasis on the need for proportionate and necessary decision-making”.

I accept your recommendation that CT Borders Policing should draw up a policy in which the distinction between “screening”, using the power to enter under paragraph 9(4) of Schedule 7, and formal examination of goods is clearly delineated. I am pleased to report that in August 2021 CT Borders Policing published Freight Recording Guidance addressing this issue.

I also accept your recommendation that CT Policing training materials on the revised Schedule 7 Code should make it clear that Schedule 7 does not authorise the use of journalistic or legally privileged material. This is addressed in the Schedule 7 accreditation course and was fully briefed out to border officers at the time of the Schedule 7 Code of Practice uplift in 2020.

Terrorism Trials and Sentencing

This section demonstrates the detailed consideration and discussion you devote to complex emerging issues in the field, and is an area I will keep under close review even when there are no immediate recommendations arising. I especially appreciated your thoughts on the definitional questions suggested by the YPG cases and the importance of prosecutorial discretion in terrorism cases.

I agree that it is vitally important that we are able to assess the impact of changes to counter-terrorism legislation, and I am pleased to report that the prosecution services across the UK have accepted your recommendation to make a record of whether amended or new offences are charged for a period of five years from the relevant amending or creating legislation. My officials have engaged the CPS which has confirmed that the information is available within its existing data recording arrangements. As you will appreciate, in Scotland the Lord Advocate is the Ministerial head of the system of prosecution, a function which he or she exercise independently of any other person. The previous Lord Advocate wrote to you separately in April 2021 to confirm that he had instructed the Crown Office and

Procurator Fiscal Service to make a record of the prosecutions that are brought in Scotland in respect of such offences. The Director of Public Prosecutions in Northern Ireland also wrote to you separately in June 2021 to confirm his acceptance of this recommendation.

I appreciate your detailed analysis of one of the recommendations made by Judge Lucraft QC, the Chief Coroner of the inquest into the London Bridge and Borough Market attack in 2017. Judge Lucraft QC recommended that "consideration should be given to legislating for further offences of possessing the most serious material which glorifies or encourages terrorism". In your analysis you note that there are already a number of existing circumstances in which possession or distribution of extreme material constitutes an offence under section 57 or 58 TACT 2000 or section 2 TACT 2006, depending on the precise nature of the material and what can be proved about the intention of the beholder. You conclude that an offence for mere possession of terrorist propaganda is "superficially attractive" but "difficult to formulate without being unworkable in practice". You also state that there are "further practical considerations to criminalising mere possession of terrorist propaganda" that are in your view "ultimately fatal" to creating such a new offence. Specifically, that it would criminalise a large number of people who have a morbid fascination with accessing such material absent any terrorist intent and that given this the extent to which possession was punished would depend on executive discretion that would be too wide.

I have taken advice from my officials who have considered your analysis and Judge Lucraft QC's recommendation in detail, and have consulted the CPS, CT Policing and the Security Service. No compelling operational case for the creation of such an offence has been identified at this time, and all partners remain confident that the existing possession and distribution offences under TACT provide a strong set of tools to counter the terrorist threat. My officials and our partners have also recognised similar concerns about the practicalities of legislating satisfactorily in this space; that is, crafting an offence that is not too narrow to be useful operationally or too wide to be enforceable. There is concern that such an offence may also have limited to no impact in terms of reducing the threat from terrorism. Taking these factors into account, I agree with your assessment and the Government will not pursue the creation of such an offence at this time. We have, however, seen the challenge that the online space poses as a vector of extremism and therefore I have asked my officials to keep the case for such an offence under review. In addition, the Government will continue to take action against terrorism content online through our draft Online Safety Bill, which will be introduced to Parliament as soon as possible.

Civil Powers

As last year, you have considered a wide range of civil powers and highlighted numerous new issues associated with them. I welcome your comment that you "can report that granular attention is given to the necessity and proportionality of TPIM

measures with good focus on the legal criteria, and a healthy degree of internal challenge". The work carried out by my officials, the police, and the Security Service is instrumental in keeping the public safe from terrorism.

I accept your recommendation that I should keep under review the question of whether there exists evidence, or whether evidence might reasonably be obtained, that gives rise to a realistic prospect of conviction of the TPIM subject. Prosecution is the Government's preferred option in terms of managing risk. TPIMs can be resource intensive tools and should be an option of last resort. Operational partners hold regular meetings to discuss all live TPIM cases and the feasibility of prosecution is discussed. Prosecution is also routinely considered on a formal basis at quarterly TPIM Review Group (TRG) meetings chaired by the Home Office. The question of whether or not there exists sufficient evidence and whether evidence might reasonably be obtained to support a prosecution for terrorism-related activity or a breach of a TPIM measure has been formally incorporated into the template for the TRG meetings since June 2021.

I accept your recommendation that in considering the proportionality of a TPIM and its measures, the TRG should expressly identify the passage of time since the previous TRG meeting as a factor weighing against continuation. I am confident that the TRG routinely considers this matter and it has also been formally incorporated into the template for the meetings since June 2021.

I note the concerns you have raised about there being instances in which TPIM subjects have failed to secure legal aid funding to support them to participate in section 9 review hearings, whereby the High Court reviews the imposition of the TPIM notice. I agree with you that independent oversight by the Court is an important aspect of the TPIM regime. The MoJ has considered your recommendation to ensure that, subject only to means, legal funding is swiftly made available to TPIM subjects for the purpose of participating in such hearings. It is longstanding Government policy that the provision of legal aid should be targeted at those who need it most and that the legal aid scheme should provide good value for money for the taxpayer. The merits test is key in ensuring legal aid is targeted sensibly and the MoJ's view is that it continues to be proportionate for TPIM subjects to need to satisfy this criterion in order to access legal aid funding. The Lord Chancellor has therefore decided to reject the recommendation.

Scotland and Northern Ireland

I appreciate the increased attention you have paid this year to Scotland and Northern Ireland, both by devoting a new section to the former and considering legislative issues in the latter. The Government's first priority is to keep people safe and secure right across the United Kingdom and we work together closely to achieve this.

I have been informed that the Secretary of State for Northern Ireland accepts your recommendation that he should take steps to increase public understanding of the approach to countering NIRT in Northern Ireland. The public plays an important role in helping to reduce the threat posed by NIRT. The Northern Ireland Office will continue to work closely with all partners to communicate successful outcomes to the public, to build capability and to provide appropriate financial support to tackle the threat in Northern Ireland.

The previous Lord Advocate wrote to you in April last year to accept your recommendation that he issue a Code of Practice on the detention of individuals in Scotland under section 41 and Schedule 8 to TACT 2000. I understand that you have since been consulted on the terms of the draft document, which is to be issued as Lord Advocate's Guidelines.

Terrorism Acts in 2018 report

I would like to take this opportunity to update you on progress concerning recommendations you helpfully made in your previous annual report which I said I would further consider or action at a later point.

We have progressed several of the recommendations you made on statistics. For example, I can confirm that as of December 2020, data on the number of cordons set up by CT Policing under section 33 of TACT 2000, is being published on a calendar year basis. Since December 2021, we have also published statistics that show the number and success rate of applications for warrants of further detention under Schedule 8 to TACT 2000.

Following further consultation with CT Policing, I have accepted your recommendation to publish statistics on the number of refusals of access to solicitors and length of delays in Great Britain under Schedule 8 to TACT 2000. This will help improve transparency on the use of counter-terrorism powers and ensure greater consistency with published statistics for Northern Ireland. Since December 2021 we have published statistics on the number of requests for access to a solicitor, and the number of those allowed and delayed. Details on the length of any delays have not been routinely captured by frontline officers until recently and we will publish this data at a later stage following completion of the necessary implementation activity.

There were also outstanding issues concerning recommendations on arrest and detention.

Further to my previous response on the use of stop and search powers in exceptional circumstances under section 47A of TACT 2000, CT Policing has delivered significant improvements to the guidance and advice provided to forces in response to an act of terrorism. This includes having increased national oversight of authorisations made under section 47A, which are overseen by the cadre of

Strategic Security Coordinators maintained by the Senior National Coordinator for Protect and Prepare. CT Policing has also enhanced the training provided to relevant officers on the requirements of the legislation and Code of Practice on section 47A. This will ensure that in future there is consistency in the application of section 47A based on its necessity and proportionality as a tactic and that authorisations, in line with the Code of Practice, are based on particular intelligence about threats against particular targets, rather than an increase in the UK threat level. The Home Office and CT Policing will also conduct a review of the relevant Code of Practice, which as you point out was issued in 2012, in light of the current operating context and recent changes in guidance and legislation.

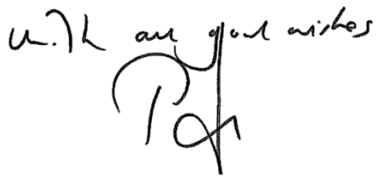
I stated in my previous response that the police would reassess College of Policing guidance with respect to your question of whether the practice of remote night-time monitoring of detainees via CCTV is unsafe. Updated Custody Authorised Professional Practice (APP) guidance that has recently been published sets out that remote monitoring via CCTV alone is not considered an appropriate method of conducting checks as it can provide false assurance as to a detainee's condition. Guidance is explicit that detainees should be physically visited every 30 minutes and that checks must be carried out sensitively in order to minimise any level of intrusion. There are four different levels of observation under the custody APP; remote monitoring via CCTV should only be used for the most at risk detainees in addition to the agreed cycle of physical checks. Furthermore, TACT custody training reflects that custody staff are only required to wake detainees when changes in their condition are seen, to allow for an adequate welfare check to be undertaken.

I have considered your recommendation to extend the Temporary Exclusion Order power to non-UK citizens. As I indicated in my initial response, for this cohort exclusion and deportation are far more suitable disruptive tools. Whilst such a proposed extension could in theory be useful for managing the risks posed by non-UK citizens with leave to remain in the UK who have travelled to engage in terrorism-related activity abroad, and who have managed to return to the UK, following consultation with operational partners we assess there would not be a net operational benefit to making such a change. I have therefore decided against implementing the recommendation. However, my officials continue to keep under careful review the viability of other changes to improve the management of any risks posed by individuals from that cohort who have returned to the UK.

I would like to reiterate my thanks for your report. I particularly appreciate your comment that "terrorism powers are complex and challenging, but my overall assessment is that the legislation is well understood, and conscientiously deployed. This impression is fortified by the cooperation I received from CT Police and officials in preparing this report, and their openness to challenge". I agree on both counts. Our counter-terrorism legislative framework is robust and kept up-to-date, and we continue to take every opportunity to scrutinise it to ensure it remains capable of

meeting an ever-changing terrorist threat. Your thorough analysis and recommendations continue to be valuable to our efforts in this space.

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

Home Secretary

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