



HM Government

The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2020 by the Independent Reviewer of Terrorism Legislation

January 2023



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

January 2023



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31 January 2023

Dear Mr Hall KC

Review of the Operation of the Terrorism Acts in 2020

Thank you for your third annual report as the Independent Reviewer of Terrorism Legislation (IRTL). As in previous years, your review of our counter-terrorism legislative framework has been conducted in considerable depth and detail. I am delighted that last year you were re-appointed for a further three year term as the IRTL, and grateful for the high-quality analysis that you continue to bring to this important role.

In April last year, the Police, Crime, Sentencing, and Courts Act 2022 received Royal Assent. The Act contains provisions to strengthen the management of terrorist and terrorist risk offenders on licence, based on recommendations you made following your independent review of Multi-Agency Public Protection Arrangements (MAPPA). These provisions, which came into force in June last year and create new powers of stop and search, premises search, and urgent arrest, improve the ability of Counter Terrorism (CT) Policing to protect the public from the risk posed by offenders of terrorism concern in the community. This is illustrative of the invaluable contribution you are making to ensure the UK's counter-terrorism legislative framework remains up-to-date.

I am also grateful for your *Terrorism in Prisons* report, which was published in April last year along with the Government response. As the Lord Chancellor said at the time of your report's publication, your findings present an invaluable opportunity for the Government to assess progress and further strengthen our approach to combatting the risk from terrorist and terrorist risk prisoners. This is why the Government accepted twelve of your recommendations, partially accepted another, and in some areas proposes going beyond them. With regard to the recommendation within your report to consider amending two specific terrorism offences so that they are capable of being committed in prisons, I can confirm that following careful consideration

of the issue the Government will amend legislation at the next available opportunity to ensure that conduct in prison falling within section 13(1) of the Terrorism Act (TACT) 2000 is capable of amounting to an offence. We continue to make progress in considering the case for amending the section 1 of TACT 2006 offence of encouragement of terrorism and my officials shall keep you updated on progress.

Your report on the operation of the Terrorism Acts in 2020 makes seventeen 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 has been partially accepted, one is being further considered, and four have been rejected.

Threat picture

In February 2020, the independent Joint Terrorism Analysis Centre (JTAC) lowered the UK National Threat Level to SUBSTANTIAL: an attack in the UK is likely. On 3 November 2020, following terrorist attacks in quick succession in Austria and France, the UK National Threat Level was raised to SEVERE: an attack in the UK is highly likely. Throughout 2020, the threat level to Northern Ireland from Northern Ireland-related terrorism held at SEVERE: an attack is highly likely.

The UK threat in 2020 was diverse and volatile and continued to be driven by a range of factors which can affect terrorist intent and capability. These include international terrorist attacks and terrorist group capability, geo-political events and developments, and terrorist media. Self-initiated terrorists remained the primary driver of the terrorist threat in the UK. Islamist terrorist groups overseas, such as ISIL and Al-Qa'ida, continued to play an important role in driving the terrorist threat in the UK; however, this role was primarily limited to attempts to inspire would-be attackers. Additionally, the onset of the COVID-19 pandemic and subsequent restrictions had a limited effect on the nature and scale of the terrorist threat in the UK.

As you note, Islamist terrorism continued to be the primary threat. Sadly, 2020 saw three terrorist attacks in the UK – the HMP Whitemoor attack in January, the Streatham High Road attack in February, and the Forbury Gardens attack in June. Each of these attacks were conducted by self-initiated terrorists using low-sophistication methodologies such as bladed and blunt force weapons. There was an ongoing threat from Extreme Right-Wing Terrorism and to a lesser extent from Left-Wing Anarchist and Single Issue Terrorism.

I appreciate your comment that “experience shows that CT Police and MI5 are ruthless in prioritising threat and it is far-fetched to believe that counter-terrorism investigative resources are deployed away from the most pressing threats to life”. Our operational partners work tirelessly to keep the public safe from terrorism, and it is essential that our counter-terrorism legislative framework that underpins their efforts is robust, effective, and up to date. In

this context, I am grateful for your next annual report, on the Terrorism Acts in 2021, given its dedicated focus to assessing the effectiveness of our legislative framework in the face of an increasingly online and ever shifting threat. This will be laid before Parliament and published as soon as practicable. I will carefully consider your report and the recommendations within and respond to you formally in due course.

Statistics

I welcome the detailed oversight you continue to provide to help ensure that my Department's published statistics on the use of terrorism powers remain fit for purpose, and the numerous helpful recommendations you have made in this regard in each of your annual reports. As you note, "the collection and analysis of data is important in helping to identify possibly hidden patterns of discrimination".

Following consultation with CT Policing, I accept the three recommendations you have made in relation to terrorism statistics, including that we should consider how to ensure that statistics on the use of terrorism powers can continue to capture useful information about ethnicity. I am pleased to report that considerable progress has already been made and since June last year we have published significantly enhanced data on the ethnicities of those stopped under section 43 of TACT 2000 stop and search (by the Metropolitan Police) and Schedule 7 ports and borders powers, with the number of ethnicity categories having increased from six to seventeen. The changes include a new "Irish" category and disaggregating the "Chinese and other" category, to ensure there are now separate categories for "Chinese" and "Arab", which will help address the specific concerns you have raised in relation to these categories.

In addition, following a recommendation in your 2018 annual report and the conclusion of the necessary implementation activity by CT Policing, similar changes to the published data on the 'ethnic appearance of persons arrested, charged and convicted after a charge for terrorism-related activity' have taken effect from September last year.

Following the recommendations in your report on the Terrorism Acts in 2020, my officials are working with relevant stakeholders, including CT Policing, to explore the viability and potential merits in terms of transparency of collecting and presenting ethnicity data for the use of section 43 stop and search and Schedule 7 examinations in a format that does not rely solely on the relevant individual self-defining their ethnicity.

Terrorist Groups

I appreciate your analysis of the proscription regime. As you say, it is a "strong executive measure with immediate practical consequences". It is one of the most powerful tools at my disposal and I will only exercise my power to proscribe an organisation having considered thoroughly a wide range of

intelligence and analysis provided by government departments and operational partners.

Having taken advice from my officials and the Proscription Review Group (PRG), I have decided against your recommendation that I should provide greater clarity over how the five public discretionary factors in favour of or against proscription operate against predominantly online groups.

As you are aware, when considering whether to proscribe an organisation, I follow a two-stage process. Firstly, in order to proscribe I must reasonably believe that the organisation is concerned in terrorism. If this threshold is met, I will then consider whether the discretionary factors weigh in favour of or against proscription. I consider it important that a distinction is drawn between these two stages. Whilst the discretionary factors are an important aspect of my consideration on whether to proscribe, the statutory test is the key legal threshold that must be met.

I also have concerns that publicly setting out the application of the discretionary factors could prove instructional to terrorist groups. We know that terrorist groups are wary of the proscription tool and actively seek to mask their activities online to evade executive action. We assess that proscribing groups operating largely or exclusively online sends a strong statement of intent that the UK is a hostile operating environment for these organisations. Publishing information on the elements that the Government looks for when considering whether to proscribe an organisation risks giving terrorist groups information that could help them evade the use of the tool.

Lastly, much of the strength of the proscription tool lies in its adaptability. I consider it important that the discretionary factors can be interpreted in a broad sense, which allows for flexibility in application on a case-by-case basis. This approach allows the PRG to utilise its significant expertise to apply the discretionary factors as flexibly to primarily online groups today as they were in 2000 when the regime was introduced and used against groups with a physical footprint. I am concerned that publicly setting out the application of the discretionary factors will detract from this approach and could artificially restrict how the PRG applies them in future.

I am continuing to consider your recommendation that legislation should be enacted to enable a court sentencing an individual for a terrorism or terrorism-connected offence to recommend that the power in section 3 of TACT 2006 be exercised by a constable in relation to specific material the court has determined to be 'unlawfully terrorism-related'. I am attracted in principle to the recommendation, which has the potential to support priority work being taken forward by the Government to limit the availability of unlawful online terrorism content, including through the Online Safety Bill. CT Policing assesses that your recommendation could strengthen its requests to Internet Service Providers to remove content, as a court directive of this nature would provide a legal standing and therefore add weight to any such requests. As

you note, however, section 3 has not been used to date, with CT Policing prioritising voluntary removal of material. I understand this position is unlikely to change in the foreseeable future. My officials are consulting CT Policing to establish a more holistic understanding of the issues associated with the use of the power, including any potential barriers to its use and whether legislative change may be required to improve its operational utility. Given the importance of ensuring a coherent approach when legislating, I am keen that this wider piece of work is concluded before any final decisions are made in respect of your recommendation. I will also carefully consider any related commentary in your report on the Terrorism Acts in 2021, given its focus on the online space, including whether your analysis of the section 3 power has evolved over time and whether you have further suggestions for change to ensure that accepting a recommendation such as this has maximum impact in practice.

I welcome your positive assessment of work by the Tri-Sector Group, which is jointly chaired by the Home Office and Foreign, Commonwealth and Development Office, particularly your comments on the publication in October 2021 of a revised information note on operating within counter-terrorism legislation, counter-terrorism sanctions and export control. As you note, the Tri-Sector Group “has now grown into a valuable presence, and one that has some impact internationally”.

Stopping the travelling public

I welcome your comment that you remain of the overall view “that the Schedule 7 (TACT 2000) power is exercised conscientiously and effectively”, and that you “have been particularly impressed at the self-critical approach of senior management within CT Borders Policing”.

I am pleased to inform you that CT Policing has accepted your recommendation that information on complaints about the exercise of Schedule 7 should be routinely captured from all police forces across the UK. Work with the National Police Chiefs’ Council to ensure all complaints arising from Schedule 7 and Schedule 3 examinations are drawn together nationally at Counter-Terrorism Policing HQ has been completed, with complaints being handled centrally as of August 2022.

CT Policing also accepts your recommendation to analyse ethnicity categories for those subject to tasked examinations compared to untasked examinations under Schedule 7. In order for the analysis to be meaningful, CT Policing has worked to improve the quality of data received on the ethnicity of those who are examined under Schedule 7. Those improvements were implemented for data collected during the second quarter of 2022 onwards, and analysis of the data is now being undertaken.

I accept your recommendation that Schedule 7 to TACT 2000 should be amended to enable the proportionate searching and copying of remotely held

data. Work is ongoing to consider the changes required to allow this to happen in a legally and operationally viable manner, both in primary and secondary legislation. I very much look forward to formally considering the analysis in your next annual report on police access to remotely stored electronic data, including following the use of search and seizure powers available in wider counter-terrorism legislation.

I agree that the effective management of data emanating from Schedule 7 examinations is important. As you note, this data is currently managed under the College of Policing's Management of Police Information guidance. CT Policing is working with the College of Policing to determine the possibility of updating this guidance so that it addresses the retention, review, and disposal timeframes for Schedule 7 data to ensure there is a resilient and accessible system in place that continues to adequately respond to national security matters. Work on this is ongoing and the Schedule 7 Code of Practice will be updated accordingly once a new regime is established.

Terrorism trials and sentencing

I appreciate your in-depth evaluation of the application by CT Policing and the Crown Prosecution Service (CPS) of the offence of collecting, possessing or viewing online a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism (section 58 of TACT 2000). I agree that "there remains a strong public interest in allowing the police to arrest and detain, and the CPS to prosecute, in circumstances where little or no evidence can be obtained of attack-planning". Given the significant threat to life posed by terrorist attacks, precursor offences such as section 58 play an important role in keeping the public safe. I welcome your conclusion that you are "not aware of any prosecutions brought where there was neither evidence of terrorist intent or terrorist sympathy...section 58 is responsibly used by prosecutors". I understand you have recently been paying specific attention to whether a new civil order might be needed, or whether existing tools might suffice, with respect to minors whose online activities give rise to potential terrorism concern but who likely lack any 'real-world' intent. I shall carefully consider any recommendations you make on this issue as part of your next annual report and respond to you formally in due course.

Special Civil Powers

I appreciate the insightful analysis that you continue to provide in relation to special civil powers, particularly Terrorism Prevention and Investigation Measures (TPIMs) which perform an essential role in our fight against terrorism.

I especially welcome your comment, in relation to our use of TPIMs against members of Al-Muhajiroun, that "few could conclude that this targeted response...was anything other than a reasonable and proportionate tactical response".

I partially accept your recommendation that the Home Office and the Security Service should work together to develop internal guidance on evaluating risk reduction for TPIM subjects. My officials and operational partners hold regular meetings to discuss all live TPIM cases and the development of appropriate “exit strategies”. Each measure is scrutinised carefully and robustly for necessity and proportionality. While the Home Office is not responsible for evaluating national security risk, following your recommendation my officials will support the Security Service to establish whether guiding principles can be developed for use in relation to TPIM cases to enhance the TPIM review process and provide additional assurance that as time passes each TPIM (and each of its measures) continues to be necessary and proportionate.

I accept your recommendation that the Home Office should consider, in cases where it is relevant, the attendance of a psychologist at TPIM Review Group meetings. This approach has already been considered for a previous TPIM case and will continue to be considered on a case-by-case basis. My officials are working together across the Home Office and with operational partners to identify appropriate support for neurologically atypical individuals and consider how that support can best be utilised within national security casework. I accept your recommendation that the Home Office should consider, in cases where it is relevant, the attendance of a psychologist at TPIM Review Group meetings. This approach has already been considered for a previous TPIM case and will continue to be considered on a case-by-case basis. My officials are working together across the Home Office and with operational partners to identify appropriate support for neurologically atypical individuals and consider how that support can best be utilised within national security casework. Ensuring our approach evolves and adapts to the challenges of the modern terrorist cohort is a priority. I note the court’s judgment following a recent section 9 appeal in relation an individual with complex needs, which found my Department’s response to the individual’s mental health was “impressively conscientious”.

I note that you have repeated your recommendation that, subject only to means, legal aid is swiftly made available to TPIM subjects for the purposes of participating in section 9 reviews, whereby the High Court reviews the imposition of the TPIM. Whilst I recognise your strength of feeling on this issue, the Government is confident in the lawfulness of the TPIM regime and the Deputy Prime Minister’s position on your recommendation has remained unchanged. 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. This includes ensuring that public money is spent on cases where there is genuine merit and therefore the merits test remains a key part of determining eligibility for legal aid. The Government’s position continues to be that it is justified and proportionate to expect TPIM subjects to satisfy the merits test, in the same way as the majority of other individuals applying for legal aid. Whilst the Ministry of Justice accepts that there have been instances in which TPIM subjects have failed to secure legal aid funding in section 9 review hearings, it

cannot be shown that the application of the merits test is the issue in these cases. As such, the Deputy Prime Minister sees no compelling reason to depart from the longstanding principle of the merits test in TPIM cases alone.

Northern Ireland

I appreciate your continued attention to detail on how our counter-terrorism legislative framework is operating in practice across the breadth of the UK. As in previous reports, you have identified several important issues relating to differences in approach, including in the reliance on certain available powers.

The Chief Constable of the Police Service of Northern Ireland (PSNI) acknowledges your recommendation that the PSNI's published statistics should include all arrests under section 41 of TACT 2000, not just those related to the 'security situation' in Northern Ireland, but has commented that the PSNI's statistics purposefully relate to this issue. While this recommendation has been rejected, it has been highlighted that the Northern Ireland Office publishes its 'Northern Ireland Terrorism Legislation: Annual Statistics' report, which includes data on all arrests in Northern Ireland under section 41.

The Chief Constable also acknowledges your recommendation that the PSNI should not take account of public perception when deciding on the appropriate arrest power, but does not consider that the PSNI is in a position to accept it. The PSNI is committed to using all the powers lawfully available to it to protect the people of Northern Ireland from terrorism, while ensuring that the rights of suspects are respected. Notwithstanding a difference in the relative reliance on the section 41 power compared to the use of the power in Great Britain, it is not PSNI policy to utilise the section 41 power of arrest based on public perception. The decision to arrest a suspect under section 41 of TACT 2000 or under Article 26 of the Police and Criminal Evidence (NI) Order 1989 is made after a determination in each case. The PSNI continues to examine strategic approaches to this issue, and looks forward to further engagement with you in this regard. Whilst the PSNI should not base the decision whether or not to arrest under TACT on public perception, the PSNI are however mandated to police in a manner that secures the support and confidence of the community.

The Director of Public Prosecutions for Northern Ireland acknowledges your recommendation that he should seek an authoritative ruling from the court, at the earliest opportunity, on whether the terrorist sentencing guidelines issued by the Sentencing Council in England and Wales or the Scottish Sentencing Council should be considered (not followed) for the purpose of sentencing terrorism cases in Northern Ireland. While the Director notes the need for the Public Prosecution Service to maintain its independence, he also recognises the benefits that clarity around the consideration of sentencing guidelines would bring. Since that acknowledgement, in a recent case before the Court of Appeal, it was held that sentencing judges in Northern Ireland are at liberty to consider Sentencing Council guidelines, with a view to determining whether these assist them in their task. It was concluded, however, that this was a

matter of choice and not obligation. Whilst the case in question related to sentencing for offences contrary to section 5(1) of TACT 2006, the principles outlined in the judgment were consistent with earlier authorities of the Northern Ireland Court of Appeal and will apply to sentencing for other terrorism offences. This recommendation has therefore been delivered in substance.

Scotland

I agree that paragraph 20 of Schedule 8 to TACT 2000 should be amended so that the power to take fingerprints with consent at a port applies in Scotland, as it does elsewhere in the UK. My officials are working to ensure that this change can be included alongside other recommendations requiring primary legislation.

I would like to reiterate my thanks for your report and the comprehensive analysis it contains. I look forward to working alongside you in your role as the Independent Reviewer of Terrorism Legislation. I will be publishing this response on the Government's website and copies will be available in the Vote Office.



Rt Hon Suella Braverman KC MP

Home Secretary

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