



House of Commons
House of Lords

Joint Committee on
Human Rights

Legislative Scrutiny: Counter-Terrorism and Border Security Bill

Ninth Report of Session 2017–19

*Report, together with formal minutes
relating to the report*

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Joint Committee on Human Rights

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Summary

On 4 June 2018, the Home Secretary re-launched the Government’s counter-terrorism strategy, CONTEST,¹ after a year-long Home Office review. Two days later, he introduced the Counter-Terrorism and Border Security Bill (‘the Bill’). The purpose of the Bill is to “make provision in relation to terrorism; to make provision enabling persons at ports and borders to be questioned for national security and other related purposes”.²

Our Committee recognises the need for the Government to have strong powers to defend our national security, prevent individuals from being drawn into terrorism and to punish those who prepare, commit or instigate acts of terrorism, or encourage or connive with others to do so. However, when these powers interfere with human rights, they must be clearly prescribed in law, necessary in the pursuit of a legitimate aim, and proportionate to that aim.

The Government has a vital role in protecting public safety and is required to take positive action to protect the right to life under Article 2 of the European Convention on Human Rights 1950 (ECHR), but there is always a difficult balance to be struck between security and liberty.

We welcome the fact that this Bill does not introduce a host of new offences in response to the successive terrorist attacks in 2017. We are also pleased that the Bill gives effect to the two recommendations made by the former Independent Reviewer of Terrorism Legislation, David Anderson QC. Firstly, there is a bar on the admissibility in court of answers to questions when an individual is stopped at a port or border under Schedule 7 of the Terrorism Act 2000. Secondly, there is a pause to the detention clock for those arrested under the powers in the Terrorism Act 2000 when they are in hospital undergoing treatment.³

The Bill seeks to update some of the existing offences and close loopholes in the law. We are concerned that some of these ‘updates’ extend the reach of the criminal law into private spaces, and may criminalise curious minds and expressions of belief which do not carry any consequent harm or intent to cause harm. In doing so, some of these offences risk a disproportionate interference with the right to privacy, the right to freedom of thought and belief, and the right to freedom of expression.

Clause 1 criminalises ‘expressions of support’ for proscribed organisations where the person expressing support is reckless as to whether the person to whom the expression is directed will be encouraged to support the proscribed organisation. It is not clear what types of speech would constitute an ‘expression of support’. This could have a chilling effect, for instance, on academic debate during which participants speak in favour of the de-proscription of proscribed organisations. There is a clear risk that this clause would catch speech that is neither necessary nor proportionate to criminalise. In our view, it violates Article 10 of the European Convention on Human Rights. Clause 2 criminalises the online publication of images in such a way as to arouse reasonable

1 The Government states that the aim of CONTEST is to reduce the risk to the UK and its citizens and interests overseas from terrorism, so that people can go about their lives freely and with confidence.

2 [Counter-Terrorism and Border Security Bill](#), [Bill 219 (2017–19)]

3 [Counter-Terrorism and Border Security Bill](#), Clauses 15 and 16

suspicion that the person is a member or supporter of a proscribed organisation. To criminalise the publication of articles worn or displayed in private places risks catching a vast amount of activity which would be disproportionate.

Clause 3 criminalises viewing material online of a kind likely to be useful to a person committing or preparing an act of terrorism, where material is viewed three or more times and the person knows or has reason to believe that the material is or is likely to be terrorist material. The defence of reasonable excuse is available but it is not clear what constitutes legitimate activity for the purpose of this defence. This clause may capture academic and journalistic research as well as those with inquisitive or foolish minds. Viewing material without any associated intentional or reckless harm is an unjustified interference with the right to receive information. The substantial increases in maximum sentences for certain terrorist offences also appear to be unjustified and disproportionate. The extension of extraterritorial jurisdiction to certain offences such as support for a proscribed organisation may be problematic in situations where there is not an equivalent offence in the country concerned.

The Bill introduces an enhanced notification regime for persons convicted of certain terrorism offences. Some of these reporting requirements last for 30 years, without the possibility of a review. In light of the case law, the increased level of intrusion into private life and the lengthy period of time for which notification requirements are imposed in some cases, there must be stronger safeguards. The Bill also provides the power to enter and search a registered terrorist offender's home, which is an intrusion with the right to private life. This power should be subject to a threshold test and any exercise of this power must be done only when there is no less intrusive option available and with due regard for the private life of any other persons affected by the intrusion.

We are concerned that biometric data of individuals who have neither been charged nor convicted may be retained for three years without any independent oversight. We recommend that the Home Office justifies the removal of the Biometric Commissioner's oversight and the extension of the retention period from two to five years without clear notification and review options.

The Bill also provides that organisers of events may be charged for necessary traffic measures put in place in light of a terrorist threat. The public authorities involved must continue to act as they normally would with regard to security and counter-terrorism matters so there is that no blurring of private and public roles, which could risk undermining the State's positive obligations to safeguard life under Article 2 ECHR.

Any additional responsibility placed on local authorities to make Prevent referrals must be accompanied by adequate training and resources to ensure that the authorities are equipped to identify individuals vulnerable to being drawn into terrorism. We reiterate our recommendation that the Prevent programme should be independently reviewed.

Schedule 3 provides for stop and search powers at ports and borders to determine whether an individual is or has been involved in hostile activity. The exercise of these powers constitutes an interference with Article 8, Article 10 and Article 1 Protocol 1 rights, yet the powers it gives are broad. The definition of "hostile act" is extremely broad (including threats to national security and the economic well-being of the UK) and there is no threshold test required before a person is detained and examined -

individual officers could simply act on a “hunch”. Guidance will be crucial and we consider it necessary for this guidance to be published immediately so that Parliament can consider it alongside its scrutiny of the Bill. We are also concerned that the vital safeguard of access to a lawyer is compromised. In our view, the Schedule 3 powers do not comply with the requirement that the law must be sufficiently foreseeable and must contain sufficient safeguards to ensure that the power will not be exercised arbitrarily.

Max Hill QC, Independent Reviewer of Terrorism Legislation, suggested that we are legislating close to the line on rights compliance by taking the criminal law into the private realm.⁴ Corey Stoughton, Advocacy Director at Liberty, stated that the Bill is not compatible with Convention rights.⁵ This Bill strikes the wrong balance between security and liberty. We doubt whether, as currently drafted, the Bill is compliant with the Convention. The issues we raise need to be explored in the course of the Bill’s progress through Parliament and changes made as necessary.

4 [Q16](#) [Max Hill QC]

5 [Q16](#) [Corey Stoughton]

1 Introduction

Background to the Bill

1. The Counter-Terrorism and Border Security Bill ('the Bill') was introduced to the Commons on 6 June and had its Second Reading debate on 11 June. The Bill follows the Government's review of its counter-terrorism strategy (CONTEST) and legislation, which was launched in June 2017.

2. The Rt Hon Ben Wallace MP, Minister for Security and Economic Crime, set out the background and purpose of the Bill in a letter sent to the Chair of the Committee on 6 June:

"Following the terrorist attacks in London and Manchester last year, the Bill is designed to enhance the powers available to protect our communities from the ongoing heightened terrorist threat. To this end, measures in the Bill include updating a number of terrorism offences to respond to the evolving terrorist threat and to close a number of gaps in the law, allowing more effective earlier intervention with prosecutions for preparatory terrorism offences, and ensuring that the law properly covers modern online behaviour and patterns of radicalisation. The Bill will strengthen the sentencing framework to ensure that offenders are appropriately sentenced, and that the police are better able to manage individuals convicted of a terrorism offence on their release.

[...]

In addition, the Bill also provides for a new power to stop, search, question and detain an individual at a port or border area in order to determine if they are, or have been, engaged in hostile state activity. This comes in response to the poisoning of Sergei and Yulia Skripal in Salisbury on 4 March 2018, following which the Prime Minister announced that the Government would introduce new powers to harden the United Kingdom's defences at the border against all forms of hostile state activity."⁶

Overview of the key provisions in the Bill

3. Part 1 of the Bill would:

- (a) make it an offence to express an opinion or belief that is supportive of a proscribed organisation while being reckless as to whether this will encourage support for a proscribed organisation (clause 1);
- (b) criminalise the publication of certain images which would arouse reasonable suspicion that the offender was a member or supporter of a proscribed organisation (clause 2);

6 Letter from Rt Hon Ben Wallace MP, Minister of State for Security and Economic Crime, to Rt Hon Harriet Harman MP, Chair of the Joint Committee on Human Rights [regarding the Counter-Terrorism and Border Security Bill](#), dated 6 June 2018

- (c) amend the existing offence of downloading terrorist material and extend it to viewing such material, where this is done on three or more occasions (clause 3);
- (d) strengthen existing offences of encouragement of terrorism and dissemination of terrorist publications (clause 4);
- (e) extend extra-territorial jurisdiction over certain offences (clause 5);
- (f) increase maximum sentences for certain terrorist offences (clause 6);
- (g) add to the list of offences for which extended sentences can be given in certain circumstances (clause 8);
- (h) make changes to the notification requirements for registered terrorist offenders, and introduce a new police power to enter and search their homes (clauses 11 and 12);
- (i) add certain terrorist offences to the list of offences for which a Serious Crime Prevention Order can be given (clause 13);
- (j) allow charges to be made for traffic measures put in place to protect events or sites from terrorist threats (clause 14); and
- (k) allow local authorities (as well as the police) to refer people who are considered vulnerable to being drawn into terrorism to the multi-agency panels which assess them and provide support (clause 18).

4. Part 2 of the Bill is a response to the poisoning of Sergei and Yulia Skripal in Salisbury on 4 March 2018. Clause 20 and Schedule 3 provide powers to stop, question, search and detain people at ports and borders to determine whether they appear to be, or have been, engaged in hostile state activity. There is no requirement for reasonable suspicion in order to exercise these powers. This includes powers to retain and copy journalistic and legally privileged information. It also includes powers that delay access to a lawyer or prevent confidential access to a legal advice.

Key human rights issues engaged by the Bill

5. On introduction of the Bill in the House of Commons, the Home Secretary (Rt Hon Sajid Javid MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights. The Bill engages the following Convention rights:

- (a) Article 8: the terrorism offences and stop and search powers may interfere with a person's right to private and family life. The extension of the biometric data retention provisions, especially without any safeguards, also raises Article 8 concerns.
- (b) Article 9: the terrorism offences and stop and search powers may interfere with a person's rights to manifest religion or belief, in worship, teaching, practice and observance.

- (c) Article 10: the terrorism offences and stop and search powers may interfere with a person's right to receive and impart information and ideas concerning their religion or political or ideological beliefs.
- (d) Article 6: access to a lawyer can be restricted in certain circumstances under the border security stop and search powers.
- (e) Article 1 of Protocol 1 and Article 2: the involvement of private actors deciding on the provision of, and in paying for, counter terrorism traffic measures raises questions concerning adequate protection of the right to life and also peaceful enjoyment of property.

6. The Government considers that any interferences with ECHR rights are justified as necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime and for the protection of the rights and freedom of others.⁷ Our inquiry considered whether the following are clearly prescribed, necessary and proportionate as required by human rights law:

- (a) the extension of existing terrorism offences;
- (b) increased maximum sentences for certain terrorism offences;
- (c) notification requirements for registered terrorist offenders;
- (d) the extension of extraterritorial jurisdiction over certain terrorism offences;
- (e) changes to the Prevent programme;
- (f) extension to the period of retention of biometric data;
- (g) increased involvement of private actors in decision-making on counter-terrorism measures necessary to protect the public at events and sites; and
- (h) the introduction of new stop and search powers at ports and borders.

7 Home Office, [Memorandum on Counter-Terrorism Border and Security Bill - European Convention on Human Rights](#), June 2018

2 Amendment of terrorism offences

Extension of existing terrorism offences

7. The Government has stated that the provisions in the Bill are “digital fixes” to the existing terrorism offences.⁸ Max Hill QC, the Independent Reviewer of Terrorism Legislation, welcomes the fact that the Bill does not introduce any new offences on the basis that we already have sufficient laws in place to deal with terrorist-related activity.⁹ However, in evidence before the Committee, he clarified that the Bill is “not all simply ‘digital fixes’ [...] There are some amendments to existing offences that I am constrained to describe as extensions to those offences.”¹⁰ We describe these more fully below. In Max Hill’s view, some elements of the Bill are “good, pragmatic solutions here for the modern world”, but some aspects of the extensions of existing offences raise serious concerns.¹¹ Liberty is also concerned by the proposed amendments to existing offences. Corey Stoughton, Advocacy Director at Liberty, suggested that much of the activity criminalised by the Bill is “not terrorism *per se*; it is protected activity–protected free expression.”¹²

8. We endorse the closing of loopholes in legislation to ensure that law remains up to date with technological developments. We also share the views of Max Hill QC, in giving credit to the Government for avoiding a ‘knee-jerk’ reaction following the successive terrorist attacks in 2017.¹³ However, we are concerned that some of the extensions of existing offences could take the criminal law in a dangerous direction for human rights, risking a ‘chilling effect’, not only on journalistic and academic freedoms, but also the inquisitive and the foolish mind. We are particularly concerned with clauses 1–3 as set out below.

Clause 1: Expressions of support for a proscribed organisation

9. Organisations are proscribed by Parliament as terrorist organisations if they are “concerned in terrorism”.¹⁴ Section 12(1) of the Terrorism Act 2000 criminalises a person who “invites” others to support a proscribed organisation. We note the decision of the Court of Appeal in *Choudary and Rahman*, which held that the current offence “does not prohibit the holding of opinions or beliefs supportive of a proscribed organisation; or the expression of those opinions or beliefs”.¹⁵ A defendant need not be providing support for a proscribed organisation, rather, the criminality lies in inviting support and the invitation must be made knowingly.¹⁶

10. Clause 1 of the Bill amends section 12 of the 2000 Act to create an offence of expressing an opinion or belief that is supportive of a proscribed organisation, where the person expressing the opinion or belief is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.

8 Gov.UK, [Home Secretary announces new counter-terrorism strategy](#), 4 June

9 Independent Reviewer of Terrorism Legislation, Counter-Terrorism and Border Security Bill 2018, [7 June 2018](#)

10 [Q2](#) [Max Hill QC]

11 [Q2](#) [Max Hill QC]

12 [Q2](#) [Corey Stoughton]

13 [Qq7–16](#) [Max Hill QC]

14 Defined by [section 3\(5\)](#) of the Terrorism Act 2000 (“the 2000 Act”).

15 *R v Choudary and Rahman* [2016] EWCA Crim 61, para 35

16 *R v Choudary and Rahman* [2016] EWCA Crim 61, paras 46 and 70

11. The Government says that “there is a clear public interest in stymieing support for terrorist organisations since the more support they have, the stronger their capacity to engage in terrorism [...] The objective of this new offence—to restrict the degree to which proscribed terrorist groups garner more support—is sufficiently important to justify the limitation of the fundamental rights under Articles 8, 9 and 10.”¹⁷

12. Clause 1 removes the requirement for an *invitation to support* and replaces it with *expressions of support*. It is not clear to us what constitutes an “expression of support”. In the case of *Choudary and Rahman*, the Court of Appeal gave the concept of support its “normal and ordinary meaning”, finding that invitations to support proscribed organisations did not need to be practical or tangible but could include “encouragement, emotional help, mental comfort and the act of writing or speaking in favour of something”.¹⁸ It is arguable that clause 1 could include, for example, an academic debate during which participants speak in favour of the de-proscription of currently proscribed organisations. If this is so, clause 1 could have a chilling effect by preventing expressions of disagreement with the Government’s decision to proscribe certain organisations.

13. In evidence, Reporters Without Borders fear “restrictions on press freedom to express legitimate concerns, for example, around a new proscription or a proscribed group. Such discussion around criminalisation, proscription, and state power is undoubtedly in the public interest, but this new offence will have a clear and disproportionate chilling effect on press freedom to engage in such debate.”¹⁹

14. Liberty says that clause 1 “pushes the law even further away from actual terrorism, well into the realm of pure speech and opinion.”²⁰ Corey Stoughton warned: “You can merely be playing in a dangerous area and expressing an idea, and if the idea is interpreted as support for Hezbollah, or for a Kurdish group that may be engaged in terrorist activity [...] you suddenly run afoul of the criminal law.”²¹

15. In evidence, Max Hill QC stated that moving away from an invitation of support to an expression of support is problematic, as the Government is “drawing back the line” without the necessary safeguards.²² An invitation of support requires consideration of the recipient(s) of the message and how this message is received. Clause 1 removes this safeguard. Max Hill QC noted that there is already an existing offence of ‘encouragement of terrorism’, set out in section 1 of the 2006 Act, which begs the question as to why this extension is necessary.²³

16. In addition, clause 1 removes the requirement of *intention* and replaces it with *recklessness*, lowering the threshold for the mental element of the offence. There is, therefore, no requirement upon the individual to deliberately or *knowingly* encourage others to support a proscribed organisation. The Home Office’s ECHR Memorandum cites the interpretation given by the Court in *R v G and another* and explains that this means that a person would only fall foul of this provision where that person had “some subjective foresight that his conduct will result in the proscribed outcome and nonetheless

17 Home Office, [Memorandum on Counter-Terrorism Border and Security Bill - European Convention on Human Rights](#), June 2018, paras 12–14

18 *R v Choudary and Rahman* [2016] EWCA Crim 61, para 46

19 Reporters Without Borders ([CBS0005](#)) para 5

20 Liberty, [Liberty’s Second Reading Briefing on the Counter-Terrorism and Border Security Bill 2018](#), June 2018, p 4

21 [Q4](#) [Corey Stoughton]

22 [Q2](#) [Max Hill QC]

23 [Q2](#) [Max Hill QC]

engages in the conduct in circumstances where a reasonable person would not.”²⁴ The Committee has previously considered that the *mens rea* of recklessness when applied to acts of speech alone is dangerous; this is exacerbated by the lack of clarity as to what type of speech constitutes an expression of support.²⁵

17. Clause 1 interferes with the right to freedom of expression, guaranteed by Article 10 of the European Convention. Article 10 encompasses the freedom to hold ideas and the right to receive opinions and information, as well as the right to express them.²⁶ It is applicable not only to information or ideas that are inoffensive, but also to those that offend, shock or disturb the State or any sector of the population.²⁷ Article 10 is a qualified right and can only be interfered with in pursuit of a legitimate aim, such as national security, if the interference is prescribed by law, necessary and proportionate.²⁸ As currently drafted, there is inherent ambiguity as to what would be caught by this offence, thus questioning whether the interference can be said to be “prescribed by law”. Moreover, there is a very clear risk that it would catch speech that is neither necessary nor proportionate to criminalise (such as valid debates about proscription and de-proscription of organisations). For these reasons, we consider that this clause violates Article 10 of the ECHR.

18. There is a careful balance to be struck here to ensure that valid freedom of expression is not unintentionally caught by new offences. In that regard it is important to recall that even speech that offends, shocks or disturbs, is still protected. The clause as currently drafted potentially catches a vast spectrum of conduct. An offence must be clearly defined in law and formulated with sufficient precision to enable a citizen to foresee the consequences which a given course of conduct may entail. It is unclear as to what type of expression would or would not be caught by this offence, thus falling foul of the requirements of natural justice requiring clarity in the law and also throwing into question whether this interference with freedom of expression can be said to be “prescribed by law” with sufficient clarity. Moreover, there is a very clear risk that this provision would catch speech that is neither necessary nor proportionate to criminalise - such as valid debates about proscription and de-proscription of organisations. For these reasons, we consider that this clause violates Article 10 of the ECHR. We therefore recommend that clause 1, at a minimum, is amended to clarify what expressions of support would or would not be caught by this offence and to ensure that the offence does not risk criminalising unintended debates that it would not be proportionate or necessary to curtail.

Clause 2: Publication of images

19. Clause 2 amends section 13 of the 2000 Act to criminalise the publication online of an image depicting an item of clothing or another article, in such a way as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organization.

24 Home Office, [Memorandum on Counter-Terrorism Border and Security Bill - European Convention on Human Rights](#), June 2018

25 Joint Committee on Human Rights, Third Report of Session 2005–2006, [Terrorism Bill](#), HL Paper 75 / HC 561, para 33; First Report of Session 2006–07, [The Council of Europe Convention on the Prevention of Terrorism](#), HL Paper 26 / HC 247, paras 30–34

26 *Sunday Times v UK* (No.1) 1979 2 EHRR 245

27 *Handyside v UK*, [1990] ECHR 32

28 European Convention on Human Rights, [Article 10\(2\)](#)

The image must be accessible to the public, but the image may have been taken in private—for example, if a photograph of an ISIS flag hanging on the wall of a bedroom in a home is posted on a publicly accessible internet forum.

20. The Government says that “the objective of the offence is [...] to deter people from engaging in displays which may encourage others to support a terrorist group; it is no more than necessary to accomplish the objective; and strikes a fair balance between the rights of the individual and those of the community [...]”²⁹

21. It is already a criminal offence to wear clothing or display an article in a *public place* where this is likely to arouse suspicion of membership of a proscribed group.³⁰ In addition, sections 1 and 2 of the Terrorism Act 2006 already provide for the offence of encouraging terrorism and dissemination of terrorism publications. In particular, section 2 of that Act makes it a criminal offence to disseminate a publication which is likely to be understood as a direct or indirect encouragement, or be useful in the commission or preparation, of terrorist acts.³¹

22. As with clause 1, there is no requirement for the publication of an image in support of a proscribed organisation to intentionally encourage support for a proscribed organisation. Nor is there a requirement for the publication to be reckless as to encouraging support for a proscribed organisation. Clause 2 requires only the publication of a photo or video of, for example, a t-shirt or a flag in a private home, which arouses reasonable suspicion that the person supports a proscribed organisation.

23. Liberty states that it “does not support the existing law’s criminalisation of a costume. The further criminalisation of *photographs* of a costume only exacerbates the risk that law enforcement officials attempting to interpret the meaning of a photograph will mistake reference for endorsement, irony for sincerity, and childish misdirection for genuine threat.”³² Reporters Without Borders fear that this clause criminalises the publication of photographs which may be part of responsible journalism in the public interest.³³

24. Professor Clive Walker notes that this clause catches “the display of historical photographs, such as IRA members in uniform during the War of Irish Independence 1919–21 [...] the espousal of historic causes and actions which are still supported by contemporary proscribed organisations thus becomes a major potential target for this offence.”³⁴ This is particularly problematic where an organisation that is now proscribed might previously have undertaken regular political work before being proscribed. For example, one might envisage the publication of photos “in such a way or in such circumstances as to arouse reasonable suspicion” that the person supports that proscribed organisation, but where that support clearly only relates to that organisation’s work and objectives prior to proscription. Criminalising such action would be clearly problematic.

29 Home Office, [Memorandum on Counter-Terrorism Border and Security Bill - European Convention on Human Rights](#), June 2018

30 Terrorism Act 2000, [Section 13](#)

31 Terrorism Act 2006, [Section 2](#)

32 Liberty, [Liberty’s Second Reading Briefing on the Counter-Terrorism and Border Security Bill 2018](#), June 2018

33 Reporters Without Borders ([CBS0005](#)) para 7

34 Clive Walker ([CBS0001](#)) p 7

25. In evidence, Max Hill QC also stated that this clause is problematic.³⁵ He explained that the use of emblems or flags supporting proscribed organisations are often used as supporting evidence in prosecutions of other offences to show the mind-set of the defendant, which can be placed before the judge and jury.³⁶ However, whilst this may be useful evidence to indicate the defendant’s involvement in other terrorist offences, we are concerned that the criminalisation of this conduct alone risks falling foul of proportionality. It is particularly disproportionate given the low threshold that provides for an individual to be convicted for simply “arousing reasonable suspicion” that he or she is a member or supporter of a proscribed organisation (which replicates the threshold currently provided in the Terrorism Act 2000).

26. In our view, to criminalise the publication of an article which may be worn or displayed in a private place risks catching a vast amount of activity and risks being disproportionate, particularly given the lack of incitement to criminality in the mens rea of this offence. It risks a huge swathe of publications being caught, including historical images and journalistic articles, which should clearly not be the object of this clause. In our view, given the lack of clarity as to what would be caught by this offence and the potentially very wide reach of clause 2, it risks a disproportionate interference with Article 10. We recommend that clause 2 be removed from the Bill or, at a minimum, amended to safeguard legitimate publications and to give greater clarity as to what acts are, and are not, criminalised.

Clause 3: Obtaining or viewing material over the internet

27. Under section 58(1)(a) of the Terrorism Act 2000, a person commits an offence if he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism.³⁷ Clause 3 of the Bill amends this section to include *viewing* online material of a kind likely to be useful to a person committing or preparing an act of terrorism. Where a person views such material three or more times, they commit the offence if they know, or have reason to believe, that the record contains or is likely to contain terrorist material.³⁸ The offence is made out if a person views terrorist material on three or more different occasions, even where the material is different each time.³⁹ The defence of reasonable excuse is retained.

28. The Government says that:

“A person who is considering involving himself in the commission or preparation of terrorist acts is rightly criminalised if he takes active and deliberate steps to collect, or make records of, information which would be useful to him, or to another, in carrying out terrorist acts, and the criminal law should proscribe those collecting/record-making activities regardless of where the information is obtained from. The internet is the modern-day source of much of this material and it is therefore proper to criminalise the collection of material from, or making of records by means of, the internet.

35 [Q6](#) [Max Hill]

36 [Q6](#) [Max Hill]

37 Terrorism Act 2000, [Section 58\(1\)\(a\)](#)

38 [Counter-Terrorism and Border Security Bill](#), Clause 3(3)(1A)

39 [Counter-Terrorism and Border Security Bill](#), Clause 3(2)(b) and (3)(3)(1B)

Likewise, the damage that can flow from repeatedly viewing material useful to a terrorist—whether or not a permanent record is made or collected—warrants the criminalisation of the act of viewing.”⁴⁰

29. Max Hill QC has previously criticised proposals to criminalise people who view content linked to terrorism online, warning that “thought without action must not be criminalised. While we can all agree that there should be nowhere for real terrorists to hide, we should also agree that legislating in the name of terrorism when the targeted activity is not actually terrorism would be quite wrong”.⁴¹

30. It is important to note that this offence requires no active expression, invitation or encouragement at all; it simply involves looking at a website. It may be a different website on each occasion and the viewings may occur over an extended period of time as there is no time limit included in the clause. We consider criminalisation of passive activity a dangerous direction of travel. By way of comparison, we note that an individual may not be prosecuted for merely viewing indecent images of children. It is a requirement of that offence that the images must be in the possession of the individual, meaning within their custody and control (i.e. downloaded or stored on their computer).⁴² Whilst we recognise the need to adapt to new technologies and practices, and the need to bridge the current gap between downloading and streaming material, there is a clear risk that this clause would catch academics, journalists and researchers, as well as those who view such material out of curiosity or foolishness without any intent to act upon the material in a criminal manner. Professor Clive Walker notes that “the Government and researchers have repeatedly asserted that there is no clear production line from viewing extremism or even being ‘radicalised’ into becoming an active terrorist.”⁴³

31. Furthermore, the defence of reasonable excuse is not sufficiently clear.⁴⁴ There is no guidance provided in clause 3 as to what is meant by a reasonable excuse—this assessment would be left to the jury. Liberty points out that “[w]hile a defence of “reasonable excuse” may prevent the successful prosecution of some journalists and academics, the chilling impact of these provisions remains. It is a brave reporter or researcher who will be undeterred by the prospect of a 15 year prison sentence.”⁴⁵ Reporters Without Borders states, “it may be that journalists would only be availed of its protection, if at all, only having endured the stress and uncertainty of a criminal trial. This legal uncertainty plainly compounds the chilling effect of this proposed offence on journalistic activity.”⁴⁶ We agree that it is dangerous to rely upon prosecutorial discretion not to prosecute in certain types of cases.

40 Home Office, [Memorandum on Counter-Terrorism Border and Security Bill - European Convention on Human Rights](#), June 2018, paras 31–32

41 The Guardian, [UK terrorism law expert warns government over plans for new legislation](#), October 2017

42 Criminal Justice Act 1988, [Section 160](#); *R v Porter* [2006] 1 Cr. App. R. 25; *R v Leonard* [2012] 2 Cr. App. R. 12

43 Clive Walker ([CBS0001](#)) p 9

44 In the case of *R v G; R v J*, [2009] UKHL 13, the House of Lords held that the defence of reasonable excuse must be an objectively verifiable reasonable excuse to be determined by the jury.

45 Liberty, [Liberty’s Second Reading Briefing on the Counter-Terrorism and Border Security Bill 2018](#), June 2018

46 Reporters Without Borders ([CBS0005](#)) para 11

32. We note that a similar provision⁴⁷ was twice struck down by the French Constitutional Court on the grounds that (1) it was unnecessary in light of existing offences; (2) it was disproportionate because of a lack of requirement to prove intent to adhere to terrorist ideology; and (3) the defence lacked certainty. The Court found a breach of the right to free communication of ideas and opinions.⁴⁸ In our view, clause 3 runs the same risk.

33. We recommend that those scrutinising the Bill give Clause 3 particular consideration. This clause may capture academic and journalistic research as well as those with inquisitive or even foolish minds. The viewing of material without any associated intentional or reckless harm is, in our view, an unjustified interference with the right to receive information protected by Article 10. We think that, unless amended, this implementation of this clause would clearly risk breaching Article 10 of the ECHR and unjustly criminalising the conduct of those with no links to terrorism. We recommend that, at the very least, consideration is given to narrowing the offence to ensure that it only captures those viewing this material with terrorist intent and that the defence of reasonable excuse is clarified as to what constitutes legitimate activity and that this is set out on the face of the Bill.

47 Penal Code, [Article 421-2-5-2](#)

48 Decision No. 2016-611 QPC of 10 February 2017 – Mr. David P; violation of Article 11, Declaration of the Rights of Man and the Citizen 1789; Clive Walker ([CBS0001](#)), p 9

3 Extraterritorial jurisdiction

34. Clause 5 amends section 17 of the Terrorism Act 2006 to extend the circumstances in which terrorist offending abroad may be prosecuted in the UK, irrespective of whether the offence is committed by UK citizens or otherwise (i.e. universal jurisdiction). Section 17 provides universal jurisdiction for the UK courts over certain listed offences.⁴⁹ This means that a person (British citizen or not) may be prosecuted in the UK for conduct that took place outside the UK which, had it taken place here, would have been unlawful under one of the listed offences. There is no requirement that the conduct must also be an offence in the jurisdiction where the conduct took place.

35. The Explanatory Notes to the Bill explain that the overall effect of section 17 is that if an individual were to commit one of these offences in a foreign country, they would be liable under UK law in the same way as if they had committed the offence in the UK. The Explanatory Notes also explain that, in practice, a prosecution would only be instituted in this country if the individual was present in the UK, for example having returned voluntarily from fighting with a terrorist organisation overseas, or having been returned in accordance with extradition procedures.⁵⁰

36. Clause 5 would amend section 17 of the 2006 Act to extend extraterritorial jurisdiction to three further offences:

- a) dissemination of terrorist publications (section 2, 2006 Act) [Clause 5(2)(a)];
- b) wearing clothing or displaying an item in a public place in such a way as to arouse reasonable suspicion that he is a member or supporter of a proscribed terrorist organization (section 13, 2000 Act) [Clause 5(3)]; and
- c) making or possessing explosives under suspicious circumstances (section 4, the *Explosive Substances Act 1883*) [Clause 5(4)].

37. In addition, extraterritorial jurisdiction over a section 1 offence (encouragement of terrorism) is currently limited to encouraging the commission, preparation or instigation of an offence listed in the Council of Europe Convention on the Prevention of Terrorism.⁵¹ Clause 5(2)(b) amends section 17 to remove the requirement that the offences must be

49 The offences currently covered by section 17 are listed in the [Explanatory Notes to the Counter-Terrorism Border and Security Bill](#) [Bill 219 (17–19)–EN]: section 1 Terrorism Act 2006 (encouragement of terrorism); section 6 Terrorism Act 2006 (training for terrorism); section 8 Terrorism Act 2006 (attendance at a place used for terrorist training) and sections 9 to 11 Terrorism Act 2006 (offences involving radioactive devices and materials and nuclear facilities) of that Act; sections 11(1) (membership of proscribed organisations) and section 54 (weapons training) of the 2000 Act.

50 [Explanatory Notes to the Counter-Terrorism Border and Security Bill](#) [Bill 219 (17–19)–EN], para 49; Note that prosecutions in England and Wales for an offence committed abroad may only be instituted with the consent of the Director of Public Prosecutions, given with the permission of the Attorney General; such prosecutions in Northern Ireland are subject to the consent of the Director of Public Prosecutions for Northern Ireland, given with the permission of the Attorney General for Northern Ireland (section 19 of the 2006 Act). In Scotland, all prosecutions are brought by the Lord Advocate or on his behalf, where to do so is in the public interest.

51 Council of Europe Convention on the Prevention of Terrorism 2005. It aims to strengthen member States' efforts to prevent terrorism in two different ways (1) by establishing as criminal offences certain acts that may lead to the commission of terrorist offences, namely: public provocation, recruitment and training and (2) by reinforcing co-operation on prevention both internally (national prevention policies), and internationally (modification of existing extradition and mutual assistance arrangements and additional means).

listed in the Convention.⁵² The effect of the amendment would mean that a person who encouraged a terrorist act overseas could be prosecuted in the UK irrespective of whether the terrorist act is listed in the Convention.⁵³

38. In evidence, Max Hill QC supported the extension of extra-territorial jurisdiction in principle, but raised particular concerns regarding the extension of extra-territorial jurisdiction over section 13 of the Terrorism Act 2000. Clause 5(3) would allow the UK to prosecute an individual, British or foreigner, who wore an item of clothing or displayed an article in support of a proscribed organisation even if this conduct was lawful at the time in the foreign country where the conduct occurred. Mr. Hill suggests that this is problematic given the proscription of organisations is not universally agreed, and that this extension should only be applied to UK citizens.⁵⁴ He explains, “placing an individual [...] on trial in this jurisdiction in front of judge and jury means that you need to prove a level of awareness as to the offence at the time the person committed it. If there is no equivalent offence abroad it is difficult, at the point of proof, to demonstrate that the offence has been committed.”⁵⁵ Professor Clive Walker agrees that this is problematic as it may “create a potential clash between UK law and the law of the country where the activity occurred [...] the fact that [the activity] falls under foreign law which has chosen not to incriminate or prosecute the display of support suggests that UK law should not intervene.”⁵⁶ The same concerns apply to clause 5(2)(b), which removes the requirement for equivalence with the Convention, so that a person who commits an offence of encouraging terrorism under section 1 of the Terrorism Act 2006 could be prosecuted in the UK irrespective of whether they were encouraging an offence listed in the Council of Europe Convention on the Prevention of Terrorism.

39. We make no comment as to whether extraterritorial jurisdiction should apply to offences where the action would also be an offence in the country where the action (or the majority of the actions) took place. However, we are concerned that the extension of extraterritorial jurisdiction to offences, such as support for a proscribed organisation, is problematic in situations where there is not an equivalent offence in the country concerned. This would offend the principles of natural justice and sufficient foreseeability of the effect of one’s actions. It would mean a foreign national, with few links to the UK, could be prosecuted in the UK if he/she attended a protest or waved a flag overseas, in support of an organisation that is lawful within that overseas jurisdiction, if that individual then travels to the UK. We recommend that further consideration is given as to whether it is justified to bring domestic prosecutions against those who have no (or very few) links to the UK at the relevant time for conduct overseas that was perfectly lawful in the jurisdiction where it occurred.

52 Terrorism Act 2006, [Section 17](#); [Section 1](#) of the Terrorism Act 2006. Offences listed in [Listed in Schedule 1](#) 2006 Act

53 [Explanatory Notes to the Counter-Terrorism Border and Security Bill](#) [Bill 219 (17–19)–EN], para 50

54 [Q9](#) [Max Hill QC]

55 [Q9](#) [Max Hill QC]

56 Clive Walker ([CBS0001](#)) p 17

4 Sentencing

Clauses 6–10: Sentencing provisions

40. Sentencing measures in the Bill would:

- a) Increase the maximum sentence available for four terrorist offences (clause 6);
- b) Extend to Northern Ireland the sentencing provisions which require a court, when sentencing a person for a specified non-terrorist offence, to treat a terrorist connection as an aggravating factor and add to the list of such specified offences (clause 7); and
- c) Make further terrorism offences eligible for Extended Determinate Sentences and Sentences for Offenders of Particular Concern (clause 8).⁵⁷ The extended period of license for these terrorism offences would be up to eight years. During this extended period the person will be liable to recall to prison if they breach their license conditions.

41. The increased sentences are as follows:

Offence	Current maximum penalty	New maximum penalty
Collection of information of a kind likely to be useful to a person committing or preparing an act of terrorism (section 58 of the 2000 Act)	10 years	15 years
Eliciting, publishing or communicating information about members of armed forces etc which is of a kind likely to be useful to a person committing or preparing an act of terrorism (section 58A of the 2000 Act)	10 years	15 years
Encouragement of terrorism (section 1 of the 2006 Act)	7 years	15 years
Dissemination of terrorist publications (section 2 of the 2006 Act)	7 years	15 years

42. The Home Office sets out the Government's rationale for increasing the maximum sentences for the above offences:

“The maximum penalties for a number of terrorism offences were established in the Terrorism Acts of 2000 and 2006. The terrorist threat has since changed, with individuals engaging in such conduct now likely to pose an increased risk of moving quickly on to attack planning, given the

⁵⁷ These offences are: Membership of a proscribed organisation (section 11 of the 2000 Act); Inviting support for a proscribed organisation (section 12 of the 2000 Act); Collection of information useful to a terrorist (section 58 of the 2000 Act); Publishing information about members of the armed forces etc (section 58A of the 2000 Act); Encouragement of terrorism (section 1 of the 2006 Act); Dissemination of terrorist publications (section 2 of the 2006 Act); and Attendance at a place used for terrorism training (section 8 of the 2006 Act).

rapid trajectory of radicalisation now being observed. Increased maximum penalties better reflect the increased risk and the seriousness of these offences.”⁵⁸

43. The maximum sentences for sections 58 and 58A would increase from 10 years to 15 years. There is no evidence, to our knowledge, to suggest that judges are sentencing at the upper limits of their powers in respect of these offences. In fact, Professor Clive Walker has provided evidence to the contrary. He suggests that the worst section 58 offenders (collection of terrorist information) of recent years have received sentences significantly below the current 10-year maximum. The Sentencing Council reported that, between 2011–2016, the mean average custodial sentence length (after any reduction for a guilty plea) was three years and four months.⁵⁹ Our concerns in respect of clause 3 (obtaining and viewing material), which amends section 58, are further exacerbated by the increased maximum sentence to 15 years. In conjunction with the lack of clarity regarding the defence of reasonable excuse, the threat of a 15 year extended sentence may have a particularly chilling effect.

44. The maximum sentences for sections 1 and 2 of the 2000 Act (encouragement of terrorism and dissemination of terrorist publications respectively), would more than double, from seven years to 15 years. Once again, we have seen no evidence to suggest current sentencing powers are inadequate. The Sentencing Council figures show that between 2006 and 2016 there were 28 adult offenders convicted for section 1 and 2 offences, with an average mean custodial sentence of two years and 10 months.⁶⁰

45. In our view, the increase in sentences does not appear to be supported by evidence to suggest why it is justified or proportionate. We recommend that the Home Office provide further evidence (if they have such evidence) as to why they consider the current maximum sentences to be insufficient and how this increase is necessary and proportionate. We are particularly concerned that a sentence of 15 years could be imposed for a precursor offence of viewing terrorist material online three times or more. This would put viewing material online (without intent to cause harm) on the same level of culpability as possession of an article (e.g. materials for bomb-making) for terrorist purposes. As such, we recommend that clause 6(2) be deleted.

Notification requirements

46. Clause 11 of the Bill introduces an enhanced notification regime for persons convicted of certain terrorism offences receiving a sentence of imprisonment of 12 months or more. Such persons (known as ‘registered terrorist offenders’ or RTOs), once released, must provide the police with certain personal information, notify them of changes, and notify them of any foreign travel. The period for which the notification requirement applies depends upon the length of sentence, ranging from 10 to 30 years.

58 Home Office, Counter-Terrorism Border and Security Bill, [Sentencing Factsheet](#), p 2

59 Sentencing Council, [Terrorism Guideline: Consultation, London 2017](#), October 2017, p 63; see Clive Walker (CBS0001) p 19

60 Sentencing Council, [Terrorism Guideline: Consultation, London 2017](#), October 2017, p 63; see Clive Walker (CBS0001) p 20

47. Under the current law, RTOs must provide police with their name, home address, date of birth, and national insurance number. Clause 11 provides additional requirements, including telephone numbers, email addresses, vehicle details, bank account details, and passport details. These reporting requirements apply automatically and there is no possibility of review.

48. The notification requirements are an interference with the Article 8 right to privacy. The domestic courts have held that the current notification scheme under the Counter Terrorism Act 2008, when applied to 10-year periods on the register, is in accordance with the law, in pursuit of a legitimate aim, proportionate and therefore does not violate Article 8.⁶¹ The courts have previously held that indefinite reporting requirements violate Article 8.⁶² Importantly, in *Bouchacourt*, the European Court held that notification and registration requirements for up to 30 years (in very similar circumstances to the UK system) were only compliant with Article 8 due to the possibility of review - something that is not present in the UK requirements.⁶³

49. Some of the notification and registration requirements last for 30 years, without the possibility of a review, unlike the sex offenders' register which has a review at the 15-year mark. Given the case law of the European Court of Human Rights, as well as domestic UK case law, we are concerned that the revisions to the current system are likely to be considered a disproportionate and unjustified interference with Article 8 rights due to the lack of any possibility of review for those on the register for exceptionally lengthy periods of time. In light of the increased level of intrusion into private life and the lengthy period of time for which notification requirements are imposed in some cases, we recommend the introduction of stronger safeguards. In particular, we consider that there should be the possibility of review of the necessity of the notification and registration requirements and that each individual subject to these requirements should have the right to make representations at that review.

50. Clause 12 provides for a new power for police to enter and search the homes of RTOs “for the purpose of assessing the risks posed by the person to whom the warrant relates”. A justice of the peace (or sheriff in Scotland, or magistrate in Northern Ireland) must approve the warrant on application by a senior police officer. Professor Clive Walker notes that a similar power is available under the Terrorism Prevention and Investigation Measures Act 2011, but the purpose of the search power is narrower as it may be exercised only for the purpose of “ascertaining whether there is anything on the individual, or (as the case may be) on the premises, that contravenes measures specified in the TPIM notice.”⁶⁴

51. The power to enter and search a person's home is a severe intrusion with the right to private life. We do not consider this should be exercised simply for the purpose of a risk assessment. We recommend that this power be subject to a threshold test which requires a reasonable belief that the individual is in breach of his/her notification requirements and that the purpose of the entry and search is to establish that belief. Any exercise of this power must be done only when there is no less intrusive option available and with due regard for the private life of any other persons affected by the intrusion.

61 R (Mohamed Irfan) v Secretary of State for the Home Department [2012] EWHC 840 (Admin)

62 F v Secretary of State Home Department [2010] UKSC 17

63 *Bouchacourt v France* (5335/06, 17 December 2009)

64 Terrorism Prevention and Investigation Measures Act 2011, Schedule 5, [para 6\(3\)](#), Clive Walker ([CBS0001](#)) p 25

5 Counter terrorism powers

Anti-Terrorism Traffic Regulation Orders

52. Clause 14 of the Bill amends the Road Traffic Regulation Act 1984 which provides for the use of Anti-Terrorism Traffic Regulation Orders. The Bill provides that organisers of events may be charged for necessary traffic measures put in place in light of a terrorist threat. However, the organisers would be involved in the decision-making as to whether such measures are needed, would be aware of the possibility of being charged and could cancel the event if they did not want to bear the expense. The Home Office's ECHR Memorandum rightly recognises that this interferes with the right to property as set out in Article 1 of Protocol 1 to the ECHR, and sets out why they consider this interference to be proportionate.⁶⁵

53. There is an obvious concern if private actors are increasingly seen to be responsible for decision-making in putting in place counter-terrorism and public security measures to protect the public from terrorism as this risks blurring private and State functions. In particular, it risks the State not taking full responsibility for its positive obligations in relation to the right to life set out in Article 2 of the ECHR.

54. *We recommend that in giving effect to the proposed traffic measures and in the associated decision-making involved, the public authorities involved continue to act in line with their obligations with regard to security and counter-terrorism matters and that there is not any unhelpful blurring of private and public roles in this regard, such that could risk undermining the State's positive obligations under Article 2 ECHR.*

Retention of biometric data

55. Clause 17 and Schedule 2 of the Bill amend existing powers to retain fingerprints and DNA samples (biometric data) for counter-terrorism purposes.⁶⁶ Biometric data must be destroyed unless it is retained under a power set out in the legislation.⁶⁷ Clause 17 and Schedule 2 of the Bill make a number of changes to the current regime for biometric data retention. There are two changes in particular that require further scrutiny.

56. Firstly, under PACE,⁶⁸ at present, where a person with no previous convictions is arrested for, but not charged with, a qualifying offence (i.e. serious violent, serious sexual offence or terrorist offence), biometric data may be retained for three years only with the consent of the Biometric Commissioner.⁶⁹ The Bill removes the requirement to obtain the consent of the Biometric Commissioner where the qualifying offence is a terrorist

65 Home Office, [Memorandum on Counter-Terrorism Border and Security Bill - European Convention on Human Rights](#), June 2018

66 [Annex B](#) to the Explanatory Notes to the Counter-Terrorism Border and Security Bill [Bill 219 (17–19)–EN], sets out the current timeframes for retention of biometric data for convicted and not convicted persons under the existing regime.

67 [Police and Criminal Evidence Act 1984](#), [Terrorism Act 2000](#), [Counter-Terrorism Act 2008](#), [Terrorism Prevention and Investigation Measures Act 2011](#), [Protection of Freedoms Act 2012](#) (see Explanatory Notes, [para 112](#) for full provisions).

68 [Police and Criminal Evidence Act 1984](#)

69 [Police and Criminal Evidence Act 1984](#), [Section 63F](#)

offence.⁷⁰ This means that the biometric data of any person arrested but not charged with certain terrorism (or related) offences (whether they are arrested under PACE or the TA 2000) can be retained for three years automatically, without the need for consent from the Biometric Commissioner. This aligns the powers under PACE with those currently provided under the TA 2000. The Government states that “this will close a gap and ensure that the police are able to retain biometric data from all suspected terrorists they arrest for the same period, regardless of the power of arrest they use.”⁷¹

57. Liberty say that they are “not aware of any evidence that supports the suggestion that the detection of crime is improved by retaining biometric data of people who are arrested but not charged, or people against whom charges are dropped or who are found to be innocent. There can be no justification for a person unlawfully or mistakenly arrested to have their biometric data exceptionally stored rather than destroyed.”⁷²

58. It is not clear what improvements are intended to be made to the detection of crime or prevention of terrorism by removing the oversight of the Biometric Commissioner. Indeed, if the aim is to align the two procedures then the more reasonable approach would be to provide relevant oversight by the Biometric Commissioner of both categories of DNA retention under both powers. Professor Clive Walker highlights this when he argues that “the weakening of oversight is unacceptable. The indication from data protection law is that more safeguards are needed, not fewer.”⁷³ We are therefore very concerned that the Government is using the excuse of harmonising powers to remove protections that were deemed necessary for one power merely because another power (for whatever reason) seems to have inordinately low levels of protection. Such an approach (without further analysis or justification) can only lead to a race-to-the-bottom of human rights protections.

59. We recognise the logic in harmonising retention periods for biometric data so that cases are treated in the same way irrespective of whether the individual is arrested under PACE or the TA 2000. However, we consider that oversight of the Biometric Commissioner gives the public greater comfort that such powers, and interferences with an individual’s right to private life, are being used reasonably and proportionately. Moreover, we have seen no arguments suggesting that the oversight by the Biometric Commissioner in any way impedes the ability of the police to undertake vital counter-terrorism work. We would therefore have thought it sensible to harmonise the two powers such as to retain necessary oversight of the Biometric Commissioner in a manner that enables the police to undertake their work. We are concerned that the proposed amendment in the Bill allows for the retention of biometric data of individuals who have neither been charged nor convicted, for three years without any independent oversight. We recommend that the Home Office provide a compelling justification for the removal of the Biometric Commissioner’s oversight. Failing that, we recommend an amendment such that the two powers are harmonised so as to provide oversight by the Biometric Commissioner whatever power of arrest is used.

60. Secondly, the Bill changes the period for retention of biometric data pursuant to a ‘national security determination’ (NSD). An NSD allows a chief police officer to determine

70 [Counter-Terrorism Border and Security Bill](#), Schedule 2, para 2; Counter-Terrorism Act 2008, terrorist offences listed in [s.41\(1\)](#)

71 Home Office, Counter-Terrorism and Border Security Bill 2018, [Biometric Data Fact Sheet](#), p 3

72 Liberty, [Liberty’s Second Reading Briefing on the Counter-Terrorism and Border Security Bill 2018](#), June 2018

73 Clive Walker ([CBS0001](#)) p 32

that it is necessary and proportionate to extend the retention period for biometric data for the purposes of national security⁷⁴ for an extra two years in circumstances where it would otherwise have to be destroyed.⁷⁵ NSDs can be renewed every two years and are kept under review by the Biometric Commissioner, who may order the destruction of the data if its retention is no longer necessary.⁷⁶

61. The Bill increases the duration of an NSD from two years to five years⁷⁷ and enables a single NSD to be made to cover data retained following multiple arrests in certain circumstances.⁷⁸ The Government justifies the extension from two to five years on two grounds. Firstly, they say the review process “can be resource intensive and complex to manage”⁷⁹ and that the extension “will reduce the burden of having to review the retention of data more frequently than is necessary.”⁸⁰ Secondly, they state that “suspected terrorists will generally pose an enduring threat to national security. This extended period will strike a better balance between ensuring there is regular review of the retention of biometrics, subject to safeguards, and more effectively enabling the police to use the data to support investigations.”⁸¹ We note that the Biometric Commissioner has expressed support for extension of the retention period in some NSD cases, stating that “the evidence/intelligence against relevant individuals is such that they could be granted for longer than two years.”⁸²

62. The retention of biometric data is a significant intrusion of an individual’s right to privacy, which is protected by Article 8 ECHR. The extension from two to five years increases the interference with Article 8. This right may only be interfered with in pursuit of a legitimate aim and where necessary and proportionate. Retaining the data of non-convicted persons may be lawful as long as the retention is not blanket and indiscriminate.⁸³ However, we are particularly concerned that without any possibility for review this measure is not proportionate.

63. The retention of data for the purpose of national security is a legitimate aim. However, in our view, the justifications given for extending the retention period from two to five years without clear notification and review options are not sufficient. We suggest further scrutiny is required as to whether the extended retention period, without the possibility of review, is necessary to “support terrorism investigations and assist in identifying persons of threat” and, if so, whether five years is a proportionate period of time to retain the biometric data of persons who have never been convicted of a crime, particularly in the absence of any possibility of review. Alternatively, we recommend including a notification and review clause which we consider would remedy proportionality concerns with this extended power.

74 The Government states in its guidance to POFA 2012, at para 38: “The UK’s approach to national security is based on the recognition that it is a necessarily flexible concept which must be capable of evolving over time to take account of the changing threats faced. Accordingly, it is not a term defined anywhere in legislation where it appears.”

75 Police and Criminal Evidence Act 1984, [Section 63M](#)

76 Protection of Freedoms Act 2012, [Section 20](#)

77 [Counter-Terrorism Border and Security Bill](#), Schedule 2, paras 3, 7(4), 10(4), 13(4), 16(3), and 19

78 [Counter-Terrorism Border and Security Bill](#), Schedule 2, para 4

79 Home Office, Counter-Terrorism and Border Security Bill 2018, [Biometric Data Fact Sheet](#), p 1

80 Home Office, Counter-Terrorism and Border Security Bill 2018, [Biometric Data Fact Sheet](#), p 2

81 Home Office, Counter-Terrorism and Border Security Bill 2018, [Biometric Data Fact Sheet](#), p 2

82 Office of the Biometrics Commissioner, Annual Report 2017, [Commissioner for the retention and use of biometric material](#), Paul Wiles, March 2018; Home Office, Counter-Terrorism and Border Security Bill 2018, [Biometric Data Fact Sheet](#), p 1

83 *S and Marper v UK*, 30562/04 [2008] ECHR 1581 (4 December 2008)

6 Prevent

64. The Prevent programme is part of the Government’s counter-terrorism strategy, CONTEST, which is aimed at preventing people from becoming terrorists. Under the Counter Terrorism and Security Act 2015, there is a legal requirement for certain specified authorities to deliver Prevent activities. These authorities include local authorities, schools, universities, health organisations, police, prisons and probation and education and health providers.

65. The Channel programme is a multi-agency strand of the Prevent programme, which identifies and supports individuals who are at risk of being drawn into terrorism. Section 36 of the Counter Terrorism and Security Act 2015 requires local authorities to establish a “Channel panel” to assess the risk and develop a support plan for the individual. At present only a police officer can refer an individual identified under Prevent to a Channel panel. Clause 18 would allow local authorities as well as the police to refer people regarded as vulnerable to being drawn into terrorism.

66. Our Committee, amongst many others, has previously called for an independent review of the Prevent programme,⁸⁴ which has been widely criticised for alienating certain communities and undermining efforts to tackle counter-terrorism. Max Hill QC has “heard various examples of how [Prevent] is having a chilling effect in different contexts and adds to a strong sense of grievance [...] and urgent attention is required to address them.”⁸⁵

67. In evidence, a number of stakeholders have reiterated this call for an independent review.⁸⁶ Dr. Charlotte Heath-Kelly at the University of Warwick has expressed serious concerns with local authority involvement in Prevent:

“We have found that this leads healthcare professionals and Local Authority processes to enquire into incidences of dissent and illiberal political beliefs—rather than vulnerability to abuse in persons with formal care needs (the legal definition of safeguarding). For example, during our study of local authority owned Prevent work, we found cases where children had been referred to safeguarding teams for watching Arabic television, and where adults were referred for planning pilgrimage trips. While these incidents did not reach Channel, it is crucial that the select committee investigate the low level, and misguided, monitoring of religiosity and political beliefs. People have a right to their beliefs without them being interpreted and medicalized as ‘vulnerabilities’.”⁸⁷

68. More recently, in its response to the Committee’s report on Freedom of Speech in Universities, the Government rejected calls for an independent review, but indicated that the Government’s counter-terrorism strategy (CONTEST) was being updated and Prevent would be part of this review.

84 Joint Committee on Human Rights, Second Report of Session 2016–17, [Counter-Extremism](#), HL Paper 39 / HC 105, Joint Committee on Human Rights, Fourth Report of Session 2017–19, [Freedom of speech in Universities](#), HL Paper 111 / HC 589

85 Forward Thinking, [UK ‘Building Bridges’ Programme, Community Roundtables: A report on the aftermath of the terrorist attacks in London and Manchester](#), July 2017

86 Muslim Engagement and Development (Mend) [\(CBS0006\)](#) p 1, Prevent Digest [\(CBS0001\)](#) para 1

87 Dr. Charlotte Heath-Kelly, University of Warwick [\(CBS0011\)](#) p 1

69. *We are concerned that the Prevent programme is being developed without first conducting an independent review of how the programme is currently operating. We are also concerned that any additional responsibility placed on local authorities must be accompanied by adequate training and resources to ensure that the authorities are equipped to identify individuals vulnerable to being drawn into terrorism. We reiterate our recommendation that the Prevent programme must be subject to independent review.*

7 Border Security

Stop and search at ports and borders

70. Schedule 3 of the Bill contains a power for “examining officers” (constables or designated immigration or customs officers) to question any person who is in a port in the UK or in the Northern Ireland border area for the purpose of determining whether the person appears to be, or has been, engaged in “hostile activity”.⁸⁸ The power to examine a person can be exercised whether or not there are grounds for suspecting that a person is engaged in hostile activity. The power is modelled on Schedule 7 to the 2000 Act which allows examining officers to question people in ports and the border area to determine whether they appear to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. As with Schedule 3 to the Bill, there is no requirement to have grounds to suspect a person in order to stop them for examination.

71. Schedule 3 provides that a person is or has been engaged in hostile activity if the person is or has been concerned in the commission, preparation or instigation of a “hostile act” that is or may be:

- a) carried out for, or on behalf of, a State other than the UK, or otherwise in the interests of such a State;⁸⁹ and
- b) threatens national security; or threatens the economic well-being of the UK; or is an act of serious crime.⁹⁰

72. Both national security and threats to economic well-being are undefined; the Government states they take their “ordinary meaning”.⁹¹ “Serious crime” is defined as an offence reasonably likely to attract a sentence of three years or more; or involving the use of violence, substantial financial gain, or conduct by a large group with a common purpose.⁹² Further, there is no requirement of certainty that a person is acting on behalf of a State other than the UK; a person is engaged in ‘hostile activity’ where the hostile act *may* be carried out for or on behalf of another State.

73. Once an individual is subject to the exercise of this power, there are numerous interferences with their Article 8 rights:

- a) a person must provide any information or document requested by the officer.⁹³ Failure to do so is punishable by a fine of £2500 and up to three months’ imprisonment;⁹⁴
- b) a person can be searched and strip-searched if the officer has reasonable grounds for suspecting concealment of evidence and this is authorized by a senior officer;⁹⁵

88 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 1

89 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 1(5)

90 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 1(6)

91 [Explanatory Notes to the Counter-Terrorism Border and Security Bill](#) [Bill 219 (17–19)–EN], para 132

92 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 7(d)

93 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 3(a-d)

94 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 16

95 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 8

- c) a person may have their personal belongings copied and retained;⁹⁶ this applies to journalistic and legally privileged information (with supervision from the Investigatory Powers Commissioner). Property can be retained for a range of reasons;⁹⁷
- d) a detained person may have their biometric data taken;⁹⁸ and
- e) a person can be detained for questioning.⁹⁹ There is no right to a solicitor if questioned for under one hour before being detained.¹⁰⁰ Following this, in some circumstances, a person may only consult their solicitor in the presence of an officer.¹⁰¹

74. The Government says:

[...] [A]s with Schedule 7, the intrusions into Article 8 rights that flow from the exercise of the new Schedule 3 power are limited given the general expectation on the part of the public that they be subjected to checks at the border; and that the imperative to conduct those checks—to detect hostile activity (for example, espionage, sabotage and state-sponsored assassination) which is harmful to national security, the nation’s economic well-being and which may involve serious crime—is as equal a legitimate end as detecting and preventing terrorism. It is sufficiently foreseeable from the public’s perspective that they may be stopped and questioned at the choke points of ports to determine whether they pose such risks.¹⁰²

75. We note the decision of the European Court in the case of *Gillan and Quinton v UK* concerning section 44 of the Terrorism Act 2000 (now replaced), which allowed the police to stop and search people without reasonable suspicion that they had committed any offence, if authorized by a senior police officer who considered it “expedient for the prevention of acts of terrorism”. The Court noted that “‘expedient’ means no more than ‘advantageous’ or ‘helpful’. There is no requirement at the authorisation stage that the stop and search power be considered “necessary” and therefore no requirement of any assessment of the proportionality of the measure.”¹⁰³ The Court also expressed concern about the breadth of discretion conferred on individual police officers: “That decision is [...] one based exclusively on the “hunch” or “professional intuition” of the officer concerned [...] Not only is it unnecessary for him to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched. The sole proviso is that the search must be for the purpose of looking for articles which could be used in connection with terrorism, a very wide category which could cover many articles commonly carried by people in the streets.”¹⁰⁴

96 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 11–1

97 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 11(2)

98 [Counter-Terrorism Border and Security Bill](#), Schedule 3, paras 27–2

99 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 4

100 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 5

101 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 26

102 Home Office, [Memorandum on Counter-Terrorism Border and Security Bill - European Convention on Human Rights](#), June 2018

103 *Gillan and Quinton v UK*, Application no. 4158/05, para 80

104 *Gillan and Quinton v UK*, Application no. 4158/05, para 83

The Court went on to find that the stop and search powers in the TA 2000 were not sufficiently circumscribed and therefore violated the requirement of Article 8 that any interference must be in accordance with the law.

76. We note that the Supreme Court has found that Schedule 7 (TA 2000) is compliant with the Convention, finding that there is an expectation that persons passing through borders may be subject to checks and searches and that there are sufficient safeguards against the arbitrary use of this power.¹⁰⁵ We recognize that Schedule 3 to the Bill mirrors Schedule 7, however we note that there are two key distinctions.

77. Firstly, the purpose of the Schedule 3 power (determining whether the person appears to be a person who is, or has been, engaged in hostile activity) is broader and more ambiguous than the Schedule 7 power (determining whether the person appears to be a person who is, or has been, concerned in the commission, preparation, or instigation of acts of terrorism).¹⁰⁶ There is, therefore, in our view, a greater risk of arbitrary use of this power. Whilst we note that guidance will be produced in due course, given how central it will be to the potential lawfulness of these provisions and their application in practice, it is necessary to expedite and formalise this guidance in order to make these provisions compatible with Convention rights.

78. Professor Clive Walker suggests that if the “real mischief” behind these powers is the Salisbury attack, then the purpose “should be confined to powers to stop, question and detain without reasonable suspicion on the basis that the person has information, or is carrying materials or data, which might relate to crimes under the Official Secrets Act, or CBRNE [chemical, biological, radiological, nuclear and explosive] crimes proliferation.”¹⁰⁷

79. Secondly, under Schedule 3 to the Bill, there are broader powers to retain articles and make copies of materials, including ‘confidential material’ (journalistic, legally privileged, human tissue, and commercial material held in confidence)¹⁰⁸ compared to Schedule 7 TA 2000. Under Schedule 7, material cannot be reviewed or copied by officers if they have reasonable grounds to believe the material is confidential.¹⁰⁹ Under Schedule 3, confidential material can be retained and copied, but only with the oversight of the Investigatory Powers Commissioner. We welcome this vital safeguard of independent oversight.¹¹⁰ The Government also points to the fact that the decisions of the Commissioner are subject to judicial review as a further safeguard.¹¹¹ However, we note the comment of the European Court in *Gillan* that although a decision may be subject to judicial review, where the statutory powers are wide applicants can face formidable obstacles in proving decisions are ultra vires.¹¹² We consider that for the safeguard of judicial review to be most effective, the statutory powers must be clearly defined and sufficiently circumscribed.

105 *Beghal v DPP* [2015] UKSC 49, paras 43–45

106 Terrorism Act 2000, [Schedule 7](#) and [s.40\(1\)\(b\)](#)

107 Clive Walker ([CBS0001](#)) p 36

108 [Counter-Terrorism Border and Security Bill](#), Schedule 3, para 12(10) and (11)

109 Para 40, Code of Practice. Confidential material for the purpose of Sch 7 is defined as legally privileged material, excluded material or special procedure material defined in sections 10, 11 and 14 of PACE.

110 This is in line with the Court of Appeal’s finding in *Miranda* that prior judicial or independent oversight is the natural and obvious safeguard against the unlawful exercise of Schedule 7 powers in cases involving journalistic freedom.

111 Home Office, [Memorandum on Counter-Terrorism Border and Security Bill - European Convention on Human Rights](#), June 2018, para 87

112 *Gillan and Quinton v UK*, Application no. 4158/05, para 80

80. *Schedule 3 provides for severe interferences with Article 8, Article 10 and Article 1 Protocol 1 rights yet the powers it gives are dangerously broad. The definition of “hostile act” is extremely wide and there is no threshold test required before a person is detained and examined. Individual officers could simply act on a “hunch”. This is not in itself inadequate, but it is nevertheless troubling given the breadth of the power. The guidance will be crucial and we consider it necessary for this guidance to be published immediately so that Parliament can consider it alongside its scrutiny of the Bill.*

81. *The vital safeguard of access to a lawyer is not adequately protected. In particular, it is not clear that individuals will be informed of their right to request access to a lawyer and yet access to a lawyer is apparently only available on request. Importantly, it would seem that access to a lawyer is not available when a person is initially questioned. There appears to be no justification for this from the Home Office. Access to a lawyer can be delayed by officers; we consider that there are more proportionate measures to mitigate risk than delaying access to a lawyer. We are also concerned at the lack of confidential access to a lawyer. Schedule 3 powers unjustifiably interfere with the right to timely and confidential legal advice, and therefore ultimately interfere with the right to a fair trial (if prosecutions are eventually brought). These provisions do not comply with the requirement that the law must contain sufficient safeguards to ensure that powers will not be exercised arbitrarily.*

82. *We recommend that serious consideration is given to circumscribing these powers by (1) clearly defining “hostile activity”; (2) requiring a threshold test of reasonable suspicion; (3) explicitly providing that the power must only be exercised where necessary and proportionate. Specifically, we recommend that the safeguards are strengthened, providing the right to access a lawyer immediately and in private.*

Conclusions and recommendations

Clause 1: Expressions of support for a proscribed organisation

1. *There is a careful balance to be struck to ensure that valid freedom of expression is not unintentionally caught by new offences. In that regard it is important to recall that even speech that offends, shocks or disturbs, is still protected. The clause as currently drafted potentially catches a vast spectrum of conduct. An offence must be clearly defined in law and formulated with sufficient precision to enable a citizen to foresee the consequences which a given course of conduct may entail. It is unclear as to what type of expression would or would not be caught by this offence, thus falling foul of the requirements of natural justice requiring clarity in the law and also throwing into question whether this interference with freedom of expression can be said to be “prescribed by law” with sufficient clarity. Moreover, there is a very clear risk that this provision would catch speech that is neither necessary nor proportionate to criminalise - such as valid debates about proscription and de-proscription of organisations. For these reasons, we consider that this clause violates Article 10 of the ECHR. We therefore recommend that clause 1, at a minimum, is amended to clarify what expressions of support would or would not be caught by this offence and to ensure that the offence does not risk criminalising unintended debates that it would not be proportionate or necessary to curtail. (Paragraph 18)*

Clause 2: Publication of images

2. *In our view, to criminalise the publication of an article which may be worn or displayed in a private place risks catching a vast amount of activity and risks being disproportionate, particularly given the lack of incitement to criminality in the mens rea of this offence. It risks a huge swathe of publications being caught, including historical images and journalistic articles, which should clearly not be the object of this clause. In our view, given the lack of clarity as to what would be caught by this offence and the potentially very wide reach of clause 2, it risks a disproportionate interference with Article 10. We recommend that clause 2 be removed from the Bill or, at a minimum, amended to safeguard legitimate publications and to give greater clarity as to what acts are, and are not, criminalised. (Paragraph 26)*

Clause 3: Obtaining or viewing material over the internet

3. *We recommend that those scrutinising the Bill give Clause 3 particular consideration. This clause may capture academic and journalistic research as well as those with inquisitive or even foolish minds. The viewing of material without any associated intentional or reckless harm is, in our view, an unjustified interference with the right to receive information protected by Article 10. We think that, unless amended, this implementation of this clause would clearly risk breaching Article 10 of the ECHR and unjustly criminalising the conduct of those with no links to terrorism. We recommend that, at the very least, consideration is given to narrowing the offence to ensure that it only captures those viewing this material with terrorist intent and that the defence of reasonable excuse is clarified as to what constitutes legitimate activity and that this is set out on the face of the Bill. (Paragraph 33)*

Clause 5: Extra-territorial jurisdiction

4. *We make no comment as to whether extraterritorial jurisdiction should apply to offences where the action would also be an offence in the country where the action (or the majority of the actions) took place. However, we are concerned that the extension of extraterritorial jurisdiction to offences, such as support for a proscribed organisation, is problematic in situations where there is not an equivalent offence in the country concerned. This would offend the principles of natural justice and sufficient foreseeability of the effect of one's actions. It would mean a foreign national, with few links to the UK, could be prosecuted in the UK if he/she attended a protest or waved a flag overseas, in support of an organisation that is lawful within that overseas jurisdiction, if that individual then travels to the UK. We recommend that further consideration is given as to whether it is justified to bring domestic prosecutions against those who have no (or very few) links to the UK at the relevant time for conduct overseas that was perfectly lawful in the jurisdiction where it occurred. (Paragraph 39)*

Clauses 6–10: Sentencing provisions

5. *In our view, the increase in sentences does not appear to be supported by evidence to suggest why it is justified or proportionate. We recommend that the Home Office provide further evidence (if they have such evidence) as to why they consider the current maximum sentences to be insufficient and how this increase is necessary and proportionate. We are particularly concerned that a sentence of 15 years could be imposed for a precursor offence of viewing terrorist material online three times or more. This would put viewing material online (without intent to cause harm) on the same level of culpability as possession of an article (e.g. materials for bomb-making) for terrorist purposes. As such, we recommend that clause 6(2) be deleted. (Paragraph 45)*

Clause 11: Additional notification requirements

6. *Some of the notification and registration requirements last for 30 years, without the possibility of a review, unlike the sex offenders' register which has a review at the 15-year mark. Given the case law of the European Court of Human Rights, as well as domestic UK case law, we are concerned that the revisions to the current system are likely to be considered a disproportionate and unjustified interference with Article 8 rights due to the lack of any possibility of review for those on the register for exceptionally lengthy periods of time. In light of the increased level of intrusion into private life and the lengthy period of time for which notification requirements are imposed in some cases, we recommend the introduction of stronger safeguards. In particular, we consider that there should be the possibility of review of the necessity of the notification and registration requirements and that each individual subject to these requirements should have the right to make representations at that review. (Paragraph 49)*

Clause 12: Power to enter and search home

7. *The power to enter and search a person's home is a severe intrusion with the right to private life. We do not consider this should be exercised simply for the purpose of a risk assessment. We recommend that this power be subject to a threshold test which*

requires a reasonable belief that the individual is in breach of his/her notification requirements and that the purpose of the entry and search is to establish that belief. Any exercise of this power must be done only when there is no less intrusive option available and with due regard for the private life of any other persons affected by the intrusion. (Paragraph 51)

Clause 14: Anti-Terrorism Traffic Regulation Orders

8. *We recommend that in giving effect to the proposed traffic measures and in the associated decision-making involved, the public authorities involved continue to act in line with their obligations with regard to security and counter-terrorism matters and that there is not any unhelpful blurring of private and public roles in this regard, such that could risk undermining the State's positive obligations under Article 2 ECHR. (Paragraph 54)*

Clause 17: Retention of biometric data for counter-terrorism purposes etc

9. *We recognise the logic in harmonising retention periods for biometric data so that cases are treated in the same way irrespective of whether the individual is arrested under PACE or the TA 2000. However, we consider that oversight of the Biometric Commissioner gives the public greater comfort that such powers, and interferences with an individual's right to private life, are being used reasonably and proportionately. Moreover, we have seen no arguments suggesting that the oversight by the Biometric Commissioner in any way impedes the ability of the police to undertake vital counter-terrorism work. We would therefore have thought it sensible to harmonise the two powers such as to retain necessary oversight of the Biometric Commissioner in a manner that enables the police to undertake their work. We are concerned that the proposed amendment in the Bill allows for the retention of biometric data of individuals who have neither been charged nor convicted, for three years without any independent oversight. We recommend that the Home Office provide a compelling justification for the removal of the Biometric Commissioner's oversight. Failing that, we recommend an amendment such that the two powers are harmonised so as to provide oversight by the Biometric Commissioner whatever power of arrest is used. (Paragraph 59)*
10. *The retention of data for the purpose of national security is a legitimate aim. However, in our view, the justifications given for extending the retention period from two to five years without clear notification and review options are not sufficient. We suggest further scrutiny is required as to whether the extended retention period, without the possibility of review, is necessary to "support terrorism investigations and assist in identifying persons of threat" and, if so, whether five years is a proportionate period of time to retain the biometric data of persons who have never been convicted of a crime, particularly in the absence of any possibility of review. Alternatively, we recommend including a notification and review clause which we consider would remedy proportionality concerns with this extended power. (Paragraph 63)*

Prevent programme

11. *We are concerned that the Prevent programme is being developed without first conducting an independent review of how the programme is currently operating. We are also concerned that any additional responsibility placed on local authorities must be accompanied by adequate training and resources to ensure that the authorities are equipped to identify individuals vulnerable to being drawn into terrorism. We reiterate our recommendation that the Prevent programme must be subject to independent review. (Paragraph 69)*

Schedule 3: Border security

12. *Schedule 3 provides for severe interferences with Article 8, Article 10 and Article 1 Protocol 1 rights yet the powers it gives are dangerously broad. The definition of “hostile act” is extremely wide and there is no threshold test required before a person is detained and examined. Individual officers could simply act on a “hunch”. This is not in itself inadequate, but it is nevertheless troubling given the breadth of the power. The guidance will be crucial and we consider it necessary for this guidance to be published immediately so that Parliament can consider it alongside its scrutiny of the Bill. (Paragraph 80)*
13. *The vital safeguard of access to a lawyer is not adequately protected. In particular, it is not clear that individuals will be informed of their right to request access to a lawyer and yet access to a lawyer is apparently only available on request. Importantly, it would seem that access to a lawyer is not available when a person is initially questioned. There appears to be no justification for this from the Home Office. Access to a lawyer can be delayed by officers; we consider that there are more proportionate measures to mitigate risk than delaying access to a lawyer. We are also concerned at the lack of confidential access to a lawyer. Schedule 3 powers unjustifiably interfere with the right to timely and confidential legal advice, and therefore ultimately interfere with the right to a fair trial (if prosecutions are eventually brought). These provisions do not comply with the requirement that the law must contain sufficient safeguards to ensure that powers will not be exercised arbitrarily. (Paragraph 81)*
14. *We recommend that serious consideration is given to circumscribing these powers by (1) clearly defining “hostile activity”; (2) requiring a threshold test of reasonable suspicion; (3) explicitly providing that the power must only be exercised where necessary and proportionate. Specifically, we recommend that the safeguards are strengthened, providing the right to access a lawyer immediately and in private. (Paragraph 82)*

Declaration of Lords' Interests¹

Baroness Hamwee

No relevant interests to declare

Baroness Lawrence of Clarendon

No relevant interests to declare

Baroness Nicholson of Winterbourne

No relevant interests to declare

Baroness Prosser

No relevant interests to declare

Lord Trimble

No relevant interests to declare

Lord Woolf

No relevant interests to declare

¹ A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mpslords-and-offices/standards-and-interests/register-of-lords-interests/>

Formal minutes

Wednesday 4 July 2018

Members present:

Baroness Hamwee, in the Chair

Ms Karen Buck MP	Baroness Lawrence of Clarendon
Joanna Cherry QC MP	Baroness Nicholson
Jeremy Lefroy MP	Lord Trimble

Draft Report (*Legislative Scrutiny: Counter-Terrorism and Border Security Bill*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 82 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Ninth Report of the Committee.

Ordered, That Karen Buck MP make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the report be made available, in accordance with the provisions of Standing Order no. 134.

[Adjourned till Wednesday 11 July 2018 at 3.00 pm]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 20 June 2018

Max Hill QC, Independent Reviewer of Terrorism Legislation, **Corey Stoughton**, Advocacy Director, Liberty.

[Q1-16](#)

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

CBS numbers are generated by the evidence processing system and so may not be complete.

- 1 ARTICLE 19 ([CBS0003](#))
- 2 Bridge Institute for Research and Policy ([CBS0008](#))
- 3 CAGE Advocacy UK Ltd ([CBS0010](#))
- 4 Dr Charlotte Heath-Kelly ([CBS0011](#))
- 5 Liberty ([CBS0009](#))
- 6 Mr Adam Banks ([CBS0004](#))
- 7 Muslim Council of Britain ([CBS0014](#))
- 8 Muslim Engagement and Development (MEND) ([CBS0006](#))
- 9 National Union of Students ([CBS0007](#))
- 10 Prevent digest ([CBS0002](#))
- 11 Prevent Watch ([CBS0015](#))
- 12 Professor Emeritus Clive Walker ([CBS0001](#))
- 13 Reporters Without Borders ([CBS0005](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis	HC 774 HL Paper 70
Second Report	Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 645 HL Paper 86
Third Report	Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill	HC 568 HL 87
Fourth Report	Freedom of Speech in Universities	HC 589 HL 111
Fifth Report	Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018	HC 926 HL 146
Sixth Report	Windrush generation detention	HC 1034 HL 160
Seventh Report	The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards	HC 890 HL 161
First Special Report	Human Rights and Business 2017: Promoting responsibility and ensuring accountability: Government Response to the Committee's Sixth Report of Session 2016–17	HC 686
Second Special Report	Mental Health and Deaths in Prison: Interim Report: Government Response to the Committee's Seventh Report of Session 2016–17	HC 753