

COUNTER-TERRORISM AND BORDER SECURITY BILL

EXPLANATORY NOTES ON LORDS AMENDMENTS

What these notes do

- 1 These Explanatory Notes relate to the Lords Amendments to the Counter-Terrorism and Border Security Bill as brought from the House of Lords on 15 January 2019 (Bill 317).
- 2 These Explanatory Notes have been prepared by the Home Office in order to assist the reader of the Bill and the Lords amendments, and to help inform debate on the Lords amendments. They do not form part of the Bill and have not been endorsed by Parliament.
- 3 These Explanatory Notes, like the Lords amendments themselves, refer to HL Bill 131, the Bill as first printed for the Lords.
- 4 These Explanatory Notes need to be read in conjunction with the Lords amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the Lords amendments.
- 5 Most Lords Amendments were tabled in the name of the Lords Minister, Baroness Williams of Trafford.
- 6 Lords Amendment 3 was tabled by Lord Rosser and was initially opposed but subsequently agreed to by the Government. Lords amendment 13 was tabled by Lord Kennedy of Southwark and was opposed by the Government.
- 7 In the following Commentary, an asterisk (*) appears in the heading of any paragraph that deals with a non-Government amendment.

Commentary on Lords amendments

Part 1: Counter-Terrorism

Lords Amendment to clause 3: Obtaining or viewing material over the internet

Lords Amendment 1

- 8 Under section 58 of the Terrorism Act 2000 ("the 2000 Act") it is an offence to collect or make a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism or to possess a document or record containing such information. Clause 3 amends section 58 to make it an offence to view or otherwise access by means of the internet a document or record containing such information. The existing and new offence has a

reasonable excuse defence. **Lords amendment 1** would supplement the reasonable excuse defence by expanding the indicative list of reasonable excuses to cover circumstances where a person's act of viewing or accessing terrorist material or possession of such material was for the purposes of carrying out work as a journalist or academic research.

Lords Amendments to clause 4: Entering or remaining in a designated area

Lords amendments 2 to 8

- 9 Clause 4 provides for a new offence of entering or remaining in a designated area overseas. The offence does not apply to Crown servants or persons acting on behalf of the Crown; there is also a reasonable excuse defence.
- 10 ***Lords amendment 3** would provide that a person would not commit the offence if they enter, or remain in, a designated area involuntarily, or they enter, or remain in, a designated area for one or more specified purposes, including providing aid of a humanitarian nature, carrying out work for the government of a country other than the UK, carrying out work for the United Nations or a UN agency, carrying out work as a journalist, attending a funeral of a relative and visiting a relative who is terminally ill or providing care for a relative who is unable to care for themselves without such assistance. The amendment also includes a definition of what is meant by "terminally ill". The amendment would enable this exhaustive list of exclusions from the offence to be amended by regulations made by the Secretary of State. **Lords amendment 4** would provide for a definition of a "relative".
- 11 Clause 4 already imposes a general duty on the Home Secretary to keep a designation under review. **Lords amendment 5** would augment this requirement by introducing a backstop sunset provision such that a designation would lapse after three years, but without prejudice to re-designating the same area.
- 12 **Lords amendment 6** would provide for the new regulation-making power to be subject to the draft affirmative procedure.
- 13 **Lords amendment 7** would place a duty on the Secretary of State, when designating an area by regulations, to lay before Parliament a statement setting out the reasons why the Secretary of State considers that the condition for designation is met in relation to that area.
- 14 **Lords amendment 8** would provide that regulations removing a designation are subject to the negative procedure; clause 4 as brought forward from the House of Commons provided that such regulations were not subject to any parliamentary procedure.

Lords Amendments to clause 6: Extra-territorial jurisdiction

Lords amendments 9 to 11

- 15 Clause 6 of the Bill extends extra-territorial jurisdiction to a number of further terrorist offences (including that in section 13 of the 2000 Act (wearing a uniform etc associated with a proscribed organisation)) to allow for the prosecution in the UK of individuals who commit certain terrorist offences overseas. **Lords amendments 9 and 10** would extend extra-territorial jurisdiction to two further proscription-related offences, namely those in section 12(1) and

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(1A) (inviting or expressing support for proscribed organisations) of the 2000 Act.

- 16 **Lords amendment 11** would limit extra-territorial jurisdiction in respect of the section 12 and 13 offences to UK nationals and residents.

New clause: Persons detained under port and border control powers

Lords amendments 12 and 15

- 17 **Lords amendment 12** would insert new clause "Persons detained under port and border control powers" which would make like changes provided for in **Lords amendments 33 to 40** (see paragraphs 32 and 33 below) to the equivalent provisions in Schedule 8 to the 2000 Act (which, amongst other things, relates to the detention of persons subject to an examination under Schedule 7 to that Act for the purpose of determining whether they are, or have been, concerned with the commission, preparation or instigation of acts of terrorism). **Lords amendment 15** would make a consequential amendment to clause 26 to provide for the new clause to be brought into force by regulations.

***Lords Amendment to clause 19: Persons vulnerable to being drawn into terrorism**

***Lords amendment 13**

- 18 **Lords amendment 13** would place a duty on the Secretary of State (in practice, the Home Secretary) to establish, within six months of Royal Assent, an independent review of "the Government strategy for supporting people vulnerable to being drawn into terrorism" (known as "Prevent"). The Home Secretary would then be required to lay before Parliament a report of the review and the Government's response within 18 months of Royal Assent.

Lords Amendment to Schedule 1: Notification requirements: financial information and information about identification documents

Lords amendment 16

- 19 Part 4 of the Counter-Terrorism Act 2008 ("the 2008 Act") makes provision about the notification of information to the police by certain terrorist offenders. Clause 12 of, and Schedule 1 to, the Bill adds to the categories of information that relevant terrorist offenders must notify to the police, including details of any bank accounts (or equivalent) held by the offender. **Lords amendment 16** would extend the new notification requirements to cover bank accounts which the offender is entitled to operate, in addition to those held in the offender's name.

Part 2: Border Security

Lords Amendment to clause 21: Port and border controls

Lords amendment 14

- 20 Clause 21 of the Bill introduces Schedule 3 to the Bill which confers powers exercisable at ports in the United Kingdom and in the border area in Northern Ireland to counter hostile state activity. **Lords amendment 14** would amend clause 21 to ensure that it accurately reflects the provisions of the Schedule.

Lords Amendments to Schedule 3 and Schedule 4: Hostile state activity ports powers

Lords amendments 17 to 42

- 21 Schedule 3 provides for the power to stop, question, search and detain an individual at a port or in the Northern Ireland border area to determine if they are, or have been, involved in hostile activity.
- 22 A person is or has been engaged in hostile activity for the purposes of Schedule 3 if the person is or has been concerned in the commission, preparation or instigation of a hostile act that is or may be carried out for, or on behalf of, a state other than the UK, or otherwise in the interests of a State other than the UK. A "hostile act" is defined as an act that threatens national security, threatens the economic well-being of the UK, or is an act of serious crime. **Lords amendment 17** would amend the "economic well-being" limb of this definition such that an act qualifies if it threatens "the economic well-being of the United Kingdom in a way that is relevant to the interests of national security". **Lords amendments 19, 26, 28 and 29** are consequential on this amendment.
- 23 Schedule 3 as brought forward from the House of Commons allows an examining officer to retain, examine, copy and potentially destroy a person's property (including confidential material – that is, confidential journalistic or legally privileged material), where it could be used in connection with a hostile act or to prevent death or significant injury.
- 24 Once a person's property has been retained under these powers, no further action can be taken without the authorisation of the Investigatory Powers Commissioner ("the Commissioner"). The retention process requires the Commissioner to consider representations made by an "affected party", namely the owner of the article, the police and the Home Secretary, before coming to a decision.
- 25 **Lords amendments 20 and 21** would provide that the Commissioner may specify the timeframes for receiving such representations.
- 26 **Lords amendments 22 and 23** would refine the definition of an "affected party" in paragraph 13(3) of Schedule 3. The Bill as brought forward from the House of Commons specified that representations to the Commissioner by the police, in relation to a person's property that has been retained under the retention powers, should be made by the chief officer of the police force to which the examining officer belongs. These amendments would allow for the possibility of a chief officer from a different force to make those representations. This is because the force to which the examining officer belongs would not always be the

investigating force and so would not necessarily be best placed to make representations regarding the decision to retain the property.

- 27 **Lords amendment 24** would clarify that the requirement to invite representations from a person whose property has been retained applies only so far as it is reasonably practicable to do so. This is to allow for a situation where it is not possible to get in contact with the person because they provided false contact details.
- 28 The process for securing authorisation for the retention and use of an examinee's property could take approximately four weeks or longer (see paragraphs 66 to 74 of the draft Schedule 3 code of practice). In the Government's view, these timeframes would not be acceptable in the most urgent of situations where retention and use of a person's property may be needed to prevent death or significant injury or a hostile act.
- 29 **Lords amendment 25** would therefore introduce an expedited process to retain and examine property seized under Schedule 3 where there is an immediate risk of death or significant injury or of a hostile act being carried out. It would allow the examining officer, with the approval of a senior officer not below the rank of superintendent, to examine the property (as well as take copies of information from it, including confidential material) before a decision has been made by the Commissioner. This mechanism would require authorisation to be given or withheld by the Commissioner (or a judicial commissioner) after the event (and where the Commissioner withholds authorisation, he or she would have the power to direct that the article be returned, and information taken from it, including copies, not used and destroyed). As with the existing process provided for in the Bill as brought forward from the Commons, the decision of the Commissioner will be taken after consideration of any representations made by affected parties and there will also be an opportunity to appeal that decision where it has been delegated to a judicial commissioner. **Lords amendment 18** is consequential on Lords amendment 25.
- 30 Schedule 3 provides a similar process for the retention of copies that consist of or include confidential material, where the examining officer believes it necessary to retain the copy in the interests of national security or the economic well-being of the UK; or to prevent or detect an act of serious crime; or to prevent death or significant injury.
- 31 **Lords amendments 31 and 32** would make two substantive changes. First, they would provide for an urgent process for the retention and use of copies that consist of or include confidential material. This would mirror the process described above in relation to a person's property. Second, they would ensure that the non-urgent process for retention of copies works in the same way as the non-urgent retention process for a person's property, including by enabling affected parties to make representations to the Commissioner. **Lords amendments 27 and 30** are consequential on these amendments.
- 32 **Lords amendments 33, 34, and 38** would write onto the face of Schedule 3 provision currently contained in the draft code of practice to the effect that a detainee must be informed of their rights when first detained.
- 33 Persons detained under the hostile activity ports powers have the right to consult a solicitor. Ordinarily, such consultations would take place in private. But, in exceptional circumstances, the Bill as brought forward from the House of Commons would enable a senior officer to direct that the detainee under Schedule 3 has to consult their solicitor in the sight and hearing of another officer. **Lords amendment 35 and 39** would replace these provisions with one whereby a senior officer can, in certain exceptional circumstances, require the detainee to consult a different solicitor of the detainee's choosing (in practice, this is likely to be the duty

solicitor). **Lords amendments 36, 37 and 40** are consequential on these amendments.

- 34 Paragraph 53 of Schedule 3 includes provision enabling an examining officer to share information acquired during an examination with particular specified persons, including the Secretary of State and a constable. The Bill contains a power to add to the list of specified persons by regulations (this is modelled on an identical power in Schedule 14 to the 2000 Act). **Lords amendment 41** would narrow the Schedule 3 regulation-making power so that it can only be used to specify persons carrying out public functions. **Lords amendment 42** would make a like change to the equivalent regulation-making power in Schedule 14 to the 2000 Act.

Financial Effects of Lords Amendments

- 35 **Lords amendments 9 and 10** which extend extra-territorial jurisdiction to further terrorism offences would have financial implications for criminal justice agencies. Based on an indicative range of one to two proceedings per year, this measure would result in a total annual cost to the Criminal Justice System of between approximately £700,000 and £2,200,000.

European Convention on Human Rights implications

Lords amendment 3: Entering or remaining in a designated area

- 36 The "designated area offence" in clause 4 of the Bill prohibits United Kingdom nationals and residents from entering a designated area and therefore gives rise to interferences with such persons' rights under the European Convention on Human Rights ("ECHR"), such as Article 8 (the right to respect for private and family life). The rights that are engaged are "qualified rights": interferences may be justified to the extent that they are "in accordance with the law" and are necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
- 37 It is the Government's view that the clause 4 offence can be justified as giving rise to ECHR rights interferences which are necessary in the interests of national security, public safety and the prevention of disorder and crime. It is also the Government's view that Lords amendment 3, which prescribes the circumstances in which a person would be exempt from the offence (such as where they are in the area to visit a terminally ill relative), together with the regulation-making power to add to the list of exceptions, ensures the offence goes no further than is necessary in restricting ECHR rights, i.e. that the interferences are proportionate to the legitimate ends identified above; and that the list of exceptions is drafted with sufficient precision to ensure the offence is adequately foreseeable so as to be "in accordance with the law".