



House of Commons
House of Lords

Joint Committee on
Human Rights

**Second Legislative
Scrutiny Report:
Counter-Terrorism and
Border Security Bill**

Eleventh Report of Session 2017–19



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*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 July 2018, we published our Legislative Scrutiny report on the Counter-Terrorism and Border Security Bill. We recognised the need for the Government to have strong powers to defend our national security. However, we emphasised that when such powers interfere with human rights, they must be clearly prescribed, necessary in pursuit of a legitimate aim, and proportionate to that aim. We expressed concern that some of the provisions of the Bill, as originally introduced, appeared not to meet these requirements and recommended that various provisions either be removed, clarified or narrowed in order to remedy these defects.

On 4 September 2018, the Home Office sent their response to our report. We are grateful to the Government for giving consideration to our concerns, and in some cases giving fuller explanations of its position. Nonetheless, this legislation proposes significant restrictions on important rights, and we consider that at the very least further probing is necessary so that Parliament can be assured the measures are necessary and proportionate.

We are particularly concerned by the introduction of the new clause establishing a ‘designated area offence’, which criminalises entering or remaining in an area even if this is done without any associated harm or intent to cause harm. Given the introduction of this new offence at Report stage and the consequent limited opportunity for scrutiny in the Commons, we urge the Lords to give particular consideration to the necessity and proportionality of this new clause.

In this brief report, we reiterate our remaining concerns with various provisions of the Bill and put forward a number of amendments which seek to ensure the Bill restricts rights only to the extent that it is necessary and proportionate to do so. In doing so, we hope this will assist the debate in the Lords. We reiterate our concern that this Bill is legislating close to the line on rights compliance by taking the criminal law further into private spaces - and, in our view, is likely to cross that line in places. We urge all those involved in scrutiny to consider carefully whether the Bill strikes the right balance between liberty and security. To that end, we have put forward a range of possible amendments, each striking a different balance.

1 Expressions of support for a proscribed organisation

Clause 1

1. Clause 1 of the Bill amends section 12 of the Terrorism Act 2000 to create an offence of expressing an opinion or belief in support of a proscribed organisation (*actus reus*) with recklessness as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation (*mens rea*).

2. 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. We continue to be concerned that there is a clear risk that this provision would catch speech that it is neither necessary nor proportionate to criminalise, such as valid debates about proscription and de-proscription of organisations.¹

3. In its response to our report, the Government stated that “section 4 of the 2000 Act provides a clear route for any person to apply to the Home Secretary for the de-proscription of any organisation, and section 10 provides clear and unambiguous immunity from prosecution under proscription offences for anything done in relation to such an application, including any statements made in support of the organisation.”² However, this defence only protects statements of support that are related to a deproscription application under section 4 of the Terrorism Act 2000—it does not provide a defence for those engaged in legitimate debate outside such proceedings. This is a limitation on Article 10 rights to hold opinions and receive and impart information and ideas without interference. Article 10 may, of course, be subject to such restrictions “as are prescribed by law and are necessary in a democratic society” for a range of reasons, including in the interests of national security and for the prevention of crime. We consider each House should carefully consider whether this restriction is wider than is necessary for those purposes.

4. The Government did not agree that clause 1 is insufficiently clear as to the lawful boundaries of such a debate, stating that: “it would be extremely difficult to define a valid debate and to distinguish this from a debate that is not valid. Such determinations will always be highly dependent on the facts and circumstances of particular cases, and can only be properly made by a court considering all of those matters in each case.”³

5. We agree that it is difficult to define ‘valid debate’ and for that reason, we consider that this lack of clarity, exacerbated by a low threshold of recklessness, risks a chilling effect on free speech and importantly, risks constituting a disproportionate interference with the right to free speech in our society.

6. We suggest the following amendments:

1 Joint Committee on Human Rights, Ninth Report of Session 2017–19, [Legislative Scrutiny: Counter Terrorism and Border Security Bill](#), HC 1208, HL Paper 167 (hereafter “HC/HL (2017–19) 1208 / 167”), para 18

2 Joint Committee on Human Rights, Third Special Report of Session 2017–19, [Legislative Scrutiny: Counter-Terrorism and Border Security Bill: Government Response to the Committee’s Ninth Report of Session 2017–19](#), HC 1578 (hereafter “HC (2017–19) 1578”), clause 1

3 HC (2017–19) 1578, [clause 1](#)

Amendment 1

To leave out Clause 1 of the Bill

Comment: by deleting this clause, the offence would remain one of ‘invitation to support’ a proscribed organisation rather than ‘expression of support’ for a proscribed organisation, and the defendant would be required to invite support for a proscribed organisation knowingly as opposed to recklessly.

Amendment 2

Page 1, line 10, leave out paragraph (b) and insert–

“(b) in doing so intends to encourage support for a proscribed organisation.”

Comment: this amendment would retain the new criminal offence of expressing support for a proscribed organisation, but it would amend the mens rea of the offence by raising the threshold from recklessness to intention.

Amendment 3

Page 1, line 12, at end insert–

“It is not an offence under subsection (1A) to express an opinion that a proscribed organisation should cease to be proscribed”.

Comment: this amendment would retain the new criminal offence but would specifically exclude statements that a proscribed organisation should be deproscribed.

2 Publication of images

Clause 2

7. Clause 2 amends section 13 of the Terrorism Act 2000 to criminalise the online publication of an image depicting clothing or other articles which arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.

8. In its response to the Committee's report, the Government has stated that it does not believe that legitimate publications will be caught as this offence only 'bites' where the publication arouses reasonable suspicion of membership or support of a proscribed organisation.⁴

9. In our view, the arousal of reasonable suspicion of support for a proscribed organisation is a low threshold to make out an offence.⁵ The Committee remains concerned that this clause risks catching a vast amount of conduct, particularly given the lack of *mens rea*, such as intention or recklessness to cause harm.

10. We suggest the following amendments:

Amendment 4

Page 1, line 15, leave out subsections (2) and (3).

Amendment 5

Page 2, line 6, at end insert -

“A person does not commit an offence under subsection (1A) if there is a reasonable excuse for the publication of that image, such as historical research, academic research or family photographs, and where the publication of that image was not intended to support or further the activities of a proscribed organisation”.

Comment: this option would retain the new offence of “publication of images” in clause 2, but it would create a defence of reasonable excuse so to ensure that the offence did not catch the publication of historical, academic or family images.

4 [HC \(2017–19\) 1578](#)

5 [HC/HL \(2017–19\) 1208/167](#), para 26

3 Viewing material online

Clause 3

11. Clause 3, as originally introduced, amended section 58 of the Terrorism Act 2000 to create an offence of viewing online material of a kind likely to be useful to a person committing or preparing acts of terrorism, where such material is viewed on three or more occasions over an indefinite period of time.

12. We expressed concern that viewing material online without any associated harm was an unjustified interference with the right to receive information. We were particularly concerned that the defence of reasonable excuse did not provide an explicit safeguard for legitimate activity, such as academic and journalistic research, as well as for those who viewed material with inquisitive or foolish minds.⁶

13. In its response the Government concedes that this clause is “imperfect and lacks sufficient clarity”.⁷ However, the Government has since tabled amendments to clause 3 which worsen the problem by removing the requirement for ‘3 clicks’ such that only ‘1 click’ would suffice to make out the offence.⁸ (The amendment also broadens the offence to include not just ‘viewing’ but ‘accessing the material in any way’.⁹)

14. Further, the Government’s amendment seeking to clarify the reasonable excuse defence raises further problems.¹⁰ The Government amendment provides that a reasonable excuse includes (but is not limited to) situations where “the person did not know, and had no reason to believe, that the document or record in question contained or was likely to contain, information of a kind likely to be useful to a person committing or preparing acts of terrorism.”¹¹

15. Whilst we agree that inadvertent viewing or accessing of material must not be criminalised, this amendment does not reassure us that there will be adequate protection for legitimate conduct: persons with inquisitive minds may knowingly view such material without any intent to commit harm.

16. We therefore suggest the following range of amendments:

Amendment 6

To leave out Clause 3 of the Bill.

Amendment 7

Page 2, line 29, at the end insert–

“and the person intends to commit or encourage acts of terrorism.”

6 [HC/HL \(2017–19\) 1208/167](#), para 33

7 [HC \(2017–19\) 1578](#)

8 House of Commons, Notices of Amendments, Thursday 6 September, [Amendment 2](#)

9 House of Commons, Notices of Amendments, Thursday 6 September, [Amendment 3](#)

10 House of Commons, Notices of Amendments, Thursday 6 September, [Amendment 4](#)

11 House of Commons, Notices of Amendments, Thursday 6 September, [Amendment 4](#)

Comment: this amendment would insert a mens rea of intent so that the person viewing the information must intend to act on this information by committing or encouraging acts of terrorism.

Amendment 8

Page 2, line 29, at the end insert–

“and the person has viewed the material in a way which gives rise to a reasonable suspicion that the person is viewing that material with a view to committing a terrorist act”.

Comment: this amendment would require that the viewing of online material gives rise to a reasonable suspicion that the person viewing the material is doing so with a view to acting on this material by committing a terrorist act.

Amendment 9

Page 2, line 41, at end insert–

“(3B) The Secretary of State must issue guidance on what constitutes a reasonable excuse for the purposes of subsection (3)”

Comment: at present, there is no guidance as to what constitutes a ‘reasonable excuse’. This is left as a matter for the jury. This amendment would require the Secretary of State to issue guidance so that it is clear what types of conduct are considered ‘reasonable’, whilst recognising that the categories of reasonable conduct are not exhaustive.

4 Extra-territorial jurisdiction

Clause 6

17. Clause 6 extends extra-territorial jurisdiction over section 13 of the Terrorism Act 2000, which criminalises wearing an item of clothing or wearing, carrying or displaying an article in a public place so as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.

18. We remain concerned that the extension of extraterritorial jurisdiction to certain offences is problematic in situations where there is no equivalent offence in the country concerned.¹²

19. The Government notes that prosecutions must be proportionate and that prosecutorial discretion, and the oversight of the Director of Public Prosecutions or Attorney General (in certain circumstances), provides an effective safeguard.¹³ Whilst such discretion and oversight may mitigate the excessive use of this power, we remain concerned that foreign nationals with no (or few) links to the UK could be prosecuted for conduct that was perfectly lawful at the time and in the place it occurred.

20. We suggest the following range of amendments:

Amendment 10

Page 5, leave out lines leave out subsection (3)

Comment: this amendment deletes the extension of extra-territorial jurisdiction to section 13 of the Terrorism Act 2000.

Amendment 11

Page 5, line 23, at end insert

(5) After paragraph (3) insert -

“(4) Save that an offence is only committed under paragraph (ca) of subsection (2) where:

(a) the relevant acts were an offence in the country where the acts took place; or

(b) the individual

(i) is a British national; or

(ii) has been present in the United Kingdom for a continuous period of at least six months in the last ten years.”

Comment: this amendment extends extra-territorial jurisdiction but only where the relevant conduct is criminal in the country concerned or there are sufficient links to the UK.

12 [HC/HL \(2017–19\) 1208/167](#), para 30

13 [HC \(2017–19\) 1578](#)

5 Sentencing

Clause 7

21. The sentencing provisions in the Bill increase the maximum sentences for four terrorist offences:

- Collection of information of a kind likely to be useful to a person committing or preparing an act of terrorism;
- Eliciting, publishing or communicating information about members of armed forces of a kind likely to be useful to a person engaged in terrorism;
- Encouragement of terrorism; and
- Dissemination of terrorist publications.¹⁴

22. We were concerned that the increase in sentences did not appear to be supported by evidence to suggest why it is justified or proportionate. We are particularly concerned that a sentence of 15 years could be imposed for an offence of viewing terrorist material online. We were concerned about this even before the recent amendments that would make a single viewing sufficient to make out the offence - circumstances which further increase these concerns.¹⁵ We recommended that the Home Office provide further evidence as to why they consider the current maximum sentences to be insufficient and how this increase is necessary and proportionate.

23. The Government response states that they “have seen an increase in low-sophistication terrorist plots which are inspired rather than directed, and in attack operatives who are self-radicalised and self-trained without necessarily having had significant direct contact with terrorist organisations. The division between preliminary terrorist activity and attack planning is increasingly blurred.”¹⁶ This does not explain why existing sentencing powers are inadequate.

24. We suggest the following amendment:

Amendment 12

Page 5, line 31, leave out subsection (3)

Comment: this amendment deletes the increase in the maximum sentence from 10 years to 15 years for the ‘collection of information’ offence provided for in section 58 Terrorism Act 2000.

14 For full details of the offences see [HC/HL \(2017–19\) 1208/167](#), para 41.

15 [HC/HL \(2017–19\) 1208/167](#), para 45

16 [HC \(2017–19\) 1578](#)

6 Notification requirements

Clause 12

25. Clause 12 of the Bill introduces an enhanced notification regime for persons convicted of certain terrorism offences receiving a sentence of 12 months or more (registered terrorist offenders, or RTOs). These notification requirements can apply for between 10 and 30 years.

26. In light of the increased level of intrusion into private life, we recommended a periodic review of the necessity of the notification requirements.¹⁷ The Government does not agree that a review mechanism equivalent is necessary to ensure proportionality, or compatibility with Article 8 of the ECHR, as the notification requirements are not indefinite.¹⁸ Mindful of the European Court’s case law, we remain concerned that even though the notification requirements are not indefinite, 30 years is a significant period of time to be subject to intrusions into one’s private life.

27. We suggest the following amendment:

Amendment 13

Page 14, line 36, at end insert–

“After section 53 (period for which notification requirements apply), insert

53A Review of the necessity and proportionality of notification

- (1) A person to whom the notification requirements apply may apply to the chief officer of police for the area in which that person resides, for a determination that the person should no longer continue to be subject to the notification requirements (“an application for review”).
- (2) An application for review may be made after a person has been subject to notification requirements for a period of 5 years and every 5 years thereafter, following a determination of the review.
- (3) The chief officer of police to whom such an application for review is made shall review the necessity and proportionality of the notification requirements and shall make a decision as to whether that person should continue to be subject to the notification requirements.
- (4) Where a determination has been made under subsection (3) that the person should no longer continue to be subject to the notification requirements, then that person is no longer subject to the notification requirements.

Where a determination has been made under subsection (3) that the person should continue to be subject to the notification requirements, the applicant has a full right of appeal to the Special Immigration Appeals Commission within 21 days of the date of decision”

17 [HC/HL \(2017–19\) 1208/167](#), para 49

18 [HC \(2017–19\) 1578](#)

Comment: this amendment introduces the right to apply for a review of the necessity and proportionality of notification requirements. If an application to that a person should no longer be subject to notification requirements is denied, this amendment provides a right of appeal against this decision to the Special Immigration Appeals Commission, which is used to dealing with closed material. There will of course need to be consequential amendments to widen the SIAC's remit.

7 Power to enter and search

Clause 13

28. Clause 13 currently provides for a power to enter and search the homes of persons on the registered terrorist offenders list for the purpose of assessing the risk posed by the person. We expressed concern that the power to enter and search a person's home is a severe intrusion with the right to private life and should not be exercised merely for the purpose of a 'risk assessment'.¹⁹

29. In its response, the Government states that the power may only be exercised as a last resort and requires a warrant and compliance with the Powers of Entry Code of Practice.²⁰ Whilst these are important safeguards, nevertheless, the threshold for exercising the power remains low. We also note that the Government response states that this power is to allow the police "to assure themselves that the person does in fact reside at the address they have notified, and to monitor compliance with other aspects of the notification regime."²¹ We see no reason why the Bill should not reflect this, rather than containing the vaguer requirement of "assessing risks".

30. While we note that the Bill stipulates that a warrant will only be given if a constable has previously failed to obtain entry to the premises on two or more occasions, we consider there should be a clearer requirement that the power be used when it is necessary and proportionate to do so, and there are grounds for suspicion that requirements have been breached.

31. We suggest the following amendments:

Amendment 14

Page 15, line 16 to 17, leave out "the risks posed by the person to whom the warrant relates" and insert "whether the person to whom the warrant relates is in breach of his or her notification requirements."

Amendment 15

Page 15, line 25, at end insert–

"that there are reasonable grounds to believe that the person to whom the warrant relates is in breach of his or her notification requirements,"

Amendment 16

Page 15, line 26, after "necessary" insert "and proportionate"

Comment: these amendments narrow the power in clause 12 by requiring a reasonable belief that the registered person has breached his or her notification requirements and ensures that the exercise of this power must be both necessary and proportionate.

19 [HC/HL \(2017–19\) 1208/167](#), para 51

20 [HC \(2017–19\) 1578](#)

21 [HC \(2017–19\) 1578](#)

8 Retention of biometric data

Clause 18 and Schedule 2

32. Clause 18 and Schedule 2 amend existing powers to retain fingerprints and DNA samples for counter-terrorism purposes. Currently under the Police and Criminal Evidence Act 1984, a person who is arrested but not charged or convicted of a terrorist offence may have his or her data retained for three years for national security purposes with the consent of the Biometrics Commissioner. The Bill removes the requirement for consent of the Biometrics Commissioner.

33. The oversight of the Biometric Commissioner gives the public greater comfort that such powers are only used where necessary and proportionate. We have seen no evidence to suggest that the oversight by the Biometric Commissioner in any way impedes the ability of the police to undertake vital counterterrorism work.²²

34. The Government's response states that they "do not agree that... it would be appropriate or responsible to reduce the powers available to the police" and that they are "not prepared to remove the three-year retention period currently provided following an arrest under the 2000 Act."²³

35. We had not recommended the removal of the three-year retention period. On the contrary, we recognised the logic in harmonising retention periods for biometric data so that cases are treated in the same way irrespective of whether an individual is arrested under PACE 1984 or the Terrorism Act 2000.²⁴ However, we expressed concern that in doing so the Government was removing the requirement of consent of the Biometrics Commissioner for retention of the data of individuals who had neither been charged nor convicted. The Government has not addressed this point in their response.

36. In the absence of any justification, we suggest the following amendment:

Amendment 17

Page 29, line 5, leave out paragraph 2

Comment: this deletes the amendment to section 63F PACE.

37. Schedule 2 also amends the time period for national security determinations (NSD). An NSD allows a chief police officer to determine that it is necessary and proportionate to extend the retention period for biometric data, for the purpose of national security, for an extra two years where it would otherwise be destroyed. This allows the police to keep such information for as long as they could possibly need (with rolling determinations if necessary), but requires a review every two years for a fresh determination. Section 63M of PACE currently allows for renewable national security determinations (NSD) every two years - the Bill changes this to 5 years.

22 [HC/HL \(2017-19\) 1208/167](#), para 59

23 [HC \(2017-19\) 1578](#), clause 17

24 [HC/HL \(2017-19\) 1208/167](#), para 59

38. We recognise that retention of data for the purpose of national security is a legitimate aim, but we questioned 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.²⁵

39. In its response, the Government stated that “operational experience has shown that the current two-year length is too short in many cases, and that those of national security concern - such that it is necessary and proportionate for the police to retain their biometric data - will often pose a more enduring threat than this.”²⁶

40. We recognise that persons of national security concern may pose a threat for longer than two years. However, the police already have the power to renew national security determinations on an indefinite basis. We are concerned that five years is too long without any right of review.

41. We suggest the following amendments:

Amendment 18

Page 29, line 29, leave out paragraph (4).

Page 32, line 3, leave out paragraph (4).

Page 33, line 4, leave out paragraph (4).

Page 34, line 33, leave out paragraph (4).

Page 36, line 4, leave out paragraph (4).

Page 37, line 28, leave out paragraph 19.

Comment: this group of amendments removes the proposed extension of national security determinations for the retention of biometric material to 5 years.

25 [HC/HL \(2017–19\) 1208/167](#), para 63

26 [HC \(2017–19\) 1578](#)

9 Prevent

Clause 19

42. Clause 19 gives local authorities the power to refer individuals who are regarded as being vulnerable to being drawn into terrorism to the Prevent programme.

43. The Government states that this change does not mark an expansion of the scope of Prevent, but a sensible measure to streamline the process by which vulnerable individuals can be referred to ensure that they receive promptly the support they need to turn away from terrorism.²⁷

44. Irrespective of whether this is an expansion or a streamlining measure, we remain concerned that the Prevent programme is being developed without first conducting an independent review of how the programme is currently operating. We reiterate our recommendation that the Prevent programme must be subject to independent review.²⁸

45. We suggest the following amendment:

Amendment 19

Page 21, line 25, at end insert–

“After section 40 (Indemnification), insert–

‘40A Independent review of preventing people being drawn into terrorism and support for those vulnerable to being drawn into terrorism

- (1) The Secretary of State must make arrangements for an independent review of the Government’s Prevent strategy for preventing people from being drawn into terrorism and for supporting those vulnerable to being drawn into terrorism within 6 months of this provision entering into force.
- (2) The Secretary of State must report on the findings of the review. This report must be laid before Parliament within 18 months of this provision entering into force.’

Comment: this amendment inserts a new provision into the Counter Terrorism and Security Act 2015 requiring the Secretary of State to carry out an independent review of the Prevent strategy and to report findings to Parliament.

27 [HC \(2017–19\) 1578](#)

28 [HC/HL \(2017–19\) 1208/167](#), para 69

10 Stop and search powers at ports and borders

Schedule 3

46. Schedule 3 introduces new stop and search powers for examining officers at ports and borders. These powers can be exercised for the purpose of determining whether an individual is involved in the commission of a ‘hostile act’ without any need for suspicion. ‘Hostile act’ is defined broadly as (a) threats to national security, (b) threats to the economic well-being of the UK, or (c) acts of serious crime, which are carried out for or on behalf of another State or in the interests of another State.²⁹

47. We expressed concern that Schedule 3 provides for interference with the rights to private life, freedom of expression, and property, yet the powers it gives are dangerously broad. In particular, the definition of ‘hostile act’ is extremely wide and there is no threshold test of suspicion required before a person is detained and examined.³⁰

48. In its response, the Government acknowledges that the definition of hostile activity is broad but states that “it is required to encompass the spectrum of threats currently posed to the UK by hostile states, which includes espionage, subversion and assassination”.³¹

49. We would be grateful for more clarity of the Government’s position on the necessity of this ‘no suspicion’ power. On the one hand the Government states that “[t]he no suspicion element is, furthermore, an operational necessity since were the power contingent on a prior reasonable suspicion of hostile activity, that would risk making it obvious to, for example, foreign intelligence agents that the UK’s security services were aware of their activity.”³² The Government response also states that “[i]ntroducing a reasonable suspicion test for the exercise of the powers under Schedule 3 would fundamentally undermine the capability of the police to determine whether that person appears to be or has been involved in hostile activity.” However, the Government also states that decisions to stop an individual will not be arbitrary and “will be informed by considerations such as the current threat to the UK posed by hostile states, available intelligence, and trends of patterns of travel of those suspected of being involved in hostile activity”.³³

50. If decisions to stop and search individuals will in fact be informed (and known to be informed) by intelligence and the travel patterns of those “suspected” of being involved in hostile activity, then the arguments for a “no suspicion” power are weakened. We consider that the circumstances described by Government would amount to factors giving rise to a reasonable suspicion. It is only in situations where entirely random stops and searches are carried out that the ‘no suspicion’ power is needed. We suggest amendments to allow the House of Lords to probe this power in more detail.

29 [Counter-Terrorism and Border Security Bill](#) [Lords], Schedule 3, [Bill 131 (2017–19)]

30 [HC/HL \(2017–19\) 1208/167](#), para 80

31 [HC \(2017–19\) 1578](#)

32 Counter-Terrorism and Border Security Bill, European Convention on Human Rights, Memorandum by the Home Office, [para 75](#)

33 [HC \(2017–19\) 1578](#)

51. We suggest the following amendments:

Amendment 20

Page 38, line 36, leave out “exercise the powers under this paragraph whether or not there are” and insert “only exercise the powers under this paragraph where there are reasonable”.

Amendment 21

Page 38, line 38, after “activity” insert “and where it is necessary and proportionate to do so”.

Comment: these two amendments insert a threshold of reasonable suspicion and require that the exercise of the power must be necessary and proportionate.

11 Access to a lawyer

Schedule 3

52. Schedule 3 imposes limitations on access to a lawyer for those questioned and detained under the new powers. We expressed concern that these powers unjustifiably interfere with the right to timely and confidential legal advice.

53. In its response, the Government states that, for those who are questioned (but not yet detained) under Schedule 3, “although there will be no entitlement, should an examinee [...] request access to a solicitor, the Schedule 3 Code of Practice will make clear that where reasonably practicable, the examining officer should permit them to seek legal counsel.”³⁴ The Government also states that it intends to publish a draft Code of Practice prior to the Bill passing to Committee stage in the Lords.³⁵

54. Those who are detained are entitled to a lawyer, however this right is not absolute. The Bill would allow an examining officer to continue to examine the detainee without a lawyer present where the officer reasonably believes that permitting them to exercise their right would prejudice the determination of the relevant matters. The Government explains that “these restrictions are to mitigate against the possibility of an examination being obstructed or frustrated as a result of a detainee using his right to a solicitor.”³⁶

55. In some cases, the detainee may only consult a solicitor in the sight and hearing of a ‘qualified officer’. The Government explains that this restriction exists to disrupt and deter a detainee who seeks to use their legal privilege to pass on instructions to a third party, either through intimidating their solicitor or passing on a coded message.³⁷

56. We recognise these concerns, but consider that there are more proportionate ways of mitigating these risks, such as pre-approval of vetted panels of lawyers. We suggest further consideration be given to alternative options so that timely and confidential legal advice can be given to all persons stopped and detained under these powers.

57. We suggest the following amendments:

Amendment 22

Page 49, line 19. At end insert -

“The detainee shall be informed of the rights in subparagraph (1) when first detained.”

Amendment 23

Page 49, line 43, leave out paragraph(b)

Amendment 24

Page 50, line 29, leave out paragraph 26.

34 [HC \(2017–19\) 1578](#)

35 [HC \(2017–19\) 1578](#)

36 [HC \(2017–19\) 1578](#)

37 [HC \(2017–19\) 1578](#)

Amendment 25

Page 53, line 12, at the end, insert:

“The detainee shall be informed of the rights in sub-paragraph (1) when first detained.”

Amendment 26

Page 54, line 12, leave out paragraph 32

Comment: these amendments ensure detainees are informed of their rights and provided with timely and confidential legal advice in all four jurisdictions.

12 Entering and remaining in a designated area

Clause 4

58. On 6 September 2018, the Government tabled a number of amendments at Report stage in the Commons. New Clause 2, now clause 4 of the Bill, which criminalises entering or remaining in a designated area outside the UK, is of particular concern. It is regrettable that this was tabled at such a late stage in the passage of the Bill, as it has not been subject to scrutiny by the Public Bill Committee or our Committee.

59. Clause 4 introduces into the Terrorism Act 2000 a new offence of entering or remaining in a designated area outside the UK. The offence can only be committed by a person who is a UK national or resident at the time of entering the area or at any time during which the person remains there. In making regulations to designate an area, the Secretary of State would need to be satisfied that it is necessary to restrict UK nationals and residents from entering or remaining in the area for the purpose of protecting the public from a risk of terrorism.³⁸

60. A defence is available for those prosecuted under this new offence if the person can show that they had a reasonable excuse for entering, or remaining in, the designated area. If a defence is raised, the jury is entitled to assume the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.³⁹

61. A person does not commit the offence if the person is already travelling to, or is already in, the area on the day on which it becomes a designated area and the person leaves the area before the end of the period of one month beginning with that day.⁴⁰ A person found guilty of the offence is liable on conviction on indictment to imprisonment for a term not exceeding 10 years, or to a fine, or to both.⁴¹

62. Clause 4 could engage:

- a) Article 8 ECHR - the right to private and family life - by preventing a person from travelling to visit their family without risk of prosecution and by potentially restricting a person from visiting family in designated areas;
- b) Article 9 ECHR - the right to manifest his religion or belief, in worship, teaching, practice and observance, where the exercise of that right involves entry into, or remaining in, a designated area;
- c) Article 10 ECHR - the right to receive and impart information and ideas concerning religion, political or ideological beliefs if the exercise of that right involves entry into, or remaining in, a designated area;

38 House of Commons, Notices of Amendments, Thursday 6 September, [NC2](#)

39 Terrorism Act 2000, [section 118](#), as amended

40 Counter-Terrorism and Border Security Bill, European Convention on Human Rights, Supplementary Memorandum by the Home Office, [paras 2–4](#)

41 Counter-Terrorism and Border Security Bill, European Convention on Human Rights, Supplementary Memorandum by the Home Office, [para 7](#)

- d) Article 14 ECHR (in conjunction with the above rights) - the prohibition on discrimination - the designation of an area in a particular country may disproportionately restrict nationals from that country, or people with family members or friends in the designated area;
- e) Article 12 of the International Covenant on Civil and Political Rights—this provides that everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Further, everyone shall be free to leave any country, including his own.

63. The Government justifies the interference with these rights on the basis that:

- a) This offence is 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;⁴²
- b) The objective is to dissuade UK nationals and residents from entering, or remaining in, areas outside the UK where they may engage in terrorism or other conduct which makes them become a more significant source of risk to the public, and to ensure that those who do so may be prosecuted and, if convicted, sentenced;⁴³ and
- c) The criminalisation of conduct will deter those tempted to travel and ensure that prosecution will follow if they do so without reasonable excuse.⁴⁴

64. We note that it is not necessary for a person to enter or remain in a designated area for the purposes of committing any terrorist act or hostile activity. On the contrary, criminal liability is established once the individual has entered a designated area, regardless of their intent in doing so, unless the individual can establish they entered the area with a reasonable excuse, the boundaries of which are unclear. The clause therefore criminalises conduct that is not in itself wrongful or inherently criminal in nature, yet it attracts a very high penalty of up to 10 years.

65. We are also concerned that the boundaries of territory under the control of terrorist organisations may constantly shift, such that it may be difficult to designate areas with sufficient clarity so that citizens may regulate their conduct accordingly.

66. Whilst it is likely to be impossible to formulate in advance a comprehensive list of reasonable excuses for travel to a designated area, reliance on the reasonable excuse defence will render persons who do not intend to undertake any inherently wrongful conduct potentially liable to prosecution. Although it may be claimed that this outcome may be avoided by the Attorney-General or Director of Public Prosecutions withholding consent to the prosecution, this discretion is arguably not a satisfactory protection against interferences with human rights. The outcome may be a chilling effect on the enjoyment of the rights to freedom of movement and association.

42 Counter-Terrorism and Border Security Bill, European Convention on Human Rights, Supplementary Memorandum by the Home Office, [para 14](#)

43 Counter-Terrorism and Border Security Bill, European Convention on Human Rights, Supplementary Memorandum by the Home Office, [para 16](#)

44 Counter-Terrorism and Border Security Bill, European Convention on Human Rights, Supplementary Memorandum by the Home Office, [para 17](#)

67. We consider that this new offence requires further scrutiny to test its necessity and proportionality. We suggest the following amendment:

Amendment 27

Leave out Clause 4.

68. We propose the consideration of an amendment to provide for the Secretary of State to pre-authorise travel to designated areas in certain circumstances.

Amendment 28:

Page 3, line 17, at end insert–

“or

(c) the person has been granted authorisation by the Secretary of State to enter or remain in a designated area.

Amendment 29

Page 3, line 18, insert–

“(4) The Secretary of State shall set out in regulations provisions regarding authorisation under section (3)(c) including:

- (a) The grounds for applying for an authorisation;
- (b) The procedure for applying for an authorisation both by an individual and by an organisation on behalf of individuals;
- (c) The timescales for determining an authorisation; and
- (d) The rights of appeal against a decision.

Annex: Consolidated amendments

References are to HL Bill 131

Amendment 1

To leave out Clause 1 of the Bill

Amendment 2

Page 1, line 10, leave out paragraph (b) and insert–

“(b) in doing so intends to encourage support for a proscribed organisation.”

Amendment 3

Page 1, line 12, at end insert–

“It is not an offence under subsection (1A) to express an opinion that a proscribed organisation should cease to be proscribed”.

Amendment 4

Page 1, line 15, leave out subsections (2) and (3).

Amendment 5

Page 2, line 6, at end insert -

“A person does not commit an offence under subsection (1A) if there is a reasonable excuse for the publication of that image, such as historical research, academic research or family photographs, and where the publication of that image was not intended to support or further the activities of a proscribed organisation”.

Amendment 6

To leave out Clause 3 of the Bill.

Amendment 7

Page 2, line 29, at the end insert–

“and the person intends to commit or encourage acts of terrorism.”

Amendment 8

Page 2, line 29, at the end insert–

“and the person has viewed the material in a way which gives rise to a reasonable suspicion that the person is viewing that material with a view to committing a terrorist act”.

Amendment 9

Page 2, line 41, at end insert–

“(3B) The Secretary of State must issue guidance on what constitutes a reasonable excuse for the purposes of subsection (3)”

Amendment 10

Page 5, leave out lines leave out subsection (3)

Amendment 11

Page 5, line 23, at end insert

(5) After paragraph (3) insert -

“(4) Save that an offence is only committed under paragraph (ca) of subsection (2) where:

(a) the relevant acts were an offence in the country where the acts took place; or

(b) the individual

(i) is a British national; or

(ii) has been present in the United Kingdom for a continuous period of at least six months in the last ten years.”

Amendment 12

Page 5, line 31, leave out subsection (3)

Amendment 13

Page 14, line 36, at end insert–

“() After section 53 (period for which notification requirements apply), insert

53A Review of the necessity and proportionality of notification

- (1) A person to whom the notification requirements apply may apply to the chief officer of police for the area in which that person resides, for a determination that the person should no longer continue to be subject to the notification requirements (“an application for review”).
- (2) An application for review may be made after a person has been subject to notification requirements for a period of 5 years and every 5 years thereafter, following a determination of the review.

- (3) The chief officer of police to whom such an application for review is made shall review the necessity and proportionality of the notification requirements and shall make a decision as to whether that person should continue to be subject to the notification requirements.
- (4) Where a determination has been made under subsection (3) that the person should no longer continue to be subject to the notification requirements, then that person is no longer subject to the notification requirements.
- (5) Where a determination has been made under subsection (3) that the person should continue to be subject to the notification requirements, the applicant has a full right of appeal to the Special Immigration Appeals Commission within 21 days of the date of decision”

Amendment 14

Page 15, line 16 to 17, leave out “the risks posed by the person to whom the warrant relates” and insert “whether the person to whom the warrant relates is in breach of his or her notification requirements.”

Amendment 15

Page 15, line 25, at end insert–

“() that there are reasonable grounds to believe that the person to whom the warrant relates is in breach of his or her notification requirements,”

Amendment 16

Page 15, line 26, after “necessary” insert “and proportionate”

Amendment 17

Page 29, line 5, leave out paragraph 2

Amendment 18

Page 29, line 29, leave out paragraph (4).

Page 32, line 3, leave out paragraph (4).

Page 33, line 4, leave out paragraph (4).

Page 34, line 33, leave out paragraph (4).

Page 36, line 4, leave out paragraph (4).

Page 37, line 28, leave out paragraph 19.

Amendment 19

Page 21, line 25, at end insert–

“() After section 40 (Indemnification), insert–

‘40A Independent review of preventing people being drawn into terrorism and support for those vulnerable to being drawn into terrorism

- (6) The Secretary of State must make arrangements for an independent review of the Government’s Prevent strategy for preventing people from being drawn into terrorism and for supporting those vulnerable to being drawn into terrorism within 6 months of this provision entering into force.
- (7) The Secretary of State must report on the findings of the review. This report must be laid before Parliament within 18 months of this provision entering into force.’

Amendment 20

Page 38, line 36, leave out “exercise the powers under this paragraph whether or not there are” and insert “only exercise the powers under this paragraph where there are reasonable”.

Amendment 21

Page 38, line 38, after “activity” insert “and where it is necessary and proportionate to do so”.

Amendment 22

Page 49, line 19. At end insert -

“() The detainee shall be informed of the rights in subparagraph (1) when first detained.”

Amendment 23

Page 49, line 43, leave out paragraph(b)

Amendment 24

Page 50, line 29, leave out paragraph 26.

Amendment 25

Page 53, line 12, at the end, insert:

“() The detainee shall be informed of the rights in sub-paragraph (1) when first detained.”

Amendment 26

Page 54, line 12, leave out paragraph 32

Amendment 27

Leave out Clause 4.

Amendment 28:

Page 3, line 17, at end insert–

“or

(c) the person has been granted authorisation by the Secretary of State to enter or remain in a designated area.

Amendment 29

Page 3, line 18, insert–

“(4) The Secretary of State shall set out in regulations provisions regarding authorisation under section (3)(c) including:

- (a) The grounds for applying for an authorisation;
- (b) The procedure for applying for an authorisation both by an individual and by an organisation on behalf of individuals;
- (c) The timescales for determining an authorisation; and
- (d) The rights of appeal against a decision.

Declaration of Lords' Interests⁴⁵

Baroness Hamwee

- No relevant interests to declare

Baroness Lawrence of Clarendon

- Chancellor of De Montfort University
- President of Stephen Lawrence Charitable Trust

Baroness Nicholson of Winterbourne

- Chairman of the AMAR International Charitable Foundation
- Chairman of the Booker Prize for Russian Fiction
- Chairman ACHLG – Association Children's High Level Group

Lord Trimble

- No relevant interests to declare

Baroness Prosser

- No relevant interests to declare

Lord Woolf

- Membership of Committees
- Office holder of Solicitors and the bodies interested/involved with criminal law, penal policy and other justice issues
- Editor of De Smith Judicial Review, various editions
- Chair of an EHRC event about the EU (Withdrawal) Bill (January 2018)
- Chief Justice of the Commercial Court of the AIFC
- Patron Woolf Institute
- Ex Chair of UCL London, London University

45 A full list of Members' interests can be found in the Register of Lords' Interests: <https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/house-of-lords-commissioner-for-standards-/register-of-lords-interests/>

Formal minutes

Wednesday 10 October 2018

Members present:

Rt Hon Harriet Harman MP, in the Chair

Fiona Bruce MP Baroness Hamwee

Ms Karen Buck MP Baroness Lawrence of Clarendon

Baroness Nicholson

Baroness Prosser

Lord Trimble

Lord Woolf

Draft Report (*Second Legislative Scrutiny Report: 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 69 read and agreed to.

Annex and Summary agreed to.

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

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

[Adjourned till Wednesday 17 October 2018 at 3.00pm]

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 70
Second Report	Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 645 HL 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
Eighth Report	Freedom of Speech in Universities: Responses	HC 1279 HL 162
Ninth Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill	HC 1208 HL 167
Tenth Report	Enforcing Human Rights	HC 669
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
Third Special Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill: Government Response to the Committee's Ninth Report of Session 2017–19	HC 1578