
Fifth Special Report of Session 2017–19

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current membership

House of Commons

Ms Harriet Harman QC MP (Labour, Camberwell and Peckham) (Chair)
Fiona Bruce MP (Conservative, Congleton)
Ms Karen Buck MP (Labour, Westminster North)
Alex Burghart MP (Conservative, Brentwood and Ongar)
Joanna Cherry QC MP (Scottish National Party, Edinburgh South West)
Jeremy Lefroy MP (Conservative, Stafford)

House of Lords

Baroness Hamwee (Liberal Democrat)
Baroness Lawrence of Clarendon (Labour)
Baroness Nicholson of Winterbourne (Conservative)
Baroness Prosser (Labour)
Lord Trimble (Conservative)
Lord Woolf (Crossbench)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publication

Committee reports are published on the Committee’s website at www.parliament.uk/jchr by Order of the two Houses.

Evidence relating to this report is published on the relevant inquiry page of the Committee’s website.

Committee staff

The current staff of the Committee are Eve Samson (Commons Clerk), Simon Cran-McGreehin (Lords Clerk), Eleanor Hourigan (Counsel), Samantha Godec (Deputy Counsel), Katherine Hill (Committee Specialist), Shabana Gulma (Specialist Assistant), Miguel Boo Fraga (Senior Committee Assistant) and Heather Fuller (Lords Committee Assistant).

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 2467; the Committee’s email address is jchr@parliament.uk
Fifth Special Report

The Joint Committee on Human Rights published its Eleventh Report of Session 2017–19, Second Legislative Scrutiny Report: Counter-Terrorism and Border Security Bill (HC 161) on 12 October 2018. The Government’s response was received on 28 November 2018 and is appended to this report.

Appendix: Government Response

Thank you for the Joint Committee on Human Rights’ second report following your further scrutiny of the provisions of the Counter-Terrorism and Border Security Bill. The Government has examined your report carefully and notes the recommendations and amendments proposed by the Committee.

All of the Joint Committee’s proposed amendments were duly tabled by Baroness Hamwee and were thoroughly debated at Committee stage in the House of Lords. Baroness Williams and Earl Howe responded to these amendments and set out the Government’s position on each during the debates. Annex A provides a collated list of the Joint Committee’s amendments together with Hansard references to the Government’s responses.

Given that the new offence of entering or remaining in a designated area was only added to the Bill following the publication of the Joint Committee’s first report on the Bill, I have responded in detail to the Committee’s concerns on clause 4 below. Where there are Government amendments tabled for debate at Report stage which touch on issues previously raised by the Joint Committee, I have also provided further detail and explanation below.

Clause 4: Entering and remaining in a designated area

We note that 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. (Para 64).

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. (Para 65).

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. (Para 66).
The new offence of entering or remaining in a designated area is an important addition to the powers available to tackle foreign terrorist fighters. Given the risk posed by returning foreign fighters to the UK, the Government is satisfied that a 10-year maximum penalty is appropriate for this offence. It will, of course, be for the courts to determine the appropriate penalty within that range in any particular case, having regard to all the circumstances of that case.

The boundaries of any designated area will be clearly set out in regulations made under new section 58C of the Terrorism Act 2000: this will ensure that there is the necessary legal certainty for anyone contemplating travelling to a designated area. The fact that the boundaries of territory under the control of terrorist organisations may shift does not affect the operation of the offence: the area designated in the section 58C regulations will be the one that matters for the purposes of the offence. Furthermore, the Government will be able to revoke existing regulations, and make further regulations designating different or additional areas, as appropriate.

During Lords Committee stage, Earl Howe explained how a pre-authorisation scheme, as proposed by the Joint Committee, would not be appropriate. Notwithstanding the fact that a designated area is likely to be one to which official Government travel advice recommends against all travel—so it would not be appropriate to nonetheless authorise travel on an ad hoc basis—such a system would be difficult to operate in a way which provides travellers with prompt and clear authorisation, and the police and security services with assurances about a traveller’s intention. Concerns were also raised in debates on the Bill that such a scheme could amount to the white-listing or black-listing of journalists and charities, which would clearly not be appropriate. In addition, we fear that such a system would also be open to abuse by those who seek authorisation to travel under the cover of legitimate activity, but who subsequently engage in terrorism related activity upon arrival in the designated area.

However, the Government does accept, and has made repeated statements to this effect, that there are a number of legitimate, reasonable excuses which an individual may have for travelling to a designated area. And we recognise that such individuals will wish to have sufficient assurance that they will not be liable to prosecution under the new offence. Indeed, Earl Howe stated during the debate that “I have heard, loud and clear, the calls for greater certainty for humanitarian workers and others”.

On further consideration, the Government has concluded that an indicative list of reasonable excuses would provide greater assurance to those who have a legitimate reason for travelling to a designated area, and we have therefore tabled amendments to this end. These amendments make it explicit on the face of the Bill that it will be a reasonable excuse for an individual to enter or remain in a designated area in order to provide humanitarian aid, to carry out work as a journalist, to carry out work on behalf of the United Nations or to attend the funeral of a relative, amongst other such reasonable excuses. For your reference, I have included the text of these amendments at Annex B. The Government is confident that these amendments will provide greater certainty around the types of activity which constitute a reasonable excuse, thus reducing the possibility of the offence having a chilling effect on those with legitimate reasons for travelling to such an area.

In addition, the Government has tabled three further amendments which will add clarity and additional safeguards to the offence. Firstly, although the Bill already imposes a
general duty on the Home Secretary to keep a designation under review, we have tabled an amendment which would limit the maximum duration of a designation to three years (but which would not preclude the same area from being re-designated). This will provide an important safeguard to ensure that a designation cannot be made for an indefinite period. The Government has also tabled an amendment to ensure that, when inviting Parliament to approve any regulations to designate an area, the Home Secretary should set out the reasons why he or she considers that the condition for designation has been met in the case at hand. Finally, the Government has tabled an amendment to provide that regulations which remove a designation should be subject to the negative procedure. These latter two amendments implement recommendations of the Delegated Powers and Regulatory Reform Committee.

Clause 3: obtaining or viewing material over the internet

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. (Para 12).

In its response the Government concedes that this clause is “imperfect and lacks sufficient clarity”. 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. (The amendment also broadens the offence to include not just ‘viewing’ but ‘accessing the material in any way’.) (Para 13).

Further, the Government’s amendment seeking to clarify the reasonable excuse defence raises further problems. 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.” (Para 14).

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. (Para 15).

In response to the concerns raised by the Joint Committee and others, the Government brought forward amendments to the Bill at Commons Report stage to remove the so called ‘three clicks’ provision and instead provide that the cases in which a person had a reasonable excuse included circumstances where the person did not know, and had no reason to believe, that the document being viewed online contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing an act of terrorism. However, the Government is aware that concerns have again been raised in the Lords, largely centring on journalists and academics accessing such material, echoing the concern the Joint Committee raised in its first report on the Bill.
Although the Government has repeatedly stated that a person accessing terrorist material in the course of carrying out work as a journalist, or conducting academic research, would be able to rely on the reasonable excuse defence, the Government has tabled an amendment to the Bill to make this explicit on the face of section 58 of the Terrorism Act 2000.

**Schedule 3: hostile state activity ports power**

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. (Para 52).

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.” 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. (Para 53).

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.” (Para 54).

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. (Para 55).

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. (Para 56).

Schedule 3 contains important new powers to allow officers to stop, question, search and detain an individual at a port or in the border area in order to determine if they are, or have been, involved in hostile state activity. These are closely modelled on the long-standing counter-terrorism ports powers provided for in the Terrorism Act 2000.

The Schedule 7 Code of Practice is clear that persons detained under the counter-terrorism ports powers must be informed of their rights to consult a solicitor on first being detained. The draft Schedule 3 Code of Practice makes equivalent provision. That said, having reflected on the recommendation by the Joint Committee and on the debate at Lords Committee stage, the Government is content for such provision to appear on the face of the legislation and has therefore tabled amendments to the Bill for Lords Report stage which will enshrine this requirement in Schedule 3 to the Bill and in Schedule 8 to the Terrorism Act 2000.
The Government has also reflected on the issues raised around the right of a Schedule 3 detainee to consult a solicitor in private. The Bill, as introduced, would have enabled a senior officer in exceptional circumstances to direct that a detainee could only consult their solicitor in the sight and hearing of another officer in order to mitigate the risk of a detainee using their solicitor, whether willingly or under threat, to pass on a message or instruction to a third party, which could then result in a number of harmful consequences. Again, this replicates provision in Schedule 8 to the Terrorism Act 2000. It is important that we are able to mitigate such risks, but the Government recognises the concerns that have been raised about the implications of this provision for legal professional privilege.

The Government has therefore tabled amendments for Report stage to remove the ability of a senior officer, in exceptional circumstances, to direct that the detainee consult their solicitor in the sight and hearing of another officer and instead to enable a senior officer to require the detainee to choose a different solicitor. This amendment is made to Schedule 8 too. This will mirror the provision under Code H to the Police and Criminal Evidence Act 1984 (PACE) should police have similar concerns about a solicitor, and was proposed by the Law Society during evidence to the Public Bill Committee (Official Report, 26 June 2018, col 27). The Government is confident that this approach will maintain an appropriate balance between legal professional privilege and ensuring that the right to consult a solicitor does not result in further harm.

The other powers that this report refers to would allow an examining officer under Schedule 3 (as is the case under Schedule 7) to require the detainee to consult their solicitor via another means (e.g. telephone) or to continue questioning the detainee before the solicitor has arrived at the port. They can only be exercised where the officer reasonably believes that to wait for the solicitor to arrive in person would prejudice the determination of the relevant matters.

These powers were designed to mitigate the risk of a detainee using their right to consult a solicitor to obstruct and frustrate the examination and run down the short detention clock. The maximum period of examination under Schedule 3 is limited to six hours. It would not take a trained terrorist or hostile actor to work out that if they were to insist on speaking to a particular solicitor, in person, who happens to be located miles away from the port where they are being examined, that they have a means of significantly delaying their examination.

The current powers under Schedule 8 to the Terrorism Act 2000, which are replicated in Schedule 3 to the Bill, provide a practical solution to mitigate that risk, by allowing the person to consult with that solicitor over the phone. If the person refuses that alternative, or the solicitor is unavailable, then the officer can continue questioning the person while they wait for the solicitor to arrive. Any decision by the officer to apply these restrictions must be clearly recorded.
Before using these restrictions, the examining officer will exhaust all other means to ensure that the detainee has been able to consult a solicitor in private, including directing them to a solicitor of the duty solicitor scheme. To confer an absolute right on a detainee to consult in person a particular lawyer would undermine the effectiveness of these powers by enabling an examinee to obstruct and frustrate the examination and run down the short detention clock.

Rt Hon Ben Wallace MP

Minister of State for Security and Economic Crime
Annex A: JCHR Amendments and Government Response

Clause 1: expressions of support for a proscribed organisation

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 subsection (2) and (3).

Government Response:


Clause 2: publication of images and seizure of articles

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 of further the activities of a proscribed organisation”.

Government Response:


Clause 3: obtaining or viewing material over the internet

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)”

Government Response:


Clause 4: Entering and remaining in a designated area

Amendment 27

Leave out Clause 4.

Government Response:


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.
**Government Response:**


**Clause 6: extra-territorial jurisdiction**

**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.”

**Government Response:**


**Clause 7: Increase in maximum sentences**

**Amendment 12**

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

**Government Response:**


**Clause 12: notification requirements**

**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.”

**Government Response:**


**Clause 13: Power to enter and search home**

**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”

**Government Response:**

Clause 18 and Schedule 2: Retention of biometric data for counter-terrorism purposes

Amendment 17
Page 29, line 5, leave out paragraph 2

Government Response:

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.

Government Response:

Clause 19: Persons vulnerable to being drawn into terrorism

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.’

Government Response:
**Schedule 3: Port and border controls**

**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”.

*Government Response:*

**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 subparagraph (1) when first detained.”

**Amendment 26**
Page 54, line 12, leave out paragraph 32

*Government Response:*
Annex B: Proposed Government amendments to Clause 4

Clause 4, Page 3, line 19, at end insert–

“(3A) The cases in which a person has a reasonable excuse for the purposes of subsection (2) include (but are not limited to) those where–

(a) the person enters, or remains in, a designated area involuntarily, or

(b) the person enters, or remains in, a designated area for or in connection with one or more of the purposes mentioned in subsection (3B).

(3B) The purpose are–

(a) providing aid of a humanitarian nature;

(b) satisfying an obligation to appear before a court or other body exercising judicial power;

(c) carrying out work for the government of a country other than the United Kingdom (including service in or with the country’s armed forces);

(d) carrying out work for the United Nations or an agency of the United Nations;

(e) carrying out work as a journalist;

(f) attending the funeral of a relative or visiting a relative who is terminally ill;

(g) providing care for a relative who is unable to care for themselves without such assistance.

(3C) But a person has a reasonable excuse for entering or remaining in a designated area by virtue of subsection (3A)(b) only if–

(a) the person enters or remains in the area exclusively for or in connection with one or more of the purposes mentioned in subsection (3B), or

(b) if the person enters or remains in the areas for or in connection with any other purpose or purposes (in addition to one of more of the purposes mentioned in subsection (3B)), the other purpose or purposes also provide a reasonable excuse for doing do.

(3D) For the purposes of subsection (3B)–

(a) the reference to the provision of aid of a humanitarian nature does not include the provision of aid in contravention of internationally recognised principles and standards applicable to the provision of humanitarian aid;

(b) references to the carrying out of work do not include the carrying out of any act which constitutes an offence in a part of the United Kingdom or would do so if the act occurred in a part of the United Kingdom.”