

HOUSE OF LORDS

Select Committee on the Constitution

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14th Report of Session 2017–19

# Counter-Terrorism and Border Security Bill

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# Counter-Terrorism and Border Security Bill

## Introduction

1. The Counter-Terrorism and Border Security Bill was introduced into the House of Commons on 6 June 2018 and passed third reading on 11 September. It was introduced to the House of Lords on 12 September and received a second reading on 9 October.
2. The Bill amends and extends certain terrorism offences; adjusts the sentencing framework for terrorism-related offences, including by increasing the maximum penalty for certain offences; and extends police powers to investigate and prevent terrorism. The Bill also provides for a new power aimed at countering hostile state activity.<sup>1</sup>
3. In this report, we draw attention to several constitutional implications of the Bill. Those implications intersect to some extent with a number of the human rights concerns that the Joint Committee on Human Rights (JCHR) raised in its two reports on the Bill.<sup>2</sup> We confine ourselves to issues raised by the Bill that are specifically constitutional in character.

## Access to legal advice

4. Schedule 3 to the Bill establishes a system whereby people at ports and borders can be stopped, searched, questioned and detained (for up to six hours). The Bill provides a right to consult a solicitor in person,<sup>3</sup> but this is subject to significant limitations. In particular, the right arises only if the person concerned is detained, yet it is possible to question a person for up to one hour without formally detaining them. As a result, the entitlement to confidential legal advice is triggered only after questioning has begun. Moreover, while access to a solicitor is available only on request, there is nothing in the Bill that requires a detainee to be notified of the right to consult a solicitor.<sup>4</sup> Questioning may continue pending the arrival of a requested solicitor “if the examining officer reasonably believes that postponing the questioning until then would be likely to prejudice determination of the relevant matters”.<sup>5</sup> Consultation with a solicitor may sometimes be permitted only in the presence of an officer, thus denying the right to confidential legal advice.<sup>6</sup>
5. The JCHR concluded: “The vital safeguard of access to a lawyer is not adequately protected.”<sup>7</sup> In its response to the JCHR,<sup>8</sup> the Government indicated, in effect, that those being questioned under schedule 3 powers

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1 [Explanatory Notes to the Counter-Terrorism and Border Security Bill](#) [HL Bill 131 (2017–19)-EN]

2 Joint Committee on Human Rights, [Legislative Scrutiny: Counter-Terrorism and Border Security Bill](#) (9th Report, Session 2017–19, HC 1208 HL Paper 167) and [Second Legislative Scrutiny Report: Counter-Terrorism and Border Security Bill](#) (11th Report, Session 2017–19, HC 1616 HL Paper 195)

3 [Counter-Terrorism and Border Security Bill](#) [HL Bill 131 (2017–19)], schedule 3, para 24(5)

4 *Ibid.*, schedule 3, [paras 24–5](#)

5 *Ibid.*, schedule 3, [para 24\(2\)–\(3\)](#)

6 *Ibid.*, schedule 3, [para 26](#)

7 Joint Committee on Human Rights, [Legislative Scrutiny: Counter-Terrorism and Border Security Bill](#) (9th Report, Session 2017–19, HC 1208 HL Paper 167), para 81

8 [Letter from the Minister of State for Security and Economic Crime to the Chair of the JCHR](#), 4 September 2018

will often be treated more favourably than they will be strictly entitled to under the Bill. For instance, while the Government acknowledged that a person has “no entitlement” to legal advice during pre-detention questioning (i.e. for up to one hour), it assured the JCHR that a code of practice “will make clear that where reasonably practicable, the examining officer should permit them to seek legal counsel”. Similarly, although nothing in the Bill requires detainees to be notified of their right to request access to legal advice, the Government told the JCHR that “the examining officer will explain that [the detainee] may, if they so request, consult a solicitor as soon as is reasonably practicable, privately and at any time”. More generally, the Government said that the schedule 3 provisions for the treatment of detained examinees is “modelled on” provisions in the Terrorism Act 2000,<sup>9</sup> such that the schedule 3 arrangements are “not new or novel”, and that “the police are experienced in exercising them only where necessary and proportionate”.<sup>10</sup>

6. **We are concerned that the Government’s justification for these provisions relies on the assurance that the powers will be used more benevolently than the text of the Bill requires. Such assurances are insufficient, particularly when civil liberties issues are engaged. They do not bind the Government and therefore cannot be relied on. Moreover, to the extent that the Government’s assurances on the operation of the Bill rely on the content of the proposed code of practice, questions arise concerning the appropriateness of leaving such matters to supplementary materials. We address that issue below.**
7. **We agree with the Joint Committee on Human Rights that access to confidential legal advice—a fundamental constitutional principle, acknowledged at common law—is not adequately protected by the Bill. We recommend that the Bill is amended to require detainees to be informed of their right to consult a solicitor; to remove the power to delay consultation with a solicitor; and to remove the power to permit consultation with a solicitor to occur only in the sight and hearing of a qualified officer.**

### **The rule of law and legal certainty**

#### *Extra-territorial jurisdiction*

8. Two aspects of the Bill give rise to concerns related to the rule of law and legal certainty. The first is the extension of extra-territorial jurisdiction over terrorism-related offences—including offences committed by foreign nationals.
9. Extra-territorial jurisdiction over criminal matters creates the possibility of criminalising conduct that does not, in the country in which the conduct occurred, constitute a criminal offence.
10. The rule of law—in particular the principle of legal certainty—requires that people have a fair opportunity of understanding what the law is, in

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<sup>9</sup> Existing powers under schedule 7 to the Terrorism Act 2000 allow people to be stopped, questioned, searched and detained at ports and borders to determine whether they are or have been “concerned in the commission, preparation or instigation of acts of terrorism”.

<sup>10</sup> [Letter from the Minister of State for Security and Economic Crime to the Chair of the JCHR](#), 4 September 2018

order to make informed decisions about how to stay on the right side of the law and thus avoid punishment for its breach. In the light of this, the possibility of people being ‘caught out’ by laws about which they could not have reasonably known is to be deprecated. Yet this possibility inevitably arises when, as is already the case in respect of certain terrorism-related offences under UK law, extra-territorial criminal jurisdiction is asserted over both UK and foreign nationals, the latter being unlikely to know—and unlikely to have any reason to inform themselves—of the content of UK criminal law. This problem becomes particularly acute if UK criminal law is especially broad in relevant respects, in which case there is a heightened risk of someone who travels to the UK being convicted for conduct, possibly lawful, committed in a foreign country in circumstances in which it was not reasonable to anticipate that criminal liability may ensue.

11. The Bill extends extra-territorial jurisdiction to criminal liability under section 13 of the Terrorism Act 2000. At present, that provision creates an offence for someone in a public place to wear an item of clothing or to wear, carry or display an article so as to “arouse reasonable suspicion that he is a member or supporter of a proscribed organisation”.<sup>11</sup> The Bill amends section 13 of the Terrorism Act 2000 to create an additional offence of publishing an image of an item of clothing or any other article so as to “arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation”.<sup>12</sup>
12. The JCHR concluded that the application of extra-territorial jurisdiction to offences with no equivalent in the country concerned raised issues of natural justice and foreseeability of the legal consequences of one’s actions. It pointed out that “a foreign national, with few links to the UK, could be prosecuted in the UK if he/she attended a protest or waved a flag overseas, in support of an organisation that is lawful within that overseas jurisdiction, if that individual then travels to the UK.”<sup>13</sup> The JCHR proposed amendments either to remove extra-territorial jurisdiction altogether, or to provide that extra-territorial jurisdiction applies only where the relevant conduct is criminal in the country concerned or the individual in question is a British national or has lived in the United Kingdom for a continuous period of six months in the last ten years.<sup>14</sup>
13. **We are concerned that the extra-territorial extension of these offences risks individuals being prosecuted in the UK for criminal offences that do not exist in the country in which the relevant conduct occurred and in circumstances in which the imposition of criminal liability might not reasonably be foreseen. This breaches the requirement, deriving from the principle of legal certainty, that people should have a fair opportunity to know the laws (particularly criminal laws which on conviction carry criminal penalties) which apply to them. We agree with the JCHR’s proposed amendment that extra-territorial jurisdiction should apply only where the relevant conduct is criminal in the country concerned or where the individual has sufficient links to the UK.**

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11 Terrorism Act 2000, [section 13\(1\)](#)

12 [Counter-Terrorism and Border Security Bill](#), clause 2

13 Joint Committee on Human Rights, [Legislative Scrutiny: Counter-Terrorism and Border Security Bill](#) (9th Report, Session 2017–19, HC 1208 HL Paper 167), para 39

14 Joint Committee on Human Rights, [Second Legislative Scrutiny Report: Counter-Terrorism and Border Security Bill](#) (11th Report, Session 2017–19, HC 1616 HL Paper 195), para 20

*'Hostile activity'*

14. Legal certainty also requires that the law is clear in how it will apply. In this regard, the Bill's definition of 'hostile activity' is problematic.
15. Schedule 3 creates new powers that will allow people to be stopped, questioned, searched and detained at ports and borders<sup>15</sup> to determine whether they are or have been engaged in 'hostile activity'. The powers are not constrained by requiring, for example, reasonable grounds for suspecting that the person concerned is or has been engaged in hostile activity. The circumstances in which a person is 'engaged in hostile activity' are broadly defined: they arise if the person "is or has been concerned in the commission, preparation or instigation of a hostile act"—meaning something that threatens national security, threatens the UK's economic well-being or is an "act of serious crime"—that is carried out for or on behalf of, or is otherwise in the interests of, another state.<sup>16</sup>
16. The JCHR expressed concerns about the powers and their implications for human rights and concluded that "serious consideration" should be given to circumscribing the powers by "(1) clearly defining 'hostile activity'; (2) requiring a threshold test of reasonable suspicion; (3) explicitly providing that the power must only be exercised where necessary and proportionate."<sup>17</sup>
17. **We are concerned that the broadly defined concept of 'hostile activity' not only engages human rights considerations, but also has implications for the rule of law and legal certainty. We support the JCHR's recommendations to circumscribe the powers.**

*Supplementary materials and parliamentary scrutiny*

18. The Government sought to assure the JCHR that the exercise of powers defined in relation to 'hostile activity' would be made more predictable by issuing guidance:
 

"The decision to stop an individual 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. Guidance as to the selection criteria will be set out in the Code of Practice, which we intend to publish in draft in advance of Committee stage of the Bill in the House of Lords."<sup>18</sup>
19. **The application of the definition of 'hostile activity' should not be left to a code of practice given the seriousness of the offences to which it relates. Our concern is compounded by the Government's failure to publish a draft code of practice for the majority of the time during which the Bill is before Parliament.**

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15 Provided that the person's presence at the port or border is believed to be connected with the person's entry into or departure from the UK or with air travel within the UK.

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

17 Joint Committee on Human Rights, [Legislative Scrutiny: Counter-Terrorism and Border Security Bill](#) (9th Report, Session 2017–19, HC 1208 HL Paper 167), para 80

18 [Letter from the Minister of State for Security and Economic Crime to the Chair of the JCHR](#), 4 September 2018