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Counter-Terrorism and Border Security Bill 2017-19

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Summary

The Counter-Terrorism and Border Security Bill was published on 6 June 2018. It is due to have its second reading on 11 June 2018. The Government has published Explanatory Notes. The GovUK website has a collection of relevant documents including overarching documents and factsheets.

Library Briefing Paper 7613, Terrorism in Great Britain: the statistics provides relevant statistical information.

The Bill follows the Government's reviews of its counter-terrorism strategy and of counter terrorism legislation. **Part 1** of the Bill would bring in the legislative changes arising from those reviews. Amongst other changes, it would:

- Make it an offence to express an opinion or belief that is supportive of a proscribed organisation in certain circumstances (**clause 1**)
- Criminalise the publication of certain images which would arouse reasonable suspicion that the offender was a member or supporter of a proscribed organisation (**clause 2**)
- Strengthen the existing offence of downloading terrorist material and extend it to streaming such material, where this is done on three or more occasions (**clause 3**)
- Strengthen existing offences of encouragement of terrorism and dissemination of terrorist publications **(clause 4)**
- Increase maximum sentences for certain terrorist offences (**clause 6**)
- Add to the list of offences for which extended sentences can be given in certain circumstances (**clause 8**)
- Make changes to the notification requirements for registered terrorist offenders, and introduce a new police power to enter and search their homes (**clauses 11 and 12**)
- Add certain terrorist offences to the list of offences for which a Serious Crime Prevention Order can be given **(clause 13)**
- Allow local authorities (as well as the police) to refer people who are considered vulnerable to being drawn into terrorism to the multi-agency panels which assess them and provide support (**clause 18)**

Part 2 of the Bill is in response to the poisoning of Sergei and Yulia Skripal in Salisbury on 4 March 2018 with a nerve agent. **Clause 20** and **schedule 3** would bring in powers to stop, question, search and detain people at ports and borders to determine whether they appear to be (or have been) engaged in hostile activity.

Most of the Bill extends and applies to the whole of the UK, but some clauses have more limited application. For example, the provisions on extended sentences in clause 8 apply only in England and Wales. Details of territorial extent are in clause 24 of the Bill and paragraphs 17-25 and Annex C of the Explanatory Notes.

The Government view is that the matters covered by the Bill are reserved, so it is not at this stage seeking legislative consent motions in the Scottish Parliament, National Assembly for Wales or the Northern Ireland Assembly.

1. Background

1.1 Recent attacks

Between March and September 2017, there were five terrorist attacks in London and Manchester in which 36 innocent people were killed and many more injured.[1] On 4 June 2017, after the London Bridge attack, the Prime Minister Theresa May announced that the Government would "need to review Britain's counter-terrorism strategy to make sure the police and security services have all the powers they need."[2]

Following the poisoning of Sergei and Yulia Skripal in March 2018, the Prime Minister announced that the Government would "urgently develop" new legislative powers, particularly to broaden current powers to detain at the border those suspected of terrorism to cover those suspected of "hostile state activity":

> We will also urgently develop proposals for new legislative powers to harden our defences against all forms of hostile state activity. This will include the addition of a targeted power to detain those suspected of hostile state activity at the UK border. This power is currently only permitted in relation to those suspected of terrorism. And I have asked the Home Secretary to consider whether there is a need for new counter-espionage powers to clamp down on the full spectrum of hostile activities of foreign agents in our country.[3]

1.2 Wider strategic context

The threat

Before 2001, counter-terrorism policy in the UK was largely focused on responding to the situation in Northern Ireland. After 9/11, the focus switched to the threat posed by Al-Qaida and the rise of Daesh. Initially the focus was on foreign nationals suspected of involvement in terrorism, but the London Underground bombings on 7 July 2005 shifted attention to "home grown" terrorists. More recently, attacks across Europe since 2015 (including those in the UK in 2017) have used very simple methodologies, such as the use of vehicles as weapons. Some of these attacks have been carried out by lone actors, sometimes acting autonomously and sometimes unconnected to any network.[4]

The Government also describes the "growing threat" from extreme right-wing activity.[5] Thomas Mair, a white supremacist, murdered Labour MP Jo Cox on 16 June 2016.[6] The Government proscribed the extreme

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1 HM Government, CONTEST: The United Kingdom's Strategy for Countering Terrorism, Cm 9608, 4 June 2018, p8

2 PM statement following London terror attack: 4 June 2017

3 HC Deb 14 March 2018, c856

4 For further detail see Library Briefing Paper7238, Counter-extremism policy: an overview, 23 June 2017 and HM Government, CONTEST: The United Kingdom's Strategy for Countering Terrorism, Cm 9608, 4 June 2018, Part 1

5 HM Government, CONTEST: The United Kingdom's Strategy for Countering Terrorism, Cm 9608, 4 June 2018, p8

6 Judiciary for England and Wales, R-v- Mair Sentencing Remarks of r Justice Wilkie, 23 November 2016

right-wing group National Action in December 2016, [7] and what it described as the group's aliases (Scottish Dawn and National Socialist Anti-Capitalist Action) in September 2017.[8]

The UK national threat level, set by the independent Joint Terrorism Analysis Centre and the Security Service, has been set at SEVERE or higher since 29 August 2014, meaning that a terrorist attack is "highly likely".[9]

Government strategies

The Labour Government published details of its counter-terrorism strategy in 2006 following the London bombings of 2005:

> 5. Since early 2003, the United Kingdom has had a long-term strategy for countering international terrorism (known within Government as CONTEST). Its aim is to reduce the risk from international terrorism, so that people can go about their daily lives freely and with confidence. The strategy is divided into four principal strands: PREVENT, PURSUE, PROTECT, and PREPARE. [10]

Labour updated the CONTEST strategy based on the same four strands in 2009.[11]

The coalition Government reviewed the strategy, publishing its first CONTEST document in July 2011, reflecting the changing terrorist threat and new Government policies.[12] CONTEST continued to be organised into the four work streams, namely:

- Pursue – to stop terrorist attacks;
- Prevent – to stop people from becoming terrorists or supporting violent extremism;
- Protect – to strengthen protection against terrorism attack;
- Prepare – where an attack cannot be stopped, to mitigate its impact.

As announced by the Prime Minister following the London Bridge attacks,[13] the Government reviewed its counter-terrorism strategy, and published its new Contest Policy on 4 June 2018.[14] In a speech the same day, the Home Secretary Sajid Javid outlined six key areas:[15]

- Disrupting threats earlier, including through new legislation
- Supporting counter-terrorism policing and the security and intelligence services, with an additional £50 million increase for

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7 Home Office Press Release, National Action becomes first extreme right-wing group to be banned in UK, 16 December 2016

8 Home Office, Further extreme right-wing groups banned in the UK, 28 September 2017

9 Explanatory Notes paragraph 3

10 HM Government, Countering International Terrorism: The United Kingdom's Strategy, Cm 6888, July 2006

11 HM Government, Pursue Prevent Protect Prepare The United Kingdom's Strategy for Countering International Terrorism, Cm 7547, March 2009

12 HM Government, CONTEST: The United Kingdom's Strategy for Countering Terrorism, July 2011

13 See section 2.1 of this Briefing Paper above

14 HM Government, CONTEST: The United Kingdom's Strategy for Countering Terrorism, Cm 9608, 4 June 2018

15 Home Office Press Release, Home Secretary announces new counter terrorism strategy, 4 June 2018

counter-terrorism policing this year, and "over 1,900 additional staff across the security and intelligence agencies"

- Closer working with international partners, including Five Eyes partners, the EU, and other allies
- Closer working with key partners outside of central government, with pilots of new multi-agency centres in London, Manchester and the West Midlands and increased co-operation with the private sector
- Joint working "to get terrorist material off the internet"
- Doing more to prevent people from becoming terrorists or supporting terrorism.

A number of Library briefings provide background on elements of this work including:

- Library Briefing Paper 7921, Oversight of the intelligence services: a comparison of the "Five Eyes" nations, 15 December 2017
- Library Briefing Paper 7238, Counter-extremism policy: an overview, 23 June 2017
- Library Briefing Paper 7798, Brexit: implications for national security, 9 April 2017, section 10
- Section 10 of Library Briefing Paper 8289, Brexit: new guidelines on the framework for future EU-UK relations, 19 April 2018

2. Existing counter-terrorism legislation

The Explanatory Notes provide a convenient summary of existing counter- terrorism legislation which is relevant to the Bill:

> The principal enactments relating to countering terrorism are the Terrorism Act 2000 ("the 2000 Act"), the Terrorism Act 2006 ("the 2006 Act"), the Counter-Terrorism Act 2008 ("the 2008 Act"), the Terrorism Asset-Freezing etc Act 2010, the Terrorism Prevention and Investigation Measures Act 2011 ("the 2011 Act") and the Counter-Terrorism and Security Act 2015 ("the 2015 Act").
>
> Amongst other things, the 2000 Act:
>
> - Provides for a definition of "terrorism" (section 1);
> - Provides a power for the Secretary of State to proscribe organisations that are concerned in terrorism and sets out associated offences (Part 2);
> - Provides the police with powers to arrest and detain suspected terrorists, and powers to search premises, vehicles and pedestrians (Part 5). Schedule 7 provides examination powers at ports and borders; and Schedule 8 provides for the treatment of suspects who are detained (including the taking and retention of fingerprints and DNA samples and profiles) and for judicial extension of the initial period of detention;
> - Provides for various terrorism offences (sections 54 to 63), including the collection of information likely to be useful to a person committing or preparing an act of terrorism (section 58) and eliciting, publishing or communicating information about members of the armed forces etc (section 58A), and for the UK courts to have jurisdiction in respect of certain terrorism offences committed abroad by UK nationals or residents (sections 63A to 63E);
>
> Provisions in the 2006 Act relevant to this Bill include:
>
> - Further terrorism-related offences, including encouragement of terrorism (section 1) and dissemination of terrorism publications (section 2);
> - A duty on the Secretary of State to appoint a person to review the provisions of the 2000 Act and Part 1 of the 2006 Act[16]. The current Independent Reviewer of Terrorism Legislation, Max Hill QC, took up his post on 1 March 2017.
>
> Amongst other things, the 2008 Act:
>
> - Provides for a court, when sentencing an offender convicted under the general criminal law, to treat a terrorist connection as an aggravating factor (sections 30 to 33);

[16] The Independent Reviewer of Terrorism Legislation is also responsible for reviewing the operation of Part 1 of the Anti-Terrorism, Crime and Security Act 2001, the 2008 Act, the Terrorism Asset-Freezing etc Act 2010, the 2011 Act and Part 1 of the 2015 Act.

- Makes provision about the notification of information to the police by certain individuals convicted of terrorism or terrorism-related offences (Part 4);
- The Terrorism Asset-Freezing etc Act 2010 seeks to prevent the financing of terrorist acts by imposing financial restrictions on, and in relation to, certain persons believed to be, or to have been, involved in terrorist activities. The Terrorism Asset-Freezing etc Act 2010 is not amended by this Bill.

The 2011 Act confers powers on the Secretary of State to impose specified terrorism prevention and investigation measures on an individual.

The 2015 Act includes provision:

- Enabling the Secretary of State to make a temporary exclusion order to disrupt and control the return to the UK of a British citizen reasonably suspected of involvement of terrorism activity abroad (Part 1, Chapter 2);
- Requiring specified bodies (including local authorities, chief officers of police, schools and universities and NHS organisations) to have regard, in the exercise of their functions, to the need to prevent people from being drawn into terrorism (Part 5, Chapter 1). Local authorities are further required to have a panel to provide support for people vulnerable to being drawn into terrorism (Part 5, Chapter 2).

3. The Government's review of counter-terrorism legislation

On 3 October 2017, the then Home Secretary Amber Rudd announced that counter-terrorism laws would be updated "to keep pace with modern online behaviour and to address the issue of online radicalisation". [17]

The 2018 CONTEST counter-terrorism strategy document published in June 2018 gave this summary:

> 162 We will continue to review counter-terrorism legislation and, in line with the shift in the threat and operating environment, we intend to introduce new counter-terrorism legislation in Parliament. This legislation will seek to amend existing terrorism legislation to enable earlier disruption using investigations, longer prison sentences and stronger management of terrorist offenders following their release. It will also include measures to update current legislation to capture terrorist conduct in the modern digital age.

17 Home Office, *Law tightened to target terrorists' use of the internet* 3 October 2017

4. The Bill

4.1 Counter terrorism legislation – Terrorist offences

Expressions of support for a proscribed organisation

Under the Terrorism Act 2000 the 2000 Act), the Home Secretary may proscribe an organisation if he believes it is "concerned in terrorism". For the purposes of the Act, this means that the organisation:

- commits or participates in acts of terrorism;
- prepares for terrorism;
- promotes or encourages terrorism (including the unlawful glorification of terrorism); or
- is otherwise concerned in terrorism.

It is a criminal offence for a person to belong to or invite support for a proscribed organisation. It is also a criminal offence to arrange a meeting to support a proscribed organisation or to wear clothing or to carry articles in public which arouse reasonable suspicion that an individual is a member or supporter of the proscribed organisation.

Proscription means that the financial assets of the organisation become terrorist property and can be subject to freezing and seizure.

There is a list of proscribed terrorist organisations in Schedule 2 of the 2000 Act. The Explanatory Notes say:

> There are currently 74 proscribed international terrorist organisations (including Al Qa'ida, Boko Haram, Islamic State of Iraq and the Levant (ISIL – also known a Daesh) and National Action) and 14 organisations in Northern Ireland that were proscribed under earlier legislation.

Further background is in Library Briefing Paper 0815, Proscribed terrorist organisations, 22 June 2017

Clause 1 would amend section 12 of the 2000 Act, which creates several offences around supporting a proscribed organisation. They include:

- Inviting support for a proscribed organisation;
- Arranging, managing or helping to run a meeting which the offender knows is to support a proscribed organisation, or to further its activities, or which is to be addressed by a person who belongs to or professes to belong to a proscribed organisation;
- Addressing a meeting where the purpose of that address is to encourage support for a proscribed organisation or to further its activities.

Clause 1 would add a new offence of expressing an opinion or belief that is supportive of a proscribed organisation, in circumstances where the perpetrator is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.

The new offence is in response to a Court of Appeal judgement.

In July 2016, Anjem Choudary and Mohammed Rahman were convicted for inviting support for Daesh under section 12.[18] They sought leave to appeal against the conviction and were refused.[19] However, while considering their application, the Court of Appeal commented on the scope of the offence under section 12, pointing out that it did not prohibit holding or expressing beliefs supportive of proscribed organisations. The Explanatory Notes give details:

> The Court of Appeal was clear that a central ingredient of the offence was inviting support from third parties for a proscribed organisation and that the offence "does not prohibit the holding of opinions or beliefs supportive of a proscribed organisation; or the expression of those opinions or beliefs" (paragraph 35 of the judgment). This clause therefore provides for a new offence which criminalises the expression of an opinion or belief that is supportive of a proscribed organisation (the actus reus or criminal act) in circumstances where the perpetrator is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation (the mens rea or mental element). The recklessness test is a subjective one, requiring that the perpetrator be aware of the risk. The new offence, as with the section 12(1) offence, is not subject to a minimum number of people to whom the expression is directed, nor is it limited in terms of applying only to expressions in a public place. The new offence is subject to the same maximum penalty as the existing section 12 offences; that is, ten years' imprisonment (section 12(6)).[20]

Publication of images

Clause 2 would criminalise the publication of an image of an item of clothing or an article (such as a flag) "in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation".

The clause would add this offence to section 13 of the 2000 Act, which already makes it an offence to wear certain clothing or carry , wear or display certain articles in a public place. These offences are also committed if the clothes or articles are worn, carried or displayed "in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation. " The Explanatory Notes explain what is envisaged:

> The new offence will apply where an image of the item is published in such a way that the image is accessible to the public. This would, for example, cover a person uploading to social media a photograph of himself or herself, taken in his bedroom, which includes in the background an ISIS flag. It is not clear that the existing offence at section 13 would cover these circumstances because a bedroom is not a public place within the meaning of section 121. The new offence is subject to the same maximum penalty as the existing section 13 offence; that is, six months' imprisonment (section 13(3)).

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18 "Anjem Choudary jailed for five and a half years for urging support for ISIS," 6 September 2016

19 R v Choudary and Rahman, [2016] EWCA Crim 61.

20 Explanatory Notes, paragraph 30

Obtaining and viewing material over the internet

Clause 3 has received the most attention of the counter-terrorism powers. It is already an offence to download information of a kind likely to be useful to a person committing or preparing an act of terrorism. The new offence would criminalise the streaming of such material.

Streaming involves watching content online without a copy of the content being stored on the device, for example, watching videos on YouTube. Streaming requires an active internet connection to watch the content. Downloading involves storing an offline copy of the content so that it can be viewed later without requiring an internet connection.

In order not to catch those who simply click on a link by mistake, the offence would only apply where a person viewed such material three or more times – characterised by some as a "three strikes and you're out" offence.

The then Home Secretary, Amber Rudd, gave considerable detail when she announced the Government's review of counter terrorism legislation in October 2017:

> The government intends to change the law, so that people who repeatedly view terrorist content online could face up to 15 years behind bars. The proposed changes will strengthen the existing offence of possessing information likely to be useful to a terrorist (Section 58 Terrorism Act 2000) so that it applies to material that is viewed repeatedly or streamed online. Currently the power only applies to online material which has been downloaded and stored on the offender's computer, is saved on a separate device or printed off as a hard copy.
>
> The move to tighten the law around the viewing of terrorist material comes as part of a wide-ranging review of the government's counter terrorism strategy, following this year's terror attacks, and will help provide an important and effective way of intervening earlier in an investigation and disrupting terrorist activity.
>
> (…)
>
> The updated offence will ensure that only those found to repeatedly view online terrorist material will be captured by the offence, to safeguard those who click on a link by mistake or who could argue that they did so out of curiosity rather than with criminal intent. A defence of 'reasonable excuse' would still be available to academics, journalists or others who may have a legitimate reason to view such material.[21]

Clause 3 amends section 58 of the 2000 Act. Section 58(1) which contains the existing offence of collecting or making a record of information likely to be useful to a person committing or preparing an act of terrorism. A record is defined to include a photograph or electronic record. Section 58 (3) states:

> It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.

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21 Home Office, Law tightened to target terrorists' use of the internet 3 October 2017

This defence might apply, for example, in the case of a journalist or academic researching the topic, but they would have to prove that their excuse was reasonable.

Clause 3 would insert a new subsection (1A)(b) to clarify that the section 58(1) offence would only apply where the person downloads material knowing, or having reason to believe, that the material contains, or is likely to contain, information likely to be useful for terrorist purposes. The Explanatory Notes state that "Unintentional or mistaken downloading of such material would not be caught by the offence."

Clause 2(2) would introduce the new streaming offence. The Explanatory Notes state:

> The requirement to view the material on at least three occasions ensures that the new offence deals with a pattern of behaviour, rather than a deliberate but one off action (perhaps sparked by mere curiosity) or the unintended viewing of such material, for example by Cl clicking on the wrong internet link. The offence would be committed whether the three occasions involved viewing the same material or different material each time (new section 58(1B) as inserted by subsection (3) of the clause). The offence would be committed whether the defendant was in control of the computer or was viewing the material, for example, over the controller's shoulder.[22]

The Financial Times predicts concerns from civil liberties organisations, academics and journalists, and points to a similar attempt to change the law in France which was struck down twice. [23]

The Government's Independent Reviewer of Terrorism Legislation, Max Hill, discussed in some detail the French attempts to legislate in a seminar in January 2018.[24]

Encouragement of terrorism and disseminating terrorist publications

Clause 4 would make changes to the existing offences of encouraging terrorism and disseminating terrorist publications. The current offences rely on the fact that those receiving the encouragement or the terrorist publications will be likely to understand that they are being encouraged to commit acts of terrorism. The Government's concern is that this would not apply in cases where the audience comprises children or vulnerable adults. Its solution is to amend the relevant sections of the Terrorism Act 2006 to replace this test with a "reasonable person" test.

Section 1 of the Terrorism Act 2006 makes it an offence to publish "a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of

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22 Paragraph 37

23 "Streaming of extremist material targeted in UK counter-terror bill [", Financial Times, 4 June 2018 (Paywall);

24 "Ensuring legislation effectively mitigates the increasing terror threat", Westminster eForum Keynote Seminar, Max Hill QC, Independent Reviewer of Terrorism Legislation, 16.01.2018; see also "France scraps law making 'regular' visits to jihadi websites an offence", Independent, 10 February 2018

acts of terrorism." The offence is committed whether or not any person is actually encouraged or induced to commit, prepare or instigate an act of terrorism.

Sub clauses 4(3) and (4) would strengthen section 1 by introducing the "reasonable person test". The Explanatory Notes give further detail:

> Given the requirement in section 1(1) that the statement must be "likely to be understood" by a member of the public as an encouragement or inducement to them to commission, prepare or instigate an act of terrorism, the encouragement offence will not be made out if the statement is directed at children or vulnerable adults who do not understand the statement to be an encouragement to engage in acts of terrorism. Subsections (3) and (4) of the clause amend section 1 of the 2006 Act to provide instead for a "reasonable person" test so that the offence would be made out if a reasonable person would understand the statement as an encouragement or inducement to them to commission, prepare or instigate an act of terrorism.[25]

Section 2 of the 2006 Act makes it an offence for a person to disseminate terrorist publications if:

- he intends an effect of his conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism;
- he intends an effect of his conduct to be the provision of assistance in the commission or preparation of such acts; or
- he is reckless as to whether his conduct has either of these two effects

Section 2(3) of the 2006 Act defines a terrorist publication as one which meets one of two tests. Either:

- the material contained in it must be "likely to be understood" by its recipients as an encouragement, inducement or instigation to commit acts of terrorism; or
- the material contains any matter which is likely to be useful in the commission or preparation of such acts, and it is likely to be understood to be such by some or all of its recipients.

Subsections (6) and (7) of clause 4 would replace this with a similar "reasonable person" test so that the offence will be committed if a reasonable person would understand the content of the publication as being an encouragement or inducement to them to commission, prepare or instigate an act of terrorism.

Extra territorial jurisdiction

Generally speaking, English criminal jurisdiction is territorial, and the courts are not concerned with conduct abroad. However, there are some statutory exceptions to this.

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25 Explanatory Notes, paragraph 42

One such exception is section 17 of the *Terrorism Act 2006*, which gives domestic courts jurisdiction over certain terrorist offences committed abroad.

The more common legislative approach is to limit extra territorial jurisdiction to acts committed overseas by British nationals or residents, as practitioners' text *Blackstone's Criminal Practice* comments:

> Extra-territorial jurisdiction is ordinarily limited to things done or omitted by persons who hold some form of British nationality or domicile. [26]

However, section 17 takes the more unusual approach of extending jurisdiction to acts committed overseas by any person, whether or not they are a British citizen or resident. This is known as "universal jurisdiction", as the European Convention on Human Rights Memorandum accompanying the Bill explains:

> section 17 of the 2006 Act [provides that] for the offences listed therein, the UK Courts have universal jurisdiction: that is, a person, whether a British citizen or not and whether or not the offending had a link to the UK, may be prosecuted in the UK for conduct that took place outside the UK which, had it taken place here, would have been unlawful under one of the listed offences. There is no requirement under section 17 that the conduct to be prosecuted in the UK under the universal jurisdiction measure must also be prosecutable under an offence in the law of the jurisdiction where the conduct took place.[27]

The offences currently covered by section 17 are listed in the Explanatory Notes, which explain that in practice a prosecution would only be instigated if the individual were in the UK:

> Section 17 of the 2006 Act makes provision in relation to extra-territorial jurisdiction for the UK courts for the offences contained in sections 1 (encouragement of terrorism), 6 (training for terrorism), 8 (attendance at a place used for terrorist training) and 9 to 11 (offences involving radioactive devices and materials and nuclear facilities) of that Act, and in sections 11(1) (membership of proscribed organisations) and 54 (weapons training) of the 2000 Act. The overall effect of the section is that if, for example, an individual were to commit one of these offences in a foreign country, they would be liable under UK law in the same way as if they had committed the offence in the UK. In practice, a prosecution would only be instituted in this country if the individual was present in the UK (for example having returned voluntarily from fighting with a terrorist organisation overseas, or having been returned in accordance with extradition procedures). Prosecutions in England and Wales for an offence committed abroad may only be instituted with the consent of the Director of Public Prosecutions, given with the permission of the Attorney General; such prosecutions in Northern Ireland are subject to the consent of the Director of Public Prosecutions for Northern Ireland, given with the permission of the Attorney General for Northern Ireland (section 19 of the 2006 Act). In

[26] Blackstone's Criminal Practice, 2018 edition, para A8.20

[27] Home Office, Counter-Terrorism and Border Security Bill: ECHR Memorandum, para 40

> Scotland, all prosecutions are brought by the Lord Advocate or on his behalf, where to do so is in the public interest.[28]

Clause 5 would amend section 17 of the 2006 Act to extend extraterritorial jurisdiction to three further offences, so far as these offences are committed for the purposes of an act of terrorism. The offences are:

- dissemination of terrorist publications (section 2 of the 2006 Act)
- wearing a uniform or wearing or carrying an article associated with proscribed organisation (section 13 of the 2000 Act)
- making or possessing explosives under suspicious circumstances (under section 4 of the *Explosive Substances Act 1883*)

Clause 5(2)(b) would extend the extra-territoriality which already applies (by virtue of section 17) to section 1 of the *Terrorism Act 2006* (encouragement of terrorism):

> Currently this [i.e. extra-territorial jurisdiction over the section 1 offence] only applies to the encouragement of certain offences listed in Schedule 1 of the 2006 Act, which are the parallel offences in UK law to offences listed in the Council of Europe Convention on the Prevention of Terrorism. The amendment would remove this limitation, so that a person who commits an offence of encouraging terrorism under section 1 could be tried in the UK whether or not they were encouraging a Convention offence.

The new trigger offences are listed in the Explanatory Notes. [29]

They include offences relating to proscribed organisations; terrorist property; failing to disclose information about acts of terrorism; weapons training; encouragement of terrorism; collecting information for the purposes of terrorism and inciting terrorism outside the United Kingdom.

4.2 "Punishment and management" of terrorist offenders

Sentencing

Sentencing measures in the Bill would:

- Increase the maximum sentence available for four offences;
- Make further terrorism offences eligible for Extended Determinate Sentences and Sentences for Offenders of Particular Concern; and
- Extend to Northern Ireland the sentencing provisions which require a court, when sentencing a person for a specified non-terrorist offence, to treat a terrorist connection as an aggravating factor and add to the list of such specified offences.

These measures, the Home Office says in its Impact Assessment,

> … will increase the length of time convicted terrorists spend in prison, increasing control around their early release and linking this to risk, and increasing the duration of restrictions on them following release.

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[28] Explanatory Notes, paragraph 49

[29] Paragraph 88

> Taken together they will increase the disruptive effect of the sentencing regime on terrorist activity.[30]

The Home Office Impact Assessment for the Bill estimates the costs of the increase in sentencing powers included in the Bill:

> The increase in sentencing powers of the courts is also relatively high in cost compared to other measures in this Bill, estimated to be £14.4m.[31]

Increase in maximum sentences

Clause 6 would amend the Terrorism Act 2000 and the Terrorism Act 2006 to increase the maximum penalty for four offences as follows:

Collection of information useful to a terrorist (section 58 of the Terrorism Act 2000)	increase from 10 years to 15 years
Publishing information about members of the armed forces, intelligence services or police (section 58A of the Terrorism Act 2000)	increase from 10 to 15 years
Encouragement of terrorism (section 1 of the Terrorism Act 2006)	increase from 7 years to 15 years
Dissemination of terrorist publications (section 2 of the Terrorism Act 2006)	increase from 7 years to 15 years

The Home Office Sentencing Factsheet produced for the Bill sets out the Government's reasons for proposing these increases:

> The maximum penalties for a number of terrorism offences were established in the Terrorism Acts of 2000 and 2006. The terrorist threat has since changed, with individuals engaging in such conduct now likely to pose an increased risk of moving quickly on to attack planning, given the rapid trajectory of radicalisation now being observed. Increased maximum penalties better reflect the increased risk and the seriousness of these offences.[32]

Sentences for offences with a terrorist connection

Section 30 of the Counter-Terrorism Act 2008 requires a court in England and Wales, when sentencing a person for an offence listed in Schedule 2 to that Act, if it appears that there was or may have been a terrorist connection, to determine whether there was such a connection. Section 31 of the 2008 Act makes similar provision in relation to Scotland.

If the court determines that there was a terrorist connection, it must treat that as an aggravating factor when sentencing the offender.

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30 Impact Assessment, para 75
31 Impact Assessment, page 2
32 Home Office, Counter-Terrorism and Border Security Bill 2018 Sentencing Fact Sheet

Clause 7 would amend section 30 of the Counter-Terrorism Act 2008:

- to require courts in Northern Ireland to consider whether specified offences have a terrorist connection; and
- to add to the list of offences where a terrorist connection must be considered the offence of wounding with intent (section 18 of the Offences against the Person Act 1861) in respect of England and Wales and broadly equivalent Scottish common law offences.

Clause 7 would also amend Schedule 2 to the 2008 Act to add offences under the law in Northern Ireland (false imprisonment, blackmail, intimidation and putting people in fear of violence and certain firearms offences) to the list of specified offences for the purposes of section 30 of that Act. The Explanatory Notes to the Bill state that such offences are commonly charged in Northern Ireland in terrorism-related cases.[33]

Extended sentences and Sentences for Offenders of Particular Concern - England and Wales

Offences listed in Schedule 15 of the Criminal Justice Act 2003 are eligible, in certain circumstances, for an extended determinate sentence (EDS). This sentence is comprised of a custodial term and an extended licence period of up to five years for violent offences and eight years for sexual offences.[34]

A person sentenced to a standard determinate sentence will serve the first half of the sentence in prison and the second half in the community on licence. Release at the half way point in the sentence is automatic.

A person who receives an EDS must serve at least two-thirds of their custodial term in custody, with release in the final third at the discretion of the Parole Board. If the Parole Board does not grant release, release is automatic at the end of the custodial term. When released, the offender must serve the remainder of their custodial term (if any) plus the extended period on licence. A person on licence may be recalled to prison if they breach their licence conditions.

An EDS can be imposed where:

- an offender is convicted of a specified offence;
- the court considers that there is a significant risk to members of the public of serious harm from the offender committing further specified offences;
- the court is not required to impose a sentence of imprisonment for life; and
- one of the following two conditions is met:
  - condition A, that at the time the offence was committed the offender had been convicted of an offence listed in Schedule 15B of the Criminal Justice Act 2003 (which sets out particularly serious sexual or violent offences);[35] or

33 Para 58

34 Section 226A (for offenders aged 18 or over) and 226B (for offenders under 18) of the Criminal Justice Act 2003

35 This condition does not apply where the offender is aged under 18

— condition B, that the appropriate custodial term for the current offence would be at least 4 years.

Clause 8 would provide for additional terrorism offences to be eligible for an Extended Determinate Sentence in England and Wales.

These offences are:

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

These offences and a number of other offences which are currently included in Part 1 of Schedule 15 as violent offences would be placed into a new Part 3 of Schedule 15 listing specified terrorism offences.

The extended period of licence for these terrorism offences, listed in Part 3, would be up to eight years. During this extended period the person will be liable to recall to prison if they breach their licence conditions.

Clause 8 would also enable a criminal court, in England and Wales, to impose a sentence for certain offenders of particular concern (SOPC) in respect of the offences listed above.

When an offender is convicted of an offence listed in Schedule 18A to the Criminal Justice Act 2003 and is sentenced to a term of imprisonment, the court must, unless it imposes a life sentence or an EDS, impose a SOPC under section 236A of the 2003 Act.

The Explanatory Notes to the Bill state that the SOPC regime was created in order to remove automatic release for terrorism and child sex offences, which would have applied to a standard determinate sentence.

A SOPC is comprised of the custodial term and an additional licence period. The Explanatory Notes summarise the effect of a SOPC :

> … release between the point half-way through the custodial term and the conclusion of the term is not automatic, but is at the discretion of the Parole Board, and on release they must serve a minimum of 12 months on licence (section 236A(2) of the 2003 Act).[36]

[36] Paragraph 67

The Home Office Factsheet: sentencing states that currently only terrorism offences which involve weapons or violence, or are linked to the commission of an actual act of terrorism, can result in an EDS or SOPC. **Clause 8** would extend EDS and SOPC to cover the further terrorism offences listed above. The Government says in the Impact Assessment that making EDS and SOPC available for these further offences will help manage the risk posed by individuals who commit preparatory terrorism offences.

Extended Sentences – Scotland and Northern Ireland

Clauses 9 and 10 would make similar changes to analogous extended sentences in Scotland and Northern Ireland respectively.[37]

In Scotland the extended licence period would be up to ten years for terrorism offences as is the case now for sexual and violent offences.

Registered terrorist offenders

Part 4 of the Counter Terrorism Act 2008 requires certain terrorist offenders to

- provide the police with personal information (for example their name, date of birth, address and national insurance number)
- tell the police about any changes to that information
- notify the police of any foreign travel.

These terrorist offenders are called "registered terrorist offenders" (RTOs). The requirements apply, for example, to those convicted of a relevant offence and sentenced to a term of 12 months or more. They would also apply to a person found not guilty by reason of insanity of a relevant offence punishable by imprisonment of 12 months or more who is subject to a hospital order.

Clause 11 would add to the information which the RTO would have to give initially to include their contact details (i.e. telephone number and email address) together with other details including any vehicle they own or use, their passport, their bank account and their bank or credit cards. They would also have to notify the police of changes.

Clause 12 provides for police powers to enter and search the home of an RTO with a warrant for the purposes of assessing the risks that an RTO may pose to the community.

Full details are in the Explanatory Notes.[38]

Serious Crime Prevention Orders

Serious Crime Prevention Orders (SCPOs) were introduced by Part 1 of the Serious Crime Act 2007. They are a civil order designed to prevent, restrict or disrupt serious crime through prohibitions, restrictions or requirements. The Crown Court can make an SCPO when sentencing a person who has been convicted of a serious offence. The orders can be made against individuals, bodies corporate, partnerships or unincorporated associations. The power is very broad, with the Act giving non-exhaustive lists of examples of prohibitions, restrictions or requirements.[39] They might cover

37 For details see the Explanatory Notes, paragraphs 69-78
38 Paragraphs 79-86
39 Section 5

a person's financial, property or business dealings, their working arrangements, communications, premises and travel. They can restrict where a person can live. The order could require a person to answer questions or provide information to the police. Breach of an order is a criminal offence.

Background on the introduction of Serious Crime Prevention Orders is given in Library Research Paper 07/52 The Serious Crime Bill. The Serious Crime Act 2015 made a number of changes including extending SPCOs to Scotland (with the consent of the Scottish Government). Background to the changes is in Library Research Paper 14/67, Serious Crime Bill.

Clause 13 would add a number of terrorist offences to the of "serious offences" in schedule 1 of the 2007 Act which can trigger an SPCO. The Explanatory Notes set these out:

> The clause extends this list of trigger offences to include terrorism offences for the time being listed in section 41(1) of the 2008 Act, namely an offence:
>
> - under section 11 or 12 of the 2000 Act (offences relating to proscribed organisations);
> - under sections 15 to 18 of the 2000 Act (offences relating to terrorist property);
> - under section 38B of the 2000 Act (failure to disclose information about acts of terrorism);
> - under section 54 of the 2000 Act (weapons training);
> - under sections 56 to 61 of the 2000 Act (directing terrorism, possessing things and collecting information for the purposes of terrorism and inciting terrorism outside the United Kingdom);
> - under section 113 of the Anti-terrorism, Crime and Security Act 2001 (use of noxious substances or things);
> - under sections 1 and 2 of the 2006 Act (encouragement of terrorism);
> - under sections 5, 6 and 8 of the 2006 Act (preparation and training for terrorism);
> - under sections 9, 10 and 11 of the 2006 Act (offences relating to radioactive devices and material and nuclear facilities);
> - in respect of which UK courts have jurisdiction by virtue of any of sections 62 to 63D of the 2000 Act or section 17 of the 2006 Act (extra-territorial jurisdiction in respect of certain offences committed outside the United Kingdom for the purposes of terrorism etc).

5. Counter-terrorism powers

5.1 Traffic regulation (clause 14)

Background

Anti-Terrorism Traffic Regulation Orders (ATTROs) allow vehicle or pedestrian traffic to be restricted for counter terrorism reasons. These can be permanent or temporary, and can include the installation of equipment such as bollards and barriers as well as the restriction of parking on or access to roads.

ATTROs are a special form of Traffic Regulation Order (TRO), provided for in Parts 1 and 2 of the Road Traffic Regulation Act 1984, as amended. Sections 22C and 22D relate to ATTROs and refer to other provisions in the Act.[40]

A general overview of the legislation providing for TROs can be found in HC Library briefing paper CBP 6013.

The first ATTRO was introduced across the City of London in 2016.[41] Examples of other ATTROs include the control lane outside Parliament along Abingdon Street and Grosvenor Square around the former US embassy. Temporary ATTROs have also operated around the sites of annual conferences of the main political parties, the start and end of the London marathon, G8 conferences, the NATO summit and royal weddings.[42]

The Bill

Clause 14 amends the regime governing ATTROs, including by removing the requirement for an ATTRO to be advertised where to do so would frustrate the purpose of the order.

Specifically, the amendments in this Bill would:

- Disapply the requirement to publicise an ATTRO in advance where in the opinion of the Chief Officer of police such publicity would undermine the purpose of the order
- Allow the discretion of a constable in managing and enforcing an ATTRO to be delegated to third parties such as local authority staff or private security personnel
- Align provisions for temporary notices and orders under the ATTRO power
- Allow the cost of an ATTRO to be recharged to the beneficiary
- Put onto a statutory footing the existing common-law police power to deploy obstructions to enforce temporary traffic restrictions in exceptional circumstances[43]

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40 These provisions were added to the 1984 Act by section 32 and Schedule 2, Part 3, para 16 of the Civil Contingencies Act 2004. The provisions were introduced by the Government at Commons Committee stage and added to the Bill without discussion or debate. The most extensive explanation of the provisions at the time was given in a letter to the Delegated Powers and Regulatory Reform Committee

41 See: "City police move to bolster 'ring of steel' during terror alert by closing streets", Evening Standard, 21 January 2016; City of London, Paper for decision on Anti-Terrorism Traffic Regulation Order (ATTRO), 15 December 2015; and City of London, Decision on Anti-terrorism regulation order (ATTRO), 21 December 2015

42 Explanatory Notes, para 98

43 Counter-Terrorism and Border Security Bill - IA No: HO0308, 9 May 2018, para 130

The main provisions in clause 14 introduce new sections 22CA and 94A to the 1984 Act.

New section 22CA and further amendments in sub-sections 14(3) to (9) would allow the existing power of police officers to exercise discretion when manning a barrier under an ATTRO to allow accredited vehicles or persons through the barrier to be delegated to other persons (e.g. security guards employed by event organisers). It would also allow the existing requirement to advertise an ATTRO before it comes into force to be disapplied where such publicity would undermine the purpose of the order. Finally, it would expressly enable a local authority to charge the beneficiary of an ATTRO, such as an event organiser, for the costs associated with the order.[44]

The Impact Assessment states that the Government anticipates savings of between £6,300 to £18,000 per year to police and local authorities from removing the requirement to advertise.[45] It anticipates a potential shift in costs from the police and local authorities to businesses of £66,900 to £191,000 per year due to the new statutory power to charge back costs to event organisers.[46]

New section 94A relates to the use of section 67 of the 1984 Act. Section 67 empowers the police in extraordinary circumstances to deploy temporary traffic signs indicating that prohibitions, restrictions or requirements in respect of vehicular traffic are in operation. 'Extraordinary circumstances' include terrorism or the prospect of terrorism. The Bill confers a statutory power on the police to deploy bollards or other obstructions where the section 67 power is being used for counter-terrorism purposes.[47]

These changes are completed by sub-section 14(10), which amends section 67 so that these powers can be exercised in connection with pedestrians as well as vehicles.

5.2 Evidence obtained under port and border control powers

Clause 15 is designed to give effect to a recommendation by David Anderson QC, then the Government's Independent Reviewer of Terrorism Legislation. It was made in his Review of the Terrorism Acts in 2015, which was published in December 2016.[48]

The clause would amend Schedule 7 of the 2000 Act, which allows police, immigration and customs officers to stop, question and if necessary detain and search a person travelling through a port, airport, international rail station or the border area. These powers can be exercised without the

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44 Ibid., paras 131-3; this is already permitted for other orders under the *Local Authority (Transport Charges) Regulations 1998* (SI 1998/948)

45 Op cit., *Counter-Terrorism and Border Security Bill - IA No: HO0308*, para 135

46 Ibid., para 138

47 Explanatory Notes, paras 104-5

48 David Anderson QC *The Terrorism Acts in 2015 Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* December 2016

officer having grounds for suspicion. David Anderson's report recommended that "there should be a statutory bar to the introduction of Schedule 7 admissions in a subsequent criminal trial".[49]

The clause would introduce a bar on using oral responses to questions by an examining officer as evidence, except in certain circumstances. The exceptions would include proceedings for offences of wilful failure to comply with a duty imposed by Schedule 7, and wilful obstruction or frustration of a search or examination under Schedule 7. Details of these exceptions are in the Explanatory Notes.

5.3 Clause 16: Detention of terrorist suspects: hospital treatment

Clause 16 is also designed to respond to a recommendation by David Anderson QC in his report on terrorism legislation in 2015. It concerns the time for people arrested on suspicion of certain terrorist offences can be detained without charge. The 2000 Act allows this for a maximum of 14 days from the time of arrest. [50] David Anderson recommended that the "detention clock" should be suspended where a detainee is admitted to hospital (providing the detainee is not questioned during that hospitalisation):

> The law should be changed so as to allow the detention clock to be suspended in the case of detainees who are admitted to hospital. The rules should reflect PACE Code C para 14 by stating that a person in police detention at a hospital may not be questioned without the agreement of a responsible doctor. If questioning takes place at a hospital, or on the way to or from a hospital, the period of questioning concerned should count towards the total period of detention permitted. Otherwise, the period of detention should be suspended until questioning takes place or until the person arrives back at the police station, whichever is the sooner."

Clause 16 provides that time in hospital, or on the way there and back, won't count towards the 14 days, except for any time during this when the detainee is questioned. This reflects the existing PACE provision.[51]

Retention of biometric data

Clause 17 would give effect to **Schedule 2** which would amend provisions governing the retention of fingerprints and DNA samples and profiles (called biometric data) by the police for counter-terrorism purposes.

The Bill would:

- Increase the maximum duration of a National Security Determination from two to five years
- Allow chief officers to make NSDs authorising the retention of biometric data taken in force areas other than their own

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49 Ibid paragraph 7.23(d)

50 Paragraph 36(3)(b)(ii) of Schedule 8 to the *Terrorism Act 2000*

51 section 41(6) of the Police and Criminal Evidence Act 1984

- Allow multiple sets of biometric data in relation to the same person to be treated as a single combined record, enabling a single NSD to be made
- Harmonise the retention periods for biometric data when individuals are arrested on suspicion of terrorism offences under the Police and Criminal Evidence Act 1984 and under the Terrorism Act 2000

The Explanatory Notes to the Bill, at paragraph 112, list the legislative provisions which contain the various schemes which would be amended. Some extend and apply to England and Wales, Scotland or Northern Ireland only.

The Explanatory Notes provide a brief overview of the current operation of these schemes governing the retention of biometric material:

> These schemes proceed on the basis that fingerprints and DNA profiles must be destroyed unless they are retained under a power conferred by the applicable regime. Under PACE, where an adult is convicted of a recordable offence his or her biometric material may be retained indefinitely. Where a person is charged with a qualifying offence (broadly speaking serious sexual, violent and terrorism offences), but not convicted, his or her biometric material may be retained for three years, extendable on a case-by-case basis for a further two years with the approval of a District Judge.[52]

For background on the law in England and Wales see the Library briefing: Retention of fingerprints and DNA data, 25 November 2015.

The Home Office Impact Assessment explains why the Government believes these changes are necessary:

> The Protection of Freedoms Act 2012 (POFA) introduced strict controls on the circumstances in which the police can retain the fingerprints and DNA profiles of people who have not been convicted, and the periods for which they can do so, with the intention of rebalancing the system in favour of civil liberties. In a number of respects this legislation has proven to be complex to operate, placing disproportionate burdens on the police and Biometrics Commissioner and not giving sufficient weight to the need to protect the public. The amended measures are designed to strike a better balance between enabling the police to use fingerprints and DNA to support terrorism investigations and continuing to provide proportionate safeguards for individuals who have not been convicted of an offence.[53]

National Security Determinations

The Police and Criminal Evidence Act 1984 (PACE) provides that a responsible Chief Officer of police may determine that it is necessary to retain, for an additional period of two years, biometric data which the police would otherwise be required to delete, if it is necessary for the purposes of national security and proportionate to do so. This is called a National Security Determination (NSD). The NSD may be renewed for

52 Explanatory Notes, paragraph 113
53 Impact Assessment, paragraph 118

successive periods of up to two years. There is statutory guidance about the making or renewing of a NSD.[54]

The Explanatory Notes to the Bill state that each of the schemes listed in paragraph 112 similarly provides for retention of biometric material pursuant to a National Security Determination.[55]

A NSD is subject to substantive review by the Biometrics Commissioner. The Biometrics Commissioner was established by the Protection of Freedoms Act 2012 and is independent of Government. The Commissioner keeps under review every NSD made or renewed and has the power to order destruction of material retained because of a NSD where it is not necessary to retain it.

The Home Office's Biometric Data Factsheet produced for the Bill states that this process can be resource intensive and complex to manage.

The Biometric Commissioner stated in his Annual Report for 2017 that:

> For some NSD cases, my judgment is that the evidence/intelligence against the relevant individuals is such that they could be granted for longer than two years.[56]

Schedule 2 would extend the duration of a NSD from a maximum of two years to a maximum of five years.

Schedule 2 would also enable any Chief Officer of police to make a NSD in respect of biometric material. Currently this can only be done by the chief officer for the police area where the fingerprints or DNA sample were taken.

The Biometrics Commissioner has also highlighted that in cases where individuals have been detained or arrested on multiple occasions, multiple NSDs have to be made for the same individual. He therefore suggested that the Government consider amending the legislation to address these issues.[57]

Schedule 2 would address this issue by enabling, in certain circumstances, a single NSD to be made covering multiple sets of fingerprints.

Retention periods

Currently the retention periods that apply automatically for biometric data when individuals are arrested on suspicion of terrorism offences are different depending on whether the individual is arrested under the Police and Criminal Evidence Act 1984 (PACE) or under the Terrorism Act 2000.

Where a person with no previous convictions is arrested under section 41 of the Terrorism Act 2000 but is not subsequently charged, their biometrics can be retained for three years on the basis of the arrest. Where a person arrested on suspicion of a terrorism offence under PACE 1984 but is not

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54 Home Office, Protection of Freedoms Act 2012 Guidance on the making or renewing of national security determinations allowing the retention of biometric data June 2013

55 Explanatory Notes, paragraph 114

56 Annual Report 2017: Commissioner for the Retention and Use of Biometric Material, March 2018, published June 2018, para 219

57 Annual Report 2017: Commissioner for the Retention and Use of Biometric Material, March 2018, published June 2018, para 228

charged, there is no automatic retention period and their biometrics must be deleted (unless an NSD is made).

PACE currently provides[58] that where a person is arrested for, but not charged with, a qualifying offence (and does not have a conviction for a recordable offence), biometric material taken in connection with the investigation of the offence may be retained for three years with the consent of the Biometric Commissioner.

Schedule 2 would remove the requirement for the Biometric Commissioner to consent to the retention where the qualifying offence was a terrorist offence (or a related ancillary offence, such as attempting or conspiring to commit the offence).

The Explanatory Notes[59] to the Bill state that this change would align the provisions in PACE with those under the 2000 Act so that the fingerprints and DNA profile of a person arrested for, but not charged with, a terrorism offence or a terrorism-related offence will automatically be retained for three years, whichever of the two applicable powers of arrest (PACE or the 2000 Act) was used.

Schedule 2 would also make a like change to the retention regime in Northern Ireland.

The Impact Assessment explains the Home Office's rationale for this harmonisation:

> … this measure implements the policy intention of the POFA [Protection of Freedoms Act 2012] that there should be an automatic retention period where a person has been arrested on suspicion of terrorism but not charged. Since police routinely use their powers under PACE 1984 to make planned arrests on suspicion of a particular terrorist offence, the automatic retention period of three years intended by Parliament under the 2000 Act is not available for the arrests made on this basis. Therefore amending the legislation will close the gap and harmonise the PACE 1984 and the 2000 Act retention periods for specified terrorism offences.[60]

58 Section 63F(5)
59 Explanatory Notes, paragraph 116
60 Explanatory Notes, paragraph 120

6. Miscellaneous

6.1 Persons vulnerable to being drawn into terrorism

Clause 18 would allow local authorities as well as the police refer people regarded as vulnerable to being drawn into terrorism to the special "Channel" arrangements under the Prevent strategy.

As set out in section 1 of this Briefing Paper, one of the four strands of the Government's CONTEST strategy, and also the most controversial of these, is its Prevent programme. The Prevent Strategy, which was initiated by the Labour government, aims to stop people becoming terrorists or supporting terrorism. It does this through work with a wide variety of partners in the public and private sectors and in local communities. Under the Counter Terrorism and Security Act 2015, there is a legal requirement for certain specified authorities to deliver Prevent activities. These authorities include local authorities, schools, universities, health organisations, police, prisons and probation and education and health providers.

The current Government's updated Prevent strategy is set out in the June 2018 CONTEST document. In particular, the Government announced that over the next few years it would develop a series of "multi-agency pilots to trial methods to improve our understanding of those at risk of involvement in terrorism and enable earlier intervention." [61] In his speech on 4 June 2018, the Home Secretary Sajid Javid summarised the approach to multi partnership working:

> Fourth, we will work more closely with key partners outside of central government.
>
> We are piloting new multi-agency centres in London, Manchester and the West Midlands, to bring together the widest range of partners and improve our understanding of those at risk of becoming involved in terrorism.
>
> We will also increase our co-operation with the private sector.
>
> As someone with a private sector background myself, I understand that government cannot deal with these kinds of challenges alone.
>
> I'm committed to improving how we work with businesses across a range of issues.
>
> That includes faster alerts for suspicious packages, improving security at crowded places across the UK and reducing the vulnerability of our critical national infrastructure. And we must also get better at harnessing private sector and academic innovation.
>
> New detection techniques, data analytics and machine learning all have the potential to dramatically enhance our counter-terrorism capabilities. [62]

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61 HM Government, CONTEST: The United Kingdom's Strategy for Countering Terrorism, Cm 9608, 4 June 2018, pages 31- 42

62 Home Office Press Release, Home Secretary announces new counter terrorism strategy, 4 June 2018

One important part of the Prevent strategy is the "Channel" programme. This is a multi-agency programme coordinated by the police to identify individuals vulnerable to radicalisation and direct them towards appropriate support. Section 36 of the Counter Terrorism and Security Act 2015 requires local authorities to establish what is known as a "Channel panel" to discuss support for people identified by the police as being at risk of being drawn into terrorism.

Clause 18 would enable local authorities to refer people to a "Channel panel" as well as the police.

Background on Prevent and Channel is given in Library Briefing Paper 7238, Counter-extremism policy: an overview, 23 June 2017.

6.2 Terrorism Insurance

Terrorism insurance cover used to be included in standard commercial policies at no extra cost, but following a series of high-profile high-cost terrorism attacks in the City of London in 1992 and 1993, insurers began to impose a ceiling of £100,000 for this cover under their normal policies. In at-risk areas, such as the main cities and financial centres, adequate insurance against terrorist acts was difficult to obtain at reasonable cost.

The Government therefore arranged, after consultation with the industry, to become a reinsurer of last resort for terrorism risks, thus allowing businesses to continue to obtain full terrorism cover. The vehicle was **Pool Re**, a Government-backed mutual reinsurer.

Pool Re was set up by the Reinsurance (Acts of Terrorism) Act 1993. It works by separating over above certain levels with a separate panel of participating insurers who quote in accordance with centrally set rates. The premium is placed by the insurer in the 'pool', and this pool is then available for participating insurers to draw on in the event of a claim arising. If the claims made exceed the value of the pooled funds, then the insurers would bear a small proportion of this additional cost through a 10% levy. Beyond this levy, the Government meets the remaining cost of claims.

The scheme has a long history of evolving to meet new circumstances. The 'Twin Towers' attack in New York prompted the realisation that terrorist attacks might be more extensive, and employ a wider range of devices than had been previously considered. As a result Pool Re cover was extended to 'all risks' caused by terrorist acts, including damage from nuclear attacks, flooding and contamination.

The increasing awareness that terror threats were no longer simply bombs or were physical events, highlighted an omission from the cover which Pool Re offered. A press release set out the response in November 2017 to extend cover to cyber attacks:

> Pool Re, the terrorism reinsurance pool, today announces that, from April 2018, it will extend its cover to include material damage and direct business interruption caused by acts of terrorism using a cyber trigger. The cover, which will exclude intangible assets, will be

> offered as standard to all policyholders which purchase terrorism insurance from Pool Re Members.[63]

In March 2018 Pool Re announced further expansion of its cyber cover capacity:

> Pool Re today announced that it has renewed its retro programme and extended the cover to include material damage and direct business interruption (BI) caused by acts of terrorism using remote digital interference. The renewed cover, brokered by Guy Carpenter, has been increased by £100m to £2.1bn and has been placed with an expanded panel now comprising 47 reinsurers, with Munich Re continuing to be largest market.
>
> The three-layer programme matches the cover provided to Pool Re member insurers, with cyber terrorism now included along with chemical, biological, radioactive and nuclear risks. This represents the most comprehensive and largest terrorism retro placement in the world.[64]

In March 2018, the Financial Services Minister, John Glen, made the following short announcement:

> I am today announcing that the government intends to legislate as soon as parliamentary time allows to amend the Reinsurance (Acts of Terrorism) Act 1993. This amendment will enable an extension of the cover provided by the government-backed terrorism reinsurer Pool Re to include business interruption losses that are not contingent on damage to commercial property. I will announce further details in due course.
>
> This government remains committed to ensuring that businesses can continue to secure insurance against the financial costs of terror attacks.[65]

Responding to this announcement Pool Re said:

> Pool Re today welcomed the Government's commitment to amend the 1993 Reinsurance (Acts of Terrorism) Act to enable it to extend its cover to include non-damage business interruption losses resulting from acts of terrorism.
>
> The reinsurer is currently restricted by the 1993 Act only to pay out if physical damage has occurred to commercial property. This means that businesses, inside a police cordon, that suffer financial loss through being unable to access their property or to trade, are only covered if there has been physical damage during a terrorist attack.
>
> Pool Re had identified the potential protection gap as a result of the spate of attacks across Europe in 2015/6. However, the terrorist attacks in Westminster, Manchester and London Bridge highlighted the actual impact of the gap in UK provisions for terrorism insurance coverage. This caused Pool Re to suggest its cover evolve to ensure continued efficacy in the face of a changing threat. It has already responded to the threat of a cyber trigger and from April 2018 Pool Re will extend its cover to include material damage and direct

63 Pool Re Press Release 27 November 2017
64 Pool Re Press Release 1 March 2018
65 HCWS579 22 March 2018

> business interruption caused by acts of terrorism using a cyber trigger.[66]

Clause 19 of the current Bill effects the Government's March 2018 pledge.

The Bill amends the 1993 Act by extending cover to business losses not caused by physical damage. 'Loss' now includes:

> Loss falls within this subsection if—
>
> (a) it results from interruption to business carried on in Great Britain,
>
> and
>
> (b) the interruption results from or is consequential upon acts of terrorism."

As has been the case in the past, the scheme has adapted to accommodate real life events. The Explanatory Notes give a recent example and the reasoning behind the clause:

> In the case of the June 2017 terrorist attack on Borough Market, there was limited physical damage to the market, but traders lost business as a result of the week-long closure of the market to enable the police to investigate the crime scene. As the losses incurred by Borough Market businesses were not consequential on physical damage to commercial property, any terrorism-related insurance backed by Pool Re and held by those businesses may not have covered such losses. While Pool Re is not the only reinsurer of terrorism risk in Great Britain, this gap means that some businesses are potentially uninsured for any business interruption losses linked to a terrorist attack but that were not as a result of physical damage.[67]

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66 Pool Re Press Release 22 March 2018

67 Explanatory Notes, clause 19

7. Part 2 of the Bill - Border security

Part 2 of the Bill is in response to the poisoning of Sergei and Yulia Skripal in Salisbury on 4 March 2018. **Clause 20** and **Schedule 3** would bring in powers to stop, question, search and detain people at ports and borders to determine whether they appear to be (or have been) engaged in hostile activity. This part of the Bill was highlighted in the press release which accompanied the Bill's publication:

> The government has today introduced new legislation to Parliament to give police new powers to investigate hostile state activity at the border.
>
> The measure, announced by the Prime Minister following the attack in Salisbury, forms part of the Counter-Terrorism and Border Security Bill.
>
> Using the new power, the police or designated immigration or customs officers will be able to stop, question, search and detain an individual at a port, airport or border area to determine whether he or she is, or has been, engaged in hostile activity.
>
> Home Secretary, Sajid Javid said:
>
> We judge that it was highly likely that the Russian state carried out the appalling attack in Salisbury which demonstrates why the police need robust powers to investigate, identify and challenge those acting against our interests.
>
> This is a necessary and proportionate response to the threat and will, of course, be subject to strict safeguards and robust oversight to assure its proper use.
>
> The power will be subject to robust oversight by the Investigatory Powers Commissioner Sir Adrian Fulford and the bill includes provisions for safeguards to protect legally privileged and journalistic material.
>
> The UK faces a sustained threat from hostile state actors seeking to undermine national security in a variety of ways, including espionage and, as the attack in Salisbury made clear, violence against individuals.[68]

Schedule 3 of the Bill contains powers to stop, question, search and detain a person at ports and borders for the purpose of determining whether the person appears to be someone who is, or has been, engaged in hostile activity. These are modelled on existing provisions:

> The provisions are modelled on those in Schedule 7 to the 2000 Act which contain similar powers to stop, question, search and detain persons at a port or border area for the purpose of determining whether they are or have been concerned in the commission, preparation or instigation of acts of terrorism.[69]

Under Schedule 3, police officers or designated immigration or customs officers could exercise these powers at a at a port or in the border area in Northern Ireland. As with the anti-terrorism powers in Schedule 7 to the Terrorism Act 2000, these officers would not need grounds to suspect the

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68 Home Office Press Release, New power to target hostile state activity, 6 June 2018

69 Explanatory Notes paragraph 129

person of being engaged in hostile activity. So they could stop, search, question and detain any persons for these purposes. The Explanatory Notes set out what is meant by "hostile activity":

> 132 Paragraph 1(5) and (6) define "hostile activity" and "hostile act" respectively. A person is engaged in hostile activity for the purpose of this Schedule if he or she is, or has been, concerned in the commission, preparation or instigation of a hostile act carried out for, or on behalf of, a State other than the UK or otherwise in the interests of a State other than the UK. The activity could be carried out wittingly or unwittingly (paragraph (7)(a)), in the latter case perhaps by a person duped into attempting to smuggle something out of the UK that is damaging to national security. A hostile act is one that threatens national security or the economic well-being of the UK or is an act of serious crime. Serious crime for these purposes is defined in paragraph (7)(d). The terms "national security" and "economic well-being" take their ordinary meaning. Acts that would threaten national security would include espionage and sabotage. Acts that would threaten the economic well-being of the UK would include acts that damage the country's critical infrastructure or disrupt energy supplies to the UK.

Under paragraph 4, officers could also stop a person or vehicle or detain a person for the purposes of conducting an examination. Under paragraph 52, there is a power to use reasonable force to do this.

A person could be examined for up to an hour without being detained, there is an overall time limit of six hours for the examination, including the period of detention. There are limits on the extent to which anything a person says could be used in a subsequent criminal trial:

> 137 Paragraph 6 debars anything said by a person during the course of an examination being used in a subsequent criminal trial. The bar is not absolute; paragraph 6(2) enables an answer or information given orally by a person in response to a question asked as part of a Schedule 3 examination to be used in evidence in a criminal trial in the following circumstances:
>
> • Proceedings for an offence under paragraph 16 of Schedule 3;
>
> • On a prosecution for perjury (as defined, in the case of England and Wales and Northern Ireland, in paragraph 6(4));
>
> • On a prosecution for another offence where, in giving evidence, the defendant makes a statement inconsistent with the answer or information provided by him or her in response to a Schedule 3 examination
>
> 138 This bar only applies to information provided orally to an examining officer. There is no bar (as considerations of self-incrimination do not arise) to prosecutors relying, in criminal proceedings against an examinee, on information, for example downloaded from an electronic device, obtained from the examinee during the course of a search conducted under this Schedule.[70]

Paragraphs 7 to 10 make provision for searches, and paragraphs 11 to 13 for retention of property, which includes documents. Where an examining officer is retaining an article which he believes could be used in connection with carrying out a hostile act, he or she must inform the Investigatory

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Powers Commissioner as soon as reasonably practicable. The Commissioner would have the power to order the destruction or retention of an article if he or she is satisfied that there are reasonable grounds to believe that it has been or could be used in connection with the carrying out of a hostile act or that returning the article could result in a risk of death or significant injury.

The Explanatory Notes discusss the safeguards in Schedule 3:

> 142 Stronger safeguards apply to the retention and use of confidential material. The definition of confidential material, in paragraph 12(10) and (11), covers:
>
> • confidential journalistic material;
>
> • items subject to legal privilege;
>
> • personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he or she holds in confidence;
>
> • other material acquired in the course of a trade etc. that is held in confidence; and
>
> • human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence.
>
> 143 The Commissioner may authorise the retention of confidential material if satisfied that the material will be held securely and will be used only as far as necessary and proportionate for a relevant purpose (that is, if its use is necessary in the interests of national security or the economic well-being of the UK, for the purpose of preventing or detecting serious crime or for the purpose of preventing death or significant injury). In the case of information held on an electronic device, such use could include examination of the information. In determining whether confidential material may be retained and used for a relevant purpose, the Commissioner must consider whether such use is necessary and proportionate. If such consideration favours confidentiality, the Commissioner must exercise the power to order destruction or order the return of the material to the person from whom it was seized. Such a determination by the Commissioner does not preclude the retention of the material where the officer believes that it may be needed for use as evidence in criminal proceedings or in connection with a decision whether to make a deportation order. Even if the Commissioner concludes that it is necessary and proportionate for the material to be used for a relevant purpose, the Commissioner may still impose any conditions he or she thinks necessary as to the use or retention of the material.
>
> 144 Before making a determination under paragraph 12, the Commissioner must invite and consider representations from affected parties, including the person from whom the article was seized (see paragraph 13(1)). Where a determination to destroy or retain the article is then made, the Commissioner must inform the person from whom the article was taken.
>
> 145 By virtue of section 227(8) the Investigatory Powers Commissioner may delegate his or her functions under this paragraph to a Judicial Commissioner. Where a determination is

made by a Judicial Commissioner, an affected party may ask the Investigatory Powers Commissioner to reconsider a determination made by the Judicial Commissioner. A decision of the Investigatory Powers Commissioner may be challenged by seeking judicial review of the decision.

Under paragraph 16, there are two criminal offences:

- Wilful failure to comply with a duty imposed under Part 1 of the Schedule, for example the duty in paragraph 3(a) on a person subject to a Schedule 3 examination to give the examining officer any information that the officer requests;
- Wilful obstruction or frustration of a search or examination under Part 1 of the Schedule, for example a refusal by a person subject to a Schedule 3 examination to provide an examining officer with the password for an electronic device so that the officer can examine its content.

The maximum penalty for the offence is three months' imprisonment, or a fine of £2,500, or both.

Detainees' rights in England, Wales and Northern Ireland are set out in paragraphs 22 to 26 and paragraphs 30 to 34 make analogous provision for detainees in Scotland. There are provisions for taking of fingerprints and DNA samples with or without consent.

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