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BRIEFING PAPER

Number 8332, 10 September 2018

Counter-Terrorism and Border Security Bill: Committee Stage Report

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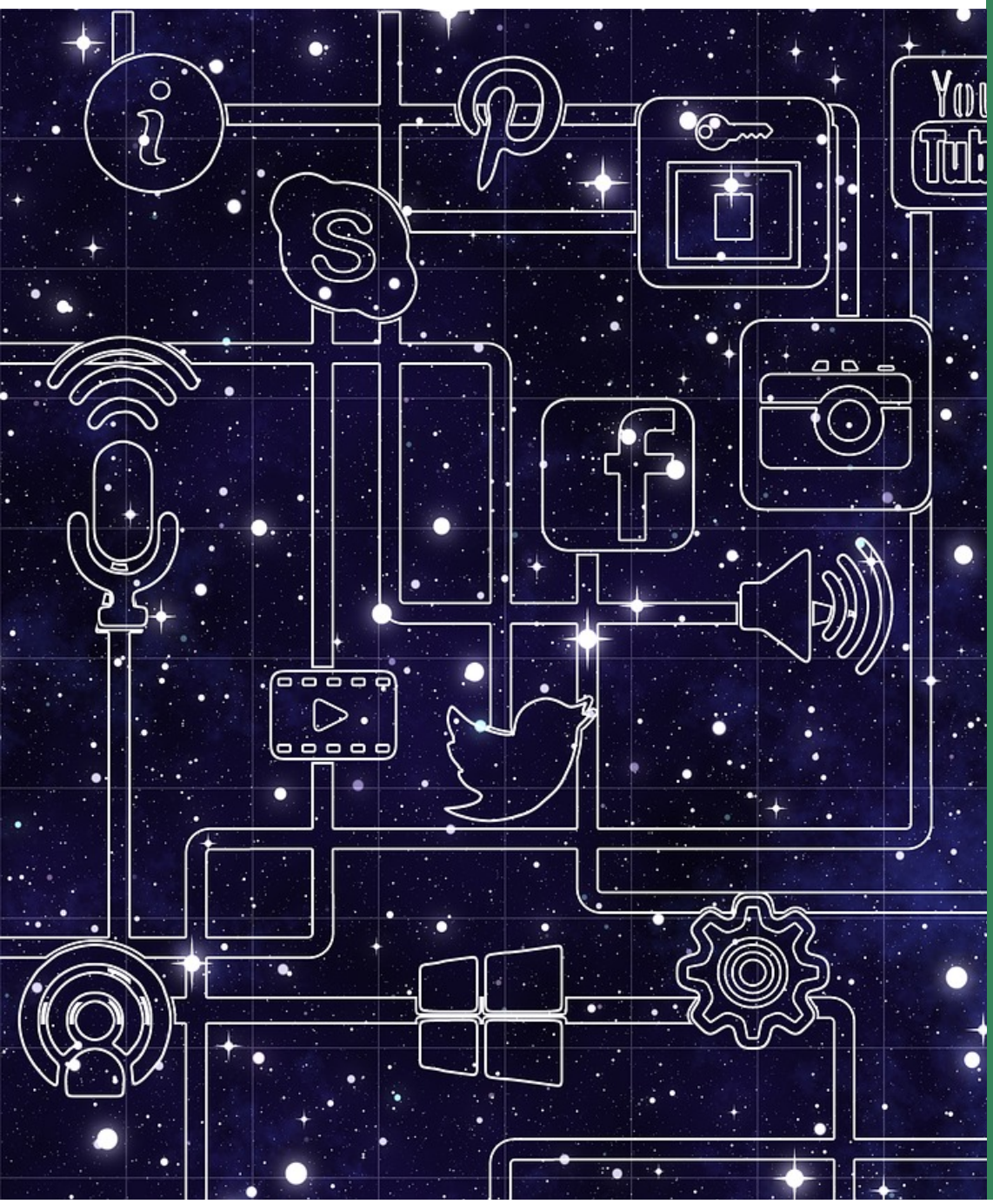

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Summary

The Counter-Terrorism and Border Security Bill was published on 6 June 2018. The Government has published Explanatory Notes. The Gov.uk website has a collection of relevant documents including overarching documents and factsheets.

The Bill follows the Government's reviews of its counter-terrorism strategy and of counter terrorism legislation. It is divided into two parts. **Part 1** of the Bill would bring in the legislative changes arising from those reviews. It would expand the scope of a number of existing terrorism offences and extend available sentences, among other things. **Part 2** represents the Government's response to the poisoning of Sergei and Yulia Skripal in March 2018. It 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.

The Bill had its second reading on 11 June 2018. The Public Bill Committee sat seven times between 26 June and 10 July. Debate focused on a number of issues, including the scope of some of the offences, the implications for freedom of expression, and the adequacy of safeguards.

The Joint Committee on Human Rights (JCHR) published a report on the Bill on 4 July 2018. The Committee welcomed the fact that the Bill does not introduce a host of new offences in response to recent terrorist attacks, and that it gives effect to certain recommendations of the former independent reviewer of terrorism legislation, David Anderson QC. However, the Committee expressed concern that some of the changes to existing offences provided for in the Bill would extend the reach of the criminal law into private spaces, and may 'criminalise curious minds and expressions of belief which do not carry any consequent harm or intent to cause harm'.[1]

Responding to the Committee, the Minister for Security and Economic Crime, Ben Wallace, expressed disappointment that it had only heard evidence from Liberty and the independent reviewer of terrorism legislation, Max Hill QC. He suggested that had the Committee heard evidence from victims of terrorism or those involved in investigating and prosecuting terrorists, it would have been able to set the legislation in the context of the current threat from terrorism.[2]

For further detail on the background to the Bill and its provisions, please see Commons Briefing Paper *Counter-Terrorism and Border Security Bill 2017-19*

1 Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017-19, HC 1208, 4 July 2018

2 Joint Committee on Human Rights report "Legislative Scrutiny: Counter-Terrorism and Border Security Bill" (Ninth Report of 2017-2019) – Government Response, 4 September 2018

1. Second reading

At second reading the Home Secretary, Sajid Javid, stated that the Bill would update the law, allow the police and MI5 to disrupt threats earlier, and would give the police additional powers to investigate hostile state activity. In particular, he suggested that the Bill would help to prevent terrorists from exploiting the internet.[3]

Almost all of those who spoke in the debate were broadly supportive of the Bill, while raising questions about the reach of some of the proposed new powers, and the adequacy of safeguards.

The Shadow Home Secretary, Diane Abbott, agreed that in light of recent terrorist attacks and the poisoning of the Skripals, it was reasonable that the Government should review, and if necessary update, counter-terrorism and border security powers. She expressed support for the Bill overall, but suggested that it would need to be amended to ensure that it meets the tests of being necessary, appropriate and proportionate. She expressed specific reservations about the criminalisation of expressions of opinion; the retention of biometric data; the extension of the Prevent duty to local authorities; and no-suspicion border security powers.[4]

Gavin Newlands spoke for the SNP, expressing support for the need to give law enforcement agencies the necessary powers to fight serious crime and terrorism in an "increasingly changing and digital world". He suggested that the SNP would judge any proposed new powers or extension of existing ones according to whether they are appropriate, effective, proportionate and respectful of civil liberties. He expressed particular concerns about the offences dealing with expressions of support and the streaming of terrorist material.[5]

Sir Edward Davey stated that the Liberal Democrats would not seek to oppose the Bill, but suggested that there were serious questions about whether some of the proposed provisions are necessary, and whether there are sufficient safeguards. He expressed concerns about the same offences as Mr Newlands, as well as the retention of biometric data and the Prevent strategy.[6]

John Woodcock (Independent) questioned why the Government had not chosen to include an offence equivalent to the Australian "declared area offence", which prohibits travel to certain areas associated with terrorist activity. The Home Secretary responded to the effect that he was considering the inclusion of such a provision.[7]

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[3] HC Deb, 11 June 2018, c 630
[4] C 638-643
[5] C 646-651
[6] C 669-673
[7] C 637

2. Reaction to the Bill

Reaction from law enforcement and criminal justice was generally positive.

Assistant Commissioner Basu of the Metropolitan Police welcomed the Bill:

> I see considerable value in the measures set out in the Bill to combat the change in threat that we have experienced post-2017. The nature and scale of the terrorist and hostile state actor threat to this country has evolved and changed. The simplicity and volatility of terrorism often requires us to intervene much earlier to protect the public. Offences previously considered periphery or minor are now seen as indicative of a volatile and unpredictable actor.[8]

Likewise, Gregor McGill confirmed that the Crown Prosecution Service (CPS) supported the legislation:

> I will put my cards on the table straightaway: we support this legislation. In the CPS we try to prosecute all terrorist activity where it meets the test in the code for Crown prosecutors. The Bill addresses both the evolving terrorist threat and the changes in technology, and it should provide the CPS with the ability to prosecute offences that previously we would not have been able to prosecute. In the CPS we are having to put more resources into our division that deals with this type of offending, to reflect the spike in activity last year.[9]

Max Hill QC, the independent reviewer of terrorism legislation, commended the Government for resisting the temptation to introduce brand new precursor offences. He did, however, have reservations about specific provisions.[10]

The Joint Committee on Human Rights (JCHR) also welcomed the fact that the Bill does not introduce a host of new offences in response to recent terrorist attacks, and that it gives effect to recommendations of the former independent reviewer of terrorism legislation, David Anderson QC. However, the Committee expressed concern that some of the updates to existing offences provided for in the Bill would extend the reach of the criminal law into private spaces, and may criminalise curious minds and expressions of belief which do not carry any consequent harm or intent to cause harm.[11]

Liberty expressed significant reservations about the Bill:

> The Bill poses several significant threats to civil liberties and human rights, symptomatic of a poorly conceived strategy that mistakes blind expansion of government power for evidence-driven responses to national security concerns.[12]

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8 PBC, 1st Sitting, 26 June 2018, c 5
9 Ibid
10 PBC, 2nd Sitting, 26 June 2018, c37-38
11 Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017-19, HC 1208, 4 July 2018
12 Liberty's Committee Stage Evidence on the Counter-Terrorism and Border Security Bill, June 2018

3. Issues for debate

The Public Bill Committee sat seven times between 26 June and 10 July. It took oral evidence during the first and second sittings from representatives of law enforcement, criminal justice, the legal profession, civil liberties groups, and the independent reviewer of terrorism legislation.

The Committee also received written evidence from interested parties, including Liberty, techUK, Index on Censorship and Article 19.[13]

The Committee was also able to take account of the JCHR's Legislative Scrutiny Report on the Bill, which was published on 4 July 2018.[14] The Government responded to the JCHR on 4 September.[15]

Debate in Committee focused on a number of specific issues in the Bill.

3.1 Expressing support for a proscribed organisation

Clause 1:

Clause would amend section 12 of the *Terrorism Act 2000* to make it an offence to express 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.

Section 12 currently makes it an offence to invite support for a terrorist organisation.

Assistant Commissioner Basu welcomed clause 1 and provided examples, when asked, of the kind of conduct that would not currently come within section 12 of the *Terrorism Act 2000*, but would be covered by the new provisions in clause 2. He concluded:

> What we have seen in the rise of terrorism – particularly with the malleable, vulnerable people not well equipped to understand the nuances of religion or ideology – is that this kind of radicalisation speech has really worked to increase the threat to the UK.[16]

He went on to describe the ability of speakers such as Anjem Choudary to speak persuasively and charismatically without being prosecuted as "the greatest threat to this country".[17]

The 'fault element' - recklessness

Much of the debate on clause 1 focused on what is called the 'fault element' of the offence. The fault element, or mental element, reflects the perpetrator's state of mind at the point the offence is committed.

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13 All written evidence available at: Bill documents – Counter-Terrorism and Border Security Bill 2017-19, parliament.uk

14 Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017-19, HC 1208, 4 July 2018

15 Joint Committee on Human Rights report "Legislative Scrutiny: Counter-Terrorism and Border Security Bill" (Ninth Report of 2017-2019) – Government Response, 4 September 2018

16 PBC, 1st Sitting, 26 June 2018, c7

17 Ibid, c12

Some offences are defined so as to require the perpetrator to intend that their conduct will have particular consequences, or will take place in specific circumstances, in order to be guilty of the offence. Clause 1 uses "recklessness" as the fault element, meaning that the perpetrator need not intend that their behaviour will have specific consequences, but may merely be reckless as to the consequences.

Max Hill did not feel that the use of recklessness as the fault element in this context was controversial:

> From a simple lawyer's perspective, however, this is nothing new: subjective recklessness is a feature of the criminal law away from counter-terrorism legislation. It is defined with some precision in section 1(2)(b) of the 2006 Act, which defines recklessness for the purpose of encouragement of terrorism. Provided the Government intend the same definition when they refer to recklessness under clause 1 of this Bill, I have nothing to add. My assumption is that that is the intention.[18]

Gregor McGill of the CPS also felt that the concept of recklessness was unproblematic in this context, suggesting that it is well known in terrorism legislation and the wider criminal law, and has been found to be ECHR-compliant.[19]

He further suggested that there was a lacuna in the existing law that needed to be addressed, where expressions of opinion become criminal and go into the "radicalisation agenda".[20]

Legal certainty and compatibility with human rights

However, the JCHR had concerns about the clause, suggesting that it is drafted with insufficient clarity to meet the need for legal certainty, and that it risks capturing speech that it is neither necessary nor proportionate to criminalise. As a result, the JCHR considered that clause 1 would violate Article 10 of the European Convention on Human Rights (ECHR), which protects the right to freedom of expression. It recommended that, at a minimum, the clause be amended to clarify what expressions of support would or would not be caught.[21]

In its response to the Committee, the Government disagreed with this analysis:

> The recklessness test in clause 1 is well established, and well-understood by the courts. In this context it would require the prosecution to prove that a person subjectively knew that expressing an opinion or belief in support of a proscribed terrorist organisation in the particular circumstances would cause someone else to support the organisation, and that they nonetheless expressed it where a reasonable person would not do so.
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> …
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> It would be impractical to define on the face of the legislation, in more specific and granular terms, particular forms of statement

[18] PBC, Second Sitting, 26 June 2018, c 41
[19] Ibid, c7
[20] Ibid, c13
[21] Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Joint Committee on Human Rights, Ninth Report of Session 2017-19, HC 1208, 4 July 2018, para 18

> that will or will not be captured. Similarly, it would be extremely difficult to define a valid debate and to distinguish this from a debate that is not valid. Such determinations will always be highly dependent on the facts and circumstances of particular cases, and can only be properly made by a court considering all of those matters in each case. To attempt to do so in legislation would be likely to unhelpfully muddy the position, and would provide no greater legal certainty to individuals.[22]

Nick Thomas-Symonds, the Shadow Security Minister, tabled amendments probing the scope of clause 1. Two alternative sets of amendments sought to provide alternative ways of extending the existing offence under section 12 of the *Terrorism Act 2000*, but not to the same extent as clause 1. This reflected concerns about the possibility that clause 1 could prove unworkable, or could attract a declaration of incompatibility with the Human Rights Act 1998. Gavin Newlands spoke in favour of the amendments on behalf of the SNP, expressing misgivings about creating a speech offence with recklessness as the fault element.

The Minister argued in response that both sets of amendments would defeat the purpose of clause 1 by introducing a requirement to establish some form of intention. Mr Thomas-Symonds agreed to withdraw the amendments pending further discussion.[23]

3.2 Publication of images taken in private place

Clause 2

Clause 2 would amend section 13 of the *Terrorism Act 2000* to create a new offence of criminalising the publication of an image of an item of clothing or an article, such as a flag, in such a way as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.

Section 13 currently makes it an offence to wear, carry or display an article or item of clothing in a public place, in such a way as to arouse suspicion that the person is a member or supporter of a proscribed organisation.

Assistant Commissioner Basu welcomed clause 2 and agreed with the Minister's proposition that it represented nothing more than a modernisation of the law, reflecting how the internet is used.[24]

However, Max Hill noted that this provision took the offence away from its origins as a public order offence:

> The public order Acts of the 1930s were intended to deal with demonstrations on the streets; clause 2 now takes this out of a public space and into a private space …. I would suggest that evidence of what is on the bedroom wall of a perpetrator is already admissible and routinely referred to by prosecutors as

[22] Joint Committee on Human Rights report "Legislative Scrutiny: Counter-Terrorism and Border Security Bill" (Ninth Report of 2017-2019) – Government Response, 4 September 2018

[23] PBC, Third Sitting, 28 June 2018, c67-76

[24] Ibid, c 14

> supporting material for indictments for other offences; the only debate is whether it is the commission of an offence on its own.[25]

He also queried how the clause would operate in the context of historical images, for example of those working for organisations that were proscribed in the past.

The JCHR had significant concerns about clause 2:

> In our view, to criminalise the publication of an article which may be worn or displayed in a private place risks catching a vast amount of activity and risks being disproportionate … . We recommend that clause 2 be removed from the Bill or, at a minimum, amended to safeguard legitimate publications and to give greater clarity as to what acts are, and are not, criminalised.[26]

Again, the Government disagreed with the Committee's analysis of the clause:

> Given that the offence will only bite where the image in question is made available to the public, and particularly given that publication online will normally make an image available to more members of the public than would its display in a public place, it is misleading to characterise clause 2 as criminalising private activity. I am happy to reassure the Committee that clause 2 will not criminalise the private possession, or the display – without publication - in a private place, of any article or an image of any article.[27]

In Committee, Nick Thomas-Symonds expressed broad support for the aims of clause 2, namely, to update the existing offence to reflect the fact that a picture taken in private and uploaded on social media could now have far greater reach than displaying something in public. However, he tabled a probing amendment that would have provided for a defence of 'reasonable excuse'.

He was again supported by Gavin Newlands, who suggested that clause 2 was disproportionate and would place a strain on resources and divert attention from more serious threats.

In response, the Minister explained that the current drafting, which requires an image to be displayed *in such a way* as to arouse reasonable suspicion of support for a proscribed organisation, was sufficient to meet their concerns. The amendment was subsequently withdrawn.[28]

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25 PBC, 26 June 2018, c 41

26 Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Joint Committee on Human Rights, Ninth Report of Session 2017-19, HC 1208, 4 July 2018, para 26

27 Joint Committee on Human Rights report "Legislative Scrutiny: Counter-Terrorism and Border Security Bill" (Ninth Report of 2017-2019) – Government Response, 4 September 2018

28 PBC, 28 June 2018, c76-82

3.3 Streaming of terrorist material: the "three clicks" offence

Clause 3

Clause 3 would amend section 58 of the 2000 Act to make it an offence to download a document or record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or to view such material on three or more occasions.

Section 58 currently makes it an offence to collect or make a record of such information, but not simply to view it.

Clause 3 has proved to be the most contentious provision in the Bill. Debate focused on whether it was legitimate in principle to criminalise the conduct in question at all, or whether it was too remote from the real harm of terrorist offending. Questions were also raised as to the practicality of the offence as drafted in terms of bringing prosecutions and utilising the 'reasonable excuse' defence.

Does clause 3 go too far?

Max Hill QC gave evidence to the Public Bill Committee, during which he warned that clause 3 would be likely to attract arguments of principle based on a rights analysis, in particular relating to the Article 10 ECHR right to freedom of expression. He acknowledged that the aim of the clause, or "new variant" of the offence in section 58, was to establish a pattern of behaviour, but suggested that it was incapable of doing so. This was because the offence consisted of three clicks on any material, rather than repeated viewing of the same material, and because there is no limit to the period of time over which the material was accessed. He also noted that attempts in France to enact a similar offence had been struck down by the Constitutional Court.[29]

Mr Hill suggested that the clause could be improved by including a time limit for the offence and by being more specific about the scope of the reasonable excuse defence.[30]

In response to further questions, Mr Hill suggested that the new provision was unnecessary because much of the conduct was covered by existing offences, notably encouraging terrorism under section 1 of the *Terrorism Act 2006*.[31] He also sought to draw a distinction between a person with a predisposition towards extremist thoughts and one who had crossed the line into terrorist offending. He suggested that whilst the former may be of interest to counter-terrorism policing and the security and intelligence agencies, they would not necessarily have crossed the threshold into criminality.

When questioned by the minister on his reservations about the provision, Mr Hill acknowledged that he did not take issue with section 58 in its current form, and agreed that streaming online was a common phenomenon in a way that had not been the case when the 2000 Act

[29] PBC, Second Sitting 26 June 2018, c37-38
[30] Ibid, c38
[31] Ibid, c40

was passed. However, he nonetheless drew a distinction between section 58 in its current form and the "new variant" provided for by the Bill, describing section 58 as an "anti-proliferation offence", that is, one aimed at preventing terrorist material being passed on to third parties. The streaming offence would apply to material that would be incapable of further dissemination, and this, together with the imprecision as to the timing and circumstances of the offence, was a cause of concern to Mr Hill. He also questioned whether section 58 in its current form constitutes a free-standing offence. He noted that it is often used as supporting evidence for more serious preparatory offences, but is rarely used on its own.

Corey Stoughton, Advocacy Director at Liberty, made a similar point, suggesting that the section 58 offence in its current form should not be a free-standing offence, although it may cover conduct that would constitute reasonable grounds to further investigate whether a person is planning to engage in terrorist activity.[32]

Mr Hill, together with his senior special advisor, Professor Clive Walker, subsequently submitted written evidence to the Committee on clause 3. This evidence raised further objections, based both on principle and practicality. Mr Hill and Professor Walker suggest that a new offence, or significant expansion of the existing offence, is unnecessary, because there are already numerous 'precursor' terrorism offences covering a wide range of activity. They note the 'preparation of terrorism' offence under section 5 of the Terrorism Act 2006 in particular as an 'all-purpose' offence. Further, they suggest that the underlying assumption of clause 3 – that a predisposition to extreme thinking inevitably leads to terrorist offending – is wrong in principle. This assertion is substantiated by reference to published research, and the Government's CONTEST strategy.[33] They also suggest that the drafting of clause 3 is insufficiently certain to be viable as an offence to be prosecuted.

Mr Hill and Professor Walker acknowledge that there may be a need for a 'digital fix' to reflect technological developments since section 58 was drafted. They suggest that clause 3 could be reformulated into a more acceptable form in order to meet this need. This could be achieved by narrowing the conduct element of the offence, by requiring that the accessed content must directly encourage or facilitate acts of terrorism (rather than being of a kind likely to be useful for such). Alternatively, the offence could be narrowed by introducing a requirement that the person viewing the material intends to commit terrorist offences.[34]

Peter Carter QC of the Criminal Bar Association also agreed that simply accessing material, without a contingent intention to use it or make it available for terrorist purposes, was too remote to justify criminalisation. He suggested that the existing section 58 offence was at the periphery

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32 Ibid, c 55

33 CONTEST: The United Kingdom's Strategy for Countering Terrorism, Cm 9608, 2018, para 103

34 Max Hill QC and Professor Clive Walker, Counter Terrorism and Border Security Bill: Submission in relation to clause 3, 8 July 2018

in terms of its connection to criminality, but that it does have an element of activity predicate to a potential terrorist offence.[35]

The 'reasonable excuse' defence

With regard to the reasonable excuse defence, Max Hill suggested that there was a danger that individuals such as journalists and academics might be put to the trouble and expense of facing an indictment when they should not have stood trial at all:

> I suppose that my point is that if we are extending the ambit of activity that is likely to require that reasonable excuse defence, it becomes more important that we do more to define circumstances in which the offence is not committed, rather than leave a generic reasonable excuse defence currently undefined. [36]

Corey Stoughton suggested that the concern with regard to journalists was not so much that they might be wrongfully prosecuted, but that the fear of wrongful prosecution would have a chilling effect.[37]

The JCHR also had significant concerns about both the scope of the offence and the utility of the reasonable excuse defence. The Committee suggested that as drafted, the clause would "clearly risk breaching Article 10 of the ECHR" and recommended that, at the least, consideration be given to narrowing the offence by requiring terrorist intent, and clarifying the defence.[38]

By contrast, Gregor McGill of the CPS suggested that the statutory defence, together with the two-stage test applied by Crown prosecutors when deciding whether or not to bring a prosecution, provided sufficient safeguards to say that the Bill achieves the right balance between protecting society and protecting the rights of a suspect.[39]

Proposed amendments

Nick Thomas-Symonds tabled a number of amendments to clause 3, with the following aims:

- To limit the time period within which the conduct constituting the offence would need to take place to 12 months;
- To include a requirement that the person committing the offence intends thereby to provide practical assistance to a person preparing or committing a terrorist act;
- To provide that if a defendant raises a reasonable excuse, the burden lies on the prosecution to disprove the excuse beyond reasonable doubt;
- To set out a non-exhaustive list of grounds on which a reasonable excuse defence may be established (such as journalism or research); and

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35 Ibid, c 56-57
36 Ibid, c42-43
37 PBC, 26 July 2018, c 53
38 Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Joint Committee on Human Rights, Ninth Report of Session 2017-19, HC 1208, 4 July 2018, para 33
39 Ibid, c6

- To require a review of the operation of the offence after 12 months.

Although he acknowledged the need to update the law to take account of streaming, he expressed concerns that clause 3 as drafted would not be workable from a practical perspective, and that it may criminalise legitimate conduct. He suggested that the lack of time-limit made it unworkably vague, and that the "three clicks" limit was arbitrary. He explained that the amendments were intended to introduce safeguards to provisions about which he had misgivings.

Gavin Newlands expressed support for the amendments, describing the powers provided for by the Bill as wide and vague, and suggesting that prosecutorial discretion was an insufficient safeguard.

In response the Minister agreed to give the provision further consideration and bring forward amendments. The opposition amendments were consequently withdrawn.[40]

The Government has now tabled amendments for consideration at report stage that would reformulate the offence. The amendments would make it an offence to view, or otherwise access, by means of the internet a document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism. The reasonable excuse defence would also be amended to provide that a person has a reasonable excuse if they did not know, and had no reason to believe, that the material contained information of a kind likely to be useful to a person committing or preparing acts of terrorism.

The Minister wrote to Nick Thomas-Symonds explaining the proposed amendments:

> The amendments to clause 3 recast section 58 such that it would be an offence to view (or otherwise access, for example by listening to an audio recording) any terrorist material online, but to provide that the existing reasonable excuse defence includes circumstances to the effect that the person did not know, and had no reason to believe, that the document or video being viewed contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing an act of terrorism. Once a defendant has raised the defence, section 118 of the 2000 Act provides that the burden of proof (to the criminal standard) to disprove the defence rests with the prosecution (which addresses the point raised in your amendment 7).[41]

3.4 Increases to maximum sentences

Clauses 6-10

Clauses 6-10 would increase the maximum available sentence for certain terrorism offences and make changes to the availability of extended sentences for terrorism offences.

40 PBC, Fourth Sitting, 3rd July, c87-93
41 Letter to Nick Thomas-Symonds, 4 September 2018, published on Counter-Terrorism and Border Security Bill 2018: overarching documents, Gov.uk

In evidence Max Hill was broadly supportive of the sentencing provisions, but suggested that the Government should also increase the maximum discretionary sentence for offences under section 38B of the *Terrorism Act 2000*, which is the failure to report the knowledge or belief that an individual is about to commit a terrorist offence. The statutory maximum sentence is currently five years.

The Government subsequently accepted this recommendation and tabled report stage amendments accordingly.[42]

Mr Hill expressed concern about the proposed increase in the maximum sentence for the section 58 offence, in light of the proposed new variant, suggesting that the possibility of a 15-year sentence was inappropriate in relation to the conduct covered by clause 3.[43]

The JCHR made a similar point:

> This would put viewing material online (without intent to cause harm) on the same level of culpability as possession of an article (eg materials for bomb making) for terrorist purposes.[44]

3.5 Traffic regulation

Clause 14

Clause 14 would amend the regime governing Anti-Terrorism Traffic Regulation Orders (ATTROs), which allow vehicle or pedestrian traffic to be restricted for counter terrorism purposes.

Corey Stoughton raised concerns that the provisions dealing with traffic regulations could allow charges to be imposed on the promoters or organisers of events, which could be incompatible with the right to assemble and protest. She suggested that there should be a legislative exemption for activity protected by articles 10 and 11 of the ECHR.

Gavin Newlands tabled an amendment to provide that the new power to impose charges could not be used to restrict protest rights. A similar amendment was tabled by Nick-Thomas Symonds.

The Minister agreed to give the provision further consideration, with a view to amending it in accordance with the SNP and Labour amendments.[45]

The Government has tabled amendments at report stage to make provision for this.[46]

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42 See Letter to Nick Thomas-Symonds, 4 September 2018, published on Counter-Terrorism and Border Security Bill 2018: overarching documents, Gov.uk
43 PBC, 26 June, c46
44 Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Joint Committee on Human Rights, Ninth Report of Session 2017-19, HC 1208, 4 July 2018, para 45
45 PBC, 3 July, c112-120
46 See Letter to Nick Thomas-Symonds, 4 September 2018, published on Counter-Terrorism and Border Security Bill 2018: overarching documents, Gov.uk

3.6 Retention of biometric data

Clause 17 and Schedule 2

Clause 17 and Schedule 2 would extend the period for which biometric data may be retained for counter-terrorism purposes from two to five years, and remove the need for the consent of the Biometrics Commissioner to retain data of persons arrested for certain terrorism offences.

Amendments to these provisions were tabled by both Labour and the SNP. The SNP amendments, which would have maintained the status quo, were withdrawn. The Labour amendments would have provided for an appeal to the Biometrics Commissioner against the retention of data by a person who was arrested in error, or arrested but never charged. Nick Thomas-Symonds described the amendments as striking an appropriate balance between liberty and security.

The Minister responded to the effect that it was already a requirement that biometric data be deleted where an arrest was unlawful or based on mistaken identity, and that there were good reasons for retaining the data of individuals for a limited period, even where no charge was ultimately brought.

The amendment was pressed to a vote and defeated.

3.7 Prevent

Clause 18

Clause 18 would extend the responsibilities of local authorities under Prevent to refer individuals who they believe to be vulnerable to being drawn into terrorism

An Opposition amendment was tabled to clause 18 requiring a statutory review of Prevent. Nick Thomas-Symonds and Dr Rupa Huq argued that a review was necessary in order to ensure that the programme was as effective as possible and that it retained the trust of affected communities.

In response the Minister suggested that a review was unnecessary because Prevent was under constant review as an evolving policy, and that a snapshot review at a particular moment in time would therefore be uninformative. He also suggested that many of the perceived problems with Prevent were based on myths and misunderstandings about its operation.

The Committee divided and the amendment was defeated.

3.8 Border security

Clause 20 and Schedule 3

Clause 20 and Schedule 3 would provide for 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.

Debate on clause 20 and schedule 3 focused primarily on the lack of threshold test for the use of the powers – there is no requirement that the officer using the powers has reasonable grounds to suspect a person of involvement in hostile activity. Concerns were also raised about restrictions on access to a lawyer. Schedule 3 provides that access to a lawyer may be delayed, and that a detainee may be required to conduct a legal consultation within sight and hearing of an officer.

Threshold test

Max Hill noted that, like Schedule 7 of the *Terrorism Act 2000*, Schedule 3 does not contain any independently referable test for the application of the new powers. He noted that he was awaiting a response from the Government to his recommendation that there should be a test of 'reasonable grounds' to support the use of Schedule 7 powers.[47]

Peter Carter QC agreed with Mr Hill that the powers should be subject to a reasonable grounds test.[48]

Corey Stoughton also agreed, but suggested that in order to do so, it would be necessary to amend the definition of "hostile activity" in the Bill, because the current definition is not linked to any particular crime.[49]

The JCHR expressed concern that the definition of "hostile act" is extremely wide, and that the lack of threshold test was troubling, given the breadth of the power. The Committee suggested that guidance on the use of the powers would be crucial, and should be published immediately, so as to be considered alongside the Bill.[50]

By contrast, Gregor McGill suggested that a 'reasonable suspicion' threshold would undermine the utility of the powers:

> From a prosecutor's point of view … if you are using an evidence base or intelligence base, you would have to make that intelligence or evidence available.
>
> There are some complications and difficulties with that. There are some legal difficulties with making some intelligence available. There are some operational difficulties in making such material available, which may impact investigative colleagues' ability to run some of their operations. On that basis, if we had to disclose that, it may limit the powers significantly.[51]

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47 PBC, 26 June 2018, c 44
48 PBC, 26 June 2018, c54
49 Ibid
50 Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Joint Committee on Human Rights, Ninth Report of Session 2017-19, HC 1208, 4 July 2018, para 80
51 Ibid, c15

Assistant Commissioner Basu agreed with this, and further suggested that intelligence would often be incomplete, or otherwise insufficient to meet a reasonable suspicion test.[52]

Nick Thomas-Symonds tabled a probing amendment that would have introduced a reasonable suspicion test. Whilst he acknowledged the need for border security measures, Mr Thomas-Symonds requested that the Minister provide evidence of the need for an exceptional no-suspicion power in this context.

This was supported by the SNP, who tabled a further amendment to introduce a reasonable suspicion test into Schedule 7 of the Terrorism Act 2000.

The Minister explained that the power was being introduced in part in response to concerns raised by the former Independent Reviewer of Terrorism Legislation that Schedule 7 counter-terrorism powers were being used to stop people on a "national security or hostile state concern". He said that a no-suspicion power was necessary because the way intelligence is presented can be very broad, not necessarily focused on a specific person. The Government's reading of the law is that if there was a reasonable suspicion test, the power would be too narrow to respond to certain threats identified by intelligence. He also pointed to protections for legally privileged and journalistic material, and the oversight of the Investigatory Powers Commissioner, as safeguards against abuse.[53]

The amendments were withdrawn.

Access to a lawyer

In evidence to the Public Bill Committee, Richard Atkinson of the Law Society described the restrictions on access to a lawyer as

> [A] very great concern. It fundamentally undermines what I would consider to be a cornerstone of our justice system – legal professional privilege.[54]

He suggested that lack of access to a lawyer was particularly significant in the context of powers that require a response to questioning, where the individual who has been detained does not have the right to remain silent.

Further, he raised concerns about the lack of safeguards around the seizure and examination of legally privileged material.

Abigail Bright, an executive member of the Criminal Bar Association, described the requirement that any conversation with a solicitor be within the hearing of an officer as "deeply concerning and wholly new … a radical departure from anything known to English law."[55]

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[52] Ibid
[53] PBC, Sixth Sitting, 5 July 2018, c183-188
[54] PBC, 26 June 2018, c26-27
[55] Ibid, c58

The JCHR recommended that safeguards around the use of the powers should be strengthened, providing the right to access a lawyer immediately and in private.[56]

Gavin Newlands tabled amendments which would have removed provisions that restrict access to a lawyer. He explained that these were intended to address concerns raised by witnesses. Similar amendments were tabled by Nick Thomas-Symonds.

The Minister explained that restrictions on the right of consult a lawyer privately were intended to be used in exceptional circumstances, such as where prior intelligence indicated that the individual might seek to obstruct an examination or alert others who might be involved in the commission of an offence. He also pointed to the requirement that the officer present during the detainee's legal consultation must not be connected with the detainee's case as an important safeguard.

The amendments were withdrawn, though it was suggested that they may be revisited.[57]

Further amendments were tabled in the final Committee sitting, both by Labour and the SNP, aimed at ensuring that detainees would be able to consult confidentially with a solicitor who had been approved by the Law Society. This was intended to meet the argument that a detainee might attempt to use a legal consultation to pass on messages to third parties.

The Minister continued to resist the amendments, characterising them as impractical and unnecessary. This time the Committee divided, and the amendments were defeated.[58]

3.9 Designated area offence

The Government has tabled report stage amendments which would provide for a new offence of "entering or remaining in a designated area".

The offence would be subject to a reasonable excuse defence[59] and would carry a maximum sentence of 10 years imprisonment.

Areas would be designated by regulations, if the Secretary of State were satisfied that it was necessary for the purpose of protecting members of the public from a risk of terrorism. The Secretary of State would be required to keep under review whether this condition continued to be met and to revoke the regulations if it did not.

The idea of introducing such an offence was raised during the second reading debate and at Committee stage.

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56 Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Joint Committee on Human Rights, Ninth Report of Session 2017-19, HC 1208, 4 July 2018, para 82

57 PBC, 5 July 2018, c 192-200

58 PBC 10 July 2018, c205-210

59 As in other instances, this would operate in accordance with section 118 of the Terrorism Act 2000, which provides that once the defence has adduced evidence that is sufficient to "raise an issue with respect to the matter" the burden is on the prosecution to establish beyond reasonable doubt that the defendant did not have a reasonable excuse.

When asked whether there were any other powers that might help to combat terrorism, Assistant Commissioner Basu said:

> I think – and you may want to get on to this – that the Australians have a "designated area" offence for people who wish to travel to war zones and fight. Although it would not be retrospective, and therefore would not have great utility in respect of the Syrian conflict, I think it would have utility for the future. If we were dealing with a similar situation in the future, stopping people from going to fight or enabling the prosecution of people fighting in theatre when they return would have great utility to us.[60]

Gregor McGill agreed with this, but sounded a note of caution:

> It is an offence that would be a useful addition to a prosecutor's armoury, but we would have to be careful how we exercised it because there are ECHR implications, and prosecutors would be alert to that.[61]

The proposal resembles the Australian "Declared area offence",[62] also an offence of entering, or remaining in, a declared area in a foreign country.

For this offence there is a defence of travelling for legitimate purposes, which include humanitarian aid work, visiting family, working as a journalist, and performing official duties.

The idea of introducing such an offence was touched on by Professor Clive Walker in his chapter annexed to the 2016 report of the Independent Reviewer of Terrorism Legislation. He concluded that such an offence would not be worthwhile for the UK:

> One such candidate involves the designation of lands controlled by Islamic State (Daesh) as forbidden zones of travel and to make any visit (or intention to visit) a criminal offence, thereby avoiding the need to plot the specific actions of a suspect at a distance of over 2,000 miles and in circumstances where correspondent policing and legal systems are wholly absent. One senior police officer that suggested such an offence would be 'incredibly helpful'. This device has been implemented in Australia by section 119.2 of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014. A defence of 'legitimate purposes' is afforded, but these 'are limited to providing humanitarian aid, making a genuine visit to a family member, working in a professional capacity as a journalist, performing official government or United Nations duties, appearing before a court or tribunal, and any other purpose prescribed by the regulations.' On balance, this offence would not be worthwhile for the UK. First, the exceptional defences place the burden of proof on the honest and worthy to show entry into the prohibited area for a legitimate purpose. As for FTFs [Foreign Terrorist Fighters], they will also cite aid purposes, so the ultimate burden of proof will still demand evidence not just of presence but also of training, logistical support, or involvement in fighting. Yet, these activities are viewed by prosecutors as already covered by specific and serious offences. Thus, the main effect will be to catch 'jihadi brides'

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60 PBC, 26 July 2018, c 9
61 Ibid, c16
62 Further information on the areas that are currently designated, and the process/ basis for designating an area, are available via the Australian National Security website: Declared area offence, nationalsecurity.gov.au

> rather than jihadi fighters, a category which is probably more in need of counselling than imprisonment. A final problem is that the area controlled by Islamic State (Daesh) is fluid, so the notion of a fixed territory will require constant reformulation.[63]

Nonetheless, the Australian offence, which was subject to a sunset provision, was recently renewed following post-legislative scrutiny and a review by the Independent National Security Legislation Monitor.[64]

63 The Terrorism Acts in 2015, Independent Reviewer of Terrorism Legislation, December 2015, page 116, para 17

64 Sections 119.2 and 119.3 of the Criminal Code: Declared Areas, Independent National Security Legislation Monitor, Report No. 2, September 2017; Review of the 'declared area' provisions: Sections 119.2 and 119.3 of the Criminal Code, Parliamentary Joint Committee on Intelligence and Security, February 2018

BRIEFING PAPER
Number 8332
10 September 2018

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