HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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Counter-Terrorism and Border Security Bill 2017-2019: Lords Amendments

By Joanna Dawson

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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 Salisbury 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 House of Lords made a number of amendments to the Bill, including:

- Providing that those carrying out work as a journalist or academic research would have a 'reasonable excuse' defence to the clause 3 offence of obtaining or viewing material over the internet;
- Introducing safeguards and exemptions to the clause 4 offence of entering or remaining in a designated area;
- Providing for an independent review of the Prevent strategy;
- Providing safeguards for individuals detained under the new border security powers, including the right to consult a lawyer in private

The House of Commons is due to consider these amendments on 22 January 2019.

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* and *Counter-Terrorism and Border Security Bill: Committee Stage Report*

Clause numbers refer to HL Bill 131 (as introduced). Lords amendment numbers refer to Bill 317 2017-19, Lords Amendments to the Bill

1. Obtaining or viewing material over the internet

Clause 3: obtaining or viewing material over the internet

Clause 3 would extend section 58 of the *Terrorism Act 2000* to make it an offence to view or access material online of a kind likely to be useful to a person committing or preparing a terrorist offence. Section 58 currently provides that it is an offence to collect or make a record of such information. The offence would be subject to a 'reasonable excuse' defence, which would include a situation in which a person did not know, and had no reason to believe, that the material they accessed was of such a nature.

Lords amendment 1 would provide that a person who views or possesses this type of material for the purposes of carrying out work as a journalist, or academic research, would have a reasonable excuse defence.

Debate

Committee

Concerns were raised in Committee that the ambit of the clause 3 offence is too wide and that it risks criminalising legitimate behaviour and those without any terrorist intent.

The Opposition tabled an amendment which would have confined the offence to those accessing relevant material "as part of a pattern of behaviour". Lord Rosser explained that the purpose of the amendment was "to minimise the possibility of people carrying out their legitimate business being caught by the new offence".[1]

Baroness Hamwee tabled amendments on behalf of the Joint Committee on Human Rights (JCHR). These would have introduced a requirement that the person accessing the material had the intention "to commit or encourage acts of terrorism", and that they had done so in a way that would give rise to a reasonable suspicion that they had "a view to committing a terrorist act".[2] She explained that the JCHR were not reassured that the proposed defence would provide adequate protection for legitimate conduct.

Lord Carlile criticised the Opposition's use of the phrase "pattern of behaviour", describing it as "breathtakingly vague". He suggested that prosecutorial discretion, as well as common sense on the part of the police, would be sufficient to address any concerns about the breadth of the offence, and suggested that it was "entirely proportionate" and simply updated the law.[3]

Responding, the Minister, Earl Howe, suggested that the inclusion of a "pattern of behaviour" requirement would raise questions as to how many viewings were required and over what period of time, and thus create legal uncertainty.

He further explained that the original proposal, for an offence committed by accessing material on three or more occasions, had

1 HL Deb 29 October 2018, c 1163
2 Ibid, c1163-1164
3 Ibid, c1165-1166

sought to achieve proportionality, but that the Government's view now is that the reasonable excuse defence is a more appropriate way to proceed.

Responding to the JCHR amendments, Earl Howe described them as raising the threshold for the offence very significantly and altering its fundamental purpose. He explained that section 58 is a preparatory offence, rather than one aimed at the actual planning or commission of terrorist acts. The proposed new offence was intended to catch people who view material without requiring them to have actually used that information for a terrorist purpose, or to intend to do so. He claimed that "this is in itself harmful behaviour, and such people can pose a very real threat to public safety." He further suggested that the inclusion of a requirement for terrorist intent would move the offence into territory already covered by other offences, such as preparation of terrorist acts under section 5 of the *Terrorism Act 2006*.

Finally, Earl Howe agreed with Lord Carlile's analysis as to the importance of prosecutorial discretion in this context

> … because the question of whether it is legitimate for someone to intentionally seek out serious and potentially very harmful terrorist material, through foolishness or inquisitiveness, will be very fact specific and particularly prone to grey areas. It needs to be considered on the basis of all the circumstances and all the evidence in any particular case. While clearly there will be cases of this type, where prosecution will not be appropriate, it will certainly not be responsible to provide a blanket exemption for any person to access any quantity of terrorist information and be able to rely on such an exemption, whatever the potential harm associated with their activities.[4]

A further Opposition amendment sought to introduce safeguards for those accessing material in the context of journalism or academic research.[5]

Baroness Hamwee spoke to amendments on behalf of the JCHR, which would have required the Secretary of State to produce guidance as to what would constitute a reasonable excuse. She suggested that this was necessary so that individuals could know when it was likely that they would be committing a criminal offence.[6]

Lord Judge expressed concern about these proposals, suggesting that guidance that was not statutory would have no legal effect, and that it would be unprecedented for the Secretary of State to issue guidance on how the law should be interpreted using executive powers.[7]

Earl Howe responded to the effect that these amendments were not necessary, because the reasonable excuse defence has operated successfully since the section 58 offence was first created, and it is well understood by the police, the CPS and the courts. He further pointed out that the existing offence has not been used to prosecute academics

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4 Ibid, c 1167-1168
5 Ibid, c 1169
6 Ibid, c 1170
7 Ibid

and journalists to date, and asserted that there is no evidence of a chilling effect.

Report

The Government tabled amendments at report stage to provide that those accessing relevant material for the purposes of carrying out work as a journalist or academic research would have a reasonable excuse defence. Earl Howe reasserted his previous position that the existing defence has been available to journalists and academics since 2000, and that a determination as to what constitutes a reasonable excuse will always be highly fact specific. However, he recognised the concerns that had been raised and explained that the Government had therefore tabled the amendments to provide greater assurance and put the matter beyond doubt. He explained that the intention of the amendment was to provide an indicative, rather than exhaustive list of cases that may constitute a reasonable excuse.[8]

The amendment was welcomed by the opposition parties and was agreed to.

[8] HL Deb, 3 December 2018, c840-842

2. Entering or remaining in a designated area

Clause 4: entering or remaining in a designated area

Clause 4 would provide for a new offence of entering or remaining in a designated area overseas. It was inserted into the Bill via a Government amendment at report stage in the Commons. The offence is subject to a reasonable excuse defence and would carry a maximum sentence of 10 years.

Lords amendments 2 to 8 seek to introduce a number of safeguards to the operation of the new offence.

Lords amendment 3 would provide that a person does not commit the offence is they enter or remain in the designated area involuntarily, or for one of the following purposes: providing humanitarian aid; satisfying an obligation to appear before a court or other judicial body; carrying out work for the government of another country or the UN; working as a journalist; and attending a funeral of a relative, visiting a relative who is terminally ill, or providing care for a relative.

Lords amendment 5 would introduce a sunset provision, meaning that the Home Secretary's designation of a particular area by order would automatically expire after three years.

Lords amendment 6 would provide for the regulation making power to be subject to the affirmative procedure.

Lords amendment 7 would require the Secretary of State, when designating an area by regulation, to explain to Parliament the reasons for the designation.

Lords amendment 8 would provide that regulations removing a designation are subject to the negative procedure.

Other amendments in this group were technical or consequential.

Debate

Committee

Amendments to clause 4 were tabled in Committee by Lord Anderson, the former Independent Reviewer of Terrorism Legislation. He explained that the amendments sought to render the offence more predictable in its application and easier to prosecute. He set out three reasons why a general reasonable excuse defence was not suitable in this context:

> First, those few people with good reason to travel to a terrorist war zone will have no assurance in advance that they will not be prosecuted for doing so. Secondly, this troubles some of them considerably, as other noble Lords will know. Thirdly, attempts to prosecute a person for this offence are likely to be met with an ingenious array of excuses to which the jury will be invited to be sympathetic. Without any outer limits on the doctrine of reasonable excuse, the prosecution – which, as the Minister said, still bears the ultimate burden of proof – is likely in practice to have to demonstrate some malign purpose for travel, which is precisely the state of affairs that this offence is designed to avoid.[9]

The effect of the amendment would be to replace the general reasonable excuse defence with a list of reasons which, if they constitute the sole reason or reasons for entering or remaining in a designated area, will mean that no offence has been committed. The list is based on equivalent Australian legislation.

[9] HL Deb, 29 October 2018, c1175

A number of other amendments were tabled with similar aims. However, there was general support for Lord Anderson's formulation.

Baroness Hamwee also tabled an amendment that would have established a prior authorisation regime for those wishing to travel to designated areas, modelled on the existing system in Denmark.

Responding, the Minister stated that the Government had consulted with both the Danish and Australian Governments when considering the clause and concluded that the reasonable excuse approach was the most appropriate, on the basis that it already exists in the Bill and elsewhere in terrorism legislation and the criminal law. He suggested that it is therefore well understood by the police, the CPS and the courts, and that there is clear case law on its application.

He also expressed concern that the approach proposed by Lord Anderson was too rigid, involving legislating for an exhaustive list of reasonable excuses.

He committed to give the matter further consideration and return to it at Report.[10]

On the proposal for a pre-authorisation regime, Earl Howe responded that it would be cumbersome and difficult to operate in a sufficiently effective and agile way, and that it could be open to abuse.

Lord Anderson tabled further amendments aimed at limiting designations under clause 4 to areas in which a proscribed organisation is involved in armed conflict. He explained that the Australian and Danish regimes have similar conditions and are thus confined in scope. He also questioned the effectiveness of parliamentary scrutiny of designation, in light of Parliament's limited access to the security picture.[11]

The Minister acknowledged that the amendments were intended to ensure that designations are proportionate and made only in circumstances where they are genuinely necessary. However, he suggested that were not necessary to secure this outcome. He suggested that the Government's approach would ensure sufficient flexibility to be used in currently unforeseen circumstances, and pointed to the fact that regulations designating an area would be subject to the affirmative procedure.

However he agreed to give sympathetic consideration to a recommendation by the Delegated Powers Committee that the Home Secretary should be required to lay before Parliament a Statement setting out the reasons why he considers that the condition for designation is met in the case in hand.[12]

Lord Anderson agreed to withdraw the amendment but expressed apprehension at the Minister's comments.

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[10] HL Deb 29 October 2018, c 1185-1187
[11] HL Deb 29 October 2018, c 1201-1202
[12] Ibid, c1202-1203

Report

At Report stage the Government tabled a series of amendments to clause 4.

Responding to the concerns raised in Committee, one of the amendments would introduce an indicative list of cases which may give rise to a reasonable excuse. The list is similar to that proposed by Lord Anderson in Committee. However, a key difference between the proposed amendments is that Lord Anderson's would have had the effect of exempting certain conduct from liability, whereas the Government amendment would provide that that conduct would give rise to a defence. Lord Anderson thus supported an alternative amendment (tabled by Lord Rosser, Lord Kennedy and Lord Paddick) that would have same effect as his own. He explained the distinction as follows:

> I do not believe that Amendment 15 makes the job of the police or the CPS any more difficult. Where it is not clear whether the reason advanced for travel is true, there should be no more obstacle to a suspected person being questioned and, if necessary, prosecuted under this scheme than there is under the Government's Amendment 11. However, the listed grounds are reasons to travel to dangerous areas, not excuses. The Australian law recognises this and so should ours.[13]

Lord Rosser agreed with this analysis, suggesting that the Government amendment does not provide adequate protection to those with a legitimate reason for being in a designated area:

> For example, an aid worker or news reporter can invoke the reasonable excuse defence only once they have been accused of or charged with an offence. The onus is then on the individual and organisation to provide evidence or proof to the authorities that they were in a designated area for a legitimate reason. Prior to being charged – if that is what happened – the individual could have been questioned by the police on their return from the designated area and they might conceivably have been placed under arrest. For a law-abiding citizen, that would potentially be an unnerving experience, and likewise for their employer or organisation, which could face a degree of reputational damage as a result.[14]

Lord Rosser also highlighted the difficulties that organisations operating in such environments might have in accessing financial services and insurance under the Government's formulation, because of the risk of individuals incurring criminal liability.

Earl Howe disagreed with the distinction drawn by Lords Anderson and Rosser, suggesting that in practice under either scheme an individual returning from a designated area could expect to be subject to police interest or investigation. He argued further that, given it would make little practical difference from the perspective of a potential defendant, the Government's approach was preferable because it fitted better with the grain of the Terrorism Act 2000.[15]

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[13] HL Deb 3 December 2018, c855
[14] Ibid, c857-858
[15] Ibid, c859-862

Baroness Hamwee, supported by a number of other speakers, proposed that the list should expanded to include peacekeeping and visiting a very seriously ill relative.

Earl Howe argued that these additions were unnecessary, given that the list is non-exhaustive.

There was a division on the Opposition amendment and it was agreed.

Another Government amendment, also responding to concerns raised in Committee, would introduce a sunsetting provision so that regulations designating an area would cease to have effect after three years. This is without prejudice to further regulations being made designating the same area. The Minister described the change as a "powerful extra safeguard to ensure that the designation of an area cannot be indefinite".

Lord Anderson tabled an amendment, supported by the Opposition, that would have reduced the sunset provision to two years.

Further amendments implemented recommendations of the Delegated Powers Committee. Firstly, that the Home Secretary should make a statement explaining why the legal test is met for designation when laying regulations before Parliament. And secondly, that regulations revoking a designation should be subject to the negative procedure. Under the original Bill, such regulations were not subject to any parliamentary approval.

Third Reading

The Government tabled further amendments to clause 4 at Third Reading, reflecting the approach put forward by the Opposition at Report. The Minister stated:

> Having consulted our operational partners, we consider that this change would not materially affect the operation of the offence. Indeed, noble Lords will recall that, on Report, I indicated that, from the perspective of an individual returning to the UK from a designated area, the two approaches would, in one sense, not look very different. Either way, the police would still need to investigate to determine whether, under one approach, an exclusion from the offence applied or, under the other, whether the subject of the investigation had a reasonable excuse.
>
> …I accept, however, that an individual with a legitimate reason for travelling to a designated area would take greater comfort from knowing that they had not committed the offence in the first place than from knowing that they had a defence to the offence.[16]

The proposed amendment therefore now constitutes a list of exemptions from the offence rather than bases for a potential reasonable excuse defence.

Baroness Hamwee sought again to argue that peacebuilding be added to the list.

[16] HL Deb 15 January 2019, c137-138

The Minister responded to the effect that adding to the list of exemptions was not within the category of amendments that should be contemplated at Third Reading, but stated that the Government would keep the list of exemptions under review. He pointed out that the Bill would now provide for a power to add to the list of exemptions by regulation. He also reiterated the Government's position that traveling to a designated area for peacebuilding purposes would constitute a reasonable excuse in any event.

3. Extraterritoriality

Clause 6: extraterritorial jurisdiction

Clause 6 would extend extraterritorial jurisdiction to certain terrorist offences, meaning that individuals could be prosecuted in the UK for offences committed overseas. This includes the offence of wearing a uniform or displaying an article in such as a way as to arouse reasonable suspicion of support for a proscribed organisation, provided for by section 13 of the *Terrorism Act 2000*.

Lords amendments 9 and 10 would extend extraterritorial jurisdiction to the existing offence under section 12 of the 2000 Act, which makes it an offence to invite support for a proscribed organisation, and to the proposed new offence provided for by clause 1 of the Bill (by amending section 12 of the 2000 Act), of expressing an opinion or belief that is supportive of a proscribed organisation, being reckless as to whether that will encourage support for the organisation.

Lords amendment 11 would limit extraterritorial jurisdiction in respect of the section 12 and 13 offences to UK nationals and residents.

Debate

Committee

Baroness Hamwee moved amendments on behalf of the JCHR that would have removed the extension of extraterritorial jurisdiction from the offence under section 13 of the Terrorism Act 2000 of wearing a uniform or displaying an article is such a way as to arouse reasonable suspicion of support for a proscribed organisation. Another proposed amendment would have limited the extension to where the relevant conduct is criminal in the country concerned, or where the individual is a British national or has been present in the UK for six months or more over a period of 10 years.

She explained that the JCHR had reached the conclusion that the extension of extra territorial jurisdiction to certain offences may be problematic in situations where there is not an equivalent offence in the country concerned. It would mean that a foreign national, with few links to the UK, could be prosecuted in the UK for attending a protest or waving a flag overseas, in support of an organisation that is lawful in that jurisdiction.[17]

Lord Rosser supported the amendments, and pointed to the conclusions of the Constitution Committee, which stated that the extension breaches the requirement that people should have a fair opportunity to know the laws which apply to them.[18]

In response, the Minister said that there was no internationally agreed list of proscribed organisations, and no realistic prospect of one being implemented. Given that terrorists travel and communicate across international boundaries, he suggested that UK courts should be able to act against such individuals in the event that they return or travel to the UK. He concluded that

[17] HL Deb, 31 October 2018, c1363-1365
[18] Ibid, c1365

> …foreign terrorist fighters should not be able to evade justice because the country that they travelled to, or hail from, does not have a proscription system equivalent to that of the UK.[19]

The Minister also identified a number of safeguards that apply in the context of extraterritorial jurisdiction, including the personal consent of the Director of Public Prosecutions (DPP) to commence a prosecution, and the further permission of the Attorney General if it appears to the DPP that the offence was committed for a purpose wholly or partly connected with the affairs of another country.

The amendment was withdrawn.

The Government laid amendments to extend extraterritorial jurisdiction to two further offences: inviting support for a proscribed organisation under section 12 of the Terrorism Act 2000, and the new variant of that offence provided for by clause 1 of the Bill.

The Minister explained that the aim of extending extraterritorial jurisdiction to these offences was to help tackle radicalisation, particularly by people who have travelled from the UK to join a terrorist organisation and then seek to spread its propaganda in the UK.[20]

Lord Anderson opposed the amendment on the basis of deficiencies with the deproscription regime. He suggested that the effect would be to criminalise people in the Republic of Ireland, who expressed supportive opinions about organisations now committed to peace, but in which their grandparents might have fought for freedom. He provided the example of Cumann na mBan, which was once aligned to the IRA, and remained proscribed in the UK, despite there being no evidence that it has been concerned in terrorism in this century.

He described the amendment as having a "regrettably colonial flavour", and suggested that the Government withdraw it, but it was ultimately agreed.[21]

Report

Nonetheless the Government returned to the issue at Report and tabled further amendments having "considered and reflected carefully on the points raised… on behalf of the JCHR". The amendments would limit the extension of extraterritorial jurisdiction in the context of the sections 12 and 13 offences to cases where the individual is a UK national or resident.

The Minister explained that this would not preclude the prosecution of individuals who travel from the UK to join a terrorist organisation and become involved in propaganda. But it would exclude cases in which a foreign national acts in support of an organisation which is not proscribed in his or her country.[22]

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19 Ibid, c1369-1370
20 Ibid, c1371-1372
21 Ibid, c1372
22 HL Deb, 3 December 2018, c 910-911

4. Persons detained under Schedule 8 of the Terrorism Act 2000

New clause 17: persons detained under port and border control powers

New clause 17 inserted by Lords amendment 12 would amend the port and border security powers provided for by Schedule 8 of the 2000 Act. Schedule 8 relates to the detention of persons subject to an examination under Schedule 7 of that Act for the purpose of determining whether they are, or have been, concerned with the commission, preparation or instigation of acts of terrorism. The amendments concern the detained person's right to consult a solicitor in private and to be informed of their rights. This reflects equivalent amendments to Schedule 3 of the Bill, which provides for port and border security powers in the context of hostile state activity.

Debate: Report

New clause 17 was introduced via Government amendments at Report stage.

The Minister, Baroness Williams, explained that the amendments are intended to address concerns raised during the debate on the equivalent powers under Schedule 3 of the Bill. They are also intended to respond to reports of the JCHR, the Constitution Committee and Delegated Powers Committee, and to representations from the Law Society and others.

The principal concern relates to the detainee's right to consult a solicitor in private, and to the power provided for by the 2000 Act and the Bill to allow an officer to overhear that consultation.

The amendments would remove that power and instead allow an officer who was concerned that the detainee might be seeking to pass a message on to a third party, to require the detainee to choose a different solicitor.

Further amendments would address points raised by Baroness Hamwee in Committee about the information provided to a detainee about their right to access a solicitor. The draft code of practice on the Schedule 3 powers states that a person detained under those powers or under Schedule 7 of the 2000 Act must be provided with a "notice of detention" that clarifies their rights and obligations. The amendments would make it clear on the face of the Bill that the detainee has to be made aware of the right to access a lawyer at the moment of detention.[23]

The opposition parties welcomed the amendments.

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[23] HL Deb, 3rd December 2018, c916-918

5. Review of Prevent

Clause 19: persons vulnerable to being drawn into terrorism

Clause 20 would amend the Counter-Terrorism Security Act 2015 to give additional powers to local authorities with respect to the Prevent duty. Lords amendment 13 would insert into clause 20 a requirement that the Secretary of State establish an independent review of Prevent within six months of the Bill receiving Royal Assent. A report of the review would have to be laid before Parliament within 18 months of Royal Assent.

Debate

Committee

Baroness Hamwee tabled amendments in Committee on behalf of the JCHR that would have provided for an independent review of Prevent.

She noted that, unlike other areas of counter-terrorism law, Prevent is not subject to continuous review or oversight. She also noted that, in his previous role as independent reviewer, Lord Anderson had suggested that Prevent could benefit from independent review. She suggested that people were unhappy and mistrustful of Prevent and that internal review on the part of the Government was not sufficient to meet these concerns.[24]

Lord Carlile was supportive of the idea of a review, but suggested that Prevent was being demonised as a campaigning route and that there was a lack of evidence of Prevent projects that have given rise to mistrust. He suggested that the new Independent Reviewer of Terrorism Legislation should, when appointed, conduct the review.[25]

Lord Anderson also supported the amendment, suggesting that

> … external review of the operation of a policy can be of particular value when potential conflicts between state power and civil liberties are acute but information about the use of those powers is tightly rationed.[26]

He argued further that an independent review could help the Government to combat the hostile narrative that has developed around Prevent, providing public reassurance and constructive challenge to Government.

The Opposition were supportive of the amendment, and tabled a similar amendment that would have further required the Secretary of State to make a statement responding to each of the review's recommendations.

Responding, Baroness Williams suggested that a review was unnecessary, and pointed to various recent initiatives to increase transparency around the programme, including the periodic publication of data on Prevent and Channel referrals for the first time.[27]

24 HL Deb 12 November 2018, c1730-1731
25 Ibid, c 1733-34
26 HL Deb 12 November 2018, c1735
27 HL Deb 12 November 2018, c1743

Baroness Hamwee agreed to withdraw the amendment, but indicated that there was a need for further discussion.

Report

At Report stage the Opposition tabled an equivalent amendment. It would require a review to be established within six months of the Bill receiving Royal Assent, and a report and any recommendations to be laid before Parliament within 18 months, accompanied by a statement by the Secretary of State responding to each recommendation.

Moving the amendment, Lord Kennedy stated that the aim of the review was not to undermine the positive aspects of Prevent but to provide reassurance. He suggested that it could be conducted by the Independent Reviewer of Terrorism Legislation.[28]

Lord Anderson and Lord Carlile continued to support the principle of a review of Prevent.

Responding, Baroness Williams maintained that a review was unnecessary, again pointing to recent improvements to transparency. She suggested that the fifth anniversary of the passage of the Counter-Terrorism and Security Act 2015 would offer the opportunity to undertake post-legislative review of the introduction of the statutory Prevent duty.

The House divided and the amendment was agreed.

[28] HL Deb 17 December 2018, c1628

6. Part 2: Border Security

Clause 21 and Schedule 3: port and border control powers to tackle hostile state activity

Clause 21 and Schedule 3 would provide for powers to stop, question, search and detain individuals at ports or in the Northern Ireland border area to determine if they are, or have been, involved in hostile activity. These powers are equivalent to those provided for by Schedules 7 & 8 of the *Terrorism Act 2000*.

Lords amendments 17 to 42 would make several changes to Schedule 3, including:

- Narrowing the definition of "hostile act", so that an act that threatens the "economic well-being" of the UK only qualifies if it does so in a way that "is relevant to the interests of national security" (Lords amendments 17, 19, 26, 28 & 29);
- Refining the process by which the Investigatory Powers Commissioner (IPC) considers whether to authorise the examination of property retained under Schedule 3, including the arrangements for receiving representations from affected parties (Lords amendments 20, 21, 22, 23 & 24);
- Providing for an expedited process for retaining and examining property where there is an immediate risk of death or serious injury or of a hostile act being carried out. In these circumstances the examination may be carried out without the authorisation of the IPC, which would be sought after the event. If authorisation is withheld, the IPC would be able to direct that the article be returned or destroyed, and that any material derived from the article be destroyed (Lords amendments 18 & 25);
- Providing for an equivalent expedited process with respect to the retention or use of copies that consist of or include confidential material in urgent cases, and an equivalent authorisation process for non-urgent cases (Lords amendments 27, 30, 31 & 32);
- Providing on the face of the Bill (rather than in the draft code of conduct) that a detainee must be informed of their rights (Lords amendments 33, 34 and 38);
- Removing the power of a senior officer to direct that a detainee must consult their solicitor within sight and hearing of an officer, and replacing it with a power to direct that the detainee consult a different solicitor, of the detainee's choosing (Lords amendments 35, 36, 37, 39 & 40)

Debate

Committee

The Government tabled amendments in Committee to Schedule 3 of the Bill. Baroness Williams explained that as a result of hostile activity, there is a national security imperative for the police to be able to retain, copy and examine articles which may include confidential journalistic or legally privileged material. Schedule 3 therefore provides for powers for an examining officer to retain, examine, copy and potentially destroy property, including confidential material. Once property is retained under these powers, no further action can be taken without the authorisation of the Investigatory Powers Commissioner (IPC). The draft code of conduct would set out the standard timeframe for this process. However the Minister explained that there could be circumstances in which this standard timeframe was unsuitable, and the amendments therefore provide for an expedited process in urgent cases. She gave the

example of a hostile agent trying to leave the UK with information detailing live UK intelligence agency operations, capabilities and employees. The procedure is modelled on similar provisions in the *Investigatory Powers Act 2016* (IPA) in relation to interception warrants.

Further amendments would make equivalent provision for an expedited process for the retention of copies that consist of or include confidential material, and enable affected parties to make representations in non-urgent cases.

During the stand part debate, Lord Paddick questioned why the "economic well-being" limb of the definition of hostile state activity did not use the same formulation as in the IPA. The IPA restricts the grounds on which warrants can be authorised in the "interests of the economic well-being of the UK", providing that this may be done only so far as those interests are relevant to the interests of national security.[29] These concerns were echoed later in the debate by Lord Anderson and Lord Pannick.[30]

Lord Marks, supported by the Opposition, tabled amendments that would have provided for individuals detained under Schedule 7 of the 2000 Act to be able to consult a solicitor in confidence. This was subsequently provided for via Government amendments (see part 5 above).[31]

Baroness Hamwee tabled equivalent amendments to Schedule 3 on behalf of the JCHR, as well as further amendments that would provide for a detainee to be informed of their rights, and remove the power to delay access to legal advice.[32]

Lord Rosser tabled amendments that would have provided for a detainee to consult a lawyer from an approved panel in order to obviate the need for the consultation to be overheard.[33]

The Minister explained in response to these amendments that the intention of the restriction on access to a lawyer is to disrupt a detainee who seeks to exploit their right to consult a solicitor by using the solicitor as a conduit to pass on instructions to a third party.

She agreed to give sympathetic consideration to the proposal to allow access to a lawyer from an approved panel, and to confirming on the face of the Bill the requirement to inform a detainee of their rights.

Report

The Government tabled an amendment at Report stage addressing some of the concerns raised in Committee about the breadth of the definition of "hostile act" for the purposes of Schedule 3. The amendment would narrow the "economic well-being" limb of the definition, so that an act would qualify if it threatens "the economic well-being of the United Kingdom in a way that is relevant to the

29 HL Deb, 14 November 2018, c1893-1894
30 Ibid, c1922-1924
31 Ibid, c1907-1910
32 Ibid c1910-1911
33 Ibid, c1912

interests of national security." This is consistent with the drafting of the IPA with respect to the ground for authorising warrants for the use of investigatory powers.

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