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Liberty's Briefing on the Counter- Terrorism and Border Security Bill for Second Reading in the House of Lords

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Contact

Gracie Bradley
Policy and Campaigns Manager
Direct Line: 020 7378 3654
Email: gracieb@libertyhumanrights.org.uk

Sam Grant
Acting Policy and Campaigns Manager
Direct Line 020 7378 525
Email: samg@libertyhumanrights.org.uk

Hannah Couchman
Advocacy and Policy Officer
Direct Line: 020 7378 3255
Email: hannahc@libertyhumanrights.org.uk

Nadia O'Mara
Advocacy and Policy Officer
Direct Line: 020 7378 3251
Email: nadiaom@libertyhumanrights.org.uk

Zehrah Hasan
Advocacy Assistant
Direct Line: 020 7378 3662
Email: zehrahh@libertyhumanrights.org.uk

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Introduction

The Counter-Terrorism and Border Security Bill poses several significant threats to civil liberties and human rights, symptomatic of a poorly conceived strategy that mistakes unreflective expansion of government power for evidence-driven responses to national security concerns. The Joint Committee on Human Rights (JCHR) has gone so far as to state that it doubts “*whether, as currently drafted, the Bill is compliant with [the European Convention on Human Rights].*”¹ Liberty’s core concerns, each addressed in this briefing, are:

- The criminalisation of expression or inquiry divorced from any act in pursuit of actual terrorism.
- The criminalisation of travel to a “designated area”.
- A weakening of protections around the retention of biometric data.
- An extension of the Prevent strategy together with a failure to reflect on long-standing concerns about the strategy.
- A radical expansion of intrusive, suspicionless border powers in the face of long-standing concerns about existing powers set out at Schedules 7 and 8 of the Terrorism Act 2000 (the 2000 Act).

Criminalising travel, expression and inquiry

Recklessly expressing support for a proscribed organisation

Clause 1 of the Bill extends the existing offence of “*inviting support for a proscribed organisation*”² beyond knowingly inviting support to “*expressions of support*” and being “*reckless*” as to whether they will encourage support for a proscribed group.³ The existing offence under section 12 of the Terrorism Act 2000 is already dangerously broad. In the 2016 case of *R v Choudhary and Rahman*, the Court of Appeal held that a person need not be personally providing support for a banned organisation, rather: “*the criminality...lies in inviting support (from third parties)*”.⁴ The support need not be tangible or practical, but could include approval, endorsement or other “*intellectual*” support.⁵

¹ Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017-19*, page 5. Available here: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1208/1208.pdf>

² Section 12, Terrorism Act 2000

³ Amends section 12 of the Terrorism Act 2000.

⁴ *R v Choudhary and Rahman* [2016] EWCA Crim 61, paragraph 45.

⁵ *Choudhary and Rahman*, paragraph 46.

The Government is now seeking to erode the very element of the offence of invitation which allowed the Court in *Choudary* to conclude that it was compatible with the right to freedom of speech:

“When considering the proportionality of the interference, it is important to emphasise that the section only prohibits inviting support for a proscribed organisation with the requisite intent. **It does not prohibit the expression of views or opinions, no matter how offensive, but only the knowing invitation of support from others for the proscribed organisation.** To the extent that section 12(1)(a) thereby interferes with the rights protected under article 10 of the Convention, we consider that interference to be fully justified.”⁶

In addition to extending the criminal law to cover mere expression, the Bill lowers the threshold for criminality by specifying that an offence is committed by those who express support and are “reckless” as to the question of whether another will be encouraged. Such a person faces a maximum prison sentence of ten years.⁷ While ‘recklessness’ is a common legal test in some areas of the criminal law, including offences against the person, it is not an appropriate standard for criminalisation when applied to speech. As the Joint Committee on Human Rights concluded in 2006:

“...recklessness is normally applied to actions that are themselves within the realm of criminality... if you hit someone or deceive them then it is absolutely appropriate for a jury to be able to convict you of an offence even if you did not intend the consequences of your actions. The same nexus between action and consequence should not exist for speech offences. **Speech does not naturally reside in the realm of criminality. This is why the element of intention should always be attached to speech offences.** It is the means by which proper criminal responsibility can be determined.”⁸

In addition to removing the requirement of intent, clause 1 also fails to make clear what kind of speech would constitute an expression of support. It is therefore difficult to see how it could, as an interference with the right to freedom of expression, be described as adequately “prescribed by law”. The JCHR has highlighted that “*this could have a chilling effect, for*

⁶ *Choudhary and Rahman*, paragraph 70.

⁷ Terrorism Act 2000, Section 12.

⁸ Joint Committee on Human Rights, The Council of Europe Convention on the Prevention of Terrorism, First Report of Session 2006–07, paragraph 9.

*instance, on academic debate during which participants speak in favour of the de-proscription of proscribed organisations.*⁹

It has further set out that:

“As currently drafted, there is inherent ambiguity as to what would be caught by this offence, thus questioning whether the interference can be said to be ‘prescribed by law’. Moreover, there is a very clear risk that it would catch speech that is neither necessary nor proportionate to criminalise [...]. For these reasons, we consider that this clause violates Article 10 of the ECHR.”¹⁰

Preparing for acts of terrorism is already a criminal offence punishable by life in prison.¹¹ Encouragement of terrorism is also already criminalised and would attract a maximum sentence of 15 years imprisonment under the provisions of this Bill.¹² There are also a broad range of offences which relate to practical support for – and encouragement of – a proscribed organisation, including: directing its activities;¹³ membership or professing membership;¹⁴ wearing its uniform or displaying its insignia;¹⁵ arranging a meeting to support a proscribed group;¹⁶ addressing such a meeting;¹⁷ fundraising for the organisation or in other ways providing financial or practical support;¹⁸ or – in some circumstances – to fail to disclose a suspicion or belief that somebody else has provided such support.¹⁹ The criminal law already provides the tools to deal with those who provide support for terrorism or banned groups. The Government has not made the case for the extension of the criminal law into the realm of bare expression which does not and is not intended to further the cause of terrorists.

Publication of images

It is already a criminal offence to wear clothing or display an article likely to arouse suspicion of membership of a proscribed group.²⁰ Liberty does not support the existing law’s

⁹ Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017-19*, para 12. Available here: <https://publications.parliament.uk/pa/jt201719/itselect/jtrights/1208/1208.pdf>

¹⁰ *Ibid.*, para 17

¹¹ Terrorism Act 2006, section 5.

¹² Terrorism Act 2006, section 1.

¹³ Terrorism Act 2000, Section 56

¹⁴ Terrorism Act 2000, Section 12.

¹⁵ Terrorism Act 2000, Section 13.

¹⁶ Terrorism Act 2000, Section 12.

¹⁷ Terrorism Act 2000, Section 12.

¹⁸ Terrorism Act 2000, Section 15-18

¹⁹ Terrorism Act 2000, Section 19.

²⁰ Terrorism Act 2000, section 13.

criminalisation of a costume or insignia. The Government has made explicit its intention that this new offence should cover photographs taken in a private place, deepening the risk that this offence becomes a means for the state to judge behaviour which does not and was not intended to incite criminality.²¹ Clause 2 increases the risk that law enforcement officials attempting to interpret the meaning of a photograph will mistake reference for endorsement, irony for sincerity, and childish misdirection for genuine threat.

The publication element of this new offence further risks having a chilling effect on journalists, archivists or researchers who may publish images, whether historic or contemporary, of the insignia of banned groups. The Independent Reviewer of Terrorism Legislation has expressed concerns about this offence and in particular *“what clause 2 unamended says about those who seek to display in private historical images of individuals working for organisations that were proscribed decades ago where it is a matter of historical record and nothing more.”*²² The JCHR has also expressed concerns that the clause *“risks a huge swathe of publications being caught, including historical images and journalistic articles,”* going on to state that *“given the lack of clarity as to what would be caught by this offence and the potentially very wide reach of clause 2, it risks a disproportionate interference with Article 10.”*²³

The new offence does not require an affected individual to in fact be a member of a proscribed organisation, to support it whether tangibly or intellectually, or to intend to encourage others to support a proscribed group by publishing an image. The only requirement is that the circumstances of a publication *“arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation”*.²⁴ During the Committee Stage debates, Security Minister Ben Wallace argued for the Government that *“this approach provides certainty to [journalists and academics] that they will not be caught by this offence.”*²⁵ This is simply not the case. Uncertainty as to what characteristics of an academic or circumstances of publication might lead to a suspicion of support for a banned group could well have a chilling effect on those simply seeking to document events.

Furthermore, the Minister argued that *“there have been no cases of prosecuting people who use the fair reason that they are a journalist or are researching something”*²⁶ under the existing offence set out under section 13 of the 2000 Act. However, the chilling effect of such offences cannot be determined purely with reference to the number of prosecutions that

²¹ Explanatory Notes, paragraph 34.

²² Public Bill Committee, 26th June 2018, Q.88.

²³ Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017-19*, para 26. Available here: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1208/1208.pdf>

²⁴ Proposed new clause 13(1A) of the Terrorism Act 2000.

²⁵ Public Bill Committee, 28th June 2018, p.79

²⁶ Public Bill Committee, 28th June 2018, p.79

occur. The chilling effect also inheres in the journalists, academics, and other people who do not support or belong to prescribed organisations, who nevertheless avoid legitimate journalistic, academic or other activity for fear of falling foul of the law. This point must be borne in mind in relation to clauses 1 and 3, as well as clause 2 of the Bill.

Moreover, the behaviour of those who disseminate terrorist publications intending to encourage terrorism or being reckless to it is already criminalised by section 2 of the Terrorism Act 2006, and will attract a 15 year maximum sentence under the provisions of this Bill.²⁷ This extension of the law risks criminalising those who have no intention to do or encourage others to carry out acts of terrorism.

Viewing material over the internet

It is already a criminal offence to download information which could be useful for terrorism.²⁸ When this Bill was first introduced to the House of Commons, the Government expressed an intention to legislate for situations in which the defendant is in control of a computer, but also situations where an individual “*was viewing the material, for example, over the controller’s shoulder*”.²⁹ The original clause 3 of the Bill would have criminalised people who use the internet to view a document or record “*on three or more different occasions*” that is likely to be useful to a person preparing or committing an act of terrorism.

In response to concerns set out at during the Second Reading and Committee Stage debates (explored further below), the Government amended clause 3 at Report Stage to replace the “three clicks” offence with a “one click” offence.³⁰ The previous three clicks requirement was arbitrary and unworkable, given that the clicks could occur over an unspecified window of time, did not have to relate to the same content on each occasion, and did not require any terrorist intent for the offence to be committed. Insofar as it raises all of the same threats to academic inquiry, journalistic research, or ill-judged curiosity, while lowering the threshold for committing the offence, the proposed one click amendment is worse.

Under clause 3 as it now stands, a person faces up to 15 years in prison for using the internet to knowingly access information likely to be useful to a person committing or preparing an act of terrorism – even if they only access that content on one occasion, and even if they have no terrorist-related intent themselves. The Government had argued in

²⁷ Clause 7(6).

²⁸ Terrorism Act 2000, section 58.

²⁹ Explanatory Notes to the Bill as introduced in the House of Commons, paragraph 37.

³⁰ Clause 3.

relation to the original clause 3 that the “three clicks” requirement was intended to identify a pattern of behaviour. With these amendments, it has abandoned even that pursuit.

The right to freedom of expression, protected by Article 10 ECHR, protects the right to receive information, as well as to impart it. Any restrictions on that right must be prescribed by law, for a legitimate aim, and must be necessary in a democratic society. Viewing content is not an inherently harmful act; indeed it is at significant distance from the offences of preparing, committing, or encouraging acts of terrorism.

The proposed offence is unlikely to be sufficiently clearly defined as to fulfil the “*prescribed by law*” limb of Article 10. For example, what counts as material useful to a person preparing or committing an act of terrorism, absent further guidance, may be very difficult for the average person to determine. That question is further complicated by the fact that multiple kinds of content – some potentially useful to a terrorist, some not – may be hosted at the same source, or contained in the same video, online publication, or podcast.

A teenager who foolishly clicks on terrorist propaganda out of curiosity; an academic who accesses an issue of *Inspire* in the course of their research; a journalist who watches an ISIS-uploaded video to geolocate war crimes would all potentially be caught by this offence. So would an activist who trawls forums to monitor far-right organising or an imam who listens to a broadcast by a proscribed group to better understand and rebut the claims they make. Important activities such as scholarship, journalistic pursuit, non-violent political activism, and religious inquiry all risk being chilled by this offence, while an array of existing offences remains available to Government to disrupt people intending to inflict terrorist violence on society.

The Government contends that “*prosecution is unlikely to commence in those circumstances [cases involving academics and journalists], because it would not pass the Crown Prosecution Service threshold test of being in the public interest and of there being a realistic prospect of conviction.*”³¹ Yet overreliance on prosecutorial discretion can be no substitute for a sufficiently tightly drawn offence in the letter of the law itself.

The Government claims to have inserted a reasonable excuse defence into the Bill. Clause 3(4) reads:

“(4) After subsection (3) insert -

³¹ Ben Wallace, Security Minister in the Report Stage, 11th September 2018, Hansard col 662

(3A) The cases in which a person has a reasonable excuse for the purposes of subsection (3) include (but are not limited to) those in which at the time of the person's action or possession, the person did not know, and had no reason to believe, that the document or record in question contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing an act of terrorism.”³²

There was much discussion during the Report Stage debate of section 118 of the Terrorism Act 2000, and the fact that this provision reverses the burden of proof, requiring the prosecution to disprove a reasonable excuse defence beyond reasonable doubt once such a defence has been advanced.³³ This discussion was little more than a distraction from the key issue at hand: that the proposed defence under clause 3 is less a reasonable excuse than a weak *mens rea*. It clarifies that for a person to commit the “one click” offence, they simply need to know that the material they are using the internet to access is likely to be useful to a person preparing or committing an act of terrorism. This falls far short of an excuse for people that access content knowingly, but absent any terrorist intent, such as journalists, academics, researchers, or those simply accessing information out of curiosity. The amendment is likely to have the perverse impact of narrowing the reasonable excuse defence available, as the courts are likely to reason that in legislating for a reasonable excuse without including lack of terrorist intent within that excuse, Parliament did not intend for this to be an available excuse.

In considering the danger that clause 3 as currently drafted poses to civil liberties, it is worth reflecting on the breadth of criticism that the original “three clicks” offence attracted. First, the Independent Reviewer of Terrorism Legislation warned the Public Bill Committee that clause 3 “*is very likely to attract arguments of principle based on a rights analysis, principally article 10 on the freedom of expression*”.³⁴ He went on to express the view that the Government should refrain from legislating in the way proposed at clause 3, particularly in light of the other offences already available to law enforcement.³⁵ Furthermore, he expressed concerns that the “three clicks” offence also risked criminalising “*those who view material in disgust, shock and disapproval*.”³⁶

³² Clause 3(4)

³³ Ben Wallace, Security Minister in the Report Stage debate, 11th September 2018, Hansard col. 662

³⁴ Public Bill Committee, 26th June 2018, Q84.

³⁵ Public Bill Committee, 26th June 2018, Q86.

³⁶ <https://terrorismlegislationreviewer.independent.gov.uk/tom-sargant-memorial-lecture-for-justice-24th-october-2017/>

The JCHR expressed concerns along similar lines, stating that “*criminalisation of passive activity is a dangerous direction of travel.*” It further reiterates that:

“There is a clear risk that this clause would catch academics, journalists and researchers, as well as those who view such material out of curiosity or foolishness without any intent to act upon the material in a criminal manner.”³⁷

A further principled objection can be applied to both the former “three clicks” offence and the new “one click” offence. During the Committee Stage debates in the House of Commons, the Minister stated that the offence is “*an attempt to tackle the difficult issue that modern terrorism unfortunately uses incredibly slick recruiting videos – they are grooming videos*”³⁸. Liberty does not dispute that the Government faces a significant and important task in responding to the threat of terrorism, and indeed to the proliferation of online content that intentionally invites support for proscribed organisations, or encourages acts of terrorism. However, it seems deeply counterintuitive to criminalise the viewer of such content, as opposed to the person that produces or uploads it, especially if the Government intends for its analogy with cyber-bullying and sexualisation³⁹ to hold.

The Minister also cited an example in support of the new offence:

“Recently, a young man was found on the way into Cardiff [...] with knives and an ISIS flag. We found no evidence that that young man had ever met a Muslim, was from a Muslim family or had been to a mosque. He had simply been radicalised by watching streamed videos online.”⁴⁰

Notwithstanding the worrying conflation of Muslims with terrorist groomers in this anecdote, the behaviour of the young man is likely to be covered by existing offences, including the offence of preparation of terrorist acts set out under section 5 of the Terrorism Act 2006. There is a vitally important distinction between viewing content online, and actually committing or preparing an act of terrorism.

³⁷ Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017-19*, para 30. Available here: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1208/1208.pdf>

³⁸ Public Bill Committee, 3rd July 2018, p91

³⁹ Public Bill Committee, 3rd July 2018, p91

⁴⁰ Public Bill Committee, 3rd July 2018, p91

Criminalising a person for accessing material via the internet absent any terrorist intent represents a chilling and potentially disproportionate restriction on the right to freedom of expression. Parliamentarians should amend the Bill to remove clause 3.

Travel to a “designated area”

Clause 4 of the Bill amends section 58 of the Terrorism Act 2000 to create a new offence of entering or remaining in a designated area overseas. It was added just prior to Report Stage in the House of Commons, and as such has not been subject to the careful scrutiny that such a significant new offence requires. The offence would apply to UK nationals and residents, with a maximum penalty of ten years’ imprisonment, a fine, or both.⁴¹ A reasonable excuse defence is available.⁴²

If enacted, clause 4 would grant the Secretary of State the power to designate an area where necessary “*for the purpose of protecting members of the public from a risk of terrorism.*” A designation would be made by regulations subject to the affirmative resolution procedure.⁴³ The Secretary of State would be required to keep the necessity of the designation under review.⁴⁴ Given the potentially far-reaching impact of such a designation, as outlined below, this is an inadequate level of scrutiny.

According to the Government the new offence is required as a response to returning foreign fighters, and to deter people from travelling to overseas combat zones. It states that there are “*400 people in this country who have returned from activity in hotspots, many of whom we believe, from intelligence, have been active, but whom we have been unable to prosecute.*”⁴⁵ Section 17 of the Terrorism Act 2006 confers extra-territorial jurisdiction for a number of offences that could potentially be used in response to such individuals, including encouragement of terrorism,⁴⁶ training for terrorism,⁴⁷ and membership of a proscribed organisation.⁴⁸ Clause 6 of this Bill would extend extra-territorial jurisdiction further, to include displaying an article associated with a proscribed organisation; dissemination of terrorist publications, and making or possessing explosives under suspicious

⁴¹ Clause 4(2)

⁴² Clause 4(2)

⁴³ Clause 4(3)

⁴⁴ Clause 4(2)

⁴⁵ Ben Wallace, Security Minister in the Report Stage debate, 11th September 2018, Hansard col 657

⁴⁶ Section 1, Terrorism Act 2000

⁴⁷ Section 6, Terrorism Act 2000

⁴⁸ Section 11(1), Terrorism Act 2000

circumstances.⁴⁹ Foreign fighters are invariably likely to fight as members of a proscribed group, and membership of a proscribed group is already a criminal offence. If sufficient evidence is not available to prosecute people under the array of extra-territorial offences already available, it is difficult to see how it is compatible with the presumption of innocence to legislate to make mere travel a criminal offence in circumstances where there is insufficient evidence to prosecute for an existing terror offence.

Protecting the public from terrorist crime is an important and legitimate aim. However, criminalising travel is a disproportionate and potentially ineffective way of trying to achieve it. People travelling to visit family, conduct research, document human rights abuses or undertake humanitarian relief could all be criminalised by this offence. Faced with up to ten years in prison should their reasonable excuse be found wanting, some people will simply opt not to travel, which would have a chilling effect on family relationships, academic inquiry, investigative journalism and acts of solidarity. The offence also risks criminalising vulnerable people who are groomed or otherwise convinced to travel under false pretences, as well as people who are unable to leave an area once it has been designated. In some circumstances, people will simply be unaware that an area has been designated, and may fear returning home once they become aware that they have committed an offence by failing to return within the requisite time period.

Reasons for travelling to volatile and even dangerous overseas locations are varied and complex, but by no means are they uniformly malign or connected with terrorism. Given the range of offences already subject to extra-territorial jurisdiction, and the proposed extension of that list by clause 6 of the Bill, it is not clear that an offence criminalising travel alone is justified, and indeed, it risks criminalising people travelling with no criminal intentions whatsoever. Clause 4 should be removed from the Bill.

Biometric data

Oversight of the Biometrics Commissioner

Section 63G of the Police and Criminal Evidence Act 1984 currently requires the Biometrics Commissioner to consent to the retention of biometric material where the qualifying offence is a terrorism offence listed in section 41(1) of the Terrorism Act 2008 (or a related ancillary

⁴⁹ Clause 6.

offence, such as attempting or conspiring to commit the offence). Schedule 2, paragraph 2 of the Bill provides that such material may now be retained for five years without the consent of the Biometrics Commissioner.

The Explanatory Notes accompanying the Bill record that this change was intended to bring the Police and Criminal Evidence Act 1984 (PACE) in line with the equivalent provisions under paragraph 20B of Schedule 8 to the Terrorism Act 2000 which does not allow for the oversight of the Biometrics Commissioner as detailed above. Liberty opposes the removal of the oversight of the Biometrics Commissioner, especially in a context where the fingerprints and DNA profile of a person arrested for, but not charged with, a terrorism offence or a terrorism-related offence are being retained.

The principles to which the Biometrics Commissioner makes reference when making his determination are outlined in the document “Principles for Assessing Applications for Biometric Retention”⁵⁰. These include the nature, circumstances and seriousness of the alleged offence, the grounds for suspicion, the reasons why the arrestee has not been charged, the strength of any reasons for believing that retention may assist in the prevention or detection of crime, the nature and seriousness of the crime or crimes which that retention may assist in preventing or detecting, the age and other characteristics of the arrestee, and any representations made by the arrestee as regards those or any other matters.

The Commissioner will grant such an application – and will consider the extended retention of such material “appropriate” – only if they are persuaded that, in the circumstances of the particular case which gives rise to that application:

- There are compelling reasons to believe that the retention of the material at issue may assist in the prevention or detection of crime and would be proportionate; and
- The reasons for so believing are more compelling than those which could be put forward in respect of most individuals without previous convictions who are arrested for, but not charged with, a “qualifying” offence.

The removal of this protection is alarming and Liberty is concerned that retention will no longer be dependent on a full and detailed consideration, by the Biometrics Commissioner, of the factors outlined above. It would be preferable for the protections afforded under PACE to be duplicated under Schedule 8; a levelling-up in safeguards, rather than levelling-down.

⁵⁰ Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/254444/Principles_for_Assessing_applications_under_PACE.pdf.

The JCHR agreed that “*it is not clear what improvements are intended to be made...by removing the oversight of the Biometric Commissioner*” and that “*the more reasonable approach would be to provide relevant oversight...under both powers*” to avoid a “*race-to-the-bottom of human rights protections.*”⁵¹

Retention periods

Schedule 2 of the Bill extends the time period for which invasive biometric data may be retained pursuant to a National Security Determination (NSD), including fingerprints and DNA, from two years to five years.⁵² NSDs are made where a chief police officer wishes to retain a person’s data for national security purposes, and believes that it is necessary and proportionate to do so. An NSD may be made with respect to the data of people who are not convicted of any offence, as well as people who are mistakenly or unlawfully arrested. Liberty finds these provisions deeply concerning.

There are already abuses of the retention of information in relation to the National Police Database⁵³, and there is ongoing and unresolved controversy over the Government’s abject failure to comply with court declarations that existing police databases of custody images violate human rights laws.⁵⁴ Liberty opposes retaining the biometric data of people unlawfully or mistakenly arrested, as well as any expansion of biometric databases in light of its well-documented and heavily criticised failure to correct these egregious errors and human rights violations in the Police National Database of custody images.

Biometric data – physical, physiological and behavioural characteristics which allow for the unique identification of that person – is deeply private information. When the state seeks to take, retain and use such material, the individual’s right to privacy (Article 8 ECHR) is engaged. There must be a legitimate aim for the intrusion, and it must not occur if the legitimate aim could be achieved in a way which either does not intrude into a person’s privacy or could do so to a lesser degree.

⁵¹ JCHR, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, 2018, para 58. Accessed at: <https://publications.parliament.uk/pa/jt201719/itselect/jtrights/1208/1208.pdf>

⁵² See Schedule 2 paragraph 3. Paragraphs 7(4), 10(4), 13(4), 16(3) and 19 make analogous changes to the retention regimes under the 1995 Act, 2000 Act, 2008 Act, 2011 Act and 2012 Act respectively

⁵³ See, for example: “The National DNA Database Ethics Group Annual Report 2016” at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655881/Annex_C_EG_Annual_Report_2016.pdf

⁵⁴ See: *R (RMC & FJ) v Commissioner Of Police Of The Metropolis & Ors* [2012] EWHC 1681 (Admin) at: <http://www.bailii.org/ew/cases/EWHC/Admin/2012/1681.html>

Liberty is not aware of any evidence that supports the suggestion that the detection of crime is improved by retaining biometric data of people who are arrested but not charged, people against whom charges are dropped, or people who are found to be innocent compared to, for instance, retaining the biometric data of random members of the public. This point was forcefully made by Richard Atkinson, the Chair of the Law Society's Criminal Law Committee:

“Before one could be satisfied of the need to extend periods of retention of biometric data, there would need to be a case made out. I certainly have not seen it... great caution needs to be expressed before extending the periods of the retention of that data without an evidential base.”⁵⁵

The JCHR has expressed concerns along similar lines, and recommended “*that the Home Office justifies the removal of the Biometric Commissioners oversight and the extension of the retention period from two to five years without clear notification and review options.*”⁵⁶

Furthermore, there can be no justification for a person unlawfully or mistakenly arrested to have their biometric data exceptionally stored rather than destroyed.

It is worth recalling that in *S. and Marper*,⁵⁷ the European Court of Human Rights was “*struck by the blanket and indiscriminate nature of the power of retention*”, and in finding a violation of the right to private life explicitly noted the limited possibilities available to an acquitted person in removing their data from a database, as well as the lack of an independent review of retention.

At Committee stage in the House of Commons, Gregor McGill, Director of Legal Services to the Crown Prosecution Service, failed to set out how the detection of crime may be improved by retaining the biometric data of people who have never been charged or convicted of a relevant offence.⁵⁸ In the JCHR's view, “*the justifications given for extending the retention period from two to five years without clear notification and review options are not sufficient*”⁵⁹.

⁵⁵ Public Bill Committee, 26th June 2018, Q76.

⁵⁶ Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017-19*, pg 4. Available here: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1208/1208.pdf>

⁵⁷ *S. AND MARPER v. THE UNITED KINGDOM* - 30562/04 [2008] ECHR 1581 (4 December 2008)

⁵⁸ PBC Deb, 26 June 2018, col 24. Accessed at: <http://bit.ly/2Mvhzby>

⁵⁹ JCHR, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill, 2018*, page 32, para 10. Accessed at: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1208/1208.pdf>

The collection of such data has wider privacy implications exacerbated by its connection with other sources of information and Government databases (for example, the Police National Computer, which sees connections drawn between sets of personal data and made available to a wider range of police bodies).

Finally, the retention of innocent people's DNA has a disproportionate impact on black and minority ethnic communities. Estimates vary, but it has been projected that between a half and three-quarters of young black men have had their DNA stored on the DNA Database.⁶⁰ This is because of the higher number of arrests of black people per head of population, which is not reflected in a correspondingly higher number of convictions. In light of this clear racial disparity between arrest and conviction rates, the Government's suggestion that "*the database reflects the threat of the moment*"⁶¹ is wholly inadequate.

Prevent

Independent review

It is Liberty's view that the Government should commit to an independent review of Prevent as a matter of urgency. The Prevent programme seeks to pre-empt terrorist attacks by identifying those at risk of becoming terrorists. The Counter-Terrorism and Security Act 2015 now enlists public sector workers to carry out the government's work, including requiring teachers, from early years providers up to university level, to identify apparent signs of extremism in their students.

At Committee Stage, the Government asserted that:

"a lot of horror stories about Prevent referrals are myths peddled by CAGE, including the toy gun story. [...] If you look at the core of where some of these myths come from, it is from the enemies of Prevent, not people with a genuine worry about Prevent."⁶²

Yet concerns about the impact and operation of Prevent have been raised by a number of individuals, organisations and bodies, including by the former Independent Reviewer of

⁶⁰ See, e.g.: Home Affairs Committee, Young Black People and the Criminal Justice System, 13 March 2007, HC 181-II 154 2005-2006, page 118, question 653 and 654. Accessed at: <https://publications.parliament.uk/pa/cm200607/cmselect/cmhaff/181/181ii.pdf>

⁶¹ Public Bill Committee, 3rd July 2018, p131

⁶² Public Bill Committee, 3rd July 2018, p146

Terrorism Legislation,⁶³ the Home Affairs Select Committee,⁶⁴ the Joint Committee on Human Rights,⁶⁵ the Women and Equalities Committee,⁶⁶ the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association,⁶⁷ the UN Special Rapporteur on counter terrorism and human rights,⁶⁸ a host of academics,⁶⁹ the National Union of Teachers,⁷⁰ the National Union of Students⁷¹ and Muslim community groups.⁷² Concerns have also been raised in the House of Lords,⁷³ by Conservative⁷⁴, Labour⁷⁵ and Liberal Democrat⁷⁶ Members of Parliament and, by the Green Party.⁷⁷ It is a bold assertion to claim that not one of these groups has a genuine concern about Prevent.

The so-called “*toy gun story*” may be a horror story, but it cannot be dismissed as a “*myth*.” The case was real, and Liberty acted as solicitors for the family, who approached us with concerns about the way their children had been treated. The children were detained for almost two hours by police. The school had called the police, concerned about its duties under the Prevent scheme, after learning that one of the children had been given a toy gun as a gift. The case was settled with admissions of wrongdoing by the local authority, including that the children were discriminated against on the basis of race and perceived religion, an apology, and a change in local authority policy.

As one member of the family subsequently wrote:

“[M]inisters have made suspects of us all – especially those of us who aren’t white. Prevent makes teachers watch and suspect their students, rather than educate and nurture them.

⁶³ <http://www.standard.co.uk/news/uk/david-anderson-qc-prevent-strategy-can-work-against-radicalisation-if-it-is-trusted-a3467901.html>.

⁶⁴ <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/135/135.pdf>.

⁶⁵ <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/105/105.pdf>.

⁶⁶ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/news-parliament-2015/employment-opportunities-for-muslims-in-uk-report-published-16-17/>.

⁶⁷ <http://freeassembly.net/news/statement-united-kingdom-follow-up/>.

⁶⁸ https://www.justsecurity.org/wp-content/uploads/2016/04/Emmerson-UNHRC-Report-A-HRC-31-65_UneditedVersion.pdf.

⁶⁹ <https://www.theguardian.com/politics/2016/sep/29/anti-radicalisation-strategy-lacks-evidence-base-in-science>.

⁷⁰ <https://www.theguardian.com/politics/2016/mar/28/teachers-nut-back-motion-calling-prevent-strategy-radicalisation-scrapped>.

⁷¹ <https://www.theguardian.com/education/2015/sep/02/nus-fights-back-against-governments-chilling-counter-radicalisation-strategy>.

⁷² <https://www.mcb.org.uk/wp-content/uploads/2015/10/20150803-Case-studies-about-Prevent.pdf>.

⁷³ <https://hansard.parliament.uk/lords/2016-10-26/debates/D21E35A2-D38C-4D46-9201-A9FE5643FF2D/PreventStrategy>.

⁷⁴ Lucy Allen MP tabled a bill to repeal the Prevent duty as it applies to nurseries and primary schools: <http://www.shropshirestar.com/news/politics/2016/06/30/telford-mp-lucy-allan-tables-parliamentary-bill-over-school-counter-terrorism-measures/> See also comments of Jeremy Lefroy MP: <http://www.christianconcern.com/our-concerns/freedom-of-speech/parliamentary-committee-reveals-muddled-thinking-in-counter-extremism>.

⁷⁵ See comments of Andy Burnham MP: <https://www.theguardian.com/politics/2016/jun/09/andy-burnham-calls-for-toxic-prevent-strategy-to-be-scrapped>; of Diane Abbott MP: http://www.huffingtonpost.co.uk/diane-abbott/prevent-strategy_b_12561086.html and of Jeremy Corbyn MP: <http://www.middleeasteye.net/news/labour-leader-corbyn-calls-reform-prevent-strategy-1547441159>.

⁷⁶ See party position of the Liberal Democrats: <https://www.theguardian.com/politics/2016/sep/13/lib-dems-aim-to-scrap-counter-productive-prevent-strategy>.

⁷⁷ <https://www.theguardian.com/law/2016/may/23/counter-extremism-bill-puts-our-rights-at-risk>.

Of course we must protect children from being drawn into terrorism. But marking them out as ‘other’ and making them afraid to speak openly won’t keep them safe. Instead, it will only increase resentment and division.

We cannot alienate children who look different because we are afraid. We cannot police their thoughts and speech because we are afraid.

Our children must not fear their teachers and see the state as their enemy. They cannot be scared to discuss world politics, ask questions and seek guidance on difficult issues.”⁷⁸

Parliament’s Joint Committee on Human Rights⁷⁹ and others⁸⁰ have echoed the call for a full, transparent and independent review of the Prevent strategy. The former Reviewer of Terrorism Legislation, David Anderson QC, while supporting the Prevent strategy in principle, has noted that an independent review would be: “*peculiarly appropriate for an area in which potential conflicts between state power and civil liberties are acute, but information is tightly rationed*”.⁸¹ This Bill provides the opportunity to give this controversial programme the scrutiny it urgently requires.

The Government’s recent internal review of its CONTEST strategy, including the Prevent element, fails to look critically at widespread concerns about Prevent and simply reasserts the value of the programme. This internal review fails, in particular, to reflect on the strategy’s focus on non-violent extremism, the interaction of Prevent with the criminal law, other legal duties on public authorities, and problems with oversight and transparency highlighted by the former Reviewer of Terrorism Legislation, David Anderson QC.⁸² The Government’s assertion during the Committee Stage debates that Prevent is “a maturing but evolving policy that is always reviewed”⁸³ reflects a similar failure.

⁷⁸ <https://www.theguardian.com/commentisfree/2017/feb/01/children-detained-toy-gun-prevent-strategy>

⁷⁹ See: House of Lords & House of Commons Joint Committee on Human Rights, ‘Counter-Extremism: Second Report of Session 2016-17,’ (HL Paper 39, HC 105, 22 July 2016), [36]-[50].

⁸⁰ Open Society Justice Initiative, ‘Eroding Trust: The UK’s Prevent Counter-Extremism Strategy in Health and Education’ (2016) (‘Open Society Report’), p19.

⁸¹ David Anderson QC, ‘Prevent strategy can work against radicalisation... if it is trusted,’ *Evening Standard* (16 February 2017), available at: <http://www.standard.co.uk/news/uk/david-anderson-qc-prevent-strategy-can-work-against-radicalisation-if-it-is-trusted-a3467901.html>

⁸² David Anderson QC, *Prevent strategy can work against radicalisation... if it is trusted*, *The Evening Standard*, 13th February 2017.

⁸³Public Bill Committee, 3rd July 2018, p143

Transparency

The Home Office should collect and publish annually the data necessary to establish whether Prevent is disproportionately impacting those of certain ethnicities and faiths. Whilst the Government publishes data on the age, gender and region of residence of those referred under the Prevent programme, together with the type of concern raised, it fails to produce information which would allow for an assessment of the impact of the programme on those of certain ethnicities and faiths. During the Committee Stage debates, the Government made reference to “ensur[ing] that the Prevent statistics are all out there.”⁸⁴ If it is genuinely committed to increasing transparency around Prevent, it must include these figures in its statistical releases.

Local authority referral power

Clause 19 is part of a broader Government commitment, heralded in its new CONTEST strategy, to drive counter-terror operations further into our communities. It extends the Prevent strategy by allowing local authorities, as well as police, to refer individuals to Channel panels. This new referral power will be used in conjunction with ill-conceived information-sharing arrangements between the security services and local service providers.⁸⁵ Rather than expanding Prevent and embroiling more service providers and local officials, this Bill should be used as an opportunity to require a full and independent review of the strategy, and clause 18 should be removed from the Bill.

Suspicionless port and border control powers

Schedule 7 of the Terrorism Act 2000

Schedule 3 of the Bill introduces a new regime of suspicionless border control powers, which broadly mirror powers set out at Schedule 7 of the 2000 Act, but are based on an astonishingly broad definition of “*hostile activity*”. The Bill therefore presents an opportunity to amend Schedule 7 of the Terrorism Act 2000 to insert a requirement of reasonable suspicion prior to the exercise of any powers of questioning, search, seizure or retention of documents, access to data stored on electronic devices, or detention.

⁸⁴ Public Bill Committee, 3rd July 2018, p146

⁸⁵ HM Government, CONTEST: the United Kingdom’s Strategy for Countering Terrorism, June 2018, page 42.

Liberty, alongside many parliamentarians and civil society groups, has long objected to existing suspicionless port and border control powers provided for at Schedule 7 of the 2000 Act. Schedule 7 disproportionately impacts those of Asian ethnicity and is unduly invasive of privacy, dangerous to journalistic and legal privilege, and a violation of due process. Clause 15 of the Bill already amends Schedule 7 to clarify that answers given when questioned under Schedule 7 cannot generally be used in evidence in criminal proceedings against the individual questioned. This Bill provides the opportunity to further amend Schedule 7.

The latest report of the Independent Reviewer of Terrorism Legislation confirms that while the number of examinations under Schedule 7 has fallen, *“the number of Asians examined under Schedule 7 is disproportionately high when compared to white persons and when expressed as a proportion of persons sharing the same ethnicity”*.⁸⁶ Elsewhere, suspicionless powers to stop and search also disproportionately affect those of certain ethnicities. Under suspicion-based search powers, you are eight times more likely to be stopped and searched by police if you are black than if you are white,⁸⁷ but that disparity deepens when it comes to the power to stop and search without suspicion. Black people are 14 times more likely to face a search under the suspicionless power set out at section 60 of the Criminal Justice and Public Order Act than white people.⁸⁸

The sort of intrusive powers available under Schedule 7 of the 2000 Act – including powers to question, search, seize and retain documents, access data stored on electronic devices and detain individuals for up to six hours – should only be available where there are reasonable grounds for suspecting that an individual is or has been concerned in the commission, preparation or instigation of acts of terrorism. This would provide a safeguard against the discriminatory use of Schedule 7 on the basis of ethnicity or faith.

Suspicionless powers to stop, search, seize, retain and detain under Schedule 3

The powers set out at Schedule 3 of the Bill largely mirror those granted by Schedule 7. A person stopped under Schedule 3 must provide any information or document that the officer requests.⁸⁹ Failure to provide requested documents or information is a criminal offence,

⁸⁶ Independent Reviewer of Terrorism Legislation, THE TERRORISM ACTS IN 2016, paragraph 5.12.

⁸⁷ Section 1 of PACE.

⁸⁸ Gov.UK, *Police powers and procedures England and Wales year ending 31 March 2017 second edition*, published October 2017. Available at: <https://www.gov.uk/government/statistics/police-powers-and-procedures-england-and-wales-year-ending-31-march-2017>.

⁸⁹ Schedule 3, paragraph 3(a) - (d).

carrying a penalty of up to three months' imprisonment (Scotland and Northern Ireland), 51 weeks' imprisonment (England and Wales), and/or a fine of £2500.⁹⁰ A person can be body-searched and have any personal effects searched, seized and copied.⁹¹ Property belonging to a person – such as a mobile phone, laptop, family photographs, or important work papers – can be seized and retained for a wide range of reasons and for no clearly defined period of time.⁹²

If an officer wants to stop or question a person for more than an hour, they must formally detain them.⁹³ Once a person is detained, they must be released no later than six hours from when questioning first began, unless they are detained under another power.⁹⁴ However, nothing prevents a border agent from circumventing these time limits by switching to the use of a different suspicionless border power, such as Schedule 7 of the Terrorism Act, effectively doubling the existing time limits. A detained person may be fingerprinted or have other “non-intimate” samples taken from them without their consent (subject to certain conditions).⁹⁵ Police, immigration and customs officers with a counter-terrorism designation will be responsible for exercising the powers set out in Schedule 3.⁹⁶ Willful failure to hand over information where it is requested under Schedule 3 powers would be a criminal offence attracting up to 51 weeks in prison.⁹⁷

The intrusive and suspicionless powers granted by Schedule 3 suffer from the same defects as the package of powers granted by Schedule 7. In one key respect, however, Schedule 3 is significantly more concerning. Whilst the statutory purpose set out at Schedule 7 is tied to criminal conduct, namely the “*commission, preparation or instigation of acts of terrorism*”, the statutory purpose for the powers set out in Schedule 3 covers a potentially vast and conspicuously uncertain range of behaviours. The intrusive stop, questioning, search, seizure and detention powers under Section 3 are available, without individual suspicion, “*for the purpose of determining whether a person appears to be a person who is, or has been, engaged in hostile activity*”.⁹⁸ The Bill defines a hostile act as including any act which threatens national security, the economic well-being of the UK, or which constitutes a serious crime where the act is carried out “*for, or on behalf of, a State other than the United*

⁹⁰ Schedule 3, paragraph 16.

⁹¹ Schedule 3, paragraph 8.

⁹² Schedule 3, paragraph 11(1)-(2).

⁹³ Schedule 3, paragraph 5(2).

⁹⁴ Schedule 3, paragraph 5(3).

⁹⁵ Schedule 3, paragraph 27. Paragraph 35 makes separate provision for fingerprints and samples to be taken if a person is detained in Scotland.

⁹⁶ See paragraph 57(3) to Schedule 3.

⁹⁷ Schedule 3, paragraph 16.

⁹⁸ Schedule 3, paragraph 1(1).

*Kingdom, or otherwise in the interests of a State other than the United Kingdom.*⁹⁹ A person need not be aware that the activity they are engaged in constitutes hostile activity, and the State that the hostile activity ostensibly benefits need not have instigated or even be aware of the activity.¹⁰⁰

The statutory purpose set out at paragraph 1 to Schedule 3 of the Bill does not offer a sensible limit on the scope of this intrusive suspicionless power. Some of the behaviour caught by this section may amount to a crime – for example the crime of unauthorised disclosure of information under section 1 or section 4 of the Official Secrets Act 1989, or the offence of spying under section 1 of the Official Secrets Act 1911. However, the section also covers a huge range of entirely lawful behaviour. Somebody currently, or at any point in the past, involved in a business venture which may involve a diversion of investment from the UK to a third state would apparently be caught by Schedule 3. Their behaviour impacts the economic well-being of the UK and offers a corresponding benefit to another state. Similarly a politician or official negotiating a trade deal with the UK government, which may offer some financial disadvantage for the UK and a benefit for another state, would presumably be caught.

Schedule 3 as drafted is unacceptably broad. At the very least, the Government must redefine the statutory purpose set out in paragraph 1 of Schedule 3 to ensure it is focused on clearly defined criminal behaviour. Once it has clarified the criminal behaviour it intends to target under Schedule 3, the Government must introduce a threshold requiring reasonable grounds for suspicion of criminal behaviour, as the JCHR has recommended.¹⁰¹

Access to a lawyer and legal privilege

Currently both Schedule 3 of the Bill and Schedule 8 of the 2000 Act provide for access to a lawyer *except* where such access would be likely to prejudice the examining officer's determinations.¹⁰² Individuals subject to the intrusive powers set out in both Schedules should always be able to access a lawyer before they are questioned.

⁹⁹ Schedule 3, paragraph 1(5) - (6).

¹⁰⁰ Schedule 3, paragraph 1(7).

¹⁰¹ Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017-19*, para 82. Available here: <https://publications.parliament.uk/pa/jt201719/itselect/jtrights/1208/1208.pdf>

¹⁰² Under Schedule 3 this is a determination of whether a person is a person who appears to be or has been engaged in hostile activity and for determining the person's presence is in a border area is connected with air travel or entry into/ departure from Great Britain or Northern Ireland. Under Schedule 7, this is a determination of whether a person is a terrorist with the meaning of section 41(1)(b) of the Terrorism Act 2000 or the determination of whether somebody's presence in a border area is connected with his entering or leaving Northern Ireland.

Both Schedules provide that a detained person is able to consult a solicitor in person *unless* the examining officer believes that the time it would take to consult a solicitor in person would interfere with the examining officer's determinations.¹⁰³ An individual subject to powers under Schedule 7 or Schedule 3 should only be prevented from consulting a lawyer in person where the examining officer reasonably believes that the time it would take to secure a solicitor's presence would create an immediate risk of physical injury to any individual. It is essential that an individual is still able to consult her lawyer in private, although this consultation may be by phone.

More concerning still, both Schedules provide that a detained person may be required to consult her solicitor "*within the sight and hearing*" of an officer where a direction to this effect is made by a senior police officer.¹⁰⁴ A senior officer can make a direction to this effect for a range of reasons, from concern about the impact on an investigation to situations in which she reasonably believes that the direction is necessary to avoid hindering the recovery of criminally obtained property.¹⁰⁵

Liberty does not believe there are any circumstances in which it is acceptable to require a person to conduct private communications with a lawyer in front of a police or immigration officer. Far from replicating the deficiencies of Schedule 8 of the 2000 Act, the Government should use this Bill as an opportunity to amend them. During the Committee Stage debates, the Government asserted that:

"to balance the removal of some rights [to access a lawyer and consult with them in private], these verbal discussions are not admissible in court as evidence, unlike in a police station, where everything said can be taken down in evidence and used."¹⁰⁶

This assertion is inaccurate. Schedule 3, paragraph 6 of the Bill establishes that information given orally by a person in response to a question may be used in evidence in a) in the course of proceedings to prosecute a person for non-compliance or obstruction of a Schedule 3 stop; b) a prosecution for perjury; or c) on a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with the answer or information given in response to interrogation under Schedule 3 powers.¹⁰⁷ It is therefore of

¹⁰³ Counter-Terrorism and Border Security Bill 2018, Schedule 3, paragraph 24(6) and Terrorism Act 2000, Schedule 8, paragraph 7A(6)

¹⁰⁴ Schedule 3, paragraph 26 to the Bill; Schedule 8, paragraph 9 to the 2000 Act.

¹⁰⁵ Full list of consequences set out at Schedule 8 of the Terrorism Act 2000, paragraph 8(4) and

¹⁰⁶ Public Bill Committee, 5th July 2018, p197

¹⁰⁷ Schedule 3, paragraph 6(2) to the Bill

the utmost importance that a person is able to access a lawyer, and consult with them in private.

The argument for the protection of legal professional privilege has been forcefully made by the Law Society's Criminal Law Committee which expressed "*very great concern*" at the requirement that consultation with a solicitor may be required to take place with the sight and hearing of a police officer, concluding:

"It fundamentally undermines [...] a cornerstone of our justice system [...] legal professional privilege is a right that belongs to the client, not to the lawyer, and it is a right to consult with their lawyer and have the contents of those discussions, where they are a matter of advice, privileged and not to be disclosed to anyone."¹⁰⁸

The Bill must be amended to protect the right to confidential legal advice in the face of the intrusive powers available at Schedule 3 of the Bill and Schedule 7 of the 2000 Act.

¹⁰⁸ Commons Public Bill Committee, 26th June 2018, Q44.