

LIBERTY

PROTECTING CIVIL LIBERTIES
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Liberty's Report Stage Briefing on the Counter-Terrorism and Border Security Bill

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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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 blind 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 travel to a “designated area”.
- The criminalisation of expression or inquiry divorced from any act in pursuit of actual terrorism.
- The impact of new charging measures on protest.
- 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

Travel to a “designated area”

Amendment NC2 would amend section 58 of the Terrorism Act 2000 to create a new offence of entering or remaining in a designated area overseas. The offence would apply to UK nationals and residents, with a maximum penalty of ten years’ imprisonment, a fine, or both.² A reasonable excuse defence is available.³

Proposed clause 58C 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.⁴ The Secretary of State would be required to keep the necessity of the

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/it201719/itsselect/jtrights/1208/1208.pdf>

² Terrorism Act 2000, proposed new clause 58B(4)

³ Terrorism Act 2000, proposed new clause 58B(2)

⁴ Terrorism Act 2000, proposed new clause 58C(5)(6ZA)

designation under review.⁵ Given the potentially far-reaching impact of such a designation, as outlined below, this is an inadequate level of scrutiny.

According to the Government, 900 individuals of national security concern have travelled to engage with the conflict in Syria.⁶ At the same time, 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,⁷ training for terrorism,⁸ and membership of a proscribed organisation.⁹ Clause 5 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 circumstances.¹⁰

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 5 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. Liberty therefore urges Parliamentarians to reject NC2.

⁵ Counter-Terrorism and Border Security Bill 2018, NC2, clause 58C(4)(a)

⁶ Government graphic titled "Current terrorist threat and the Government's response", available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714116/CTBS_Bill_Threat_Landscape_Graphic_PDF.pdf

⁷ Section 1, Terrorism Act 2000

⁸ Section 6, Terrorism Act 2000

⁹ Section 11(1), Terrorism Act 2000

¹⁰ Counter-Terrorism and Border Security Bill 2018, clause 5.

Recklessly expressing support for a proscribed organisation

Amendment

Page 1, line 5, leave out Clause 1.

Effect

This amendment would remove clause 1 from the Bill. Clause 1 extends the existing offence of “*inviting support for a proscribed organisation*” beyond knowingly inviting support to expressions of support and being “*reckless*” as to whether they will encourage support for a proscribed group.¹¹

Briefing

The existing offence of “*invitation of support*”, set out 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)*”.¹² The support need not be tangible or practical, but could include approval, endorsement or other “*intellectual*” support.¹³

The Government is now seeking to erode the very element of the offence of invitation which allowed the Court in *Choudhary* 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.”¹⁴

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

¹¹ Amends section 12 of the Terrorism Act 2000.

¹² *R v Choudhary and Rahman* [2016] EWCA Crim 61, paragraph 45.

¹³ *Choudhary and Rahman*, paragraph 46.

¹⁴ *Choudhary and Rahman*, paragraph 70.

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.¹⁵ 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.”¹⁶

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 instance, on academic debate during which participants speak in favour of the de-proscription of proscribed organisations.*”¹⁷

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.”¹⁸

Preparing for acts of terrorism is already a criminal offence punishable by life in prison.¹⁹ Encouragement of terrorism is also already criminalised and would attract a maximum

¹⁵ Terrorism Act 2000, Section 12.

¹⁶ Joint Committee on Human Rights, The Council of Europe Convention on the Prevention of Terrorism, First Report of Session 2006–07, paragraph 9.

¹⁷ 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/jtselect/jtrights/1208/1208.pdf>

¹⁸ *Ibid.*, para 17

¹⁹ Terrorism Act 2006, section 5.

sentence of 15 years imprisonment under the provisions of this Bill.²⁰ There are also a broad range of offences which relate to practical support for – and encouragement of – a proscribed organisation, including: directing its activities;²¹ membership or professing membership;²² wearing its uniform or displaying its insignia;²³ arranging a meeting to support a proscribed group;²⁴ addressing such a meeting;²⁵ fundraising for the organisation or in other ways providing financial or practical support;²⁶ or – in some circumstances – to fail to disclose a suspicion or belief that somebody else has provided such support.²⁷ 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

Amendment

Page 1, line 13, leave out Clause 2.

Effect

This amendment would remove clause 2 from the Bill. Clause 2 creates a new offence of publishing an image of an item of clothing or an article in circumstances arousing suspicion that a person is a member or supporter of a proscribed organisation.

Briefing

It is already a criminal offence to wear clothing or display an article likely to arouse suspicion of membership of a proscribed group.²⁸ Liberty does not support the existing law's 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.²⁹ Clause 2 increases the risk that law enforcement officials

²⁰ Terrorism Act 2006, section 1.

²¹ Terrorism Act 2000, Section 56

²² Terrorism Act 2000, Section 12.

²³ Terrorism Act 2000, Section 13.

²⁴ Terrorism Act 2000, Section 12.

²⁵ Terrorism Act 2000, Section 12.

²⁶ Terrorism Act 2000, Section 15-18

²⁷ Terrorism Act 2000, Section 19.

²⁸ Terrorism Act 2000, section 13.

²⁹ Explanatory Notes, paragraph 33.

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.”*³⁰ 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.”*³¹

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”*.³² 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.”*³³ 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”*³⁴ 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 occur. The chilling effect also inheres in the journalists, academics, and other people who do not support or belong to proscribed 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.

³⁰ Public Bill Committee, 26th June 2018, Q.88.

³¹ 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>

³² Proposed new clause 13(1A) of the Terrorism Act 2000.

³³ Public Bill Committee, 28th June 2018, p.79

³⁴ Public Bill Committee, 28th June 2018, p.79

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.³⁵ 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

Government amendments 2-4: the “one click” offence

It is already a criminal offence to download information which could be useful for terrorism.³⁶ The Government had previously expressed its intention to legislate for situations where 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*”.³⁷ It had introduced clause 3 of the Bill, which as it stands would criminalise 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 has now proposed an amendment to clause 3 that would effectively replace the “three clicks” offence with a “one click” offence.³⁸ 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.

If amendment 2 is successful, a person will face 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 relation to clause 3 that the “three clicks” requirement was intended to identify a pattern of behaviour. With these amendments, it has abandoned even that pursuit.

³⁵ Clause 6(6).

³⁶ Terrorism Act 2000, section 58.

³⁷ Explanatory Notes, paragraph 37.

³⁸ Government amendment 2, https://publications.parliament.uk/pa/bills/cbill/2017-2019/0249/amend/counter_rm_rep_0905.1-7.html

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 claims to have inserted a reasonable excuse defence into the Bill. New sub-clause (3A) reads:

“(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.”³⁹

On closer inspection, however, the proposed defence is less a reasonable excuse than a weak *mens rea*, clarifying that for a person to commit the one click offence, they simply need

³⁹ Counter-Terror and Border Security Bill 2018, clause 3, proposed new sub-clause 3(A)

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 to people charged with the offence, 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 lack of terrorist intent to be an available excuse for this offence.

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. Liberty urges Parliamentarians to reject Government amendments 2-4.

Existing clause 3: Three clicks

Amendment

Page 2, line 10, leave out Clause 3.

Effect

This amendment would remove clause 3 from the Bill. Clause 3 amends the existing offence of “collecting information” to include viewing online content “*of a kind likely to be useful to a person committing or preparing an act of terrorism*” three or more times. The content viewed may be different on each occasion. There is no specified time period during which the viewings must occur for the offence to be committed.

Briefing

Even if Government amendments 2-4 to clause 3 are rejected, it remains the case that the three clicks offence as currently drafted should be removed from the Bill. The Government had previously suggested that the offence is designed to prevent prosecutions of those who accidentally alight on online content, but it would be criminal to click on three different articles or videos of a kind likely to be of use to a terrorist, even if they relate to entirely different and unrelated groups and the clicks occur years apart. As the Independent Reviewer of Terrorism Legislation warned the Public Bill Committee, clause 3 “*is very likely*

to attract arguments of principle based on a rights analysis, principally article 10 on the freedom of expression".⁴⁰ 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.⁴¹

During the Committee Stage debates, while agreeing to look again at the clause before Report Stage,⁴² 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*".⁴³ 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 sexualisation⁴⁴ 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."⁴⁵

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.

The offence at clause 3 risks criminalising academic inquiry, journalistic investigation or passive curiosity without any intention to harm. As the Independent Reviewer of Terrorism Legislation has pointed out, it also risks criminalising "*those who view material in disgust, shock and disapproval*".⁴⁶

⁴⁰ Public Bill Committee, 26th June 2018, Q84.

⁴¹ Public Bill Committee, 26th June 2018, Q86.

⁴² Public Bill Committee, 3rd July 2018, p91

⁴³ Public Bill Committee, 3rd July 2018, p91

⁴⁴ Public Bill Committee, 3rd July 2018, p91

⁴⁵ Public Bill Committee, 3rd July 2018, p91

⁴⁶ <https://terrorismlegislationreviewer.independent.gov.uk/tom-sargant-memorial-lecture-for-justice-24th-october-2017/>

The JCHR has 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.”⁴⁷

While a defence of reasonable excuse is available, the courts have been clear that reasonable excuse is “*a concept for decision by the jury on the individual facts of each case*”.⁴⁸ It would be open to an individual to submit “*for the jury's consideration his assertion that that purpose was an objectively reasonable one.*”⁴⁹ The courts have explicitly declined to give more guidance than this, leaving the test an inherently uncertain one to be determined on the facts of an individual case. As the Independent Reviewer of Terrorism Legislation has pointed out:

“The question, however, is whether we need to rely on prosecutorial discretion not to prosecute in what many would argue are the obvious non-prosecution cases, or whether there is a risk of significant numbers of people who are taken to the trouble and even the expense of going to court in order to demonstrate or to raise the question of reasonable excuse.”⁵⁰

Overreliance on prosecutorial discretion can be no substitute for clarity in the law itself. When the stakes are as high as 15 years in prison, it is the brave journalist or researcher who will be undeterred. The chilling effect of this offence on free speech will be significant.

Protest

Briefing

Clause 14 of the Bill provides that where an order or notice is made by an authority under new section 22C of the Road Traffic Act 1984, in relation to measures to reduce the

⁴⁷ 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>

⁴⁸ R v AY [2010] EWCA Crim 762, R. v G [2009] UKHL 13.

⁴⁹ R v AY [2010] EWCA Crim 762, R. v G [2009] UKHL 13.

⁵⁰ Commons Public Bill Committee, 26th June 2018, Q7

likelihood of danger connected with terrorism, that authority may now impose “a charge of such amount as it thinks reasonable in respect of anything done in connection with or in consequence of the order or notice (or proposed order or notice)”.⁵¹ The charge is payable by an event promoter or organiser, or occupier of a site, and relevant events include those taking place for charitable or not for profit purposes.

Liberty had previously expressed concerns that this power to impose a charge could be levied against the organisers of static or moving protests or other demonstrations, and had recommended that an exemption should be set out to expressly exclude public processions and assemblies taking place to demonstrate support for, or opposition to, the views or actions of any person or body of persons, to publicise a cause or campaign, or to mark or commemorate an event,⁵² from these charges.

Liberty therefore welcomes amendments 6 and 7 tabled in the name of the Home Secretary, which will ensure that the rights to freedom of assembly and association as protected by Articles 10 and 11 ECHR are not curtailed by a demonstration organiser’s inability to pay any charge levied under this clause.

Biometric data

Oversight of the Biometrics Commissioner

Amendment

Schedule 2, page 26, line 5, leave out paragraph 2.

Effect

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 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.

⁵¹Counter-terrorism and Border Security Bill 2018, Part 1, Chapter 3, clause 14(2)

⁵² Public Order Act 1986, Section 11(1)

This amendment would remove this paragraph, such that the oversight of the Biometrics Commissioner is retained.

Briefing

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”⁵³. 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.

Whilst Liberty does not support the retention of biometric data for those who have committed no crime in any event, the removal of this protection is alarming and Liberty is concerned that

⁵³ Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/254444/Principles_for_Assessing_applications_under_PACE.pdf.

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.

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.”*⁵⁴

Retention periods

Amendment

Schedule 2, page 26, line 29, leave out sub-paragraph 3(4).

Effect

Sub-paragraph 3(4) extends the time period for which invasive biometric data, including fingerprints and DNA, can be retained – including biometric data of people who have never been convicted of any crime – from two years to five years.

The removal of this paragraph means that the time period will remain at two years.

Amendment

Schedule 2, page 29, line 3, leave out sub-paragraph 7(4).

Effect

Sub-paragraph 7(4) extends the time period for which invasive biometric data, including fingerprints and DNA, can be retained – including biometric data of people who have never been convicted of any crime – from two years to five years.

The removal of this paragraph means that the time period will remain at two years.

⁵⁴ JCHR, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, 2018, para 58. Accessed at: <https://publications.parliament.uk/pa/lt201719/jtselect/jtrights/1208/1208.pdf>

Amendment

Schedule 2, page 30, line 3, leave out sub-paragraph 10(4).

Effect

Sub-paragraph 10(4) extends the time period for which invasive biometric data, including fingerprints and DNA, can be retained – including biometric data of people who have never been convicted of any crime – from two years to five years.

The removal of this paragraph means that the time period will remain at two years.

Amendment

Schedule 2, page 31, line 32, leave out sub-paragraph 13(4).

Effect

This paragraph extends the time period for which invasive biometric data, including fingerprints and DNA, can be retained – including biometric data of people who have never been convicted of any crime – from two years to five years.

The removal of this paragraph means that the time period will remain at two years.

Amendment

Schedule 2, page 33, line 4, leave out sub-paragraph 16(4).

Effect

This paragraph extends the time period for which invasive biometric data, including fingerprints and DNA, can be retained – including biometric data of people who have never been convicted of any crime – from two years to five years.

The removal of this paragraph means that the time period will remain at two years.

Amendment

Schedule 2, page 34, line 28, leave out paragraph 19.

Effect

This paragraph extends the time period for which invasive biometric data, including fingerprints and DNA, can be retained – including biometric data of people who have never been convicted of any crime – from two years to five years.

The removal of this paragraph means that the time period will remain at two years.

Briefing

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.⁵⁵ 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 Database⁵⁶, 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.⁵⁷ 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.

⁵⁵ See Schedule 2 sub-paragraphs 3(4), 7(4), 10(4), 13(4), 16(4) and Schedule 2, paragraph 9

⁵⁶ 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

⁵⁷ 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>

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.

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."⁵⁸

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.*"⁵⁹

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*,⁶⁰ 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, 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.⁶¹ 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*"⁶².

⁵⁸ Public Bill Committee, 26th June 2018, Q76.

⁵⁹ 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/it201719/itselect/jtrights/1208/1208.pdf>

⁶⁰ *S. AND MARPER v. THE UNITED KINGDOM* - 30562/04 [2008] ECHR 1581 (4 December 2008)

⁶¹ PBC Deb, 26 June 2018, col 24. Accessed at: <http://bit.ly/2Mvhzby>

⁶² JCHR, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill, 2018*, page 32, para 10. Accessed at: <https://publications.parliament.uk/pa/it201719/itselect/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 people from BAME backgrounds. 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. 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*"⁶³ is wholly inadequate.

Prevent

Independent review

Amendment

Page 19, line 3, insert the following new Clause –

() Independent Review of Prevent

(1) Before the end of the period of three months beginning on the day on which this Act is passed, the Secretary of State shall appoint an independent reviewer to:

(a) conduct an independent review of the operation of the Prevent strategy; and

(b) send a report to the Secretary of State on the findings of the review.

(2) The report must address the following matters:

(a) the extension of Prevent to encompass non-violent extremism;

⁶³ Public Bill Committee, 3rd July 2018, p131

- (b) the interaction of Prevent with:
 - (i) other legal duties on public authorities; and
 - (ii) the criminal law.

(c) the manner in which personal information is processed and shared by authorities involved in the Prevent strategy and Channel programme;

(d) the human rights implications of Prevent; and

(e) the adequacy of current oversight and disclosure arrangements.

(3) The independent reviewer must invite evidence from civil society groups and others with expertise in, or experience of, Prevent.

(4) An individual must not be appointed to the role of independent reviewer if that individual—

- (a) has a close association with Her Majesty's Government; or

- (b) has concurrent obligations as a Government appointed reviewer or adviser.

(5) The reviewer must have access to security sensitive information on the same basis as the reviewer appointed under section 36 of the Terrorism Act 2006.

(6) The Secretary of State shall provide the reviewer with such staff as are sufficient to secure that the reviewer is able to properly carry out its functions.

(7) The Secretary of State must pay to the reviewer-

- (a) expenses incurred in carrying out its functions under this section, and

- (b) such allowances as the Secretary of State determines.

(8) The Secretary of State must lay before Parliament a copy of the report received under subsection 1(b).

(9) In this section “Prevent” means the Prevent strand of the Government’s counter-terrorism strategy, CONTEST, together with the provisions set out at Part 5 of the Counter-Terrorism and Security Act 2015.

Effect

This amendment would require the Home Secretary to appoint an independent person to review the operation of the Prevent strategy. The reviewer would be required to consider a non-exhaustive list of aspects of the Prevent regime. The considerations listed at (2)(a)-(e) represent areas of particular concern in relation to the operation Prevent, including the strategy's focus on non-violent extremism and problems with oversight and transparency highlighted by the former Reviewer of Terrorism Legislation, David Anderson QC.⁶⁴ In the wake of Government programmes facilitating greater information sharing between law enforcement and local authorities under Prevent, this amendment would require the Independent Reviewer to consider the handling and sharing of information by public authorities involved in the operation of Prevent.

To qualify for the role of independent reviewer, the amendment requires that an individual be independent of government. It also requires that they do not already have a function as a government appointed reviewer or advisor. The Prevent reviewer would be required to invite submissions from those with expertise and experience of Prevent and would be able to consider security sensitive information on the same basis as the current Independent Reviewer of Terrorism Legislation.

Briefing

The Prevent strategy 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.”⁶⁵

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 Terrorism Legislation,⁶⁶ the Home Affairs Select Committee,⁶⁷ the Joint Committee on Human

⁶⁴ David Anderson QC, *Prevent strategy can work against radicalisation... if it is trusted*, The Evening Standard, 13th February 2017.

⁶⁵ Public Bill Committee, 3rd July 2018, p146

⁶⁶ <http://www.standard.co.uk/news/uk/david-anderson-qc-prevent-strategy-can-work-against-radicalisation-if-it-is-trusted-a3467901.html>.

⁶⁷ <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/135/135.pdf>.

Rights,⁶⁸ the Women and Equalities Committee,⁶⁹ the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association,⁷⁰ the UN Special Rapporteur on counter terrorism and human rights,⁷¹ a host of academics,⁷² the National Union of Teachers,⁷³ the National Union of Students⁷⁴ and Muslim community groups.⁷⁵ Concerns have also been raised in the House of Lords,⁷⁶ by Conservative⁷⁷, Labour⁷⁸ and Liberal Democrat⁷⁹ Members of Parliament and, by the Green Party.⁸⁰ 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.

⁶⁸ <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/105/105.pdf>.

⁶⁹ <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/>.

⁷⁰ <http://freeassembly.net/news/statement-united-kingdom-follow-up/>.

⁷¹ https://www.iustsecurity.org/wp-content/uploads/2016/04/Emmerson-UNHRC-Report-A-HRC-31-65_UneditedVersion.pdf.

⁷² <https://www.theguardian.com/politics/2016/sep/29/anti-radicalisation-strategy-lacks-evidence-base-in-science>.

⁷³ <https://www.theguardian.com/politics/2016/mar/28/teachers-nut-back-motion-calling-prevent-strategy-radicalisation-scrapped>.

⁷⁴ <https://www.theguardian.com/education/2015/sep/02/nus-fights-back-against-governments-chilling-counter-radicalisation-strategy>.

⁷⁵ <https://www.mcb.org.uk/wp-content/uploads/2015/10/20150803-Case-studies-about-Prevent.pdf>.

⁷⁶ <https://hansard.parliament.uk/lords/2016-10-26/debates/D21E35A2-D38C-4D46-9201-A9FE5643FF2D/PreventStrategy>.

⁷⁷ 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>.

⁷⁸ 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>.

⁷⁹ See party position of the Liberal Democrats: <https://www.theguardian.com/politics/2016/sep/13/lib-dems-aim-to-scrap-counter-productive-prevent-strategy>.

⁸⁰ <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.”⁸¹

Parliament's Joint Committee on Human Rights⁸² and others⁸³ 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”*.⁸⁴ 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.⁸⁵ The Government's assertion during the Committee Stage debates that Prevent is “a maturing but evolving policy that is always reviewed”⁸⁶ reflects a similar failure.

⁸¹ <https://www.theguardian.com/commentisfree/2017/feb/01/children-detained-toy-gun-prevent-strategy>

⁸² 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].

⁸³ Open Society Justice Initiative, 'Eroding Trust: The UK's Prevent Counter-Extremism Strategy in Health and Education' (2016) ('Open Society Report'), p19.

⁸⁴ 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>

⁸⁵ David Anderson QC, *Prevent strategy can work against radicalisation... if it is trusted*, *The Evening Standard*, 13th February 2017.

⁸⁶Public Bill Committee, 3rd July 2018, p143

Transparency

Amendment

Page 19, line 3, insert the following new clause –

() Transparency requirements relating to Prevent

(1) Section 36 of the Counter-Terrorism and Security Act 2015 is amended as follows.

(2) After subsection (3) insert -

(3A) The Secretary of State must ensure the collection and annual release of statistics on:

(a) the religion; and

(b) the ethnicity

of those subject to a referral under subsection (3).

Effect

This amendment would require the Home Office to collect and publish annually the data necessary to establish whether Prevent is disproportionately impacting those of certain ethnicities and faiths.

Briefing

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.”*⁸⁷ If it is genuinely committed to increasing transparency around Prevent, it must include these figures in its statistical releases.

Local authority referral power

Amendment

⁸⁷ Public Bill Committee, 3rd July 2018, p146

Page 19, line 3, leave out Clause 18.

Effect

This amendment would remove clause 18 from the Bill. Clause 18 extends the Prevent strategy by allowing local authorities, as well as police, to refer individuals to Channel panels.

Briefing

Clause 18 is part of a broader Government commitment, heralded in its new CONTEST strategy, to drive counter-terror operations further into our communities. This new referral power will be used in conjunction with ill-conceived information-sharing arrangements between the security services and local service providers.⁸⁸ 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.

Suspicionless port and border control powers

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*”.

Schedule 7 of the 2000 Act – reasonable suspicion

Amendment

Page 18, line 8, insert the following new Clause –

() Threshold for port and border control powers

(1) Schedule 7 to the Terrorism Act 2000 is amended as follows.

(2) In paragraph 1 after subsection (3) insert -

“(3A) A person may only be questioned under section 2 or 3 where the examining officer has reasonable grounds to suspect that he is a person falling within section 40(1)(b)”.

(3) In paragraph 2 omit subsection (4).

⁸⁸ HM Government, CONTEST: the United Kingdom’s Strategy for Countering Terrorism, June 2018, page 42.

(4) In paragraph 6 at end insert -

“(3A) An examining officer may only stop or detain a person under this section where he has reasonable grounds to suspect that he is a person falling within section 40(1)(b)”.

Effect

This amendment would introduce a threshold of reasonable suspicion to exercise the intrusive Schedule 7 powers to stop, question, search, compel the production of documents, detain individuals, gain access to electronic devices and copy and confiscate belongings. To meet the threshold for exercising Schedule 7 powers, an examining officer must have reasonable grounds for suspecting that an individual is or has been concerned in the commission, preparation or instigation of acts of terrorism.⁸⁹

IN THE ALTERNATIVE

Amendment

Page 18, line 8, insert the following new Clause –

() Threshold for port and border control powers

(1) Schedule 7 to the Terrorism Act 2000 is amended as follows.

(2) In paragraph 5 before “A person who is questioned” insert “Subject to paragraph 9A”.

(3) After paragraph 6A(2) insert -

“(2A) A person questioned under paragraph 2 or 3 may not be detained under paragraph 6 unless the examining officer has reasonable grounds to suspect that he is a person falling within section 40(1)(b).”

(4) In paragraph 8(1) before “An examining officer” insert “Subject to paragraph 9A below,”

(5) In paragraph 9(1) before “An examining officer” insert “Subject to paragraph 9A below,”

(6) After paragraph 9 insert -

“9A Data stored on electronic devices

(1) For the purposes of this Schedule -

(a) the information or documents which a person can be required to give the examining officer under paragraph 5,

(b) the things which may be searched under paragraph 8, and

(c) the property which may be examined under paragraph 9

⁸⁹ Terrorism Act 2000, Section 40(1)(b).

do not include data stored on personal electronic devices unless the person is detained under paragraph 6.

(2) “Personal electronic device” includes a mobile phone, a personal computer and any other portable electronic device on which personal information is stored.

Effect

This amendment would implement the recommendations of Parliament’s Joint Committee on Human Rights and introduce a reasonable suspicion threshold before an individual can be subject to the most intrusive powers under Schedule 7. The amendment would require an officer to have reasonable grounds for suspecting an individual is or has been concerned in the commission, preparation or instigation of acts of terrorism before she could detain an individual for up to six hours under Schedule 7.⁹⁰ The amendment also creates a threshold of reasonable suspicion before an officer can detain an individual or access, search and examine data stored on personal electronic devices. The amendment achieves this by restricting such access and examinations to situations where a person is detained under a suspicion-based power.

Briefing

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”*.⁹¹ 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,⁹² but that disparity deepens when it comes to the power to stop and search without suspicion. Black people are

⁹⁰ Terrorism Act 2000, Section 40(1)(b).

⁹¹ Independent Reviewer of Terrorism Legislation, THE TERRORISM ACTS IN 2016, paragraph 5.12.

⁹² Section 1 of PACE.

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.⁹³

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

Amendment

Page 19, line 30, leave out clause 20 and Schedule 3.

Effect

This amendment would remove clause 20 and Schedule 3 from the Bill. Together these provisions provide for a new regime of intrusive suspicionless powers at the border. Schedule 3 broadly mirrors the provisions set at Schedule 7 of the Terrorism Act 2000.

Briefing

The powers set out at Schedule 3 of the Bill largely mirror those granted by Schedule 7. An individual stopped under Schedule 3 must provide any information or document that the officer requests.⁹⁴ Failure to provide requested documents or information is a criminal offence, carrying a penalty of up to three months' imprisonment and a fine of £2500.⁹⁵ A person can be body-searched and have any personal effects searched, seized and copied.⁹⁶ 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.⁹⁷

⁹³ 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>.

⁹⁴ Schedule 3, paragraph 3(a) - (d).

⁹⁵ Schedule 3, paragraph 16.

⁹⁶ Schedule 3, paragraph 8.

⁹⁷ Schedule 3, paragraph 11(1)-(2).

If an officer wants to stop or question a person for more than an hour, they must formally detain them.⁹⁸ 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.⁹⁹ 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).¹⁰⁰ Police and immigration officers with a counter-terrorism designation will be responsible for exercising the powers set out in Schedule 3.¹⁰¹ 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.¹⁰²

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*”.¹⁰³ 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 Kingdom, or otherwise in the interests of a State other than the United Kingdom.*”¹⁰⁴ 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.¹⁰⁵

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

⁹⁸ Schedule 3, paragraph 5(1).

⁹⁹ Schedule 3, paragraph 4(3).

¹⁰⁰ Schedule 3, paragraph 27. Paragraph 35 makes separate provision for fingerprints and samples to be taken if a person is detained in Scotland.

¹⁰¹ See paragraph 57(3) to Schedule 3.

¹⁰² Schedule 3, paragraph 16.

¹⁰³ Schedule 3, paragraph 1(1).

¹⁰⁴ Schedule 3, paragraph 1(4) - (6).

¹⁰⁵ Schedule 3, paragraph 1(7).

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.¹⁰⁶

Access to a lawyer and legal privilege

Amendment

Page 18, line 8, insert the following new Clause –

() Access to a solicitor

(1) Schedule 8 of the Terrorism Act 2000 is amended as follows.

(2) In paragraph 7 omit “Subject to paragraphs 8 and 9”.

(3) In paragraph 7A -

(a) omit sub-paragraph (3),

(b) omit sub-paragraph (6) and insert -

“Sub-paragraph (5) does not apply if the examining officer reasonably believes that the time it would take to consult a solicitor in person would create an immediate risk of physical injury to any person.”

(c) in sub-paragraph (7) at end insert -

“provided that the person is at all times able to consult with a solicitor in private.”

(d) omit subparagraph (8).

(4) Omit paragraph 9.

¹⁰⁶ 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/jtselect/jtrights/1208/1208.pdf>

Effect

This amendment would delete provisions in the Terrorism Act 2000 which restrict access to a lawyer for those detained under Schedule 7.

Amendment

Schedule 3, page 46, line 17, leave out “and 26”

Schedule 3, page 46, line 26, leave out sub-paragraph (3)

Schedule 3, page 46, line 33 leave out sub-paragraph (6) and insert -

“Sub-paragraph (5) does not apply if the examining officer reasonably believes that the time it would take to consult a solicitor in person would create an immediate risk of physical injury to any person.”

Schedule 3, page 46, line 37, at end insert -

“provided that the person is at all times able to consult with a solicitor in private.”

Schedule 3, page 47, line 29, omit paragraph 26.

Effect

This amendment would delete provisions in the Bill which restrict access to a lawyer and confidential communication with a lawyer for those detained under Schedule 3, for the purpose of assessing whether they are or have been engaged in hostile activity.

Briefing

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.¹⁰⁷ Individuals subject to the intrusive powers set out in both Schedules should always be able to access a lawyer before they are questioned.

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.¹⁰⁸ An individual subject to powers under

¹⁰⁷ 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 connect 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.

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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.¹⁰⁹ 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.¹¹⁰

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."¹¹¹

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.¹¹² It is therefore of 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

¹⁰⁹ Schedule 3, paragraph 26 to the Bill; Schedule 8, paragraph 9 to the 2000 Act.

¹¹⁰ Full list of consequences set out at Schedule 8 of the Terrorism Act 2000, paragraph 8(4) and

¹¹¹ Public Bill Committee, 5th July 2018, p197

¹¹² Schedule 3, paragraph 6(2) to the Bill

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.”¹¹³

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.

¹¹³ Commons Public Bill Committee, 26th June 2018, Q44.