

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's Second Reading Briefing on the Counter-Terrorism and Border Security Bill 2018**

**June 2018**

## About Liberty

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

## Liberty Policy

Liberty provides policy responses to Government consultations on issues implicating human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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1. The Government's Counter-Terrorism and Border Security Bill 2018 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 Bill:
  - Creates new offences that criminalise information-seeking and the expression of opinion, divorced from intention to harm or any act in pursuit of actual terrorism, and expands penalties for those crimes.
  - 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. This is proposed despite an ongoing, unresolved controversy over the Government's abject failure to comply with court declarations that existing police databases of custody images violate human rights laws.
  - Extends the PREVENT strategy by allowing local authorities, as well as police, to refer individuals to Channel panels.
  - Expands the power for suspicionless detentions, interrogations and searches of people crossing the UK border or taking a domestic or international flight — as well as the seizure of “biometric samples,” private papers, and personal data — adding a broad, new rationale for invasions of privacy unconnected to any individualised suspicion of wrongdoing.
  
2. At Second Reading, Liberty urges parliamentarians:
  - To oppose new criminal offenses and harsher penalties as an unnecessary threat to freedom of thought, conscience and expression.
  - Oppose 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 egregious errors and human rights violations in the Police National Database of custody images.
  - Push for an independent review of the PREVENT strategy prior to any consideration of further extension of the regime.
  - Call for new limits on overbroad, suspicionless border search powers, in lieu of any expansion of those powers.

### **Clauses 1-3: Criminalising exploration, information-gathering, opinion and expression**

3. The Bill creates new offences that criminalise information-seeking and the expression of opinion, divorced from intention to harm or any act in pursuit of actual terrorism. If passed, it would be a shameful step toward the normalisation of thought crime. The primary goal of terrorists is to undermine our freedom. In this Bill, the Government would deliver this objective itself.
4. Our criminal law already contains a broad range of terrorism offences sufficient, if effectively enforced, to prevent and punish the use of violence for political ends.<sup>1</sup> In an October 2017 speech, the Government-appointed reviewer of terrorism legislation, Max Hill QC, pointed out that *“our legislators... have provided for just about every descriptive action in relation to terrorism”* and urged the Government to *“pause before rushing to add yet more offences to the already long list.”*<sup>2</sup>
5. Disregarding the advice of the expert it appointed to advise it, this Bill seeks to create three new “terrorist offences.”
6. Liberty urges MPs to reject the new offences in this Bill, which risk criminalising expression and information-gathering activities far removed from any act of terrorism. Each of the three new offences is examined in the sections that follow.

#### *Reckless invitations of support*

7. Clause 1 extends the existing offence of *“inviting support for a proscribed organisation”* beyond knowingly inviting support to include making supportive statements and being *“reckless”* as to whether they will encourage support for a proscribed group.<sup>3</sup> The offence would be punishable by up to 10 years in prison.<sup>4</sup>

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<sup>1</sup> See, for example, offences set out in the Terrorism Acts 2000 which criminalise membership of groups deemed to promote, encourage, or glorify terrorism, the support of any of these groups, the wearing of their uniform or the failure to disclose information to the police where an individual knows or believes it could assist in the prevention of an act of terrorism. Offences in the Terrorism Act 2006 include the encouragement of terrorism and acts preparatory to terrorism and the Serious Crime Act 2007 includes a number of inchoate offences.

<sup>2</sup> The Guardian, *UK terrorism law expert warns government over plans for new legislation*, October 2017. Available at: <https://www.theguardian.com/politics/2017/oct/24/uk-terrorism-government-plans-new-legislation-laws-max-hill>.

<sup>3</sup> Amends section 12 of the Terrorism Act 2000.

<sup>4</sup> Terrorism Act 2000, Section 12 (6)(a).

8. The current list of “proscribed organisations” includes 88 groups. The Home Secretary can add to that list at any time, at his discretion, where he believes a group to be “concerned in terrorism”.<sup>5</sup>
9. The existing “invitation of support” offence is already dangerously broad. A 2016 Court of Appeal decision held that a person need not be personally providing support for a banned organisation, rather: “*the criminality...lies in inviting support (from third parties)*”.<sup>6</sup> The support need not be tangible or practical, but could include approval, endorsement or other “intellectual” support.<sup>7</sup>
10. But that same 2016 court decision placed one clear, critical limit on the offence. To be guilty, the Court of Appeal held, a person must “*knowingly invite support*” for the proscribed organisation.<sup>8</sup>
11. The Bill removes this requirement of intention. In doing so, it pushes the law even further away from actual terrorism, well into the realm of pure speech and opinion. The Bill actively and intentionally reverses the Court of Appeal’s conclusion that the criminal law “*does not prohibit the holding of opinions or beliefs supportive of a proscribed organisation; or the expression of those opinions or beliefs.*”<sup>9</sup>

#### *Publication of images of clothing*

12. 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.
13. It is already a criminal offence to wear clothing or display an article likely to arouse suspicion of membership of a proscribed group.<sup>10</sup> Liberty does not support the existing law’s criminalisation of a costume. The further criminalisation of *photographs* of a costume only exacerbates 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 Government has made explicit its intention that the offence should cover photographs taken in a private place, deepening the risk that this

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<sup>5</sup> Terrorism Act 2000, Section 3(4).

<sup>6</sup> *R v Choudhary and Rahman* [2016] EWCA Crim 61, paragraph 45.

<sup>7</sup> *Choudhary and Rahman*, paragraph 46.

<sup>8</sup> *Choudhary and Rahman*, paragraph 70.

<sup>9</sup> *Counter-Terrorism and Border Security Bill: Explanatory Notes*, paragraph 30.

<sup>10</sup> Terrorism Act 2000, section 13.

offence becomes a means for the state to judge behaviour which does not and was not intended to incite criminality.<sup>11</sup>

#### *Viewing material over the internet*

14. 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. The existing offence already criminalises downloading information which could be useful for terrorism.<sup>12</sup> The Government’s intention is that the offence will cover 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*”.<sup>13</sup>

15. In October the Independent Reviewer of Terrorism Legislation criticised proposals from then Home Secretary, Amber Rudd, to criminalise people who viewed content linked to terrorism online. He warned that:

*thought without action must not be criminalised. While we can all agree that there should be nowhere for real terrorists to hide, we should also agree that legislating in the name of terrorism when the targeted activity is not actually terrorism would be quite wrong.*<sup>14</sup>

16. This new offence pointedly ignores that distinction. It risks criminalising academic inquiry, journalistic investigation or passive curiosity without any intention to harm. While a defence of “reasonable excuse” may prevent the successful prosecution of some journalists and academics, the chilling impact of these provisions remains. It is a brave reporter or researcher who will be undeterred by the prospect of a 15 year prison sentence.

**17. At Second Reading, Liberty urges parliamentarians to oppose the offences created by Clauses 1-3, which would undermine freedom of thought, conscience and expression and divert law enforcement resources from tackling terrorist threats.**

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<sup>11</sup> *Explanatory Notes*, paragraph 33.

<sup>12</sup> Terrorism Act 2000, section 58.

<sup>13</sup> *Explanatory Notes*, paragraph 37.

<sup>14</sup> The Guardian, *UK terrorism law expert warns government over plans for new legislation*, October 2017. Available at: <https://www.theguardian.com/politics/2017/oct/24/uk-terrorism-government-plans-new-legislation-laws-max-hill>.

## **Clauses 8-10: More punitive responses to less serious crime**

18. The Bill's creation of dangerous new thought crime is rendered more worrying by proposals to dramatically increase maximum sentences for those crimes. Under the Bill, a person convicted of viewing material online would face 15 years in prison. They may also face an extended sentence, meaning that they will only be considered for release after they have served two-thirds of their term, with the prospect of a newly extended licence period of up to 8 years.<sup>15</sup>
19. A person convicted of either the new offence covering unintentionally inviting support for a banned organisation or for viewing certain content will also be subject to a new, enhanced notification regime.<sup>16</sup> Clause 12's new notification requirements would require people convicted of these new offences to provide police with more personal information, from email addresses to bank account details. A police officer notified of an individual's address may ultimately be granted a warrant to enter her home to conduct a "risk assessment." On conviction, Clause 13 provides that she may become the subject of a Serious Crime Prevention Order restricting her ability to do a range of activities, including travelling and making financial arrangements.
20. The catastrophic consequences of conviction for offences of expression and exploration risks fostering an environment in which free speech and the pursuit of academic or journalistic inquiry are dramatically chilled. **At Second Reading, Liberty urges Parliamentarians to oppose increased sentences as creating an unnecessary risk of chilling the exercise of fundamental rights.**

## **Clause 17 and Schedule 2: Expanded retention of invasive biometric data**

21. The Bill 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. Clause 17 gives effect to Schedule 2, which amends various

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<sup>15</sup> The extended sentence system is provided for in the Criminal Justice Act 2003. Amendments to the scheme to bring a larger number of offences within remit and increase extension periods are set out in clauses 8-10 of the Bill.

<sup>16</sup> Additions to the notification requirements provided for in the Counter-Terrorism Act 2008 are set out in clause 11 of the Bill.

legislative regimes governing the retention of fingerprints, DNA samples and profiles by police forces for counter-terrorism purposes.<sup>17</sup>

22. Paragraph 2 amends the Police and Criminal Evidence Act 1984 to provide that fingerprints and DNA evidence relating to a person arrested *but not charged* for a terrorism-related qualifying offence may now be retained for three years. It also removes the requirement for the Biometric 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.
23. Paragraphs 3, 10, 13 and 18-20 amend various statutes that provide for the retention of biometric material pursuant to a national security determination made by a qualified law enforcement official, to provide that *any* chief officer of police may make a national security determination in respect of biometric material and extends the duration of a national security determination to a maximum of five years.
24. As it currently stands, the law requires a national security determination to be made by the "responsible chief officer of police" – the chief officer for the police area where the fingerprints or DNA sample were taken – and limits the duration of a national security determination to a maximum of two years. The Bill, therefore, significantly expands broad national security-based justifications for indiscriminate retention of biometric data.
25. 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 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.
26. 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, or people against whom charges are dropped or who are found to be innocent.<sup>18</sup> There

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<sup>17</sup> Those legislative regimes are: section 63 of the Police and Criminal Evidence Act 1984; paragraph 20E of the Terrorism Act 2000; Section 18B of the Counter-Terrorism Act 2008; and the Protection of Freedoms Act 2012.

<sup>18</sup> As compared to, for example, DNA profiles taken at random from the general population.

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

27. 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).
28. 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).
29. **At Second Reading, Liberty urges parliamentarians to oppose extension of powers to retain the biometric data of innocent people. We further urge members to hold the Government to account for its well-documented and heavily criticised failure to correct egregious errors and human rights violations in the Police National Database of custody images.**

#### **Clause 18: Expanding the flawed PREVENT Program**

30. At the beginning of June, the Government produced a new iteration of its counter-terror strategy "CONTEST". The new strategy is the result of an internal review and largely rubber-stamps the divisive and counter-productive approaches of the past.
31. The new CONTEST strategy reiterates the Government's commitment to the PREVENT programme. PREVENT requires schools, health authorities and other bodies to report people they suspect are vulnerable to "extremism" – linked to a vague definition of British values - to the police-led Channel programme for de-radicalisation.<sup>19</sup> PREVENT has been broadly criticised for alienating the communities it seeks to engage and damaging our efforts to combat terrorism.<sup>20</sup>

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<sup>19</sup> See paragraph 7 of HM Government, *Revised Prevent Duty Guidance for England and Wales*, revised on 16th July, for the Government's definition of extremism. It includes "vocal or active opposition to fundamental British values" such as democracy or individual liberty.

<sup>20</sup> Concerns about Prevent's operations have been raised by a number of individuals, organisations and bodies, including by the Independent Reviewer of Terrorism Legislation, the Home Affairs Select Committee, the Joint Committee on Human Rights, the Women and Equalities Committee, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, the UN Special

32. Clause 18 of the Bill extends the PREVENT strategy by allowing local authorities, as well as police, to refer individuals to Channel panels.<sup>21</sup> It 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.<sup>22</sup>

**33. At Second Reading, Liberty urges parliamentarians to reject any extension of PREVENT and to use parliamentary consideration of this Bill to call for an independent review of the PREVENT strategy.**

### **Clause 20 and Schedule 3: Suspicionless searches and “hostile activity”**

34. The Bill expands the power for suspicionless detentions, interrogations and searches of people crossing the UK border or flying anywhere in the UK — as well as the seizure of “biometric samples,” private papers, and personal data — adding a broad, new rationale for invasions of privacy unconnected to any individualised suspicion of wrongdoing.

35. This new power mirrors powers under the highly controversial Schedule 7 of the Terrorism Act 2000, which allows suspicionless border searches and detentions for terrorism-related purposes. But it also expands those powers by creating an entire new regime for exercising powers to stop, question, search, detain and seize property. Liberty—alongside many parliamentarians and civil society groups—has long objected to Schedule 7 as discriminatory, unduly invasive of privacy, dangerous to journalistic and legal privilege, and a violation of due process.

36. Clause 20 gives effect to Schedule 3, which creates a new power to question or detain any person in a port or border area, or any person taking a domestic or international flight, “for the purpose of determining whether the person appears to be a person who is, or has been, engaged in hostile activity”. “Hostile activity” is defined broadly as anything that

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Rapporteur on counter terrorism and human rights , a host of academics , the National Union of Teachers , the National Union of Students , Muslim community groups. Concerns have also been raised in the House of Lords, by Conservative, Labour and Liberal Democrat Members of Parliament and, by the Green Party.

<sup>21</sup> Channel Panels are which is chaired by the local authority and made up of health education and policing representatives who meet to discuss referrals on the Channel de-radicalisation programme.

<sup>22</sup> HM Government, *CONTEST: the United Kingdom’s Strategy for Countering Terrorism*, June 2018, page 42.

*“threatens national security; threatens the economic well-being of the UK, or is an act of serious crime.”*<sup>23</sup>

37. The Bill is explicit that its broad powers can be justified *“whether or not there are grounds for suspecting that a person is or has been engaged in hostile activity.”*<sup>24</sup> The breadth of the definition of “hostile activity” is therefore secondary to the fact that anyone can be subject to the Bill’s invasive powers once an officer invokes a purpose of investigating hostile activity.
38. Once singled out, a person subject to this new power walks into a minefield of jeopardy. The person must provide any information or document they have that the officer requests.<sup>25</sup> Failure to provide requested documents or information is a criminal offense, carrying a penalty of up to three months’ imprisonment and a fine of £2500.<sup>26</sup> A person can be body-searched and have any personal effects searched, seized and copied.<sup>27</sup> 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 for no clearly defined period of time.<sup>28</sup> There is no right to consult a solicitor if a person is examined and questioned for under an hour.
39. If an officer wants to stop or question a person for more than an hour, they must formally detain them.<sup>29</sup> 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.<sup>30</sup> 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.
40. A detained person in England, Wales or Northern Ireland may be fingerprinted or have other “non-intimate” samples taken from them without their consent (subject to certain conditions).<sup>31</sup>

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<sup>23</sup> Clause 20 and Schedule 3, paragraph 1(1).

<sup>24</sup> Schedule 3, paragraph 1(4).

<sup>25</sup> Schedule 3, paragraph 3(a-d).

<sup>26</sup> Schedule 3, paragraph 16.

<sup>27</sup> Schedule 3, paragraph 8.

<sup>28</sup> Schedule 3, paragraph 11(1)-(2).

<sup>29</sup> Schedule 3, paragraph 5(1).

<sup>30</sup> Schedule 3, paragraph 4(3).

<sup>31</sup> Schedule 3, paragraph 27. Paragraph 35 makes separate provision for fingerprints and samples to be taken if a person is detained in Scotland.

41. The Bill does give a person who is detained (that is, held for more than an hour) a qualified right to consult a solicitor. However, the Bill compromises that right by—among other limitations—granting the power to an officer of the appropriate rank to require a detained person to consult their solicitor solely within the sight and hearing of another officer.<sup>32</sup>
42. **At Second Reading, Liberty urges parliamentarians to reject any extension of suspicionless border powers and to use parliamentary consideration of this Bill to call for new limits on Schedule 7.**

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<sup>32</sup> Schedule 3, paragraph 26(5).