



Home Office

Rt Hon Ben Wallace MP
Minister of State for Security and
Economic Crime

2 Marsham Street
London SW1P 4DF
www.gov.uk/home-office

Rt. Hon. Harriet Harman QC MP
Chair, Joint Committee on Human Rights
Houses of Parliament
London
SW1A 0AA

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Joint Committee on Human Rights report “Legislative Scrutiny: Counter-Terrorism and Border Security Bill’ (Ninth Report of Session 2017-19) – Government Response

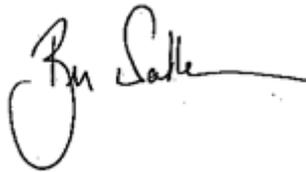
Thank you for your report following the Committee’s scrutiny of the Counter-Terrorism and Border Security Bill. We have examined your report closely, and I note that the Committee made a number of recommendations, to which I have responded below.

It is the first duty of Government to protect its citizens and their right to life. Last year 36 innocent people lost their lives and many more were injured in five terrorist attacks. This year, the UK Government concluded that it is highly likely that the Russian state was responsible for the incident in Salisbury involving a nerve agent of the type known as Novichok. It is right, therefore, that the Government takes steps to safeguard the fundamental right of people in this country to go about their daily lives free from the threats to their safety and security posed by Islamist and Far-Right terrorism and hostile state actors.

Against this backdrop, it is disappointing that in scrutinising the Bill, the Committee only heard evidence from Liberty and the Independent Reviewer of Terrorism Legislation, Max Hill QC. I believe that had the Committee also taken evidence from the police, the Crown Prosecution Service and those who have been victims of terrorism, it would have been able to set this legislation into the context of the current threats which our law enforcement and security agencies are striving to tackle. Amongst other witnesses, the Public Bill Committee in the Commons took oral evidence from Assistant Commissioner Neil Basu, the National Counter-Terrorism Policing Lead, who said that “the simplicity and volatility of terrorism often requires us to intervene much earlier to protect the public. Offences previously considered

periphery or minor are now seen as indicative of a volatile and unpredictable actor.” Indeed, operational experience has shown that patterns and methods of radicalisation are changing, with the time taken from radicalisation to carrying out attacks reducing.

As the Committee notes in its report, when powers impact on human rights, they must be “necessary in the pursuit of a legitimate aim, and proportionate to that aim”. I strongly believe that stopping terrorism is a legitimate and just aim, and that given the nature of the threat we face, enabling law enforcement agencies to intervene earlier to stop such plots is a proportionate way to protect the public from the great harm caused by a terrorist attack. The Government has a duty not only to protect the rights of those who are investigated and prosecuted, but to preserve the fundamental right to life of those who may be targeted by terrorist and hostile state activity.

A handwritten signature in black ink, appearing to read 'Ben Wallace', with a long horizontal flourish extending to the right.

Rt Hon Ben Wallace MP

Minister for Security and Economic Crime

Government response to the Committee's conclusions and recommendations

Clause 1: Expressions of support for a proscribed organisation

There is a careful balance to be struck to ensure that valid freedom of expression is not unintentionally caught by new offences. In that regard it is important to recall that even speech that offends, shocks or disturbs, is still protected. The clause as currently drafted potentially catches a vast spectrum of conduct. An offence must be clearly defined in law and formulated with sufficient precision to enable a citizen to foresee the consequences which a given course of conduct may entail. It is unclear as to what type of expression would or would not be caught by this offence, thus falling foul of the requirements of natural justice requiring clarity in the law and also throwing into question whether this interference with freedom of expression can be said to be “prescribed by law” with sufficient clarity. Moreover, there is a very clear risk that this provision would catch speech that is neither necessary nor proportionate to criminalise - such as valid debates about proscription and de-proscription of organisations. For these reasons, we consider that this clause violates Article 10 of the ECHR. We therefore recommend that clause 1, at a minimum, is amended to clarify what expressions of support would or would not be caught by this offence and to ensure that the offence does not risk criminalising unintended debates that it would not be proportionate or necessary to curtail. (Paragraph 18)

Government Response:

Clause 1 makes it clear that individuals who promote hatred and division by generating support for proscribed terrorist organisations will not be tolerated. As set out in the Government's ECHR memorandum, the new offence is rationally connected to this objective since it criminalises those who recklessly express supportive opinions or beliefs which they know may generate such support in others. Given the gravity of the threat posed by proscribed terrorist organisations, and the role that support for them has been shown to play in radicalisation and inspiration to commit acts of terrorism, this approach adopts a fair balance between the rights of the individual and those of the community at large.

The Government notes the Committee's concerns that, as drafted, clause 1 may catch people who debate the proscription and de-proscription of organisations, and its recommendations that the clause be amended firstly to specify the types of expressions of support that are and are not captured, and secondly to make clear that valid debates about the proscription and deproscription of organisations are not captured.

The Government recognises that clause 1 extends the reach of the existing offence at section 12 of the Terrorism Act 2000 (“the 2000 Act”), in a way that engages sensitive issues around freedom of expression. The Government

also recognises that people will wish to, and should be able to, have lawful debates on the merits of the proscription and deproscription of individual organisations. Section 4 of the 2000 Act provides a clear route for any person to apply to the Home Secretary for the deproscription of any organisation, and section 10 provides clear and unambiguous immunity from prosecution under proscription offences for anything done in relation to such an application, including any statements made in support of the organisation. Three groups have been deproscribed following such applications.

The Government does not agree that, in a case where a person does not apply for the deproscription of an organisation but nonetheless wishes to debate the merits of its proscription, clause 1 is insufficiently clear as to the lawful boundaries of such a debate. The recklessness test in clause 1 is well-established, and well-understood by the courts. In this context it would require the prosecution to prove that a person subjectively knew that expressing an opinion or belief in support of a proscribed terrorist organisation in the particular circumstances would cause someone else to support the organisation, and that they nonetheless expressed it where a reasonable person would not do so. On this basis a hypothetical example of a lawful statement might be one to the effect that a proscribed organisation is not, as a matter of fact, concerned in terrorism, and therefore does not meet the legal test for proscription; whereas an example of an unlawful statement, which risks encouraging others to support the same organisation, might be one praising its terrorist activities and suggesting that it should not be proscribed so that individuals in the UK could be free to better emulate such terrorist conduct. Of course, in practice, all the circumstances in which a statement is made will be relevant to its lawfulness.

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

Clause 2: Publication of images

In our view, to criminalise the publication of an article which may be worn or displayed in a private place risks catching a vast amount of activity and risks being disproportionate, particularly given the lack of incitement to criminality in the mens rea of this offence. It risks a huge swathe of publications being caught, including historical images and journalistic articles, which should clearly not be the object of this clause. In our view, 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. We recommend that clause 2 be removed from the Bill or, at a minimum, amended to safeguard

legitimate publications and to give greater clarity as to what acts are, and are not, criminalised. (Paragraph 26)

Government Response:

The Government does not agree with the Committee's characterisation of clause 2. Clause 2 amends section 13 of the 2000 Act, under which it is an offence to display an article or wear an item of clothing in a public place, in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member of supporter of a proscribed terrorist organisation.

The existing section 13 offence will already cover many cases in which a person publishes an image of an article in such circumstances, but it is not clear that it will always cover a case where an image, despite being published and therefore made available to the public, with the consequent harm that can flow from such publication, depicts an article which is not situated in a public place. Clause 2 is intended to put this beyond doubt and to close the gap, by making it an offence to publish – that is, to make available to the public - an image of an item of clothing or other article, without reference to the location of the item depicted within the image, in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member of supporter of a proscribed terrorist organisation. This will update the section 13 offence for the digital age, by ensuring that it fully covers the publication online of images which it would already be unlawful to display in a public place.

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

The Government also does not agree that there is a risk of legitimate publications being caught, including historical or journalistic publications. The section 13 offence, both as it has been in force since 2000 and as amended by clause 2, is absolutely clear that it only bites where the article in question is displayed or published in such a way or in such circumstances as to arouse reasonable suspicion that the person displaying or publishing it is a member of supporter of a proscribed terrorist organisation. It is not committed by the act of displaying an article, or publishing an image, on its own.

This provides a clear and effective safeguard for legitimate publications. Where, for example, a journalist publishes the image of a Daesh flag in the course of legitimately reporting a news story, or an academic legitimately includes such an image in published research on the group, it would be clear to any reasonable person that they are not themselves a member or supporter of the organisation. Such individuals will therefore have a very high level of certainty that their activities will not be covered by clause 2 (as they have been able to enjoy a similar certainty in relation to the existing offence at

section 13). Of course, if the circumstances of the publication are such as to arouse a reasonable suspicion that the person publishing it is in fact a member or supporter of a proscribed organisation, for example an IRA supporter who publishes a historical image of an article such as a flag associated with that organisation, then it is right that the police and the courts should be able to take action.

Clause 3: Obtaining or viewing material over the internet

We recommend that those scrutinising the Bill give Clause 3 particular consideration. This clause may capture academic and journalistic research as well as those with inquisitive or even foolish minds. The viewing of material without any associated intentional or reckless harm is, in our view, an unjustified interference with the right to receive information protected by Article 10. We think that, unless amended, this implementation of this clause would clearly risk breaching Article 10 of the ECHR and unjustly criminalising the conduct of those with no links to terrorism. We recommend that, at the very least, consideration is given to narrowing the offence to ensure that it only captures those viewing this material with terrorist intent and that the defence of reasonable excuse is clarified as to what constitutes legitimate activity and that this is set out on the face of the Bill. (Paragraph 33)

Government Response:

The Government welcomes the Committee's recognition that we need to update for the digital age the offence at section 58 of the 2000 Act, of collecting or making a record of information likely to be useful to a terrorist, so that it applies consistently to information that is accessed online. The issue for the Committee, and others, has been how the Bill seeks to close this gap. On reflection, the Government accepts that the 'three clicks' mechanism, which was intended to ensure proportionality and to provide a safeguard for those who access such material inadvertently, was imperfect and lacked sufficient clarity. The Government has taken on board the concerns that have been raised, and has tabled amendments to clause 3 for Commons Report stage.

These amendments recast section 58, firstly so that it will be an offence to view (or otherwise access, for example by listening to an audio recording) any terrorist material online, removing entirely the 'three clicks' provision; and secondly by replacing this with an equivalent, but clearer and more certain, safeguard for individuals who may inadvertently access terrorist material. This clarifies the reasonable excuse defence, making it clear on the face of the legislation that the offence will not be committed if the person does not know, and has no reason to believe, that the information they are accessing is likely to be useful to a terrorist. Once this defence is raised by a defendant, the burden of proof will fall to the prosecution to disprove it to the criminal standard.

However, as to the application of the reasonable excuse defence to those with a legitimate reason to access material likely to be useful to a terrorist, the Government does not agree that the current formulation at section 58(3) is

insufficient or unclear. This has been in force since 2000, and during much of this period the normal means by which an academic or journalist would access terrorist information online have been those currently covered by section 58, that is by downloading or otherwise making a record of it, rather than by streaming it. It is only in more recent years that streaming information online has become prevalent alongside downloading or otherwise recording the information, and indeed I would expect that journalists and academics engaged in legitimate research today would in many cases still wish to make a record of information they discover through streaming it.

If the existing safeguard was inadequate, we would have seen ongoing prosecutions of academics, journalists and others who have legitimately accessed such material. But we have not; rather the offence has been used sparingly and in a targeted way, with just 61 convictions since 2001. The Government is also unaware of any credible reports of a chilling effect, nor of any substantiated evidence that professionals in those fields have been hampered or deterred in going about their legitimate business. Clause 3 does not in any way narrow or reduce the existing safeguard, nor does it expand or change the type of material that is covered by section 58. It is solely focused on the practical means by which that material is accessed, and on ensuring that the existing offence is updated for the digital age.

The Government is of the view that, in addition to being unnecessary, it would be neither helpful nor in fact possible to define on the face of the legislation what does and does not constitute legitimate activity for the purpose of the reasonable excuse defence. This question of prescribing categories of reasonable excuse in advance, or in the abstract, was considered by the Appellate Committee of the House of Lords in the case of *R v G and R v J* [2009] UKHL 13. At paragraph 81 of its report the Committee held that:

“...the circumstances which may give rise to a section 58(1) offence are many and various. So it is impossible to envisage everything that could amount to a reasonable excuse for doing what it prohibits... whether or not an excuse is reasonable has to be determined in the light of the particular facts and circumstances of the individual case. Unless the judge is satisfied that no reasonable jury could regard the defendant’s excuse as reasonable, the judge must leave the matter for the jury to decide.”

And at paragraph 83 the Committee found that:

“...the question as to whether [the defendant] would have a reasonable excuse under section 58(3) is not one that can be answered in the abstract, without knowing exactly what the defendant did and the circumstances in which he did it.”

Clause 5: Extra-territorial jurisdiction

We make no comment as to whether extraterritorial jurisdiction should apply to offences where the action would also be an offence in the country where the action (or the majority of the actions) took place. However, we are concerned that the extension of extraterritorial jurisdiction to offences, such as support for a proscribed organisation, is problematic in situations where there is not an equivalent offence in the country concerned. This would offend the principles of natural justice and sufficient foreseeability of the effect of one's actions. It would mean a foreign national, with few links to the UK, could be prosecuted in the UK if he/she attended a protest or waved a flag overseas, in support of an organisation that is lawful within that overseas jurisdiction, if that individual then travels to the UK. We recommend that further consideration is given as to whether it is justified to bring domestic prosecutions against those who have no (or very few) links to the UK at the relevant time for conduct overseas that was perfectly lawful in the jurisdiction where it occurred. (Paragraph 39)

Government Response:

Modern patterns of radicalisation and indoctrination have seen individuals located overseas, many of whom have travelled from the UK as foreign fighters, reaching back to the UK to promote proscribed terrorist organisations, disseminate terrorist publications, propaganda and information, as well as to encourage the commission of acts of terrorism. Part of such activity has included the targeting of individuals for radicalisation, as well as the promotion to the general public of proscribed organisations and their terrorist activity and ideology, through the publication online of images of flags, logos and other articles associated with organisations such as Daesh.

This is serious activity and can have genuinely harmful consequences. The Government believes that this measure is both necessary and proportionate in order to tackle the threat that such radicalisation poses. Terrorist organisations will often be located in unstable or failed states which may not have functioning systems of government with effective jurisdiction over their territory, or in countries with less effective or simply different legislative frameworks to that in the UK. Foreign terrorist fighters should not be able to evade justice because the country they travelled to does not have a proscription system equivalent to the UK. Equally, for foreign nationals, it is a legitimate aim to seek to deter from coming here those who may have been engaged in terrorism-related activity in another country by making clear that, even if they gain entry to the UK, they can expect to be investigated and, if there is evidence to support such a charge, be prosecuted. To deliver such an effect the Government agrees that it would be helpful if the change were widely publicised and intends to do so when the offence takes effect. However, the Government notes that UK courts have extraterritorial jurisdiction for most existing terrorism offences (including, since 2006, membership of a proscribed organisation - regardless of the nationality of the

individual or his links to the UK); this measure makes that coverage comprehensive.

Of course, prosecutions in individual cases must always be proportionate and appropriate, and the normal system of prosecutorial discretion provides an effective safeguard in this respect. Any decision to prosecute under powers provided by clause 5 will be taken by the police and the independent Crown Prosecution Service (CPS) on a case-by-case basis. In line with the normal test the CPS would need to be satisfied that prosecution would be in the public interest, and that there is sufficient evidence to provide a realistic prospect of conviction. Before any trial could take place, prosecutions for an offence committed overseas could only be instituted with the consent of the Director of Public Prosecutions. And as a further safeguard, recognising that the extra-territorial jurisdiction provided by clause 5 is not limited to British nationals, if it appears to the DPP that the offence was committed for a purpose wholly or partly connected with the affairs of a country other than the UK, he or she may only give that consent with the permission of the Attorney General.

Clauses 6–10: Sentencing provisions

In our view, the increase in sentences does not appear to be supported by evidence to suggest why it is justified or proportionate. We recommend that the Home Office provide further evidence (if they have such evidence) as to why they consider the current maximum sentences to be insufficient and how this increase is necessary and proportionate. We are particularly concerned that a sentence of 15 years could be imposed for a precursor offence of viewing terrorist material online three times or more. This would put viewing material online (without intent to cause harm) on the same level of culpability as possession of an article (e.g. materials for bomb-making) for terrorist purposes. As such, we recommend that clause 6(2) be deleted. (Paragraph 45)

Government Response:

It is important to remember that for all four offences, 15 years' imprisonment will be the maximum penalty provided by clause 6, and a sentence of that length will only be appropriate in cases of the utmost seriousness. In the normal way, it will be for the sentencing judge to determine the appropriate sentence to be imposed, taking into account the circumstances of each individual case, in line with applicable sentencing guidelines.

Since Parliament set the current maximum penalties for the offences at sections 58 and 58A of the 2000 Act, and sections 1 and 2 of the Terrorism Act 2006, the threat landscape has changed significantly.

In the modern digital age, individuals who view or disseminate terrorist material, or who encourage terrorism, pose an increased risk of quickly moving to attack planning themselves or of radicalising others to do so. We have seen an increase in low-sophistication terrorist plots which are inspired

rather than directed, and in attack operatives who are self-radicalised and self-trained without necessarily having had significant direct contact with terrorist organisations. The division between preliminary terrorist activity and attack planning is increasingly blurred, and the move from the type of activity covered by these offences to planning or launching an attack can happen quickly and unpredictably, with little or no warning, particularly in the case of spontaneous or volatile individuals. An increased maximum penalty does not mean that we consider every case is going to be of equivalent seriousness.

If the police and intelligence agencies are going to keep the public safe they need the powers to effectively disrupt terrorists involved in this type of activity at an earlier stage, before the risk of them carrying out an attack has progressed. The increased maximum penalties will properly reflect the seriousness of these offences and the risk arising from this activity, and will help to protect our communities.

Clause 11: Additional notification requirements

Some of the notification and registration requirements last for 30 years, without the possibility of a review, unlike the sex offenders' register which has a review at the 15-year mark. Given the case law of the European Court of Human Rights, as well as domestic UK case law, we are concerned that the revisions to the current system are likely to be considered a disproportionate and unjustified interference with Article 8 rights due to the lack of any possibility of review for those on the register for exceptionally lengthy periods of time. In light of the increased level of intrusion into private life and the lengthy period of time for which notification requirements are imposed in some cases, we recommend the introduction of stronger safeguards. In particular, we consider that there should be the possibility of review of the necessity of the notification and registration requirements and that each individual subject to these requirements should have the right to make representations at that review. (Paragraph 49)

Government Response:

The notification requirements are not unduly onerous, and apply only to those convicted of serious terrorism-related offences and sentenced to terms of imprisonment of 12 months or more. They do not prohibit any particular activity, rather they require notification of certain details to the police on an annual basis or as and when those details change. The Bill expands the information that registered terrorist offenders are required to notify, bringing it into line with the requirements on registered sex offenders under the Sexual Offences Act 2003, with the further addition of a requirement to provide details of vehicles (the use of vehicles has of course been a significant feature of several of the recent terrorist attacks).

Unlike the requirements under the Sexual Offences Act 2003, terrorist offenders cannot be subject to the notification regime indefinitely. The

notification period is graduated, based on the length of sentence imposed, with a maximum period of 30 years reserved for the most serious offenders who receive sentences of 10 years or more. For sentences of between one and five years the notification period is 10 years, and for sentences of between five and 10 years the notification period is 15 years. The Government considers that these periods are proportionate, given the seriousness of the offending and the gravity of the risks which the notification requirements are intended to mitigate, set against the low level of intrusion arising from the requirements. We do not agree that the modest expansion to the information which must be notified as a result of the Bill will increase the level of intrusion disproportionately.

The Government also does not agree that a review mechanism equivalent to that under the Sexual Offences Act 2003 is necessary to ensure proportionality, or compatibility with Article 8 of the ECHR. The case of *R (on the application of F) v Secretary of State for the Home Department* [2013] QB 885 considered indefinite notification under the 2003 Act, which applied following any sentence of 30 months or more and found that a review is necessary in that context. As a result, the 2003 Act was amended to introduce a review at the 15-year point only for individuals subject to indefinite notification requirements. As indefinite notification is not available at all under the Counter-Terrorism Act 2008, and as no terrorist sentenced to less than 10 years can be made subject to the requirements for longer than 15 years, the two schemes are not comparable in this respect. Furthermore, the Court of Appeal has considered the notification requirements under the 2008 Act in their current form. Having reviewed the case law the Court of Appeal found (in *R (on the application of Irfan) v Secretary of State for the Home Department* [2012] EWCA Civ 1471) the notification requirements to be lawful, agreeing that terrorist offending was different in nature from sexual offending, such that the two were not directly comparable when considering the proportionality of notification periods.

Clause 12: Power to enter and search home

The power to enter and search a person's home is a severe intrusion with the right to private life. We do not consider this should be exercised simply for the purpose of a risk assessment. We recommend that this power be subject to a threshold test which requires a reasonable belief that the individual is in breach of his/her notification requirements and that the purpose of the entry and search is to establish that belief. Any exercise of this power must be done only when there is no less intrusive option available and with due regard for the private life of any other persons affected by the intrusion. (Paragraph 51)

Government Response:

The Government recognises that the power of entry and search can represent a significant intrusion, and should be exercised cautiously and only when necessary and proportionate. Of course, we should also recognise that the

notification requirements are intended to provide the police with a means of managing the potentially high level of risk that can be posed by convicted terrorists.

In order to do so effectively, the police must be able to assure themselves that the individual does in fact reside at the address they have notified, and to monitor compliance with other aspects of the notification regime. However there is currently no requirement on registered terrorist offenders to cooperate with police visits to their registered address, and no power for the police to enter the address without the offender's consent. The police have reported that, as a result, terrorist offenders will rarely cooperate with home visits, and will regularly obstruct officers in conducting home visits in the absence of a power to enter. This situation means that police are currently limited in their ability to monitor terrorists subject to the notification requirements.

The power of entry provided for in clause 12 mirrors that available in relation to registered sex offenders under the Sexual Offences Act 2003, which has not been successfully challenged in the courts. Experience has been that sex offenders are aware of the power and will as a result tend to cooperate with visits by officers, without the power needing to be used. Like sexual offending, the Government considers that terrorism offences fall into a special category of seriousness such that a precautionary approach, with robust powers to monitor and manage risk, is appropriate.

The Government considers that the power at clause 12 is proportionate, and will be subject to appropriate safeguards. It may only be exercised as a last resort, as an officer must have first tried on at least two previous occasions to visit the terrorist offender, and must have failed to gain entry. It may not be exercised solely on the officer's discretion, but instead requires warrant to be issued by a Justice of the Peace in England and Wales, a magistrate in Northern Ireland or a Sheriff in Scotland, on application by a police officer at least of the rank of Superintendent.

Any use of the power would be subject to the normal requirements on police exercising any power of entry and search. The Powers of Entry Code of Practice, issued under section 48 of the Protection of Freedoms Act 2012, sets out how officers conducting a search should conduct themselves, and includes a requirement that officers consider if they can achieve the necessary objectives by less intrusive means, including consideration of the possible impact on Article 8 rights. The code provides, amongst other things, that officers should exercise their powers reasonably and courteously and with respect for persons and property. These requirements are well-established and are well-understood by the police, they already provide adequate safeguards for the rights of individuals, and we do not consider that any further safeguards specific to the power at clause 12 are necessary.

Clause 14: Traffic Regulation

We recommend that in giving effect to the proposed traffic measures and in the associated decision-making involved, the public authorities involved continue to act in line with their obligations with regard to security and counter-terrorism matters and that there is not any unhelpful blurring of private and public roles in this regard, such that could risk undermining the State's positive obligations under Article 2 ECHR. (Paragraph 54)

Government Response:

An Anti-Terrorism Traffic Regulation Order (ATTRO) is made by a traffic authority (usually a local council) on the recommendation of a Chief Officer of Police, in order to reduce the danger or damage connected with terrorism. The Bill will not change this; the decision to make an ATTRO will continue to be in the hands of the State, which is best placed to judge the necessity of such measures. Strategic decisions connected with the making of an order will remain with the traffic authority acting on the advice of a Chief Officer. The Bill will allow the discretion of a constable in managing and enforcing an ATTRO to delegate to third parties such as local authority staff or private security personnel, within parameters set by the relevant traffic authority. For example, this could mean that specified contracted security staff, or specified local authority staff, are able to allow accredited vehicles through a checkpoint, something which previously only a police officer would have been able to do. These are tactical decisions; as such, there is no material risk that the State's Article 2 obligations will be undermined by these measures.

Clause 17: Retention of biometric data for counter-terrorism purposes etc.

We recognise the logic in harmonising retention periods for biometric data so that cases are treated in the same way irrespective of whether the individual is arrested under PACE or the TA 2000. However, we consider that oversight of the Biometric Commissioner gives the public greater comfort that such powers, and interferences with an individual's right to private life, are being used reasonably and proportionately. Moreover, we have seen no arguments suggesting that the oversight by the Biometric Commissioner in any way impedes the ability of the police to undertake vital counterterrorism work. We would therefore have thought it sensible to harmonise the two powers such as to retain necessary oversight of the Biometric Commissioner in a manner that enables the police to undertake their work. We are concerned that the proposed amendment in the Bill allows for the retention of biometric data of individuals who have neither been charged nor convicted, for three years without any independent oversight. We recommend that the Home Office provide a compelling justification for the removal of the Biometric Commissioner's oversight. Failing that, we recommend an amendment such that the two powers are harmonised so as to provide

oversight by the Biometric Commissioner whatever power of arrest is used. (Paragraph 59)

The retention of data for the purpose of national security is a legitimate aim. However, in our view, the justifications given for extending the retention period from two to five years without clear notification and review options are not sufficient. We suggest further scrutiny is required as to whether the extended retention period, without the possibility of review, is necessary to “support terrorism investigations and assist in identifying persons of threat” and, if so, whether five years is a proportionate period of time to retain the biometric data of persons who have never been convicted of a crime, particularly in the absence of any possibility of review. Alternatively, we recommend including a notification and review clause which we consider would remedy proportionality concerns with this extended power. (Paragraph 63)

Government Response:

For the vast majority of people who are arrested and whose fingerprints and DNA profile are taken by the police, if they are not convicted then that biometric data will be promptly deleted. However, in passing the Protection of Freedoms Act 2012 which established the current framework for the retention and deletion of biometrics by the police, Parliament recognised that it would be irresponsible and would put the public at risk to make this a blanket requirement in every case, regardless of the risk the individual might pose.

The 2012 Act therefore made limited and tightly circumscribed provision for biometrics to be retained for limited periods in certain circumstances, in the absence of a conviction. In addition to provisions applying to those arrested on suspicion of violent and sexual offences, this includes an automatic retention period of three years where a person is arrested on suspicion of terrorism, and the power for a Chief Officer of police to make a national security determination (NSD) authorising ongoing retention if this is necessary for national security purposes and with the Biometrics Commissioner’s approval.

The Government does not agree that, in the face of the heightened terrorist threat we face and the increasingly important role that biometrics routinely plays in terrorist investigations, it would be appropriate or responsible to reduce the powers available to the police to retain the fingerprints and DNA profiles of suspected terrorists. The recent case of Khalid Ali highlights the importance of such powers. Ali’s fingerprints had been taken several years prior to his eventual conviction for the most serious terrorist activity, which was directly facilitated by the police’s ability to retain his fingerprints over the intervening period, of course on a lawful basis and subject to oversight by the Biometrics Commissioner.

We are therefore not prepared to remove the three-year retention period currently provided following an arrest under the 2000 Act. The Bill removes the anomaly that the same period is not available where the same individual is

arrested under PACE in relation to the same activity, thereby ensuring a consistent approach to the retention of biometric data for all those arrested on suspicion of terrorism. This is proportionate, and will ensure that the police are able to retain the biometrics of suspected terrorist for a limited period in order to protect the public.

The Bill will also provide a proportionate increase in the maximum length of an NSD, to five years, although it will be open to chief officers to make shorter authorisations if appropriate in individual cases. Operational experience has shown that the current two-year length is too short in many cases, and that those of national security concern - such that it is necessary and proportionate for the police to retain their biometric data - will often pose a more enduring threat than this. The Biometrics Commissioner has said that “for some NSD cases, my judgment is that the evidence/intelligence against the relevant individuals is such that they could be granted for longer than two years”.¹

There are a broad range of circumstances in which a person who presents a national security risk today may continue to pose a sufficient risk in two years' time that it will still be necessary and proportionate for the police to retain their fingerprints and DNA, to help them identify if the person continues to engage or re-engages in conduct of national security concern. For example, extremist views can be very entrenched. Individuals who hold such views can disengage and then reengage unpredictably and without warning, over a longer period than two years, and so can pose an ongoing risk. And in the case of individuals who travel overseas to engage in terrorist training or fighting, they may remain overseas for longer than two years, and are likely to pose a particularly high risk to the public on their return. Biometrics can be a key means of identifying such individuals attempting to re-enter the UK.

Given the nature of these cases, the Government does not support the introduction of a “notification and review clause”. Such a notification mechanism would effectively mean disclosing to subjects of an NSD that they are of interest to the police and that there is a degree of intelligence coverage of them, thereby potentially compromising sensitive sources or ongoing investigations, with all the national security consequences that would flow from that. This would not be in the public interest.

The retention of biometric material will continue to be subject to appropriate checks and balances, including both case-by-case approval of NSDs as well as oversight of the entire system by the independent Biometrics Commissioner. The Commissioner has himself recommended a number of the changes we are making, and has confirmed that he supports the measures in the Bill.

¹ Professor Paul Wiles, Commissioner for the Retention and Use of Biometric Material, *Annual Report 2017*, para. 219

Prevent

We are concerned that the Prevent programme is being developed without first conducting an independent review of how the programme is currently operating. We are also concerned that any additional responsibility placed on local authorities must be accompanied by adequate training and resources to ensure that the authorities are equipped to identify individuals vulnerable to being drawn into terrorism. We reiterate our recommendation that the Prevent programme must be subject to independent review. (Paragraph 69)

Government Response:

The Government believes that preventing people from being drawn into terrorism in the first place is vital not only to protect the public, but to protect these individuals from serious harm. This is why we have maintained Prevent, and continue to invest in it. Prevent continues to be open to public scrutiny; last November, we published data on referrals to Prevent and Channel for the first time, and will continue to do so on an annual basis. Prevent is continually reviewed and updated to reflect the current threat landscape, and it has taken account of recent reviews, both internal and external, of our counter-terrorism strategy, CONTEST. Therefore, the need for an independent review of Prevent is unfounded.

The change made to Channel panels by clause 18 of the Bill does not mark an expansion of the scope of Prevent, but a sensible measure to streamline the process by which vulnerable individuals can be referred to ensure that they receive promptly the support they need to turn away from terrorism.

Schedule 3: Border security

Schedule 3 provides for severe interferences with Article 8, Article 10 and Article 1 Protocol 1 rights yet the powers it gives are dangerously broad. The definition of “hostile act” is extremely wide and there is no threshold test required before a person is detained and examined. Individual officers could simply act on a “hunch”. This is not in itself inadequate, but it is nevertheless troubling given the breadth of the power. The guidance will be crucial and we consider it necessary for this guidance to be published immediately so that Parliament can consider it alongside its scrutiny of the Bill. (Paragraph 80)

The vital safeguard of access to a lawyer is not adequately protected. In particular, it is not clear that individuals will be informed of their right to request access to a lawyer and yet access to a lawyer is apparently only available on request. Importantly, it would seem that access to a lawyer is not available when a person is initially questioned. There appears to be no justification for this from the Home Office. Access to a lawyer can be delayed by officers; we consider that there are more proportionate measures to mitigate risk than delaying access to a lawyer. We are also concerned at the lack of confidential access to a lawyer. Schedule 3

powers unjustifiably interfere with the right to timely and confidential legal advice, and therefore ultimately interfere with the right to a fair trial (if prosecutions are eventually brought). These provisions do not comply with the requirement that the law must contain sufficient safeguards to ensure that powers will not be exercised arbitrarily. (Paragraph 81)

We recommend that serious consideration is given to circumscribing these powers by (1) clearly defining “hostile activity”; (2) requiring a threshold test of reasonable suspicion; (3) explicitly providing that the power must only be exercised where necessary and proportionate. Specifically, we recommend that the safeguards are strengthened, providing the right to access a lawyer immediately and in private. (Paragraph 82)

Government Response:

Although the definition of hostile activity is broad, it is required to encompass the spectrum of threats currently posed to the UK by hostile states, which includes espionage, subversion and assassination. It is important to note that a person is or has been engaged in hostile activity only if the activity is carried out for, or on behalf of, a foreign state or otherwise in the interests of a foreign state. It is also important to note that the concept of “hostile activity” is not itself a trigger for executive action; it is simply the type of conduct which examining officers would be seeking to identify by means of questioning under the new power.

It is vital that the ‘no suspicion’ element of the power remains. Only accredited officers that have completed their training will be able to exercise Schedule 3 powers and they will be guided by a statutory Code of Practice. Officers will not be able to “simply act on a “hunch”; the decision to select a person for examination will not be arbitrary. The decision to stop an individual will be informed by considerations such as the current threat to the UK posed by hostile states, available intelligence, and trends of patterns of travel of those suspected of being involved in hostile activity. Guidance as to the selection criteria will be set out in the Code of Practice, which we intend to publish in draft in advance of Committee stage of the Bill in the House of Lords.

Introducing a reasonable suspicion test for the exercise of the powers under Schedule 3 would fundamentally undermine the capability of the police to determine whether that person appears to be or has been involved in hostile activity. For instance, the police may be in possession of ‘incomplete’ intelligence where the nature and extent of the threat that a person potentially engaged in hostile activity poses to the public will not necessarily be clear. This was emphasised by Assistant Commissioner Neil Basu of the Metropolitan Police who gave evidence to the Bill Committee in the Commons. The police might be aware that a particular travel route is being exploited by hostile actors, or even have credible intelligence to suggest a hostile actor is intending to enter the UK on a specific flight. If a suspicion

threshold was to be introduced, the police would be unable to act on that intelligence and utilise it to detect and disrupt threats from hostile actors.

Requiring reasonable grounds for suspicion to select an individual for examination would also risk exposure of intelligence sources and coverage. Anyone examined under these powers would know the police had grounds to suspect them of involvement in hostile activity, which could leave vital intelligence sources exposed and indicate the extent of the intelligence coverage that we rely on to keep our country safe. Hostile actors are aware of UK security measures to counter their activities and intelligence shows they flex and adapt accordingly. If we were to introduce a suspicion threshold for the exercise of these powers, then we should expect hostile actors to adapt their methods to minimise the changes of alerting and being interdicted by the police, as well as using “clean skins” (who are not known to UK law enforcement) to bypass these security checks.

Furthermore, if a suspicion test were required, travelling companions of a person suspected of involvement in a hostile act could not be examined, undermining any possibility to determine their involvement in hostile activity and affording suspects the opportunity to displace evidence of hostile activity onto their companion.

In the context of the ports power in Schedule 7 to the 2000 Act, the Supreme Court endorsed the Government’s view that this needs to be based on no suspicion. In the case of [*Beghal v Director of Public Prosecutions*](#) [2015] UKSC 49, the Court held at paragraph 49 of the judgment that:

“...it is clear that the vital intelligence gathering element of Schedule 7 would not be achieved if prior suspicion on reasonable grounds were a condition for questioning.”

And again, at paragraph 78:

“...it is easy to understand why Schedule 7 does not limit the right to stop and question to those people who give rise to objectively explicable suspicion. The fact that officers have the right to stop and question unpredictably is very likely to assist in both detecting and preventing terrorism, and in deterring some who might otherwise seek to travel to or from this country for reasons connected with terrorism.”

The same logic applies to the new ports power in Schedule 3 to the Bill.

On the issue of an examinee’s access to a lawyer, the provisions of Schedule 3 mirror those under Schedule 7 to the 2000 Act, by entitling an individual who has been formally detained as part of their examination, access to a solicitor, on request, and at any time. That entitlement will be explained in full by the examining officer as soon as a decision has been made to detain an individual. The individual will also be provided with a ‘notice of detention’ after they have been detained, which explains their rights and duties. An example ‘notice of detention’ for Schedule 3 will be included as an annex to the draft

Code of Practice that we intend to publish prior to Lords Committee (the notice for Schedule 7 to the 2000 Act can be found at [Annex A of the relevant Code of Practice](#)).

As with Schedule 7 to the 2000 Act, an individual may be formally detained at any point during the first hour of a Schedule 3 examination, but must be detained if the examining officer needs to continue the examination beyond that hour. Although there will be no entitlement, should an examinee who has not been detained request access to a solicitor, the Schedule 3 Code of Practice will make clear that where reasonably practicable, the examining officer should permit them to seek legal counsel. Police officers will speak to members of the public for a number of reasons in the course of their duties, which do not require consultation with a solicitor. Similarly, an individual questioned or searched by Border Force officers under the Customs and Excise Management Act 1979 also has no right to access a solicitor unless they have been arrested. Making arrangements for a solicitor to attend every examination would likely extend the length of each examination and unnecessarily prolong the disruption of the traveller.

Where an individual has been detained under Schedule 3 to the Bill, the examining officer will explain that they may, if they so request, consult a solicitor as soon as is reasonably practicable, privately and at any time. Where the detainee makes such a request, the examining officer may not question the detainee until they have consulted their solicitor, or no longer wishes to do so.

In the vast majority of cases, there will be no reason to interfere with this right. On rare occasions, however, there may be a need for the examining officer or a more senior officer to impose certain restrictions. For instance, the Bill would allow an examining officer to continue to examine the detainee (and not postpone questioning until a consultation has taken place) or to require the detainee to consult a solicitor via telephone or video conference, where the officer reasonably believes that permitting them to exercise their right would prejudice the determination of the relevant matters. These restrictions are to mitigate against the possibility of an examination being obstructed or frustrated as a result of a detainee using his right to a solicitor - for example, by insisting on consulting a solicitor who he knew couldn't arrive within the six-hour examination window or is unavailable by another means.

The Bill would also allow a police officer of at least the rank of superintendent to authorise a delay in permitting the detainee to consult a solicitor where the officer has reasonable grounds for believing that exercise of the right will have any of a number of set consequences – including interference with evidence; injury to another person; alerting others that they are suspected of an indictable offence; or hindering the recovery of property obtained by an indictable offence. The aim here is to mitigate against a situation where a detainee instructs or pressures the solicitor to do something that leads to one of the above consequences.

In exceptional cases, the Bill would allow an Assistant Chief Constable to direct that the detainee may only consult a solicitor in the sight and hearing of a 'qualified officer' (another officer who has no connection to the detainee's case), where the officer has reasonable grounds for believing that exercise of the right to access a lawyer will result in these consequences - for example, where intelligence indicates that the individual may have been trained to bypass, frustrate or subvert police examinations. This restriction exists to disrupt and deter a detainee who seeks to use their legal privilege to pass on instructions to a third party, either through intimidating their solicitor or passing on a coded message.

These restrictions are largely modelled on PACE Code C (requirements for the detention, treatment and questioning of suspects not related to terrorism in police custody) and Schedule 8 to the 2000 Act. They are, therefore, not new or novel, as they already exist in PACE and the 2000 Act and the police are experienced in exercising them only where necessary and proportionate. The more exceptional restrictions are also subject to important safeguards, in that they are only available to an officer of a more senior rank and a 'qualified officer' can only be a police officer who has no connection to the detainee's investigation.

This Government takes the rights of those subject to police detention extremely seriously and will always act to safeguard those rights. It does, however, agree that previous governments were right in their assessment that the severity and magnitude of an act that falls under the remit of terrorism makes it important that these powers to restrict access to lawyers in tightly prescribed and safeguarded circumstances are available within counter-terrorism legislation - not only because of the devastating impact that such acts have on our communities, but because those who carry them out are often trained to bypass the powers and mechanisms available to stop them. It is the Government's position that this logic applies at least equally and arguably even more in the context of hostile state activity.