



Home Office

Baroness Williams of Trafford
Minister of State for
Countering Extremism

2 Marsham Street,
London SW1P 4DF

www.gov.uk/home-office

Baroness Taylor of Bolton
Chairman,
Constitution Committee
House of Lords
SW1A 0PW

28 NOV 2018

Dear Ann,

Select Committee on the Constitution report “Counter-Terrorism and Border Security Bill” (14th 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 carefully, and I note that the Committee has identified concerns in three principal areas, to which I respond 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. Furthermore, the UK Government is certain that the two suspects charged for the Salisbury nerve agent attack are Russian Military Intelligence (GRU) officers. The attack was almost certainly approved outside the GRU at a senior level of the Russian state. It is right, therefore, that the Government takes steps to safeguard its people as they go about their daily lives free from the threats to their safety and security posed by terrorism and hostile state actors.

The Government acknowledges that the measures in the Bill have constitutional implications insofar as they impact on the relationship between the State and its citizens (or others living in the UK). In putting forward this Bill, the Government has sought to introduce measures only where they are both necessary and proportionate to tackle the current threats we face. To this end, the Bill does not represent a wholesale addition to the current suite of powers for dealing with these threats, but makes carefully calibrated updates to existing laws to reflect the changes we have seen in patterns of radicalisation, methods of terrorist attack, and the increasing threat posed to the UK by hostile state activity. The Bill is ultimately intended to further protect the public.

Access to legal advice under Schedule 3

We are concerned that the Government's justification for these provisions relies on the assurance that the powers will be used more benevolently than the text of the Bill requires. Such assurances are insufficient, particularly when civil liberties issues are engaged. They do not bind the Government and therefore cannot be relied on. Moreover, to the extent that the Government's assurances on the operation of the Bill rely on the content of the proposed code of practice, questions arise concerning the appropriateness of leaving such matters to supplementary materials. We address the issue below. (Para 6).

We agree with the Joint Committee on Human Rights that access to confidential legal advice – a fundamental constitutional principle, acknowledged at common law – is not adequately protected by the Bill. We recommend that the Bill is amended to require detainees to be informed of their right to consult a solicitor; to remove the power to delay consultation with a solicitor; and to remove the power to permit consultation with a solicitor to occur only in the sight and hearing of a qualified officer. (Para 7).

Schedule 3 contains important new powers to allow officers to stop, question, search and detain an individual at a port or in the border area in order to determine if they are, or have been, involved in hostile state activity. These are closely modelled on the long-standing counter-terrorism ports powers provided for in the Terrorism Act 2000.

The Schedule 7 Code of Practice is clear that persons detained under the counter-terrorism ports powers must be informed of their rights to consult a solicitor on first being detained. The draft Schedule 3 Code of Practice makes equivalent provision. That said, having reflected on the recommendation by the Joint Committee on Human Rights (JCHR) and on the debate at Lords Committee stage, the Government is content for such provision to appear on the face of the legislation and has therefore tabled amendments to the Bill for Lords Report stage which will enshrine this requirement in Schedule 3 to the Bill and in Schedule 8 to the Terrorism Act 2000.

The Government has also reflected on the issues raised around the right of a Schedule 3 detainee to consult a solicitor in private. The Bill, as introduced, would have enabled a senior officer in exceptional circumstances to direct that a detainee could only consult their solicitor in the sight and hearing of another officer in order to mitigate the risk of a detainee using their solicitor, whether willingly or under threat, to pass on a message or instruction to a third party, which could then result in a number of harmful consequences. Again, this replicates provision in Schedule 8 to the Terrorism Act 2000. It is important that we are able to mitigate such risks, but the Government recognises the concerns that have been raised about the implications of this provision for legal professional privilege.

The Government has therefore tabled amendments for Report stage to remove the ability of a senior officer, in exceptional circumstances, to direct that the detainee consult their solicitor in the sight and hearing of another officer and instead to enable a senior officer to require the detainee to choose a different solicitor. This amendment is made to Schedule 8 too. This will mirror the provision under Code H to the Police and Criminal Evidence Act 1984 (PACE) should police have similar concerns about a solicitor, and was an approach to this challenge proposed by the Law Society during evidence to the Public Bill Committee (Official Report, 26 June 2018, col 27). The Government is confident that this approach will maintain an appropriate balance between legal professional privilege and ensuring that the right to consult a solicitor does not result in further harm.

With regards to the power to delay a detainee's access to a solicitor, powers to delay informing a named person of a detainee's detention and that detainee's access to a solicitor have been enshrined in PACE for many years (see section 58), and also appear in Schedule 8 to the Terrorism Act 2000 (see paragraph 8). These powers are therefore not new or novel but are familiar in the wider policing context and allow the police to delay consultation with a solicitor where an officer of at least the rank of superintendent has reasonable grounds for believing that exercise of the right to consult a solicitor at that time will have the serious consequences set out in paragraph 30(3), such as the interference with or harm to evidence of an indictable offence, interference with or physical injury to any person or the alerting of persons who are suspected of having committed an indictable offence but who have not been arrested for it. To remove this power of delay would undermine the ability to mitigate these risks.

Extra-territorial jurisdiction

We are concerned that the extra-territorial extension of these offences risks individuals being prosecuted in the UK for offences that do not exist in the country in which the relevant conduct occurred and in circumstances in which the imposition of criminal liability might not reasonably be foreseen. This breaches the requirement, deriving from the principle of legal certainty, that people should have a fair opportunity to know the laws (particularly criminal laws which on conviction carry criminal penalties) which apply to them. We agree with the JCHR's proposed amendment that extra-territorial jurisdiction should apply only where the relevant conduct is criminal in the country concerned or where the individual has sufficient links to the UK. (Para 13).

The amendments proposed by the JCHR on this issue were tabled by Baroness Hamwee and debated in Committee on 31 October (Official Report, columns 1363-1371). Similar concerns to those expressed by the JCHR and the Constitution Committee at the extension of extra-territorial jurisdiction (ETJ) to the offence at section 13 of the Terrorism Act 2000 were also voiced in relation to the Government amendment, accepted by the House, which

extended ETJ to the offences at section 12 and 12(1A) of the 2000 Act (inviting support for or recklessly encouraging support for a proscribed organisation).

Having reflected carefully on the debates at Committee stage and the conclusions reached by the JCHR and Constitution Committee, the Government has tabled amendments for Lords Report stage which limit ETJ for the section 12 and 13 offences to UK nationals and residents. This will allow us to take action against those who travel overseas and reach back to this country in order to radicalise others, without risking inappropriate prosecutions of persons who have no connection to the UK.

'Hostile Activity'

We are concerned that the broadly defined concept of 'hostile activity' not only engages human rights considerations, but also has implications for the rule of law and legal certainty. We support the JCHR's recommendations to circumscribe the powers. (Para 17).

In the Government's response to the JCHR of 4 September, we responded fully to their concerns.

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.

Introducing a requirement for the officer to have grounds to suspect an individual of hostile activity would fundamentally undermine the utility of these powers and the ability of the police to detect, disrupt and deter those engaged in such activity. A key concern is that anyone examined under a suspicion power could infer that they are known to the police or to intelligence agencies, which would risk disclosure of intelligence coverage and capabilities to known hostile actors. Officers may be required to explain to these individuals the reasons why they have been stopped. It is likely that hostile actors would use such information to reverse-engineer our methods, bypass future security checks and increase their reliance on 'clean skins'.

It would also remove a significant tool to identify and disrupt unknown hostile actors. In giving evidence at Commons Committee, Assistant Commissioner Neil Basu explained that the police are often in possession of intelligence that is 'fragmented' or 'incomplete' and is not always focused on a specific individual. This intelligence may instead point to trends or patterns of travel, or an active threat linked to a particular destination and timeframe. Introduction of a grounds to suspect threshold would limit the availability of these powers to known individuals, or those who demonstrated suspicious behaviour at a port. It would prevent ports officers from selecting individuals for examination

who are potentially exploiting travel routes that have been uncovered by intelligence or heading to a specific destination within an identified threat window.

For example, if intelligence indicated that an individual of hostile activity concern, who belonged to a certain nationality, would be arriving at a particular destination within a particular timeframe, these powers would be critical to identifying that individual. There wouldn't necessarily be sufficient material in respect of any particular person to amount to reasonable grounds to suspect engagement in hostile activity; nor would the Code permit selection of any person on the basis of their nationality alone. Yet taken together, the nationality, arrival destination and arrival time would be sufficient, under a no suspicion power, to allow the ports officer to stop and question a person for the critically important purpose of following up on the intelligence concerning terrorist or hostile activity risk.

Finally, it would also severely limit any secondary gains from use of the powers, such as excluding individuals from further investigation, acquiring additional intelligence or deterring those involved in hostile activity from travelling to and from the UK. A short port examination may be the difference between identifying or excluding a person from further investigation, allowing the police and intelligence services to focus their limited resources on monitoring those individuals of most concern. The intelligence benefit would be dramatically reduced by the unavailability of these powers with respect to unknown individuals and may be eliminated altogether if officers are required to disclose to the person the reasons for their selection.

The Government has consistently rejected the introduction of any higher threshold for the exercise of powers under Schedule 7 because to do so would fundamentally undermine the utility of the power, and the capability of the police to keep the public safe. The same arguments are also valid in relation to the new power under Schedule 3.

It is important to remember that Schedule 3 powers must be exercised in a manner which is proportionate to the legitimate aim of determining if an individual is, or has been, involved in hostile activity, and the powers must not be used in a way which unlawfully discriminates against anyone of the grounds of their protected characteristics. It is not the case that examining officers will exercise these powers arbitrarily. The equivalent powers under Schedule 7 have consistently been judged necessary and proportionate due to the nature of their location and the exercise of the power by accredited officers, affecting only a small sub-section of the travelling public. Such use of the powers was endorsed by the Supreme Court in a July 2015 judgment in the case of *Beghal v DPP*. The same logic applies to the new power in Schedule 3 of this Bill.

The application of the definition of 'hostile activity' should not be left to a code of practice given the seriousness of the offences to which it relates. Our concern is compounded by the Government's failure to

publish a draft code of practice for the majority of the time during which the Bill is before Parliament. (Para 19).

As we stated in our response of 4 September to the JCHR's first report on the Bill, it was the Government's intention to publish the draft Code of Practice in the Autumn. We delivered on that undertaking by publishing the draft Code on 1 November; this allowed Peers to scrutinise the draft Code ahead of the Committee Stage debate on the provisions contained within Schedule 3. As Schedule 3 has now been amended in the Lords, it will in due course be the subject of further debate in the House of Commons when MPs will be able to take into account the provisions of the draft Code. The draft Code is available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/753375/2018-11-01_Schedule_3_Draft_Code_of_Practice.pdf

When the Bill receives Royal Assent (subject to parliamentary approval), the Government will launch a formal consultation on the draft Code of Practice, which will provide individuals with a further opportunity to scrutinise and comment on the draft Code before it is laid before Parliament. The draft Code will then have to be debated and approved by both Houses before it can come into force.

A handwritten signature in black ink, appearing to read 'Austen', with a large, stylized flourish above the name.

Baroness Williams of Trafford