Law Society of Scotland

Counter-Terrorism and Border Security Bill

Memorandum of Comments

26 July 2018

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee welcomes the opportunity to respond to the call for evidence in relation to the Counter-Terrorism and Border Security Bill 2018 (Bill). The Committee has the following comments to put forward for consideration.

General Comments

The purpose of the Bill is to '*make provision in relation to terrorism'* and '*to make provision enabling persons at ports and borders to be questioned for national security and other related purposes'*[1]. We understand the principles lying behind the Prime Minister's announcement regarding the need to conduct a review to ensure that the police and security services have the powers that they require[2]. We are also aware that in the year ending 31 December 2017, there were 412 arrests for terrorism related offences in Great Britain, an increase of 58 % compared to the 261 arrests the previous year which is indicative of there being increased activity[3].

The Bill seeks to update some existing offences and close what may be described as legal loopholes. That will ensure the legislation is fit for the digital age described by Max Hill QC, Independent Reviewer of Terrorism Legislation as '*digital fixes'*[4]. There may be a tendency as technology advances for conduct that

[1] Counter-Terrorism and Border Security Bill https://publications.parliament.uk/pa/bills/cbill/2017-2019/0219/cbill_2017-20190219_en_1.htm

[2] https://www.gov.uk/government/speeches/pm-statement-following-london-terror-attack-4-june-2017

[3] http://publications.parliament.uk/pa/bills/cbill/2017-2019/0219/en/1829en03.htm

is to be criminal to require '*prosecutors…[to] sometimes shoehorn offending into other offences, but experience tells us that that can result in problems down the line*[5]'

There are inevitable concerns that making such changes will extend the ambit of the criminal law and risk affecting the balance to be maintained between the right to privacy, freedom of thought and belief and freedom of expression.

The Bill does not represent a '*knee-jerk*'[6] response some may have anticipated as a consequence of the recent terrorist threats and events in 2017. It is clear that the whole of the UK comprising Scotland, Wales, Northern Ireland and England faces similar terrorist threats.

We refer to our written response[7] on the proposed UK-EU Security treaty in pursuance of the UK Government's proposal to negotiate a treaty between the UK and EU where we highlighted the attacks at Glasgow Airport and the London West End terrorist attack by Doctor Bilal Abdullah[8]. These attacks demonstrate exactly why there are concerns. The UK's ability to handle terrorist incidents has been strengthened since then with the Memorandum of Understanding of Handling of Terrorist cases. Where jurisdiction is shared by the prosecuting authorities within the UK[9] such incidents arising in both jurisdictions can be prosecuted at one location, rather than both England and Scotland. Where cross-border terrorism cases arise, there are substantial benefits to the public interest for such cases involving co-conspirators to be tried together in one country. The UK-wide jurisdiction in relation to terrorist offences under the Counter-Terrorism Act 2008 has been extended. Other offences connected to terrorism and such circumstances may also share jurisdiction.

Specific comments on the Bill

The Bill covers issues of counter-terrorism and national security which under Schedule 5 of the Scotland Act 1998[10] are matters reserved to the UK Parliament. Terrorism legislation such as the Bill does not therefore lie within the Scottish Parliament's or Scottish Ministers' competence. The majority of the Bill's provisions apply to Scotland equally as for England, Wales and Northern Ireland. (There are some separate provisions under Schedules 2 and 3 of the Bill to deal with differences in Scottish criminal

5 Gregor McGill:Director of legal services to the Crown Prosecution Service https://hansard.parliament.uk/commons/2018-06-26/debates/43910eef-63a2-4757-9ea5-7276e3244077/Counter-TerrorismAndBorderSecurityBill (First Sitting)

6 https://www.bbc.co.uk/news/election-2017-40165045

7 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/brexit-the-proposed-ukeu-security-treaty/written/83500.html

8 https://www.dailyrecord.co.uk/news/scottish-news/glasgow-airport-bomber-bilal-abdullah-5068762

9 Joint Statement by HM's A-G and the Lord Advocate handling of terrorist cases where the jurisdiction to prosecute is shared by prosecuting authorities within the UK http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Protocols_and_Memorandum_of_Understanding/Handling%20of%20Terrorist%20Cases%20where%20the%20Jurisdiction%20to%20Prosecute%20is%20shared%20by%20Prosecuting%20Authorities%20within%20the%20UK.PDF paragraph 1.4

10 The distinction between reserved and devolved matters is that where it is listed in Schedule 5 of the Scotland Act 1998, it is reserved. If it is not, it is devolved.

procedures. Clause 9 of the Bill, for instance, deals with extended sentences for terrorist offences with the equivalent clauses 8 and 10 referring to England and Wales/Northern Ireland).

'*We welcome the Minister's statement at Committee recognising that 'Although the Bill relates to reserved matters, it clearly affects criminal justice agencies across the United Kingdom and local authorities in Great Britain and accordingly, we extensively consulted the devolved Administrations on its drafting'*[11]

Criminal law, criminal justice, the courts, the police, the prison services, the prosecution service and the legal profession are all elements of devolved competence in Scotland and counter terrorism law is applied throughout the Scottish legal system. These Scottish organisations that have an interest in terrorism issues include:

- Scottish Government where responsibility mainly falls within the remit of the Scottish Government Justice Directorate
- Scottish Courts and Tribunal Service who are responsible for the administration of the distinct Scottish court system. That also includes the role of the judiciary under the Judicial Office for Scotland who provide support to the Lord Justice General, with responsibility for the training and conduct of judges, as well as their disposal of court business
- Crown Office and Procurator Fiscal Service (COPFS) is the Scottish prosecution service. The Lord Advocate has a unique position as its head where he is responsible, among his other roles, for prosecution system as well as acting as the principal legal adviser to the Scottish Government. His decision making as to prosecution where the locus of the crime is Scotland is taken independently of the Scottish Government. In decision-making, he is required to act in the public interest. Crimes which have a security aspect tend to be more serious in nature where indictments (as such cases are prosecuted at solemn level) run in his name. All reports as to crimes to be prosecuted in Scotland (which will include those with cross border implications whether UK, EU or international) all fall to be considered by the COPFS in accordance with Scottish criminal procedural and evidential rules. The Memorandum by the Home Office[12] on the Bill recognises the Lord Advocate's role
- Police Scotland is involved in dealing with organised crimes and counter terrorism dedicated in keeping people safe. Areas of its work directly align with the police in England, Wales and Northern Ireland
- Scottish Prison Service, funded by the Scottish Government, deals with those persons remanded or sentenced by the courts to custody and rehabilitation. This includes the administration, safety, standards of care and organisation of Scottish prisons

[11] https://hansard.parliament.uk/commons/2018-07-10/debates/f8f9d957-45d2-4eeb-9b06-b755b2dd368e/Counter-TerrorismAndBorderSecurityBill(SeventhSitting) Column 213

[12] 12 Paragraph 39 of the COUNTER-TERRORISM AND BORDER SECURITY BILL EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM BY THE HOME OFFICE https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713837/20180601_ECHR_Memorandum.pdf

These different organisations apply the existing terrorism laws though now advice may be provided will be by the organisations within the devolved context. This will include decision making about prosecution regarding sufficiency of admissible evidence, the forum and the procedure to be adopted for any prosecution. The UK Government and the Scottish Government need to co-operate fully in relation to matters of terrorism in Scotland. The Memorandum of Understanding fully demonstrates the sort of co-operation envisaged at paragraph 5. 3[13]:

'The Lord Advocate and the Attorney General share a strong personal commitment to working together and with the Directors of Public Prosecutions for England and Wales and Northern Ireland, to resolve as speedily as circumstances require any decisions arising from concurrent UK jurisdiction. In doing so they act in the overall public interest, independently of Government and to safeguard national security.'

Chapter 1 Terrorist offences

It is vital that legislation keeps pace with the increased use of the internet and information technology which is employed in much criminality and affects how most crimes are committed and detected. Crimes are committed on a global scale which are not necessarily restricted to one jurisdiction. As the threat that terrorism presents becomes more complex, the enforcement organisations in Scotland and UK need to have appropriate powers to be able to deal effectively with these threats.

We endorse the idea that the law requires to be kept under review so that innovation in terrorist methodology is not overlooked. Consideration should also be given to consolidation or codification of terrorism laws to avoid complexity[14] with all those concerned requiring to refer to a number of pieces of legislation. The law needs to be set out as clearly as it can and preferably in one location under one relevant piece of legislation. If there is to be any extension of any offences, this needs to be set out clearly and to be explicit.

The provisions of the Bill must ensure that there is a balance between the interests of the State and those of the individual.

Clauses 1 to 4 are designed to deal with extending and updating existing terrorist offences. By way of background, Max Hill QC had urged the Government to '*pause before rushing to add yet more offences to*

[13]Joint Statement by HM's A-G and the Lord Advocate handling of terrorist cases where the jurisdiction to prosecute is shared by prosecuting authorities within the UK http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Protocols_and_Memorandum_of_Understanding/Handling%20of%20Terrorist%20Cases%20where%20the%20Jurisdiction%20to%20Prosecute%20is%20shared%20by%20Prosecuting%20Authorities%20within%20the%20UK.PDF paragraph 1.4

[14] The main legislation applying to terrorism are the Terrorism Act 2000, Terrorism Act 2006,Counter-Terrorism Act 2008,Terrorism Asset-Freezing etc Act 2010, Terrorism Prevention and Investigation Measures Act 2011 and the Counter-Terrorism and Security Act 2015.

the already long list' of terror offences, which were '*generated often in reaction to major events and in haste*'[15].

Clause 1: Expressions of support for a proscribed organisation

Clause 1 aims to criminalise '*expressions of support'*[16] for proscribed organisations where the person expressing support is reckless as to whether the person to whom the expression is directed will be encouraged to support the proscribed organisation. It seeks to amend Section 12(1) of the Terrorism Act 2000 (2000 Act) which criminalises a person who 'invites' others to support a proscribed organisation. That provision does not currently prevent any person holding opinions or beliefs supportive of a proscribed organisation; or the expression of those opinions or beliefs[17]. There is no need for actual support; the offence lies in inviting support. Now the requirement for an invitation is removed and replaced with *'expression of support'*.

There is already an offence of '*encouragement of terrorism'* that exists under section 1(1) of the Terrorist Act 2006 (2006 Act) though it is restricted to the action of publication. Clause 1 takes that offence further.

The issues which we would identify in relation to Clause 1 are:

The type of speech that would constitute an '*expression of support'* is not stated. A common definition of *'support'* is understood to comprise '*approval, comfort or encouragement'*[18] that all imply the need to demonstrate some positive conduct or action. The offence therefore cannot be committed by accident, carelessness or inaction. There is a requirement to satisfy the 'recklessness' test which removes the requirement of actual intention and replaces it with recklessness. That lowers the standard required for commission of the offence.

The individual does not need deliberately or knowingly to encourage a person to whom the expression is directed to support a proscribed organisation in order to have committed an offence. In an earlier case[19], recklessness under section 2(1) (c) of the 2006 Act meant subjective recklessness so that the defendant must have '*knowledge of a serious and obvious risk'* where dealing with publication that would encourage terrorist offences. There is a safeguard then in that discussion, criticism or explanation would not have been enough to contravene. But now if an '*expression of support'* arose in such circumstances, an individual might well fall foul of the law.

[15] 2017 Tom Sargant Memorial Lecture *in London October 2017*

[16] Organisations are proscribed if they are 'concerned in terrorism' under section 3(5) of the Terrorist Act 2000. UK Government has the right under Schedule 2 of the Terrorist Act 2000 to set out who are proscribed organisations which is correct.

[17] *R v Choudary and Rahman* [2016] EWCA Crim 61

[18] https://en.oxforddictionaries.com/definition/support

[19] R v Farah [2012] EWCA Crim 2820

The clause may affect an individual's conduct and engage Article 10 (Freedom of Expression) under the European Convention on Human Rights (ECHR).

Terrorism offences and stop and search powers may interfere legitimately with a person's right to receive and impart information and ideas concerning their religion, political or ideological beliefs[20]. The proposed clause may go beyond what is required for the purpose of establishing criminality when the proportionality test is applied. That requires such rights to be curtailed *only* where *'such…restrictions …. are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime*…' [21]

A question is how the courts might seek to interpret such an offence. This issue was considered in relation to the 2006 Act when considering if its provisions represented a proportionate restriction on freedom of expression in relation to the purposes of Article 10(2) of ECHR. The Court of Appeal declined to be drawn into a general examination of the 2006 Act but was clear that conviction could not arise just because publication expressed a *religious or political view, controversial or not'*. Lord Judge[22] stated:

'[I]t is difficult to see how a criminal act of distribution or circulation of a terrorist publication with the specific intent, or in the frame of mind expressly required as an essential ingredient of this offence to encourage or assist acts of terrorism, can be saved by reference to the principle of freedom of speech, unless that principle is absolute, which, as we have indicated, it is not.'

Certainly, recent case law tends to reflect the courts' hostility towards incidents that support terrorism and stir up hatred. There is a read across[23] from this type of work to the issues underpinning any need for the creation or development of terrorist offences as outlined in clause 1.

Ongoing discussion of these issues in Scotland is taking place currently as the Scottish Government is considering recommendations made in the Independent Review of Hate Crime Legislation Report by Lord Bracadale[24] whose remit included that:

'Racism, intolerance and prejudice of all kinds are a constant threat to society, and while Scotland is an open and inclusive nation, we are not immune from that threat…This review will help ensure we have the right legislative protection in place to tackle hate crime wherever and whenever it happens'[25].

Stopping hate or intolerance is part of the global picture of terrorism. Additionally, incidents both north and south of the border, demonstrate examples where individual freedoms have been curtailed in the face of grossly offensive behaviour including:

[20] Paragraph 5 (c) of the Legislative Scrutiny: Counter-Terrorism and Border Security Bill Ninth Report of Session 2017–19

[21] Article 10 (2) of the European Convention on Human Rights

[22] R v Brown [2011] EWCA Crim 2571

[23] Ben Wallace MP Minister for security and economic crime

[24] https://www.gov.scot/Publications/2018/05/2988/0

[25] January 2017, Annabelle Ewing MSP, Minister for Community Safety and Legal Affairs

- Michael Meechan being convicted in May 2018 of posting material that was 'grossly offensive' and 'anti-Semitic and racist in nature' in breach of the Communications Act 2003. He posted video footage of a dog responding to Nazi slogans and raising its paw in an imitation Nazi salute when it heard these slogans. That was described as *'deeply offensive and no reasonable person can possibly find the content acceptable in today's society*[26]'.
- Alison Chabloz[27] was convicted of posting "grossly offensive" material to YouTube which she had written when she performed anti-Semitic songs mocking the Holocaust. The district judge, John Zani was satisfied the material was grossly offensive and that Chabloz intended to insult Jewish people.

There are also concerns that clause 1 might prevent legitimate debate around the Government's use of its powers. The counter argument is of course that the Government considers that interference with ECHR rights is justified in the interests of national security, public safety. The effect of clause 1 has been described as having a potentially '*chilling effect*'[28] on such debate.

In conclusion, there needs to be clarity when seeking to criminalise conduct. Firstly, criminalisation must actually be necessary (and go beyond the powers that can be exercised at present). Secondly, it needs to be clear so that those offending are aware of the law, what it prevents and is criminal. For instance, would those offending necessarily be aware of the identity of all the proscribed organisations when expressing an opinion? Tech UK in their written evidence stated that

'*this process should be guided by the evidence and a clear identification of problems that can only be resolved by intervention …the process should be allowed to run its course and that the Bill is not the time for pre-emptive legal change.*[29]'

We fully endorse that:

'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.[30]'

Clause 2: Publication of images

Clause 2 criminalises the online publication of images including publication of an image such as an item of clothing or other article in such a way or in such circumstances as to arouse reasonable suspicion that the

[26] Detective Inspector David Cockburn of Lanarkshire CID https://www.telegraph.co.uk/news/2016/05/09/nazi-pug-man-arrested-after-teaching-girlfriends-dog-to-perform/

[27] https://www.theguardian.com/uk-news/2018/may/25/woman-who-posted-holocaust-denial-songs-to-youtube-convicted-alison-chabloz

[28] Paragraph 12 Legislative Scrutiny: Counter-Terrorism and Border Security Bill Ninth Report of Session 2017-2019

[29] https://publications.parliament.uk/pa/cm201719/cmpublic/CounterTerrorism/memo/CTB09.htm

[30] Paragraph 18 of the Legislative Scrutiny: Counter-Terrorism and Border Security Bill Ninth Report of Session 2017-2019

person is a member or supporter of a proscribed organisation. This clause aims to prohibit more than under the existing section 13 of the 2000 Act. That currently makes it an offence to wear an item of clothing or wear, carry or display an article in such a way that it arouses such suspicion about being a member or supporter of a proscribed organisation.

There is no requirement (compared to clause 1) for the prosecution to establish that the publication of the image had been reckless. The prosecution is required to show reasonable suspicion which is a lower standard: mere publication of the image satisfies the offence. The argument is of course that such actions are indicative of an individual's involvement in other terrorist offences and may well be used to build a picture of any accused before being involved and invoking the more serious aspects of the Bill.

The points which we have made in relation to clause 1 above equally apply when considering if this clause satisfies the proportionality argument. However there may be a further argument given how wide this clause is that a number of historical images and journalistic articles may well be designated as offending by this clause. Journalists objecting to this clause claim that it will prevent responsible journalism in the public interest[31].

We think that there needs to be greater clarity as to the circumstances in which this clause is intended to operate.

Clause 3: Obtaining or viewing materials over the internet

We are in support of updating the law to take account of digitalisation. In doing so, the law should be made as simple and easily understood as possible. What has been described as a '*three click offence'* seems simple in practice but presents a number of questions.

Clause 3 of the Bill seeks to amend Section 58(1) (a) of the 2000 Act to make it an offence if a person collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism. It provides that it is an offence if an individual:

'on <u>three or more</u> (our emphasis) *different occasions [views] by means of the internet a document or record containing information or that kind'.*

As currently drafted, the offence is made out if a person views terrorist material on three or more different occasions even where the material is different each time. There is also no actual timescale in which the three occasions should arise.

[31] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/legislative-scrutiny-counterterrorism-and-border-security-bill/written/86024.html

The Memorandum by the Home Office[32] justifies the creation of this offence by reference to:

'the internet [as] the modern-day source of much of this material and it is therefore proper to criminalise the collection of material from, or making of records by means of, the internet. Likewise, the damage that can flow from repeatedly viewing material useful to a terrorist–whether or not a permanent record is made or collected– warrants the criminalisation of the act of viewing.'

The concern is of course is that the offence can be committed inadvertently since it does not require action of storage, invitation or expression as set out in Clause 1. Though there is a defence of reasonable excuse, there may be challenges when facing the prospect of invoking the section 58 (3) defence of reasonable excuse at their trial. It is of course open to the relevant prosecution authority to decide that prosecution is not merited in the public interest where there may be an excuse.

Practice tends to indicate that prosecution will take place leaving the issue of the defence as a matter for the jury after the Crown has established the factual basis and discharged the evidential burden of proof of their case.

A parallel has been drawn with viewing of indecent images which require actual proof of possession.[33]. There may be legitimate reasons to engage in viewing extremist content such as research, academic and journalistic activities and those who might well view such materials for interest or as a challenge. At what point does the viewing of such information tip over into radicalisation and into a criminal sphere?

No doubt the question of granting academic licences could be considered but this would be very complicated. Who gets a licence and how? Who scrutinises the grant?

In conclusion, we understand that the French Constitutional Court[34] struck down the attempted creation of a similar provision on the basis that it was unnecessary given the existing law, issues of disproportionately and lack of certainty:

'*The court ruled that the legislation was an extreme and disproportionate infringement on the freedom of expression and that the provisions of the legislation were neither necessary nor adequate, given provisions of existing laws used to fight genuine terrorism'.*

As France has a separate system of law, constitution and that the Conseil Constitutionel can strike down laws which are inconsistent with the Constitution, we recognise that the same circumstances do not apply directly in the UK. However we do consider that if this offence is to remain there needs to be careful consideration given to when the conduct amounts to circumstances justifying prosecution.

Illustration of the issues includes:

[32] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713837/20180601_ECHR_Memorandum.pdf

[33] Section 160 of the Criminal Justice Act 1988 (England and Wales) section 52(1) (c) of the Civil Government(Scotland) Act 1982

[34] http://theduran.com/french-constitutional-court-stands-up-for-free-speech/

- Timescale for the three clicks to have arisen
- Why three clicks: is there evidence to suggest after three clicks that there is more likelihood of radicalisation?
- If it requires to be the same or different material on each occasion
- How long the view took individually (fleeting) or collectively and
- How the three clicks offence arose such as by separate use of different devices, for example a mobile phone on one occasion, then a laptop and a tablet on another.

There was a suggestion[35] that to include 'streams' might provide a safeguard in relation to the 'three clicks offence' to ensure that it was not fleeing.

By utilising a dictionary definition in computing terms[36] 'stream' means *'a continuous* (our emphasis) *flow of data or instructions, typically one having a constant or predictable rate'.* This definition may have an advantage in that it does seem to imply more than momentary. It does not deal with the question of actual interest in the materials available to be seen post click. Just because you access, is there a desire to view/read such materials

We would also highlight:

- Use of terminology: Considering the use of current words in 2018 associated with computing, given the pace of digitalisation and as technology advances, these could be outdated before such legislation reaches the statute book. There is a need to future proof the legislation.
- Reasonable excuse defence: If the ranges of offences are to be extended, though the courts do understand the question of reasonable defence, providing further definition would be useful. Section 57(2) of the 2000 Act provides: *'possession of the article was not for a purpose connected with the commission preparation or instigation of act of terrorism.'* There may be a way to consider this in relation to developing the defence to address some of the concerns highlighted above.

Clause 4: Encouragement of terrorism and dissemination of terrorist publications

We have no comment in relation to Clause 4. It seeks to make changes to the existing section 1 and 2 offences of the 2006 Act. Amending these sections to provide for the '*reasonable person'* test seems appropriate.

Clause 5: Extra-territorial jurisdiction

[35] Max Hill QC Independent Reviewer of terrorism Legislation Parliamentary Debate House of Common Official Report 26June 2018 at Q92

[36] https://www.bing.com/search?q=Stream+defintion&src=IE-TopResult&FORM=IETR02&conversationid=

There are a number of concerns when legislation appears to extend its jurisdiction beyond the UK in seeking to apply the law.

Clause 5 seeks to amend section 17[37] of the 2006 Act to extend the circumstances in which terrorist offending abroad may be prosecuted in the UK, irrespective of whether the offence is committed by UK citizens or otherwise. The person, whether a British citizen or not, may be prosecuted in the UK for conduct that takes place outside the UK which would have been unlawful under one of the listed offences if it had been committed in the UK. It seeks to extend section 17 of the 2006 Act to offences such as:

- dissemination of terrorist publications under section 2 of the 2006 Act
- wearing clothing or displaying an item in a public place in such a way as to arouse reasonable suspicion that he is a member or supporter of a proscribed terrorist organization under section 13 of the 2000 Act
- making or possessing explosives under suspicious circumstances under section 4 of the Explosive Substances Act 1883

As proscription of organisations is not universally adopted, if there is no equivalent offence abroad, it is difficult to demonstrate that the offence has been committed. There may also be international legal issues where the offence is not a crime in the country where it has been committed. We agree with concerns that there is infringement of '*the principles of natural justice and sufficient foreseeability of the effect of one's actions*'[38].

Chapter 2 Punishment and management of terrorist offences

Clauses 6–10 deal with the sentencing provisions. Clauses 6 (in part) and 9 (extended sentences for terrorism offences in Scotland) concern Scotland.

Increases in any sentencing power must be demonstrated to be justified when considering the requirements of sentencing such as punishment, deterrence, reformation, public protection and reparation. There is also a need, reflecting our observations above about the similar risks affecting both Scotland and England and Wales, for there to be parity of sentencing wherever the relevant terrorist offence arises. The actual sentence which is imposed is up to the judge to assess in the light of the facts and circumstances of each case. Scotland does not currently have any sentencing guidelines but Scottish courts can and do take cognisance of sentencing guidelines from other jurisdictions where they exist — such as in cases where death has been caused in a serious road traffic matter.

[37] This already included universal jurisdiction. There is no requirement that the conduct must also be an offence in the jurisdiction where the conduct took place.

[38] Paragraph 39 of the Legislative Scrutiny: Counter-Terrorism and Border Security Bill Ninth Report of Session 2017-2019

Given that terrorism legislation applies similarly across England and Scotland, there is a need for consistency.

We note that the Bill proposes that the amended section 58 of the 2000 Act (offence of viewing terrorist material online three times or more) could attract a sentence of up to 15 years (from 10 years) under clause 6(2) of the Bill. That puts it on a scale with a section 1 or 2 offence. Although that level of sentence might never be imposed, the upper limit on the sentence will indicate to the judiciary just how seriously they should view the offending behaviour.

Notification requirements

Clause 11 of the Bill amends the Counter-terrorism Act 2008 (2008 Act) with regard to the periods of notification for persons convicted of certain terrorism offences where they receive a custodial sentence of 12 months or more. Once released, they must continue to supply the police with certain specified information in a manner similar to the notification requirements in sexual offence cases[39]. The length of the notification requirement depends on the sentence that was imposed since sentences may range for periods ranging from 10 to 30 years. The reporting requirements apply automatically with no review. We do consider that without a review mechanism that these do potentially contravention Article 8 ECHR rights (right to privacy).

The current notification scheme under the 2008 Act when applied to 10-year periods on the register was held as being in accordance with the law and not in violation of Article 8. Whether the proposed extension of the notification scheme is compliant itself is the first question.

The second question is whether the absence of any review mechanisms is justified.

In our view there should be recourse to the court by way of a review mechanism as a suitable safeguard.

Clause 12: Power to enter and search

Clause 12 amends section 56 of the 2008 Act to provide a new power for police to enter and search the homes of registered terrorist offenders (RTOs) or for the purpose of assessing the risks posed by the person to whom the warrant relates. A justice of the peace (or sheriff in Scotland or magistrate in Northern Ireland) must approve the warrant on application by a senior police officer. Since the clause envisages lay decision making for England, Wales and Northern Ireland, it seems possibly anomalous that it should not also lie within the jurisdiction of the JP court in Scotland.

[39] https://www.inbrief.co.uk/offences/the-sex-offenders-register/

Why this right to search should be extended to include risk seems to be too extensive. It would be best if it reflected a reasonable belief that the individual is in breach of their notification requirements and that the purpose of the entry and search is required to establish that belief.

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

Clause 17 gives effect to Schedule 2 that amends the legislation relating to the retention of fingerprints and DNA samples and profiles by the police for counter-terrorism purposes. The relevant provisions relating to those who are arrested in Scotland are contained at paragraphs 6 and 7 that amend the Criminal Procedure (Scotland) Act 1995 (1995 Act)[40].

Schedule 2 Paragraph 7 (4) amends the period for which samples can be retained from 2 to 5 years where a national security determination is made by the Chief Constable of Police Service of Scotland who determines that it is necessary. National security is an important public safety objective but there seems little or no justification for this extension, especially where there is no mechanism for review and will affect those that may not have been convicted of any crime.

There is currently no biometric oversight provided in Scotland as provided for in England and Wales which considers whether such powers are being used appropriately at present. A Scottish advisory group was set up and reported in March 2018 making recommendations which included the proposed creation of an independent Scottish Biometrics Commissioner, the establishment of a statutory code of practice covering biometric data and technologies and a review of the existing retention rules. Recommendation 5 specifically refers to:

'a review of the rules on retention of biometric data in sections 18 to 19C of the [1995 Act] considering all questions of proportionality and necessity. The review should be research led and consider not only the gravity of the offending but also the value of biometrics in the investigation of certain offences, re-offending rates relating to different crimes, the escalation of offending, and the value that biometric retention has in the investigation of this escalation. It should be informed by any developments in the law in Scotland, England and the [ECHR][41]*'.*

We recommend that there should be oversight of the exercise of these provisions, however that may be achieved, through a court review mechanisms or the creation of a Scottish Biometrics Commissioner with an appropriate remit.

[40] The Explanatory Notes to the Bill do set out the background to schedule 2 but do not refer to paragraphs 6 and 7 which aim to make the consequential amendments in relation to Scottish criminal procedures.https://publications.parliament.uk/pa/bills/cbill/2017-2019/0219/en/18219en.pdf

[41] Report of the Independent Advisory Group on the Use of Biometric Data in Scotland

http://www.gov.scot/Publications/2018/03/9437/2

A new section 18GA is inserted to the 1995 Act to deal with the retention of further fingerprints. We suspect that references in this section to '*determination'* where they occur should for consistency read '*national security determination'* as that is the terminology referred to in the 1995 Act.

Clause 20 Port and border controls

Clause 20 confers powers to be exercised at ports and borders in connection with the questioning and detention of persons suspected of involvement in hostile activity for or on behalf of or otherwise in the interests of a State other than the UK. These are set out in detail in schedule 3 of the Bill. What seems to be envisaged are powers to stop, question and detain, processes that will operate consistently across the UK to provide the basis on which the police operate when dealing with a person who is or has been engaged in hostile activity. We can fully understand the reason why in relation to terrorism such processes should be consistent, but these do need to be proportionate.

How these processes sit with existing provisions under Scots law is unclear. It is assumed that these procedures will apply instead of the provisions currently governing arrests etc as set out under the Criminal Justice (Scotland) Act 2016 (2016 Act). It may be best to state this specifically in relation to detentions within Scotland as detention is not now the terminology that is adopted in Scotland (see section 1 of the 2016 Act).

Paragraph 1(6) of schedule 3 defines a 'hostile act' as an act that threatens national security, the economic well-being of the UK or is an act of serious crime. Certainly in relation to serious crime[42], this is a very wide definition as it would encompass, for sake of argument, any crimes capable of being prosecuted on indictment in the Sheriff and Jury court and above. There seems no qualification as to serious crime requiring to be connected in any way to economic well-being or national security. We recommend that there needs to be an appropriate qualification inserted so that the serious crime is linked in some measure to economic well-being or national security.

This is especially the case where under paragraph 1(1) of schedule 3, the examining officer may question whether 'the person appears to be' as well as 'has been'. There is no threshold test before such provisions come into operation. Paragraph 80 of the Joint Committee on Human Rights Legislative Scrutiny: Counter-Terrorism and Border Security Bill identifies fully therefore that that '*individual officers could simply act on a "hunch"'* rather than requiring focused reasonable suspicion. We believe that a threshold test needs to be considered.

We have concerns too regarding schedule 3 paragraph 3 (a) which requires the person to give the examining officer any information (unspecified) in the person's possession that is requested. Though it appears such rights are exercisable only for an hour until such time as the person requires to be detained,

[42] Paragraph 1(7) (d) does further define serious crime but still contain no link to national security or economic well-being of the UK.

there appears no access to minimum criminal rights from the outset (though these are in a limited way available as set out in paragraphs 30- 35 applying to Scottish detentions). These rights would include the basic rights which provide for the right to remain silent, access to advice from a solicitor and the requirements to provide only certain information (set out in 2016 Act).

There is a safeguard in paragraph 6(1) of schedule 3 only in respect of oral answers or information to exclude them from the ambit of admissible evidence in criminal proceedings presumably if obtained at any time during the 1 or 6 hour period of detention. There are exceptions where prosecution is of offences set out in paragraph 16 of schedule 3 which relate to obstruction, perjury or where the person says something different later on. For example, that seems to mean if the person refuses to answer any question and the matter proceeds to prosecution for obstruction that any reply would then be taken into account and could be used in evidence. Any so-called protection from prosecution seems exceptionally limited.

There is a right to consult a lawyer (schedule 3 paragraph 31(1)) but only after detention commences. Questioning cannot take place until after that consultation. Such rights to a lawyer can be:

- postponed (paragraph 31(3)),
- restricted on time grounds (paragraph 31(6)) or
- conducted in circumstances where a uniformed officer is present during the consultation (paragraph 32(2)).

The presence of the police during the interview is of major concern on a number of grounds not only as a breach of their human rights under Article 6 ECHR (right to a fair trial), there are significant implications from a legal standpoint of confidentially and privilege as well as professional practice standards.

We would reflect the earlier comments of the Society[43] that being able to speak with a legal representative in private is a fundamental human right that should not be infringed:

'It is key to the rule of law that people can discuss matters openly with their legal representatives so that the solicitor, advocate or is in a position to advise properly on what avenues are open to the person'.

These endorse the comments of Richard Atkinson of the Law Society of England and Wales in that:

'.. It fundamentally undermines what I would consider to be a cornerstone of our justice system—legal professional privilege. As you may know, legal professional privilege is a right that belongs to the client, not to the lawyer, and it is a right to consult with their lawyer and have the contents of those discussions, where they are a matter of advice, privileged and not to be disclosed to anyone. Clearly, if someone is

[43] Official Report, Counter- Terrorism and Border Security Public Bill Committee 26 June 2018 : c.49, Q103 https://hansard.parliament.uk/commons/2018-07-10/debates/f8f9d957-45d2-4eeb-9b06-b755b2dd368e/Counter-TerrorismAndBorderSecurityBill(SeventhSitting) Column 213

listening to that conversation who is not advising them, that conversation is no longer privileged. Therefore, that risks undermining the whole concept we have of privilege[44]'.

The amendments proposed at the Committee stage to Schedule 3 were rejected at the Committee on July 2018. We have significant concerns as the Bill stands that it provides inadequate protection to an accused person. which is in our view in breach of the ECHR Article 6 provisions (right to a fair trial) to allow access to a lawyer, to consult in private and to the impression that any lawyer who is subject to training would not act with the highest professional standards and inadvertently hand on information.

We urge the Scottish Government to consult on these regulations at the earliest opportunity.

We also note the reference to legal aid provisions for England and Wales. There will be a need for Scottish secondary regulations to support the appropriate payment for lawyers in Scotland. This was recognised at the Committee which confirmed that:

'the Scottish Government will bring forward any necessary secondary legislation to make equivalent provision in Scotland'[45]

We would urge the Scottish Government to consult on these regulations at the earliest opportunity.

In conclusion we would fully support the call for:[46]

'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[47]'.

For further information, please contact:
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[44] https://www.theyworkforyou.com/pbc/2017-19/Counter-Terrorism_and_Border_Security_Bill/01-0_2018-06-26a.26.1

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[46] https://www.theyworkforyou.com/pbc/2017-19/Counter-Terrorism_and_Border_Security_Bill/01-0_2018-06-26a.26.1 Paragraph 82 of the Legislative Scrutiny: Counter-Terrorism and Border Security Bill Paragraph 82 of the Legislative Scrutiny: Counter-Terrorism and Border Security Bill

[47] Paragraph 82 of the Legislative Scrutiny: Counter-Terrorism and Border Security Bill