Law Society of Scotland

UK Parliament 2nd Reading House of Lords

Counter-Terrorism and Border Security Bill 2018

3 October 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 provide a response to assist with the 2nd Reading of the Counter-Terrorism and Border Security Bill 2018 (Bill). We have concerns regarding the Bill which include:

- Whether the scope of the proposed new offences being created are clearly defined and proportionate as to the threat presented by terrorism and terrorist related behaviour
- The lack of clarity of the circumstances of any defence that would operate in relation to the proposed new offences such as obtaining or viewing items over the internet
- Any failure to deny access to a confidential interview with lawyer
- Emphasising that powers should only be exercised where necessary and proportionate.

Please see the following comments about the Bill 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].

Extent of the problem

We have not been able to identify where the existing counter-terrorism regime[2] prevents the police and other agencies from doing all they can to prevent, detect and prosecute terrorist offences.

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

[2] Max Hill QC Independent Reviewer of terrorism legislation refers to the regime as comprising the Terrorism Acts 2000 and 2006, the Terrorism Prevention and Investigation Measures Act 2011 and the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 (part 1 to be repealed in favour of the Sanctions and Anti-Money Laundering Bill).

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[3]. Some figures may assist in indicating that there has been increased activity.

- 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[4].
- In response to a parliamentary question[5] regarding convictions for terrorist-related offences in each of the last three years, the UK Government responded that there had been 'a 75 per cent rise in terrorism-related prisoners over the last three years' which we have set out in the Table below:

	May 2015	May 2016	May 2017	May 2018	Total convicted
Number of those convicted of terrorist activities	38	54	46	4	142

- Annex A of the Operation of Police Powers under the Terrorism Act 2000, quarterly update[6] available to 30 June 2018 indicates that there have been 351 arrested of whom 120 have been charged, 184 released without charge, 18 described with alternative action (not further specified) and 29 released on bail[7].

Purpose of the Bill

The Bill seeks to add new offences as well as updating existing offences and close what have been described as legal loopholes. That will ensure that the Bill is fit for the digital age dealing with the risks from terrorism that have become apparent. Max Hill QC, Independent Reviewer of Terrorism Legislation has described the Bill as making '*digital fixes*'[8].

There is a need to keep relevant legislation under review as:

- new technologies emerge and advance and

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

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

[5] Terrorism: Convictions: Written question - 141737https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-05-08/141737/

[6] This does not include Norther Ireland and does not distinguish Scotland.

[7] Operation of Police Powers under the Terrorism Act 2000, quarterly update to June 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739708/annex-a-flow-chart-jun2018.pdf

8 Public Bill Committee Second Sitting 26 June 2018

- where conduct is perceived as being criminal, there is a requirement for '*prosecutors…[to] sometimes shoehorn offending into other offences, but experience tells us that that can result in problems down the line*[9]'

Our concerns have been fully reflected in the parliamentary debates about these changes extending the scope of the criminal law. Reasons justifying making changes must be *'based on sound legal concerns about necessity and proportionality'*[10]*.* These changes risk affecting the balance that needs to be maintained between the right to privacy, the right to freedom of thought and belief and the right to freedom of expression.

The UK faces similar terrorist threats. In our written response[11] on the proposed UK-EU Security treaty in pursuance of the UK Government's proposal to negotiate a treaty between the UK, we highlighted the attacks at Glasgow Airport and the London West End terrorist attack by Doctor Bilal Abdullah[12]. Scotland is not exempt.

These attacks demonstrate exactly why there are concerns. The UK's ability to handle terrorist incidents has been strengthened with agreement to the Memorandum of Understanding of Handling of Terrorist cases. Jurisdiction in relation to such cases is shared by the prosecuting authorities within the UK[13] that covers Incidents arising in both jurisdictions that would otherwise have fallen to be prosecuted on both sides of the Scottish/English border. If and where terrorism cases arise that are cross border in nature, there are clearly substantial benefits to the public interest for such cases involving co-conspirators to be tried together in one country.

Specific comments on the Bill

The Bill covers issues of counter-terrorism and national security which under Schedule 5 of the Scotland Act 1998[14] 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. Most 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 procedures.

9 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)

10 Joanna Chery Column 680 https://hansard.parliament.uk/commons/2018-09-11/debates/156B51AC-2504-442B-BEE4-02B6E2FBB5D5/Counter-TerrorismAndBorderSecurityBill#debate-3600119

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

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

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 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.

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).

Scotland needs to play its part by committing to and being responsible regarding its role in relation to terrorism and security, internally and externally.

Criminal law, criminal justice, the courts, the police, the prison services, the prosecution service and the legal profession are all elements of devolved competence for Scotland. The 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) which 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[15] on the Bill does recognise the Lord Advocate's role. There were several references to the Crown Prosecution Service during the House of Commons debate on 11 September.[16] For Scotland, such references should be to COPFS.
- 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

[15] 15 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

[16] https://hansard.parliament.uk/commons/2018-09-11/debates/156B51AC-2504-442B-BEE4-02B6E2FBB5D5/Counter-TerrorismAndBorderSecurityBill#debate-3600119

These organisations apply existing terrorism laws though the exercise of advice will be undertaken within the devolved context. That includes decision making about prosecution depending on sufficiency of admissible evidence and 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 referred to above is an example of that sort of co-operation envisaged[17]:

"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

Legislation must keep pace with the increased use of the internet and information technology used in much criminality and affecting how many crimes are committed and detected. Crimes are now committed on a global scale that are not necessarily restricted to one jurisdiction. As the threat that terrorism becomes more complex, the enforcement organisations in Scotland and UK must have appropriate powers to deal effectively with these threats.

Consideration should be given to consolidation or codification of terrorism laws to avoid complexity[18] with all those concerned requiring to consult different pieces of legislation. This Bill will provide a further layer of complexity. The law needs to be set out as clearly as it can and preferably in one location under one relevant piece of legislation. Any extension or addition to offences need set out clearly and to be explicit. Transparency is vital. 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. Max Hill QC urged the Government to "pause before rushing to add yet more offences to the already long list' of terror offences, which were 'generated often in reaction to major events and in haste."[19]

[17]Paragraph at paragraph 5. 3 of the 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

[18] 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.

[19] 2017 Tom Sargant Memorial Lecture *in London October 2017*

Clause 1: Expressions of support for a proscribed organisation

Clause 1 aims to criminalise "expressions of support"[20] 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 amends 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[21]. 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 action of publication. Clause 1 takes that offence further.

The issues identified 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'[22] implying 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. Clause 1 as drafted lacks that precision as far as what the scope of expressions of support means.

The individual does not need deliberately or knowingly to encourage a person to whom the expression is directed to support a proscribed organisation to have committed an offence. In an earlier case[23], 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 in that discussion, criticism or explanation would not have been enough to contravene. But now if an '*expression of support'* arises in such circumstances, an individual could fall foul of the law.

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

[20] 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.

[21] R v Choudary and Rahman [2016] EWCA Crim 61

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

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

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[24]. The proposed clause goes beyond what is required for establishing criminality when the proportionality test is applied. Such rights should 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*…" [25].

How might the courts might seek to interpret such an offence? This was considered in relation to the 2006 Act. It considered if its provisions represented a proportionate restriction on freedom of expression under Article 10(2) of ECHR. The Court of Appeal declined to examine the 2006 Act but was clear that a conviction could not arise just because publication expressed a 'religious or political view, controversial or not'. Lord Judge[26] 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'"

Recent case law tends to reflect the courts' hostility towards incidents that support terrorism and stir up hatred. There represents a read across[27] to the issues underpinning the need for the creation/development of terrorist offences.

There is ongoing discussion in Scotland as the Scottish Government considers the recommendations in the Independent Review of Hate Crime Legislation Report by Lord Bracadale.[28] That 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"[29].

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

- Michael Meechan 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

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

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

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

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

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

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

slogans. That was described as "*deeply offensive and no reasonable person can possibly find the content acceptable in today's society."*[30]

- Alison Chabloz[31] 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 in 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 that the Government considers 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"*[32] on such debate.

There needs to be clarity when criminalising conduct. Criminalisation must be necessary (and go beyond the powers that can be exercised at present). It needs to be clear so that those offending are aware of the law, what it prevents and what constitutes criminal. Would those offending necessarily be aware of the identity of all the proscribed organisations when expressing an opinion?

"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."[33]

Clause 2: Publication of images

Online publication: 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 person is a member or supporter of a proscribed organisation. This prohibits more than under the existing section 13 of the 2000 Act. It makes 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 that such actions are indicative of an individual's involvement in other terrorist offences. They may be used to build a picture of any accused before being involved and invoking the more serious aspects of the Bill.

[30] 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/

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

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

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

The points made in relation to clause 1 above equally apply when considering if this clause satisfies the proportionality argument. There is a further argument given the width of this clause that historical images and journalistic articles may be designated as offending. Journalists objecting to this clause claim that it will prevent responsible journalism in the public interest[34].

An offence to enter or remain in a designated area: The Government have latterly included an additional provision to Clause 2. A designated area would be created to protect members of the public from a risk of terrorism and to restrict United Kingdom nationals and United Kingdom residents from entering or remaining in that area. Such area will be set out by regulations made under parliamentary affirmative resolution which correctly accommodates the need for parliamentary debate. A defiance to this offence is included under subsection (2) that:

"a person charged with an offence under this section to prove that the person had a reasonable excuse for entering, or remaining in, the designated area".

The justification for the creation of this new offence was outlined in the Government's debate on 11 September 2018. Other countries have already legislated in this area. A proposal regarding the inclusion of a sunset clause was rejected.

We have concerns about the defence. During the debate, 'reasonable excuse' was said to encompass activities such as:

"those in line with the European Convention on Human Rights,[including] access to family, the right to visit and all those things that give people their rights, but we are trying to introduce an important tool to make sure we deal with the scourge of the foreign fighter threat we now face here"[35].

That defence is not set out specifically in the legislation. It will be a matter for the relevant prosecution authority to decide whether prosecution is not merited in the public interest where there may be a reasonable excuse. Practice tends to indicate that prosecution tends to take place leaving the issue of the defence as a matter for the jury to consider if it is made out after the Crown has established the factual basis and discharged the evidential burden of proof of their case.

Under Scots law, there is no requirement during a police interview to provide such excuse since no adverse inference from caution exists. Such an individual could be prosecuted before such reason requires to be given and thereafter assessed by the jury.

There is a need to avoid making criminals of persons who may have been naïve. There are concerns that vulnerable persons may be criminalised such as those who may have been groomed or otherwise

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

35 The Minister for Security and Economic Crime, Mr Ben Wallace Column House of Commons debate Column 656 https://hansard.parliament.uk/commons/2018-09-11/debates/156B51AC-2504-442B-BEE4-02B6E2FBB5D5/Counter-TerrorismAndBorderSecurityBill#debate-3600119

convinced to travel under false pretences. Persons may be unable to leave an area once it has been designated or unaware that an area has been designated. They then fear returning home once they become aware that they have committed an offence by failing to return within the requisite time-period.

We would echo the concerns voiced during the debate[36].The reasonable excuse defence is a vital safeguard and should be set out specifically in detail as to what constitutes a reasonable defence bearing in mind the public interest factors.

Clause 3: Obtaining or viewing materials over the internet

Updating the law to take account of digitalisation is appropriate. The law should be simple and as easily understood as possible.

We support that the concept of a '*three click offence'* which seemed simple in practice is no longer proceeding[37]. Clause 3 of the Bill now amends Section 58(1) (a) of the 2000 Act so where a person views or accesses by means of the internet a document or record, he may be guilty of an offence.

This amendment seems worse in effect as now one click will suffice which considerably widens the offence. It now includes not just viewing but accessing material in any way. The use of word 'access' seems to have a particular concern as consulting an online definition within the context of computers means 'obtain or retrieve' (computer data or a file). We question if it would be better to adopt terminology which ensures that actions considered in relation to actual prosecution must be more than merely transitory.

A defence has been included which states:

"the cases in which a person has a reasonable excuse …..include (but are not limited to) those in which at the time of the person's action or possession, the person did not know, and had no reason to believe, that the document or record in question contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing an act of terrorism."

This could narrow the reasonable excuse defence as courts may consider that there is an absence of lack of terrorist intent within that excuse. There is a need to ensure that persons are not criminalised where people who view documents with no criminal intent such as academics and journalists.

Similar concerns as expressed above exist as 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, no-one would want to face the prospect of invoking the section 58 (3) defence of

36 Nick Thomas-Symonds (Torfaen) (Lab) https://hansard.parliament.uk/commons/2018-09-11/debates/156B51AC-2504-442B-BEE4-02B6E2FBB5D5/Counter-TerrorismAndBorderSecurityBill#debate-3600119 House of Commons Column 664

37 'Following the helpful debate in Committee and considerable discussions with the Labour party and its Front-Bench Members, I took the decision that it was best to drop the concept of the three clicks' Column 667 House of Commons debate https://hansard.parliament.uk/commons/2018-09-11/debates/156B51AC-2504-442B-BEE4-02B6E2FBB5D5/Counter-TerrorismAndBorderSecurityBill#debate-3600119

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.

A parallel has been drawn with viewing of indecent images which require actual proof of possession[38]. There has been a view expressed that extremist content[39] such as envisaged under clause 3 is not inherently harmful in the same way as child pornography is. 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?

We understand that the French Constitutional Court[40] 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, the same circumstances do not apply directly in the UK. There needs to be careful consideration given to when the conduct amounts to circumstances justifying prosecution.

We would also highlight possible issues about the 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.

Where the ranges of offences are being extended, though the courts do understand the question of reasonable defence, providing further definition would be useful. The reasonable defence excuse should be clarified in the light of the proposed expansion of these offences. It should continue to be available as was provided by section 58(3) of the Terrorism Act 2000. It should be widened so that a person charged with an offence under section 58 of the Terrorism Act 2000 as amended would be able to establish either that they had a defence of reasonable excuse or that their purpose was not connected with the commission, preparation of instigation of an act of terrorism.

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

[39] Corey Stoughton advocacy director of Liberty

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

Section 58 (3) of the Terrorism Act 2000 should be amended to take account of current legislative drafting practice which is gender neutral.

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

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

Clause 5 seeks to amend section 17[41] 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.

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.

[41] 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.

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 and requires to be sentenced. The actual sentence which is imposed is for 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. Given that terrorism législation applies similarly across England and Scotland, there is a need for consistency.

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) regarding 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[42]. The length of the notification requirement depends on the sentence imposed since such sentences can be for periods from 10 to 30 years. The reporting requirements apply automatically with no review.

Without a review mechanism, these appear potentially to contravene Article 8 ECHR rights (right to privacy). Is this justified?

The current notification scheme under the 2008 Act when applied to 10-year periods was held not to be in violation of Article 8. Whether the proposed extension of the notification scheme is compliant itself is the first question. We consider that there should be recourse to the court by way of a review mechanism as a safeguard.

Clause 12: Power to enter and search

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

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 assessing the risks posed by the person to whom the warrant relates.

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)[43].

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. There seems little justification for this extension, especially where there is no review mechanism. It will affect those that may not have been convicted of the 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[44] 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][45]*".*

[43] 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

[44] https://www.gov.scot/Publications/2018/03/9437/0

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

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

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

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 18 Persons vulnerable to being drawn into terrorism

We welcome the Government clause to provide a review specifically charged with looking at support of person vulnerable to be drawn into terrorism:

"… within 6 months of the passing of the Counter-Terrorism and Border Security Act 2018 [to] make arrangements for an independent review and report on the Government strategy for supporting people vulnerable to being drawn into terrorism".

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. In relation to serious crime[46], 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

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

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 the person requires to be detained, 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. 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 considered 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. Persons must be free to discuss matters with their solicitors in that:

"It is key to the rule of law that people can discuss matters openly with a legal representative so that the solicitor, advocate or barrister is in a position to advise properly on what avenues are open to the person. Clearly one would want to ensure that that was adequately protected[47]*"*

We 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 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[48]*'.*

Access to a lawyer is fundamental and we welcome the commitment of the Minister in the recent debate did undertake to consider the issue highlighted above on legal professional privilege[49]. These are important principles which should not be disregarded in that it should be set out clearly that such powers must be exercised where necessary and proportionate. These safeguards should be strengthened, providing the right to access a lawyer immediately and in private.

Schedule 4 Minor and Consequential Amendments

We also welcome the legal aid changes applying to Scotland included under schedule 4. These amendments secure that legal advice and assistance will be available to persons detained in Scotland under Schedule 3 to the Bill, or under section 41 of, or Schedule 7 to, the Terrorism Act 2000, without reference to the financial limits set out in section 8 of the Legal Aid (Scotland) Act 1986.

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47 Official Report, Counter-Terrorism and Border Security Public Bill Committee, 26 June 2018; c. 49, Q103.

48 https://www.theyworkforyou.com/pbc/2017-19/Counter-Terrorism_and_Border_Security_Bill/01-0_2018-06-26a.26.1

49 Nick Thomas- Symonds column 714 House of Commons debate on 11 September 2018 https://hansard.parliament.uk/commons/2018-09-11/debates/156B51AC-2504-442B-BEE4-02B6E2FBB5D5/Counter-TerrorismAndBorderSecurityBill#debate-3600119