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Note No 257

The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland presents its compliments to the Special Procedures Branch of the Office of the High Commissioner for Human Rights and has the honour to transmit the attached response of the UK to Joint Communication OL GBR 6/2018 from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

The Permanent Mission of the United Kingdom avails itself of this opportunity to renew to the Special Procedures Branch the assurances of its highest consideration.

7 September 2018



Office of the High Commissioner for Human Rights

## **Joint Communication from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression – Government Response**

Thank you for your letter of 17 July to the Foreign Secretary following your scrutiny of the Counter-Terrorism and Border Security Bill. I am replying as the Minister for Security and Economic Crime, with responsibility for the Bill. The Government has examined your report closely, and I note that you made a number of observations, to which we respond below.

It is the first duty of Government to protect its citizens. Last year 36 innocent people lost their lives and many more were injured in five terrorist attacks. Furthermore, the UK Government is certain that the two suspects charged for the Salisbury nerve agent attack are Russian Military Intelligence (GRU) officers. The attack was almost certainly approved outside the GRU at a senior level of the Russian state. It is right, therefore, that the Government takes steps to safeguard its people as they go about their daily lives free from the threats to their safety and security posed by terrorism and hostile state actors.

As you note, under Article 19(3) of the International Covenant on Civil and Political Rights, the right to freedom of expression may only be restricted as is necessary “for respect of the rights of reputations of others” or “for the protection of national security or of public order... or of public health or morals”. Given the nature of the threat we face, it is necessary to enable law enforcement agencies to intervene earlier with effective disruptions to stop terrorist plots, in order to protect the public from the great harm caused by a terrorist attack. This includes prosecuting criminal offences which are cast in ways which proportionately interfere with the right to freedom of expression; it is right that those who abuse that right, by encouraging others to commit acts of terrorism, should be liable under the criminal law.

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

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

Clause 1: Expressions of support for a proscribed organisation

**Clause 1 makes it an offence to express support of a proscribed organization, and in doing so being “reckless” as to whether a person to whom the expression is directed will be encouraged to support a proscribed organization under the Terrorism Act of 2000. Through this clause, the requirement of “inviting” support in the Terrorism Act 2000 is removed and replaced with “expressing support”. The offence can be punishable by up to 10 years imprisonment, or extended if clause 8 is adopted.**

**I am concerned at the criminalization of the mere expression of an opinion or belief that is deemed “supportive” of a proscribed organization, without any intent to invite support or to cause harm. The Act does not define what is meant by “supportive” and would cover a broad range of opinions. I am also concerned that this overbroad wording may apply to the activities of human rights organizations and associations, including those providing legal opinions defending the rights of members of a proscribed organizations. In the absence of a qualification of the expression, such as an outward facing actions, I am concerned that this offence may amount to a thought crime, whereby persons who aspire to the same political objectives as terrorist groups run the risk of prosecution. As a result, this would criminalize an individual’s association with terrorist views, not with terrorism.**

*Government Response:*

Clause 1 makes it clear that individuals who promote hatred and division by generating support for proscribed terrorist organisations will not be tolerated. As set out in our [ECHR memorandum](#) published by the Home Office alongside the Bill, the revised offence is rationally connected to this objective since it criminalises those who recklessly express supportive opinions or beliefs which they know may generate such support in others. Given the gravity of the threat posed by proscribed terrorist organisations, and the role that support for them has been shown to play in radicalisation and inspiration to commit acts of terrorism, this approach adopts a fair balance between the rights of the individual and those of the community at large. These restrictions are both necessary and proportionate, falling within the provisions of Article 19.3(b) and Article 20.2 of the ICCPR and Article 10.2 of the ECHR.

Clause 1 does not criminalise the mere expression of opinions or beliefs that are supportive of a proscribed organisation or its political aims (as you know, a political aim is part but not the sole definition of what constitutes terrorism-related activity in UK law). In order for the offence to be committed it must also be proven that the individual was reckless as to whether another person will be encouraged to support the organisation. The concept of recklessness in the criminal law is familiar to the courts, and is well understood as a result of clear case law established by the House of Lords in 2003 in the case of *R vs G and another*. This ruling provided that a person acts recklessly when he is aware that, in the circumstances, there is a risk that his conduct will result in

the illegal outcome (in this case the encouragement of others to support a proscribed terrorist organisation), and he nonetheless engages in the conduct in circumstances where a reasonable person would not.

In the case of *R v Choudary and Rahman* [2016] EWCA Crim 1436, the Court of Appeal agreed at paragraph 46 with the judge of the trial that:

"The Oxford English Dictionary's definition of the noun 'support' includes the provision of assistance, of backing or of services to keep something operational: examples of the sort of practical or tangible assistance which defence counsel submit is the true subject of the section 12(1) offence. But the dictionary definition also includes encouragement, emotional help, mental comfort, and the action of writing or speaking in favour of something or advocacy. In everyday language, support can be given in a variety of ways, and it seems to me that it is for a jury to decide whether the words used by a particular defendant do or do not amount to inviting support. In its ordinary meaning, "support" can encompass both practical or tangible assistance, and what has been referred to in submissions as intellectual support: that is to say, agreement with and approval, approbation or endorsement of, that which is supported.

From the point of view of the proscribed organisation, both types of support are valuable. An organisation which has the support of many will be stronger and more determined than an organisation which has the support of few, even if not every supporter expresses his support in a tangible or practical way. The more persons support an organisation, the more it will have what is referred to as the oxygen of publicity. The organisation as a body, and the individual members or adherents of it, will derive encouragement from the fact that they have the support of others, even if it may not in every instance be active or tangible support. Hence in my judgment, it is a perfectly understandable that Parliament, in legislating to give effect to the proscription of a terrorist organisation, prohibits the invitation of support for that prohibited organisation without placing any restriction upon the meaning of the word 'support', other than to exclude conduct caught in any event by a separate provision of the Act."

As such, this Bill will not seek to further define what is meant by the term 'support'.

I note your concern that, as drafted, clause 1 may catch people who are involved in providing legal opinions defending the rights of members of proscribed organisations, or otherwise advocating for such individuals. However, I do not agree that this is a likely risk. It is extremely difficult to conceive of a scenario in which a lawyer advising or representing a client in criminal or civil legal matters connected with their membership of a terrorist organisation, or an NGO advocating for or providing support to such an

individual in respect of their treatment, would have a legitimate professional need to express their own opinion in support of that organisation (as opposed to representing their client's views, advising their client on legal matters, or promoting the fair treatment of their client), in circumstances where they are aware there is a risk that in doing so they will encourage others to support the organisation and in which a reasonable person would not do so. The offence would not be committed by making representations on behalf of the client to the effect that they are innocent of charges related to membership of the organisation or on related legal matters, or by seeking to defend their rights or promote their fair treatment.

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

The Government does not agree that, in a case where a person does not apply for the deproscription of an organisation but nonetheless wishes to debate the merits of its proscription, clause 1 is insufficiently clear as to the lawful boundaries of such a debate. The recklessness test in clause 1 is well-established, and well-understood by the courts, as set out above. An example of a lawful statement might be one to the effect that a proscribed organisation is not, as a matter of fact, concerned in terrorism, and therefore does not meet the legal test for proscription: whereas an example of unlawful statement, which recklessly risks encouraging others to support the same organisation, might be one praising its terrorist activities and suggesting that it should not be proscribed so that individuals in the UK could be free to better emulate such terrorist conduct.

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

The Bill will not make it an offence to hold private views supportive of terrorism or of the same political objectives as a terrorist organisation, or to merely aspire to be a terrorist without taking some active step towards that aspiration or to promote it to others. Indeed, the Independent Reviewer of Terrorism Legislation, Max Hill QC, said in oral evidence to the House of Commons Public Bill Committee that "I was worried that we might come

across new offences of aspiration for terrorism... but I am pleased to see that we do not have them". The Bill does not make thought crime a reality, and it will not be an offence to merely hold any belief; rather it will be an offence to express certain beliefs in a way which may encourage others to engage in or to provide support to terrorism.

### Clause 2: Publication of images

**Clause 2 criminalizes the publication of an image of an item of clothing or "any other article" in such a way or circumstances as to arouse "reasonable suspicion" that a person is member of supporter of a proscribed organization. Clause 2 extends the offence under section 13 of the Terrorism Act of 2000 which criminalizes the wearing of clothing in a public place such as to arouse suspicion of membership of a proscribed group. Unlike section 13, however, the new offence replaces "public place" with "publish". As a result, the offence is one of publication and behaviour in the streets. The offence is punishable by 6 months imprisonment. The government has noted that the new offence is intended to cover circumstances in which individuals take photos or film themselves against the background of an ISIS flag.**

**I am concerned that the new offence is overly broad, and falls short of any form of incitement to violence or intent to cause harm. Similarly, the offence could lead to prosecution of those who are documenting human rights abuses, including journalists, activists and academics. The provision as currently drafted would also criminalize the publication and display of historical photographs.**

### *Government Response:*

Clause 2 amends section 13 of the Terrorism Act 2000, under which it is currently an offence to display an article or wear an item of clothing in a public place, in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member of supporter of a proscribed terrorist organisation. Section 13 does not require any incitement or intent to be proven, either in its current form or as it will be amended by clause 2. The maximum sentence on conviction is six months' imprisonment. Clause 2 adds to this a new offence in subsection (1A), criminalising the publication by a person of an item of clothing or any 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.

The existing section 13(1) offence will already cover many cases in which a person publishes an image of an article in such circumstances, but it is not clear that it will always cover a case where an image, despite being published and therefore made available to the public, depicts an article which is not situated in a public place. Clause 2 is intended to put this beyond doubt and to close the gap, by making it an offence to publish – that is, to make available to the public - an image of an item of clothing or other article, without reference



to the location of the item depicted within the image, in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed terrorist organisation. This will update the section 13 offence for the digital age, by ensuring that it fully covers the publication online of images which it would already be unlawful to display in a public place.

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

This provides a clear and effective safeguard for legitimate publications. Where, for example, a journalist publishes the image of a Daesh flag in the course of legitimately reporting a news story on the conflict in Syria, or an academic includes such an image in published research on the group (or similarly a historical image associated with a proscribed organisation), it would be clear to any reasonable person that they are not themselves a member or supporter of the organisation. Such individuals will therefore have a very high level of certainty that their activities will not be covered by clause 2 (as they have been able to enjoy a similar certainty in relation to the existing offence at section 13(1)).

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

### Clause 3: Obtaining or viewing material over the internet

**Clause 3 criminalizes the viewing or streaming, on three or more occasions, of material of kind “likely to be useful to a person committing or preparing an act of terrorism”. This offence would be punishable by up to 15 years imprisonment if clause 6 of the Bill were adopted. The clause amends section 58 of the Terrorism Act of 2000.**

**I am concerned that this provision as currently drafted is applicable to a wide range of legitimate activities, including those by investigative journalists, academics or individuals. The right to freedom of expression, includes “the right to seek, receive and impart information and ideas of all kinds”. I am concerned that clause 3 covers a wide range of information and material, and that the criteria that it is “useful” to a person preparing an act of terrorism is not sufficiently precise for the purpose of criminalization. The mere act of viewing a website is not**

**sufficient to establish an intent to commit acts of terrorism. While section 58 of the Terrorism Act of 2000 provides for a “reasonable excuse” defense, I am concerned that this is not sufficient and that the provision may lead to a chilling effect on the right to seek information online. I am also concerned that the offence does not comply with the necessity requirement under international human rights law, and that the proposed sentence is disproportional.**

*Government Response:*

Clause 3 amends section 58 of the Terrorism Act 2000, under which it is an offence to collect, make a record of or possess information likely to be useful to a terrorist. This includes where the information is accessed by means of the internet. Clause 3 amends the existing offence so that it also covers viewing such information online in circumstances where a permanent record is not made, for example by viewing a webpage, or by streaming a video or audio recording without a record of that page, image or recording being permanently downloaded onto the device. Section 58 does not (either now or as it will be amended by clause 3) require an intent to commit acts of terrorism to be proven.

It is important to emphasise that clause 3 does not broaden or change in any way the type of information covered by the section 58 offence, which is well understood by the police and the courts as the offence has been operating successfully since 2000. It is solely focused on the practical means by which the information is accessed. This will update the offence to ensure that it properly reflects modern technology and online behaviour, and will close a significant gap which is currently inhibiting the police and the courts from acting against people who view potentially very harmful terrorist material online, which it would already be illegal for them to download and store on the same device.

The Government welcomes the broad acceptance of the need to update section 58 for the digital age in Parliamentary debates on the Bill so far. We recognise that concerns have been raised, in particular about the clarity of the requirement to view material on three or more occasions, which was intended to ensure proportionality and to provide a safeguard for those who access such material inadvertently. Having reflected on these points, the Government has tabled amendments to the Bill for consideration at Report stage in the House of Commons to remove this provision and replace this with an equivalent, but clearer and more certain, safeguard for individuals who may inadvertently access terrorist material. This extends the reasonable excuse defence, making it clear on the face of the legislation that the offence will not be committed if the person does not know, and has no reason to believe, that the information they are accessing is likely to be useful to a terrorist. Once this defence is raised by a defendant, the burden of proof will fall to the prosecution to disprove it to the criminal standard, i.e. beyond reasonable doubt.



However, as to the application of the reasonable excuse defence to those with a legitimate reason to access material likely to be useful to a terrorist, the Government does not agree that the current formulation at section 58(3) is insufficient or unclear. This has been in force since 2000, and during much of this period the normal means by which an academic or journalist would access terrorist information online have been those currently covered by section 58, that is by downloading or otherwise making a record of it, rather than by streaming it. It is only in more recent years that streaming information online has become prevalent alongside downloading or otherwise recording the information, and indeed I would expect that journalists and academics engaged in legitimate research today would in many cases still wish to make a record of information they discover through streaming it.

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

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

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

And at paragraph 83 the Committee found that:

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

Clauses 6, 8, 9 and 10: Sentencing provisions

**Clauses 6, 8, 9 and 10 provide for harsher sentences for certain offences. Clause 6 increases maximum sentences for certain offences from 10 to 15 years. The offences include collection of information (section 58 of the Terrorism Act of 2000); and encouragement of terrorism and dissemination of terrorist publications (sections 1 and 2 of the Terrorism Act of 2006).**

**Clause 8, 9 and 10 add terrorist offences to the list of offences for which extended sentences can be given in certain circumstances under the Criminal Justice Act of 2003. These include: inviting support for a proscribed organization; collection of information; encouragement of terrorism and dissemination of terrorist publications.**

**I am concerned that the increased sentences are disproportionate. The increased sentences equate information, collection and dissemination as being just as harmful as collecting materials for a bomb under the Terrorism Act of 2000.**

*Government Response:*

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

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

In the modern digital age, individuals who view or disseminate terrorist material, or who encourage terrorism, pose an increased risk of quickly moving to attack planning themselves or of radicalising others to do so. We have seen an increase in low-sophistication terrorist plots which are inspired rather than directed, and in attack operatives who are self-radicalised and self-trained without necessarily having had significant direct contact with terrorist organisations. The division between preliminary terrorist activity and attack planning is increasingly blurred, and the move from the type of activity covered by these offences to planning or launching an attack can happen quickly and unpredictably, with little or no warning, particularly in the case of spontaneous or volatile individuals.

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

help to protect our communities. Extending the scope of the extended determinate sentence (EDS) and sentences for offenders of particular concern (SOPC) to cover further terrorism offences will ensure that offenders are not released automatically half way through their sentence if they continue to pose a risk to the public and that they can be subject to extended periods of supervision on licence.