



UK Mission to the
United Nations
in Geneva

UK Mission Geneva
PO Box 6
Avenue Louis Casar 58
1216 Cointrin GE

Tel: 022 918 2363

Note No 258

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 7/2018 from the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

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 human rights and fundamental freedoms while countering terrorism – 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 I respond below.

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

As you note, “terrorism poses a serious challenge to very tenets of the rule of law, the protection of human rights and their effective implementation”. The Government has a duty not only to protect the rights of those who are investigated and prosecuted, but to protect those who may be targeted by terrorist and hostile state activity. Given the nature of the threat we face, enabling law enforcement agencies to intervene earlier to stop such plots is both necessary and proportionate to protect the public from the great harm caused by a terrorist attack, and this includes by restricting the right to freedom of expression if in doing so an individual would encourage others to commit acts of terrorism.

A handwritten signature in black ink, appearing to read "Ben Wallace", is centered within a light gray rectangular box. The signature is written in a cursive style 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 amends Section 12 of the Terrorism Act 2000 by criminalizing expressing “an opinion or belief that is supportive of a proscribed organization”, to the extent such expression is “reckless” as to whether it will “encourage support” for the organisation in question. The amendment expands the scope of Section 12 in that it removes the requirement that the expression “invite support” for the organization. The draft Bill does not clarify the criteria for expression to be considered “supportive”, a shortcoming that has been highlighted by a number of stakeholders contributing to the debate, including the Joint Committee on Human Rights. Furthermore, the draft Bill lowers the threshold for the requisite *mens rea* from intentionally or knowingly calling for support for a proscribed organization to being reckless as to the effects of the expression on those to whom it is directed, without setting clear criteria detailing what “encouraging support” implies and how such result is assessed or measured. (Para 6.)

I would like to underscore that the rights to freedom of expression extends “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.” While freedom of expression is a qualified right, all restrictions to the right must be interpreted narrowly. As clarified by the European Court of Human Rights, the necessity of any restrictions to the right to freedom of expression must be ‘convincingly established’ pursuant to a ‘pressing social need’. Relevant measures must further be proportionate to the protected interest. (Para 7.)

I therefore urge that the provisions be brought in compliance with the United Kingdom’s obligations under Articles 19 and 20 ICCPR as well as Article 10 ECHR. (Para 8.)

I note that the United Kingdom is cognizant that the provision restricts Articles 8, 9 and 10 ECHR but argue that such restriction is justified. I however join others in expressing concern that public interest speech as well as other legitimate activities, including those undertaken by civil society, human rights organizations, journalists and academics may be deemed as falling within the scope of the provision, “risking a ‘chilling effect’, not only on journalistic and academic freedoms, but also the inquisitive and the foolish mind” as the Joint Committee [on Human Rights] warns. (Para 9.)

I note that Clause 1, as it currently stands, may not comply with the requirement of foreseeability as established under international human rights law. I further stress in this respect that lowering the required *mens reas* to recklessness is particularly problematic in the case of an offence criminalizing expression as it further reduces the foreseeability element for all stakeholders concerned by the provision. (Para 11.)

I also join the Independent Reviewer of Terrorism Legislation and others in noting that encouragement of terrorism is already criminalized in the Terrorism Act of 2006 and calls for a review of the necessity for introducing this additional provision. (Para 12.)

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, the new offence is rationally connected to this objective since it criminalises those who recklessly express supportive opinions or beliefs which they know may generate such support in others. Given the gravity of the threat posed by proscribed terrorist organisations, and the role that support for them has been shown to play in radicalisation and inspiration to commit acts of terrorism, this approach adopts a fair balance between the rights of the individual and those of the community at large. 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.

The recklessness test in clause 1 is well-established, and well-understood by the courts. In this context it would require the prosecution to prove that a person subjectively knew that expressing an opinion or belief in support of a proscribed terrorist organisation in the particular circumstances would risk causing someone else to support the organisation, and that they nonetheless expressed it where a reasonable person would not do so. On this basis 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 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 is very difficult to conceive of a situation in which a human rights organisation, journalist or academic might have a valid reason to make a statement falling into the latter, unlawful, category in the course of their legitimate activities, or might struggle to identify such a statement.

However, it would be extremely difficult to define on the face of the legislation, in sufficiently 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.

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'.

Under section 1 of the Terrorism Act 2006 it is an offence to directly or indirectly encourage another person to commit, prepare or instigate an act of terrorism. Section 12 of the 2000 Act is materially different, as it concerns the invitation - or, as amended by clause 2, the reckless encouragement - of support for a proscribed terrorist organisation, rather than of involvement in acts of terrorism. Such conduct will not necessarily be caught by section 12. The two offences, whilst appearing similar in some respects, do cover different ground, and are both needed to ensure that we have comprehensive powers to protect the public from the full range of harmful terrorist activity.

Clause 2: Publication of images

I am concerned that Clause 2 runs the risk of criminalizing a broad range of legitimate behaviour, including reporting by journalists, civil

society organizations or human rights activists as well as academic and other research activity. I consider that the provision falls short of the requirements of the principle of legality under Article 15 ICCPR and Article 7 ECHR. I am particularly troubled by the intention to attach serious criminal consequences (including imprisonment) to conduct that merely raises “reasonable suspicion” without requiring that membership in or concrete support of proscribed organizations is actually established. (Para 14.)

Government Response:

Clause 2 amends section 13 of the Terrorism Act 2000, under which it is currently an offence for a person 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 or supporter of a proscribed terrorist organisation. 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 image 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.

This amended offence is not intended to cover membership or provision of concrete support for proscribed organisations, which are covered by other offences attracting greater maximum penalties. Rather than membership of the organisation, the conduct covered by existing section 13(1) is the wearing or display of the article in question in a public place in such a way as to suggest to the reasonable bystander that the individual is a member or supporter of that organisation. For example, waving the flag of a terrorist organisation at a demonstration in support of a cause linked to the organisation is not in itself proof that the individual is a member, but it is nonetheless harmful conduct in its own terms, which the Government considers it appropriate to criminalise.

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 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 believe that there is a risk of legitimate publications being caught by the amended offence, including historical or journalistic publications or human rights activists. 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 legitimately 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 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

I would like to stress that the mere consultation of material that is “likely to be useful to a person committing or preparing terrorist acts” cannot be persuasively qualified as conduct implicating a sufficiently pressing social need requiring criminalization. The provision is criminalizing conduct that is far removed from any recognized offence and lacks a clear *actus rea*, an essential element of a criminal act. In particular, as the Government specifies, “the offence would be committed whether the defendant was in control of the computer or was viewing the material, for example, over the controller’s shoulder.” It is not clear under what circumstances would this result in the prosecution of someone who was merely present while the proscribed material was being viewed. (Para 16.)

In this context, I further note the danger of employing simplistic “conveyor-belt” theories of radicalization to violence, including to terrorism... It also carries a clear risk to the freedom to seek information, and may penalize journalism, academic and other research and the work of civil society and human rights advocates. Whilst the defence of reasonable excuse may mitigate some of the adverse effects of the law, the potential to chill free speech and the right to seek, receive and impart information remains undeniable, especially as those coming within the purview of the law may nonetheless be subjected to “the stress and uncertainty of a criminal trial”. (Para 17.)

The offences are broadly defined, falling short of the principle of legality requiring a requisite level of legal certainty in case of criminalization of conduct as well as of the principles of necessity and proportionality. (Para 18.)

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; rather 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.

I do not agree that it is inappropriate or unnecessary to criminalise the collection, possession or viewing of material likely to be useful to a terrorist. We should remember that this is potentially very harmful material. It may include instructions on bomb-making or on the use of knives or vehicles to commit mass murder, propaganda published by terrorist organisations, or the incitement of hatred and violence by extremist preachers. The police and security services report that viewing this kind of terrorist material through the internet, often in large volumes, is a very common part of the process of radicalisation. This is particularly so in the case of individuals who plan or commit terrorist attacks, for whom such material will often have played a significant part in their inspiration and motivation. This is not a 'simplistic' theory of radicalisation, rather it is the experience and the expert view of those most closely involved in managing the risk posed by such radicalisation. We make no apology for ensuring that our laws are effective in protecting the public, and that they properly reflect the modern world and the threats we now face.

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, and following discussions with the Opposition, we have tabled amendments to the Bill 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."

Although you note the danger of using "conveyor-belt" theories of radicalisation, operational experience has shown that accessing such material online is a very common feature of radicalisation. Many terrorist investigations have seen individuals quickly radicalised to the point of planning attacks partly as a result of the volume and nature of terrorist material that they have accessed online. This is, therefore, a serious offence, and it is therefore imperative that we update it to ensure that we can take action earlier in an investigation before an individual has progress to planning attacks.

Clause 11: Additional notification requirements

I note that the notification regime interferes with affected persons' right to privacy, family life and potentially other interlinked rights. For this reason, the measures' necessity and proportionality must be demonstrated. Family members may be significantly adversely affected by such measures given the co-dependency of financial resources and financial instruments for many and given the gender profiles of RTOs there may be a distinctly gendered effect produced by such registration requirements. Moreover, its automatic applicability casts doubt on the necessity of imposing such measures in each individual case, while the lack of a review further raises issues with respect to proportionality. I therefore recommend setting up robust safeguards that adequately address the risk of arbitrary interference involved by the intrusiveness of the measures. In addition, I recommend the establishment of clear 'off-ramps' for such notification measures if an offender is socially integrated and rehabilitated and poses no further threat. (Para 20.)

Government Response:

The notification requirements are not unduly onerous, and apply only to those convicted of serious terrorism-related offences and sentenced to terms of imprisonment of 12 months or more. They do not prohibit any particular activity, including financial activities, rather they require notification of certain details to the police on an annual basis or as and when those details change. These requirements will therefore not have a significant adverse effect on family members. The Bill expands the information that registered terrorist offenders are required to notify, bringing it into line with the requirements on

registered sex offenders under the Sexual Offences Act 2003, with the further addition of a requirement to provide details of vehicles (the use of vehicles has of course been a significant feature of several recent terrorist attacks).

Unlike the requirements under the Sexual Offences Act 2003, terrorist offenders cannot be subject to the notification regime indefinitely. The notification period is graduated, based on the length of sentence awarded, with a maximum period of 30 years reserved for the most serious offenders who receive sentences of 10 years or more. For sentences of between 1 and 5 years the notification period is 10 years, and for sentences of between 5 and 10 years the notification period is 15 years. The Government considers that these periods are proportionate, given the seriousness of the offending and the gravity of the risks which the notification requirements are intended to mitigate, set against the low level of intrusion arising from the requirements. We do not agree that the modest expansion to the information which must be notified as a result of the Bill will increase the level of intrusion disproportionately. Given this, the Government also does not agree that a review mechanism is necessary to ensure proportionality. The courts have considered the notification requirements under the 2008 Act in their current form, including the notification periods and the absence of a review, and have found (in *R (on the application of Irfan) v Secretary of State for the Home Department* [2012] EWCA Civ 1471) them to be lawful.

These notification requirements will apply to all registered terrorist offenders, irrespective of their protected characteristics, including gender. The Government believes that the Bill does not discriminate against any individual on the basis of protected characteristics.

Clause 12: Power to enter and search home

Clause 12 confers broad authority to conduct warrant-based searches of RTOs' addresses or addresses where they may be found. This clause does not require that the RTO have breached or is believed to have breached any notification requirement. Having the possibility to employ such intrusive measures without any suspicion of wrongdoing, merely "for the purpose of assessing the risks posed by the person to whom the warrant relates" raises serious concerns as to the necessity and proportionality of the measures. The broad authority may further sustain stigma for ex-offenders, posing barriers to successful re-integration, employment opportunities, and normal family life. Such outcomes are not conducive to the prevention of terrorism and may compound exclusion and ex-offender discrimination.

Government Response:

The Government recognises that the power of entry and search can represent a significant intrusion, and should be exercised cautiously and only when necessary and proportionate. Of course, we should also recognise that the notification requirements are intended to provide the police with a means of

managing the potentially high level of risk that can be posed by convicted terrorists.

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

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

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

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

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

Clause 17 and Schedule 2 extend the period of time for which biometric data (fingerprints and DNA samples) can be retained by the Government. The changes sought by this clause would allow the government to retain, for a period of three years and without the consent of the Commissioner for the Retention and Use of Biometric Material (Biometric Commissioner), the biometric data of individuals who were arrested in connection with a terrorist offence, even if subsequently not charged or convicted of such. The draft Bill also seeks to increase the national security determination extension for retention from two to five years. At no point does the Government have an obligation to notify the subject of the national security determination. The Government has not provided evidence supporting the necessity of the newly proposed broad powers for public order or national security purposes or that the current retention period is insufficient. Furthermore, the removal of the oversight exercised by the Biometric Commissioner further raises the risk of arbitrary, including discriminatory, use of the power, in violation of the United Kingdom's human rights obligations, including those relating to the right to privacy under Article 17 of the ICCPR and Article 8 ECHR. (Para 22.)

Government Response:

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

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

The recent case of Khalid Ali highlights the importance of such powers. Ali's fingerprints had been taken several years prior to his eventual conviction for the most serious terrorist activity, which was directly facilitated by the police's ability to retain his fingerprints over the intervening period, of course on a lawful basis and subject to oversight by the Biometrics Commissioner.

The Bill removes the anomaly that the same three-year retention period currently provided following an arrest under the Terrorism Act 2000 is not available where the same individual is arrested under the general power of arrest in the Police and Criminal Evidence Act 1984 (PACE) in relation to the

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

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

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

Given the nature of these cases, it would not be appropriate to notify subjects of an NSD. This would effectively mean disclosing to suspected terrorists that they are of interest to the police and that there is a degree of intelligence coverage of them, thereby potentially compromising sensitive sources or ongoing investigations, with all the national security consequences that would flow from that. This would not be in the public interest.

The retention of biometric material will continue to be subject to appropriate checks and balances, including case-by-case approval of NSDs as well as oversight of the entire system by the independent Biometrics Commissioner, who is required to report to the Home Secretary on an annual basis (and the Home Secretary is required to publish his reports). The Commissioner has himself recommended a number of the changes we are making, and has confirmed that he supports the measures in the Bill.

Clause 18

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

Clause 18 of the Bill amends Sections 36 and 38 of the Counter-Terrorism and Security Act 2015, thereby extending the scope of the Prevent Strategy by authorizing local authorities, in addition to police, to refer individuals considered as vulnerable to being drawn into terrorism to so-called “Channel panels”. (Para 23.)

I note the calls by diverse stakeholders, including the Joint Committee on Human Rights, international human rights mechanisms, such as the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance as well as civil society to conduct a comprehensive and independent audit of the Prevent strategy. Against this background, I recommend that the United Kingdom launch an independent review of the Prevent Strategy and that such review incorporates a comprehensive assessment of the Strategy’s human rights impact. (Para 24.)

Government Response:

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

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

Clause 20 and Schedule 3

Clause 20 and Schedule 3 of the Bill provide for stop and search as well as detention powers at ports and borders to determine whether an individual is or has been involved in “hostile activity for, on behalf of, or otherwise in the interest of, a State other than the United Kingdom”. The Bill provides for a broad definition of “hostile acts” as any act that threatens national security, the economic well-being of the United Kingdom, or is an act of serious crime. It does not provide for a definition of “national security” or “economic wellbeing” nor does it delineate the scope of acts that may be deemed as threats to these interests. While the government contends that the terms “take their ordinary meaning”, the lack of proper guidance raises issues regarding the level of foreseeability of the law, both for implementing authorities and individuals impacted by their implementation. The powers can be exercised without any cause or suspicion as to the respective person’s

involvement in hostile activity, thus further broadening the discretion conferred upon national authorities. (Para 25.)

Any person subject to this power must provide any information or document requested by the officer under pain of committing an offence – the penalty for which can be imprisonment and/or a fine – and may have their personal belongings copied and retained, including belongings containing privileged information. Access to a lawyer is limited in case questioning lasts for under an hour and even afterwards the person can only consult with the lawyer in the presence of a police officer. (Para 26.)

The exercise of these powers constitutes an interference with a series of rights, including the rights to privacy, freedom of expression, freedom of movement, the right to liberty and security of person and others. The discretion conferred upon authorities is very broadly defined with insufficient safeguards against abusive implementation and with limited oversight. In this respect, I would like to warn, in particular, of the risk of such powers being applied in a discriminatory fashion including race, colour, language, religion, or national origin. (Para 27.)

Government Response:

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

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

Introducing a reasonable suspicion test for the exercise of the powers under Schedule 3 would fundamentally undermine the capability of the police to determine whether that person appears to be or has been involved in hostile activity. For instance, the police may be in possession of ‘incomplete’ intelligence where the nature and extent of the threat that a person potentially engaged in hostile activity poses to the public, will not necessarily be clear.

This was emphasised by Assistant Commissioner Neil Basu of the Metropolitan Police who gave evidence to the Bill Committee in the Commons. The police might be aware that a particular travel route is being exploited by hostile actors, or even have credible intelligence to suggest a hostile actor is intending to enter the UK on a specific flight. If a suspicion threshold was to be introduced, the police would be unable to act on that intelligence and utilise it to detect and disrupt threats from hostile actors.

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

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

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

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

And again, at paragraph 78:

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

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

Similarly, the Supreme Court in the case of *Beghal v Director of Public Prosecutions* said in paragraph 89 of the judgment that:

“there is no evidence that the Schedule 7 powers have been used in a racially discriminatory fashion. Indeed, discriminatory use is specifically prohibited by the code [of practice]”.

This will be mirrored in the Schedule 3 Code of Practice to ensure that the powers under Schedule 3 are not used in a discriminatory fashion.

On the issue of an examinee’s access to a lawyer, the provisions of Schedule 3 mirror those applicable to those examined under Schedule 7 to the 2000 Act, by entitling an individual who has been formally detained as part of their examination, access to a solicitor, on request, and at any time. That entitlement will be explained in full by the examining officer as soon as a decision has been made to detain an individual. The individual will also be provided with a ‘notice of detention’ after they have been detained, which explains their rights and duties. An example ‘notice of detention’ for Schedule 3 will be included as an annex to the draft Code of Practice that we intend to publish prior to Lords Committee (the notice for Schedule 7 to the 2000 Act can be found at [Annex A of the relevant Code of Practice](#)).

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

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

In the vast majority of cases, there will be no reason to interfere with this right. On rare occasions, however, there may be a need for the examining officer or a more senior officer to impose certain restrictions. For instance, the Bill would allow an examining officer to continue to examine the detainee (and not postpone questioning until a consultation has taken place) or to require the detainee to consult a solicitor via telephone or video conference, where the officer reasonably believes that permitting them to exercise their right would prejudice the determination of the relevant matters. These restrictions are to mitigate against the possibility of an examination being obstructed or

frustrated as a result of a detainee using his right to a solicitor, e.g. by insisting on consulting a solicitor who he knew couldn't arrive within the 6-hour examination window or is unavailable by another means.

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

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

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

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