

COUNTER-TERRORISM AND BORDER SECURITY BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS
SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum supplements a memorandum dated 6 June 2018 prepared by the Home Office which addressed issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Counter-Terrorism and Border Security Bill. This supplementary memorandum addresses ECHR issues that arise in relation to a Government amendment to clause 2 of the Bill tabled for Commons Report stage.

Evidence seizure power

2. Section 13(1) of the 2000 Act provides that a person in a public place commits an offence if they wear an item of clothing, or wears, carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that they are a member or supporter of a proscribed organisation. The amendment will add a power for a constable to seize an item of clothing or any other article if the constable reasonably suspects that it is evidence in relation to an offence under section 13(1) and is satisfied that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.
3. The power allows a constable to require a person to remove the item of clothing or other article if the person is wearing it but the constable is not empowered to seize, or require a person to remove, an item of clothing being worn next to the skin or immediately over a garment being worn as underwear.
4. The power is needed because of the particular context of policing public gatherings at which people display articles, or wear clothes or articles, which may arouse a reasonable suspicion that they are members or supporters of a proscribed organisation. In some cases, the circumstances may be such that the conditions for arrest under the power in section 24 of the Police and Criminal Evidence Act 1984 are not satisfied, in which case the power in section 32 of that Act to seize evidence is unavailable because that is contingent on a person having been arrested. In other cases, the circumstances may be such that arrest (and subsequent evidence seizure) is possible but police may actively choose not to arrest the person at that time, for fear of stoking unrest. Instead the police may choose to report a person for summons; that is, the police provide information which alleges the crime before a magistrate, resulting in a summons being issued, which requires the accused to attend court on a specified day to answer the allegations in the information. In these

circumstances, where no arrest is made at the time of the alleged offence, there is significant doubt about the availability of the police's existing evidence seizure powers and the new power creates statutory authority for evidence seizure in these circumstances.

Article 8

5. Absent a legal authority to do so, the seizure of something carried or worn by another person is a trespass to that person, and consequently any power authorising the seizure represents a significant intrusion into that person's Article 8 right to private life. In the case of the seizure of clothing worn by a person, the Article 8 intrusion is particularly acute.

Article 9

6. A person wishing to display or wear items of clothing or any other article associated with a terrorist group, in exercise of that person's right to manifest his or her religion or belief, will be restricted in doing so where the power is exercised to seize such clothing or article.

Article 10

7. Similarly, a person wishing to display or wear such items of clothing or article, in exercise of his or her right to impart information concerning those beliefs, will be restricted in doing so where the power is exercised.

Article 1, Protocol 1

8. A power to seize articles displayed, or clothing or articles worn, by people will interfere with their right to free enjoyment of property.

Justification for ECHR interferences

9. The Government considers that these intrusions into ECHR rights are justified as necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder and crime and for the protection of the rights and freedom of others (such as the Article 2 right to life and property rights protected by Article 1 of Protocol 1). The rationale for the section 13(1) offence is to dissuade people from (whether deliberately or otherwise) encouraging support for a proscribed terrorist organisation, by wearing clothing or displaying clothing or other articles in such a way or in such circumstances as to arouse a reasonable suspicion that they are members or supports of such an organisation, and to enable the prosecution of those who do so. The harms that can flow from activity which boosts support for terrorist groups were explained in the ECHR Memorandum of 6 June and are not repeated here. In order for section 13(1) to be effective, and thus mitigate the risks to the public that are posed by proscribed groups, the police must have the powers they need to gather evidence that is necessary to make out the offence, to maximise the prospects of a conviction.

10. The ECHR intrusions that are involved with this offence are also considered proportionate:

- the objective of the evidence seizure power is sufficiently important to justify the intrusions;
- the power is rationally connected to that objective;
- it is no more than necessary to accomplish the objective, since the power is only exercisable where the constable reasonably suspects that the clothing or article is evidence in relation to the offence and is satisfied that seizure is necessary in order to prevent the evidence being concealed, lost, altered or destroyed; and is further limited so that it cannot be used to remove clothing worn next to the skin or immediately over a garment worn as underwear; and
- the power strikes a fair balance between the rights of the individual and those of the community. The gravity of the risk posed by terrorist groups to the public at large is such that it is proper to curtail the Article 8, 9, 10 and A1/P1 rights of people who may encourage support for such groups by wearing clothes or displaying clothes or other articles which arouse a reasonable suspicion that they are members or supporters of such groups, by empowering the police to seize such clothes or articles as evidence of the section 13(1) offence in circumstances where no arrest has been made.

Home Office
4 September 2018