Home Office

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

2 Marsham Street
London SW1P 4DF
www.gov.uk/home-office

Nick Thomas-Symonds MP
House of Commons
London
SW1A 0AA

4 September 2018

Dear Nick,

COUNTER-TERRORISM AND BORDER SECURITY BILL: GOVERNMENT AMENDMENTS FOR COMMONS REPORT STAGE

I am writing to let you have details of the Government amendments I have today tabled for Report stage. Many of these amendments respond to points raised in Public Bill Committee, including by the witnesses who gave oral evidence to the Committee.

Viewing terrorist material over the internet (amendments to clause 3)

Clause 3 closes a gap in the current law (section 58 of the Terrorism Act 2000 (the "2000 Act")) whereby it is an offence to collect or possess information of a kind likely to be useful to a person committing or preparing an act of terrorism, including by downloading a document from the internet, but it is not currently an offence to view the same information without downloading or storing a copy, for example by streaming a Daesh propaganda video. To avoid criminalising persons who may inadvertently access such material online or do so once or twice out of curiosity, the Bill makes it an offence to view terrorist material online on three or more occasions. In Committee, you acknowledged that it is not right that section 58 criminalises downloading but not the streaming of such material, but expressed concern about the "three clicks provision". I undertook to examine whether there was a better solution to this issue (Official Report, 3 July 2018, column 92).

The amendments to clause 3 recast section 58 such that it would be an offence to view (or otherwise access, for example by listening to an audio recording) any terrorist material online, but to provide that the existing reasonable excuse defence includes circumstances to the effect that the person did not know, and had no reason to believe, that the document or video being viewed contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing an act of terrorism. Once a defendant has raised the defence, section 118 of the 2000 Act

provides that the burden of proof (to the criminal standard) to disprove the defence rests with the prosecution (which addresses the point raised in your amendment 7).

I attach a copy of section 58 of the 2000 Act as it would be amended. You will see that the existing reasonable excuse defence in subsection (3) covers all limbs of the offences in subsection (1). The scope of the defence 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 the judgment the House of Lords 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."

Given this, I am satisfied that no further amplification of the reasonable excuse defence is required, or would indeed be compatible with the Appellate Committee's clear guidance on the difficulties of defining legitimate activity in advance or in the abstract, and on the importance of juries determining whether an excuse is reasonable on the particular facts and circumstances of the individual case.

Finally, your amendment 9 in Committee sought to provide for an independent review of the new offence. Section 36 of the Terrorism Act 2006 (the "2006 Act") already provides for this given that section 58 of the 2000 Act, as amended (and indeed the whole of the 2000 Act and Part 1 of the 2006 Act), falls within the remit of the Independent Reviewer of Terrorism Legislation. Section 36(4) of the 2006 Act requires the Independent Reviewer to carry out a review of the 2000 Act on an annual basis, and to provide a report on that review to the Home Secretary, who is in turn required to lay the report before Parliament.

<u>Traffic regulation (amendments to clause 14)</u>

Clause 14 includes provision to enable traffic authorities to impose reasonable charges in connection with the costs of an anti-terrorism traffic regulation order or notice. In Committee, I undertook to consider amendments which you and Gavin Newlands tabled, designed to prevent such charges being levied on the organiser of a public procession or assembly so as not to restrict the right to peaceful protest (Official Report, 3 July 2018, column 116). As I indicated when responding to those amendments, I am not aware that the powers in the Road Traffic Act 1984 have been used to protect a march or assembly from the risk of terrorism. Nonetheless, I accept that it would be open to a traffic authority, on the recommendation of a chief

officer, to make an anti-terrorism traffic regulation order or notice in such circumstances. Consequently, the amendments to clause 14 ensure that a charge cannot be imposed in such a case.

Police power to seize flags, emblem etc of proscribed organisations (amendment to clause 2)

Under section 13(1) of the 2000 Act it is an offence to wear clothing, or wear, carry or display articles in a public place in such a way or in such circumstances as to arouse reasonable suspicion that an individual is a member or supporter of a proscribed terrorist organisation. At present, the police are only able to seize an article, such as a flag, if they arrest the person displaying it and take them to a police station. However, this will not always be appropriate given wider public order considerations, and the legal tests for the necessity of an arrest. This issue mainly arises in the context of public demonstrations, such as the annual Al-Quds Day parade, where the police may not generally consider it proportionate to arrest persons wearing or displaying such articles if they are not themselves subjects of counter-terrorism interest. In such circumstances, it may instead be appropriate to report the person for summons on suspicion of the section 13 offence. However, at present there is no power for police to seize items as evidence of the offence, absent an arrest.

In his oral evidence to the Committee, Assistant Commissioner Neil Basu argued for a power of seizure in such circumstances (Official Report, 26 June, column 24). The Crown Prosecution Service has also indicated that such a power could support investigations and prosecutions as it would help ensure that the best evidence is available to prosecute. The amendment to clause 2 would enable the police to seize flags, banners or items of clothing (outer garments only) where they have reason to believe that such an item is evidence of an offence under section 13(1) of the 2000 Act and it is necessary to seize the item to prevent the loss or destruction of evidence.

Increase in maximum penalty for offence of failure to disclose information about acts of terrorism (amendment to clause 6)

Clause 6 of the Bill increases the maximum penalty for a number of terrorism offences. In his evidence to the Public Bill Committee, the Independent Reviewer of Terrorism Legislation, Max Hill QC, argued that the maximum penalty for the offence of failure to disclose information about acts of terrorism (section 38B of the 2000 Act) should also be increased (Official Report, 26 June 2018, column 46). We have considered this matter further, including in the light of Max Hill's evidence, and agree that the existing maximum penalty of five years' imprisonment does not adequately reflect the seriousness of this offence. The amendment to clause 6 would increase the maximum penalty to 10 years' imprisonment.

Hostile state activity ports power (amendments to Schedules 3 and 4 and clause 25)

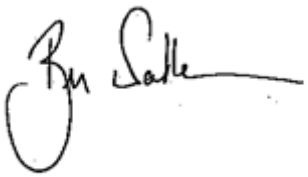
Schedule 3 to the Bill (paragraphs 11 to 13) includes provision for the police to examine electronic devices and other property retained as part of an examination under the hostile state activity ports power. In certain circumstances (in particular, where the property contains journalistic or legally privileged material), retention and examination of property is subject to authorisation by the Investigatory Powers

Commissioner. The Commissioner is required to consider representations from affected persons, including the person from whom the property was taken, before making a determination authorising (or otherwise) the retention and examination of the property. The amendment to Schedule 3 clarifies that such representations must be made in writing (including by email).

In Committee, we amended Schedule 4 to the Bill to ensure the provision of legal advice and assistance to persons detained in Northern Ireland under Schedule 3 to the Bill (and Schedule 7 to the 2000 Act) is available in the same way as applies in relation to persons arrested and detained under the Police and Criminal Evidence (Northern Ireland) Order 1989. Following further discussions with the Scottish Government, the amendments to Schedule 4 (see new paragraphs 18A and 25A and the consequential amendments to clause 25) ensure that persons detained in Scotland under Schedule 3 to the Bill (or section 41 of and Schedule 7 to the Terrorism Act 2000) similarly have access to legal advice and assistance.

I attach “Keeling Schedules” showing sections 13 and 58 of the 2000 Act as they would be further amended by these changes, and supplementary delegated powers and ECHR memoranda.

I am copying this letter to Diane Abbott, members of the Public Bill Committee, Yvette Cooper (Chair, Home Affairs Select Committee), Harriet Harman (Chair, Joint Committee on Human Rights), Dominic Grieve (Chair, Intelligence and Security Committee), Sir Edward Davey, Lord Rosser and Lord Paddick; I am also placing a copy in the library of the House.



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SECTION 13 OF THE TERRORISM ACT 2000 AS AMENDED

13 — Uniform *and publication of images*

(1) A person in a public place commits an offence if he–

(a) wears an item of clothing, or

(b) wears, carries or displays an article,

in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation.

(1A) A person commits an offence if the person publishes an image of—

(a) an item of clothing, or

(b) 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.

(1B) In subsection (1A) the reference to an image is a reference to a still or moving image (produced by any means).

~~(2) A constable in Scotland may arrest a person without a warrant if he has reasonable grounds to suspect that the person is guilty of an offence under this section.~~

(3) A person guilty of an offence under this section shall be liable on summary conviction to–

(a) imprisonment for a term not exceeding six months,

(b) a fine not exceeding level 5 on the standard scale, or

(c) both.

(4) A constable may seize an item of clothing or any other article if the constable—

(a) reasonably suspects that it is evidence in relation to an offence under subsection (1), and

(b) is satisfied that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.

(5) In connection with exercising the power in subsection (4), a constable may require a person to remove the item of clothing or other article if the person is wearing it.

(6) But the powers conferred by subsections (4) and (5) may not be exercised so as 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.

SECTION 58 OF THE TERRORISM ACT 2000 AS AMENDED

58 - Collection of information

(1) A person commits an offence if–

(a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, ~~or~~

(b) he possesses a document or record containing information of that kind*, or*

(c) the person views, or otherwise accesses, by means of the internet a document or record containing information of that kind.

(1A) The cases in which a person collects or makes a record for the purposes of subsection (1)(a) include those where the person does so by means of the internet (whether by downloading the record or otherwise).

(2) In this section "record" includes a photographic or electronic record.

(3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.

(3A) The cases in which a person has a reasonable excuse for the purposes of subsection (3) 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.

(4) A person guilty of an offence under this section shall be liable–

(a) on conviction on indictment, to imprisonment for a term not exceeding ~~10 years~~ *15 years*, to a fine or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.