



**JUSTICE**

## **Counter-Terrorism and Border Security Bill 2017-19**

**House of Lords**

**Second Reading**

**October 2018**

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## Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. This briefing addresses the Counter-Terrorism and Border Security Bill,<sup>1</sup> ahead of Second Reading in the House of Lords on 9 October 2018.
3. In advance of House of Commons First Committee Debate on 26 June 2018, we circulated a note that outlined our concerns regarding the new port and border controls (Clause 21, Schedule 3); expanded retention of biometric data (Clause 18, Schedule 2); and the power to enter and search the homes of registered terrorist offenders (Clause 13) contained in the Bill.<sup>2</sup> This briefing expands on those concerns, taking into account the debate and tabled amendments at Committee and Report Stages as well as the Third Reading in the Commons.
4. JUSTICE acknowledges the severity of the terrorist threat facing the UK. We are mindful of the context from which the Bill arises: 36 deaths from five terrorist attacks last year and this year’s Novichok nerve agent attacks in Salisbury – likely carried out under directions from the Russian state. We recognise too, as the Minister points out in his response to the Joint Committee on Human Rights’ report on the Bill, that the Government has a “duty...to protect its citizens and their right to life”.<sup>3</sup> Correspondingly, JUSTICE appreciates the need for robust counter-terrorism provisions on the statute book.
5. However, JUSTICE nonetheless would agree with the Joint Committee on Human Rights in its argument that “this Bill strikes the wrong balance between security and liberty”.<sup>4</sup> In particular, JUSTICE is not convinced that the case has been made for suspicion-less

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*All web links accessed 4 October 2018*

<sup>1</sup> Counter-Terrorism and Border Security HC Bill (2017-19) [219].

<sup>2</sup> JUSTICE Note on Counter Terrorism and Border Security Bill for Committee Stage 22 June 2018 (unpublished, available on request).

<sup>3</sup> Joint Committee on Human Rights, Legislative Scrutiny Counter-Terrorism and Border Security Bill: Government Response to the Committee’s Ninth Report of Session (2017–19, HC 1578), 1.

<sup>4</sup> Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill (2017-19 HL 167, HC 1208) 5.

border checks in general, still less the introduction of a parallel system of controls that will co-exist with the current Terrorism Act 2000 (“TACT”) Schedule 7 regime.

6. JUSTICE is concerned by an assertion made by the Minister at Committee Stage:

*Once someone is within our community, because of the way we live our lives, quite rightly, they have free movement and free everything. I am delighted that those are our values, but if we are to keep that special, and maintain that freedom within the United Kingdom, we have to be able to give that power [to make a schedule stop] for the simple purpose of establishing the intent—the who and the what—at our border.<sup>5</sup>*

We acknowledge that officers, on the basis of intelligence, will need to stop and occasionally detain travellers at the border. But it is a worrying state of affairs when the fundamental rights of those who travel to the UK are thought to hold less status on the grounds that the traveller is not situated “within our community” – incidentally, without regard for the traveller’s citizenship. The assertion corresponds with a worrying slippage in the government’s commitment to human rights standards in recent months, illustrated most conspicuously by the Home Secretary’s unprecedented decision not to seek assurances on application of the death penalty in the case of British-born alleged ISIS fighters sought for prosecution in the US following our mutual legal assistance.<sup>6</sup>

7. As stated in Assistant Commissioner Basu’s evidence, it may well be the case that “the nature and scale of the terrorist and hostile state actor threat to this country has evolved and changed”.<sup>7</sup> In this context, it is more important than ever that the UK takes a proportionate response and remains a leader in safeguarding procedural rights, including those afforded to individuals stopped and detained at the border. The Counter-Terrorism and Border Security Bill provides an opportunity for government to demonstrate its commitment to the rights of suspects as well as its dedication to keeping citizens safe. Our suggested amendments below go some way towards striking the right balance.

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<sup>5</sup> Counter-Terrorism and Border Security Bill Deb 10 July 2018, col 209.

<sup>6</sup> Letter from Rt Hon Sajid Javid MP to US Attorney General Jeff Sessions (22 June 2018); see letter from JUSTICE to Rt Hon Sajid Javid MP (27 July 2018) available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/07/Letter-to-Home-Office.pdf>

<sup>7</sup> Counter-Terrorism and Border Security Bill Deb 26 June 2018, col 5.

## Port and border controls (Clause 21, Schedule 3)

- JUSTICE would suggest that the **statutory purpose of Schedule 3 is clarified**.

8. Schedule 3 contains a new regime of “stop and search” powers at ports and borders to determine whether an individual is or has been involved in “hostile activity”. As pointed out by the Joint Committee on Human Rights, the definition of “hostile act” in paragraph 1(5) and 1(6) is extremely broad,<sup>8</sup> encompassing threats to national security, economic well-being and “acts of serious crime”.
9. The Minister has justified this breadth on the basis that the provision “is required to encompass the spectrum of threats currently posed to the UK by hostile states, which includes espionage, subversion and assassination”.<sup>9</sup> Espionage, subversion and assassination are indeed genuine threats that could be listed as examples within the Schedule
10. However, JUSTICE is concerned that the term “hostile activity” still provides for insufficient foreseeability. As Liberty highlights in its Report Stage Briefing on the Bill, “the section ...covers a huge range of entirely lawful behaviour. Somebody currently, or at any point in the past, involved in a business venture which may involve a diversion of investment from the UK to a third state would apparently be caught by Schedule 3”.<sup>10</sup> JUSTICE appreciates that Government is looking into this area as a discreet concern.<sup>11</sup> However, strengthening State powers under the Enterprise Act 2002, for example, will not negate the possibility of misuse of new Schedule 3 in its current form. Given that the liberty of travellers to the UK is at stake, it is critically important that the ambit of the Schedule is circumscribed as specifically as possible.
10. JUSTICE would suggest that the statutory purpose of the new powers should be clarified and further narrowed, especially given that the substance of Schedule 3 provides for severe interferences with Articles 6, 8, 10 of the European Convention on Human Rights

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<sup>8</sup> Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, 4.

<sup>9</sup> Joint Committee on Human Rights, Legislative Scrutiny Counter-Terrorism and Border Security Bill: Government Response to the Committee’s Ninth Report of Session, 14.

<sup>10</sup> Liberty, Report Stage Briefing on the Counter-Terrorism and Border Security Bill (September 2018), 32.

<sup>11</sup> See Secretary of State for Business, Energy and Industrial Strategy, *National Security and Investment, A consultation on proposed legislative reforms* (July 2018).

(ECHR) and Protocol 1, Article 1 rights.<sup>12</sup> Our particular concerns with regard to the Schedule are outlined in paragraphs 11-31 below.

*Reasonable suspicion*

If the Schedule is not removed, we would suggest the following amendment:

- **In paragraph 1(4), for the words “whether or not there are”, substitute the words “where there are reasonable”.**

11. JUSTICE has long argued that the powers in TACT Schedule 7 are overly broad, arbitrary and discriminatory in their application.<sup>13</sup> Of particular concern is the exceptionally broad discretion that allows for individuals to be stopped whether or not any grounds exist for suspecting that they may have an involvement in terrorist activity. We have previously suggested that Schedule 7 should include a requirement for *reasonable suspicion* on the part of the officer.<sup>14</sup>

12. The concern in relation to proposed Schedule 3 is particularly acute given the breadth of the new power’s stated purpose (determining whether the person appears to be a person who is, or has been, engaged in “hostile activity”), as outlined in paragraphs 8-10 above. As highlighted by the Joint Committee, this is “broader and more ambiguous” than the purpose of the Schedule 7 power (determining whether the person appears to be a person who is, or has been, concerned in the commission, preparation, or instigation of acts of terrorism).<sup>15</sup> This greater breadth gives rise to the concern that the new powers are particularly open to be employed in a manner that is arbitrary or discriminatory.<sup>16</sup> Without adequate limitations in the legislation itself, the promise that a Code of Practice on the lawful exercise of the power will be published shortly is not sufficient to assuage this fundamental concern.<sup>17</sup>

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<sup>12</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill*, 4.

<sup>13</sup> See, for example, JUSTICE House of Lords Second Reading Briefing on Anti-Social Behaviour, Crime and Policing Bill (October 2013), 17, available at <http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/JUSTICE-Briefing-ASB-Crime-and-Policing-Bill-HL2R-PDF.pdf>.

<sup>14</sup> *Ibid.*, 19.

<sup>15</sup> TA 2000, Schedule 7 and s.40(1)(b).

<sup>16</sup> See Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill*, para 76. The Committee argues persuasively that while the suspicion-less power in TA 2000 Schedule 7 is ECHR-compatible under *Beghal v DPP* [2015] UKSC 49, paras 43–45, the new power may be distinguished by virtue of its different policy aim.

<sup>17</sup> Joint Committee on Human Rights, *Legislative Scrutiny Counter-Terrorism and Border Security Bill: Government Response to the Committee’s Ninth Report of Session*, 14.

13. Further, we feel that the provisions do not serve the policy aim, even as currently articulated in the Bill. An officer hoping to prevent the type of (foreign state-directed) “hostile act” envisaged would surely stop an individual on the basis of requisite intelligence, i.e. with reasonable suspicion. Without such requisite intelligence – stopping, detaining and searching any given traveller would be wholly disproportionate, and risk impeding the rights of foreign citizens.

14. The Master of the Rolls observed in *Miranda* that:

*[T]he majority of examinations which have led to convictions were intelligence-led rather than based simply on risk...intuition or the ‘copper’s nose’”. Indeed, despite having made the necessary enquiries, I have not been able to identify from the police any case of a Schedule 7 examination leading directly to arrest followed by conviction in which the initial stop was not prompted by intelligence of some kind.<sup>18</sup>*

Two implications flow from this observation. First, decisions that are “intelligence-led rather than simply on risk...intuition or the ‘copper’s nose’” are surely grounded in reasonable suspicion; if the Master of the Rolls is correct, then the bulk of ‘successful’ decisions to stop and search at the border are made on that basis in any event. Second, however, there lies a disjoint between what may happen in practice and what is in fact permitted. Even if the bulk of officers *do* make stop and search decisions in the manner described by the Master of the Rolls, this does not suggest that they *must* do so. The implication that will be reinforced by the introduction of the new Schedule 3 is that there is room for manoeuvre; even if most officers make decisions that are intelligence-led, some may employ the new provision to stop travellers at the border legally when they intuit that there is cause to do so.

15. The apparent justification for the position is that “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”.<sup>19</sup> This argument does not properly account for a suspicion-less test; there is nothing to suggest that suspicion on the basis of “incomplete intelligence” will not be reasonable. What seems to be desired is a novel creature: some kind of middle ground between reasonable suspicion and a “hunch”. While JUSTICE appreciates the anxiety that serious crime might

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<sup>18</sup> *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6.[36] (Sir Terrence Etherton MR).

<sup>19</sup> Joint Committee on Human Rights, Legislative Scrutiny Counter-Terrorism and Border Security Bill: Government Response to the Committee’s Ninth Report of Session, 16.

not be prevented were a reasonable suspicion test introduced, we would suggest that the provision as drafted leaves too much room for discretion on the part of an individual officer and is inappropriate where travellers' liberty is concerned.

16. Relatedly, the Minister's argument that a border stop under the new power might be "be based on a method, on a threat on a date, or on a plane, rather than on a person ... the Government's reading of the law is that if we had to have reasonable grounds, it would be too narrow for us to be able to respond to some of that intelligence" seems unsustainable.<sup>20</sup> However, following the guidance in PACE Code A, reasonable grounds for suspicion merely necessitate "a genuine suspicion on the part of the officer concerned and an objective basis for that suspicion".<sup>21</sup> Any of the above examples (method/date/threat/plane) might suffice as an "objective basis" for stopping an individual at the border. The same applies with an arrest premised on traveller routes or patterns, or with an arrest premised on intelligence suggesting that the traveller is merely connected to another individual involved in a hostile activity – "reasonable suspicion" does not create loopholes for any of these envisaged scenarios.<sup>22; 23</sup> The current Bill, however, arguably allows for a plane to be stopped on the basis of no intelligence whatsoever – a disproportionate infringement on the rights of an entire cadre of people.

17. In his evidence to the Public Bill Committee, the Independent Reviewer of Terrorism Legislation ("IRTL"), Max Hill QC, restated his view that TACT Schedule 7 should be supported with a reasonable grounds test, and considered how this might relate to the current Bill:

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<sup>20</sup> Counter-Terrorism and Border Security Bill Deb 10 July 2018, col 187.

<sup>21</sup> See PACE Code A, para 2.2.

<sup>22</sup> We would suggest that the same argument applies with the illustrative examples listed in the *Examining Officers and Review Officers under Schedule 7 to the Terrorism Act 2000 Code of Practice* (March 2015), 12: "Known and suspected sources of terrorism; Individuals or groups whose current or past involvement in acts or threats of terrorism is known or suspected, and supporters or sponsors of such activity who are known or suspected; Any information on the origins and/or location of terrorist groups; Possible current, emerging and future terrorist activity; The means of travel (and documentation) that a group or individuals involved in terrorist activity could use; Emerging local trends or patterns of travel through specific ports or in the wider vicinity that may be linked to terrorist activity; and/or Observation of an individual's behaviour".

<sup>23</sup> See *Blackstones Criminal Practice 2018* (OUP), D1.4, Notably, "information required to form a reasonable suspicion is of a lower standard than that required to establish a *prima facie* case. *Prima facie* proof must be based on admissible evidence whereas reasonable suspicion may take into account matters which are not admissible in evidence or matters which, while admissible, could not form part of a *prima facie* case (*Hussien v Chong Fook Kam* [1970] AC 942)". Additionally, "the arresting officer is not under a duty to check information supplied, and an arrest will be lawful even if the information was incorrect (*R (Tchenguiz) v Director of the SFO* [2012] EWHC 2254 (Admin); *R (Chatwani) v NCA* [2015] EWHC 1283 (Admin))".

*I recommended a test of reasonable grounds to support the use of Schedule 7 in accordance with codes of practice. I know from subsequent discussions with the Government and officials that very careful thought is being given to that, but I await the outcome ... My thinking—although, ... is that the border security power is likely to be exercised in far fewer numbers ... None the less, looking at it from the perspective of principle, this needs to be very carefully scrutinised.<sup>24</sup>*

Peter Carter QC developed this argument, focussing on the need for a reasonable grounds test as a measure against which a stop and search decision under the new power might be challenged:

*I agree with Max. I think there ought to be a reasonable grounds test. There are a large number of detailed preservations of rights and protections, which are entirely appropriate, but they are rather undermined by the non-existence of a reasonable grounds test, because it is very difficult to challenge it if there is no reasonable grounds test.<sup>25</sup>*

This is persuasive. The Schedule as drafted not only draws officers' powers too wide but renders them invulnerable to review.

18. In line with recommendations from Max Hill QC, Peter Carter QC, Liberty and the Joint Committee, we would recommend the introduction of a reasonable grounds test. The following amendment (similar to Nick Thomas-Symonds MP's amendment 44 at Committee Stage, withdrawn after debate) would serve this purpose:

**In paragraph 1(4), for the words “whether or not there are”, substitute the words “where there are reasonable”.**

19. We appreciate that this amendment would effectively recreate the current arrest requirements and that the only differential factor would be the statutory purpose for the arrest. For purposes of legal clarity, this underscores the need for a narrower definition of “hostile activity” that retains a focus on state-directed behaviour but excludes the possibility of penalising benign activity.

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<sup>24</sup> Counter-Terrorism and Border Security Bill Deb 26 June 2018, col 44.

<sup>25</sup> Counter-Terrorism and Border Security Bill Deb 26 June 2018, col 54.



## *Period of detention*

We suggest the following amendment as a new sub-paragraph to Schedule 3, paragraph 5:

- **X: An officer may not stop, search and/or detain a person pursuant to another power once an individual has been detained for the maximum 6-hour period authorised under sub-paragraph (3).**

20. Paragraph 5 of Schedule 3 allows officers to formally detain individuals for up to six hours should they wish to stop or question them for more than an hour. Restrictions on the duration of questioning are required so that any interference with Article 5 and 8 rights are “in accordance with the law”.<sup>26</sup>

21. Max Hill QC suggested in evidence that “I understand that both [Schedule 3 and 7 powers] are both to be deployed by counter-terrorism policing — the same officers at our borders — it is not a pick-and-mix choice between legal powers”.<sup>27</sup> However, the period of detention could in principle be extended. Following questioning, should an officer no longer consider that the person appears to be engaged in a hostile act, they could then stop them for potential involvement in a terrorist act under Schedule 7. In our view this would be a disproportionate use of the officer’s power. By that stage, the officer should have formed a reasonable suspicion that an offence has been committed, and if so, arrest under the relevant authorisation to do so.

22. Liberty agreed with this concern in its Second Reading Briefing: “nothing prevents a border agent from circumventing these time limits by switching to the use of a different suspicionless border power, such as Schedule 7 of the Terrorism Act, effectively doubling the existing time limits”.<sup>28</sup>

23. If Schedule 3 is retained, we would suggest a new sub-paragraph to paragraph 5:

**X: An officer may not stop, search and/or detain a person pursuant to another power once an individual has been detained for the maximum 6-hour period authorised under sub-paragraph (3).**

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<sup>26</sup> *Beghal v DPP* [2015] UKSC 49 [43] (Lord Hughes).

<sup>27</sup> Counter-Terrorism and Border Security Bill Deb 26 June 2018, col 44.

<sup>28</sup> Liberty, Second Reading Briefing on the Counter-Terrorism Bill (June 2018), para 39.

24. We understand that guidance in line with our suggestion will be included in the draft code of practice that is set to be available for Committee Stage. We are informed that this will provide for any time already spent in detention to be deducted, should an officer decide to continue an arrest under a different regime. This is a welcome development; however, given that travellers' liberty is at stake in these provisions, we would nonetheless suggest that this rule is codified on the face of the Bill.

*Investigatory Powers Commissioner – notification requirement*

We suggest the following amendment as a new sub-paragraph to Schedule 3, paragraph 12 or to be contained in the code of practice accompanying the Bill:

- **X: A person whose articles have been retained must be informed that the Commissioner will review the retention in accordance with this paragraph.**

25. Schedule 3, paragraph 12 stipulates that the Investigatory Powers Commissioner is informed of the retention of a person's articles under paragraph 11. We agree that this review mechanism is appropriate. However, the person whose belongings have been removed must understand that this review will take place otherwise it is a safeguard that they cannot take comfort from.

26. If Schedule 3 is retained, we would suggest a new sub-paragraph to paragraph 12 to introduce a notification requirement:

**X: A person whose articles have been retained must be informed that the Commissioner will review the retention in accordance with this paragraph.**

This is similar to Nick Thomas-Symonds MP's suggested amendment 36 (not called): "the person who owns or was carrying or transporting an article which is retained...must be notified by the examining officer when the Commissioner is informed that the article has been retained". We would suggest that our amendment places a lesser burden on the investigatory forces and may be easier to accomplish in practice.

27. At Committee stage, the Minister stated that "officials are working with the Investigatory Powers Commissioner's Office to determine the precise mechanism for keeping the individual informed of the fate of their property, including the appeal process and notice of any decision made. That will be set out in greater detail in the Schedule 3 Code of Practice ... let me reassure the Committee that no individual will be left guessing as to

what has happened”.<sup>29</sup> We welcome this indication, and trust that such a notification requirement, and the manner of executing it, is included in the Code of Practice.

*Right to legal assistance*

We suggest the following amendments to Schedule 3:

- **sub-paragraph 24(5) should be amended with the insertion of the words “in private” at the end of the paragraph;**
- **paragraph 26 should be removed.**

28. Schedule 3 recognises the right to legal assistance during the detention under this provision. Paragraph 24(5) provides for legal assistance in person but not in private. This is a fundamental part of the right to legal assistance and without clarification, renders the right meaningless. As argued by the Joint Committee, “these provisions do not comply with the requirement that the law must contain sufficient safeguards to ensure that powers will not be exercised arbitrarily”.<sup>30</sup>

29. At Committee Stage, Gavin Newlands MP cited Richard Atkinson, co-chair of the Law Society’s criminal law committee, as well as Abigail Bright from the Criminal Bar Association member, to explain what is at stake in this provision. Both quotations are worth rehearsing in full:

*The cornerstone is legal professional privilege. That is not access to a lawyer; it is the confidential nature of discussions between a lawyer and their client. That is the cornerstone that has been in existence for hundreds of years and that is held out internationally as a gold standard that we have in this country. That is what is being undermined by this Bill saying that a police officer can stand and listen to the consultation that is going on between the client and the lawyer.*

*[The lack of ability to speak to a lawyer in private] is deeply concerning and wholly new. ‘Radical’ is a well-chosen word here; it is a radical departure from anything known to English law. My view, and the view of the specialist Bar associations, is that it is unnecessary and undue, and that it would not in any way be a serious improvement on the powers available to law enforcement agents.*<sup>31</sup>

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<sup>29</sup> Counter-Terrorism and Border Security Bill Deb 5 July 2018, col 190.

<sup>30</sup> Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, para 81.

<sup>31</sup> Counter-Terrorism and Border Security Bill Deb 10 July 2018, col 206.

30. In light of these persuasive submissions, we would suggest that **paragraph 24 (5) should be amended with the insertion of the words “in private” at the end of the paragraph.** This is similar to Gavin Newlands MP’s amendment 24, negated on division at Committee Stage, which would insert the phrase: “provided that the person is at all times able to consult with a solicitor in private”.
31. We appreciate that there is an analogue for Paragraph 24(5) in TACT Schedule 8 Paragraph 7A. However, we would draw attention to former IRTL David Anderson’s comment that “the right to consult with a solicitor [in TACT] is the right to consult privately” – any exceptions are “tightly-drawn”.<sup>32</sup> Further, in his capacity as IRTL, Max Hill QC has recommended in relation to TACT “respect for lawyer-client confidentiality, also known as legal professional privilege which is fundamental to the confidence any detainee should have in the custody system, and the criminal justice system in general”.<sup>33</sup> In our view, the existence of a similar provision in the Bill should not serve as a pretext for any further compromise to the right to confidential legal advice.
32. Schedule 3, paragraph 26 provides for a legal consultation within sight and hearing of an officer. For the reasons set out above, this is in our view wholly objectionable and **should be removed.** The Minister justifies the provision on this basis: “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”. We do not find this to be persuasive: how would an officer know that a coded message was being passed on?
33. In our view requiring a person to conduct private communications with a lawyer in front of an officer is not a proportionate infringement of that individual’s right to confidential legal advice.<sup>34</sup> Where the justification for this power is the risk that relevant assets may be

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<sup>32</sup> David Anderson QC, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (June 2012), para 7.51.

<sup>33</sup> Max Hill QC, *The Terrorism Acts in 2016: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006* (Jan 2018), para 6.45.

<sup>34</sup> See also Liberty, Report Stage Briefing on the Counter-Terrorism and Border Security Bill (September 2018). 34. The assertion made by the Government at Committee Stage that the power could be justified as “these verbal discussions are not admissible in court as evidence” was plainly incorrect given Schedule 3, paragraph 6 of the Bill, which establishes that information given orally by a person in response to a question may be used in evidence.

dispersed, solicitors already have professional and legal duties in relation to money laundering that cover this risk.<sup>35</sup>

34. We are heartened that the Government is at present considering Nick Thomas-Symonds MP's proposal for a "panel of lawyers, properly regulated by the Solicitors Regulation Authority and the Law Society" as one way of combatting the perceived risk of abuse of legal privilege.<sup>36</sup> We hope that the introduction of a mechanism such as the "panel of lawyers" paves the way for the insertion of a proper privacy safeguard in the Bill, as suggested in our amendments above.
35. We also trust that Government will respect the professional duties and obligations of solicitors, regulated by the Solicitors Regulation Authority, to conduct their work lawfully, ethically and honestly.

#### **Expanded retention of biometric data (Clause 18, Schedule 2)**

We suggest the following amendments to Schedule 2:

- **the extension of time from two to five years in paragraphs 3(4), 7(4), 10(4), 13(4), 16(4) and 19 should be removed.**

36. Any use of biometric data must be in accordance with the right to privacy recognised by Article 8 of the European Convention on Human Rights and the guidance offered by the European Court of Human Rights ("ECtHR") in *Marper*.<sup>37</sup>
37. An interference with the right to privacy may be justified pursuant to Article 8(2) ECHR if it is 'in accordance with the law', proportionate and 'necessary in a democratic society' for, *inter alia*, the prevention of crime, or the protection of the rights and freedoms of others.
38. Schedule 2, sub-paragraph 7(4) extends the maximum time period for which biometric data can be retained from two to five years. The Minister has justified the retention of

<sup>35</sup> See, for example, The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017 No. 692.

<sup>36</sup> Counter-Terrorism and Border Security Bill Deb 11 September 2018, col 206.

<sup>37</sup> *S and Marper v United Kingdom* 2008) 48 EHRR 50.

biometric data with reference to “the recent case of Khalid Ali ... 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. We are therefore not prepared to remove the three-year retention period currently provided following an arrest under the 2000 Act”.<sup>38</sup> Further, the Minister has cited the Biometrics Commissioner to claim that “for some NSD [National Security Database] case...the evidence/intelligence against the relevant individuals is such that they could be granted for longer than two years”.<sup>39</sup>

39. Neither of the Minister’s arguments in paragraph 34, above, account for extending the period by more than twice the number of years. Indeed, the Minister has cited no objective basis for the new extended period, other than that “five years give us that extra time and some of these investigations take a lot of time”. In the context of the intrusive nature of biometric data (i.e. fingerprinting and DNA), and the “well-documented and heavily criticised failure to correct...egregious errors and human rights violations in the Police National Database of custody images”,<sup>40</sup> we are not convinced that the case for the extension has been adequately justified. While we appreciate that a review of the NSD decision at 2 years creates an operational burden, this cannot justify an extension where a traveller’s data is held for up to half a decade without review.
40. JUSTICE would question whether the extension of the time period for retention of biometric data from three to five years (proposed in Schedule 2 paragraphs 3, 7(4), 10(4), 13(4), 16(3) and 19) is indeed proportionate. We would suggest that the extension of time in these provisions is **removed** or at least revised downwards with a cogent justification for the proposed maximum.

### **Power to enter and search home (Clause 13)**

We suggest the following amendment to Clause 13:

- Either **delete sub-paragraph 56A(1)(b) and consequential provisions** regarding search; or,

<sup>38</sup> Joint Committee on Human Rights, Legislative Scrutiny Counter-Terrorism and Border Security Bill: Government Response to the Committee’s Ninth Report of Session (2017–19, HC 1578), 11.

<sup>39</sup> *Ibid.*, 12.

<sup>40</sup> Liberty, Report Stage Briefing on the Counter-Terrorism and Border Security Bill (September 2018), 19, citing *R (RMC & FJ) v Commissioner Of Police Of The Metropolis & Ors* [2012] EWHC 1681 (Admin).

- End of 56A(1)(b), insert – **“that there are reasonable grounds for believing that the person to whom the warrant relates has committed an offence”**

41. A registered terrorist offender (“RTO”) under the Counter Terrorism Act 2008 already has to provide detailed information regarding their home, lifestyle and finances following a conviction. Clause 13 extends these requirements. JUSTICE accepts that such an invasion of privacy may well be appropriate, in certain cases and determined on a case by case basis.

42. However, Clause 13, confers a coercive power on the police to enter and **search** the home address of an RTO – following authorisation from a magistrate and once police have failed twice to gain access – “for the purpose of assessing the risks posed by the person”. This is in our view disproportionate and vague.

43. The Minister’s argument that the parallel power in relation to registered sex offenders under the Sexual Offences Act 2003 “has not been successfully challenged in the courts” is in our view no justification for the introduction of a new power. Lack of judicial censure should be a baseline, not an invitation, for rights-compliant legislation.<sup>41</sup>

44. JUSTICE accepts that there may be a need to monitor an individual already convicted of a serious terrorist offence, in order to secure compliance. In order to do that, officers will need to establish that individual’s address and their existence at that address. It does not necessarily follow that in the event they struggle to do so, officers should be empowered (albeit having obtained a warrant) to conduct a full *search* of the individual’s home.

45. JUSTICE would suggest that a *warrant* for a *search* should only be sought and issued with reference to a more strenuous test that a magistrate could assess on application. Presumably the purpose of a search would be to ascertain whether any further criminal conduct is being pursued. The search power under s. 8 of PACE provides an example for how this can be drafted:

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<sup>41</sup> Joint Committee on Human Rights, Legislative Scrutiny Counter-Terrorism and Border Security Bill: Government Response to the Committee’s Ninth Report of Session (2017–19, HC 1578), 9.

(1) *If on an application made by a constable a justice of the peace is satisfied that there are **reasonable grounds** for believing—*

- (a) that an indictable offence has been committed; and*
- (b) that there is material on premises mentioned in subsection (1A) below which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and*
- (c) that the material is likely to be relevant evidence; and*
- (d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and*
- (e) that any of the conditions specified in subsection (3) below applies he may issue a warrant authorising a constable to enter and search the premises in relation to each set of premises specified in the application.*

46. JUSTICE would argue that the provision needs to be confined to a monitoring exercise without a coercive search power. In the alternative, should Parliament deem that a search power is necessary to achieve a justified policy aim, the Clause should include a higher threshold test. In the latter case, we would suggest that Nick Thomas-Symonds MP's proposed amendment 28 (withdrawn) – introducing a reasonable grounds test **“for believing that the person to whom the warrant relates has committed an offence”** is an appropriate mechanism for differentiating between a mere “risk assessment” (which might be conducted on the doorstep) and a fuller search of an RTO's home.
47. Police officers should not be exercising the power to search a person's home – “a severe intrusion with the right to private life”<sup>42</sup> – merely in order to conduct risk assessments. While we accept that this provision differs from the PACE test cited above as it falls within the context of a post-conviction regime – the stated purpose and the current breadth of the power are currently at odds.

JUSTICE

4 October 2018

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<sup>42</sup> Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Border Security Bill, 9.