



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Parliamentary Briefing Paper on Counter-
Terrorism and Border Security Bill.**

August 2018

About Us:

The NI Human Rights Commission (the Commission) protects and promotes the human rights of everyone in NI. We do this by:

- keeping under review the adequacy and effectiveness in NI of law and practice relating to the protection of human rights;
- advising the Secretary of State for NI and the Executive Committee of the NI Assembly of legislative and other measures which ought to be taken to protect human rights;
- advising the NI Assembly whether proposed legislation is compatible with human rights standards;
- promoting understanding and awareness of the importance of human rights in NI by, for example, undertaking or commissioning or otherwise assisting research and educational activities.

In addition, the Commission has powers to:

- give assistance to individuals who apply to it for help in relation to proceedings involving law or practice concerning the protection of human rights;
- bring proceedings involving law or practice concerning the protection of human rights;
- institute, or intervene in, legal proceedings concerning human rights where it need not be a victim or potential victim of the unlawful act to which the proceedings relate;
- conduct investigations, and;
- require a person to provide information and documents in their possession, and to give oral evidence, in respect of an investigation;
- enter a specified place of detention in NI, in respect of an investigation, and;
- publish its advice and the outcome of its research and investigations.

The Bill:

The Counter-terrorism and Border Security Bill 2017-19 introduces a new offence and strengthens pre-existing offences relating to terrorism and makes provision enabling persons at ports and borders to be questioned for national security and other related purposes. The Bill will next be considered at Report Stage and Third Reading on a date to be announced.

In this briefing paper the Commission provides its advice on the compatibility of key provisions in the Bill with the European Convention on Human Rights and international human rights law.

Clause 1 - New Offence of inviting support for a proscribed organisation

Clause 1 would make an addition to section 12 of the Terrorism Act 2000 which prohibits an individual from inviting support for a proscribed organisation. Clause 1 would amend the 2000 Act to provide,

“(1A) A person commits an offence if the person—
(a) expresses an opinion or belief that is supportive of a proscribed organisation, and (b) in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.”

The explanatory note confirms that if enacted the clause will create:

a new offence which criminalises the expression of an opinion or belief that is supportive of a proscribed organisation (the actus reus or criminal act) in circumstances where the perpetrator is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation (the mens rea or mental element). The recklessness test is a subjective one, requiring that the perpetrator be aware of the risk.

Clause 1 would therefore create a new offence of expressing an opinion or belief that is supportive of a proscribed organisation, in circumstances where the perpetrator is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.

The Joint Committee on Human Rights, amongst others, has raised concerns regarding Clause 1 of the Bill stating,

It is arguable that clause 1 could include, for example, an academic debate during which participants speak in favour of the de-proscription of currently proscribed organisations. If this is so, clause 1 could have a chilling effect by preventing expressions of disagreement with the

*Government's decision to proscribe certain organisations.*¹

The right to freedom of expression is protected by the European Convention of Human Rights at Article 10 and the International Covenant on Civil and Political Rights, at Article 19. The European Court of Human Rights (ECt.HR) through its jurisprudence has set out that Article 10 applies to all expressions that 'afford the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds'.² The right to freedom of expression is a qualified right and may be subjected to proportionate limitation which are prescribed by law in pursuit of a legitimate aim, including national security. The ECt.HR has made clear that,

a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.³

As currently drafted Clause 1 neither sets specific parameters nor makes clear the circumstances in which an individual will fall foul of the new offence, in particular it is unclear what acts will or will not amount to an expression of support. This raises a concern that Clause 1 is incompatible with ECHR, Article 10.

The Commission recommends that Clause 1 is amended to set specific parameters to clarify what expressions of support would or would not be criminalised as a result of the new offence, to ensure compliance with ECHR, Article 10.

Clause 2 – Publication of images

Clause 2 would make an addition to section 13 of the Terrorism Act 2000 to criminalise the publication of certain images which would arouse reasonable suspicion that the offender was a member or supporter of a proscribed organisation. Clause 2 would amend the 2000 Act to provide,

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

¹ Joint Committee on Human Rights Legislative Scrutiny: Counter-Terrorism and Border Security Bill Ninth Report of Session 2017–19 10 July 2018, para 12

² Muller and Others v Switzerland (Application no. 10737/84) [1988] ECHR 5, para 27

³ The Sunday Times v The United Kingdom (No 1): ECHR 26 Apr 1979, para 49

(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.

The explanatory note confirms,

The new offence will apply where an image of the item is published in such a way that the image is accessible to the public. This would, for example, cover a person uploading to social media a photograph of himself or herself, taken in his bedroom, which includes in the background an ISIS flag. It is not clear that the existing offence at section 13 would cover these circumstances because a bedroom is not a public place within the meaning of section 121.

The Terrorism Act 2000 section 13 currently criminalises the wearing of clothing or display of an article in a public place where this is likely to arouse suspicion of membership of a proscribed group. Clause 2 would extend section 13 to provide an offence of publication. The Terrorism Act 2006 sections 1 and 2 currently provide for the offence of encouraging terrorism and dissemination of terrorism publications. The amendment to section 13 included in clause 2 would effectively make the act of publication in itself an offence.

Professor Clive Walker in his evidence to the Joint Committee on Human Rights has highlighted,

If the publications caught under [the proposed] s.13(1A) do not encourage support for terrorism, then one wonders where is the social harm? There is no longer any element of disturbance of the Queen's peace. Even worse, the problem arises of criminalising the display of historical photographs, such as IRA members in uniform during the War of Irish Independence 1919-21. Indeed, one is far more likely to find historic pictures of uniforms, flags or banners than contemporary images. The espousal of historic causes and actions which are still supported by contemporary proscribed organisations thus becomes a major potential target for this offence, and the fact that the image is historic does not excuse its publication once the offence is enacted.⁴

This clause interferes with the right to freedom of expression as protected by Article 10 of the ECHR. In light of the pre-existing offences the necessity for the proposed offence has not been clearly demonstrated. Furthermore the potential for new offence to criminalise legitimate publications raises a significant concern.

The Commission, in line with the Joint Committee on Human Rights, recommends that clause 2 be amended to safeguard legitimate publications and to give greater clarity as to what acts are, and are not, criminalised. These amendments must ensure the display of historical

⁴ Written evidence from Professor Emeritus Clive Walker (CBS0001) to Joint Committee on Human Rights Legislative Scrutiny: Counter-Terrorism and Border Security Bill Ninth Report of Session 2017-19 10 July 2018

images in circumstances clearly not designed to promote contemporary support for terrorism are not criminalised.

Clause 3 – Obtaining or viewing material over the internet

Clause 3 will extend the existing offence of collecting or making a record of information likely to be useful to a person committing or preparing an act of terrorism, provided by section 58 of the Terrorism Act 2000, to include the streaming of such material. Where a person views such material three or more times, they commit the offence if they know, or have reason to believe, that the record contains or is likely to contain terrorist material.

The Commission is concerned that Clause 3 may criminalise academic and journalistic research. The Independent Reviewer of Terrorism, Max Hill QC has highlighted that the proposed offence assumes that '*a predisposition to extreme thinking—has crossed the line into terrorist offending, which is violent extremism*'.⁵

The Ect.HR has made clear that Article 10 of the ECHR,

*guarantees "everyone" the freedom to receive and impart information and ideas and that no distinction is made according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom. Article 10 applies not only to the content of information but also to the means of dissemination, since any restriction imposed on such means necessarily interferes with the right to receive and impart information. Likewise, the Court reaffirms that Article 10 guarantees not only the right to impart information but also the right of the public to receive it.*⁶

The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in a 2011 report on imparting information through the internet stated,

Imprisoning individuals for seeking, receiving and imparting information and ideas can rarely be justified as a proportionate measure to achieve one of the legitimate aims under article 19, paragraph 3, of the International Covenant on Civil and Political Rights protection of

⁵ Examination of Witness Counter-Terrorism and Border Security Bill – in a Public Bill Committee at 12:00 am on 26th June 2018.

⁶ Ahmet Yildirim v. Turkey (Application no. 3111/10) 18 December 2012, para 50

national security or countering terrorism cannot be used to justify restricting the right to expression unless the Government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.⁷

The Commission is concerned that as currently drafted clause 3 risks criminalising those seeking to receive information via the internet in a range of circumstances.

The Commission recommends in line with the recommendations from the UN Special Rapporteur that to ensure compliance with the ECHR, Article 10 and the ICCPR, Article 19 that clause 3 be amended to require a viewer to have the intention of and the viewing to have the effect of encouraging or facilitating the commission of terrorism acts.

Clause 20 and Schedule 3 – Port and border controls

Schedule 3 of the Bill contains powers to stop, question, search and detain people at ports and borders to determine whether they appear to be (or have been) engaged in hostile activity. Under Schedule 3, police officers or designated immigration or customs officers could exercise these powers at a port or in the border area in Northern Ireland, which includes the first place at which a train travelling from the Republic of Ireland stops for the purposes of allowing passengers to leave.⁸ In Northern Ireland that will be Newry railway station.

In its analysis of the provision the Joint Committee on Human Rights has highlighted that an individual's right to private and family life, as protected by ECHR, Article 8 may be interfered with in a number of ways including,

'a) a person must provide any information or document requested by the officer. Failure to do so is punishable by a fine of £2500 and up to three months' imprisonment;

⁷ Human Rights Council, Seventeenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue A /HRC/17/27, 16 May 2011 para

⁸ Schedule 3 Para 57(6)(b) states, it is the first place at which a train travelling from the Republic of Ireland stops for the purposes of allowing passengers to leave

b) a person can be searched and strip-searched if the officer has reasonable grounds for suspecting concealment of evidence and this is authorized by a senior officer;

c) a person may have their personal belongings copied and retained; this applies to journalistic and legally privileged information (with supervision from the Investigatory Powers Commissioner). Property can be retained for a range of reasons;

d) a detained person may have their biometric data taken; and

e) a person can be detained for questioning. There is no right to a solicitor if questioned for under one hour before being detained. Following this, in some circumstances, a person may only consult their solicitor in the presence of an officer. ⁹

The powers may be exercised with respect to any individual 'hostile act'. The term 'hostile act' is not defined within the Bill. However the explanatory memorandum states that a 'hostile act' is '*one that threatens national security or the economic well-being of the UK or is an act of serious crime*'.¹⁰ The Home Office Impact Assessment on the Bill refers to Schedule 7 of the Terrorism Act 2000 and states that there is,

'no equivalent power to stop an individual at a port or border area to determine if they are involved in hostile state activity. The need for such a power has become more acute following the incident in Salisbury on 4 March 2018 during which a nerve agent of a type developed by Russia was used'. ¹¹

Professor Clive Walker has highlighted that the term 'hostile act' has '*not been used in the UK beyond war-related legislation, such as the Civil Defence Act 1939 and the Geneva Conventions Act 1957*'.¹²

The powers contained within the clause and schedule will interfere with the right to private life, as protected by the ECHR, Article 8, this right may be subject to proportionate limitation in accordance with the law in pursuit of a legitimate aim.

A law which grants discretion to public authorities to interfere with the right to private life must be framed with sufficient clarity and specify the manner in

⁹ Joint Committee on Human Rights Legislative Scrutiny: Counter-Terrorism and Border Security Bill Ninth Report of Session 2017-19 10 July 2018 para 73

¹⁰ Explanatory Notes paragraph 132

¹¹ Home Office, Impact Study (IA H00308, 2018) para.153.

¹² If that is the real mischief behind Part II, then the powers should be confined to powers to stop, question and detain without reasonable suspicion on the basis that the person has information, or is carrying materials or data, which might relate to

- crimes under the Official Secrets Acts 1911-89
- CBRNE crimes or proliferation

which it is to be exercised, to ensure adequate protections against arbitrariness.¹³ An analysis of the impact study and other supporting statements does not clearly demonstrate that the proposed measures are necessary in a democratic society and that an appropriate balance has been struck between the rights of the individual and the interests of the State. Whilst the oversight of the Investigatory Powers Commissioner is an important safeguard, the proposed restrictions on the right to access a lawyer raise concerns.

The lack of clarity as to the pressing social needs the proposed measure will address raises a concern, in light of this the Commission recommends that the Schedule 3 is amended to clearly define “hostile activity” and to ensure powers contained within the Schedule are only exercised as a proportionate response to a pressing social need. In addition the need for the proposed power to delay access to a solicitor for a person detained (Schedule 3 Para 25) and the power to require a consultation between a detained person and qualified solicitor to occur ‘within sight and hearing’ of a police officer (Schedule 3 Para 26) have not been clearly demonstrated.

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¹³ The Sunday Times v The United Kingdom (No 1): ECHR 26 Apr 1979