

Amendments to the Counter-Terrorism and Border Security Bill

Amendment to be moved at Committee Stage

Clause 1, page 1, line 8 After “of” insert “in that it approves, endorses or encourages”

Clause 2, page 1, line 18 After the second “person” insert “knowingly”

Clause 3, page 2, line 29 Add at end –

“provided that the person who has viewed or accessed such material has done so creating a reasonable suspicion that such material has been viewed or accessed with a view to committing a terrorist act”

Clause 3, page 2, line 41 Add at end –

“(3B) In considering whether prosecution is merited, regard must be had to the public interest factors that identify in what circumstances that conduct will be considered to be reasonable such as the nature and content of the document or record containing information of that kind, the instrument or device used to view and the length of time that the document or record was viewed”

Clause 6, page 5, line 18 Add at end –

“provided that the relevant conduct constitutes an offence in the country where such conduct took place and that the person concerned is a British national or has been resident in the United Kingdom for period of one year”

Clause 12, Page 14, line 36 Add at end

after Section 53 insert-

“53A (1) A person to whom the notification requirements apply may make an application for review by the court where the notification requirements have been imposed for a period in excess of 10 years

(2) In Scotland, such court shall be the High Court of Justiciary

(3) The application will be reviewed to ascertain whether the period for which the notification requirements have been imposed is both necessary and proportionate having regard to the circumstances of the person and the notification requirements which has been imposed

(4) Where the determination has been made that the notification requirements are not justified, the court may decide (a) that the person should no longer be subject to such notification requirements in excess of the 10-year period or (b) that the notification requirements should be restricted as the court may consider appropriate”

Clause 13, page 15, line 23 Add at end –

“(iii) there is a reasonable belief that the person to whom the warrant relates is in breach of their notification requirements and that entry and search is required to assess the risks posed by that person”

Schedule 3, page 38, line 36 Insert before “An” insert “Where the examining officer considers that there is reasonable suspicion”

Schedule 3, page 39, line 34 Leave out “any” and add “such”

Schedule 3, page 39, lines 34 Leave out “that the officer requests” and add “in relation to Scotland as provided for in Section 34(4) of the Criminal Justice (Scotland) Act 2016”

Schedule 3, page 53, line 36, leave out “Subject to paragraph 32”

Schedule 3, page 54, line 5 Leave out subparagraph (6) and insert “Sub-paragraph (5) does not apply if a police officer not below the rank of superintendent may authorise that the detainee does not consult a solicitor in person where they determine that the time it would take to consult a solicitor in person would be likely to prejudice determination of the relevant matters”

Schedule 3, page 54, line 12 Leave out paragraph 32(1)

Schedule 3, page 54, line 20 Leave out “and in sub-paragraph (1)”

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Clause 1, page 1, line 8 After “of” insert “in that it approves, endorses or encourages”

Effect

This is an amendment to provide clarity about what expressing an opinion or belief means in relation to supporting a proscribed organisation.

Reason

Clause 1 aims to criminalise those making an “expression of support” for proscribed organisations. It extends the provisions of section 12 of the Terrorism Act 2000 (2000 Act) to create an offence of expressing an opinion or belief in support of a proscribed organisation with recklessness as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.

When offences are being created or extended in criminal law, clarity is needed over the definition and formulation to ensure that any citizen can understand the scope of the offence. They can then foresee the consequences for them of any given course of action that is in contravention of the offence.

Clause 1 as drafted lacks that precision as far as what the scope of an “expression of support” means. By amending, it ensures the offending conduct required would involve active or positive action as opposed to passive. Support would require involve actions of actual approval, comfort or encouragement. This would avoid the offence being committed by accident, carelessness or inaction.

Furthermore, the amendment would assist in discouraging the commission of an offence that restricts free speech and debate.

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Clause 2, page 1, line 18 After the second “person” insert “knowingly”

Effect

This is an amendment to ensure that the offence of publishing images cannot be committed by accident, carelessness or inaction. This provides a safeguard for those that become involved inadvertently.

Reason

Clause 2 amends section 13 of the Terrorism Act 2000. Online publication of images such as an item of clothing or other article in a way or in such circumstances as to arouse reasonable suspicion that the person publishing is a member or supporter of a proscribed organisation becomes an offence.

There is no requirement in contrast to Clause 1 for the prosecution to establish that the publication of the image has been reckless. The prosecution merely requires to show reasonable suspicion which is a lower standard: mere publication of the image satisfies the offence. There is no need for the prosecution to demonstrate intention or recklessness to cause harm.

The argument for widening the offence is that such actions are indicative of an individual’s involvement in other terrorist offences and may be used to build a picture of any accused before being involved in more serious offences.

There needs to be proportionality in creating any new offences. That means a balance is required between the criminalisation of conduct that is necessary and goes beyond the offences which currently exist and ensuring that those who offend are aware of what constitutes offending conduct.

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Clause 3, page 2, line 29 add at end –

“provided that the person who has viewed or accessed such material has done so creating a reasonable suspicion that such material has been viewed or accessed with a view to committing a terrorist act”

Effect

This amendment clarifies that an offence of viewing or accessing materials over the Internet must be done in such a way that it creates a reasonable suspicion that they are doing so with a view to committing a terrorist act.

Reason

Clause 3 amends section 58(1) (a) of the Terrorism Act 2000 to make an offence of viewing or otherwise accessing online material of a kind likely to be useful to a person committing or preparing acts of terrorism. What is now proposed would ensure that one click would suffice to commit an offence and widens the offence to include “accessing” in any way.

This amendment addresses the issue of ensuring that the viewing or accessing of such material is for the commission of terrorism. This is required to ensure that the commission of the offence cannot be inadvertent.

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Clause 3, page 2, line 41 Add at end –

“(3B) In considering whether prosecution is merited, regard must be had to the public interest factors that identify in what circumstances that conduct will be considered to be reasonable such as the nature and content of the document or record containing information of that kind, the instrument or device used to view and the length of time that the document or record was viewed”

Effect

This amendment provides in establishing any offence under clause 3 that there will be a public interest consideration required and outline the factors to be considered before any prosecution would take place.

Reason

The reasonable defence excuse should be clarified in the light of the proposed expansion of these section 58 offences. The reasonable excuse should continue to be available as was provided by section 58(3) of the Terrorism Act 2000 but should be amended to take account of current legislative drafting practice which is gender neutral.

Though there is a defence of reasonable excuse to be provided under section 58(3) of the Terrorism Act 2000 as the Bill amends, there can still be challenges with such a defence in invoking its use at any trial. It is of course open to the relevant prosecution authority to decide that prosecution is not merited in the public interest where there may be a reasonable excuse.

Practice tends to indicate that prosecution tends to take place leaving the issue of the defence as a matter for the jury to consider if it is made out after the Crown has established the factual basis and discharged the evidential burden of proof of their case.

There may be legitimate reasons to engage in viewing extremist content such as research, academic and journalistic activities and those who might well view such materials for interest or as a challenge. By having reference to public interest considerations, this will ensure that there is careful consideration given as to when the conduct amounts to circumstances justifying prosecution rather than leaving it to a jury ultimately to assess.

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Clause 6, page 5, line 18 Add at end-

“provided that the relevant conduct constitutes an offence in the country where such conduct took place and that the person concerned is a British national or has been resident in the United Kingdom for period of one year”

Effect

The amendment is proposed to restrict the scope of the extra- territorial jurisdiction of any contravention of section 13 of the Terrorism Act 2000. This ensures that the conduct is of such a nature that it constitutes an offence in the country in which the conduct took place. The person concerned should have some relevant link with the United Kingdom whether by nationality or by residence.

Reason

Clause 6 extends extra-territorial jurisdiction in relation to section 13 of the Terrorism Act 2000 which involves a person in a public place committing an offence if they (a) wear an item of clothing or (b) wears, carries or displays an article to arouse suspicion that the person is a member or supporter of a proscribed organisation. The amendment restricts the operation of this provision to ensure that the person has links to the United Kingdom and that the actual commission of the offence is also an offence in the country where the conduct took place.

No one should be capable of being prosecuted by the British authorities where the conduct in which they engaged was lawful in the country in which it took place and where they may have insufficient links with the United Kingdom.

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Clause 12, Page 14, line 36 Add at end-

After Section 53 insert

“53A (1) A person to whom the notification requirements apply may make an application for review by the court where the notification requirements have been imposed for a period in excess of 10 years

(2) In Scotland, such court shall be the High Court of Justiciary

(3) The application will be reviewed to ascertain whether the period for which the notification requirements have been imposed is both necessary and proportionate having regard to the circumstances of the person and the notification requirements which has been imposed

(4) Where the determination has been made that the notification requirements are not justified, the court may decide (a) that the person should no longer be subject to such notification requirements in excess of the 10-year period or (b) that the notification requirements should be restricted as the court may consider appropriate”

Effect

This amendment seeks to include a review mechanism through the appeal court mechanism in Scotland where a person is subject to a determination which is imposed for a period in excess of 10 years.

Reason

This clause amends the Counter-Terrorism Act 2008 regarding periods of notification for persons convicted of certain terrorist offences where they receive a custodial sentence of 12 months or more. Once released, they must continue to supply the police with certain specified information. The length of the notification requirements depends on the sentence imposed since such sentences can be imposed for periods from 10-30 years. The notification requirements apply automatically without review.

Without a review mechanism, this clause may well contravene Article 8 of the European Convention of Human Rights (right to privacy). This would not seem to be justified.

The amendment includes a right to appeal. For Scotland the appeal would lie to the High Court of Justiciary as this would provide an adequate safeguard to examine the imposition of such notification requirements to ensure fairness.

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Clause 13, page 15, line 23 Add at end –

“(iii) there is a reasonable belief that the person to whom the warrant relates is in breach of their notification requirements and that entry and search is required to assess the risks posed by that person”

Effect

This amendment qualifies the circumstances under which the application for a warrant can be made. There would need to be justification of a reasonable belief which currently operates in relation to searches for drugs under the Misuse of Drugs Act 1971.

Reason

Clause 13 amends section 56 of the Terrorism Act 2000 to provide that an application can be made for a warrant from a judge to authorise entry and search of the home of registered terrorist offender for the purpose of assessing the risks posed by that person.

This provision is too wide and has no safeguards. Some standard needs to be imposed so that there should be a reasonable belief which should be set out as required by the senior police officer to justify the application for a warrant to be granted. The provisions should not be capable of being operated on a mere whim or conjecture.

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Schedule 3, page 38, line 36 Insert before “An” insert “Where the examining officer considers that there is reasonable suspicion”

Effect

This amendment provides that the examining officer cannot question any person unless there is a basis of reasonable suspicion on which to justify questioning them.

Reason

Section 1(1) of the Bill provides a wide basis for an examining officer to question any person since it includes where the person “appears to be” as well as “has been”. There is no threshold test before these provisions come into effect.

Individual officers can therefore work on a hunch rather than a focused basis for suspicion. By amending the examining officer needs to have some basis on which to question. The examining officer can be asked to justify their suspicion at a later stage if required.

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Schedule 3, page 39, line 34 Leave out “any” and add “such”

Schedule 3, page 39, lines 34 Leave out “that the officer requests” and add “in relation to Scotland as provided for in Section 34(4) of the Criminal Justice (Scotland) Act 2016”

Effect

This amendment provides that a Person “P” does not require to give any information other than that which is required in respect of any other person arrested in Scotland.

Reason

Schedule 3 paragraph 3 provides unlimited powers to the examining officer to request any information in P’s possession that the officer requires. There is no qualification to the officer’s powers as to what information to request. Though these provisions may operate only for an hour, this goes far beyond the powers provided for the police in terms of the Criminal Justice (Scotland) Act 2016.

These rights and protections within that Act should equally apply equally to those being held in terms of the Bill.

Amendment to be moved at Committee Stage

Schedule 3, page 53, line 36, leave out “Subject to paragraph 32”

Effect

This amendment removes the right of the police officer to direct that any consultation with a solicitor can be held in the presence of a uniformed police officer.

Reason

The right to consult in private with a solicitor is a fundamental requirement of the UK legal system. If there is a police officer listening to the consultation, quite simply, the purpose of having a consultation with a lawyer cannot be achieved. There are also significant implications in respect of professional privilege and confidentiality. There can be no client confidentiality.

It is the right of the person who is detained to consult with their legal representative and have the contents of that discussion which relate to legal advice, privileged and not disclosed to anyone. Additionally, clients should be encouraged to speak frankly with their legal adviser so that appropriate professional advice can be given on what their rights are, and avenues open to them. That cannot be achieved if such an interview can be conducted in the presence of the police.

The right to listen to any solicitor’s interview is also in contravention of Article 6 of the European Convention on Human Rights (right to a fair trial).

The rights to those affected by the provisions of the Bill should be ensured which include access to a lawyer and a consultation in private.

Any lawyer attending a consultation is bound by professional rules and training. There should be no concern that any such lawyer would hand over information obtained during a consultation. To do so would lay them open to significant professional consequences and most likely criminal charges.

Amendment to be moved at Committee Stage

Schedule 3, page 54, line 5 Leave out subparagraph (6) and insert –

“Sub-paragraph (5) does not apply if a police officer not below the rank of superintendent may authorise that the detainee does not consult a solicitor in person where they determine that the time it would take to consult a solicitor in person would be likely to prejudice determination of the relevant matters”

Effect

The amendment is to achieve consistency so that any deviation from the right of a person being detained to consult with a solicitor must be authorised by a police officer not below the rank of superintendent.

Reason

The examining officer should not be making the decisions not to allow a consultation. Where these decisions are justified these should not be made by the examining officer.

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Schedule 3, page 54, line 12 Leave out paragraph 32(1)

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Schedule 3, page 54, line 20 Leave out “and in sub-paragraph (1)”