# **Rule of Law Implications of the Counter-Terrorism and Border Security Bill**

**Date**: 17 July 2018

**Time**: 0930-11:00

**Location**: Committee Room 12, House of Commons

*Please note: all comments made by any person at the meeting are to be treated as comments made in public. Attendees may tweet and report as they wish.*

**Meeting Aim**

To provide MPs and Peers with an opportunity to discuss the rule of law issues that arise in relation to the Counter-Terrorism and Border Security Bill. A panel of expert speakers will assess the extent to which clauses 1-3 of the Bill give effect to core principles of the Rule of Law.

**Proposed Schedule**

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| 09:30 – 09:35 | **The Rt Hon Dominic Grieve QC MP (Chair)** Introduction |
| 09:35 – 10:05 | **Expert speakers**  (10 minutes each) |
| 10:05 – 10:25 | **Questions and comment** – MPs and Peers |
| 10:25 – 10:45 | **Questions and comment** – open to the floor |

**Background**

Following a succession of mainland terrorist attacks in 2017 that took the lives of 36 British citizens, the government committed to a review of its ‘CONTEST’ counter-terrorism policy. After eight months of detailed consideration and consultation, the new policy was unveiled in June 2018 by Home Secretary Sajid Javid.[[1]](#footnote-1) The policy is premised upon six principles:

1. Creating new legislative powers that enables threats to be disrupted;
2. Supporting counter-terrorism policing and the security and intelligence services, with an additional £50 million increase for counter-terrorism policing this year, and “over 1,900 additional staff across the security and intelligence agencies”;
3. Closer working with international partners, including Five Eyes partners, the EU, and other allies;
4. Closer working with key partners outside of central government, with pilots of new multi-agency centres in London, Manchester and the West Midlands and increased co-operation with the private sector;
5. Joint working “to get terrorist material off the internet”; and
6. Doing more to prevent people from becoming terrorists or supporting terrorism.

The focus of this meeting will be the Counter-Terrorism and Border Security Bill which is a key part of this agenda. The Bill is designed to facilitate the 1st, 5th and 6th principles of the revised CONTEST policy and the government hopes that it will “reduce the threat posed by terrorism and hostile state activity”. Its four aims are:

1. Updating terrorism offences for the digital age, and to reflect contemporary patterns of radicalisation;
2. Disrupting terrorism by enabling the police and Crown Prosecution Service to intervene at an earlier stage in investigations;
3. Ensuring that sentences properly reflect the seriousness of terrorism offences, and strengthen the ability of the police to manage terrorist offenders after their release; and
4. Strengthening the country’s defences at the border against hostile state activity.

The Bill proposes to amend a number of existing criminal offences initially introduced by the Terrorism Act 2000 (the 2000 Act) and is currently (as of the time of writing) being considered by a Public Bill Committee in the House of Commons.

State responses to terrorist activity need to strike a difficult balance to ensure that a rational, evidence-based policy is created that complies with the rule of law. Acknowledging the importance of the issues at stake, the Joint Committee on Human Rights (JCHR) began an [inquiry](https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2017/counter-terrorism-bill-inquiry-launch-17-19/) into the human rights implications of the Bill on 12 June 2018. The two-week consultation saw the Committee receive evidence from a number of civil society and academic organisations that variously criticise the proportionality,[[2]](#footnote-2) potential interference with the freedom of expression,[[3]](#footnote-3) and anticipated discriminatory application of new obligations upon law enforcement agencies.[[4]](#footnote-4)

**The Provisions In Question**

Clauses 1-3 of the Bill were the most contentious and frequently criticised in the evidence to the JCHR. These provisions amend the 2000 Act in order to update terrorist legislation for an age of digital threats.

**Clause 1- Expressions of support for a proscribed organisation**

Clause 1 proposes to amend s12 of the 2000 Act (creating an offence of membership of a proscribed organisation) by inserting the following provision:

“(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 standard of recklessness introduces a lower level of intent in committing the crime than the original provision of the 2000 Act.

**Clause 2- Publication of images**

Clause 2 proposes to amend s13 of the 2000 Act by inserting the following provision:

“(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).”

This clause prohibits the publication of images that might arouse reasonable suspicion that a person is a member of a proscribed organisation, whether the original image was taken in a public or private place (such as a bedroom). The previous scope of the offence extended only to public places explicitly.

**Clause 3- Obtaining or viewing material over the internet**

Clause 3 proposes to amend s58 of the 2000 Act (on collection of information of a kind likely to be useful to a person committing or preparing an act of terrorism) by inserting the following provision at the end of paragraph (b):

“,or

(c) on three or more different occasions the person views by

means of the internet a document or record containing information of that kind.”

Where previously the offence was triggered by downloading information that could be useful to a person committing or preparing an act of terrorism, the new provision proscribes repeated streaming of such content.

**Rule of Law Questions**

The legislation raises a number of rule of law questions that will be discussed in the meeting:

1. **Certainty and clarity of the law**

The law should be clear (to the point that it is followable) and predictable. With no explicit maximum time limit referenced in clause 3 between the first and third click, it may be difficult for the public to understand when the offence is triggered.

1. **Equality before the law**

The law does not operate in a vacuum and the application of criminal penalties can reinforce the biases of law enforcement agents. It is reported that terror laws are disproportionately applied against members of Muslim communities.

1. **Law rather than discretion**

Journalistic and academic inquiries will fall within the scope of the prohibited conduct in clauses 2 and 3 in a prima facie sense. This places a large amount of discretionary power in the hands of the prosecutorial state actors: the CPS and the police. Rule of law standards suggest that discretion in this regard should be minimised.

The power handed to the Secretary of State to proscribe organisations means that although an organisation may have long changed its objects, the minister will retain the discretion to decide whether support for that organisation is rendered criminal.

1. **Protection of fundamental human rights**

Proscribing the streaming of content related to terrorism may disproportionately interfere with the freedom of conscience, especially where citizens are attempting to better inform themselves. Preventing citizens from accessing terrorism-related content may also restrict their freedom of expression as a lack of engagement with subject matter could be said to restrict an individual’s ability to make arguments and articulate oneself with regard to the relevant subject matter.

**The Bingham Rule of Law Principles**

The Rule of Law questions above are based on eight core principles that were identified by Lord Bingham, which can be summarised as:

1. The law must be accessible and so far as possible, intelligible, clear and predictable;
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
5. The law must afford adequate protection of fundamental human rights;
6. Means must be provided for resolving without prohibitive cost or inordinate delay, bone fide civil disputes which the parties themselves are unable to resolve;
7. Adjudicative procedures provided by the state should be fair; and
8. The rule of law requires compliance by the state with its obligations in international law as in national law.

**Speakers’ Biographies**

Max Hill QC

Max Hill is Head of Red Lion Chambers and, since March 2017, the current Independent Reviewer of Terrorism Legislation. He is also the former Leader of the South Eastern Circuit (2014-16) and Chairman of the Criminal Bar Association (2011-12). Max has an extensive profile advising and appearing in terrorism related cases. Although he is unable to accept such instructions in his tenure as Independent Reviewer, Max maintains a heavyweight crime practice, defending and prosecuting in a number of complex cases of homicide, violent crime and high value fraud and corporate crime. He also has extensive advisory experience both nationally and internationally.

Corey Stoughton

Corey Stoughton leads the Advocacy team at Liberty and supervises their legal, policy and campaigning work. Before joining Liberty, she was senior counsel to the Assistant Attorney General for Civil Rights in the U.S. Department of Justice under President Obama. Corey also worked at the New York affiliate of the American Civil Liberties Union, where she litigated on a broad range of US constitutional and human rights issues. Corey has spent time as an adjunct clinical professor of law at New York University School of Law. She graduated from Harvard Law School in 2002 and the University of Michigan in 1998. Corey joined the Liberty team in order to continue to work on issues close to her heart after moving to the UK.

Dr Lindsey Bell

Lindsey is a Lecturer at the University of Bristol after previously holding a lectureship at Royal Holloway, University of London. Prior to her academic career she worked for a time as a civil servant doing strategic policy in relation to defence and national security on Whitehall. Lindsey’s research interests are highly inter-disciplinary and connected by her fascination with the relationship between law and society. Her research at present focuses on her experience in the civil service to examine UK terrorism law and policy, including the counter-radicalisation 'Prevent' strategy.

**Further Reading**

Liberty, ‘**Second Reading Briefing on the Counter-Terrorism**

**and Border Security Bill 2018**,’ [Liberty Website](https://www.libertyhumanrights.org.uk/sites/default/files/Liberty%27s%20Second%20Reading%20Briefing%20%20on%20the%20Counter-Terrorism%20Bill%20FINAL.pdf)

Goldberg, Jadhav and Younis, **‘Prevent: What Is Pre-Criminal Space?’** [BJPsych Bulletin 2017 Aug; 41(4): 208–211](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5537575/)

Hill and Walker, ‘**Counter Terrorism and Border Security Bill: Submission in Relation to Clause 3,’** [Independent Reviewer of Terrorism Legislation Website](https://terrorismlegislationreviewer.independent.gov.uk/submission-in-relation-to-clause-3-of-the-counter-terrorism-border-security-bill-2018/)

1. [Home Secretary Announces New Counter-terrorism   
   Strategy, Home Office Press Release](file:///F:\2018%20Meeting%203%20Papers-%20AGM\Home%20Secretary%20announces%20new%20counter-terrorism%20strategy) [↑](#footnote-ref-1)
2. [Article 19 Written Evidence to the Joint Committee on Human Rights](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/legislative-scrutiny-counterterrorism-and-border-security-bill/written/85999.html) [↑](#footnote-ref-2)
3. [Reporters Without Borders Written Evidence to the Joint Committee on Human Rights](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/legislative-scrutiny-counterterrorism-and-border-security-bill/written/86024.html) [↑](#footnote-ref-3)
4. [Cage](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/legislative-scrutiny-counterterrorism-and-border-security-bill/written/86064.html); [MEND](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/legislative-scrutiny-counterterrorism-and-border-security-bill/written/86030.html); [Muslim Council for Britain Written Evidence to the Joint Committee on Human Rights](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/legislative-scrutiny-counterterrorism-and-border-security-bill/written/86094.html) [↑](#footnote-ref-4)