House of Commons Public Bill Committee – Counter-Terrorism and Border Security Bill 2018

ARTICLE 19 written evidence

Introduction and Executive Summary

1. ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19) is an independent human rights organisation that works around the world to protect and promote the rights to freedom of expression and freedom of information. ARTICLE 19 has significant experience scrutinizing legislation that impacts freedom of expression, including online. We have analysed several cybercrime and national security laws over the years, such as the Malaysia Sedition Act 1948[1] or the Bangladesh Digital Security Bill[2]. We have also recently intervened in a number of high profile cases involving the arrest and detention of journalists, academics, writers and documentary-makers on charges of terrorist propaganda before the Turkish courts.[3] We also intervened in *Regina (Miranda) v Secretary for the Home Department and another* case before the High Court and the Court of Appeal about the use of Schedule 7 powers to detain a journalist and seize journalistic material.[4]

2. ARTICLE 19 welcomes the opportunity to comment on the Counter-Terrorism and Border Security Bill 2018 ('the Bill'). In summary, ARTICLE 19 believes that the Bill poses a significant threat to freedom of conscience, thought and religion and freedom of expression online. In particular, we find that the new offences criminalizing the viewing of 'terrorist' content online, the publication of certain images and expressing an opinion that is supportive of a proscribed organization are both unnecessary and disproportionate in a democratic society (clauses 1-3). We further believe that the government has failed to make the case for harsher penalties for existing terrorist offences (clauses 6, 8-10). In our view, up to 15 years imprisonment or extended sentences is disproportionate. More generally, we believe that the measures proposed in the Bill, if adopted, would set a worrying precedent worldwide, particularly in countries with overbroad counter-terrorism laws that are used to criminalise journalists, human rights defenders and other dissenters. We therefore urge the Public Bill Committee to reject clauses 1-3, 6 and 8-10. We do not comment on other aspects of the Bill.

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[1] ARTICLE 19, Malaysia: Sedition Act upheld in further blow to free expression, 6 October 2015, at https://www.article19.org/resources/malaysia-sedition-act-upheld-in-further-blow-to-free-expression/

[2] ARTICLE 19, Bangladesh: Draft Digital Security Act, 11 May 2016, at https://www.article19.org/resources/bangladesh-draft-digital-security-act/

[3] See e.g. ARTICLE 19's opinion in the *Bakur* case involving documentary makers accused of terrorist propaganda for producing a film about the life of PKK members, at https://www.article19.org/wp-content/uploads/2018/05/Bakur-expert-opinion-29-May-18-FINAL-EN.pdf. See also our opinion in the Altans case involving the arrest and detention of journalists being charged, among other things, with terrorist propaganda, at https://www.article19.org/resources/turkey-article-19-submits-expert-opinion-in-the-case-of-brothers-ahmet-and-mehmet-altan/

[4] ARTICLE 19, UK: ARTICLE 19 intervenes in Miranda Case, 16 December 2016, at https://www.article19.org/resources/uk-article-19-intervenes-in-miranda-case/

Criminalizing the expression of opinions and collection of information violates the right to freedom of expression (clauses 1-3)

3. Clauses 1-3 create new offences or significantly broaden the scope of already sweeping offences under the Terrorism Act 2000 ('TA 2000') and Terrorism Act 2006 ('TA 2006'). In particular, they criminalise the mere expression of opinions about proscribed organisations or the mere viewing of terrorist material without reasonable excuse. We have had the benefit of reading Liberty's Second Reading Briefing on the Bill and fully support it. By contrast, we respectfully disagree with the Independent Reviewer of Counter-Terrorism legislation, Max Hill QC, that the Bill "does not contain a single new terrorist offence" but merely offers "digital fixes". [5] We explain why further below.

Expressions of support for a proscribed organisation

4. Clause 1 makes it an offence to express an "opinion or belief" that is "supportive" of a proscribed organization, and in doing so being "reckless" as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation. The offence would be punishable by up to 10 years imprisonment [6] but could be extended if clause 8 is adopted.

5. ARTICLE 19 is deeply concerned by this provision. It amends section 12 TA 2000 – already sweeping in itself - by creating a new offence that would criminalise the mere expression of opinions or beliefs about proscribed organisations. It therefore goes further than the section 12 offence because all that would be needed is to show that the opinion or belief was "supportive" of a proscribed organization, without any intent to invite support for that organization, let alone intent to cause harm. The Act does not define what "supportive" means in this context – though the meaning of "support" is broader than the mere giving of money or other property under the TA 2000. In any event, the term "supportive" is so broad that individuals voicing opinions perceived to be favourable or positive about designated organisations could be prosecuted. For instance, an individual stating that ISIS has a point in fighting Assad would fall within the scope of this provision, despite the fact that Western democracies, including the United Kingdom, would agree that Assad must be defeated. It is easy to see how this provision could be used to stifle debate on legitimate topics of interest.

6. Indeed, it is important to bear in mind that, as at December 2017, no less than 74 international organisations and 14 organisations in Northern Ireland were proscribed under the TA 2000. [7] Some of these organisations may sometimes be perceived as legitimate freedom fighters in armed conflict or legitimate political actors. However, the offence in clause 1 is so broad that mere debate about the legitimacy of the struggle or political views of these groups would be criminalized. Such far-reaching offences are simply unacceptable and widely disproportionate in a democracy.

7. We also note that the new offence is so broad that it raises serious questions about its application to the activities of NGOs or other human rights organisations such as ARTICLE 19. For instance, one may wonder whether a legal opinion defending the rights of members of a proscribed organisation could be deemed supportive of that organization. We are also concerned that if such broad criminal offences were to become law, they

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[5] https://terrorismlegislationreviewer.independent.gov.uk/counter-terrorism-and-border-security-bill-2018/
[6] Section 12 (6) (a) TA 2000.
[7] Home Office, Proscribed Terrorist Organisations, at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/670599/20171222_Proscription.pdf

would have a discriminatory impact particularly on Muslim communities. They would also risk having a counter-productive effect on individuals, who might otherwise contribute to counter-radicalisation efforts but may view government efforts as unfairly stigmatizing their communities.

8. In our view, the broad offences proposed in the Bill are not worthy of democratic societies and fail the legality and necessity tests under Article 10 of the European Convention of Human Rights ('ECHR'), to which the United Kingdom is a party. We note that similar efforts in Belgium to "strengthen" counter-terrorism legislation were recently struck down by the Belgian Court of Cassation. As Dirk Vorhoof, Professor at Ghent University, explains: [8]

> "In its judgment 31/2018 of 15 March 2018 the Belgium's Constitutional Court annulled a government amendment to an anti-terrorism provision in Article 140*bis* of the Belgian Criminal Code. The amendment broadened the scope of incrimination of public incitement to commit a terrorist attack, by removing one of the essential components of determining criminality: the case-by-case assessment of the "risk" of offenses being committed. The amendment aimed to making speeches on the topic of terrorism in itself an incitement to commit a terrorist attack, even when there exists no risk of an attack being committed. In its ruling, the Constitutional Court observed that the need to simplify the production of evidence could not justify the fact that a person could be sentenced up to 10 years' imprisonment for incitement to terrorism if there are no serious indications that a terrorist crime would in fact be committed. The Court considered the new provision in breach with the right to freedom of expression as guaranteed by Article 19 of the Belgian Constitution, in combination with Article 19 ICCPR and Article 10 ECHR."

Publication of images

9. Clause 2 criminalises the publication of an image of an item of clothing or "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 organization. This offence is punishable by 6 months imprisonment. It extends the already overbroad offence under section 13 TA 2000, which criminalizes the wearing of clothing in a public place such as to arouse suspicion of membership of a proscribed group. The government has noted that the new offence is intended to cover circumstances in which individuals take photos or film themselves in their bedroom against the background of an ISIS flag.[9]

10. ARTICLE 19 is concerned however that the new offence is overly broad and could lead to the prosecution of those (such as human rights activists or journalists) who are simply trying to document human rights abuses, e.g. in Syria. Similarly, we note that journalists, activists, academics and others in Turkey are currently being charged with terrorist propaganda or attempts to overthrow the government merely on the basis that they allegedly use a particular phone app. If Turkey were to follow the UK's lead, it would be able to prosecute individuals who have been unfortunate enough to have been caught on camera using the Bylock app, despite their lack of intent to commit any harm. In other words, the UK would be setting a dangerous precedent for other countries to adopt similarly broad laws that would likely be applied arbitrarily. In any event, we note that just because an individual takes a photo of him or herself against the background of an ISIS flag does not necessarily mean that they intend to incite harm. One cannot exclude the possibility of teenagers making misguided jokes about terrorism, including by

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[8] See "*No overbroad suppression of extremist opinions and hate speech*", in Strasbourg Observers blog, 12 June 2018, at https://strasbourgobservers.com/2018/06/12/no-overbroad-suppression-of-extremist-opinions-and-hate-speech.

[9] See explanatory notes to the Bill, at https://publications.parliament.uk/pa/bills/cbill/2017-2019/0219/en/18219en.pdf

wearing e.g. ISIS-looking costumes, and posting them online (see e.g. Twitter Joke trial case).

Obtaining or viewing material over the Internet

11. Clause 3 amends section 58 of the TA 2000 by adding a new offence that would criminalise the mere viewing/streaming, on three or more occasions, of material of kind "likely to be useful to a person committing or preparing an act of terrorism". This offence would be punishable by up to 15 years imprisonment if clause 6 of the Bill were adopted. The government explains that the offence would be committed whether the defendant was in control of the computer or was viewing the material, for example, over the controller's shoulder.[10]

12. ARTICLE 19 is gravely concerned by clause 3. In our view, it would have a dramatic chilling effect on investigative journalism, academic research or individuals merely trying to understand the ideology driving terrorist groups. The government avers that "the requirement to view the material on at least three occasions ensures that the new offence deals with a pattern of behaviour, rather than a deliberate but one off action (perhaps sparked by mere curiosity) or the unintended viewing of such material, for example by inadvertently clicking on the wrong internet link".[11] We disagree. To begin with, the government notes that the "offence would be committed whether the three occasions involved viewing the same or different material each time". Given common Internet connection problems, it is highly likely that an individual seeking to view terrorist material out of mere curiosity would seek to reload several times before being able to view it. Therefore, he or she would get caught despite the government's stated intention to capture patterns of behaviour.

13. In any event, individuals should not be criminalised when they are merely trying to take an informed view about terrorist groups' motivations and actions without intent to commit a terrorist offence. Under section 58 TA and the new clause, however, the mere downloading or viewing of material that would be "useful" to a person preparing an act of terrorism without actual intent to commit a terrorist act would be enough. Although the House of Lords has previously held that in order to be useful, the information at issue would have to be of practical assistance to a person committing or preparing an act of terrorism,[12] we are concerned that the legislation itself is ambiguous and that watching ISIS propaganda videos - which are generally useful to its cause - but without intent to carry out terrorist acts would be criminalised. Although section 58 TA2000 provides for a "reasonable excuse" defence, it is, in our view, grossly inadequate to deal with the chilling effect that the new provision would have, particularly as individuals would be faced with imprisonment of up to 15 years if clause 6 were adopted. [13]

14. From a comparative perspective, we note that the French *Conseil constitutionnel* declared a similar provision unconstitutional in 2017.[14] The *Conseil constitutionnel* noted that the

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[10] Explanatory notes, *op. cit.*, page 10.

[11] *Ibid.*

[12] See R v G, R v J [2009]UKHL 13. paras. 43.

[13] This is notwithstanding the interpretation of the 'reasonable excuse' defence by the Court of Appeal in RvY(A) [2010]2Cr.A..R.15. For a summary, see Independent Review of Terrorism legislation, *Tom Sargant Memorial Lecture*, 24 October 2017, at https://terrorismlegislationreviewer.independent.gov.uk/tom-sargant-memorial-lecture-for-justice-24th-october-2017/

[14] See Decision no. 2017-682 QPC 15 December 2017, at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2017-682-qpc/communique-de-presse.150406.html

authorities already had several powers allowing them to deal with the threat of terrorism, including a range of terrorism offences and the power to block access to sites inciting to terrorism and/or publicly condoning terrorism. It further considered that the *mens rea* for the offence of "regularly consulting terrorist websites", namely that the defendant espoused the views of expressed on the websites at issue, was not sufficient to establish that the defendant intended to commit acts of terrorism. Similarly, the 'reasonable excuse' defence was insufficient to protect the right of individuals to seek information online.

15. ARTICLE 19 believes that the proposed new offence in the Bill is equally vague and unnecessary. Moreover, we note that the proposed sentence for the French offence was 2 years rather than 15 years, the government's proposal in the Bill, i.e more than 5 times higher.

16. Finally, we draw attention to the recently adopted EU Terrorism Directive 2017. Although far from perfect, we consider that Article 8 of the Directive, which enjoins Member States to make it an offence to receive training for terrorism coupled with Recitals 11 and 40 provide much greater clarity than clause 3 of the Bill.[15]

Harsher sentences for certain terrorist offences are unnecessary and disproportionate (Clauses 6, 8-10)

17. Clause 6 increases maximum sentences for certain terrorist offences from 10 to 15 years, including for section 58 TA 2000 offences (collection of information), section 1 (encouragement of terrorism) and section 2 (dissemination of terrorist publications) of the Terrorism Act 2006 ('TA 2006') .

18. Similarly, clauses 8-10 add certain terrorist offences to the list of offences for which extended sentences can be given in certain circumstances under the Criminal Justice Act 2003. This includes offences under section 12 TA2000 (inviting support for a proscribed organization), section 58 TA 2000 ((collection of information), section 1 TA 2006 (encouragement of terrorism) and section 2 TA 2006 (dissemination of terrorist publications) among others. In practice, this means that offenders would only be entitled to automatic release after serving two-thirds of their custodial sentence and would then potentially face an extended period of licence of up to 8 years.[16]

19. ARTICLE 19 notes that the government has not made the case as to why such a substantial increase in sentencing was necessary.[17] In particular, the government does not point to any evidence to show that the existing maximum fails to provide sufficient deterrent effect, nor do they explain how the extension of custodial sentences beyond the halfway point provided by the Criminal Justice Act 2003 is consistent with the rehabilitation of those convicted of terrorism offences. In the absence of any such evidence, we consider the proposed extension to be both unnecessary and disproportionate. This is particularly concerning as far as it applies to crimes related to the exercise of freedom of expression and freedom of thought, conscience and religion.

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[15] Article 8 provides "Member States shall take the necessary measures to ensure that receiving instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1) is punishable as a criminal offence when committed intentionally", see https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L0541&from=EN

[16] The sentencing scheme under the Criminal Justice Act 2003 is explained here and here.

[17] See Explanatory notes, *op. cit.*

Conclusion

20. Contrary to the Independent Review of Terrorism legislation's assertion that the Bill does not create any new offences, we believe that it significantly expands the range of offences available to prosecutors in relation to terrorism. In our view, these new offences are both overly broad and unnecessary. We note that the legal framework governing terrorism offences and counter-terrorism powers has been examined on numerous occasions over the past three decades, including the review by Lord Lloyd of Berwick, the Privy Council Review of the Anti-Terrorism Crime and Security Act 2001, multiple reviews by the Joint Committee on Human Rights and the detailed review undertaken by the former Director of Public Prosecutions Sir Ken Macdonald QC in 2010. In light of the extensive range of offences already available, we consider the case for adding new offences to the statute book must be particularly compelling. In our view, no such case has been made out here.