

REPORTERS WITHOUT BORDERS

FOR FREEDOM OF INFORMATION

**Reporters Without Borders
Briefing for the House of Lords
Counter-Terrorism and Border Security Bill
8 October 2018**

Introduction

1. Reporters Without Borders – known internationally as Reporters sans frontières (“RSF”) – is an international non-profit organisation that promotes and defends press freedom. Accordingly, this submission focuses specifically on the impact of the Counter-Terrorism and Border Security Bill 2018 (“the Bill”) on freedom of expression, press freedom and protection of journalistic sources.

Summary

2. The Bill proposes new offences that threaten press freedom and could criminalise responsible journalists investigating and reporting on issues of public interest. New search powers put confidential journalistic sources at risk. These are not mere “digital fixes”, but significant expansions to the existing law which endanger the right to free expression protected in the common law and by Article 10 of the European Convention on Human Rights (“ECHR”).

3. RSF is particularly concerned about the following provisions:

- a. Clause 1: criminalising “reckless” expressions of opinion where there is no intent, to encourage another to support a proscribed organisation is a disproportionate interference with the right to freedom of expression;
- b. Clause 2: criminalising the publication of images of costume, where there is only the possibility of arousing reasonable suspicion that the person is supportive of a proscribed organisation, is a stark and disproportionate restriction of press freedom;

- c. Clause 3: journalists may commit an offence simply for viewing or accessing, vaguely defined information. The reasonable excuse defence proposed provides inadequate protection for responsible journalistic activity;
- d. Clause 4: the introduction of an offence of entering or remaining in designated areas overseas could be used unreasonably to restrict or shut down legitimate reporting, without adequate safeguards for journalists;
- e. Clause 7: the proposed increase in maximum sentences is significant and will further the chilling effect of criminalisation on journalistic activities;
- f. Clause 13 increased powers to enter and search home addresses threatens the protection of confidential journalistic sources; and
- g. Clause 21 and Schedule 3: the new powers of stop, search, detention, and particularly retention and copying of material at ports and borders, threaten the confidentiality of journalistic sources.

Clause 1: Expressions of support for a proscribed organisation

4. Clause 1 will create a new criminal offence where a 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”*

5. There is no defence for journalistic activities. There is a lack of clarity around the meaning of “support”. The standard of “recklessness” removes any requirement for subjective intent. Taken together, this reduces the threshold for criminality to a point where it will be difficult to predict when the offence might apply.^[1] RSF can immediately foresee restrictions on press freedom to express legitimate concerns, for example, around a new proscription or a proscribed group. Such discussion around criminalisation, proscription, and state power is undoubtedly in the public

interest, but this new offence will have a clear and disproportionate chilling effect on press freedom to engage in such debate.

Clause 2: Publication of images

6. Clause 2 proposes to criminalise a person who:

“...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.”

7. RSF is seriously troubled by the concept of criminalising the act of publishing images of clothing or other items. This is far beyond a person wearing clothing or carrying or displaying an article themselves,[\[2\]](#) but criminalises the publication of photographs of such items, which may well be part of responsible journalism in the public interest.

8. The low threshold of “*to arouse reasonable suspicion*” is worryingly vague in its scope and would seemingly include, for example, press publications where there is no intent to support a proscribed organisation, nor membership or support for such a group.[\[3\]](#) From the Explanatory Notes to the Bill, it seems the government has failed to engage with the impact of this clause on press freedom. RSF fears the chilling effect of such criminalisation on journalists.

9.RSF reiterates the conclusion of the Joint Committee on Human Rights that these measures are incompatible with the requirements of Article 10 ECHR:

In our view, to criminalise the publication of an article which may be worn or displayed in a private place risks catching a vast amount of activity and risks being disproportionate, particularly given the lack of incitement to criminality in the mens rea of this offence. It risks a huge swathe of publications being caught, including historical images and journalistic articles, which should clearly not be the object of this clause (Joint Committee

on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill*, 10 July 2018, HL Paper 167 of session 2017–19, p 30).

Clause 3: Obtaining or viewing material over the internet

10. Clause 3 of the Bill will criminalise the viewing of “*information of a kind likely to be useful to a person committing or preparing an act of terrorism*” (Terrorism Act 2000, section 58(1)(a)), where:

“(c) the person views, or otherwise accesses, by means of the internet a document or record containing information of that kind.”

11. RSF is alarmed by this proposal. The government seeks to extend the existing offence of making a record or possessing such information (Terrorism Act 2000, s.58(1)(a)-(b)), to merely the act of viewing online.^[4] RSF notes that this clause has been amended to remove the previous condition of having viewed the information on three or more different occasions, now criminalising a single viewing. In either iteration, this new offence will stifle investigative journalism; it would take a brave journalist indeed to face the risk of the Bill’s proposed 15 years’ imprisonment (Clause 7(3)).

12. Whilst the defence of “*reasonable excuse*” is available, the scope and availability of such defence is fact sensitive and legally uncertain. The extent to which journalistic acts of investigation would be protected as reasonable excuse is far from clear. It may be that journalists would only be availed of its protection, if at all, only having endured the stress and uncertainty of a criminal trial. This legal uncertainty plainly compounds the chilling effect of this proposed offence on journalistic activity.

13. The Government response to JCHR criticism of these proposals asserts there is no hard evidence of any chilling effect posed by s.58 offences (Home Office, *Government Response to the Joint Committee on Human Rights Report “Legislative Scrutiny: Counter-Terrorism and Border Security Bill”*, 4 September 2018, p 7). The Government cited the low number of prosecutions under s.58. With respect, the level of prosecutions pursued provides no reasonable indicator of the chilling effects of any measure. The impact of existing terrorism regulation on journalistic activity is substantial. These new proposals go far further than any existing measure,

criminalising the mere viewing of material. The negative chilling effects of these new measures on legitimate journalism will, in our view, be significant, unnecessary and unjustified.

Clause 4: Entering or remaining in a designated area

14. Clause 4 introduces an offence of entering or remaining in an overseas area designated by Ministers in Regulations. It will be a defence to have a “reasonable excuse” to be in the designated area. There is a grace period of a month following designation for individuals to leave the designated area without committing any offence. Any area can be designated for up to 40 days without Parliamentary approval. Ministers must be satisfied that designation is necessary to protect members of the public against a “risk of terrorism” to restrict United Kingdom nationals and United Kingdom residents from entering, or remaining in, the area. Introducing the measure, the Minister of State for Security and Economic Crime, Ben Wallace explained:

Once an area has been designated, there will be a grace period of one month, enabling persons already in the designated area to leave before the offence takes effect. Of course, there will be individuals who have a valid reason to enter and remain in a designated area, such as to provide humanitarian aid, to work as a journalist, or to attend a funeral of a close relative. To cover such cases, we have provided for a reasonable excuse defence (HC Deb, 11 September 2018, col 656).

15. It is important that the Government accepts that journalism will provide a reasonable excuse to remain in a designated area. Journalists reporting from areas of conflict or international controversy serve a valuable public interest, often endangering their lives to cast light on some of the darkest of human conduct. The new power for Ministers to designate certain areas as “off bounds” may operate unreasonably to shut down reporting, without adequate safeguards. However, for the reasons outlined above, RSF is again concerned that this new offence will create an unjustifiable danger to legitimate journalism. An express statutory safeguard should be introduced to exempt journalistic activity from the regulations designed to criminalise travel.

Clause 7: Increase in maximum sentences

16. An increase in maximum sentences set out in Clause 7 – in so far as they relate to offences connected with expression and the collection and dissemination of information - will undoubtedly compound the chilling effect of these offences on journalists.[\[5\]](#)

Clause 13: Power to enter and search homes

17. Increased powers to enter and search home addresses raises particular concerns for RSF. Journalistic sources are properly afforded legal and moral protections,[\[6\]](#) as the confidentiality of journalistic sources is an essential facet of press freedom.[\[7\]](#)

18. Clause 13 applies to persons who are subject to notification requirements, having been sentenced or subject to an order specified in Part 4 of the Counter-Terrorism Act 2008. As this includes convictions under section 12 of the Terrorism Act 2000, to include Clause 1's proposed criminalisation of reckless expression, this is potentially relevant to journalists and the protection of their sources. There are existing search powers available to officers investigating terrorism (section 42 and Part 1, Schedule 5 of the Terrorism Act 2000); this proposal is an unnecessary and disproportionate infringement on press freedom. The Bill contains none of the limited but specific protection afforded to journalistic material provided either in Schedule 5, Terrorism Act 2000 or in the Police and Criminal Evidence Act 1984.

Clause 21 and Schedule 3: Port and border controls

19. Clause 21 and Schedule 3 provide new powers to stop, question, search and detain persons at ports and borders. These powers are said to be for the specified purpose of determining whether someone is, or has been, engaged in "*hostile activity*".

20. This "*hostile activity*" is defined - broadly – as any act in the interests of a third state not the UK, and includes activity which threatens national security, the economic well-being of the UK, or which involves the commission of a serious crime.[\[8\]](#) The JCHR describes these measures as "dangerously broad" (*Legislative Scrutiny: Counter-Terrorism and Border Security Bill*, 10 July 2018, HL Paper 167 of session 2017–19, [80]). This definition is exceptionally broad and could cast a net over a whole range of journalistic activities in the public interest.[\[9\]](#) However, officers would *not* need grounds to suspect the person of being engaged in hostile activity; anyone could be stopped, searched, questioned, and detained under Schedule 3 powers. The JCHR concluded that they could be triggered on anything amounting to an officer's "hunch" (*Legislative Scrutiny: Counter-Terrorism and Border Security Bill*, 10 July 2018, HL Paper 167 of session 2017–19, [80]).

21. RSF is particularly concerned that the expansion of no-suspicion powers on the rights of journalists travelling across borders. These provisions expand upon the already much-criticised no-suspicion powers in the Schedule 7, Terrorism Act 2000 applied in the case of David Miranda in circumstances where inadequate protection was offered for journalistic activity.[\[10\]](#) The JCHR has recommended that, if retained, they are amended (1) clearly defining “hostile activity”; (2) requiring a threshold test of reasonable suspicion; and (3) explicitly providing that the power must only be exercised where necessary and proportionate. Further protection should be provided for access to a lawyer (*Legislative Scrutiny: Counter-Terrorism and Border Security Bill*, 10 July 2018, HL Paper 167 of session 2017–19, [82]). The only amendments made in the House of Commons refer to legal advice. They are inadequate to address the sweeping impact of these unnecessary and ill-defined measures.

22. Paragraphs 11 to 13 provide for retention of a person’s property, and paragraphs 14 to 15 the power to make and retain copies. Paragraph 16 criminalises a wilful failure to comply or obstruction of a search or duty under this Part. RSF is acutely aware that such powers threaten to undermine fundamental principles of confidentiality of journalistic sources and criminalise those journalists who would seek to abide by their ethical and legal obligations to protect their sources’ confidentiality.

23. The protection proposed for confidential journalistic material is limited. It should be retained securely and only used to the extent that is necessary and proportionate for a relevant purpose (paragraphs 12(5) and 15(5)); and such retention is subject to review by a Judicial Commissioner after Schedule 3 is exercised. RSF considers these limited and ex-post facto restrictions on interference are wholly inadequate to protect the confidentiality of journalistic sources.[\[11\]](#)

Conclusion

22. RSF is deeply concerned that the Bill threatens press freedom and the protection of journalistic sources. The proposed criminalisation of the expression of thought and expression, viewing information online, and the publishing of photographs is an unlawful, unnecessary and disproportionate infringement of the fundamental rights of expression guaranteed both by the common law and by Article 10 of the ECHR.

23. RSF urges the House of Lords to subject these clauses to close scrutiny, and to excise the aforementioned problematic measures from the Bill, or at a minimum, include clear and specific exemptions for journalists in each clause.

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[1] These measures would supplement existing provisions in the s.1 Terrorism Act 2006 and in s.12(1), Terrorism Act 2000. In concluding that the “support” offence in s.12(1) was compatible with Article 10 ECHR, the Court of Appeal in *R v Choudary (Anjem)* [2018] 1 W.L.R. 695; “requisite intent” was key to the Court’s conclusion. That offence did not – in the view of the Court of Appeal - prohibit the expression of views or opinions, no matter how offensive, but only the *knowing* invitation of support from others for the proscribed organisation (at [70]).

[2] Section 13, Terrorism Act 2000.

[3] Again, see *R v Choudary (Anjem)* [2018] 1 W.L.R. 695, [70].

[4] Explanatory Notes, [37] explains that the viewing of a site “over the shoulder” of someone else researching material online would be sufficient basis for the offence.

[5] Including, but not limited to, for example, s.58, 58A Terrorism Act 2006.

[6] For example, section 10 of the Contempt of Court Act 1981; rule 14 of the Editors’ Code of Practice; and Article 10 of the European Convention on Human Rights.

[7] See, for example: *Goodwin v United Kingdom* (1996) 22 EHRR 123, at [64].

[8] “*Hostile activity*” is defined in Schedule 3, para 1(5).

[9] Examples have been given by others, including activities by individuals negotiating investment or trade activities inconsistent with the economic interests of the UK, but in the interests of a third state. In many cases, reporting on these matters might similarly be covered as a significant matter of public interest.

[10] In *R (Miranda) v Secretary of State for the Home Department* [2016] 1 WLR 1505, the Court of Appeal emphasised the importance of express protection for journalistic sources as an aspect of free expression (see [113]). Max Hill QC, the Independent Reviewer of Terrorism Legislation has already reiterated his view to the Committee that Schedule 7 must be reformed to introduce a requirement for reasonable suspicion. See Oral Evidence, 20 June 2018.

[11] See *Sanoma Uitgevers B.V. v. Netherlands*, App. No. 38224/03 (2010) (GC), [88] et seq.