SUBMISSION FROM CAGE ON THE COUNTER-TERRORISM AND BORDER SECURITY BILL 2018

CAGE

Submission from CAGE on the Counter-Terrorism and Border Security Bill 2018 (July 2018)

This is a written submission from CAGE.

CAGE is an independent advocacy organisation that campaigns for the rule of law and due process.

Executive Summary

· The Counter-terrorism and Security Bill builds upon and expands many aspects of British anti-terrorism law controversially amassed over the past 18 years.

· Rather than heeding calls from across society to fundamentally rethink those approaches to security and counter-terrorism, this Bill sees the government further cement provisions that have seen norms of due process abandoned, and individuals criminalised unjustly.

· The dangers presented in this Bill are three-pronged. These include:

1. Strengthening the hard arm of policing, by introducing new and broader terror-related offences and longer prison sentences;

2. Widening the scope of surveillance and intelligence-gathering outside the sphere of crime, with new powers to stop, search and detain individuals without suspicion; and

3. Securitising the public sector and space further, by co-opting local authorities further into the counter-terror apparatus.

· CAGE believes that the Counter-Terrorism and Border Security Bill (CTBS) 2018, will increase an already unreasonable security environment in the UK, beyond all measure of necessity.

Introduction

On reading through the provisions of the Bill, it is clear that the government seeks to increase the extent of the security state, even if this means enforcing provisions that have already been

deemed unnecessary and even counter-productive through research and case studies we have meticulously detailed over the years. These reports are freely available on our website[1].

CAGE reiterates our basic position in relation to long term solutions to social cohesion in the UK:

- All acts of violence should be treated as criminal law matters through pre-9/11 legislation such as the Offences Against the Person Act and the Fire and Explosives Act.
- Strict liability offences that relate to possession of materials or the dissemination of ideas should be removed entirely from the statute book and any crimes that incite violence, should be dealt with as crimes of incitement.

The record of the parliamentary discussion on the second reading of the Bill in the House of Commons belied one important aspect missing from any discussion about the trade-off between security and liberty: the experiences of those who would be impacted by this legislation.

Any discussion about such a trade-off, without primarily taking into account the lived experiences of those who have been impacted by unjustified encroachment of the state, is morally indefensible.

In this briefing CAGE will set out some of the key areas of concern. Our findings are based on the experiences of hundreds of clients that have come through our doors, who have related to us devastating accounts of their rights having been taken away through counter-terrorism legislation and policies.

New Schedule 7-type powers at borders

1.1. The Bill gives officers at ports and borders powers to question, stop, search and detain individuals, mirroring existing powers under the much-maligned Schedule 7 provision of the Terrorism Act 2000:

> *Ability for 'questioning and detention of persons suspected of involvement in hostile activity for, on behalf of, or otherwise in the interests of, a State other than the United Kingdom'* ***[Pt 1, s1]***

1.2. These powers can be exercised:

- *with or without grounds for suspicion that the subject has engaged in any hostile activity* ***[Pt 1, s1(4)]***
- *with power to search person, ship, plane or items for this purpose* ***[Pt 1, s1(7)]***
- *with power to retain and copy confidential journalistic and protected material* ***[Pt 1, s12(10)]***
- *administering a maximum sentence for obstructing this search - one year, not three months as under Schedule 7* ***[Pt 1, s16(2)]***

1.3. Whilst detaining individual under this power, the examining officer can:

- *question detainees before allowing consultation with a solicitor* ***[Pt 2, s25]***
- *a police officer can also postpone detainee's ability to contact another individual or solicitor to notify them of their detention* ***[Pt 2, s24(3)]***
- *solicitors can only be consulted in sight or earshot of the officers* ***[Pt 2, s26]***
- *fingerprints can be taken to verify 'a person's identity [including] references to showing that the person is* ***not*** *a particular person.' (our emphasis)* ***[Pt 2, s27(8)]***

Why is this a problem?

1.4. This introduces a new power that is open to abuse and further undermines the Rule of Law, like Schedule 7 on which it is based. Any increase in intrusive powers in the name of 'security' must be held up to rigorous scrutiny. The justifications given for this power simply do not hold up under scrutiny[2].

1.5. Schedule 7 powers themselves have long been criticised for being draconian and flouting norms of due process. Allowing for stops without suspicion of offence invests a large amount of power in officers. This has made Schedule 7 a tool for racial profiling and harassment - and this new power can only continue in the same path.

What is CAGE's stance?

1.6. CAGE has highlighted consistently the overbearing use of Schedule 7 of the Terrorism Act 2000 and called for its repeal. Therefore we are deeply opposed to powers that expand on or augment those like in this Bill.

CASE STUDY: Muhammad Rabbani[3]

CAGE's International Director Muhammad Rabbani was stopped under Schedule 7 at Heathrow airport on his way back from the Middle East, having met with a client about a case involving torture[4].

He was told to surrender his passwords as part of the stop - including those to his laptop, which contained confidential material relating to the client's case.

Rabbani refused this request, was arrested, and later found guilty of wilfully obstructing a police search under Schedule 7 of the Terrorism Act 2000 and fined.

Under this new stop and search power, Rabbani would have faced up to a year's imprisonment for obstructing the search - even for the purposes of protecting client confidentiality.

2> 'Hostile Acts' can be invoked in political and subjective ways

2.1. Within this new power, the definition of 'hostile acts' is defined as an act that:

> *(a) threatens national security,*
> *(b) threatens the economic well-being of the United Kingdom, or*
> *(c) is an act of serious crime.* ***[Sch 3. Pt 1, s1(6)]***

2.2. However:

> *'it is immaterial—*
> *(i) whether a person is aware that activity in which they are or have been engaged is hostile activity, or*
> *(ii) whether a State for or on behalf of which, or in the interests of which, a hostile act is carried out has instigated, sanctioned, or is otherwise aware of, the carrying out of the Act'* ***[Sch 3. Pt 1, s1(7)]*** *(our emphasis)*

Why is this a problem?

2.3. Similar to the category of 'extremism', the definition of which is still the subject of dispute but which has become embedded in policing powers in the UK, 'Hostile Acts' is a highly subjective and deeply politicised category of offences that opens up individuals to a range of possible sanctions outside of criminal law.

2.4. The defined language of 'Hostile Acts' is particularly troubling, not only because it is vague in its reach, to include such broad terms as threatening 'national security' and 'economic well-being', but also in relation to its intentionality.

2.5. Seemingly from this draft legislation, a person could be stopped for something that they may have done, and yet they may be completely unaware that what they have done is wrong in the eyes of the state. This means anyone can be stopped at the state's discretion.

2.6. This is further exacerbated by the provisions in the Bill that provide cover to officers who make mistakes in the way in which they conduct their examinations. Under Schedule 2, the Secretary of State is to issue codes of practice for examining officers but *'The failure of an examining officer to observe a provision of a code does not of itself make the officer liable to criminal or civil proceedings.'* **[Sch 2. Pt 4, s49(5)].**

2.7. This allows for abuses of power without any accountability.

What is CAGE's stance?

2.8. The drive to 'stretch' the cast net of policing and surveillance is unnecessary - introducing 'Hostile Acts' as a category of offences only allows for more 'exceptionalised' policing strategies that undermine due process and pre-emptively criminalise individuals. They do nothing to address the actual roots of the issues concerned.

2.9. Just as with the 'counter extremism' agenda, the logic of introducing this new category seems to be circular: the existence of powers to stop Hostile Acts serves no purpose other than to legitimise the existence of powers to stop Hostile Acts.

2.10. We are opposed to this approach and continue to advocate for a return to due process under criminal law where necessary. Security services do not need more political powers.

3> Expansion of powers in relation to viewing 'terrorist material' online

3.1. The CTBS Bill seeks to expand the crime of viewing 'terrorist material' online, which is outlined under the Terrorism Act 2000.

3.2. The government has mooted a 'three strikes' system, that will result in a criminal sanction, and extended maximum prison sentences. Viewing such material is an now an offence if:

'on three or more different occasions the person views by means of the internet a document or record containing information [likely to be useful to a person committing or preparing an act of terrorism]'." **[Pt 1, Ch1. s3(2)]**
And

'when doing so the person knows, or has reason to believe, that the record contains, or is likely to contain, information [likely to be useful to a person committing or preparing an act of terrorism]'. **[Pt 1, Ch1. s3(3)]**

And

***'**It does not matter for the purposes of [the above] whether it is the same document or record that is viewed on each occasion or whether a different document or record is viewed."'* **[Pt 1, Ch1. s3(3)]**

Why is this a problem?

3.3. The premise of this power - that viewing 'terrorist content' (itself a subjective definition) online draws people towards committing acts of violence - cannot justify the wide-ranging criminalisation of activities here.

3.4. This three occasions system is particularly problematic as it is reminiscent of the three strikes system that has so plagued African-Americans in the US 'War on Drugs' *(see Michelle Alexander's 'The New Jim Crow')*. As Alexander helps us to understand, there are multiple subjective factors that are applied by those involved in policing and security that result in repeat offending, often without any context, resulting in individuals being given lengthy sentences without due regard for their environment.

3.5. This provision risks following the system of mass incarceration in the US, widely decried as being counter-productive and abusive.

What is CAGE's stance?

3.6. This power builds on the mistaken and discredited assumption underlying counter-terrorism policy[5] that so-called 'radicalising' material pushes people along a linear pathway to committing acts of violence.

3.7. We continue to oppose this logic as being reductionist, and therefore oppose this power for acting upon it. A non-punishment based approach would be far more useful than criminalising individuals.

3.8. For the government to double down on an already-contentious power in this manner is short-sighted and counterproductive. In practice, we believe that expanding these powers will have a deeply censorious impact.

CASE STUDY: Umm Ahmed

Umm Ahmed had a digital copy of Al Qaeda's *Inspire* magazine on her USB, which she was researching into regarding brother's arrest, which she believed was connected to the magazine.

Following a violent police raid on her home, the police found the file, and she herself was arrested. During sentencing, the judge accepted that Umm Ahmed had possessed the file due to interest in her brother's case, that she posed no threat and that she had no intention of committing violence.

Nonetheless, he sentenced her to 12 months in prison for 'possession of terrorism material', and she was tagged and placed under curfew upon her release.

With the provisions of this Bill, there is the very real possibility of miscarriages of justice like this occurring more often and people being imprisoned without any intent of criminality.

4. Expansion of the 'glorification of terrorism' provisions

4.1. The new Bill seeks to expand previous provisions on the 'glorification' of terrorism, to also include where it is done "recklessly". As the Bill sets out, there is an offence if a person:

'expresses an opinion or belief that is supportive of a proscribed organisation, and in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.' **[Pt 1, Ch1. s1]**

4.2. The maximum sentence for such an offence is also increased to 15 years. **[Pt 1, Ch2. s6]**

Why is this a problem?

4.3. 'Glorification' offences under the Terrorism Act 2006 are already controversial, marking a further shift away from prosecuting actual acts of violence towards policing thought and behaviour.

4.4. This Bill builds on those foundations, allowing subjective assessments to be made on the impact of one individual's statement to another, and risk being open to abuse.

What is CAGE's stance?

4.5. CAGE reiterates our position that the only crimes of incitement that should be prosecuted, are direct instances of incitement to murder, where there can be a clear legal understanding that an individual is actively inciting others to commit acts of violence.

4.6. Vague provisions as they have been set out in the Bill, that permit for an assessment of recklessness based on political interpretations, subvert the principles of criminal justice.

5. Expansion of offences 'with terrorist connections'

5.1. Beyond the actual planning or preparation of a terrorist offence, the Bill also includes the emphasis on also charging those offences that have a 'terrorist connection' which is understood as:

'Aiding, abetting, counselling or procuring the commission of an offence/conspiracy and incitement to offence specified in [Schedule 15 of Terrorism Act 2000]' **[Pt 1, Ch2. s173]**

Why is this a problem?

5.2. To draw on the experience in the US again, the US Federal Sentencing Guidelines have similar provisions that have permitted the US prosecutors to bring in allegations of terrorism at sentencing proceedings of offences. This has resulted in heavy sentences, even where there was not actual involvement in terrorism – and has resulted in gross miscarriages of justice (see CAGE's report 'Too Blunt for Just Outcomes'[6]).

5.3. In a similar vein, there is concern that the evidentiary standard to prove a 'terrorist connection' will be significantly lower than the required criminal justice standard, permitting individuals to be prosecuted with allegations of terrorism that are not proven in court.

What is CAGE's stance?

5.4. As we have long argued, 'counter-terrorism' legislation has allowed the state to shore up powers of policing outside the standards of due process by practicing them on a test population - primarily Muslims - and that this is then brought to bear upon the rest of the population. This Bill seems to reaffirm that reality.

5.5. In conjunction with Schedule 4, these provisions seem to be lowering the bar for what can be considered terrorism as well as 'civilian-ising' terrorism by embedding terrorism offences into a range of other laws which previously concerned themselves with violent and/or sexual offences.

6. The expansion of Channel powers to the public sector will erode trust

6.1. The Counter-Terrorism and Security Act (CTSA) 2015 placed a requirement on all public sector (and in some cases private sector) institutions to stop individuals from being drawn into terrorism by enacting the Prevent policy - known as the 'Prevent duty'.

6.2. This Bill extends the power of local authorities to make referrals to Prevent's Channel stream, which previously was allowed only to police. **[Pt 1, Ch.4 s18]**

Why is this a problem?

6.3. The emphasis on the public sector being given wider powers to play a role in tackling so-called 'radicalisation', is through using local authorities to play a more active role. This serves as part of the push to securitise the public sector, and turn those very institutions of social welfare and service into branches of the state's surveillance apparatus. This can only result in a climate of subjective reporting and deep mistrust between the population and the public sector that is meant to serve it.

What is CAGE's stance?

6.4. CAGE believes that this move is cynical in attempting to dissociate the idea of Prevent and Channel interventions from policing, as part of its rebrand as 'safeguarding'.

6.5. As CAGE has written about in many reports, we believe that the best way to combat the risk factors that might cause vulnerable people from all walks of life to become disenfranchised alienated and angry, is to treat the causes of their issues – be they personal, psychological or political – for what they are, and not to see them through a lens of security.

6.6. Those with mental health, sexual or domestic violence issues, should not be seen as potential future terrorists – as we have documented to be the case – but they should rather be seen as those who need assistance from established and objective sectors with a track-record in effective safeguarding.

6.7. We also reiterate our belief that Prevent should be scrapped, along with the Prevent duty of the CTSA 2015, based on hundreds of case studies, many of which have been widely published and which illustrate that the policy is deeply counter-productive.

7. Public authorities subjectively punishing venues at the own discretion

7.1. The Bill suggests that local authorities should have the power to impose charges on event organisers and venues (including sporting, charity, non-for-profit and social events):

'for the purpose of protecting a relevant event or a relevant site from danger or damage connected with terrorism.' **[Pt 1, Ch3. s14]**

Why is this an issue?

7.2. This power could be used by the local authority in a punitive fashion to quell any dissenting voices by making decisions ostensibly based on security, and imposing charges that are unwarranted.

7.3. This is a particularly dangerous tool as it will severely inhibit freedom of expression as events will not take place due to prohibitive costs. This could result in local authorities taking on an approach that is in reality a form of thought-policing, but which is exercised subjectively under a political agenda.

What is CAGE's stance?

7.4. Along with the expansion of Channel powers above, it is clear that the responsibility of surveillance is moving away from direct policing to being placed as a responsibility among local authorities, which they must fulfil under the obligation created under the CTSA 2015. Having been on the receiving end of attempts to stifle our ability to organise perfectly legal events ourselves, we are concerned this power has the potential to be used in a censorious and political manner.

Conclusion

Rather than heeding calls from across society to fundamentally rethink those approaches to security and counter-terrorism in the name of preserving civil liberties, this Bill sees the further abandonment of norms of due process. This sets a worrying precedent for society that will facilitate further injustices.

As more individuals are criminalised unjustly, so the need for government to take heed of the opinions of those most affected by this legislation will become increasingly urgent. The more those in the corridors of power ignore these important voices, the less the powerful will be viewed as being representative of their population.

We urge government to engage meaningfully with individuals and organisations most affected by counter-terrorism legislation, so that positive responses to our current challenges can be arrived at in a manner that ensures equal justice for all.

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[1] https://www.cage.ngo/resources

[2] https://www.cage.ngo/europol-report-shows-counter-terrorism-legislation-has-led-to-unnecessary-criminalisation-and-overzealous-policing

[3] https://www.passwithprivacy.com/

[4] https://www.cage.ngo/35000-pages-of-evidence-implicating-named-us-federal-agents-in-torture-on-us-soil

[5] https://cage.ngo/wp-content/uploads/2016/09/CAGE-Science-Pre-Crime-Report.pdf

[6] https://www.cage.ngo/product/too-blunt-for-just-outcomes-why-the-us-terrorism-enhancement-sentencing-guidelines-are-unfair-unconstitutional-and-ineffective-in-the-fight-against-terrorism-report