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To: The Rt Hon. the Lord Lang of Monkton DL
Chairman, Constitution Committee
House of Lords

The Rt Hon. Keith Vaz MP
Chairman, Home Affairs Committee
House of Commons

Dr Hywel Francis MP
Chairman, Joint Committee on Human Rights

Re: Failure of 'support' provisions of draft Counter-Terrorism and Security Bill to comply with fundamental human rights and democratic principles

12 January 2015

Dear Lord Lang of Monkton, Mr Vaz and Dr Francis

1. The Center for Democracy & Technology ('CDT') is a non-governmental organisation that works to advance human rights online, and is committed to finding forward-looking and technically-sound solutions to the most pressing challenges facing users of electronic communications technologies. Our experts have previously submitted comments concerning the UK's counter-terrorism laws to Parliament and the Independent Reviewer of Terrorism Legislation.

2. We are writing to share our serious concerns about the failure of certain aspects of Part 5, Chapter 2 of the draft Counter-Terrorism and Security ('CTS') Bill to comply with fundamental democratic principles as well as the United Kingdom's obligations under the European Convention on Human Rights ('ECHR') and its implementing legislation, the Human Rights Act 1998. Whilst recognising the critical importance of counter-terrorism initiatives, we believe that such programmes must always be sure to adhere scrupulously to these human rights and democratic values.

Introduction and recommendations

3. We are in full agreement with the Home Secretary that the United Kingdom and all other democratic societies face a need to prevent terrorist violence.

4. However, we are submitting these comments in order to draw your attention to several major aspects of Part 5, Chapter 2 of the draft CTS Bill that, in our view, fail to comply with the ECHR and certain basic tenets of democracy.

5. This chapter of the draft bill, titled '*Support etc for people vulnerable to being drawn into terrorism*', would create a statutory basis for the anti-radicalisation initiative currently known as 'Channel'. In doing so, it would compel all police forces and local authorities in England and Wales to participate in the Channel programme.[1]

6. As explained below, we believe the adoption of this chapter, as currently drafted, would be highly inconsistent with the Convention rights to **respect for private life and correspondence** (Article 8), **freedom of expression** (Article 10) and **freedom of thought and opinion** (Articles 9 and 10). Moreover, we are concerned the violation of some of these rights may entail **discrimination** barred by Article 14. We have therefore concluded that the statements of the Home Secretary and Lord Bates[2] that the bill is compatible with the ECHR are incorrect, and are also concerned that in abridging these rights, the bill will weaken some of the most important foundational principles of democracy.

7. Our concerns about the draft CTS Bill's compatibility with fundamental rights extend beyond these particular provisions; however, we wish to highlight these aspects of the bill in line with our unique expertise.

8. **In light of our conclusions, our recommendations are as follows:**

   - **We urge that Parliament reject Part 5, Chapter 2 of the draft bill, as we believe these provisions would violate several of the fundamental rights established in the ECHR and the Human Rights Act and are not consistent with democratic values.**

   - **In the absence of such a step, we recommend that Parliament amend this chapter to provide that:**

     - **individuals can only be referred for 'support' pursuant to this chapter where there is specific and demonstrable evidence that they have committed or intend to commit a terrorism-related criminal offence;**

     - **individuals who are vulnerable in some other respect (e.g. due to mental health issues) and require assistance from the local authority should be referred to the appropriate entities in the same manner as other members of the local community, and with the same regulations and policies governing consent to receive support or other services;**

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[1] Throughout this document, we use the term 'local authority' as it is defined in Section 33 of the draft CTS Bill (i.e. a county council, district council, London Borough Council, etc).

[2] Home Office, 'Counter Terrorism and Security Bill: European Convention on Human Rights' (undated), available at http://www.parliament.uk/documents/joint-committees/human-rights/ECHR_Memo_Counter_terrorism_Bill.pdf; HL Bill 75 2014-2015, as introduced on 7 January 2015, available at http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0075/15075.pdf.

- **an individual's decision to refuse consent to receive 'support' under the scheme set out in Part 5, Chapter 2 of the draft bill must result in the termination of the panel's consideration or review of his or her case in the absence of any new evidence of the kind described above (although criminal investigations or prosecutions may of course continue);**

- **in accordance with the Data Protection Act, panels (and panel partners) operating pursuant to this chapter must not collect, store, share or otherwise process 'sensitive personal data' such as an individual's race or ethnicity, religious beliefs, political opinions, sexual life or physical or mental health without the individual's explicit consent;**

- **in addition to complying with the Data Protection Act, police, panel members and all other authorities involved in the implementation of this scheme must at all times scrupulously respect all of the rights found in the ECHR, EU law and UK law, including by refraining from engaging in impermissible racial, religious or other discrimination in ensuring the enjoyment of those rights;**

- **police, panel members and all other authorities involved in the implementation of this scheme must receive training that is adequate to ensure complete respect for these rights in all cases;**

- **the composition of the panels must reflect fundamental concerns of professionalism, competence, fairness, tolerance, diversity, accountability and transparency; and**

- **individuals who believe they have been improperly made subject to referrals under this scheme, or who believe that the implementation of the scheme has violated their rights under UK law, EU law or the ECHR, must be able to complain to a body that can address their complaints effectively and provide adequate redress. Decisions taken by the body receiving the complaints must be subject to judicial review.**

Powers conferred under Part 5, Chapter 2 of the draft bill are not consistent with democracy

9. As explained below, many of the powers conferred on police and local authorities under Part 5, Chapter 2 of the draft CTS Bill are arbitrary, ill-defined and susceptible to abuse. These provisions, like the non-statutory programmes that preceded them, empower the authorities to keep individuals' lives under intrusive and potentially indefinite scrutiny even where there is no indication that those individuals have any intention of committing any offence. In this respect, we believe the scheme set out in this chapter of the draft bill is fundamentally inconsistent with basic democratic values such as equality, the rule of law and the free exchange of ideas.

10. In this context, we wish to recall at the outset that having or expressing opinions, beliefs or thoughts that others may view as 'extreme', 'radical' or offensive is not a crime in the United

Kingdom, except in specific circumstances where the expression of a view constitutes a legally proscribed act such as a threat, harassment or incitement to violence or hatred.

11. As mentioned above, the provisions found in this chapter of the draft CTS Bill would codify and make mandatory a scheme currently known as the 'Channel' programme. Under Channel, the Home Office encourages police to identify individuals who may be 'vulnerable to radicalisation'. The police are meant to refer these individuals to their local authorities, who then become responsible for setting up panels that will scrutinize the case in question and develop a plan of action. Sections 28 and 29 of the draft bill will make police and local authority participation in this scheme mandatory.

12. In order to be referred to the local authority as 'vulnerable to radicalisation', an individual does not need to have committed (or demonstrated any intention to commit) any civil or criminal offence, let alone a terrorist act: under the Channel guidance, at least, mere 'engagement' with a 'group, cause or ideology' is regarded as sufficient. (The guidance states that the group does not need to be a proscribed one.) The Home Office has taken this approach even whilst admitting that 'it is possible to be engaged [with a group, cause or ideology] without intending to cause harm'.[3]

13. Indeed, among the 22 factors that the Channel guidance lists as contributing to vulnerability to radicalisation, a majority concern 'engagement' rather than any intent or capacity to cause harm.[4] Under this guidance, an individual could potentially be scrutinized for 'vulnerability' simply because he or she demonstrated such vaguely worded and common characteristics as '[a] need for identity, meaning and belonging', 'desire for excitement and adventure', 'desire for political or moral change', 'feelings of grievance and injustice' or '[b]eing at a transitional time of life'.[5] Other factors from the government's guidance include a person's 'style of dress or personal appearance' and—most relevant to CDT's concerns—'communications with others that suggest identification with' a certain way of thinking.[6]

14. We note in this respect that under Chapter II of the Regulation of Investigatory Powers Act 2000, police have the power to use secret surveillance to obtain a broad range of electronic communications data (including the identities of the sender and recipient of correspondence) for a variety of purposes. They are not required to obtain judicial authorisation prior to conducting this type of surveillance, and we believe it is possible that they may seek or use data acquired in this covert manner when identifying individuals for referral to the panels described below. Police thus have broad powers keep individuals whom they regard as potentially 'vulnerable' under surveillance not only by examining their public Internet activity

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[3] HM Government, 'Channel: Protecting vulnerable people from being drawn into terrorism' (October 2012), ¶ 3.6, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118194/channel-guidance.pdf (hereinafter 'Channel guidance').

[4] *Ibid.* at ¶ 3.7.

[5] HM Government, 'Channel: Vulnerability assessment framework' (October 2012), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118187/vul-assessment.pdf.

[6] Channel guidance, *supra* n. 3, ¶ 3.8. Although the 22 factors in the Channel guidance are not reproduced in the draft CTS Bill, we are concerned that they reflect the manner in which this chapter of the legislation is likely to be implemented.

(e.g. on Facebook, Twitter, LinkedIn, Tumblr or Pinterest), but also by secretly monitoring their correspondence.

15. There are, of course, other means by which an individual may come to the attention of a chief officer of police in the context of this scheme; for example, the organisation Liberty has raised the possibility that the Home Office will encourage 'teachers, healthcare staff and others involved in the delivery of public services to report their students and patients to the police.'[7] Reportedly, the Home Office intends to require even teachers of nursery-age children to participate in the programme.[8]

16. In other words, this legislation raises the spectre of police monitoring private communications, and individuals informally monitoring one another's speech, dress and behaviour, in order to identify members of the community whose words or conduct give rise to a suspicion that they (or their friends or family members) hold unpopular views. Even leaving aside the constraints of human-rights law (discussed below), this type of scrutiny of opinions, thoughts, beliefs and conduct is manifestly incompatible with the notion of a participatory democracy founded on equality and the free exchange of ideas.

17. After a chief officer of police identifies an individual as potentially 'vulnerable to being drawn into terrorism' and refers him or her to the local-authority panel, the panel is required under Section 28(4) of the draft bill to 'prepare a plan' for offering 'support' to the individual concerned. The term 'support' is not defined in the legislation, although an array of public bodies that may have a degree of power over an individual's education and health are listed as possible partners in this endeavour.

18. Pursuant to the draft bill, the authorities may only provide such 'support' if the individual consents. However, even if the individual does not consent to the provision of 'support', the panel is empowered to keep him or her under continued scrutiny by 'carry[ing] out further assessments' for a potentially indefinite period.

19. In this context, we are particularly troubled by media reports suggesting that at least some of the 'support' activities that currently take place pursuant to the Channel programme are in fact conducted for surveillance purposes, and that the names of people who are referred into the programme (along with exceptionally sensitive personal information such as their mental health and sexual practices) are collected and stored in intelligence databases.[9]

20. Once a referral has been made, the local authority is largely left to determine the composition of each panel (although police participation in all panel meetings is mandatory). Under Section 29 of the draft bill, panel decisions do not need to be unanimous: a simple

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[7] Liberty, 'Liberty's second reading briefing on the Counter-Terrorism and Security Bill in the House of Commons' (December 2014).

[8] Robert Mendick and Robert Verkaik, 'Anti-terror plan to spy on toddlers "is heavy-handed"', *The Telegraph*, 4 January 2015, available at http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11323558/Anti-terror-plan-to-spy-on-toddlers-is-heavy-handed.html.

[9] Nafeez Mosaddeq Ahmed, 'UK's flawed counter-terrorism strategy', *Le Monde diplomatique* (Dec. 2013), http://mondediplo.com/blogs/uk-s-flawed-counter-terrorism-strategy; Vikram Dodd, 'Government anti-terrorism strategy "spies" on innocent', *The Guardian* (16 Oct. 2009), http://www.theguardian.com/uk/2009/oct/16/anti-terrorism-strategy-spies-innocents.

majority will suffice. There is no limit on the number of panel members, raising the possibility that the local authority may adjust the size or composition of a panel with a view to achieving a particular outcome. In the absence of a majority opinion, the local authority, as chair of the panel, is empowered to take decisions.

21. The Home Office has stated an intention to hold public consultations on the diversity impact of the CTS Bill. Additionally, it has previously asserted that 'Prevent', the broader strategy of which the Channel guidance is a part, 'covers all forms of terrorism', including the threat from the far right.[10] However, the available statistics (as well as various references in the current guidance) suggest that the panel scheme is primarily focused on people who identify as Muslim.[11]

22. Thus, these provisions of the draft CTS Bill confer broad, ill-defined and arbitrary powers upon police and local authorities to engage in intrusive and far-reaching examinations of individuals' lives on the basis of criteria that are expansive, vague, not dependent upon any intent to commit an offence and potentially discriminatory. In our view, no legislation that exhibits such characteristics can be regarded as truly democratic.

Part 5, Chapter 2 of the draft bill is also inconsistent with the ECHR and the Human Rights Act

23. The Home Secretary has assessed whether Part 5, Chapter 2 of the draft bill complies with Article 8 of the ECHR, concluding that the sharing of information pursuant to 'support' plans will comply with the right to privacy so long as the disclosure of the information between various public authorities is necessary and proportionate. The Home Secretary has not, however, assessed the compliance of this chapter with any other provision of the ECHR.

a. Article 8: Right to respect for private life and correspondence

24. In our view, the draft bill does not in fact comply with Article 8 of the Convention, which requires that interferences with private life and correspondence—including the monitoring of both public and private communications as well as an official's disclosure of an individual's personal information[12]—be 'necessary in a democratic society' and done 'in accordance with the law'. This is as true of Internet communications as it is of more traditional forms of correspondence.[13]

25. As explained above, far from being necessary in a democratic society, the scheme set out in Part 5, Chapter 2 of the legislation will operate to undermine some of the most fundamental values of democratic systems.

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[10] 'Protecting the UK against Terrorism: Prevent', https://www.gov.uk/government/policies/protecting-the-uk-against-terrorism/supporting-pages/prevent.

[11] *Ibid.*; see also Channel guidance, *supra* n. 3, ¶ 3.2; Alan Travis, 'Hundreds of young people have received anti-radicalisation support', *The Guardian* (26 March 2013), http://www.theguardian.com/uk/2013/mar/26/hundreds-people-anti-radicalisation-support; Association of Chief Police Officers, 'National Channel Referral Figures', http://www.acpo.police.uk/ACPOBusinessAreas/PREVENT/NationalChannelReferralFigures.aspx (last accessed 8 January 2015).

[12] *Shimovolos v Russia* (2011), ¶¶ 64-65; *Weber and Saravia v Germany* (dec., 2006), ¶ 79.

[13] See *Copland v the United Kingdom* (2007), ¶ 44.

26. Moreover, the European Court of Human Rights ('ECtHR') has repeatedly found that in order for an interference to be 'in accordance with the law', the relevant law must be '*sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are empowered to resort to any [covert monitoring] measures*'.[14] The discussion above highlights the vague, undefined and/or arbitrary nature of the monitoring and other powers conferred by the draft bill. Such nonspecific and potentially expansive provisions cannot and do not enable individuals to foresee the types of behaviours that may lead them to be identified as 'vulnerable to being drawn into terrorism' and evaluated by the official panels whose creation the legislation mandates.

27. We have therefore concluded that Part 5, Chapter 2 of the draft CTS Bill, in its current form, is not consistent with Article 8 of the ECHR.

b. Article 10: Freedom of expression

28. Article 10 of the Convention protects the right to freedom of expression, which includes, among other things, the right to 'receive and impart information and ideas without interference by public authority'. Although this right is a qualified one, any restrictions imposed or enforced by the government must (as under Article 8) be 'prescribed by law' and 'necessary in a democratic society'.

29. As the ECtHR has observed for decades: '*Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.*' Subject only to restrictions of the kind described above, the freedom '*is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".*'[15]

30. Although the United Kingdom, like all parties to the Convention, enjoys a certain 'margin of appreciation' in this respect[16], it is our view that Part 5, Chapter 2 of the draft CTS Bill employs terms that are so vague, and will have such a chilling effect on the willingness to receive and impart information that expresses a potentially unpopular view, that it cannot be compatible with Article 10.

c. Articles 9 and 10: Freedom to hold opinions and freedom of thought

31. One of the most disturbing aspects of Part 5, Chapter 2 of the draft bill is that individuals can be identified as persons of concern (and experience the resulting scrutiny and potential stigma) not only on the basis of beliefs or ideas that they actually express, but also on the mere suspicion that they hold certain opinions or think certain thoughts.

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[14] *Ibid.* at ¶ 46; *see also Shimovolos*, *supra* n. 12, ¶ 68; *Liberty and others v the United Kingdom* (2008), ¶ 62.
[15] *Handyside v the United Kingdom* (Plenary, 1976), ¶ 49.
[16] *Ibid.* at ¶ 48.

32. We believe this aspect of the legislation contravenes the freedom to hold opinions (Article 10 of the ECHR) as well as the freedom of thought (Article 9). Under the Convention, these freedoms are absolute[17], and we regard the potential for violations of these most basic and inalienable of human rights as an exceptionally grave matter.

33. We note that in the related context of freedom of religion, the ECtHR has observed that an individual has a right '*not to be obliged to disclose his or her religion or beliefs and not to be obliged to act in such a way that it is possible to conclude that he or she holds – or does not hold – such beliefs.*' As a result, '*State authorities are not entitled to intervene in the sphere of an individual's freedom of conscience and to seek to discover his or her religious beliefs or oblige him or her to disclose such beliefs*'.[18]

34. We believe a necessary consequence of these provisions of the draft bill is that individuals will implicitly face a burden of indicating to the outside world, through words or conduct, that they are not having certain thoughts that are viewed as suspect or holding opinions that are regarded as undesirable. Moreover, we believe these provisions of the draft bill raise the deeply unsettling possibility that people in the UK will monitor one another in an effort to determine whether each other's thoughts and beliefs conform to what is regarded as acceptable and non-extreme.

35. For these reasons, we have concluded that the relevant chapter of the draft bill does not comply with these elements of Articles 9 and 10 of the Convention.

d. Article 14: Prohibition of discrimination

36. Finally, Article 14 of the Convention prohibits discrimination in the upholding of these rights on any basis such as, *inter alia*, race, colour, religion, opinion, language or national origin. Especially in light of the risk that police and local authorities carrying out their duties under Part 5, Chapter 2 of the legislation will disproportionately target Muslims, we are deeply concerned that in practice, these provisions will violate Article 14 taken together with the other Convention provisions discussed above.

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37. We hope these comments will assist you, and we respectfully urge you to consider our recommendations. Please do not hesitate to contact us (sstvincent@cdt.org or rcant@cdt.org) if you have any questions.

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[17] *See, e.g.,* Monica Macovei, *Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights*, 2nd edition (undated), p. 8, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff48; cf. UN Human Rights Committee, General Comment 22, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993, ¶ 3, available at http://www1.umn.edu/humanrts/gencomm/hrcom22.htm.

[18] *Sinan Işik v Turkey* (2010), ¶ 41.

Yours sincerely,

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