PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

COUNTER-TERRORISM AND BORDER SECURITY BILL

Second Sitting

Tuesday 26 June 2018

(Afternoon)

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Saturday 30 June 2018

The Committee consisted of the following Members:

Chairs: † Mrs Anne Main, Joan Ryan

† Bowie, Andrew *(West Aberdeenshire and Kincardine)* (Con)
† Chapman, Douglas *(Dunfermline and West Fife)* (SNP)
† Coyle, Neil *(Bermondsey and Old Southwark)* (Lab)
† Dakin, Nic *(Scunthorpe)* (Lab)
† Doughty, Stephen *(Cardiff South and Penarth)* (Lab/Co-op)
† Foster, Kevin *(Torbay)* (Con)
† Hall, Luke *(Thornbury and Yate)* (Con)
† Hoare, Simon *(North Dorset)* (Con)
† Huq, Dr Rupa *(Ealing Central and Acton)* (Lab)
† Khan, Afzal *(Manchester, Gorton)* (Lab)
† Lopez, Julia *(Hornchurch and Upminster)* (Con)
† Maclean, Rachel *(Redditch)* (Con)
† Maynard, Paul *(Lord Commissioner of Her Majesty's Treasury)*
† Newlands, Gavin *(Paisley and Renfrewshire North)* (SNP)
† Pursglove, Tom *(Corby)* (Con)
† Smith, Eleanor *(Wolverhampton South West)* (Lab)
† Thomas-Symonds, Nick *(Torfaen)* (Lab)
† Wallace, Mr Ben *(Minister for Security and Economic Crime)*
† Warman, Matt *(Boston and Skegness)* (Con)

Nehal Bradley-Depani, David Weir, *Committee Clerks*

† attended the Committee

Witnesses

Max Hill QC, Independent Reviewer of Terrorism Legislation

Michael Clancy OBE, Director, The Law Society of Scotland

Corey Stoughton, Advocacy Director, Liberty

Abigail Bright, Executive Member, Criminal Bar Association, and Barrister at Doughty Street Chambers

Peter Carter QC, Member, Criminal Bar Association, and Barrister at Doughty Street Chambers

Public Bill Committee

Tuesday 26 June 2018

(Afternoon)

[Mrs Anne Main *in the Chair*]

Counter-Terrorism and Border Security Bill

Examination of Witness

Max Hill gave evidence.

2 pm

Q83 The Chair: While we are waiting for Max Hill QC, let me say that we are expecting a vote, for which we normally allow 15 minutes. There is no injury time and Mr Hill must leave by quarter to 3, so after the Division, as soon as we are quorate—which is seven Members, including myself—we will resume questions, even if some people are not back. *[Interruption.]* Ah, here he is. Good afternoon, Mr Hill.

The Committee will now hear oral evidence from Max Hill QC, the independent reviewer of terrorism legislation. For this session, we have until 2.45 pm. Mr Hill is aware that we might well have an interruption due to a vote. Mr Hill, would you please introduce yourself for the record?

Max Hill: Thank you very much for inviting me. I am the independent reviewer of terrorism legislation—as some people sometimes put it, I am the new David Anderson. I review four statutes, namely the Terrorism Acts 2000 and 2006, the Terrorism Prevention and Investigation Measures Act 2011 and the Terrorist Asset-Freezing (Temporary Provisions) Act 2010, part 1 of which is shortly to be repealed in favour of the Sanctions and Anti-Money Laundering Bill when that has statutory force.

The Chair: Thank you.

Q84 Nick Thomas-Symonds (Torfaen) (Lab): Thank you, for coming along to assist today, Mr Hill. I have read some of your writings about the Bill and watched your evidence to the Joint Committee on Human Rights, so I am aware of your views. Could I ask first, just in broad terms, about clause 3, which updates the streaming offence from the downloading offence? Do you think the clause is satisfactory as it is, and, if not, what changes would you suggest?

Max Hill: By way of introduction, I have sought to look with care at the clauses alongside my senior special adviser, Professor Clive Walker, and he and I would agree in answering that question. The amendment—perhaps it is better to say the new variant of the section 58 offence—is likely to be difficult in practice. It is my duty to warn the Committee that it is very likely to attract arguments of principle based on a rights analysis, principally article 10 on the freedom of expression.

I commend the Government, who have scrutinised counter-terrorism strategy ever since the Prime Minister announced on 4 June 2017 that it would be done. My commendation is on the basis that we do not see brand new precursor offences appearing in the draft legislation. As an independent reviewer, I was worried that we might come across new offences of aspiration for terrorism—for want of a better expression—but I am pleased to see that we do not have them. The question that you pose on clause 3 is, first, whether this is a new offence. That is debatable, but it certainly is a new way of committing the existing offence under section 58.

I am concerned about the very low threshold that has been set, and about the lack of precision in some respects that at the moment is written into clause 3. Trying to move, though, from a position of giving credit to the Government, who have looked at it very carefully, what I believe they are attempting—the explanatory notes give force to this—is to identify a "pattern of behaviour". That is a phrase from the explanatory notes for clause 3. If the clause as drafted is capable of identifying a pattern of behaviour, then although article 10 arguments do not go away, one can understand the logic behind the new variant of a section 58 offence, but I am concerned that it might not go that far—in other words, it is incapable of establishing a pattern. Why? Because the three clicks offence—forgive me for using the shorthand—may relate to different material rather than to repeated viewing of the same material, and there is no indication of the period of time over which an internet user may log on for different sessions. It is certainly no longer necessary for there to be any download or offline footprint of the material, whereas section 58 currently pretty much requires that, and of course the more general arguments are that there is no requirement that the individual either go on to prepare, or still less commit, an act of terrorism. That is a very low threshold.

The last part of my answer—forgive me for going on at a little length, but this is a headline example of the new variant offences—is that the French Parliament has attempted to legislate into exactly this space. On two occasions, the Cour de Cassation—the constitutional court in France—has struck down the French equivalent, yet the French equivalent attempts to define "reasonable excuse." To put that another way, it exempts from prosecution—I am paraphrasing here—professional research, which may be journalistic or academic. This clause does not do that.

I have no doubt at all that the general reasonable excuse defence under section 58(3) remains, but—forgive me for repeating a phrase that I have used elsewhere—the mesh of the net that the proposed new clause would create is likely to be so fine that, although it would perhaps capture some who represent a pattern of behaviour, it would also capture others who probably do not. I hope that answers your question as to the concerns I have.

Q85 Nick Thomas-Symonds: I will combine two questions about how to improve the clause. First, would it help to be more specific on the face of the Bill about the reasonable excuse defence and what that might include? Secondly, should we have a time limit—12 months, to pick a time limit out of the air, or perhaps another period—for the streaming offence in clause 3? Would those two changes assist?

Max Hill: The short answers are yes and yes. All I would add as a criminal lawyer is that, as many members of the Committee will know, the appellate courts have been asked to consider reasonable excuse on at least

two occasions—the cases of G and J in the House of Lords in 2010, and the case of AY in the Court of Appeal in 2011-12. At a judicial level, the courts have said that reasonable excuse means anything that is capable of being regarded by a jury as reasonable. That is perfectly understandable, because judges like me do not make law; it is Members of the Houses of Parliament who make law.

Perhaps one way of putting it is that if we are going to have a new offence, there is an imperative to define with greater precision the ways in which somebody is not guilty of that offence. That is just as important as defining and placing in statutory form the ways in which someone is, or may be, guilty.

The Chair: Thank you. I am conscious that quite a few people want to ask questions.

Q86 Simon Hoare (North Dorset) (Con): Following on from Mr Thomas-Symonds's question, can I probe slightly? Given the pressures of time, I hope that it will just be a slight probe.

I listened with great attention to what you said, Mr Hill. As a matter of principle, do you think that a clause that aims to track, monitor and quantify streaming, its effects on behaviours and so on, perhaps amended to reflect some of the issues that you have set out, merits inclusion in an Act of Parliament? You have suggested some improvements or embellishments to the clause, but if you were given a free hand, would you say, "If you are going to have it, you need to embellish it," or, "Actually, it would be better not to have it at all"? Does that make sense? I am not a lawyer, so I am not very good at asking these lawyerly questions.

Max Hill: That does make sense. Given a choice—given a free hand—I would be more likely to argue that it is not necessary to legislate in this way at all. Let me explain that in two very short ways. First, I do not seek to undermine the existing section 58 offence of collecting information. It has its place on current indictments, many of which I have prosecuted over the years. I do not seek to undermine that, but this new variant sets a lower threshold than we have at the moment.

The second point is that there is at least an argument, or perhaps a discussion, which no doubt time forbids today, that there is a very considerable overlap between what one has in mind by clause 3 and the existing offence of encouragement of terrorism, which is separately enshrined in section 1 of the Terrorism Act 2006. If that argument has force, that is the second way in which I would say we do not need to replicate where we already have a precursor offence—one that has withstood scrutiny for more than a decade and that actually goes into considerable detail in its sub-clauses as to the definition of recklessness, for example. Where section 1 of the 2006 Act already covers territory, I would be tempted to argue that this is unnecessary.

Q87 Simon Hoare: Mr Hill, you talk about lowering the threshold. Obviously, that is a subjective assessment. Perhaps the threshold set in part of the 2000 Act was about right given the circumstances at the time, the challenges the country faced, the nature of terrorism as it presented itself, and indeed the scope and reach of the internet. Are we now, 18 years subsequent to that, right to review and potentially to lower the threshold because the opportunity to engage, search and disseminate information is such that it is now much easier and available to affect a larger number of people than was the case even 18 years ago? I know it does not seem that long ago, but in technological and internet terms, it is a millennium ago.

Max Hill: Yes. I agree, if I may put it this way, with the Home Secretary on relaunching Contest on 4 June, when he said in answer to questions that this Bill introduces a number of "digital fixes"—the Home Secretary's words—to existing legislation. It is of course right that, even after one decade—sometimes even less, because of the way that communication technology moves on—Parliament is perfectly entitled to revisit existing offences. What that means is that a redefinition to include online activity within section 58 does not strike me as controversial.

What does strike me as difficult, though, is the suggestion that somebody who is thinking in a particular way without more—let us define that as a predisposition to extreme thinking—has crossed the line into terrorist offending, which is violent extremism. I am concerned that setting a lower threshold, which is a matter for Parliament, actually takes one across that line and ultimately we are doing nothing more by clause 3 than identifying people who may express an interest in certain types of material, but who up until now have not been at risk of prosecution for terrorist activity. They may be of interest to counter-terrorism policing and to the security and intelligence services—it is their function to take a very keen interest in even this sort of activity—but I am concerned about saying that that has crossed the threshold into criminality.

The Chair: Thank you. I am conscious that we could have a Division very soon and I am conscious that the Minister and the shadow Minister also wish to ask questions. I hope Mr Doughty is happy that we swap places and put Mr Dakin next, and afterwards I will call the Minister?

Q88 Nic Dakin (Scunthorpe) (Lab): Thank you, Mrs Main. Given your experience, Mr Hill, do you have any other misgivings about the Bill as drafted that you have not already raised?

Max Hill: I hope I have given appropriate credit for other matters that might have been brought forward in this Bill but have not been. What I would say, looking at the five offence-creating clauses in general, is that clause 4 is something against which there is no pushback—no adverse reaction from me. In other words, amending sections 1 and 2 of the 2006 Act to place the jury's view at the heart of offence creation—the view of a reasonable person as to whether encouragement is actually what the defendant is about—strikes me as eminently sensible, so I agree with clause 4.

I agree with clause 5 as to the principle of extraterritorial jurisdiction and the extension of the remit of the Explosive Substances Act 1883 and sections 1 and 2 of the Terrorism Act 2006. There is no comment from me—I agree. However, I am worried about the extension of section 13 of the 2000 Act—the proscription offence—and affording extraterritorial jurisdiction to that, because of the dual criminality issue; forgive me for using lawyer's shorthand. This country takes a robust and appropriate approach to proscription, which may be different from that taken by other countries. I suggest that clause 5, at the very least,

needs reconsideration as to whether extraterritorial jurisdiction concerning section 13 should be limited to UK citizens, who are deemed to know how we deal with proscription here, as opposed to foreign nationals.

On clause 3, I have answered as far as can. Regarding clauses 1 and 2, recklessness as used in clause 1 is a term of art that I know caused discussion on Second Reading and may do so again. From a simple lawyer's perspective, however, this is nothing new: subjective recklessness is a feature of the criminal law away from counter-terrorism legislation. It is defined with some precision in section 1(2)(b)(ii) of the 2006 Act, which defines recklessness for the purpose of encouragement of terrorism. Provided that the Government intend the same definition when they refer to recklessness under clause 1 of this Bill, I have nothing to add. My assumption is that that is the intention.

That only leaves clause 2, which amends section 13 of the 2006 Act—the flags and paraphernalia offence. As a legal historian, it is interesting to note that we are moving away from the public order origin of legislating in this space. The public order Acts of the 1930s were intended to deal with demonstrations on the streets; clause 2 now takes this out of a public space and into a private space, and, as the explanatory notes make clear, a particular flag on a bedroom wall is sufficient for the commission of the offence. I would suggest that evidence of what is on the bedroom wall of a perpetrator is already admissible and routinely referred to by prosecutors as supporting material for indictments for other offences; the only debate is whether it is the commission of an offence on its own.

Whatever the answer on that initial concern, the extra concern that I have about clause 2 is that, without more, it begs some serious questions about the display of historical images. There is no statute of limitations on clause 2. I wonder whether one is intended, whether there should be one, or what clause 2 unamended says about those who seek to display in private historical images of individuals working for organisations that were proscribed decades ago where it is a matter of historical interest and nothing more. It seems to me there is a vulnerability in clause 2. I understand where the Government are trying to get to, but some tighter definition might be of use.

Q89 The Minister for Security and Economic Crime (Mr Ben Wallace): Can I go back to the clause pertaining to section 58 of the Terrorism Act 2000—the streaming clause or the three clicks provision? The original section of the Terrorism Act 2000 is very clear: it is about collecting material, which can include a record which is electronic. Back in 2000, broadband was pretty slow, if it worked at all, so most people watched things by downloading; nowadays it is streamed, because, first, you do not want to use up your own data and secondly, that is how most of us live our lives. If you are going to watch iPlayer, you do not download each programme before you watch it. Streaming is a reality that is not reflected in the 2000 Act; that simply refers to the way that people look at records. In your experience of doing the job so far, is streaming now used quite broadly by terrorist suspects in learning things, spreading belief or radicalisation, or indeed training? Do you see a lot of that?

Max Hill: Let me answer you this way. I am with you on the digital fix, because I think that is what you are referring to. It is undoubtedly a new variant that, instead of downloading, there are some circumstances—although technically they are quite few—in which one goes no further than streaming and there is no download imprint that has been caused. I add that prosecutors are already alive to the risk of using as prosecution evidence cached material, within an internet cache, from which it does not follow that the perpetrator has ever actually read that which appears in the cache. I know that the clause is not designed to capture information of that sort, but we need to be very clear that a cache on a laptop or phone is not evidence of personal interest by the owner of the device in the material in question.

Streaming is a modern phenomenon and to that extent I am with you, but section 58 in its origin might be looked at as an "anti-proliferation offence"—my phrase and nobody else's. I would suggest that one of the reasons Parliament originally looked to section 58 is to stop the proliferation and perpetuation of material that we deem to be extreme terrorist propaganda, which should not go to other places. This does not deal in the same way with that. This is not anti-proliferation, because, by definition, somebody who streams and does not go any further is not bringing to the attention of third parties—still less is he or she storing for dissemination later on—material that is already online.

So there are some very strict limitations to what somebody is actually doing by streaming without more. They are not straying into the section 2 of the 2006 Act dissemination territory, which they might with section 58 in its current form. Download might be issue number one, and then issue number 2 might be later proliferation, perhaps with additions or amendments to whatever was originally downloaded. That is not what we are talking about here. We are talking about merely online streaming in—as I am afraid I have described it—rather imprecise circumstances as to time and circumstance, and that is why I am concerned.

Q90 Mr Wallace: If we all agree that streaming is a problem and is a modern reflection of how people are viewing things, would another solution to your worries be simply to amend section 58? The first line of section 58 says:

"A person commits an offence if (a) he collects or makes a record of information of a kind—"

so that in and of itself is an offence with a reasonable excuse defence in it.

Max Hill: Yes.

Mr Wallace: Are you happy with section 58 of the 2000 Act as it stands?

Max Hill: Yes. I hope I have made clear that I do not seek to undermine that. I have a practical question—it is nothing more than that—as to whether it forms an indictment pure and simple. I am very familiar with it and have prosecuted indictments myself where section 58 offences on their own, or in multiples, are used as supporting evidence for more serious preparatory or terrorist plotting activities, but it is very rarely used on its own.

Q91 Mr Wallace: But as it stands at the moment, it can be an offence on its own?

Max Hill: It can be, technically, yes.

Q92 Mr Wallace: If you were to just amend subsection (a)—

"A person commits an offence if…he collects or makes"—

and added ", or streams", would you be satisfied with that? Would that address the issue we are getting at?

Max Hill: In one sense it would, but I am afraid it still begs the questions as to how much you are streaming, on how many occasions, and how much interest you are actually showing in material that you do not go on to download or store. Reasonable excuse, as you say, remains. The concern I have is that, whether the French example is a good one or a bad one, the legislators there have sought to provide exemptions and licences for obvious categories—professionals, academics, journalists—which we do not have in this draft clause. There must be a danger that individuals will be put to the trouble, and often considerable expense, of facing an indictment, raising reasonable excuse at trial, and it then being incumbent on the prosecution to disprove it where they should not have stood trial at all.

Q93 Mr Wallace: Could that already be the case for academics downloading, recording or collection information under the existing section 58?

Max Hill: It could.

Q94 Mr Wallace: And it has not been struck down by any of our courts?

Max Hill: No, it has not been struck down. There is appellate judicial guidance on what reasonable excuse means. I suppose that my point is that if we are extending the ambit of activity that is likely to require that reasonable excuse defence, it becomes more important that we do more to define circumstances in which the offence is not committed, rather than leave a generic reasonable excuse defence currently undefined.

Q95 Mr Wallace: The Government are always being probed for judicial discretion. There is the idea that we have a tendency to be too prescriptive and want to encourage judicial discretion. Is that not, a bit like the appellate guidance that you talk about, a place for judicial discretion?

Max Hill: There is judicial discretion and before that, of course, there is prosecutorial discretion. The Director of Public Prosecutions, or her designates, will have a discretion as to whether to prosecute. But I am afraid, from my position as an independent reviewer, I am bound to say that although that is a valuable safeguard, it would be better, given the opportunity, if we defined as matter of legislation more closely the circumstances in which an indictment should follow, rather than left it to prosecutorial discretion.

2.26 pm

Sitting suspended for a Division in the House.

2.33 pm

On resuming—

The Chair: We are now quorate, so we will resume the sitting.

Q96 Stephen Doughty (Cardiff South and Penarth) (Lab/Co-op): I want to ask two questions. The first is about the detention provisions, the removal of property and so on. Parts of the Bill mirror the existing schedule 7 powers, and I have encountered concerns about how those operate. We obviously want these powers to operate effectively, but we also want to maintain the public's confidence around their use. Where do you think the Bill is on that? Do you think the balance it strikes is right?

Max Hill: You are obviously referring to schedule 3, which introduces a border security equivalent to schedule 7 to the Terrorism Act 2000. They are separate mechanisms. The first point is that, although I understand that they are both to be deployed by counter-terrorism policing—the same officers at our borders—it is not a pick-and-mix choice between legal powers. In recent years, there has been some intense scrutiny of the use of schedule 7 —the best example is the case of the journalist Miranda, in relation to the Snowden material—so it is all the more important, if there is to be a new parallel power, that CT police at our ports are given training, that there are codes of practice, and that police operate from a base of certainty and training when they detain a traveller, whether under the border security provisions or under the existing schedule 7.

I have a remit to review in relation to schedule 7, but it is clear from schedule 3 that I do not have a remit in relation to border security. I would therefore defer to Sir Adrian Fulford, whose remit covers this area. No doubt, his views will be far more important than mine.

The comment I would make is that, like schedule 7, schedule 3 as drafted is absent any independently referable test for the application of the new powers. I am still awaiting the Government's response to my recommendation in my annual report, published in January this year. I recommended a test of reasonable grounds to support the use of schedule 7 in accordance with codes of practice. I know from subsequent discussions with the Government and officials that very careful thought is being given to that, but I await the outcome. It is my hope that, if we do not have reasonable grounds for suspicion, which my predecessor recommended, we should at least have a threshold test.

There may be a clue, in the absence of a threshold test in the new schedule 3, as to how the Government will respond to my suggestion of a threshold test under schedule 7. Because thousands of travellers are being inconvenienced every year under schedule 7, this is an important feature. My thinking—although, again, I would defer to Sir Adrian—is that the border security power is likely to be exercised in far fewer numbers. We may be talking about 100 or even the low dozens of individuals. None the less, looking at it from the perspective of principle, this needs to be very carefully scrutinised. That is my reaction to schedule 7.

Q97 Stephen Doughty: That is very helpful. On an unrelated issue, the Home Affairs Committee, on which I sit, has been discussing the issue of extremist and terrorist content online. Obviously, there are provisions in the Bill relating to those viewing such material. I have a lot of concern about the failure of technology companies to remove such content adequately. The voluntary approach works to an extent, but it has not worked in many areas. We have identified very serious examples of where major companies such as YouTube, Twitter and Facebook have not removed content. Obviously, there is a different legislative environment in Germany and other countries. I have tabled a new clause requiring manual and automatic searching of all proscribed organisations. I accept that there is a difficulty with the wider boundaries of what is

[Stephen Doughty]

or not, but given that we do have a legally defined list of proscribed organisations, what is your view about whether more needs to be done to regulate such activities—

The Chair: Mr Doughty, that was too long a question. I am conscious that Mr Hill has got to go at 2.45 pm, and several of your colleagues wish to get in.

Max Hill: My line on this, which has been constant—rightly or wrongly—is that we should really hesitate before legislating against these very large internet companies, which have the tools at their disposal to look at the material that their platforms support. It would be a more desirable outcome to have ever-greater co-operation and collaboration—obviously, with supervision and access where possible for counter-terrorism policing. That would be preferable to legislating in this space.

My observation, for what it is worth, is that if the large internet companies were not aware of the need to scrutinise their own online spaces before the atrocities in this country last year, they are much more keenly aware of it now and are doing more. Alongside that, we have the Global Internet Forum to Counter Terrorism, which was, if I may so, very ably supported and encouraged by the former Home Secretary. It is doing good work in data-banking extreme content, providing it can be clearly identified.

We have to exercise care in this area. To take an example not relating to terrorism for just a moment, anybody can identify a pornographic image of a child—that is not difficult. Identifying terrorist propaganda is more difficult. That is where the global internet forum comes into play.

The second point is that, having data banked by the headline companies under the forum, it is important that those companies play their part to impress on their much smaller commercial partners or competitors that the smaller platforms need to take the same route. My line has been that that is better through coercion on a non-statutory footing. Of course, we wait to see how effective the new power will be in Germany, and I am aware of other countries that are considering it. So I suggest you are right to consider it; whether we are at the point of legislation yet, I beg to differ.

Finally, the Counter Terrorism Internet Referral Unit, which is a counter-terrorism policing vehicle—I have sat at the shoulder of dedicated officers who surf the web, day by day, with a view to issuing section 3 2006 Act take-down notices—is doing valuable work without the need for further legislation at this time. I understand that the report is that once a take-down notice is issued, that material is taken down in almost every case within 40 minutes of the request. So, if I may say so, we are in a better place than we were a year ago. I agree with the thrust of your question—that we must always do more—but I beg to question whether legislation is needed yet.

The Chair: Mr Khan will ask a quick, succinct question, and then, Mr Hill, you have three minutes or so to answer.

Q98 Afzal Khan (Manchester, Gorton) (Lab): You have talked about lowering the threshold in the Bill and about no preparation for an act being necessary, yet we see that sentencing is up to 15 years. How fair and safe are these changes?

Max Hill: The way I would look at it is there are tiers of terrorist offending. At the top tier, there is a clear need, on a discretionary basis, for the imposition of indeterminate sentences. The life imprisonment provision is important, and that is why, under section 5 of the 2006 Act—the preparatory offence—individuals can be sentenced to life imprisonment, and a number of recent cases have found that necessary.

What the Government are looking at here, it seems to me, is second tier—we might argue as to whether the sentencing provisions are second and third tier or just second tier. There is a legitimate argument that, at the second tier, the time may have come to increase the discretionary maximum—I emphasise discretionary only. I would not have supported mandatory minimum sentences, which we see in other general crime statutes here and there. I am glad that we do not see that in this area, where the most experienced and, frankly, hand-picked judges try these cases. They are in the best position to judge the criminality and the balance between offence and offender. We have the Sentencing Council's guidelines for terrorism. There is no evidence of a call for higher discretionary maximums, so when debating the sentence provisions, I would encourage some thought as to how necessary that is.

So I give principled support to some increases for second-tier offences, but the one area in which I would definitely have supported an increase in a discretionary maximum sentence is the one area the Government have not included: section 38B of the Terrorism Act 2000, which is the knowledge or belief that an individual—a principal offender—is about to commit a terrorist offence or has committed one, in circumstances where there is no call to the authorities.

The Court of Appeal has looked at that offence—the case is Girma, some eight or nine years ago now—and the statutory maximum is five years. I can see an argument—if I may take an example from last year—where there was an individual who was aware of the planning for either the Manchester Arena attack or the London Bridge attack and did nothing about it, for that individual perhaps to be at risk of a discretionary sentence of five years or above. However, that is not a provision that has been included in the Bill.

It is a delicate area, and it should be evidence-led. I would say there is some evidence for extending the discretionary maximum for section 38. I am concerned, however, about extending the maximum under section 58—particularly in the new variant, clause 3—as high as 15 years. I beg to ask whether somebody should be at risk of a sentence of that magnitude if and when convicted only of the clause 3 offence.

The Chair: I call Dr Rupa Huq, but I think you have only a second to ask your question.

Q99 Dr Rupa Huq (Ealing Central and Acton) (Lab): Just a quickie. You mentioned clause 3. I just wonder what you think—

The Chair: Order. I am afraid that brings us to the end of the time allotted for the Committee to ask questions. On behalf of the Committee, I thank Mr Hill for his evidence. Perhaps you might be my first port of call in the next session, Dr Huq.

Examination of Witness

Michael Clancy gave evidence.

2.45 pm

The Chair: Could you please introduce yourself for the record, Mr Clancy?

Michael Clancy: Good afternoon. My name is Michael Clancy and I am the director of law reform at the Law Society of Scotland.

Q100 Gavin Newlands (Paisley and Renfrewshire North) (SNP): Welcome Mr Clancy. From a Scottish or a devolved perspective, is there anything in the Bill that the Committee should take cognisance of?

Michael Clancy: Schedule 5 of the Scotland Act 1998 reserves to the United Kingdom issues of terrorism legislation. In that sense, terrorism legislation is not within the competence of the Scottish Parliament or of Scottish Ministers, so one might say no. But there is a "but", which is of course that criminal law and criminal justice—the courts in Scotland, the police, the prison services and the legal profession—are all elements of devolved competence, so therefore there is a point at which these two tectonic plates meet. Due accord should be given to the fact that one is dealing with a different legal system with different traditions and a different structure.

We have always advocated the idea that the United Kingdom and Scottish Governments should get along on issues where these matters concern us all. An example of that is the memorandum of understanding between the Attorney General and the Lord Advocate, which was signed by Attorney General Patricia Scotland and Lord Advocate Elish Angiolini. I hope to see that sort of co-operation as we go forward.

Q101 Gavin Newlands: We heard this morning, in terms of some of the Bill's provisions, such as the three clicks and the lack of a time limit on that, that to rely on prosecutorial discretion, rather than having fixed limits and so on in the Bill, is a step too far. Do you agree?

Michael Clancy: That is an interesting question, and it allows me to get out my brief on clause 3. Prosecutorial discretion is an important issue. The position of the Lord Advocate in Scotland, as a Scottish Minister, is separate from his position as head of the prosecution service. Prosecutorial discretion is therefore key to how the prosecution service undertakes its work, and it has to be inherent in any prosecutorial legislation. It is quite difficult to dictate to the prosecutor what cases should be prosecuted, so I would prefer to stick with the arrangements for prosecutorial discretion in Scotland.

Nick Thomas-Symonds: Thank you for coming along, Mr Clancy. I appreciate your evidence about terrorism legislation being reserved to the UK and about the memorandum of understanding between the Attorney General and the Lord Advocate and so on. However, moving beyond that, do you have any concerns about clause 3 of the Bill that you have not already referred to?

Michael Clancy: I think we were generally in favour of the idea that this area should be updated to take account of the digital revolution. The fact that the review of terrorism legislation that the Government precipitated last year has resulted in no further offences, as Max Hill described, is a vindication of the extent to which the law captures most of the issues. However, there are always questions that can be asked—some of which you have already heard about—about the balance between the right of expression and the requirements under the Bill.

It is fair to say that the courts have been quite explicit about where they fall on that balance. The right to freedom of expression under ECHR article 10 is not an absolute right; it has to be balanced with the other rights that the rest of us enjoy, such as the right to life, and so on. Therefore, although others may not subscribe to this view, the case has to be made that the provisions in the Bill will upset those rights to the extent that we would be considerably concerned about them, given that they build on existing provisions that have already been tested in the courts.

In that context, we have to look at all the legislation we have got—several Acts relate to counter-terrorism—and construct some sort of codification or consolidation of it. I do not know about you, ladies and gentlemen, but flitting between three or four Acts of Parliament within the compass of one Bill is difficult enough. It is difficult to imagine that those who will be subject to the legislation will do that kind of thing. We should make the law as simple and easily understood as we can.

Q102 Mr Wallace: Thank you very much for coming today. May I ask your view of clause 1, which is obviously the part of the Bill that talks about expressions of support, and the challenge around that? Critics have used the phrase "thought police". Obviously, we are trying to grapple with the threat from inspiring—people who do not specifically stand up and say, "Join ISIS", but use their position recklessly to promote such organisations by saying, "I think they are great," and so on. Correct me, because I may not know this. Is the previous legislation that deals with the area of incitement and religious hatred devolved or reserved?

Section 18 of the Public Order Act 1986 and the Racial and Religious Hatred Act 2006 effectively do the same thing: they set out that, for an offence to have been committed, you do not have to tell people to hate, or say, "You must attack Muslim people," or, "You must attack Jewish people". You can express in a private or public place sentiments or views that could have the consequence of inciting racial or religious hatred. Do you see a read-across from that position, which is accepted in established law, to clause 1, so it relates to encouragement towards a proscribed organisation?

Michael Clancy: I have not, I confess, made that read-across myself, Mr Wallace, but I will go back to Edinburgh and do so later on today. The general proposition about someone making a reckless statement and about whether the person to whom the expression is directed will be encouraged to support a proscribed organisation raises a couple of issues. What is reckless? It is taking a risk, in terms of the information you convey about the outcome of what you say. What is a proscribed organisation might, too, be a difficulty, because if I were to ask members of the Committee to list all the proscribed organisations they might not be able to do that. It might also pose a difficulty regarding whether some people making statements are supporting a proscribed organisation as we understand that to be the case.

There are some issues. There is a read-across to the analogous provisions in race and religion. Of course, if we have those models to follow, and those have been followed without any difficulty since they were enacted, the Government are probably on safe ground in extending the provisions to the kind of incitement envisaged in clause 1.

The Chair: Does anybody else have more questions for Mr Clancy? Yes, Mr—

Gavin Newlands: It is okay, Chair, I forget my name quite often as well, and my Mum certainly does.

The Chair: It is the glasses dilemma. Sorry, Mr Newlands.

Q103 Gavin Newlands: It is fine. I have two questions if we have time. We heard this morning from your colleague of the Law Society of England and Wales that there is great concern that schedule 3 has both access to justice issues and issues pertaining to legal professional privilege—that is, the inability to consult a lawyer in private. Do you share those concerns, or do you have a different view?

Michael Clancy: They can certainly be stated to be real concerns. The concept of legal professional privilege and the concept of confidentiality in Scotland are similar but not exactly the same. If we want people to be in a position where they can freely discuss matters with their legal representatives, we have to preserve this value. It is key to the rule of law that people can discuss matters openly with their legal representatives so that the solicitor, advocate or barrister is in a position to advise properly on what avenues are open to the person. Clearly one would want to ensure that that was adequately protected.

Q104 Gavin Newlands: Back to your earlier point about prosecutorial discretion, do you think there is a danger that elements of clause 3 risk criminalising thought without action?

Michael Clancy: Well, there is an action: clicking three times is the action. It depends on what is clicked on and how that works in practice. It says in the existing provision for the collection of information in section 58 of the Terrorism Act 2000:

"A person commits an offence if…he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism…he possesses a document or record containing information of that kind"

or—this is the addition made by clause 3 of the Bill—

"on three or more different occasions the person views by means of the internet a document or record containing information of that kind."

That fits in the analogous provision in the 2000 Act of possessing

"a document or record containing information of that kind."

The fact that it is on the internet is simply an update.

I am not convinced that three strokes is the problem. We heard from Max Hill about the French cases. We have to be cautious about drawing analogies with another legal system—certainly one that has a written constitution and a codified arrangement for its law. Those are two significant differences from the system here, where something that contravenes article 10 or some other article of the European convention on human rights is subject simply—simply—to a declaration of incompatibility. That would require Mr Wallace to come to a decision about whether he would amend the legislation, were the courts to make such a declaration of incompatibility.

We must be careful about demonising this issue in that way, in so far as there has not already been trespass on the idea of freedom of expression and freedom of thought. That is that balance that has to be struck between making the counter-terrorism law work and at the same time preserving our rights. The courts have to be asked to make that balance day in, day out.

I wonder just how one would work around this provision. If I were so minded, would I, for example, click once and then take out my phone and take a film of what I was watching on the internet? Is that a reasonable proposition? Is that captured in this Bill? I do not think so. Those are the kinds of questions that one might return to later on in your deliberations.

Q105 Nick Thomas-Symonds: Just one question, Mr Clancy, arising out of the Minister's question about section 18 of the Public Order Act 1986 and the Racial and Religious Hatred Act 2006. Both Acts are about the use of abusive, threatening or insulting behaviour to stir up hatred, but do you agree that there is a distinction between that and actual recruitment to the cause, which is what the clause in this Bill is talking about? Are they different things?

Michael Clancy: Clearly, there is a legislative distinction between the two. It depends on what the abuse in terms of race or religion is intended to do. Is it simply to make someone feel uncomfortable, aggrieved or violated, because of their religion or race? Or is it in some kind of a way to encourage others to take up that same kind of attitude toward people based on their religion or race?

Legislation in this area, countering discrimination on the basis of religion or race, is something that we have had in this country since the 1960s. Therefore, the fact that we are continually having to look at this again means that the educative value of that legislation has not yet reached its optimum. We have to be aware of pushing that further, to make sure that those who would fall into that pattern of behaviour know that it is wrong, illegal and that they must desist from doing it.

Q106 Mr Wallace: I want to follow on from the previous issue of the person collecting the materials and the three clicks. I do not know if you heard my question to Max Hill, which was that given that section 58 of the 2000 Act is well established, has been used and has not been struck down by challenge in a European court setting, if instead of defining by three clicks it was to explore simply adding in streaming, with the reasonable excuse defence, do you think that would solve the problem of streaming as opposed to holding or downloading information?

Michael Clancy: If you have an adequate definition of streaming, that might work, but for me it is just a word that people use when they are accessing information and videos on the internet. I suspect that the kinds of videos that are covered by this legislation will not have a pop-up window that says, "Do you want to play from the start or resume from where you left off?" The idea that these might be formal productions is not the case.

If we can do something that makes the legislation tighter and more usable, of course. But we may get into those difficulties about what is meant by streaming,

how long does the stream have to be and what kind of document or record is being streamed.

Q107 Mr Wallace: To reflect on section 58, when we talk about collecting electronic records or making a copy, we do not qualify that by saying that the definition is that it has to be longer than 10 seconds long or it has to be an hour long. We do not do that already; we do not seek to narrow it there.

Michael Clancy: That is a good point. Perhaps we have to look at that and say whether it is covering everything we need to cover there.

I am also interested in the defence provisions about having a reasonable excuse. Reasonable excuse covers most of the instances, but under the Criminal Justice Act 1988 of course, someone can have lawful authority, justification or excuse. If we look at Section 57(2) in the Terrorism Act 2000, it says there is a defence if

"possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism."

There may be a way in which one could look at that element of defence to make sure that those who are anxious about this provision have their concerns allayed.

Q108 Andrew Bowie (West Aberdeenshire and Kincardine) (Con): You mentioned in passing in an answer to Mr Newlands that access to legal advice and issues surrounding confidentiality were different in the Scottish and English legal contexts. As this is a whole UK Bill, I wondered if you might expand on that. I would also ask what your experiences have been in the Scottish context of the operation of the counter-terrorism ports power, in terms of detainees having access to legal advice.

Michael Clancy: The distinction between reserved and devolved matters is that if it is listed in schedule 5 of the Scotland Act 1998, it is reserved. If it is not, it is devolved. That is why aspects such as the legal system, the courts and the legal professions are devolved, because they are not listed as being reserved. It means that the justice agencies in Scotland, including the courts, the police and the legal profession, have to exercise a law that is reserved, but they exercise it in a devolved context. That covers areas where advice is given and where the police have to act, except in provisions where they might be directed in the Bill, or the Act, to do so. I hope that that gives you enough on that.

I am afraid to say I have no experience of the ports provisions that I can offer, but I will ask the question back in Edinburgh and see if anybody can enlighten me. If so, I will write to you.

The Chair: If there are no further questions, thank you for giving your time to give evidence to the Committee. We will move on to our next set of witnesses.

Examination of Witnesses

Peter Carter, Abigail Bright and Corey Stoughton gave evidence.

3.9 pm

The Chair: We will now hear oral evidence from our last panel of witnesses. They are Corey Stoughton, advocacy director of Liberty, Abigail Bright, executive member of the Criminal Bar Association, and Peter Carter QC, a member of the Criminal Bar Association. Both Abigail Bright and Peter Carter are also barristers at Doughty Street Chambers. We must end this session by 3.45 pm. Would the witnesses please introduce themselves for the record?

Corey Stoughton: I am Corey Stoughton, advocacy director at Liberty.

Abigail Bright: My name is Abigail Bright. I am a practising barrister at Doughty Street Chambers.

Peter Carter: I am Peter Carter. I am Queen's Counsel at Doughty Street, and I am also a member of the Bar Council law reform committee.

Q109 Nick Thomas-Symonds: If I could start with you, Corey Stoughton, could you turn please to clause 14 of the Bill, which is the traffic regulation clause? Having read some of Liberty's previous comments on the Bill, I know that there is a concern here about the imposition of charges, which would have an impact on legitimate protest. Could you explain your concern about that?

Corey Stoughton: Thank you for raising this issue. Our concern with clause 14 is simple and straightforward. Read strictly, it would allow charges to be imposed on the promoters or organisers of events in connection with the cost of protecting those events from terrorism. To be consistent with the right to assemble and protest under article 10, there must be a legislative exemption for activity protected by those fundamental rights. That is an exemption that we have seen replicated in other, similar provisions in UK law. I assume it was just an oversight that that exemption was not put in here. A simple fix to this would be to recognise that putting such charges on activity protected by the right to protest and assemble is an undue burden on that activity, and the cost of protecting those events has to fall on the state in the course of its obligation to protect that right.

Q110 Nick Thomas-Symonds: Turning from that issue to the retention of biometric data, do you think there should be additional safeguards to protect those who are wrongly arrested as a result of mistaken identity or poor intelligence?

Corey Stoughton: Yes, I do. Viewed against the context we currently live in, where the Government have struggled to correct existing deficiencies in databases such as the police national database of custody images, it is deeply concerning that the Bill's provision on biometric data retention extends the powers on retention of data, including fingerprint data and DNA data, of people who are arrested but not charged—that is to say, innocent people—and also removes the critical safeguard of requiring that retention to be proved by the Biometrics Commissioner.

Arguably, the current system has insufficient safeguards and, against the backdrop of the repeated pattern of an inability to correct databases that have already been ruled by courts not to be complying with human rights standards, there should be great caution and a pause before expanding the Government's power to retain the data, particularly when that data belongs not to people convicted of any crime, but to people merely arrested, which would include those who have been falsely or wrongly arrested for terrorism-related crimes.

Q111 Matt Warman (Boston and Skegness) (Con): Again to Corey Stoughton, your briefing says that clause 3 risks criminalising academics or journalists.

[Matt Warman]

I used to be a journalist, and I cannot myself recall a case where a journalist has been prosecuted for the kind of things that you are worried about, and which we would all be worried about. Is there a case that I have not noticed, or is this a theoretical inquiry, in which case, are you simply arguing for responsible prosecutions?

Corey Stoughton: It is not theoretical. I have to say that, although concern about wrongful prosecution is a legitimate concern, the real concern here is with the chilling effect that this has on journalistic activity. The question is not, do we believe that prosecutors will prosecute a *Guardian* journalist who clicks three times on extremist content. The real question is what journalist—what independent journalist, what citizen journalist—would be deterred from engaging in valuable journalistic activity? They will now, given the sentencing enhancements in this Bill, face a potential 15-year penalty for clicking on extremist content, which they may have done over the course of any unlimited period of time.

So we are concerned with that chilling effect and the fear of what that does to a journalist. It is a very brave journalist who would risk a 15-year sentence for anything, but you should not even require that level of bravery to be a journalist. Many journalists who are out there pursuing important critical activity are not protected by the legal teams that people at established journalistic institutions are, but that journalism deserves protection and respect, no less than other journalism.

Q112 Matt Warman: Is it your argument that that chilling effect is immeasurable because we do not know what it is, or do you have any sense of what that chilling effect might be?

Corey Stoughton: We have heard Index on Censorship reporters and press freedom groups that represent journalists say that they have serious concerns about that. That establishes quite well that the journalist community itself is concerned about it.

Q113 Matt Warman: Are those concerns backed up with evidence, or are they concerns about what the future might look like?

Corey Stoughton: I think they are both. It is one thing when you can say, "As long as I don't download, I can engage in my journalistic or academic activity"—whatever mode of investigation a person is deploying in their life—but under the Bill the offence is merely clicking on something. That, I think, raises the bar a substantial degree over the current offence, which requires downloading. In point of fact, to date there has not been a stand-alone prosecution of the existing offence. It tends to be brought as a corollary charge when people are engaged in other acts that indicate they are participating in planning acts of terrorism.

To lower the bar further and to risk bringing legitimate activity under the criminal law compounds an error that, frankly, already exists under the UK's current criminal regime. That error would be massively compounded by the Bill, which would make an offence of acts that are not themselves crimes or terrorism—there is no sense in which viewing or even downloading something is actually terrorism, according to the definition in the Terrorism Act 2000. They are acts that, in certain circumstances, can be associated with terrorism. We have already taken quite a few baby steps along the road of turning acts that might legitimately lead law enforcement to suspect that a person is preparing terrorism into criminal acts themselves. This takes another dramatic step in the wrong direction and, along the way, creates the risks we have discussed.

The Chair: Order. This is very engaging, but I have loads of Members who are trying to get in, so I am going to have to ask that answers be quite concise. I am also conscious that there are two other members of our panel who have given of their time today. The Minister and the shadow Minister now also want to come in, and I do not want to miss them out either.

Q114 Stephen Doughty: I want to ask all of you the same question I asked Max Hill about the detention powers in schedule 3, which obviously replicates powers in schedule 7 to the 2000 Act. There is obviously a balance between operating effectively and ensuring it is done fairly and appropriately, with compensation and so on. Where do you sit on the detention powers and how they are applied?

Peter Carter: I agree with Max. I think there ought to be a reasonable grounds test. There are a large number of detailed preservations of rights and protections, which are entirely appropriate, but they are rather undermined by the non-existence of a reasonable grounds test, because it is very difficult to challenge it if there is no reasonable grounds test.

Q115 Stephen Doughty: Is that the same for you?

Abigail Bright: I agree. There might well be a case for identifying exceptions to liability under the Bill, but if we are to co-exist with reasonable grounds alone, I certainly agree with Peter's and Max Hill's approach.

Corey Stoughton: I agree with that. I would also point out that, to create a reasonable grounds standard, you would have to amend the Bill's current definition of hostile activity, because hostile activity as currently defined is not linked to any particular crime. It is any action that could arguably negatively affect the interests of the nation. On the face of it, that could include a businessman engaged in a trade deal that is to the detriment of the UK economy, or a businessman striking a deal that would not help UK businesses. I do not think that is what the power was meant to get at, but that is the way it is drafted. It needs to be amended to link it to criminal activity, and there must also be a reasonable grounds standard.

Q116 Simon Hoare: Can I ask the witness from Liberty how you would amend clause 3?

Corey Stoughton: I would stamp it out. I do not think there is a way to amend that provision in a way that would not end up simply reducing it to what is already covered by existing criminal offences. There is no ground between what is already criminal and would therefore be unnecessary, and what goes too far.

Q117 Simon Hoare: This may be a little rhetorical. I remember, not exactly, it has to be said, with unalloyed pleasure, the very long debate that we had on the Investigatory Powers Bill—Mr Newlands and Mr Warman will also remember this—about the distinction between

a journalist and a citizen journalist. It might just be my impression, but there always seems to be a disconnect between realpolitik and the outlook of Liberty. When was the last time that Liberty demonstrated either an appreciation or an understanding of the need for, or indeed a welcome of, any proposed legislation to deal with the significant and frightening threat that this country faces from those who wish us ill, both within it and outside it?

Corey Stoughton: Let me affirm that Liberty takes very seriously the Government's responsibility and obligation to protect all of us from terrorist attacks, which threaten the fundamental right to life. There are many provisions in the Bill that we have no objection to whatsoever. However, I also point out that our opposition to this is not radical or extreme—we are joined by the independent reviewer of terrorism legislation and the eminent counsel sitting next to me—so I do not think there is any cause to point out that our criticisms of the Bill are radical or not in keeping with what a, frankly, rational lawyer would think when looking at the provisions proposed.

Simon Hoare: I did not actually use the word "radical". That is an interpretation.

The Chair: Thank you. That is now very much on the record.

Q118 Mr Wallace: Can I ask all three of you the same questions, to hear your views? First, to Liberty, as it stands section 58 of the Terrorism Act 2000 basically hinges on the collecting or downloading of material. Is it your view that that, too, should be struck out?

Corey Stoughton: Liberty opposed the introduction of that offence. We certainly understand that this is not the time or place to take that step.

Mr Wallace: It is either a principle or it is not. You either think it is wrong or it is not. Would you venture that section 58 is not needed?

Corey Stoughton: We would, yes.

Q119 Mr Wallace: So downloading terrorist content and manuals on how to make a bomb and all that sort of stuff should not be an offence?

Corey Stoughton: Downloading terrorist manuals on how to make a bomb is already criminalised under the collection of material that would be useful for the purposes of terrorism, which is already an offence under terrorism legislation. Those things would be illegal.

Mr Wallace: That is training. What about downloading ISIS or al-Qaeda propaganda materials?

Corey Stoughton: Liberty's position is that merely looking at that material should not be an offence. It may well be reasonable grounds to further investigate whether a person is planning to engage in terrorist activity.

Q120 Mr Wallace: On the broader issue of biometric data, the Government have responded to the Biometrics Commissioner's recommendations. I hear the points about there not being enough safeguards and there being other issues previously. Does that mean that two years is too much already?

Corey Stoughton: I have to think about that a little bit more. It has been a while since we engaged with that provision of the Bill. At this stage, there are obviously occasions on which the retention of biometric data is appropriate, but I think it is clear enough to say that, for the purposes of the Bill, expanding that power, when there are already existing concerns over the way similar powers are being used, is not the right way forward. We need to clean up the system that currently exists and ensure that the important safeguards that currently exist in the system are maintained or, if not perfectly maintained, at least substituted with safeguards that continue to ensure that those powers are exercised wisely and consistent with human rights laws.

Peter Carter: Can I deal with clause 3 and the amendment to section 58? Section 58 of the 2000 Act deals with the collection of information that can then be used, or is likely to be used or of benefit, for an act of terrorism. Simply looking at something is not a predicate act to providing that information for a terrorist purpose. It would be better to make a distinction between the act of simply looking and the act of deliberately retaining something with the potential intention or purpose of it being used or passed on to somebody else.

I therefore think that clause 3 and its amendment of section 58 add a new and undesirable dimension to section 58. It is undesirable because it expands the ambit of the offence in an unnecessary way. By adding something extra, we are making the life of the counter-terrorism command, and the life of judges who have to direct juries, more difficult. In this area of law, simplicity is very desirable, and this is over-complex.

Q121 Mr Wallace: First, the head of counter-terrorism would not have agreed with that. If you heard his evidence this morning, I think he welcomed the ability to deal with the streaming challenge. Secondly, on its own, as a stand-alone, section 58 is an offence—simply to collect material—and it does not necessarily have to be linked. Obviously you can deploy a reasonable excuse. My question to other witnesses has been: it may be that people do not like the three clicks and that sort of route, but if we were simply to amend section 58 to add in "he collects, makes or streams", would that not achieve the same issue? There would still be reasonable excuse as a defence.

Peter Carter: I think "collecting"—our making a record—is different from accessing. There is perfect justification for having an amendment that accepts the new changes in technology, and that is necessary. But if it is going to be purely accessing, you need a contingent intention: in other words, you are doing it for the purpose of an act preparatory to terrorism, or intending to use it for terrorism or to make it available for terrorism. Simply accessing is too remote.

Q122 Mr Wallace: Would that not already exist? If I were to bring a charge under the existing section 58, and I proved that you had downloaded lots of things but you had not done anything with them, it is likely that a prosecutor would not prosecute. I do not think there has been a case in that environment. So as the offence stands at the moment you have to do more with it than just effectively download it.

Peter Carter: But you are extending an offence which is at the periphery of what is certain—how it is connected, certainly, to a potential act of criminality. In order to

protect the right of people, whether they be journalists, academics or those doing research, as Max Hill said, you should not have people facing a risk of needing to raise a defence, having been arrested, charged and had their life interrupted for however long it takes before they can put that before the jury.

Q123 Mr Wallace: There are hundreds of examples of academics and journalists downloading some of this data, and they have not been prosecuted. There is no evidence of a chilling effect on existing journalists under the existing section 58. There is no evidence that prosecutors have been abusing their discretion to bring charges—or, indeed, that the judiciary has successfully allowed a prosecution.

Peter Carter: That is because, as I say, section 58 as it exists has, as its apparent purpose, an element of an activity predicate to a potential terrorist offence. There is nothing to stop the security services from tracing and tracking people who simply access the material. The question is whether you transform that material, available to the security services to keep an eye on people, to make it a specific criminal offence. You should not transform one to the other.

Q124 Mr Wallace: I just want to explore reasonable grounds in the schedule. How focused is reasonable grounds in the law that currently governs stop-and-search? Is it very specific to an individual? Is it currently able to be used in a broader environment where you simply have an indication that a knife is about to be used in an area? In other words, how elastic is that concept?

Peter Carter: It is elastic: it depends on the circumstances. It may be that, depending on the nature of the intelligence available to the officer—the person doing the stop-and-search—it needs to be specific if there is a person of a particular description, but it may be that the nature of the threat is so serious and the information about the individual so amorphous that it is perfectly justifiable to stop a large number of people in a specific area.

Q125 Mr Wallace: If I had intelligence that we suspected that a hostile state would move some radioactive material via a passenger on an aeroplane into this country over the next six months, would that be too broad to target flights from a certain part of the world? For reasonable grounds to be satisfied, would that need to be narrower?

Peter Carter: I am not going to say that it would not be satisfied in certain circumstances; I have prosecuted lots of drug trafficking cases where the customs officers have had intelligence of that nature. That has then been refined, which meant that they could focus on a finite number of planes or ships, but they have had to do covert surveillance on a potentially large number of persons and transits. If that transforms itself into focusing down on to, "Right, this is an individual on this flight or on this ship who satisfies what we think our refined intelligence is," then yes, it can be quite a few people.

Q126 Mr Wallace: But it may not get that narrow. It may not be something you can further explore. It may simply be that you know that between June and September, there is a plan to bring something—a radioactive material—into this country, and that is what I, as the Security Minister, will have to take a defence against.

Peter Carter: I would suggest that it is a question of proportionality. If the threat is extreme, I would not want to say that your hands are tied.

Q127 Mr Wallace: But would not using reasonable grounds or grounds of suspicion be doing that?

Peter Carter: You would do, because if you were able to identify that it was coming from a particular place and was of a particular kind, in reality, you would not search everything and everyone. As I say, it is a question of proportionality. If there was a really major threat to the security of this nation, I would hope that appropriate powers would be available to ensure that it never came to pass. If that meant an extensive number of searches, that would be proportionate and reasonable.

Q128 Nic Dakin: Looking at the powers of detention at the border, I see that there is no access to a solicitor for an hour, and there is a power for someone to have to speak to their solicitor within the hearing of an officer. Does that concern you?

Abigail Bright: The first part certainly does—having no access to a lawyer, on the face of it for no good reason. If there is a good reason, of course that will present itself—it will be case-specific or fact-specific—but I do not see why the hands of law enforcement officers should be tied to one hour, or why the rights of a suspect, who is potentially an accused person, should be diminished with reference to that. That would be my observation about that first part.

Peter Carter: I agree.

Q129 Nic Dakin: And on the second part—about the conversation with the solicitor being in the presence of someone else?

Abigail Bright: That is deeply concerning and wholly new. "Radical" is a well-chosen word here; it is a radical departure from anything known to English law. My view, and the view of the specialist Bar associations, is that it is unnecessary and undue, and that it would not in any way be a serious improvement on the powers available to law enforcement agents. It is makeweight, and I would submit that it is just a gloss.

Peter Carter: At the moment, existing laws allow a police officer, a superintendent, to require an interview to take place in the sight of an officer. That is appropriate. Sometimes it is a protection to lawyers, if there are reasonable grounds to suspect that the person being interviewed might try to pass something, damage the lawyer concerned, hold them hostage or something. Those are existing powers used in exceptional circumstances that are always diligently reviewed ex post facto.

Q130 Nic Dakin: But "in the sight of" is different from "in the hearing of".

Peter Carter: "In the hearing of" means that private, privileged communication is effectively frustrated, and that is very worrying.

Q131 Julia Lopez (Hornchurch and Upminster) (Con): I wanted to raise this when we were debating the three clicks issue, but it seems to me that there are parallels between viewing terror material and viewing child pornography content. I am keen to understand your

positions on the issue of establishing a pattern of behaviour and when is an appropriate time to prosecute somebody for viewing material.

Does Liberty believe that you should never be prosecuted simply for viewing material? Or are you arguing that, in the case of terror, viewing the material is not sufficiently serious, in comparison with something such as child pornography, that you should be able to convict somebody for it?

Corey Stoughton: Child pornography is a different case, because it is inherently criminal. The harm is done in the viewing and in the production of those—

Q132 Julia Lopez: So a beheading would not be considered the same?

Corey Stoughton: Extremist content is what the current provision would cover. Extremist content is not inherently harmful in the same way as child pornography is. For example, there may be a range of legitimate reasons for a range of people to engage in viewing extremist content, whether because you knew that a student of yours in your secondary school had viewed it, or your child had viewed it, and you wanted to understand what they were looking at, or for journalistic and academic activity, which we have covered.

Child pornography really is in a class by itself, because the harm in the creation and the viewing of it is so unique and different that it is appropriate for it to be criminalised in that way. Extremist content, although quite serious—I do not mean to diminish the seriousness of the problem of the proliferation of extremist content and the challenges it legitimately poses to law enforcement—is of a different kind from child pornography for that reason.

Q133 Mr Wallace: I just wanted to clarify: terrorism content or extremist content?

Corey Stoughton: I am not sure I know what the difference is.

Q134 Mr Wallace: *Inspire*, a magazine written by al-Qaeda and promoted around the internet, or an ISIL document? Are those terrorist? I would say it is created by terrorists for spreading terrorist theology and hate.

Corey Stoughton: Would I still distinguish that from child pornography? Yes.

Q135 Mr Wallace: No, would you say that was terrorist content or extremism content?

Corey Stoughton: I do not know. Part of the problem with these laws is that the terms are fluid and not very well defined. What one person might consider extremist content another person might not consider extremist.

Q136 Mr Wallace: So a magazine written by al-Qaeda, claiming to be by al-Qaeda, which gives a theology about kufr and attacking everyone else, is inherently a terrorist publication?

Corey Stoughton: Sure. I would agree with that, absolutely.

Q137 Mr Wallace: I understand the issue about extremism content, but when it comes to terrorist content, surely there is a crossover to the paedophile streaming and viewing?

Corey Stoughton: I still think there is quite an important distinction to be drawn from that, because no child is harmed in the creation. If a child was harmed and it was child pornography, obviously it would be different.

The Chair: Order. I am just conscious that the Minister is asking the questions.

Mr Wallace: You should just watch them; you will see people being executed in the background. I would guess that is harm.

The Chair: If there is a moment left, I will come back, but I am conscious that Dr Huq would like to ask a question before we run out of time.

Q138 Dr Rupa Huq (Ealing Central and Acton) (Lab): This morning, as you were saying, I asked the two panels about clause 3 and the potential for criminalising thought without action. I raised a case that was quite high profile at the time, and nobody from the two panels this morning had heard of them.

I wanted to ask you about, first, the issue of thought without action and secondly, the difference between lone wolves and proscribed organisations. The case I wanted to raise was the first ever person convicted under the Terrorism Act, in 2007, the 23-year-old "lyrical terrorist"—the person writing extremist poetry about beheading people. That resulted in an Old Bailey conviction that was later overturned by the Court of Appeal. What are your thoughts on that and this Bill? How would they apply? Have you heard of that case? Nobody this morning had, and I was surprised by that.

Peter Carter: No, I am afraid I have not. It was not one I acted in.

Simon Hoare: Are you sure you did not dream it?

Dr Huq: It was all over the news at the time in 2007 and it was overturned in 2008.

Peter Carter: The difficulty with section 58 is that it is not about terrorist material; it is about

"information of a kind likely to be useful to a person committing or preparing an act of terrorism".

If it was about terrorist material, as identified by the Minister, I think there would be very little problem with it.

The difficulty of extending the definition of "material" in section 58 of the 2000 Act, as this clause does, is to take it into thought. We are at risk of getting close to a heresy idea. It would be trying to stop what is genuine interest in political issues of extremism and people being able to inform themselves about extremism in order to engage with the debate and to defeat these views. Unless we engage in a debate with those views, we will not defeat them. There has to be a capacity for ordinary people to be able to understand what extremism is and why these views are so dangerous that we must engage with them and overcome them.

Q139 Dr Huq: Was Liberty involved in the 2007-08 case?

Corey Stoughton: I am sorry to say that I am not sure, because I am also unfamiliar with the case.

Q140 Dr Huq: For good measure, Ms Bright?

Abigail Bright: I am not aware of the case.

Q141 Dr Huq: I have another short question. Are the three of you aware of the Prevent programme having lost the confidence of certain communities? Do you have any comments on that?

Peter Carter: I was involved in training the counter-terrorism command when the Prevent policy started. I was an enthusiastic supporter of it, because it was subtle and very effective. It has gone slightly off track and lost the support of some communities. That is a great shame, because it really needs to be supported.

I shared a panel recently at the Law Society with the Metropolitan Police Commissioner; I am glad to say that she and I agreed about just about everything. One of those things was the importance of the Prevent strategy and of getting back the confidence of the communities, because their engagement in it is vital. As a concept, it is a vital part of fighting terrorism.

Abigail Bright: A very specific part of the community is the family doctor—the general practitioners. One only needs to look at *The BMJ* to see the concern expressed by medical practitioners about the Prevent programme. In principle, there is no resistance to it among the medical fraternity, but how it is executed and how it risks trespassing on medical confidentiality and trust between doctor and patient is a very discrete part of how it is problematic in the community.

Mr Wallace: GPs are not covered by the Prevent duty.

Abigail Bright: On another view, much training of general practitioners goes into how to deal with Prevent.

Q142 Gavin Newlands: I think we have covered a fairly wide area. I want to go back to biometrics, because we missed out on that answer previously. Ms Bright and Mr Carter, do you think it is justifiable to retain biometrics information for five years, without oversight by a Biometrics Commissioner of those people who are not charged, whose charges are dropped or who are found innocent? Do you think that is of any use to the police and the security services?

Peter Carter: I am afraid I am going to disagree slightly with Liberty on this one. It is a bit like personal data: it needs to be constantly reviewed. There needs to be a finite term to begin with; then if necessary, continued retention needs to be justified. I do not think there should be an automatic prohibition on the retention of data by those who are not prosecuted, because it might well be that a person is diverted from prosecution even though there is very good reason and very strong evidence that they did actually have the material and were on the verge of getting involved with terrorist activity. In those kinds of cases, it is justified to retain the material. I think it is a question of proportionality—two years to begin with, with the possibility of extending it to five or further, if there is justification.

Abigail Bright: From the specialist Bar associations, I would add two things. First, the Bill incorporates a review by the Investigatory Powers Commissioner. That is very welcome and it is a good part of the Bill as drafted. As the Committee knows, the commissioner is to have two functions: to monitor and to keep under review the operation of provisions of the Act, and after that to report as a long backstop every calendar year. Within that, the commissioner has the power to report to the Secretary of State as and when the commissioner thinks appropriate much before a year.

The Chair: Order. I am afraid that brings us to the end of the allotted time for the Committee to ask questions. I thank Ms Stoughton, Ms Bright and Mr Carter for the evidence they have given the Committee.

3.45 pm

The Chair adjourned the Committee without Question put (Standing Order No. 88).

Adjourned till Thursday 28 June at half-past Eleven o'clock.

Written evidence reported to the House

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