



HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: Legislative Scrutiny: [Counter-Terrorism and Border Security Bill](#), HC 1208

Wednesday 20 June 2018

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Members present: Ms Harriet Harman (Chair); Fiona Bruce; Ms Karen Buck; Alex Burghart; Baroness Hamwee; Baroness Nicholson of Winterbourne; Baroness Prosser; Lord Trimble; Lord Woolf

Questions 1–16

Witness[es]: **Max Hill QC**, Independent Reviewer of Terrorism Legislation; **Corey Stoughton**, Advocacy Director, Liberty.

Q1 **Chair:** Thank you very much indeed, Max Hill and Corey Stoughton, for coming along and helping us with this inquiry. As you will know, we are the Joint Committee on Human Rights. We are half Lords and half Commons, and our focus and our concern is on human rights.

One of the human rights that we are concerned about is not being blown up by terrorists and to have your right to life and have the Government and the state protect you, but the other is to make sure that the state does not overstep the mark and abuse other human rights that people have.

In looking at this new legislation—the Counter-Terrorism and Border Security Bill—we are very grateful to you for coming along and explaining to us the benefits or otherwise of this Bill, how you think it is going to work and whether you are satisfied that it respects human rights. Baroness Hamwee will pose the initial question.

Q2 **Baroness Hamwee:** The question, as you might expect, is about the Government's whole approach to this. They say that they are closing loopholes. Corey, Liberty has said that it is not necessary. Max, right at the beginning of your appointment, if not before, you went on record as saying that we have plenty of offences. The Government say on their factsheet that they are not creating wholly new counterterrorism powers but that they are building on

the existing legislative framework. We would be glad to hear from both of you whether the Government are adopting the right approach.

Max Hill: My starting point is to give at least some credit where it is due. After the atrocities in London and Manchester last year, I and many other observers were in a state of anticipation as to what the government review of counterterrorism strategy announced on 4 June last year would amount to. Precisely a year had passed when the new Home Secretary relaunched Contest on 4 June, and we had this Bill two days later. Giving credit where it is due, we do not have a raft of entirely new terrorism offences, what might be called precursor or preparatory offences. Sitting in my seat, I am pleased by that.

As to what I was fearful of—the danger—looking at this from a rights-based analysis, those around the table conducting the government review might have reached for what you might call aspiration to terrorism and might have sought to criminalise that. In other words, they might have sought to criminalise thinking about it but not quite yet doing it, still less preparing to do it. It is a pleasant surprise to find that we do not have a putative offence of aspiration to terrorism. For the avoidance of doubt, I would not have been able to support it if we had. That is to the good.

The next point is that we see in this draft Bill some very welcome provisions, some of which flow from the recommendations of my predecessor. There is, for example, an absolute bar on the admissibility in court of answers to questions when an individual is port stopped under Schedule 7 of the 2000 Act, and it is very good to see that enshrined in statute, and that there is a pause to the detention clock for those arrested under the powers of the Terrorism Act 2000 when they are in hospital undergoing treatment. That is another of my predecessor's recommendations that has found its way into statute. There are some welcome provisions, and there are, if I can put it this way, some welcome absences.

To come to the point about what is there, in relaunching Contest on 4 June the Home Secretary, in answer to a question, said that it comes down to what he calls "digital fixes" to the existing legislation. I agree with and understand what he says there. It is only right that when we are looking at legislation that is almost two decades old—the 2000 Act—there are examples of the ways in which we communicate with each other and use digital and online platforms, which have moved on since 2000 when Parliament considered that Act.

However, this is not all simply "digital fixes" in my observation. There are some amendments to existing offences that I am constrained to describe as extensions to those offences. I am shy of calling any of the clauses—the offence creation clauses—entirely new offences, because they are not, but where there are extensions on existing offences I am very grateful for the opportunity to come before this Committee, because you are

absolutely right to look at the infringement of rights that is engaged here alongside the Government's understandable desire to maintain and heighten security.

Perhaps not now but a little later I would be very interested in trying to share my thoughts with you on these clauses, one after the other, because there are some extensions to existing legislation, which in my previous messaging I have described as part practical, part problematic. That indicates where I sit with Part 1 of the Bill. There are some good, pragmatic solutions here for the modern world, but there are some aspects of the extension of existing offences that give me serious cause for concern. I know that I am not alone in that.

Baroness Hamwee: I am going to come to you in a moment, Corey, but before we get to the detail of each clause, would you say, Max, that the extensions are more than exists by way of inchoate offences that we have now?

Max Hill: Yes. There is no new preparatory offence nor what lawyers would call a fresh inchoate form of an existing offence, but there are variations on existing offences that are of a slightly different order. Clause 3 and the extension of Section 58, the multiple viewing offence, which we will come to, is of a different order to what is currently prosecuted, and that is in the problematic rather than the pragmatic category.

Corey Stoughton: I really appreciate the opportunity to come before the Committee and help to fulfil Liberty's role in being an organisation that, like the Committee, takes the threat of terrorism very seriously and accepts that the Government have an important role to play in protecting public safety but that they need to be tested and continually reminded of the intersection between those, often great, powers and human rights and civil liberties.

I am loath to get involved in a semantic debate about whether something is a new offence or an extension of an old offence. The critical piece of information for the Committee is that activity that was not criminal before will be criminal after the passage of this Bill if it passes. Much of that activity is not terrorism per se; it is protected activity—protected free expression and free speech. That should give anyone pause to think about the rationale for extending or creating these offences and bringing that activity under the umbrella of criminal law.

As a whole, Clauses 1 to 3—I am happy to go into detail on each of them as the Committee wishes—reflect a confusion between activity that might reasonably lead to a suspicion of criminality and terrorism and activity that is itself criminal or terroristic activity. It further compounds an error that we have been drifting into with existing offences of bringing in activity that in and of itself is not terrorism, bringing it under the criminal

law and creating with that extension of the criminal law a risk of chilling protected activity, whether it is journalistic activity, academic inquiry or even misjudged and ill-thought-out behaviour by an undeveloped and immature or misguided mind.

We have to acknowledge that our freedoms mean that there is space not only for the highly protected pursuits of journalism or academia but for making mistakes of misjudgment when those activities in and of themselves are not inherently criminal or terroristic. Each of these offences suffers from that sort of flaw in its own way.

Baroness Hamwee: Chair, I imagine you would like to leave it until we have gone through questions on each of the clauses so that our witnesses can come in at the end and tell us if we have missed anything.

Chair: Yes, I totally agree. Are you going to take us on to Clause 1, Sally?

Q3 **Baroness Hamwee:** Yes. You have already talked about there being no offence of aspiration to terrorist acts. However, in Clause 1, expressing an opinion or belief supportive of a proscribed organisation and being reckless as to whether the person to whom it is directed—that is interesting when we are talking about the internet—will be encouraged to support it. Are we going across a line and criminalising thought and belief with this, rather than action?

Max Hill: Undoubtedly with Clause 1, the authors—the Government—are drawing back the line to an earlier point with regard to criminality. The proposed move from an invitation of support to an expression of support is, I am afraid, problematic. The amendment, moving from inviting support to proposed support only, lacks the necessary safeguards, which are to be found in the offences in Section 1 and Section 2—encouragement and dissemination—in the 2006 Act.

Thinking of it in those terms gives rise to the question whether an expression of support, as included in Clause 1, if it is criminal, strikes me as being, if it is anything at all, akin to encouragement of terrorism. This takes me directly to Section 1 of the 2006 Act. We have an existing offence of encouragement, which has a number of checks and measures in its subsections. It begs me to ask why we need this variant to Section 12 of the 2000 Act.

Can I put one layer of detail on that? My suspicion, which is possibly made good in part by the commentary on the provisions in the Bill in the Explanatory Notes, is that those around the table conducting the review who have come up with Clause 1 had recent cases in mind, undoubtedly including that of Anjem Choudary. Numbers of commentators and judges

gave very careful consideration to circumstances in which someone of that type crosses the line from a non-criminal expression of a view, with which many people might disagree but that does not require prosecution, to criminality—namely, encouragement of terrorism.

The case of Choudary and Rahman 2016 is cited by the Government in the Explanatory Notes, in particular the part of the judgment—paragraph 35—where “their Lordships said the offence does not prohibit the holding of opinions or beliefs supportive of a proscribed organisation or the expression those opinions or beliefs”. Clause 1 does that, and to the extent that one can read what the Court of Appeal identified as a gap in the law, Clause 1 fills it.

It is not for me to say, but I wonder whether that is what their Lordships meant. They were expressing, as crisply as they tend to in the Court of Appeal, where the boundary between criminality and a merely odious opinion lies. They were not inviting the creation of a new offence to fill a gap, they were indicating where the boundary is. If I am right about that, and I might not be, Clause 1 crosses the line. I find it problematic, but in any event, to the extent that an expression of support represents encouragement for terrorism, we should not worry about Clause 1 because we have Section 1 of the 2006 Act.

In short, that is my critique of Clause 1 as it currently reads.

Lord Woolf: When you say that we should not worry about Clause 1, you are really saying, if I have followed you correctly, and please tell me if I am wrong, that Clause 1 is not necessary.

Max Hill: I am. I am begging to ask whether it is necessary.

Chair: If somebody says that an organisation should not be proscribed and they think it is wrong that it has been proscribed, is that expressing support for a proscribed organisation?

Max Hill: Arguably it is not. It is discussing the parameters for proscription.

Chair: If you say, “It should not be”, you are not discussing it, you are expressing a view—“This organisation should not have been proscribed by the Government”. Would that be in breach of Clause 1?

Max Hill: It might. That is an indication of the very wide circumstances in which there might be a conversation at, say, academic or journalistic level, or even parliamentary level, where setting the line where the Government have in Clause 1 creates the difficulty that you identify.

Chair: Even beyond academic discussion and journalistic commentary, there is an issue about whether it will be a criminal offence to challenge the Government's use of their power to proscribe an organisation.

Max Hill: Yes. Plainly to go that far and no further would not, one would think, be where the criminality lies.

To take another example slightly away from that, again in the Choudary case he expressed support for the introduction of Sharia law as a mandatory facet of society in this country. That was not inviting support for a proscribed organisation or encouragement of terrorism, but he then went further and extolled the virtues of ISIL, or Islamic State. He was crossing the line.

There is legitimate discussion, albeit one that many people may disagree with, which surely is not criminal, and then there is a move into the illegitimate and criminal space of exhorting and encouraging others to take a certain view, which breaches the law. "Inviting support"—the current form of the Section 12 offence—casts your attention on the third party, the receiver of the message, and allows you to judge the virulence of the message according to those who are receiving it. In the amended form, that is taken away. It is "support" per se. It is difficult, although perhaps not impossible, to say that where it is support without a positive invitation, without positive encouragement to terrorism, that represents a criminal act.

Q4 **Chair:** Corey, is it dangerous for the Government to have a power to proscribe organisations, which is quite a swingeing power, and then put themselves in a position where nobody can criticise them, because if they criticise them they run the risk of falling foul of an offence of supporting a proscribed organisation? Where are the checks and balances there?

Corey Stoughton: It is extremely dangerous, and you are right to look directly to the language of proposed Clause 1. You do not even have to be a lawyer to realise that the expression of an opinion that is supportive of a proscribed organisation would seem to encompass criticism of the notion that that organisation should be proscribed under the law. When you consider the context that the Government will no doubt go to, which is uncontroversially terrorist groups such as ISIL or al-Qaeda, it does not seem that dangerous, but the reality is that there are debates about which organisations belong on this list, and in an open society there needs to be room to have those debates.

Chair: Indeed, some organisations change, so it might be well to justify proscription to begin with but then move on, in which case the argument ought to be able to be made lawfully that it should be not proscribed. However, presumably under this legislation, once that clamp

has come down you just have to wait for the Government to decide in their own time.

Corey Stoughton: That is right. It highlights the fact that it cuts off public debate about a question, confining decision-making and input into decision-making into the back halls of Government, cut off from public input and open discussion. That is antithetical to the rule of law and democracy. So much of democracy in this country is built on the notion of consultation. That is the process that we are engaged in now. This criminalises participation in that act and risks criminalising participation in that act.

We have to acknowledge that the police and prosecutors will always say, in response to the criticism that we are engaging with, that that is not in fact how the law will be applied. You can believe that but still identify a relevant danger, because the law is not merely a statute book that gets put into the office of a prosecutor to exercise his or her discretion; the law is a guide for people to determine what behaviour they may engage in without penalty and what behaviour they should avoid. That is the chilling effect that this has, again, on journalistic and academic activity but also on common people participating in a debate about how the Government should exercise their power.

I would like to highlight an additional risk in the way this provision is drafted. It is the introduction of the idea of recklessness into the offence, instead of intentional or knowing invitation of support. Although the recklessness has a place in the criminal law, this Committee has itself on a prior occasion noted that recklessness applied to acts that pertain to the exercise of speech is a mismatch. Recklessness can be used when the activity itself is criminal and a perpetrator of that criminal activity is reckless as to the criminal consequences of his or her act.

When you attach recklessness to the expression of opinion or the expression of any protected activity, you exacerbate the chilling effect that that has on behaviour, because you no longer have to establish the subjective intent to engage in something which the Government consider to be dangerous. You can merely be playing in a dangerous area and expressing an idea, and if the idea is interpreted as support for Hezbollah, or for a Kurdish group that may be engaged in terrorist activity, or for any of the number of groups that are constantly changing their alliances in Syria, and you suddenly run afoul of the criminal law, that is a very dangerous development.

Q5 **Baroness Hamwee:** Max, would you like to comment both on the recklessness and on the person to whom an expression is directed?
I do not tweet, but if I tweeted, am I directing?

Max Hill: I give the Government a slightly easier ride on the question of recklessness, because subjective recklessness is not a new feature in the

legal landscape. There are many general crime offences—criminal damage, to name the first that comes to mind—where judges and juries grapple with subjective recklessness. Yes, it is a lower form of mental element than intent. None the less, there is a threshold that must be established on admissible evidence before the commission of the offence is proved. Recklessness does not on its own give rise to alarm as far as I am concerned.

The difficulty with Clause 1 is that it is uncertain in other respects as to how far one can go without being at risk of arrest and prosecution. I can understand at a policing level and possibly at a Crown Prosecution Service level that being able to intervene where there is evidence of support without having to prove the third-party element—the person who is being invited—makes it easier. That does not mean that it is right to apply the sort of scrutiny that we are talking about this afternoon.

I come back to the fundamental point, which is that Section 1 of the 2006 Act, which is robust in multiple parts and has the right safeguards, allows the police, and the Crown Prosecution Service for that matter, to intervene and to prosecute in any case where an individual has set upon a course of encouragement. That is a valuable tool. There is no suggestion that that should be swept away. The question is whether this is a useful or necessary addition at all.

Lord Woolf: We started off by asking what constitutes support. If it was support of the person doing a proscribed act—I will use the phrase that may or may not be accurate—that is one thing, but just to have “support” without any qualification as to what it constitutes is a problem.

Corey Stoughton: Yes. It is worse than that, Lord Woolf, because in the same decision that Max referred to earlier, which identified this critical limit on the power as requiring intention, the court acknowledged that even intellectual support would qualify as a criminal act under the existing offence of inviting support for a proscribed organisation. We already know that under the existing offence it can be intangible support. It need not even be tangible, let alone itself a criminal act such as laundering money or engaging in violence. Even intellectual support for a proscribed organisation is criminal. That is a feature of the existing law, but it is a bit of background information about the offence that heightens the concerns about the extension of the offence in this Bill.

Q6 **Fiona Bruce:** Good afternoon. Clause 2 is the clause that criminalises the publication of images that could arouse reasonable suspicion that an individual supports or is a member of a proscribed organisation. That is where the images are publicly accessible, even though they might be in a private place. The images could have been taken in a private place, such as a flag on a bedroom

wall.

We are seeking to understand whether you think this is proportionate or whether it goes too far, bearing in mind that the images would originally have been in a private place. Is there a risk of mistaking a background reference to endorsement? I am interested in particular in how you feel the words “arouse reasonable suspicion” would be interpreted. Those words are key.

Corey Stoughton: We are concerned about this offence. You have hit upon the core of the matter, which is that the only limiting principle on this to distinguish innocent activity from guilty activity is the idea of reasonable suspicion that a person is a member or supporter. When you consider that the offence is triggered at the mere posting of a single photograph, it is quite difficult to understand how, from a context like that, you would be expected to determine whether or not that photograph itself establishes reasonable suspicion, or how you would distinguish those who publish images, again, for academic or intellectual inquiry, or, again, going back to the less hallowed behaviour, misjudgment, misbehaviour and experimentation and, if you will forgive me, stupid teenage behaviour.

To know when a photograph, whether it is posted on Twitter, Facebook or any social media, constitutes not endorsement itself—it is not an objective, intent-based standard—but just something that a reasonable person, a reasonable officer or anyone in the position of judging reasonable suspicion could reasonably suspect and not prove or conclude as endorsement creates a real danger that you sweep in behaviour that falls within the realm of liberty that any person in an open society should be able to enjoy.

Again, the concern here is about the ways in which offences like this play out. What we see most often—we discussed this previously—is that these prosecutions tend not to happen in a vacuum. They tend to be charges added on to someone who is actually engaged in acts of terrorism, which gives rise to the question why these offences are necessary. A photograph may end up being evidence in support of a more serious criminal charge of actual terroristic activity, but the posting of a photograph in and of itself, especially with a loose standard like this, falls into what I said at the start: that these offences tend to further blur the line.

This is activity that we can all agree may create a reasonable suspicion that might warrant further investigative activity by the Government, but you have to consider whether, standing alone—and this is what Parliament must consider—this behaviour is criminal and whether it should be a crime to engage in this behaviour, devoid of any other context of engagement in actual acts of criminality or terrorism. The risk that it will blur the line between freedom and legitimate and academic and intellectual inquiry is far too great a cost to pay.

Max Hill: I agree that the display of flags or other emblems associated with proscribed organisations is, and has always been, admissible evidence as to the mindset of the individual who is displaying that paraphernalia. I say that from my own long experience of prosecuting terrorism cases in which emblems, displayed in public or on bedroom walls, are supporting evidence that is placed before judge and jury.

What is interesting in this proposal, but which also imports some difficulties, is that the Government are moving away from the origin of offence creation of this type, which lies in public disorder legislation, classically the Public Order Act 1936. I am thinking back to the problems and the protests on the streets in the 1930s, and one can understand the criminalisation of a display in public in those circumstances. What is now happening, though, is that that is being drawn into private circumstances, the suggestion being that it is also the commission of offence.

Why is that problematic? It is problematic, first, because of what you have already heard about how far one can go and how many conclusions one can actually draw merely from the display of an image. What I would add to that is the question of the historical context on which the clause is silent and, so far as I am aware, the Government, thus far, have been silent. On its face this would criminalise the private display of a historic image in relation to a proscribed organisation many decades ago but that is now criminalised, as well as having a chilling effect on research, journalistic endeavour and the rest. That strikes me as a particular extension that may not be what the Government intend but it is what appears on the face of this clause.

The Committee suspended for a Division.

Q7 **Fiona Bruce:** Clause 3 makes it an offence not only to download but to view material over the internet that is likely to be useful to a person committing or preparing to commit an act of terrorism where this is done three or more times. That person can be prosecuted for viewing material three times even when the material is different each time.

While it may seem reasonable to close a loophole in the existing offence to ensure that viewing terrorist material is treated in the same way as downloading terrorist material, does this offence as worded risk criminalising curiosity and inadvertent viewing? Is it drafted sufficiently tightly? Only today, I was talking to a PhD student who is doing her thesis on torture. That is a situation where she could very easily be caught by this legislation.

Max Hill: Yes. This is the one clause that we knew long ago was going to appear in this Bill, because it was flagged as an intention by the previous Home Secretary at the party conference speech in October, which I mention only because—I claim no credit for it—I have written about this

proposal at some length, all the way back in late October last year in my Tom Sargent memorial lecture for Justice. It is at least of interest that at that time I was musing on whether two clicks on internet-based material was going to be said to form the commission of the offence.

The Government would say, "No, it is three clicks", to which my question is the obvious one, I am afraid: can we define the difference between a second and a third click as to where the offence-creating line is crossed? In the Explanatory Notes to this clause—we should accord a margin of appreciation to the Government for this—the Government say that they are trying to deal with a pattern of behaviour and if, in the way that Clause 3 has been drafted, that really demonstrates a pattern of behaviour, perhaps we should have some sympathy and understanding for this clause. My question is whether that is the effect or something much less than that.

There are clearly risks for journalists and others. Index on Censorship shared its thoughts with me on this. If I just read a sentence, it expressed a concern about the potential restrictive and frightening effect on researchers, students, academics and journalists amongst others, who are researching case studies, making arguments and carrying out interviews. Without more, there is a risk that the mesh of the net that the Government are creating with Clause 3 is far too fine and will catch far too many people.

The Government's answer would be that subsection (3), which is unamended, remains, and there is a reasonable excuse defence. That is right. The question, however, is whether we need to rely on prosecutorial discretion not to prosecute in what many would argue are the obvious non-prosecution cases, or whether there is a risk of significant numbers of people who are taken to the trouble and even the expense of going to court in order to demonstrate or to raise the question of reasonable excuse.

My suggestion is that this new variant of the Section 58 offence will prove difficult in practice and lacks clarity on the many circumstances in which the offence is not committed as to which—forgive me for going back to my Justice lecture—there is some relevant learning from the French experience here of the last 18 months. Twice in that period the French Parliament has attempted to legislate into this space, targeting exactly this sort of activity, and twice the constitutional court—the *cour de cassation*—has struck it down.

The bases on which the court has struck it down are rights based as well as certainty based. It fails both tests. That is notwithstanding that in the French experiment both at the first iteration and at the second iteration there was an expression within the terms of the new offence that it would not apply in circumstances of professional research. I am *précisant*. Here we do not even have an expression of that sort to give encouragement to those who are not committing the offence. This is extremely difficult.

The questions are obvious. It begs the question as to whether a week, a month or six months is too short or too long a gap between the first click and the third click. Given that it is not the same material, it will be difficult to identify a pattern of behaviour.

I am bound to extend my comments on Clause 3 to the sentence extension provisions, which I know are later in the Bill. The Government intend that somebody who falls foul of Clause 3 will be at risk of a sentence of imprisonment of up to 15 years, which is an extension of the current maximum. I find that difficult to countenance when nothing is to be done with the material. It is not passed to a third party. It is not even the commission of the current Section 57 offence in the 2000 Act, which is collection of information for a terrorist purpose. There need be no purpose here, yet there is a risk in the draft clauses of up to 15 years' imprisonment.

Lord Woolf: There is power to impose an extended sentence.

Max Hill: Yes. Powers to impose extended sentences in the main, as a matter of generality, are provisions that I can support, particularly because the extended provisions post-conviction that have found their way into the Bill are learned lessons from general crime, whether it be sexual offence prevention orders or matters of that sort that have been proven to work in other areas of criminality and that are now being extended into terrorism. That is a good example of using general crime solutions in this area, which is just another species of general crime.

I note and give credit for the fact that all of the sentencing powers extensions are discretionary maxima. They are not mandatory minimum. That would be even worse. It really begs the question as to whether there is a case in which somebody, merely for clicking online on three occasions, might require a sentence of that sort of length. The terrorism-defence definitive guideline that the Sentencing Council produced earlier this year is already a robust piece of work. It already deals, in terms of the aggravating factors, with a significant volume of terrorist publications, the length of time over which the offending was committed and the deliberate use of encrypted communications. This is all pre-Bill. Those factors are already built into the sentencing matrix for Section 58 as it is now.

I share the fear of many that, for lack of certainty and lack of an expression of the circumstances in which people do not commit an offence, this clause should be looked at again and either amended in some form or revisited. It would be possible to amend to say that the three clicks offence is committed only in circumstances where somebody intends to support terrorism. That would cure many of the problems that I have just mentioned. If that were the amendment I would pose the question, "That is what we have Section 57 for, so why do we need this?"

For those various reasons, this is a problematic clause. I understand where the Government are coming from. I understand that they are seeking to identify patterns of behaviour and I understand that there may be circumstances in which without a download you are still accessing material, but they are quite few and far between. It is very easy, as we know, to create a trace on one's computer through a click. This is designed for instances where there is no download. Are there really many cases that come into this category properly? I beg to question.

Corey Stoughton: I will not labour by adding to that. I agree with almost everything that Max just said. I would underscore that with regard to the Government's response on the availability of the reasonable excuse defence, the courts have acknowledged that that is a question for a jury, which means that a person is in jeopardy of facing a trial all the way to a jury before a reasonable excuse can be established. That is not a sufficient defence to mitigate the clear effect that this will have on legitimate journalistic and academic behaviour.

I also wish to underscore that, as with the other offences, we should be concerned from a civil liberties and democratic society perspective not only with journalists and academics but with people who view this material for legitimate reasons, such as to cope with feelings of disgust and horror at what happens in the world, or to better understand and disapprove of wrongful terrorist acts, or even those who view it out of foolishness or poor judgment.

Again, this is activity that falls outside the realm of activity that is actual terrorism and into the realm of activity that, while it may in some circumstances be associated with terrorism or even legitimate grounds to inquire and further investigate whether a person is engaged in terroristic offences, it also encompasses legitimate activity and has to be carefully scrutinised and heavily justified in this offence and the Government's case where it does not meet that bar.

Q8 Fiona Bruce: Thank you very much indeed. You have largely addressed the questions I wanted to ask, including the supplementaries.

We would just like to probe a little bit further regarding the defence of reasonable excuse. You have both given some examples where a jury might consider this. Could you give us some specific examples of where a reasonable excuse would be justified, other than, say, journalistic or academic activity? What would a young man—a young teenager in his bedroom who had heard about this on the news and wanted to find out more about it—go about providing a reasonable excuse?

Max Hill: I absolutely understand the concern. The draft legislation does not distinguish between those who might have the wrong sort of interest in this material and individuals who might look in curiosity, as in your example, or in horror, or even in disgust. I can imagine circumstances in which an individual who has no intention of preparing or committing an act of terrorism might even click twice on the same material within a short period of time, in outrage at what he or she sees. The danger of this is that they would be two-thirds of the way towards the commission of this offence.

The exclusions, where, in France, they have attempted to draft them, are a starting point for defining reasonable excuse. In the recent legislation, although it did not pass the scrutiny of the constitutional court, the draftsman said that consulting material constitutes a legitimate reason as defined if resulting from the normal practice of a profession of which the purpose is to inform the public, arising in the context of scientific research or research carried out in order to serve as evidence in legal proceedings, or the fact that this visit is accompanied by a report of the content of this service to the competent public authorities. All those get-out clauses were applied, but still that did not meet with approval in France.

Here the defence of reasonable excuse was considered when the House of Lords sat in this Chamber in the cases of G and J, and just before the institution of the Supreme Court, and their Lordships, when asked this question exactly, have said, "It needs to be an objectively verifiable reasonable excuse". To put that another way, anything that, in the view of a judge, a jury might conclude is a reasonable excuse goes for the consideration of the jury. Their Lordships, despite invitations, were not prepared to bear down on the circumstances in which reasonable excuse did or did not apply.

In a later case, AY in the Court of Appeal, another attempt was made. I happened to be counsel in that case, so forgive me, because it is on my personal list. Again, attempts to identify the sorts of material that were beyond a reasonable excuse—one could not even argue it—did not meet with favour. That may be because their Lordships here and in the Court of Appeal were of the view that if this was going to be clarified it was a matter for Parliament and not for them, in which case we wait to see an attempt at grappling with what a reasonable excuse may amount to. I am afraid it is absent here at the moment.

Q9 Lord Woolf: Would you take the same view about these proposals if they were taken to apply to people regardless of their citizenship, or should we be banning them from entering the UK if we suspect that they have been involved in this sort of activity?

Max Hill: The principle of extended and extraterritorial jurisdiction is one which the Government have grappled with in this Bill. I support the principle, which is not new in this Bill. Since 2015 we have extraterritorial

jurisdiction for some of the headline offences, the most well-known of which is Section 5 in the 2006 Act on the preparation of terrorism offence. The Government now propose to extend ETJ to further categories of offences. I certainly support that principle. I can understand that extending the operation of the Explosive Substances Act—old though robust statute that it is—to activity abroad makes sense. Similarly, with regard to the encouragement offences, Sections 1 and 2 of the 2006 Act, there is no reason why they cannot have application for activity abroad.

I have difficulty with the third proposal, which is to extend Section 30 in the proscription offence in such a way that an individual who supports a proscribed organisation when they are abroad is liable to trial here. Why do I have a difficulty with that? It is because proscription in this jurisdiction is different in its definition and its application when compared with other jurisdictions.

Clause 5, which deals with extending extraterritorial jurisdiction, perhaps needs greater focus. Perhaps in circumstances where a UK citizen who is deemed to know the law as to proscription then travels abroad and undertakes activity in support, that person, if and when they return, could be tried here. Where it is not a UK citizen and where that individual living abroad may be under a different legal regime where proscription is defined in different ways, it strikes me as problematic to say that extra-territorial jurisdiction should catch that person merely because they happen to travel back here.

Lord Woolf: I wonder if you could just clarify that for me. If there is an offence abroad but it is not identical with what we are producing here then I see what you mean. Do you go further and take the same view where there is no offence abroad?

Max Hill: The problem that extradition lawyers are more familiar with than I am is the equivalence problem, which is at the heart of your question. Where there is no equivalence it is difficult to succeed in an extradition request and it seems to me that it should be difficult to succeed in applying extraterritorial jurisdiction to these sorts of offences. The difficulty is that however low a level it might be—we have talked about recklessness as opposed to intent, and we have talked about reasonable suspicion as opposed to other forms of proof—placing an individual, whether they are a UK citizen or not, on trial in this jurisdiction in front of judge and jury means that you need to prove a level of awareness as to the offence at the time the person committed it. If there is no equivalent offence abroad it is difficult, at the point of proof, to demonstrate that the offence has been committed. That is why I suggest some narrowing and clarification of Clause 5, particularly in respect of the Section 13 proscription offences.

Lord Woolf: What approach do you take with regard to citizenship?

Max Hill: We have a raft of legal measures that the Government already use to deal with those who do travel abroad, starting with deprivation of UK citizenship in the case of dual or multiple nationals. That is not a breach of international humanitarian law as long as an individual is not rendered stateless. That is a power that can be used. It does not follow that just because someone has had UK citizenship deprived they could not be tried in this jurisdiction if, by some means, they came back to the jurisdiction. The two are separate. That power is in place, as is the temporary exclusion order, which allows British authorities to prepare for the return of a UK citizen, as are all of the other ancillary steps leading up to prosecution in many cases, or not in many other cases.

We are aware of individuals who have returned from particular foreign countries who have not been prosecuted because they are not assessed as being at a present or ongoing risk of national security. We have a complicated matrix of powers that the Government have in place to deal with those who travel. We do not have an offence of travelling to a designated part of the world and saying that that is criminal per se. That has not been brought forward in the Bill. There are other jurisdictions, Australia being the leading one, where this is such an offence. Perhaps I do not need to deal with it because it is not a proposal on paper at the moment.

Lord Woolf: We certainly do not need to deal with it.

Q10 **Chair:** What about the increase in sentencing? Do we want to come back to that at the end of this, or do you want to say something at his point about the more or less doubling?

Corey Stoughton: We would be happy to address it now. From Liberty's perspective, the critical flaw in the extended sentences under the Bill really go back to the flaws in the underlying criminal acts. It is not the extension of the sentences in and of themselves that create the threat to human rights so much as the fact that those extensions are being applied to criminal laws that are flawed in the ways we have just explored here in this Committee.

Chair: Do you think that the higher the sentence the more certainty there should be and the more clarity around the definition?

Corey Stoughton: I hesitate to agree with that only in the sense that there is certainly a floor of certainty and definition that should be present in in any criminal statute no matter how low the penalty, any time the person is facing any jeopardy or deprivation of liberty. It certainly heightens the concerns around these and magnifies and throws into light the degree to which we are talking about the extraordinary exercise of power against individuals. When you consider the chilling effects that we

have discussed of these offences on journalistic and academic activity, the sentences have to come into play.

When you consider what we were discussing about reasonable excuse and the fact that there is fundamentally very little guidance on what that means and it is fundamentally a question for the jury, you have to imagine that it is a very brave journalist or academic who is going to risk all of that, when, at the end of that, there is risk of a 15-year sentence for the sake of their journalistic or academic pursuits. There will be people who will be deterred from engaging in that kind of critically important activity for our democracy. It is the intersection of the sentences with the flaws in the proposed criminal law.

It is also worth going back to and remembering that some of the existing criminal offences themselves suffer from some of the flaws that are present in these new proposed additions to the criminal law. Even if the Bill were cured in the sense that tomorrow the Government withdrew Clauses 1 through 3 from the Bill, it is important to engage with the extensions of the sentences as to other precursor criminal statutes under the Bill. It is not that that would eliminate the concerns we have about the extension of the sentences, but in any case the extensions of sentences are always grounded in the concerns that we have about the underlying criminal offence and the scope of it.

Lord Woolf: I am grateful to our Chair for drawing my attention back to this matter. If you view it in the context of the state of our prisons at the present time, is it necessary for these offences—the ones that we are particularly concerned with—to regard the present sentencing powers as being inadequate?

Corey Stoughton: It is a great question. It is a very relevant consideration to take into account. The question that it begs is what the evidence is that increasing the maximum sentences will have a tangible effect in reducing the threat of terrorism. There should obviously be punishment for criminal behaviour, but in deciding whether it is worth taking on the potential costs of incarceration, one has to wonder what we can say will happen—or, more appropriately, not happen—and the likelihood that we will be safer because the sentences are increased? It is legitimate to ask the Government what evidence they have that increasing sentences will produce what I presume is their intended result of an increased deterrent effect.

Max Hill: I take a slightly different approach to the sentencing provisions in the Bill. At Clause 6, under the heading “Increase in maximum sentences”, it seems to me that there are principal terrorism offences that, on a discretionary but not mandatory basis, are capable of an indeterminate sentence—a discretionary life sentence. The Section 5 preparation offence, again, is the headline example. That is quite right, in

my submission, and has the benefit of extraterritorial jurisdiction that we have just discussed.

There are other principal offences that are capable of attracting very high sentences. What the Government are doing here is not interfering with those headline offences but drawing attention to what one might call the second-tier offences, some of which are preparatory in nature. In Clause 6(5), for example, they propose to substitute a 15-year discretionary maximum for the current seven-year maximum for Section 1 encouragement of terrorism.

I do not quarrel with that. Although it must be on a discretionary basis and must be down to the experience and case knowledge of an individual judge, there may be circumstances in which somebody who, after trial or on a plea, is convicted of encouragement of terrorism may require a sentence at or in excess of the current seven-year maximum. I support that.

I also support the notion that for dissemination of terrorist publications, particularly of a virulent nature, perhaps in bulk, perhaps widely distributed on a targeted basis, there is a case for saying that a seven-year discretionary maximum is not high enough and there may be cases that go into the next category, seven to 15 years.

However, in Clause 6, there is also a proposal that Section 58, which we have been discussing, should have its current 10-year maximum increased to 15 years. I have a comment and a difficulty with that, which is that in those very early precursor offences it is very hard to see why there is any need for an extension to a judge's discretionary power. I am not aware of any complaint, after trial or on appeal, that sentencing powers are insufficient. We are aware of the Sentencing Council's terrorism offence definitive guideline, which now stratifies this area on a root-and-branch basis. It is very difficult to see why a 15-year maximum should be applied to Section 58.

Lord Woolf: You take that view with regard to those. If you were going to put up the sentences, should you have gone from seven years to 15 years? What would you say if they go to 10 years?

Max Hill: On the basis that research does not reveal complaints by experienced judges as to inadequacy, I would agree that any increase, even a more modest one, might be entirely sufficient. I am not aware, nor have the Government suggested any research to indicate, that there is a deficiency in current powers.

Can I add, though, that there is one missed opportunity that I have written about in the past and that has not found its way into the Act? That is the Section 38B offence under the 2000 Terrorism Act, which is, effectively, possession of information and failure to report—failure to disclose information about acts of terrorism, to give it its full title. That has a maximum of five years' imprisonment, can be committed on a

hybrid mental element basis of knowledge or belief and can be committed before the principal event has taken place, or after. That means during a preparation phase for what may be a major atrocity or during the escape phase by the perpetrator thereafter. The maximum is only five years.

I have suggested in the past, if I can give a brief example, that if somebody were in possession of knowledge about the London Bridge atrocity last year, not of such an order that would make them a co-conspirator but in possession of knowledge as to something that was being planned, which they could have brought to the attention of the authorities and failed to do so, surely there is an argument that again, on a discretionary basis, an experienced judge trying that individual should be able to impose more than a five-year maximum.

I would take Section 58 out of Clause 6, but I would encourage the Government to think again about Section 38 and about putting that in. In a sentence, in the definitive guideline on Section 38, looking at the culpability table, information that is very significant, including but not limited to information that could have prevented an act of terrorism, surely takes an offender into territory where—I repeat, on a discretionary basis—there might be the need for something more than five years.

As to filling the prisons, it is beyond my remit to deal with the politics or even the resources of prisons. There is a need for increased research as to what happens to people in prison convicted of terrorist offences and perhaps serving longer sentences. There is a paucity of information at the moment. There are measures that are already in place to deal with the risk of radicalisation at separation centres. There is very little information about how radicalisation happens in prison and very little information on the circumstances in which people who are not Muslim on entering the prison estate but are when they leave it may have converted to Islam. There are, of course, multiple circumstances in which someone might convert to Islam with no intention of taking an interest in terrorism or still less of becoming a terrorist.

Research is being conducted under the supervision of SOAS here in London, which intends over the next three years to create a dataset of all the circumstances in which people convert to Islam in prison. Once we know what that says, that might enliven the debate about where we need to go in future on incarceration in this area.

Lord Woolf: Have you had any suggestion from any source, in particular from the body responsible for talking about tariffs—sentences—generally as to how these fit in to the wider range of offences?

Max Hill: The Sentencing Council will plainly have to revisit and scroll up or down the guidelines that it has drafted, but I am not aware—and I was part of the consultation that led to the creation of the guidelines—of any argument that sentencing powers in general are deficient.

I am aware of a handful of cases where particular individuals have been brought before the court, perhaps after a long period of time, where

anxious consideration is given to exactly how to sentence. Coming back to the Anjem Choudary case again, the judge's sentencing remarks and the appellant consideration are in that category. Therefore, I give a margin of appreciation to the Government for some of the proposals in Clause 6, but across the piece there does not appear to be an argument that a general increase in discretionary maxima is necessary.

Lord Woolf: The sentencing judge could get the message that, if these become law, a general increase of sentences is required.

Max Hill: You are in a much position than I to express an opinion on that, but yes, certainly. I limit my comment to saying that I would have very robust criticism indeed if there were any suggestion of a mandatory minimum. Fortunately, that is not what we are faced with.

Lord Woolf: You already made that clear earlier. Thank you very much.

Q11 **Lord Trimble:** I want to turn to the retention of biometric data. The current position is that this data can be retained for up to two years, but the Bill before us is proposing to extend that two-year retention to up to five years. I wondered if you had some views on this.

Max Hill: There is a remit issue that I must start with here, which is that I am not the reviewer for the retention and use of biometric material. Professor Paul Wiles is, and I have his annual report, published in March of this year, in front of me. I do not know, but the thinking behind this extension may in some way be to alleviate the work of the biometrics commissioner, given the frequency with which these decisions have to be taken. If that is the thinking, I have a measure of concern about it.

To take another example, we know from the legislation in Europe and our own Court of Appeal in *Watson and Tele2 Sverige* that there has been judicial scrutiny and an element of criticism of the circumstances in which not necessarily biometric data but communications data is obtained and stored in the first place. That is why there is a call from the European court for greater certainty. The Investigatory Powers Act, which again is beyond my remit, now needs to be looked at with a view to clarifying the circumstances in which there is to be collection and retention. The serious crime proposal is one of them.

I would use the logic of that to say that biometric retention for five years is not offensive per se provided that relevant safeguards are in place. What might they be? First, a limit to the circumstances in which the chief police officer who is considering retention for a longer period can with justification say that it would lead to the prevention of serious crime. Secondly, a retention of independent scrutiny, which would be through Professor Wiles and not through me; the level of scrutiny is not quite

clear in the draft Bill at the moment. Thirdly, consideration of notification to the subject of the fact that his or her biometric data is going to be retained for a much longer period of time.

The current regime, since the Protection of Freedoms Act, allows for national security determinations. Professor Wiles superintends that, and in his annual report he makes it quite clear that he conducts robust scrutiny at chief officer level before approving a national security determination. I would draw attention to the parts of his report in which he indicates that there needs to be a specific purpose for retention. There need to be safeguards to ensure that this material is not simply going to be generally available but is being retained for an express purpose, which I would hazard a guess at, or a first proposal at the prevention of serious crime and not less than that. Without more, there are some questions that this proposal begs. It may be that they can be answered as the Bill goes through further scrutiny.

Lord Trimble: On the basis of what I have here, there is no indication of the elements that you mentioned about the purpose for which it is retained. The Government's position seems to be just that the people who handle this material, presumably police officers, feel that the review at a two-year part is putting too much of a burden on them.

Max Hill: Yes. That is why the European Court experience, as far as the Investigatory Powers Act is concerned, is very relevant, because one could expect that without further clarification there will be that level of scrutiny if this measure goes through. It is not for me to say that it is inappropriate, but I can go so far to say that safeguards and checks and balances are needed.

Q12 **Lord Trimble:** We turn, then, to the Prevent strategy and the provisions in this Bill, which enables local authorities, as well as the police, to refer an individual to a Channel panel if they believe that the person is vulnerable to being drawn into terrorism. At the moment, the police have a role in the Prevent programme, but do they have the experience and the expertise to determine when individuals should be moved into the Channel panel?

Corey Stoughton: Could I just add one more thing on biometrics before we move off that? As you know, Liberty has been leading the legal challenge against the Investigatory Powers Act, and in that litigation, which Max just referenced, there has been a ruling in the UK court that surveillance of even communications data, which is not the same as but is arguably even less intrusive than the retention of biometric data, must be only for serious crime purposes and must be approved by independent oversight.

It is deeply concerning and, although the Bill was a little unclear, the one thing the Bill clearly would do is withdraw independent oversight with the biometrics commissioner over these decisions. It is deeply concerning in that way. It is also deeply concerning in light of the ongoing failures to cure systemic violations of law in the retention of the police national database of custody images, which has been repeatedly failed to be cured. The idea that there will be an expansion of a biometric database, in the context of that legal ruling without those safeguards and in the context of the Government's inability under an existing court order to rein in on existing biometric databases, is concerning.

As for Prevent, there are concerns, as the Committee has noted. This Committee has called for an independent review of Prevent. This is an extension, a doubling down on the Prevent strategy amidst calls for an independent review and amidst serious concerns about the way that Prevent is being carried out across the country. In that context, the extension of the Prevent strategy is a step that should not be taken. If it is to be taken, it should at least be taken in conjunction with a fulfilment and satisfaction of the many calls that have been placed, including from this Committee, for an independent review of the strategy.

It is disappointing that, in response to the controversy over Prevent, the Government have ignored those calls and instead in this Bill seek to extend and reinforce the Prevent strategy without looking back at questions like what the interaction of Prevent is with other legal duties and the criminal law. How is personal information being dealt with in the Prevent programme? It would now, under this Bill, be extended. Referrals will be increased as they are done by local authorities and not just by police. What are the human rights implications, including the implications for free speech and expression and non-discrimination?

This is an opportunity to refocus on the calls for an independent review of Prevent, to ensure, if there is to be continuation and indeed an extension of the strategy, that it is done in an appropriate way that accounts for the considerations that I have just mentioned.

This is also an opportunity to ask the Government to fix another problem with Prevent, which relates to the transparency concerns about the programme, especially the Government's failure to track and publish data necessary to establish whether Prevent is disproportionately impacting those of certain ethnicities and certain faiths. The Government have published information about Prevent, but they have not published information about the ethnicity and religion of the people who are referred under the programme, and that is a gap in our ability to understand whether the success rate of this programme, which under the Government's own data is not especially high, is worth the impact that we know that it is having on communities and the stigma that we know is being felt in Muslim communities as a result of the programme.

Max Hill: My answer comes with another remit disclaimer, because I am not the reviewer for Prevent. Clause 18, which is headed "Persons

vulnerable to being drawn into terrorism”, makes a slight amendment, namely that local authorities, which as I understand it are already under an obligation to convene and to run Channel panels, will have the power, alongside the police, to refer individuals to those panels. It strikes me that local authorities have a role here.

To put this into context, one thinks of the Parsons Green attack and the Parsons Green attacker—circumstances in which a local authority, through fostering or through some other means, finds itself dealing with individuals on a safeguarding basis. We have one appalling example of such an individual who went on to commit, or to attempt to commit, a major atrocity. There is a relevance there to local authorities that the Government are seeking to recognise in this amendment.

That goes hand in hand with the operational improvement review that my predecessor carried out. I do not know whether to call him Sir David or Lord Anderson; I think he is both now. His recommendation was that there should be greater information-sharing but for designated and limited purposes of intelligence relating to individuals who were, to use the vernacular, on the radar of the security services. The first example of information-sharing would be sooner than is currently done for intelligence services to share with general policing, community policing, information that is currently held at a counterterrorism-only policing level. It strikes me that that is very sensible. Sharing with local authorities is the next example and the next tier down.

Working from the logic of the Parsons Green experience, provided there are safeguards, provided there are checks and balances, there may not be great offence in the notion that a local authority already involved in this area of dealing with and assisting those at risk of radicalisation through Channel panels should have the power to refer. The danger, which Corey’s answer goes to, is that there will be overcompliance and automatic referral that on scrutiny should not have been made at all. That sort of objection needs to be listened to and worked through. I am not sure that this is such an offensive provision per se.

Q13 Lord Trimble: In a recent report you said that you had heard various examples of how Prevent is having a chilling effect in various contexts. Could you comment further on that?

Max Hill: Since the Prevent reporting duty was placed on a statutory footing in 2015, those who represent the health and education sectors would say that doctors and teachers, out of an abundance of caution, are choosing to refer more often than they need to. It is not for me to say how accurate that is, but I know that is what is being reported. I am sure that the same could apply to local authority employees without further guidance, without further checks, on this otherwise, as it seems to me, perfectly straightforward recommendation.

Lord Trimble: There might be a case for a bit more transparency.

Max Hill: Certainly.

Corey Stoughton: That is the critical point. It is not the proposal in this Bill that is the burning concern. It is the system itself, the programme itself and the failure to address ongoing criticisms of it. It is the concern of expanding it in a way that on its face is not a radical departure or even in and of itself, in a fully functioning and completely defensible programme of this nature, objectionable. It is in the context of the ongoing failure to address the criticisms of the programme and how it is working and the risks that the expansion of it will magnify those problems. A very good way forward is to do what the Government propose but also alongside that attempt to address those longstanding problems.

Q14 **Baroness Prosser:** We are moving on to Clause 20, Schedule 3, which provides new powers to stop, question, search and detain individuals at ports and borders, et cetera, to determine whether or not they have been engaged in what is written as "hostile activity". That goes on to be defined as anything that threatens national security, threatens the economic well-being of the UK or is an act of serious crime. What does all that mean? What is the economic well-being of the UK? It is hugely broad, is it not?

Max Hill: Yes, it is a broad provision. In terms of the mechanics, it is quite obvious that Schedule 7 of the 2000 Act—the more familiar port-stop power—has been used as the model for what is now Schedule 3 in this Bill. Again, there is a remit issue, because although it will be the same officers—namely, counterterrorism and police officers—who would operate this new power, the review remit that comes to me under Schedule 7 comes to the Investigatory Powers Commissioner, Sir Adrian Fulford, under Schedule 3 of this Act. It is for him, not for me.

However, by parallel reasoning, the comments I make, for any assistance they give, are that this is a very broad power. As with Schedule 7 there is no threshold test and, as we see in Clause 20, the power can be exercised whether or not there are reasonable grounds to suspect that an individual is involved in "hostile activity". Where this comes from is the Salisbury incident.

Baroness Prosser: Yes. What do you think about that?

Max Hill: My thoughts are driven only by what I know from my own remit, which is that Section 1 of the Terrorism Act 2000—the overarching definition of terrorism that sits on top of all the legislation I review—in all likelihood does not apply to the border security problem that the Government are identifying in Part 2 of the Bill. Our current definition of

terrorism in essence comes down to non-state actors, individuals or groups who threaten the security of us all or of our Government. That is separate from the border security issue, which is about state actors, individuals or groups who threaten the security, perhaps of their own current or former citizens who happen to be resident here. I can understand, therefore, that Schedule 7 would not apply to deal with the problem that Part 2 identifies.

That is correct and logical, because the challenges in recent court decisions to Schedule 7 and its operation were there to be listened to. The Miranda case is the principal example where journalistic material was intercepted. An individual was held in transit. There was a question mark, on appeal, as to whether counterterrorism police were within their powers under Schedule 7 to affect that interception. The judgment went their way but there was much discussion by their Lordships. Here to stop somebody involved in hostile state activity under Schedule 7 would be outside the power. Either it does not happen at all or there needs to be a mechanism, and this is the mechanism that the Government have chosen. I defer to Sir Adrian as to what he thinks of it and how it is to be scrutinised by him, but I am sorry to see that, as in Schedule 7, there is no threshold test of reasonable grounds to suspect.

I am still waiting for the Government to answer the recommendation that I made in my annual report published in January this year, which was that for Schedule 7, the existing regime, there needs to be a threshold. My predecessor recommended reasonable grounds for suspicion. The Government said no to that. I have suggested that at least we get some positive travel if there were to be reasonable grounds to support the application of the powers according to the code of practice. Here we see a mere repetition of what there is under Schedule 7, so my recommendation for others—I stress that it has been placed outside my remit—is that, at least as a starting point, there needs to be a measurable threshold before this power is exercised.

My final comment, if it is of any interest, is that although Schedule 7 results in thousands of temporary detentions a year—although that has dropped from 60,000 seven or eight years ago down to about 16,000 now, it is still many thousands of people—here I suspect that this is a power that would be operating in a very few cases, maybe handfuls, maybe dozens. We are not talking about thousands of individuals. In a rights-based analysis, that makes no difference to the need for robust scrutiny and a threshold test that is capable of being reviewed.

Baroness Prosser: It makes you feel anxious that, if there is not some kind of parameter, it is a bit like the Wild West, really, is it not? Anything goes almost.

Max Hill: It is an interesting conundrum for counterterrorism police who have their Schedule 7 power and will now have their Part 2 power. They will need to be very clear which power they are operating. They will not be entitled to move from one to the other at will. These are separate

regimes even though the practical model has been laid out, as we can see, in a similar fashion.

Corey Stoughton: There are two flaws in this proposal. The first is that although the Government may have identified a legitimate gap that needs to be filled, this definition of "hostile activity" is not fit for purpose. It is important to consider how it could be applied. The definition is so broad that any business person who is engaged in anything that might involve a diversion of investment income away from the United Kingdom towards another country, crossing the border, is engaged in a "hostile act" under this statute. Anyone who is involved in negotiating a trade deal that might not be to the economic benefit of the country might fall into this category. In the City of London there are many, many people who are engaged in that kind of activity as a legitimate business enterprise.

The Government have not done a very good job of drafting to solve the problem that Max has identified of the terrorism power not reaching the ability to address the risk of state-sponsored activity. The direction needs to be moved more in the direction of grounding it in criminal activity. That is a power that is addressed to crimes that is in service of a hostile power rather than just something about the interest of countries, which draws too broadly.

The second thing, as Max said, is that there are serious problems with Schedule 7, and this now extends Schedule 7. Before Parliament can consider doing that there has to be an answer to the call for the need for a reasonable suspicion threshold for the exercise of these kind of border powers but also the addressing of other problems in the safeguards around Schedule 7 that are replicated in the statute this time, in Schedule 3 to the Act, including problems with the right to counsel.

In the Bill as it is drafted there is no meaningful ability to access counsel when you are detained under what would be the new Schedule 3 powers, just as currently under the codes of practice for Schedule 7, because there are very broad loopholes in an officer's discretion. They can deny you access to a solicitor if they feel that it will interfere in their ability to question you. That is a loophole that you can drive a truck through. There are provisions in the Bill that would allow a border officer to allow you access to a solicitor but only in sight and sound of the border officer, which is obviously not a meaningful access to counsel.

There are a range of other reforms to this power in addition to the critical one of the reasonable suspicion standard that should be implemented before this power is extended and should be attached to Schedule 7 with this Bill, because this is an opportunity to address those pressing human rights concerns with the existing border power.

Q15 **Baroness Hamwee:** Corey has partly answered the question I was going to ask, which was about the definition of serious crime, which is not as serious as I would have expected it to be. Bearing in mind the time and your remit, Max, are you really saying there should be

a specific exclusion or some cross-reference to Schedule 7 here to ensure that officers do not go backwards and forwards across that border?

Max Hill: They are separate regimes. We can see the drafting history, just as a matter of draftsmanship. They are separate legal regimes. They will need a separate code of practice; separate training will have to be given to counterterrorism police if they are encouraged to use the Schedule 3 powers. It is not necessary for there to be a direct interplay between the two, because they are separate regimes, but where we see the use of this sort of intrusive power, whether or not there are grounds for suspecting that a person is or has been engaged in "hostile activity", by parallel reasoning I am as concerned about that as I am about the lack of an objective standard under Schedule 7.

That is what is missing from the Bill, in answer to my recommendation under Schedule 7. It may be that it is possible to work out what the Government's answer is likely to be by the way in which they drafted Schedule 3, but they are separate regimes.

Corey Stoughton: I may disagree with that in one sense. Yes, they are separate regimes, assuming this regime comes into force, but you have to consider how this will play from the perspective of the border agent who is exercising this power, because that is where the human rights rubber hits the road.

One of the things that is concerning about this regime is the extent to which it will diverge from Schedule 7. It would be a mistake at the end of the day not to consider those two powers side by side, because requiring the same officer at a border to keep in mind, on a day-to-day basis, nuanced distinctions in the way two quite similar powers are exercised, and expect them to respect and remember quite nuanced differences in both statutory and regulatory provisions on the exercise of that power, is asking quite a lot of any person.

In thinking about how to draft this, that is a very powerful argument for why one cannot consider the creation of a new "hostile activity" power and consider the proper limits on that without also bringing Schedule 7 into that umbrella and ensuring that the balance struck between the exercise of power there and limitations necessary to respect human rights are as parallel as they can be. I am not sure that is a disagreement necessarily, but it is a point that may flow from that discussion.

Q16 **Chair:** Some of the questions that were further on have been addressed, particularly the point about access to lawyers and delaying it and having it in front of a port official. You have made some very forensic, trenchant and concerning critiques about this Bill. The Secretary of State has made the statement under the Human Rights Act that, "In my view the provisions of the Counter-Terrorism and Border Security Bill are compatible with the

convention rights". If you were him, Corey, would you have signed that statement?

Corey Stoughton: No. There are so many examples that we could draw on, but as a lawyer, and a human rights lawyer, the one that stands out the most is the one we referred to in relation to Clause 1, the 2016 Court of Appeal decision that interpreted Section 12 of the Terrorism Act and held quite clearly that the description that there should not be an offence that reaches the holding of opinions or beliefs supportive of a proscribed organisation was essential to the reconciliation of a prosecution under that Act with Article 10.

The Government, not necessarily in bad faith, clearly misinterpret that as an invitation to fill a statutory gap, instead of a clear interpretation of what is necessary to reconcile the Human Rights Act and the European Convention on Human Rights with this criminal statute. That is a concrete forensic, legalistic and, critically, very illustrative example of the mistakes, misinterpretations and overstepping that the Government have made in striking the wrong balance between increased measures to protect public safety and the need to balance that against human rights.

Chair: What about you, Max? Would you sign this off as being compatible with the convention rights? It sounds to me from what you have just said about it that the answer is no.

Max Hill: I am not going to make such a bold statement about incompatibility. I would answer it this way, Chair.

Dr Diane Webber of Georgetown University conducted comparative research between UK terrorism law and US terrorism law, and she drew the conclusion that UK arrests for terrorist activity appear to be taking place at earlier stages than in the US. That is an interesting finding that, if right, suggests that the way that we are legislating is closer to the line on rights compliance than possibly even in the United States.

My second answer is that in discussion with Professor Stuart Macdonald from Swansea University School of Law he pointed out that many of the international obligations that the UK has acted in compliance with in constructing new legislation do not require the UK to go as far as it has.

An example is that Article 5 of the Council of Europe Convention on the Prevention of Terrorism issued a requirement upon member states to criminalise "public provocation to commit a terrorist offence". The UK made good on that commitment by enacting Section 1 of the Terrorism Act 2006, the encouragement offence. That is robust legislation, as I said earlier in this session.

Some of the changes in the new Bill go above and beyond. To put that another way, they are taking criminality into private spaces where the benchmark has previously been public provocation to commit a terrorist offence. Whether that means that it is difficult to make the declaration that the Home Secretary did I am not going to say directly, but that is

why I have expressed the concerns that I have about the need for greater certainty, for robust safeguards, for review in every case—that need not be me but could be other reviewers—and for defining circumstances in which offences are not committed under the new Act, which is almost as important as circumstances in which offences are committed. That is at least a partial answer to your question.

Chair: Thank you very much. From the critique you have given us about the problems with this Bill, it sounds to me that it is not compatible with convention rights and therefore does not merit its certificate, but ultimately it is the job of the Secretary of State to make that declaration.

You have both been very helpful in your evidence, so thank you very much indeed for coming in at this opportune moment, because the Bill is going to be continuing its scrutiny in the House of Commons but will also receive a lot of scrutiny in the House of Lords. Your evidence will very much assist them in doing that. Thank you.