**COUNTER TERRORISM AND BORDER SECURITY BILL: SUBMISSION IN RELATION TO CLAUSE 3**

**BY MAX HILL QC AND PROFESSOR CLIVE WALKER**

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| **Terrorism Act 2000 section 58: Collection of information.**(1) A person commits an offence if—(a) 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, or(b) he possesses a document or record containing information of that kind.(2) In this section “record” includes a photographic or electronic record.(3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.(4) A person guilty of an offence under this section shall be liable—(a) on conviction on indictment, to imprisonment for a term not exceeding 10 years, to a fine or to both, or(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.  |
| **Bill Clause 3: Obtaining or viewing material over the internet**(1) Section 58 of the Terrorism Act 2000 (collection of information) is amended as follows.(2) In subsection (1)—(a) omit “or” at the end of paragraph (a);(b) after paragraph (b) insert “, or(c) on three or more different occasions the person views by means of the internet a document or record containing information of that kind.”(3) After subsection (1) insert—“(1A) The cases in which a person collects or makes a record for the purposes of subsection (1)(a) include those where—(a) the person does so by means of the internet (whether by downloading the record or otherwise), and(b) when doing so the person knows, or has reason to believe, that the record contains, or is likely to contain, information of the kind mentioned in subsection (1)(a).(1B) It does not matter for the purposes of subsection (1)(c) whether it is the same document or record that is viewed on each occasion or whether a different document or record is viewed.” |

1 This paper follows evidence given to the Bill Scrutiny Committee on 26th June 2018 by Max Hill QC, Independent Reviewer of Terrorism Legislation. Together with Professor Clive Walker QC (Hon), Senior Special Adviser to the Independent Reviewer, the premise of this paper is to ask the question, if a new variant of section 58 is needed at all, what might that look like ?[[1]](#footnote-1)

2 The fundamental question is whether any reforms are needed at all. In response, it has not been proven that significant criminal law extension is needed, as is engineered by clause 3. That need should be judged in the light of the high rate of success for prosecutions of a range of other offences which cover precursor activities – especially under the Terrorism Act 2006, sections 1, 2 and 5. The frequency and success of such prosecutions suggests strongly that most forms of precursor activities are being adequately addressed by the existing criminal law. It is also notable that the *Impact Assessment* in relation to the Bill was unable to identify with certainty any rate of prosecutions for the new offence.[[2]](#footnote-2) By contrast, more minor adjustments may be necessary to take account of technological development and so to ‘update for the digital age’.[[3]](#footnote-3) Doubts around the necessity for a new offence (or substantially new variant of the existing offence) arise because of reasons of principle and practicality, about which the Independent Reviewer gave evidence both to the Bill Scrutiny Committee on 26th June 2018, and at greater length to the Joint Committee for Human Rights on 20th June 2018.

(a) The principle of a fair and legitimate criminal code demands certainty and an emphasis on the prohibition of action or expression which is harmful to other persons, but also on the tolerance of distasteful or imprudent behaviour or even ‘extremism’, which has not yet been proposed as the subject of a criminal offence. Those boundaries have already been pushed by the successive creation of ‘precursor’ crimes.[[4]](#footnote-4) Admittedly, counter terrorism is not unique in generating such precursor crimes, and they are not all of recent origin. But counter terrorism has been markedly inventive in traversing the precursor boundaries, as exemplified by the all-purpose ‘preparation of terrorism’ offence under section 5 of the Terrorism Act 2006, which has now pushed both sections 57 and 58 of the Terrorism Act 2000 into the shade in terms of their usage. This point about principle is underlined by the fact that the Sentencing Council’s *Draft Guidelines on Terrorism Offences* actually described section 57 as a low volume offence.[[5]](#footnote-5) That statement should be noted in the light of the fact that the use of section 57 had been prolific until around 2008 (in other words, pre-section 5). Perhaps legislators and lawyers too easily forget that these offences are extraordinary. As things stand, the UK legislation goes further than most other jurisdictions in enacting these precursor offences, including the US material support offence and most Continental European jurisdictions (with the exception, perhaps, of France). Furthermore, neither section 58 nor clause 3 can be justified by reference to any requirement under international law, such as the Council of Europe Convention on the Prevention of Terrorism 2005 or the Additional Protocol of 2014.[[6]](#footnote-6) In conclusion, a principled boundary line as to the legitimate usage of criminal law is being crossed. As stated by the Independent Reviewer in his evidence, clause 3 wrongly assumes that ‘a predisposition to extreme thinking—has crossed the line into terrorist offending, which is violent extremism’.[[7]](#footnote-7) To justify clause 3, one must make the assumption that the activity is inherently risky and points towards an inevitable outcome. Thus, the inherent claim is that viewers will either be seduced or have their will overwhelmed by the inevitable power and persuasion of the terrorist messages. Yet, other outturns are statistically more likely by far. The government[[8]](#footnote-8) and researchers[[9]](#footnote-9) have repeatedly asserted that there is no clear production line from viewing extremism or even being ‘radicalised’ into becoming an active terrorist. In summary, the new mode of offending is based on the premise of the ‘one-way’ or ‘conveyor belt’ radicalisation-to-terrorism thesis which the government is normally at pains to reject.[[10]](#footnote-10)

(b) The process of criminalising the collection of information inevitably impinges on human rights in the shape of freedoms of thought and expression. The European Court of Human Rights has increasingly underlined that access to the Internet is an important aspect of the freedom to receive and impart information and ideas.[[11]](#footnote-11) To date, the section 58 offence has been upheld as ECHR-compliant by domestic courts and even the ECtHR.[[12]](#footnote-12) However, as the boundaries of the criminal law are expanded, so are the impingements on thought and expression and so are the arguments about legal (un)certainty. The French litigation which is described in Professor Walker’s submission to the JCHR equally raises objections on these human rights grounds. Though the decisions lack depth in their argumentation, the principle is clear that the further away the point of criminal law intervention becomes from any demonstrable desire or move to commit terrorist acts, the more likely it is to be condemned as disproportionate.

(c) The counter-argument that any chilling effect or disproportionality can be solved by reference to the defence of reasonable excuse under section 58(3) triggers a further objection in principle. This justification runs afoul of the fundamental principle that the main burden of proof should reside with the prosecution. The bulk of the work must be done by the prosecution rather than inevitably requiring the defendant to explain some kind of reasonable excuse based on rights of free thought or expression. Thus, a pattern of behaviour of viewing should only become worrisome and worthy of an explanation by way of defence if there are indications of action which follows the viewing.

(d) As for 'practicality', the question is whether there is sufficient certainty in the terms of clause 3 to make it viable as an offence to be prosecuted. For instance, questions have been raised about whether three viewings over a long period (more than, say, several months) would really fit the purpose of the offence, especially if the items viewed are each of a wholly distinct nature. More uncertainty arises over what is a ‘view’. Just because a page appears on a computer screen does not mean that it is viewed. It might be generated by automatic means as a form of spam and deleted as soon as it is discovered to have been accessed. In addition, what proportion of a page or document is it necessary to view? Some materials (such as an online magazine) may be terrorist related or unrelated or both at the same time. For example, an edition of *Inspire* might contain one article about how to make a bomb and another about arcane religious doctrine. What if the edition of *Inspire* is read selectively? The issue of uncertainty has also been raised in debates in relation to the meaning of the defence of reasonable excuse, which will come more to the fore as an issue once the ambit of the offending behaviour has been extended.

3 Without prejudice to the foregoing negative answer to the fundamental question as to whether any amendment is needed for section 58, we have considered whether – if changes are needed at all - minor changes could be made in ways which are not only compatible with principle, but also practical and worthwhile. There are three preliminary considerations to be canvassed here.

(a) The need for a 'digital fix' has been put forward as a call to official action on the basis that no ‘record’[[13]](#footnote-13) may have been created by internet activity. In reality, it is technically hard to use a computer to view any data on the internet without downloading some temporary file at some point. However, one might imagine either some forms of streaming or chat facilities or even access via a computer in an internet café where any download is not within the ownership, control or possession of the viewer, so that the only accessible download might be to the person’s memory.

(b) Another 'mischief' sought to be caught by the proposed legislation is the need to capture (and to base the clause 3 offence around) the idea of ‘a pattern of behaviour, rather than a deliberate but one off action (perhaps sparked by mere curiosity) or the unintended viewing of such material, for example by inadvertently clicking on the wrong internet link’.[[14]](#footnote-14) This notion of ‘pattern’ is inadequately captured in clause 3 because there is no sense of linkage of the individual viewings – there is repetition but not necessarily any pattern evident from the repetition, especially if the material is very varied and the period is elongated. The argument might be that a 'pattern of behaviour' becomes the correct focus of interest of the criminal law if it can with some certainty be taken to be an indicator of attachment to a way of thinking and to sympathy for putting words into deeds.

(c) The term, 'reasonable excuse', has been canvassed as in need of further definition before any criminal law extension can go ahead. However, this refinement is only required if the offence itself cannot be defined with sufficient precision. If it cannot, then the new variant offence should not proceed at all because of the principled objection to reversing the burden of proof. However, if the new variant of the section 58 offence can be defined with more precision, then it would be better to leave reasonable suspicion as a broad concept to be applied in factual circumstances by a jury. The defence will be more useful as a common sense brake on police and prosecutors rather than as a legal term of art which ordinary internet users will not understand.

4 Bearing these three points in mind, we suggest that clause 3 could be reformulated into a more acceptable statement of the criminal law by means of the following changes:

(a) It would be possible to state a narrower *actus reus* in that the accessed data contrary to the offence must directly encourage or facilitate the commission of terrorism acts by the viewer. This formulation is narrower than ‘information of a kind likely to be useful to a person committing or preparing an act of terrorism’ under section 58.

(b) Next, it would be possible to formulate a narrower *mens rea* by specifying proof of intent to commit terrorism activities by the viewer.

(c) The foregoing options could be applied severally or in combination to the existing wording in clause 3. The third option would be a total replacement of the existing clause 3. The following wording builds on the language in section 57 of the Terrorism Act 2000 and also borrows from the Protection from Harassment Act 1997, section 7:

'(1) A person commits an offence if he … (c) views information of that kind by way of a course of conduct on three or more occasions without any record being collected or made but in a way which gives rise to a reasonable suspicion that his viewing is for a purpose connected with the commission, preparation or instigation of an act of terrorism.'

The prosecutor would thus need to prove not just the repeated viewing but why and how the data has been internalised with a purpose in mind. Almost certainly, other evidence would be required for such proof - scribblings in notebooks, emails to others, and so on. It might be said that the Terrorism Act 2006, section 5 overlaps, but it has already been noted that the government is aware of the current overlap of section 5 with both sections 57 and 58.

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1. This paper should be read in conjunction with the analysis already given in Professor Walker’s written submission to the Joint Committee on Human Rights, [↑](#footnote-ref-1)
2. *Impact Assessment* (IA HO0308, London, 2018) para.43. [↑](#footnote-ref-2)
3. *Explanatory Memorandum*, para.1. [↑](#footnote-ref-3)
4. See Walker, C., 'The Impact of Contemporary Security Agendas against Terrorism on the Substantive Criminal Law' in Masferrer, A. (ed.), *Post 9/11 and the State of Permanent Legal Emergency* (Springer, Dordrecht, 2012). [↑](#footnote-ref-4)
5. (London, 2017) p.58. [↑](#footnote-ref-5)
6. ETS 196, 217. [↑](#footnote-ref-6)
7. Hansard (House of Commons) Public Bill Committee on the Counter-Terrorism and Border Security Bill, Second Sitting, Tuesday 26 June 2018, col.40. [↑](#footnote-ref-7)
8. Home Office, *Prevent Strategy* (Cm 8092, London, 2011) para.6.4. [↑](#footnote-ref-8)
9. Bouhana, N., and Wilkström, P-O., *Al Qa’ida Influenced Radicalisation* (Occasional Paper 97, Home Office, London, 2011); Munton, T., *et al*, *Understanding vulnerability and resilience in individuals to the influence of Al Qa’ida violent extremism* (Occasional Paper 98, Home Office, London, 2011). [↑](#footnote-ref-9)
10. *CONTEST: The United Kingdom’s Strategy for Countering Terrorism* (Cm.9608, London, 2018) para.103. [↑](#footnote-ref-10)
11. *Cengiz and Others v. Turkey*, App. nos. 48226/10 and 14027/11, 1 December 2015, paras.49 and 52. [↑](#footnote-ref-11)
12. *Jobe v United Kingdom*, App no 48278/09, 14 June 2011. [↑](#footnote-ref-12)
13. Hansard (House of Commons) Public Bill Committee on the Counter-Terrorism and Border Security Bill, Second Sitting, Tuesday 26 June 2018, col.41, Ben Wallace. [↑](#footnote-ref-13)
14. *Explanatory Memorandum*, para.37. [↑](#footnote-ref-14)