Thank you for your further letters of 10 and 16 July to the Home Secretary regarding the Anti-social Behaviour, Crime and Policing Bill. In your letters you ask a number of questions regarding the provisions in Parts 11 and 12 of the Bill. Our response to these questions is set out below.

Questions from letter dated 10 July

Q1: What mechanism will be used to assess whether the proposal to remove the automatic right of appeal reduces the number of unmeritorious appeals or merely reduces the number of appeals?

In his review of the UK’s extradition arrangements, Sir Scott Baker found that the success rate of appeals in extradition case was extremely low, less than 13 per cent in 2010, and therefore recommended that the unfettered right of appeal to the High Court be replaced with an appeal filter. We agree with that recommendation.

The appeal filter does not remove any person’s right to seek leave to appeal, but will ensure that appeals without merit are disposed of at the earliest opportunity. This is in line with the process in judicial reviews and criminal cases.

As is the case at the moment, the courts will continue to provide information on the number of appeals where leave has been granted and the subsequent number of appeals that were successful at the High Court; and this will be reviewed on a regular basis.
Q2: What measures are in place to ensure that the requested persons receive adequate legal advice when preparing an application for leave to appeal?
As at present, any person wanted for extradition has a right to legal representation at any time in the extradition process, including when preparing an application for leave to appeal.

Q3. How much public money does the Government estimate will be saved annually by making the change in eligibility for compensation for miscarriages of justice?
The Government does not expect the creation of a statutory definition of a miscarriage of justice to have a significant impact on the number of applicants who prove eligible for compensation. However, we believe that a clearer and more accessible definition will reduce the number of unsuccessful attempts to seek judicial review of the Secretary of State's decisions, and thus save legal costs to the tax payer of around £100,000 per annum.

Q4. Leaving aside the question of whether or not Article 6(2) ECHR applies to a determination of an application for compensation under s.133 Criminal Justice Act 1988, please explain the Government's reasons for its view that it is compatible with the presumption of innocence to require proof of innocence beyond reasonable doubt as a condition of such compensation.
The Committee has asked further questions about this issue in its letter of 16 July in light of the judgment of the European Court of Human Rights in the case of Allen v the UK (application number 25424/09), handed down on 12 July 2013. We are considering the implications of that judgment on the issues raised by the Committee. We will provide the Committee with a more substantive response to this question, and to the questions in your letter of 16th July, once this consideration is complete. We anticipate this will be before Report stage of the Bill in the autumn.

Q5. What can the Government point to in the text of the Covenant, the travaux preparatoire, or the case-law or General Comments of the Human Rights Committee that support its view that the proper meaning of Article 14(6) ICCPR is that a person whose conviction has been quashed is only entitled to compensation if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent of the offence?
As the Supreme Court considered in Adams, it is difficult to glean from the travaux preparatoire to the ICCPR what its framers intended "m miscarriage of justice" to mean for the purposes of Article 14(6). Lord Phillips, for example, considered that the travaux are "inconclusive" so far as the precise meaning of "miscarriage of justice" is concerned (see paragraph 19 of the judgment).

The text of the Covenant supports the Government's view, in stating that compensation should be paid where a new fact shows "conclusively" that there has been a miscarriage of justice. There is nothing that we have found in the case-law or General Comments of the United Nations Human Rights
Committee (comments 13 and 32) which suggests that what is proposed is incompatible with the ICCPR. Nor is there international consensus on what the ICCPR requires in this regard. The UK, having a dualist legal tradition, gives effect to its international obligations through incorporating legislation. The courts have recognised the term “miscarriage of justice” is an ambiguous term open to differing views about the right interpretation. A treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. In the Government’s view this is what the proposed test achieves.

Q6. What is the Government’s justification for retrospectively depriving claimants for compensation for miscarriages of justice of the benefit of the court judgments in Adams and Ali in clause 132(2)(b) of the Bill?
There is a degree of retrospective effect but the test will apply in exactly the same way as a change in approach resulting from a fresh decision of the courts. In such cases a new approach would apply to undecided cases just as it would to new applications. We also consider it right and appropriate that where cases have not been finally determined compensation should be paid in accordance with the UK’s interpretation of its international obligations.

Q7. Have the applications for compensation in the Adams and Ali cases themselves been finally determined?
The applications for compensation in the Adams case have been finally determined by the Secretary of State.

The application of Ian Lawless (the only applicant in Ali who won his case in the Divisional Court) has not been finally determined since it is to be remitted to the Secretary of State for reconsideration following the Divisional Court’s decision in Ali. The applications for compensation for three of the unsuccessful applicants in Ali have been given permission to appeal the decisions of the Divisional Court. Their applications have been determined by the Secretary of State but if his decisions in those cases are quashed on appeal then their cases will be treated as not having finally been determined by the Secretary of State. In the event that they fail to be reconsidered once the legislation has come into force the provisions of clause 143(2)(b) (as it now is following the reprinting of the Bill post Committee stage) will apply to them.

Q8. How many applications for compensation under s.133 Criminal Justice Act 1988 are currently pending? How many such pending applications does the Government estimate would succeed on the Adams test but not on the proposed new statutory test?
At the moment, twelve applications are under consideration. Since the eligibility of pending applications has, necessarily, not yet been fully considered, it would be impossible to say how many would succeed under different tests, but we do not expect the creation of a statutory definition to make a significant change to the numbers of applications which ultimately prove eligible for compensation.
Q9. How much public money does the Government estimate will be saved by making the change in eligibility for compensation for miscarriages of justice apply to any application which has not been finally determined on the date the change comes into force?
As explained in the answers to question 3 and 8 above, the Government does not expect any significant savings to result from the application of the transitional provision.

Questions from letter dated 16 July

Q: In light of the judgment of the Grand Chamber of the European Court of Human Rights in Allen v UK, I would be grateful if you could provide supplementary memorandum setting out the Government's assessment of the compatibility of clause 132 of the Bill with the presumption of innocence in Article 6 (2) ECHR.
Please see response to question 4 above.

Q: What evidence does the Government rely on in support of its argument that there is a pressing social need to widen the circumstances in which DNA samples may be retained and removing the judicial oversight currently provided for by section 63R of PACE?
Section 63R of PACE currently requires the destruction within six months not only of 'DNA samples' but also of 'any other sample to which this section applies'. Samples' include both:

- 'Intimate samples' (which means: (a) a sample of blood, semen or any other tissue fluid, urine or pubic hair; (b) a dental impression; (c) a swab taken from any part of a person's genitals (including pubic hair) or from a person's body orifice other than the mouth); and
- 'Non-intimate samples' (which means: (a) a sample of hair other than pubic hair; (b) a sample taken from a nail or from under a nail; (c) a swab taken from any part of a person's body other than a part from which a swab taken would be an intimate sample; (d) saliva; (e) a skin impression).

Section 63R currently requires all these sample types, if taken under Part 5 of PACE or if taken consensually by the police in connection with the investigation of an offence, to be destroyed within six months. This requirement applies even if they are or may be needed as evidence in court, unless a court order is obtained extending the six month period.

The evidence the Government relies on in relation to destruction of DNA and non-DNA samples consists of representations from the police and the Crown Prosecution Service (CPS) that the destruction of samples within six months will prevent relevant evidence being available in court proceedings. It is difficult to meet defence (or prosecution) arguments about samples if they are made after the sample has been destroyed. For example, a defendant might argue that his state of mind had been affected because he had taken a prescription drug. With no sample taken at the time of the offence remaining, it would be difficult to rebut this argument.
It may also not be possible to identify and process relevant samples within a six month window. Police forces may take a number of samples during an investigation but not process all of them until CPS advice has been received about which are most relevant to the presentation of a case in court. Force advice is that CPS takes about 16 weeks to deal with a case file, and in the case of processing to determine drug and alcohol levels, it may take months to obtain a result from the laboratories. Forces cannot send all samples which might be relevant to laboratories in advance of CPS advice as this would be financially prohibitive.

While there is a provision for a court order to be obtained extending the six month period, this has two disadvantages. First, it depends on any issue which might require use of the sample in evidence being raised in time for a court order to be obtained before six months from the date on which the sample was taken. It is common for issues to be raised after this period. Second, several thousand cases per year involve use of samples, often a number in each case. For example, in 2012/13 there were 1,227 referrals to Metropolitan Police Sexual Assault Referral Centres, almost all of which involve taking samples. It would be excessively costly and bureaucratic for both the police and courts if a court order had to be obtained every time a sample might be needed in evidence more than six months after it was taken.

In addition, as section 63R currently applies, whether the person consents to the supply of the sample is irrelevant – it must still be destroyed. By virtue of section 63U(6), though, samples taken from one person to get material from another person can be retained. The result of this is that samples taken from victims (e.g. of rape or other sexual assault) which relate to the victim themselves must be destroyed whereas samples taken from the victim which relate to the offender do not. The Department of Health has pointed out that this could threaten the work of sexual assault referral centres, in particular where a victim initially does not wish to involve the police but later changes their mind.

Q: What is the justification for retention of DNA samples in all cases raising CPIA concerns when in some cases there may be scope for obtaining a further sample in the future?

The general principle is that the retention of DNA and fingerprint data on the national databases continues to be governed by PACE, while evidence for use in court is governed by the CPIA.

Section 63(3A) of PACE, as inserted by the Crime and Security Act 2010, provides that if a defendant disputes that a DNA profile derives from a sample taken from him or her, another sample may be taken. However there are many cases where this is of no value. For example, in the case of a sample taken to determine drug or alcohol levels, there is no power to resample, nor would this be of any use as a sample taken later would not replicate drug or alcohol levels which existed at the relevant time. In the case of DNA, reanalysis may be required when profiles are derived from material which
mixes several persons' DNA, rather than where a profile is derived from a sample from a single individual who then disputes the derivation of the profile.

Q: Will the government consider strengthening the safeguards in the CPIA Code of practice, as recommended by the Information Commissioner?
The Government's amendment dealing with samples contains two safeguards. First, that a sample which is retained because of the application of the CPIA must not be used other than for any proceedings for the offence in connection with which the sample was taken. Second, if a sample is protected from destruction by CPIA, but CPIA then ceases to apply, the sample must be destroyed. The Government is willing to discuss any concerns with the ICO and to consider adding further safeguards to the CPIA Code of Practice.

Q: Did the government consult the Information Commissioner's Office about new clause 10 and the retention of DNA samples?
Yes. The ICO are permanently represented on the National DNA Database Strategy Board precisely so that they can be involved in discussion about the retention of DNA samples and profiles. The ICO representative was involved in detailed discussion of the proposed change in sample retention at the meetings of the Board on 12 March and 5 June 2013.

Q: Please explain the Government's policy in relation to consulting the Information Commissioner's Office about proposed legislation within the ICO's remit.
The Government's policy is to consult the ICO about proposed legislation within the ICO's remit.

Rt Hon Damian Green MP