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Joint Committee on Human Rights  
Committee Office  
House of Commons  
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11 NOV 2013

Dear Hywel,

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL: FOURTH REPORT OF SESSION 2013-14

I am grateful to the Joint Committee on Human Rights for their thorough scrutiny of the Anti-social Behaviour, Crime and Policing Bill. My Ministerial colleagues (both in the Home Office and the Department for Communities and Local Government, Department for Environment, Food and Rural Affairs, Department for Transport and Ministry of Justice) and I have considered the Committee’s conclusions and recommendations carefully and I am pleased that the House of Commons had an opportunity to consider a number of the Joint Committee’s suggested amendments at Report stage in October. I have no doubt that the House of Lords will also wish to consider the Committee’s proposed amendments when the Bill is considered in Committee starting 12 November. In advance of that, I am writing in response to the Joint Committee’s report so that the House of Lords can consider our response alongside the Joint Committee’s conclusions and recommendations.

Conclusion and Recommendation 1: In our Report on the Children and Families Bill in June this year, we said that we looked to the Government to reassure Parliament that it will continue to conduct its own assessment of the impact of laws and policies on children’s rights. Our experience of scrutinising the current Bill, which has very significant implications for children’s rights, does not encourage us to believe that the mechanisms for ensuring that such a systematic analysis is carried out are yet embedded across Whitehall. We repeat our call for the Government to reassure Parliament that in future it will conduct a thorough assessment of the impact of legislation on the rights of children under the UN Convention on the Rights
of the Child before any legislation is introduced. We propose to raise with the
Children’s Commissioner the question of what can be done, in practical terms,
to accelerate the Government’s progress towards implementing its
undertaking to Parliament of nearly three years ago. (Paragraph 8)

As Jeremy Browne and Damian Green indicated in their letter of 16 July to the Joint
Committee, our ECHR memorandum did contain an analysis of any rights under the
UNCRC engaged by Parts 1 to 4 of the Bill. That letter also provided further analysis
in respect of the provisions in Parts 5 and 10 (Part 9 as was). I acknowledge that it
would have been more helpful to the Joint Committee if such analysis had been
included in the Government’s ECHR memorandum as published on introduction of
the Bill and we will bear that in mind for the future.

Conclusion and Recommendation 2: We are pursuing with the Leader of the
House of Commons our concerns about the recurring inadequacy of the time
available to scrutinise the human rights compatibility of significant
Government amendments to Bills. (Paragraph 9)

It is the case that the Government has tabled a number of amendments to the Bill
introducing new provisions which have ECHR implications. Our Committee stage
amendments, in particular those in respect of the retention of DNA and fingerprints,
and extradition, were tabled on 27 June and 11 July respectively, that is three
months before the Joint Committee reported. I accept that the Government also
tabled substantial new amendments for Commons Report stage on 8 October to
reform the civil order regime under the Sexual Offences Act 2003, but you will
understand that these amendments were in response to a new clause tabled by
Nichola Blackwood on 10 September. Clearly these amendments came too late for
the Joint Committee to consider in their recent report, but I hope it will be possible for
the Committee to scrutinise what is now Part 9 of the Bill and report further whilst the
Bill is being considered by the House of Lords.

Whilst the Government endeavours to ensure that the Joint Committee has as much
time as possible to scrutinise significant Government amendments, it is necessarily
the case that new issues emerge during the passage of the Bill which may require
the tabling of amendments throughout the passage of the Bill, some of which may
raise new human rights issues. As with this Bill, we will publish supplementary ECHR
memorandum where appropriate. It is, of course, for the relevant House to decide
whether to agree such amendments.

Conclusion and Recommendation 3: We regret to report that these two
significant pieces of further information were only sent to us on 7 October,
less than 48 hours before the meeting at which we considered this Report. We
have done our best to take account of the further information in this Report,
but this is not sufficient time to enable us to do our job of scrutinising
legislation for human rights compatibility, and we call on the Government,
once again, to ensure in future that we are provided with the information we
request in time to inform our scrutiny of Government Bills. (Paragraph 10)
I regret that the Joint Committee did not have sufficient time to take account of the further information we provided to the Committee on 7 October. I hope the Committee will understand, however, that it necessarily took some time to consider fully the implications of the European Court of Human Rights’ decision in the case of Allen v. UK, delivered on 12 July 2013, and that it was similarly necessary to give due care and attention to the preparation of the working draft of a revised code of practice under Schedule 7 to the Terrorism Act 2000. This will remain a live document ahead of public consultation and Parliamentary scrutiny following the passage of the Bill.

Anti-social Behaviour (Parts 1-6)

Conclusion and Recommendation 4: Preventive measures against anti-social behaviour are in principle a welcome fulfilment of the positive obligation on the state to protect people against having their rights interfered with by others. This is the important context in which we consider the human rights implications of the anti-social behaviour provisions of the Bill. (Paragraph 11)

We note and welcome the Committee’s comments.

Conclusion and Recommendation 5: the Government has not set out how it will ensure that the best interests of the child are a primary consideration when imposing IPNAs against children. In our view, an express guarantee in the Bill is necessary to ensure that relevant agencies and the courts apply this principle. (Paragraph 17)

Conclusion and Recommendation 6: The use of detention as a sanction for breach of an injunction for children aged 14 and over, including the risk that the Bill might lead to children being imprisoned in respect of conduct falling far short of criminal behaviour, is not in accordance with the UNCRC requirement under Article 37 that children should be imprisoned only for the most serious offences. (Paragraph 18)

Conclusion and Recommendation 8: In order to reduce the potential negative impact of these provisions on children, and in accordance with the UK’s obligation under Article 3 UNCRC, we recommend that the Bill is amended to include an express requirement that the courts must take into account the best interests of the child as a primary consideration when deciding whether to impose the following: any injunction; the terms of any prohibition or requirement; sanctions for breach; and when determining reporting of a child’s case. (Paragraph 20)

In shaping these reforms, the Government naturally considered the needs and rights of young people so that we get the right balance between enforcement and helping those who commit anti-social behaviour to turn their lives around. We have included provisions in the Bill that require a person applying for an injunction to consult the local youth offending team to give young people who behave anti-socially the best chance of addressing the underlying causes of their anti-social behaviour in the long
term – which benefits both the perpetrator and the victims. The person applying must also inform any other body or individual the applicant thinks appropriate.

The Government believes that the ability of the courts to detain someone aged 14 and over is compatible with the UNCRC requirement under Article 37. The Anti-social Behaviour, Crime and Policing Bill makes it clear that where a young person breaches the terms of their injunction, the court may only detain them as a very last resort, that is, unless it is satisfied that, in view of the severity or extent of the breach, no other power available to the court is appropriate. The Bill also requires the court to state in open in court why it has decided to make a detention order against a young person.

The best interests of a child are a primary consideration in the courts decision making process. By virtue of section 44 of the Children and Young Persons Act 1933, every court must have regard to the welfare of any child or young person brought before it. Moreover, it is unlawful for public authorities, which includes the courts, to act in a manner incompatible with a child or young person’s Convention rights. By virtue of these obligations, the Government believes that the detention of a young person is not something a court will consider lightly, and would reflect the seriousness of the circumstances. While the rights of the child will be a primary concern for the court when deciding that an injunction is the appropriate response, and especially when it results in the detention of a young person, this should be done alongside a consideration of the impact that the young person’s behaviour is having on the lives of victims. The Government therefore believes that detention must be an option available to the court if the injunction under Part 1 in the Bill is to act as an effective deterrent and, ultimately, protect victims and communities from anti-social behaviour.

Conclusion and Recommendation 7: We are concerned about the potential impact of reporting on children’s privacy rights. (Paragraph 19)

Conclusion and Recommendation 19: We are concerned about the potential impact of reporting on children’s privacy rights. We therefore recommend that the Bill contains a requirement that the courts must take into account the best interests of the child as a primary consideration when determining reporting of a child’s case. (Paragraph 58)

The Government accepts that there is a balance to be struck. Making the public aware of the perpetrator and the terms of the order can be an important part of the process in tackling anti-social behaviour. The Government believes it can provide reassurance to communities that action will be taken when they report anti-social behaviour and can provide the information local people need to identify and report breaches. An order can be publicised unless the court has made a decision under section 39 of the Children and Young Person’s Act 1933 to prohibit publication of the order against the young person. The courts have considered the court’s power to lift reporting conditions a number of times\(^1\) and have set out the relevant principles to

\(^1\) R (A) v St Albans Crown Court ex parte T [2002] EWHC 1129 and in R (on the application of Y) v Aylesbury Crown Court, CPS, Newsquest Media Group Limited [2012] EWHC 1140 (Admin); Venables and Thompson and News Group Papers Ltd and Associated Newspapers Ltd and MGM Ltd. [2001] EWHC QB 32
consider. These include a consideration of the child’s welfare, the impact upon rehabilitation and the interests of the wider community. Such case law provides a human rights and UNCRC compatible framework for decision making by the courts.

On 7 October, the Government published draft guidance for front line professionals in respect of the anti-social behaviour powers in Parts 1 to 6 of the Bill. In that draft guidance the Government has made it clear that when deciding whether to publicise an order, public authorities (including the courts) must consider that it is necessary and proportionate to interfere with the young person’s right to privacy, and whether it is likely to affect a young person’s behaviour, with each case decided on its own facts.

Conclusion and Recommendation 9: While we acknowledge the practical issues raised by the Government in relation to evidence gathering, we are not satisfied with the Government’s response concerning its justification for the use of the ASBI definition of anti-social behaviour in the context of IPNAs. We consider that “conduct capable of causing nuisance or annoyance to any person” is not sufficiently precise to satisfy the requirement of legal certainty required by both human rights law and the common law. We recommend that the Bill be amended to make the test for anti-social behaviour more precise. (Paragraph 26)

The wording for the test is taken from the current anti-social behaviour injunction (Housing Act 1996), which has been used successfully in its current form by social landlords to tackle anti-social behaviour since June 2004. The ‘nuisance and annoyance’ test is also a feature of other long-standing housing legislation in respect of the recovery of the possession of secure and assured tenancies (see Schedule 2 to the Housing Acts 1985 and 1988). This wording means that the conduct need not have caused any nuisance or annoyance to a specific individual, but that it is capable of having that effect. The importance of this drafting is that it sets an objective threshold for ‘nuisance and annoyance’. In other words, it is not necessary to prove whether or not the conduct actually did cause nuisance or annoyance, instead, a judge can objectively consider whether the threshold has been satisfied, rather than relying on a variable standard based, subjectively, on how much a victim can take before they are annoyed or feel they have been subjected to nuisance.

This means the injunction can be used preventatively to stop anti-social behaviour before a victim is ‘created’. Importantly though, the conduct has to be occurring or have occurred. The Government believes that the test should remain unchanged, given that it has worked well for over a decade in allowing social landlords to tackle anti-social behaviour quickly and effectively. Organisations that represent social landlords, the Social Landlords Crime and Nuisance Group and the Chartered Institute of Housing have made it clear to us that the test not only allows them to use injunctions to stop problems quickly, but also to intervene early. Ultimately, the court will decide if the test has been met and there is a good body of case law to guide frontline professionals and the courts, ensuring the power is used proportionately.

Conclusion and Recommendation 10: Bearing in mind the breadth of the Bill’s definition of “anti-social behaviour”, we consider that the broad and open-ended definition of the prohibitions and positive requirements that may be
included in an injunction in clause 1(4) of the Bill does not satisfy the requirement of legal certainty. In order to satisfy that requirement, it is not sufficient simply to state that any requirements in an injunction will be contained in an order of the court authorised by statute. The quality of the law which authorises the making of such orders must satisfy minimum standards of foreseeability. (Paragraph 32)

Conclusion and Recommendation 11: We recommend that the Bill be amended to achieve greater legal certainty on the face of the Bill, by stating that any prohibition or requirement must identify specified actions which are related to the anti-social behaviour that the respondent has engaged or threatened to engage in (Paragraph 33).

Conclusion and Recommendation 17: We consider that the broad and open-ended definition of the prohibitions and positive requirements that may be included in a CBO in clause 21(5) of the Bill does not satisfy the requirement of legal certainty, for the reasons we have given above. We recommend that the Bill be amended to achieve greater legal certainty on the face of the Bill. (Paragraph 56)

The Government believes that the provisions in the Bill do allow for legal certainty and that the proposed changes are not required. Although the Bill prohibits the respondent from doing anything described in the injunction and requires the respondent to do anything described in the injunction, those prohibitions or requirements must specifically relate to the anti-social behaviour as specified under clause 1(2) under Part 1 of the Bill and clause 21(3) and (4) under Part 2 of the Bill. As part of its considerations, the courts will ensure that any prohibitions or requirements clearly specify what an individual must stop doing and/or what an individual is required to do.

Conclusion and Recommendation 12: A test of "just and convenient" for the imposition of measures which interfere with Convention rights is not compatible with the ECHR, because it is a considerably lower test than the requisite test of "necessary and proportionate". We do not consider that the Government's reliance on section 6 of the Human Rights Act is a satisfactory response, as Parliament has the opportunity to define the test appropriately on the face of the legislation. (Paragraph 37)

The "just and convenient" test is well known in the civil courts in the contexts of injunctions. In addition to the housing legislation referred to above, it is also found in a number of other statutes, such as section 37 of the Supreme Court Act 1981, section 40 of the Policing and Crime Act 2009 and section 19(4) of the Pensions Act 2004. The Government is therefore satisfied that this part of the test for the injunction is not arbitrary, but rather satisfies the common law principle of legal certainty and human rights law. Furthermore, in considering an application for an injunction, the court will have regard to the principles of proportionality and fairness in deciding whether it is just and convenient to grant the injunction.
Conclusion and Recommendation 13: In our view, Parliament should ensure that legislative provisions are compatible with Convention rights, rather than rely on the courts to render laws compatible by interpretation. We are not persuaded as to why it is necessary to single out religious belief in clause 1(5), particularly as the freedom to hold religious beliefs is an absolute right. We recommend that this provision is deleted. (Paragraph 40)

Conclusion and Recommendation 16: We acknowledge the practical points that the Government makes in its response to us, particularly its concerns regarding the difficulty in obtaining evidence. However, any interferences with the rights protected by Articles 8, 9 (in relation to the manifestation of religion or belief), 10 and 11 of the Convention must be “necessary”, which means there must be a pressing social need for the interference. We therefore recommend an amendment to this clause to require that the CBO will prevent the offender from engaging in anti-social behaviour. (Paragraph 55)

Conclusion and Recommendation 18: We recommend the same amendment to clause 21(9) as we recommended in relation to clause 1(5) above, for the same reasons. (Paragraph 57)

The Government accepts that the right to hold religious beliefs is absolute but manifestation of an individual's religion or beliefs is not – it is a qualified right. It is the latter consideration which the provisions in the Bill is concerned with. It allows the court to avoid, as far as practicable, including prohibitions or requirements in an injunction or an order that conflicts with the respondent’s religious beliefs. The courts must interpret the provision compatibly with Article 9 of the European Convention of Human Rights, which covers freedom of thought, conscience and religion.

Conclusion and Recommendation 14: We welcome the Government’s amendment to clause 12 to apply the exclusion powers without regard to tenure. We also note the Government’s statement in relation to the amendment that it expects this power to be “rarely used”. (Paragraph 44)

We note and welcome the Committee's comments.

Conclusion and Recommendation 15: We believe that the Government should make the appropriate standard of proof clear on the face of the Bill, rather than leave the courts to make their own judgment on the applicable standard of proof, particularly as the standard of proof is specified in relation to IPNAs. We recommend that clause 21(3) be amended to specify the criminal standard of proof (Paragraph 52).

The Government expects that the courts will follow the reasoning in Clingham (formerly C (a minor) v Royal Borough of Kensington & Chelsea and R v Manchester Crown Court ex parte McCann [200] UKHL 39; 1 AC 787) and apply the criminal standard of proof, that is, beyond reasonable doubt, to the first condition of the test for the Criminal Behaviour Order. For that reason, we do not consider that it is necessary to specify the standard of proof for the order on the face of the Bill.
Conclusion and Recommendation 20: We welcome the Government's amendment to clause 32(2) of the Bill to make clear that the authorising officer's belief must be "reasonable" in order to use the dispersal powers provided in Part 3 of the Bill. In our view, this is essential to ensure that any use of the powers is properly circumscribed. (Paragraph 62)

We note and welcome the Committee's comments.

Conclusion and Recommendation 21: We accept the legitimate aim of these measures. However, as these measures interfere with individuals' privacy rights and freedom to assemble, it is essential that the dispersal powers are only exercised when necessary and proportionate. We also accept the Government's point that these are intended to be preventive powers and therefore the condition for authorisation must be defined in terms of future events. We recommend, therefore, that: (Paragraph 65)

- there is clear guidance for the police on the use of this dispersal power; and that

- there is a review of the use of this dispersal power after 2 years of its operation, and periodically thereafter.

Conclusion and Recommendation 22: We welcome the protections given in this Bill to lawful picketing and processions under the Trade Union and Labour Relations (Consolidation) Act 1992 and the Public Order Act 1986. In our view, however, the protections offered in this Bill remain too narrow. It is important that there is a clear connection between the use of the dispersal powers with the legitimate aims pursued of addressing anti-social behaviour. The powers must not be used in a way that targets peaceful assemblies. We recommend that clause 34(4) of the Bill is amended to make this clear. (Paragraph 70)

It is not the Government's intention for the dispersal power to be used to disperse those who are peacefully protesting or assembling. Moreover, the dispersal power cannot be used to disperse someone engaged in peaceful protest or assembly, as mere presence in an area is not itself a ground for dispersal. The dispersal may only be used where an individual's or group's behaviour is causing, or is likely to cause, harassment, alarm or distress, or crime or disorder in the locality. This allows the power to be exercised compatibly with the rights to freedom of expression and association enshrined in Articles 10 and 11 of the Convention.

In October we published draft guidance on the new powers. The guidance makes it clear that the power is intended to be used to provide short-term respite from anti-social behaviour and that in areas where there are regular problems the police should work with the council to find sustainable long-term solutions. It states that the senior officer's decision to authorise use of the power must be made on objective grounds, such as local knowledge of an area and intelligence that there are likely to be problems at a specific time. When authorising the use of the power the locality should be defined as a specific geographic location with a defined boundary and should not cover an area larger than necessary. The guidance also makes it clear
that the dispersal power may only be used based on someone's behaviour, and not merely their presence in an area. Additionally, guidance is provided on how to deal with groups hanging around, making it clear that this behaviour is not in itself anti-social. We acknowledge that young people in particular often gather in public places to socialise and do not intend to intimidate or harass others.

In accordance with the Government's general approach, the provisions of the Bill will be subject to post-legislative review three to five years after Royal Assent. That process will provide an opportunity to review the use of the dispersal power.

Conclusion and Recommendation 23: We are not persuaded by the Government's justification for this discretionary ground of possession for riot-related anti-social behaviour. In our view, it is unnecessary and disproportionate. We are concerned about its potential serious implications for family members, and consider that it may disproportionately affect women and children. We also consider that it amounts to a punishment rather than a genuine means of preventing harm to others. We recognise the seriousness of riot related offences. However, we believe that the custodial sentences imposed by the courts in relation to these offences act as a sufficient deterrent. We recommend that this provision is removed from the Bill. (Paragraph 76)

As the Government made clear in its initial response to the Joint Committee, we believe that it is right that landlords should have the power to seek to evict a tenant where they or a member of their household chooses to inflict damage through rioting, not only in their own neighbourhood, but also in other people's communities. The intention is that the proposal will send a strong signal and have a deterrent effect on potential rioters who are tenants or members of their household.

It is important to note, however, that responses from landlords consulted on this proposal suggested that, whilst the messaging was important, seeking to evict a tenant where they or a member of their household has been convicted of an offence that does not affect the neighbours or the local community is only likely to happen very exceptionally.

In addition, it is clear, when clause 91 of the Bill is read with the Housing Act 1985 and the Housing Act 1988, that the new ground is "discretionary". This means that the court will not be able to make a possession order unless it considers it reasonable to do so. It is the Government's view that this should prevent the new ground from giving rise to unnecessary interferences with rights.

Reasonableness has been held to require the judge to take into account all relevant circumstances as they exist at the date of the hearing in a broad commonsense way. The court may be less likely to conclude that it was reasonable to evict where

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2 See s. 84(2)(a) of the Housing Act 1985 and s. 7(4) of the Housing Act 1988.
3 Cumming v Danson (1942) All ER 653.
the crime was not committed in the locality of the property (a condition for seeking possession on other anti-social behaviour grounds).

We would also expect the court, to consider the rights of other family members, including any children, when considering "reasonableness". Where the anti-social behaviour has been caused not by the tenant but by another resident, the court is likely to need to be fully appraised of the extent to which the tenant has sought to modify or control that behaviour.4

Therefore, whilst we would expect clause 91 to result in only a very marginal increase in evictions over time (and of course it does not apply retrospectively), we consider that it sends out an important message about the seriousness of rioting and the possible housing, as well as criminal justice, implications of taking part in a riot.

However, in light of the concerns raised by the Joint Committee, the Government will want to reflect carefully on the views expressed during the Committee stage in the House of Lords.

**Forced Marriage**

**Conclusion and Recommendation 24:** We welcome the criminalisation of a breach of a forced marriage protection order as a positive measure in improving the effectiveness of the current civil mechanism. (Paragraph 79)

We note and welcome the Committee’s comments.

**Conclusion and Recommendation 25:** We cautiously accept the Government’s reasoning for the criminalisation of forced marriage. However, given the concerns expressed about criminalisation during the Government consultation process, it is clear that careful implementation and monitoring of the new law will be required. It is essential that criminalisation is accompanied by additional measures to ensure that the law is effectively implemented. There has not been a successful prosecution of female genital mutilation since it was criminalised 28 years ago, and it appears that the practice remains widespread, which demonstrates that criminalisation alone is not sufficient. We therefore recommend that: (Paragraph 89)

- the Crown Prosecution Service develops a strategy on prosecutions of forced marriage. In developing such a strategy, there should be consultation with relevant stakeholders; and

The principles and the overarching strategic framework regarding the cross-government long-term commitment to Violence Against Women and Girls (VAWG), which includes forced marriage, are set out in *Call to End Violence Against Women*.

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and Girls; a Home Office publication. The VAWG Inter-Ministerial Group, of which the Solicitor-General is a member, agreed to this strategy to tackle violence against women and girls through a high level strategic narrative and action plan. Prevention is at the heart of the strategy and the action plan reflects this theme, with an emphasis on awareness raising, early identification and early intervention.

The Crown Prosecution Service has selected specialist forced marriage prosecutors who have been trained in measures to improve victim safety, and their capacity to give evidence. The training was greatly enhanced by input from specialist agencies supporting victims of forced marriage. Legal Guidance has been developed to assist prosecutors when charging and prosecuting cases involving forced marriage.

- the Government reports to Parliament annually on the effectiveness of the criminalisation of forced marriage.

It is vital to note that the difference we want to make through the forced marriage legislation will not be measured by the number of prosecutions, but rather in the prevention of girls and women, boys and men having their lives blighted by forced marriage. We are determined to protect the right of every individual to make their own choices about their relationships and their own future. The introduction of new legislation sends out a clear message that forced marriage is totally unacceptable and will not be tolerated in the UK. It will also increase the level of protection available for victims and ensure perpetrators will be properly punished. We know that legislation alone is not enough to address this issue and will continue to work with partners across government, Non-Government Organisations and others to ensure that victims and potential victims of forced marriage are aware of the support and options available to them.

The Forced Marriage Unit (FMU) is the Government’s delivery arm for tackling cases of forced marriage. The FMU runs a public helpline, providing confidential advice and support to victims and practitioners charged with responsibility for safeguarding children and vulnerable adults, ensuring they are fully informed on how to handle such cases. The number of reports to the helpline has steadily increased year on year – in 2012 advice or support was provided in almost 1500 cases. The FMU has the capacity and function to monitor the difference that legislation makes to victims of forced marriage and make recommendations to Ministers on any necessary policy changes.

Whilst the Government would be happy to update Parliament on the progress of our work in this area in due course, including as part of the normal post-legislative scrutiny of the Act, we are not persuaded that these provisions should be singled out for an annual report to Parliament.

Powers to stop, question, search and detain at ports (Part 10)

Conclusion and Recommendation 26: We are disappointed by the Government’s refusal to publish the responses to its consultation in full, in light of our recommendation in our Report on the Justice and Security Green
Paper that in future such consultations should make clear that responses will be published unless confidentiality is expressly sought. (Paragraph 100)

Cabinet Office guidance is that publication of responses, whether in full or in summary, is a matter for each Department. Responses to most consultations are published in summary form. This is necessary when, as in the case of the public consultation on the operation of Schedule 7 to the Terrorism Act 2000 ('Schedule 7'), responses received from police forces and individual police officers contain operationally sensitive details that would be inappropriate to publish for security reasons.

Conclusion and Recommendation 27: We also regret the lack of opportunity for pre-legislative scrutiny of the changes to Schedule 7 powers. The Independent Reviewer has expressed concern about the operation of these powers in three consecutive reports, and in our view the publication of draft clauses would have provided more opportunity for thorough parliamentary scrutiny of the Government's proposals. (Paragraph 101)

The public consultation on the operation of Schedule 7 provided opportunity for comment on the scope of the Government's proposals to amend the provisions. The Home Office wrote to police forces, legal organisations, industry bodies and a wide range of community, faith and interest groups to raise awareness of the consultation. In addition, with the help of the police and local authorities, Home Office officials undertook a series of community engagement events across the UK last year, in Birmingham, Bradford, Crawley, Manchester, Rotherham, Stirling, Tower Hamlets and Westminster. These events, which ran in parallel to the public consultation, saw lively public debates about Schedule 7 and also served to encourage responses to the consultation.

Conclusion and Recommendation 28: We welcome these improvements to the powers in Schedule 7. The amendments narrow the very wide scope of the powers and so reduce the potential for the powers to be found incompatible with Convention rights. (Paragraph 103)

We note and welcome the Committee's comments.

Conclusion and Recommendation 29: In our view, however, a number of significant human rights compatibility concerns remain about the Schedule 7 powers, even after these changes have been made. (Paragraph 104)

Conclusion and Recommendation 30: In our view, a statutory power to stop, question and search travellers at ports and airports, without reasonable suspicion, is not inherently incompatible with the right to liberty in Article 5 ECHR or the right to respect for private life in Article 8 ECHR. (Paragraph 109)

Conclusion and Recommendation 31: In our view, the Government has clearly made out a case for a without suspicion power to stop, question and search travellers at ports and airports, given the current nature of the threat from terrorism, the significance of international travel in the overall threat picture,
and the evidence seen by the Independent Reviewer demonstrating the utility of non-suspicion stops at ports in protecting national security. The retention of a without suspicion power in Schedule 7 of the Terrorism Act 2000 is therefore not inherently incompatible with Articles 5 and 8 ECHR. (Paragraph 110)

The Government is making amendments to Schedule 7 in the Bill to ensure the right balance between security and individual freedoms, and to reduce the scope for the powers in Schedule 7 to be operated in a way that may interfere with individuals' rights unnecessarily or disproportionately, whilst still retaining the operational effectiveness of the provisions to protect the public from terrorism.

The conclusion of the JCHR about the compatibility of a power to stop and question travelers at ports with fundamental human rights is echoed in a recent High Court judgment. In the case of Sylvie Beghal v the Director of Public Prosecutions [2013] (EWHC 2573 Admin)\(^5\), the Court said: “the Schedule 7 powers are neither arbitrary nor disproportionate..... a fair balance has been struck between the rights of the individual and the interests of the community” and “in short, the balance struck between individual rights and the public interest in protection against terrorism does not violate the fundamental human rights in question”.

Conclusion and Recommendation 32: We have considered carefully whether the Government has demonstrated the necessity for these more intrusive powers being exercisable without reasonable suspicion, and we are not persuaded that they have. In our view, the legal framework should distinguish between powers which can be exercised without reasonable suspicion, such as the power to stop, question, request documentation, and physically search persons and property, and more intrusive powers such as detention, strip searching, searching the contents of personal electronic devices, the taking of biometric samples, seizure and retention of property, including personal information on personal electronic devices. In our view, the latter set of more intrusive powers should be exercisable only if the examining officer reasonably suspects that the person is or has been involved in terrorism. (Paragraph 112)

Conclusion and Recommendation 33: We therefore recommend that the Bill be amended to introduce a reasonable suspicion requirement before the more intrusive powers under Schedule 7 are exercisable. We recommend that the reasonable suspicion threshold be introduced at the point at which the person being examined is formally detained, which the Bill requires to happen after an hour of questioning. The following amendment would give effect to this

\(^5\) http://www.judiciary.gov.uk/media/judgments/2013/sylvie-beghal-dpp-judgment-28082013
recommendation in relation to detention and the taking of fingerprints and non-intimate samples without consent. (Paragraph 113)

Conclusion and Recommendation 34: We consider that the current powers to access, search, examine, copy and retain data held on personal electronic devices, such as mobile phones, laptops and tablets, are so wide as not to be "in accordance with the law". We welcome the express references to necessity and proportionality in the working draft of the revised Code of Practice, but since examining officers are already required by the Human Rights Act to act compatibly with the right to respect for private life in Article 8 ECHR they do nothing to restrict the wide scope of the powers. In our view, the powers to search personal electronic devices are so intrusive, given the nature of the information held on those devices, that we do not consider these references in the Code to be sufficient to circumscribe the width of the powers. In our view they should only be exercisable on reasonable suspicion. The following amendments to the Bill would give effect to this recommendation. (Paragraph 122)

Introducing a reasonable suspicion test to be met before an examining officer may detain a person, search for and retain property or take biometric samples would undermine the capability of the police to necessarily and proportionately determine whether or not individuals passing through ports and airports may be concerned in terrorism.

The Bill will provide that strip searches may only be carried out if the person is detained, if the examining officer has reasonable grounds to suspect that they are concealing something which may be evidence that they are involved in terrorism and the strip search has been authorised by a senior officer not directly involved in questioning the person.

The Government has brought forward in the Bill an amendment to Schedule 7 which will ensure, in future, that no examination may continue for more than one hour without the individual being detained and receiving the statutory rights of a detained person. This will mean, in future, no person can be examined at length without being afforded those rights and protections. Lengthy examinations can be required to determine whether a person is involved in terrorism – requiring reasonable suspicion, ahead of even making that determination, risks undermining the security of the British public.

Conclusion and Recommendation 35: We call on the Government to explain to Parliament during debates on the Bill why s. 49 of RIPA does not apply in the context of border searches. (Paragraph 124)

The statutory Code of Practice for examining officers exercising powers under Schedule 7 is clear that the information they may require in an examination includes passwords to electronic devices and data.

Part III of the Regulation of Investigatory Powers Act 2000 provides a mechanism for investigators to require disclosure of protected electronic information in an intelligible
form or to acquire the means by which protected electronic information may be accessed or put into an intelligible form by the giving of a Notice. These provisions are typically used in relation to encrypted media in complex investigations of offences including possession of indecent images of children, kidnapping of children, insider dealing, fraud and drug possession with intent to supply. The annual report of the Chief Surveillance Commissioner for 2012/13 indicates only twenty-six Notices were served in that period.

Conclusion and Recommendation 36: We also recommend that the Government bring forward proposals which would introduce adequate safeguards for categories of material, such as material subject to legal professional privilege, parliamentary privilege or which would disclose a journalist’s sources, which enjoy protection under other legal frameworks such as the Police and Criminal Evidence Act. (Paragraph 125)

The protection afforded to items subject to legal privilege and excluded material in the exercise of powers under Schedule 7 is an issue arising from the examination of David Miranda at Heathrow Airport in August 2013. There is a criminal investigation and civil proceedings underway in relation to that specific matter.

The Government will consider carefully the judgment of the Court in the Judicial Review of David Miranda’s examination and the observations and any recommendations that the Independent Reviewer of Terrorism Legislation, David Anderson QC, may make in his investigation and report on the examination of David Miranda.

Conclusion and Recommendation 37: We recommend that the Government discuss paragraphs 15 to 18 of the draft revised Code with the Equality and Human Rights Commission with a view to identifying whether there is scope for further guidance which will make it less likely in practice that the powers will be exercised in a way which has an unjustifiably disproportionate impact on Muslims and other minority groups. We also recommend that the revised Code of Practice should provide that records of examinations should include the self-declared religion of the person examined, if given, in addition to their self-declared ethnicity as already provided for in the Code. (Paragraph 127)

The statutory Code of Practice for examining officers is clear that an individual’s perceived ethnic background or religion must not be used alone or in combination with each other as the sole reason for selecting a person for examination. Selection for examination must be in connection with the threat posed by terrorist groups active in and outside the United Kingdom.

Self-defined members of ethnic minority communities do comprise a majority of those examined under Schedule 7. However if the power is being exercised properly, the composition of those examined would correlate not to the ethnic breakdown of the general population, or even the travelling population, but to the ethnic breakdown of the terrorist population.
In his annual report published in 2013\(^6\) David Anderson QC said: "it is overwhelmingly likely that examinations, and especially detentions, are imposed on members of some minority ethnic communities to a greater extent than would be indicated by their numerical presence in the travelling population". He added: "Police are entitled and indeed required to continue to exercise the power in a manner aligned to the terrorist threat. As in previous years I have seen no evidence, either at ports or from the statistics, that Schedule 7 powers are operated in a discriminatory manner".

Nevertheless, the Government is committed to ensuring that Schedule 7 is not operated in an unlawfully discriminatory way. Home Office officials and examining officers have engaged with the Equality and Human Rights Commission, and continue to do so, to provide guidance to examining officers to ensure that the powers are not exercised randomly, arbitrarily or in ways which have an unjustifiably disproportionate impact on ethnic minority groups.

Conclusion and Recommendation 38: We welcome the Government's commitment to amend the Code of Practice to make clear that recording of interviews is best practice where the facilities are available, but we note that this is not in fact clear in the current working draft. To ensure that progress is made towards that goal, we recommend that the Bill be amended to require all Schedule 7 examinations at ports to be recorded, to be brought into force on whatever day the Secretary of State appoints by order. This would be in keeping with other changes made by the Bill which remove the distinction between detention at a police station and detention at a port under Schedule 7.

Conclusion and Recommendation 39: We do not see any reason of principle for taking a different approach in relation to the periodic review of detention under Schedule 7 compared to detention under Schedule 8 of the Terrorism Act 2000. We recommend that the Bill be amended so as to specify the intervals for the review of detention, rather than leave them to be specified in the Code of Practice. The following amendment would give effect to this recommendation. (Paragraph 137)

Ports and airports are not police stations and recording facilities are not always going to be available, particularly at smaller ports and airports. The Government will, through a revised Code of Practice, make clear that examinations of individuals detained at ports should be recorded where practical. The questioning of any person detained for examination under Schedule 7 at a police station already falls under a Code of Practice for the video recording of interviews.

Introducing statutory review of detention is a key Government reform that the Bill will deliver. The Government recognises the importance of clear review periods as part of the new provisions and will reflect further whether these periods should be

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addressed in a revised Code of Practice for Schedule 7, that will follow the Bill, or in the statute itself.

**Compensation for miscarriages of justice**

Conclusion and Recommendation 40: In our view, requiring proof of innocence beyond reasonable doubt as a condition of obtaining compensation for wrongful conviction is incompatible with the presumption of innocence, which is protected by both the common law and Article 6(2) ECHR. We recommend that clause 143 be deleted from the Bill because it is on its face incompatible with the Convention (Paragraph 157).

Clause 143 as was (now clause 151) does not require a person applying for compensation for a miscarriage of justice to "prove" their innocence – what is determinative is the fact on the basis of which the conviction was overturned. Provided that fact shows that the applicant did not commit the offence, compensation will be payable. We do not believe this to be incompatible with the ECHR.

The European Court of Human Rights (in its decision on *Allen v UK*) found that the presumption of innocence is engaged when a decision is taken whether or not to grant compensation, but concluded that, provided the language used in declining an application to pay compensation does not cast doubt on the innocence of the applicant, the presumption of innocence is respected. We consider that it would be just as possible to refuse compensation compatibly with the presumption of innocence under the proposed new test as it would under the law currently in force, since it is the language used that is determinative.

Interestingly, soon after the Allen judgment seven of the judges of the European Court who sat on *Allen* delivered another judgment relating to an application for miscarriage of justice compensation – the case of *KF* (Application no. 30178/09, decision of 3 September 2013). K.F.'s application was decided by the Secretary of State in October 2008, when the test applied was "clear innocence", based on Lord Steyn's definition of a miscarriage of justice in *R (Mullen) v Secretary of State for the Home Department [2004] UKHL 18*. K.F.'s application to the European Court complained that denying him compensation on this basis breached the presumption of innocence. The court reiterated that what is determinative for Article 6(2) compliance is the language employed by the Secretary of State in the compensation decision. The Court found that the Secretary of State, in concluding that K.F. had not suffered a miscarriage of justice, did not breach the presumption of innocence. We consider *KF* provides support for our view that there is no incompatibility between the test proposed in clause 151 and Article 6(2).

**Miscellaneous**

Conclusion and Recommendation 41: We welcome the extension of the dangerous dogs offence to private property as a human rights enhancing measure, because it improves the protection provided by the criminal law for people's life and physical integrity which are protected by Articles 2 and 8 ECHR. (Paragraph 160)
Conclusion and Recommendation 42: In our view, to exempt from the scope of that legal protection trespassers, or anyone believed by the householder to be a trespasser, is on the face of it incompatible with the UK’s positive obligations to protect life and physical integrity under Articles 2 and 8 ECHR, and to ensure the enjoyment of those rights without unjustifiable discrimination under Article 14 ECHR. We recommend that further consideration be given to clause 98(2)(b) in order to prevent such incompatibility. (Paragraph 165)

The Government welcomes the Joint Committee’s support for extending the offence of allowing a dog to be dangerously out of control to all places. As the law stands now, an owner cannot be prosecuted for this offence where a dog is dangerously out of control in a private place where it has a right to be.

The Government notes the Joint Committee’s recommendation in relation to the exemption from prosecution for a dog owner whose dog bites a trespasser in or entering the home. The Government considers that a trespasser’s decision to enter a householder’s home unlawfully and without any regard for the householder’s Article 8 rights justifies proportionate (potential) interference with their human rights. A careful balance has been struck by restricting the exemption to inside the building which serves as a dwelling, where trespassers are most likely to have malign intent. The trespasser has a choice regarding their unlawful entry to the property and can elect to comply with the law.

A householder has an Article 8 right to enjoy their home free of interruption from trespassers and the Government considers it would be a significant and upsetting interference for millions of householders to have to restrain their dogs inside their homes or indeed get rid of their dogs in case a trespasser may try to break into their property whilst the householder is out or overnight, resulting in an offence being committed.

The current status quo is not being changed in relation to trespassers inside a dwelling, who will still be afforded the current level of protection under the law. Should the householder use the dog as a weapon, for example by deliberately setting the dog on the trespasser, this could constitute an offence under the Offences Against the Person Act 1861 if not in self-defence. If a householder set a dog on a trespasser with the requisite intent and without excuse and the trespasser dies, the householder could be convicted of murder or manslaughter, thus protecting the trespasser’s Article 2 rights. Equally, any dangerous dog can be destroyed under the Dogs Act 1871. Outside the dwelling trespassers will receive the same enhanced protection afforded to any person on private property, which reflects the reduced likelihood of a trespasser outside the dwelling having malign intent; for example a child retrieving a ball.

Where the intruder is not in fact a trespasser, the householder must have an objectively held reasonable belief that they are a trespasser. This will be a matter for the court on the individual facts, but as an example it is likely that anyone wearing a
uniform or announcing the nature of their legitimate business will not be subject to the exemption.

If Article 14 were engaged, the Government is satisfied that a fair and proportionate balance has been struck and that an exemption in relation to trespassers in dwellings is justified and non-discriminatory.

Conclusion and Recommendation 43: To the extent that the provisions in the Bill close a gap in the current legal framework in relation to those who possess firearms with the intention of supplying them to another, we welcome them as a positive step taken by the Government pursuant to its responsibility to protect its citizens from gun-related violence. (Paragraph 167)

We note and welcome the Committee’s comments.

Conclusion and Recommendation 44: In our view, the Government should have a firmer evidence base when increasing maximum sentences from 10 years to life, especially bearing in mind that the offence would attract the mandatory minimum sentences provided for in the Firearms Act 1968, and reflect on whether an alternative maximum sentence might be appropriate. (Paragraph 168)

The individuals targeted by the firearms legislation in this Bill make gun crime possible. The Government believes that tougher sentences should be commensurate with the level of criminality involved. These individuals cannot be ignorant that the primary use of the guns they are putting in the criminal market is to kill or to make someone believe they will be killed. This is very serious criminal behaviour which has a disproportionate impact on the victims, their families and the communities affected. We believe that the current maximum sentence of 10 years does not reflect the level of criminality involved and the maximum should be increased to life. Victims of firearm related crime, their families, and the wider society will feel better served by a level of punishment which reflects the seriousness of the crime.

The Government’s decision to act to amend the law is also based, in part, on comments made by the judiciary. In R v Wilkinson and others (2009) EWCA Crim 1925, the Lord Chief Justice commented on the disparity between the maximum sentences for the importation of firearms and class A drugs, and on the absence of a specific offence of possessing a firearm with intent to supply. The amendments to the firearms legislation in this Bill will bring the sentencing framework for illegal firearms in line with class A drugs.

Conclusion and Recommendation 45: We welcome the Government’s reassurance that the relevant human rights standards have been properly respected in the development of an armed capability by the British Transport Police. (Paragraph 170)

We note and welcome the Committee’s comments.
Conclusion and Recommendation 46: Like the express provision made in the Children and Families Bill to ensure that certain of the Children’s Commissioner’s powers apply to private contractors, which the Government agreed to insert into that Bill at our suggestion, this is a positive human rights enhancing measure which we welcome. (Paragraph 171)

We note and welcome the Committee’s comments.

Conclusion and Recommendation 47: We also welcome as a human rights enhancing measure the Bill’s provision requiring police forces to respond to IPCC recommendations about complaints or conduct matters, setting out what action they are taking in response, or explaining why they are not taking any action: it strengthens the powers of the IPCC which will often be making recommendations which concern the State’s positive obligations under Articles 2 and 3 ECHR. (Paragraph 172)

We note and welcome the Committee’s comments.

Conclusion and Recommendation 48: We welcome the Government’s promise to clarify the scope of the new appeal right against information notices issued by the IPCC in the Explanatory Notes accompanying the Bill. (Paragraph 177)

We note and welcome the Committee’s comments. The relevant paragraph of the Explanatory Notes (paragraph 347) has now been revised in the Lords Introduction edition.

Conclusion and Recommendation 49: We consider that some of the Government’s reasons in relation to costs and bureaucracy are not sufficient to establish that there is a pressing social need to retain samples, particularly as the Government has said that “in practice, it is likely that only a small proportion of samples will need to be protected as evidence”. However, we understand the importance of ensuring effective criminal proceedings, and we note the practical considerations that there may be some situations where samples are required to be retained for longer than six months (Paragraph 183)

The Government’s arguments for the amendment are based not only on costs and bureaucracy but also on the interests of justice. If samples have been destroyed, both prosecution and defence arguments relating to them cannot be made. We welcome the Joint Committee’s comments on the importance of ensuring effective criminal proceedings and the practical reasons for retaining samples.

Conclusion and Recommendation 50: We note the Bill’s proposed safeguards in relation to the retention of samples. We recommend the following additional safeguards to protect against the prolonged retention of samples, particularly on a precautionary or speculative basis: (Paragraph 188)

- a robust process is established to ensure that each sample is considered and a determination is made as to whether or not it is
required for the purposes of the CPIA. If it is not required, it should be destroyed within the PACE time limits.

- a robust independent audit regime of retained samples under CPIA is established to help ensure against unnecessary prolonged retention. HMIC or ICO could carry out this function. Similar independent oversight is provided for under Regulation of Investigatory Powers Act 2000.

We welcome the Committee's recommendations.

In relation to the first part of the recommendation, it is important to distinguish between samples taken for the purpose of deriving DNA, and other samples. For DNA samples, police forces have been advised that under the regime created by the amendment, the norm will be that samples taken for DNA analysis will be destroyed by forensic suppliers after processing to produce a DNA profile. The advice also states that, should forces require the retention of the sample for casework purposes, they will need to notify the forensic supplier at the time of submitting the sample for analysis, and this is only to be done when a forensic scientist is carrying out an expert comparison of DNA evidence, not in the case of routine DNA matches from the National DNA Database.

For other samples (that is, blood, semen, hair, dental impressions, nails and scrapings, swabs, saliva and skin impressions), there are no databases, the samples can only be used for casework, and their retention is regulated by CPIA.

We agree that independent oversight of sample retention is required. This is the role of the Biometrics Commissioner - section 20(6) of the Protection of Freedoms Act 2012 requires him to keep under review the retention and use of fingerprints, DNA profiles and samples under the Police and Criminal Evidence Act. The Commissioner had already raised the need for particularly careful oversight of sample retention in the context of the CPIA and discussions are being held with him about the details of his role in this connection and the information he will need to carry it out.

Conclusion and Recommendation 51: We welcome the Government's stated policy of consulting with the Information Commissioner’s Office about proposed legislation within the ICO’s remit. We recommend, as good practice, that the Government ensures that this policy is applied consistently by Government Departments to ensure that the ICO is consulted at early stages of policy and legislative proposals on relevant provisions concerning data and information powers. (Paragraph 189)

We confirm the Government intends this policy to be applied consistently by Government Departments.

Conclusion and Recommendation 52: We welcome as human rights enhancing measures the Government’s introduction of an express “proportionality” requirement into the Extradition Act in order to ensure that extradition only happens when the offence is serious enough to justify it, and the bar on
extradition if there is no prosecution decision in the requesting state, which should help to prevent people from spending long periods in pre-trial detention following their extradition. (Paragraph 191)

We note and welcome the Committee's comments.

The Joint Committee will wish to publish this response in the normal way, but to ensure that members of the Lords have sight of it before the first day of Committee stage I am copying it to those Peers who spoke at Second Reading and to Jack Dromey. I am also placing a copy in the library of both Houses.

Yours sincerely

Norman Baker MP
Minister of State