The Rt Hon Theresa May MP,
Secretary of State for the Home Department,
Home Office,
2 Marsham Street,
London, SW1P 4DF

Wednesday 26 June 2013

Dear Theresa,

Anti-social Behaviour, Crime and Policing Bill Parts 1-10

The Joint Committee on Human Rights is currently scrutinising the Anti-social Behaviour, Crime and Policing Bill in light of the requirements of human rights law.

Information provided by the Government

The Committee is grateful to you for the human rights memorandum you have provided summarising the Government’s consideration of the Bill’s provisions in light of the European Convention on Human Rights. It is also grateful to the Bill team which has made itself available to meet the Committee’s staff.

Many of the Bill’s provisions have significant implications for the human rights of children, particularly Parts 1-6 concerning anti-social behaviour and Part 9 concerning forced marriage. The Government undertook on 10 December 2010 to always have due regard to the UN Convention on the Rights of the Child when developing law and policy. The Committee has been pleased to receive from the Government memoranda accompanying Bills which demonstrate that it has honoured that commitment by setting out a detailed analysis of the Bill’s compatibility with the UNCRC, most recently in relation to the Children and Families Bill. We have not received such a memorandum in relation to this Bill, notwithstanding that it has very significant implications for the rights of children.

Q1: I would be grateful if you could provide the Committee as soon as possible with a memorandum setting out the Government’s analysis of the compatibility of Parts 1 to 6 and 9 of the Bill with the UNCRC.
• It would be helpful if you could include in the memorandum the Government’s analysis of the relevance to Parts 1 to 6 of the Bill of any reports of the UN Committee on the Rights of the Child, including its General Comment No. 10 (2007) on Children’s Rights in Juvenile Justice and its 2008 Concluding Observations on the UK, and of any other international standards the Government considers relevant such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”).

I would also be grateful if you could answer the following specific questions about Parts 1 to 10 of the Bill. The Committee may be in touch further about Parts 11 and 12 of the Bill when it has had the opportunity to consider them.

**Anti-social Behaviour (Parts 1-6)**

**Injunctions to prevent nuisance and annoyance (Part 1)**

Q2: What is the Government’s justification for making injunctions to prevent nuisance and annoyance available against children as young as 10?

• Bearing in mind that the punishment for breach of such an injunction includes imprisonment, and children cannot be imprisoned until they reach the age of 14, will the Government consider raising the minimum age in clause 1(1) of the Bill from 10 to 14?

Q3: Please explain why the Government is satisfied that defining the threshold for an injunction in terms of “conduct capable of causing nuisance or annoyance” in clause 1(2) of the Bill is sufficiently precise to satisfy the requirement of both the common law principle of legal certainty and human rights law, that any interferences with rights must be defined with sufficient precision to enable individuals to anticipate the consequences of their actions?

• What in the Government’s view would be the disadvantage of defining “anti-social behaviour” as conduct causing or likely to cause harassment, alarm or distress, rather than conduct capable of causing nuisance or annoyance?

Q4: Does the Government envisage that the court, when deciding under clause 1(2) whether, on the balance of probabilities, the person has engaged or threatens to engage in anti-social behaviour, will apply a flexible civil standard of proof, depending on the seriousness of the behaviour alleged?

Q5: Although paragraph 1(6) of Schedule 2 gives procedural effect to the requirement in Article 37(b) UNCRC that the imprisonment of a child shall be used only as a measure of last resort, is the substance of that requirement undermined by the breadth of the Bill’s definition of anti-social behaviour because it may lead to children being imprisoned for breach of the terms of injunctions imposed in respect of conduct falling far short of criminal behaviour?
Q6: In view of the express requirement in the ECHR that all interferences with the rights protected by Articles 8, 9, 10 and 11 of the Convention must be “necessary”, what is the justification for making the second condition in clause 1(3) of the Bill that the court considers it “just and convenient”, rather than “necessary”, to grant the injunction?

- What in the Government’s view would be the disadvantage of requiring the court to be satisfied that an injunction is “necessary” for the purpose of preventing the respondent from engaging in anti-social behaviour, rather than “just and convenient”?

Q7: Bearing in mind the breadth of the Bill’s definition of “anti-social behaviour”, why is the Government satisfied that the broad and open-ended definition of the prohibitions and requirements that may be included in an injunction, in clause 1(4) of the Bill, satisfies the requirement of both the common law principle of legal certainty and human rights law, that any interferences with rights must be defined with sufficient precision to enable individuals to anticipate the consequences of their actions?

- What are the Government’s reasons for not taking the same approach as it has taken in the Terrorism Prevention and Investigation Measures Act, by including in the legislation an exhaustive list of the types of prohibitions and requirements that can be included in an injunction to prevent nuisance and annoyance?

Q8: Please explain in more detail than is provided in the Explanatory Notes to the Bill or the ECHR memorandum, the purpose of the selective restrictions in clause 1(5) on the scope of the prohibitions and requirements that may be included in an injunction.

- Specifically, is clause 1(5)(a) of the Bill compatible with Article 9 of the Convention, which permits justifiable interferences with the freedom to manifest one’s religion or beliefs but does not permit interferences with religious beliefs as such?

- Is “practicability” (in clause 1(5)) the appropriate standard by which a court should judge whether prohibitions and requirements in an injunction are justifiable interferences with Convention rights?

Q9: What is the justification for confining the scope of the power in clause 12, to exclude a person from their home in cases of violence or risk of harm, to tenants of a local authority or a housing provider?

Q10: Is it the Government’s intention that the power in clause 12 to include a provision in an injunction excluding a person from their own home should only be available to the court where it is satisfied that there has been violence or threatened violence against someone who lives in the premises, or someone who
*lives in the premises* is at significant risk of harm from the person, as the Government’s ECHR memorandum suggests at paragraph 20?

- If so, will the Government amend clause 12(1)(c) to make this explicit on the face of the legislation and so ensure that this extraordinary power to interfere with the right to respect for home in Article 8 ECHR is “tightly drawn and proportionate” as the Government intends?

Q11: What is the justification for disaplying the usual restrictions on reporting legal proceedings in which children are concerned for the purposes of injunctions to prevent nuisance and annoyance (clause 17)?

- Please explain why in the Government’s view the disaplication of the usual presumption against reporting is compatible with the child’s right to respect for privacy in Article 8 ECHR and Article 16 UNCRC and, in the case of proceedings relating to breach of an injunction, the State’s obligation under Article 40(2)(vii) UNCRC to ensure that the child’s privacy is fully respected at all stages of proceedings in which the child is alleged to have infringed the penal law.

- Should the best interest of the child be the primary consideration when a court decides whether or not to allow reporting of proceedings concerning children under Parts 1 and 2 of the Bill?

**Criminal Behaviour Orders (Part 2)**

Q12: If the Government’s intention is that the court must be satisfied to the criminal standard of proof (i.e. beyond reasonable doubt) that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress, as the Explanatory Notes (para. 108) suggest, is there any reason why this should not be made explicit in clause 21(3) of the Bill?

Q13: In view of the express requirement in the ECHR that all interferences with the rights protected by Articles 8, 9, 10 and 11 of the Convention must be “necessary”, what is the justification for making the second condition in clause 21(4) of the Bill that the court considers that making a criminal behaviour order “will help” in preventing the offender from engaging in behaviour that caused or was likely to cause harassment, alarm or distress, rather than is “necessary” to prevent such behaviour?

- What in the Government’s view would be the disadvantage of requiring the court to be satisfied that a criminal behaviour order is “necessary” for the purpose of preventing the offender from engaging in such behaviour?

Q14: Please answer Q8 above in relation to clause 21(9).

Q15: Please answer Q11 above in relation to clause 22(8).
Dispersal powers (Part 3)

Q16: Is it the Government’s intention that the authorising officer must have objective grounds for his view that the statutory condition for authorising the use of dispersal powers is met?

- If so, will the Government amend clause 32(2) of the Bill to make clear that the authorising officer’s belief that the condition is met must be “reasonable”?

Q17: What is the justification for providing in clause 32(3) that an authorisation can be made if the authorising officer considers that use of the dispersal powers “may be necessary” rather than “is necessary”?

- Why has the Government not taken the same approach to defining the threshold for authorising this exceptional power as it has taken to the exceptional power to stop and search without reasonable suspicion in s. 47A of the Terrorism Act 2000?

Community Protection (Part 4)

Q18: Please explain why the description in clauses 40 and 55 of the Bill of “unreasonable conduct having a detrimental effect on the quality of life of those in the locality” is sufficiently precise to satisfy the requirement of both the common law principle of legal certainty and human rights law, that any interferences with rights must be defined with sufficient precision to enable individuals to anticipate the consequences of their actions.

Recovery of possession of homes on anti-social behaviour grounds (Part 5)

Q19: In the absence of any requirement that there be a connection between the particular dwelling house and the riot-related offence, please explain why in the Government’s view the new riot-related grounds for possession introduced by clause 91 of the Bill do not amount to a punishment rather than a means of preventing harm to others.

Q20: Where possession of a dwelling house is ordered on the ground that the tenant or person living there has been convicted of a riot-related offence, what is the justification for interfering with the Article 8 rights of other family members, including children, who live in the home?

Dangerous dogs (Part 7)

Q21: Please provide the Government’s analysis of the compatibility of the “householder exemption” in clause 98(2)(b) with the UK’s obligation to ensure that its criminal law provides adequate protection for the right to life in Article 2 ECHR and the right to physical integrity in Article 8 ECHR.
Firearms (Part 8)

Q22: In the drafting of clause 102, what consideration has been given to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials?

Q23: Before the change in clause 102 comes into force, will British Transport Police receive the same training in the use of firearms as other police forces, including training in the relevant human rights standards contained in Article 2 ECHR, as interpreted by the European Court of Human Rights, and the UN Basic Principles?

Forced marriage (Part 9)

Q24: Please identify the evidence the Government relies upon to demonstrate that criminalisation will enhance effectiveness and what steps the Government intends to take to ensure this measure is not counter-productive for victims.

IPCC’s powers (Part 10)

Q25: Bearing in mind that most appeals against information notices issued by the IPCC under clause 118 are likely to take the form of complaints that the request for information is not a necessary, proportionate or justified interference with the right to respect for private life in Article 8 ECHR, and that “in accordance with the law” is a term of art with a particular meaning in the context of Article 8 ECHR, will the Government consider defining the ground of appeal against an information notice differently to avoid the risk of it being interpreted too narrowly?

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

Q26: Why has the Government not published its summary of responses to its consultation on the reform of Schedule 7, or its response to the consultation, more than 6 months after that consultation closed and before introducing its reforms in this Bill?

Q27: When will the summary of consultation responses and the Government’s response to the consultation be published?

Q28: In addition to publishing the summary of responses, will the Government now place in the public domain, in full not summary form, the responses to its consultation for which confidentiality was not claimed by the respondent? If not, please explain why not.

Q29: In view of the significance of the human rights issues raised by the powers in Schedule 7, reflected in the attention they have received from the Independent Reviewer, why has the Government not afforded a better opportunity for thorough pre-legislative scrutiny before introducing the measures in Schedule 6 to the Bill?
Q30: Even after the changes made by the Bill to the Schedule 7 powers, are there any powers to stop, question, search and detain UK citizens without reasonable suspicion which are wider in scope than, or comparable to, these powers? If so, please specify.

Q31: What is (are) the main purpose(s) of the powers in Schedule 7?

- Is gathering intelligence which is useful in the fight against terrorism one of the purposes relied on by the Government to justify the powers?

Q32: How useful in practice are stops based on risk factors rather than specific intelligence?

Q33: What proportion of examinations culminate in an intelligence report being compiled? Please provide a breakdown of this answer as between ports and airports.

Q34: What is the Government’s justification for saying that each of the following powers is necessary without reasonable suspicion:

- a power to stop and question
- a power to detain
- a power to compel answers to questions on pain of imprisonment
- a power to search the person and items of property including mobile phones?

Q35: Why, after a person has been examined for one hour under the Schedule 7 power, is there no requirement of reasonable suspicion before they can be detained for the purposes of ascertaining whether they appear to be a person involved in terrorism?

Q36: Are there any equivalent provisions to that in Schedule 7, requiring people to answer an examining officer’s questions on pain of imprisonment, in other contexts?

- What is the justification for such an unusual power in this particular context?

Q37: Is it the Government’s view that answers provided under such legal compulsion can be relied upon in proceedings such as TPIMs or asset-freezing proceedings?

Q38: When will the new draft Code of Practice be made available?

Q39: Will the Code of Practice make clear that the scope of questioning must be limited to the purpose of it, namely to ascertain whether the person appears to be a person involved in terrorism?
Q40: Will the Code of Practice make clear that searches of the person must also be confined to the purpose of the power, namely to ascertain whether the person being examined is involved in terrorism?

Q41: What is the justification for the period of detention being as long as 6 hours?

Q42: What is the reason for the Bill providing that intervals at which detention under Schedule 7 is periodically reviewed will be specified in the Code of Practice, rather than on the face of the legislation itself, as it is in para. 21 of Schedule 8 to the Terrorism Act 2000 for reviews of detention under s. 41?

Q43: What is the justification for distinguishing between Schedule 7 interviews at a police station and those at a port for the purposes of audio or video-taping the interview?

- Is there any reason why the words “if the interview takes place in a police station” should not be deleted from paragraph 3(6) of Schedule 8 to the Terrorism Act 2000, in line with other changes the Bill makes to the legal framework which remove the distinction between detention at a police station and detention at a port under Schedule 7?

Q44: Is the power in paragraph 8 of Schedule 7 to search anything the person being examined has with them, or belonging to them, the lawful authority relied upon to authorise copying the contents of the person’s mobile phone? If not, what other lawful authority is relied upon?

Q45: Does the Government consider that copying the contents of a mobile phone SIM card during a Schedule 7 search is compatible with Article 8 ECHR? If so, please explain the Government’s reasons for its view.

Q46: Will the training to be received by designated officers in the exercise of Schedule 7 powers be co-ordinated by ACPO and uniform across all the officers with the authority to use them?

Q47: Will the Government agree to share the Schedule 7 training materials with the EHRC and permit the EHRC to witness the training itself?

It would be helpful if we could receive your reply to these questions by 12 July 2013. I would also be grateful if your officials could provide the Committee secretariat with a copy of your response in Word format, to aid publication. I look forward to hearing from you.

Dr Hywel Francis  
Chair