Dear Victoria,

Offensive Weapons Bill

Clause 6 and the offence of having a corrosive substance in a public place

1. In the Chair’s absence, the Committee has asked me to write to you in relation to the Offensive Weapons Bill. We understand the need to tackle the increasing misuse of corrosive substances. Nonetheless it is important that measures to prevent crime do not inadvertently criminalise everyday behaviour and that it is sufficiently clear to people what activity would cause them to commit a criminal offence. The Committee is particularly concerned about Clause 6 of this Bill which creates an offence of a person having a corrosive substance with them in a public place. This is a reverse burden offence. The offence is committed by a person merely having the substance on them (e.g. cleaning products bought in a supermarket when leaving the supermarket). However, there is a defence if one can prove that one had “good reason or lawful authority”¹ for having the corrosive substance with them in a public place.

2. The Bill gives little guidance as to what substances might be covered by “corrosive substance”, which is defined as a “substance which is capable of burning human skin by corrosion”. We understand that it is likely that a number of household products would be covered by this offence, but that there has been no clear explanation setting out which products are or are not covered². Nor does there appear to be any intention to make this clear to those buying the products, such as through labelling, as to whether they might be committing an offence by taking the product to a public place (e.g. supermarket car park).

¹“Reasonable excuse or lawful authority” if in Scotland (see clause 6(3)).
²This is in contrast to the definition of “corrosive products” relating to clauses 1-4 of the Bill, which has a clear definition and list of products covered is contained in Schedule 1 to the Bill.
This would seem to mean that someone, say, buying bleach or drain unblocker in a supermarket, could be guilty of this offence and would then need to prove a defence of having a “good reason” for needing bleach or drain unblocker.

3. Further, we note that there is no clarity provided as to what would constitute a “good reason” defence, which seems to be left for the magistrates or jury to determine in an eventual court case, without any guidance being produced to assist members of the public in knowing when they might have committed this offence and when they might have a valid defence - or indeed any guidance to assist the police or CPS in deciding whether to bring a prosecution under this provision.

4. This contrasts with the position on knives, where there is a clear ban on particular types of knives, and guidance on the Government website on examples of good reasons for carrying a knife or weapon.

5. Given that this offence will be one to which a reverse burden applies, this would mean that potentially hundreds or thousands of people will be committing the elements of this offence every day. Such people would then (if stopped) having to prove a defence of “good reason” to justify their having the substance, without any clarity or guidance as to what products are covered or what might constitute a sufficient defence for possession. This lack of clarity is of significant concern and raises real problems. Indeed we have concerns that such an approach is not consistent with the principles of the rule of law or natural justice.

6. We would be grateful to know how you justify the lack of clarity as to when this offence is committed and what you consider could be a “good reason” defence.

7. We would be grateful to know what steps you have considered to ensure greater clarity such that we can be assured that the principles of natural justice and the rule of law will be respected were this offence become law? In particular, can a list, such as that in Schedule 1, be drawn up to cover these corrosive substances?

8. We are considering whether the following amendments might help to address this issue as to the lack of clarity in the elements of this offence and would be grateful for your thoughts on whether such drafting might help improve the clarity of the offence
and bring it more into line with the requirements of the rule of law and natural justice:
Possible amendments:

OPTION 1

In Clause 6(9), leave out the definition of “corrosive substance”, and insert -

““corrosive substance” means a substance which contains a substance listed in the first column of Schedule 1 in a concentration higher than the limit set out for that substance in the second column of that Schedule”.

This would provide clarity, so that individuals would know which substances were caught by this possession offence. It would link the meaning of corrosive substance for the clause 6 offences to the meaning of corrosive product and corrosive substance in other offences created under this Bill.

OR

OPTION 2

In Clause 6(9), leave out the definition of “corrosive substance” and after clause 6(8) insert -

“(8A) In this section “corrosive substance” means a substance which contains a substance listed in the first column of Schedule 1A in a concentration higher than the limit set out for that substance in the second column of that Schedule.

(8B) The appropriate national authority may be regulation amend Schedule 1A by adding, modifying or removing a reference to a substance or a concentration limit.”.

AND

After Schedule 1, insert –

SCHEDULE 1A: CORROSIVE SUBSTANCES
This is the table referred to in section 6(8A)—

<table>
<thead>
<tr>
<th>Name of substance and Chemical Abstracts Registry number (CAS RN)</th>
<th>Concentration limit (weight in weight)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ammonium hydroxide (CAS RN 1336-21-6)</td>
<td>10% w/w</td>
</tr>
<tr>
<td>Formic acid (CAS RN 64-18-6)</td>
<td>10% w/w</td>
</tr>
<tr>
<td>Hydrochloric acid (CAS RN 7647-01-0)</td>
<td>10% w/w</td>
</tr>
<tr>
<td>Hydrofluoric acid (CAS RN 7664-39-3)</td>
<td>5% w/w (Greater than 0%)</td>
</tr>
<tr>
<td>Nitric acid (CAS RN 7697-37-2)</td>
<td>5% w/w</td>
</tr>
<tr>
<td>Phosphoric acid (CAS RN 7664-38-2)</td>
<td>70% w/w</td>
</tr>
<tr>
<td>Sodium hydroxide (CAS RN 1310-73-2)</td>
<td>12% w/w</td>
</tr>
<tr>
<td>Sodium hypochlorite (CAS RN 7681-52-9)</td>
<td>10% w/w</td>
</tr>
<tr>
<td>Sulfuric acid (CAS RN 7664-93-9)</td>
<td>15% w/w</td>
</tr>
</tbody>
</table>
This would provide clarity, so that individuals would know which substances were caught by this possession offence. It would allow the Government flexibility to make provision to define different substances in relation to the clause 6 offences as compared to the meaning of corrosive product and corrosive substance in other offences created under this Bill.

The lack of a justification for different approaches to the legal and evidential burdens between different UK jurisdictions

9. Clause 6(2) imposes a legal burden (persuasive burden) on people in England and Wales or Northern Ireland to prove this “good reason” defence [see the requirement in clause 6(2) for them to “prove” this point]. However, people in Scotland are only subject to an evidential burden [see the requirement in clause 6(4) for them to “show” this matter]. One reading of this is that a lesser burden is therefore required to make out the defence if one is in Scotland, as compared to if one is in England, Wales or Northern Ireland.

10. Given that human rights are engaged here, there is a need to show the proportionality and necessity of any interference with an individual’s human rights. As the Home Office’s ECHR memorandum makes clear, “these burdens amount to a reverse burden of proof” and therefore Article 6(2) ECHR is engaged. The Home Office note further correctly states that the “Convention requires such burdens to be confined within “reasonable limits”3”. However, it is difficult to understand why a reasonable limit in Scotland is different to a reasonable limit in England, Wales or Northern Ireland; and it is therefore difficult to understand how it can be necessary and proportionate to interfere with a person’s human rights in England or Wales or Northern Ireland in a more significant way which is not considered necessary or proportionate in Scotland. It goes without saying that such an analysis needs an individual consideration when considering the creation of this specific offence, and cannot be made generally by reference to other legislation.

11. We would be grateful for a substantive explanation as to the reasons for this different approach for this specific offence. In particular we would like to know why it is necessary and proportionate to have a greater interference with the rights of those in England, Wales and Northern Ireland that would not be necessary or proportionate were that person in Scotland.

12. This concern would seem to be readily achieved by amending the reference to “to prove” in clause 6(2) and Clause 6(3) so that in each case it reads “to show”. We

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3 Salabiaku v France 13 EHRR 279; Sheldrake v DPP [2005] 1 AC 264; R v Foye [2013] All ER (D) 248.
would be grateful for your thoughts on such an amendment. Such an amendment might then read:

In Clause 6(2) –
Leave out “prove” and insert “show”.

In Clause 6(3) –
Leave out “prove” and insert “show”.

The possible draft amendments are also set out in an Annex to this letter for ease of reference. I would be grateful for a response by 9th November.

Yours sincerely

Baroness Sally Hamwee
ANNEX: POTENTIAL AMENDMENTS

CLAUSE 6: Offence of having a corrosive substance in a public place

ISSUE: The lack of clarity as to when the offence of "having a corrosive substance in a public place" is committed.

CONCERN: The clause as drafted is not consistent with the principles of the rule of law or natural justice.

PROPOSED AMENDMENT:

OPTION 1

In Clause 6(9), leave out the definition of "corrosive substance", and insert -

"corrosive substance" means a substance which contains a substance listed in the first column of Schedule 1 in a concentration higher than the limit set out for that substance in the second column of that Schedule".

This would provide clarity, so that individuals would know which substances were caught by this possession offence. It would link the meaning of corrosive substance for the clause 6 offences to the meaning of corrosive product and corrosive substance in other offences created under this Bill.

OR

OPTION 2

In Clause 6(9), leave out the definition of "corrosive substance" and after clause 6(8) insert –

"(8A) In this section "corrosive substance" means a substance which contains a substance listed in the first column of Schedule 1A in a concentration higher than the limit set out for that substance in the second column of that Schedule.

(8B) The appropriate national authority may be regulation amend Schedule 1A by adding, modifying or removing a reference to a substance or a concentration limit.".

AND

After Schedule 1, insert –
### SCHEDULE 1A: CORROSIVE SUBSTANCES

This is the table referred to in section 6(8A)—

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*This would provide clarity, so that individuals would know which substances were caught by this possession offence. It would allow the Government flexibility to make provision to define different substances in relation to the clause 6 offences as compared to the meaning of corrosive product and corrosive substance in other offences created under this Bill.*

**ISSUE:** The lack of a justification for different approaches to the legal and evidential burdens between different UK jurisdictions.

**CONCERN:** This suggests that the interference with individuals' Article 6(2) rights in England, Wales and Northern Ireland will not be justified

**PROPOSED AMENDMENT:**

In Clause 6(2) –

Leave out "prove" and insert “show”.

In Clause 6(3) –

Leave out “prove” and insert “show”.
