Andrew Dismore
Chair, Joint Committee on Human Rights
Committee Office
House of Commons
7 Millbank
London
SW1P 3JA

UK BORDERS BILL

Thank you for your letter to the Home Secretary dated 13th March which coved the Joint Committee on Human Right's initial examination of the Bill. I am responding as the Bill Minister. There has been some confusion between our officials concerning the receipt of that letter, and I apologise that this has caused my response to be delayed. My officials agreed a revised deadline of 27th April for sending the Government response to you. I enclose a memorandum which addresses your questions raised in the letter.

LIAM BYRNE MP

JOINT COMMITTEE ON HUMAN RIGHTS
MEMORANDUM BY THE HOME OFFICE

UK Borders Bill

1. This memorandum is submitted by the Home Office in response to the questions raised in respect of the UK Borders Bill by the Joint Committee on Human Rights in the Chairman's letter dated 13th March 2007.

2. The Home Secretary made a statement under section 19(1)(a) of the Human Rights Act 1998 when the Bill was introduced in the House of Commons, indicating that in his view, the provisions of the Bill are compatible with the Convention rights. He believes that, where the Convention rights are engaged, the proposals are a balanced and proportionate response to a pressing social need and that the judgements he has made about the balance to be struck between competing rights and responsibilities can be objectively justified.

(1) Immigration officers' powers to detain, search and seize

Q1: Please provide a more detailed explanation of why the new powers to detain, search and seize in clauses 1 and 2 of the Bill are required.

3. Strengthening border security is central to the delivery of the government's 5 year strategy for asylum and immigration "Controlling our borders: Making Migration work for Britain". It is also an important feature of part of the counter terrorism strategy "CONTEST" which is managed at official level by the work of the Official Committee on Domestic and International Terrorism TIDO (Protect). This theme is continued in the IND Review 2006 (*Fair, effective, transparent and trusted: Rebuilding confidence in our immigration system*) which makes it clear that our priority is to toughen our borders, prevent abuse of our immigration laws and manage migration to

benefit the UK. Strengthening border controls is the first objective in delivering this agenda and we need to work in collaboration with all the agencies responsible for securing our borders to deliver this objective.

4. At present, immigration officers have only limited powers to intervene against those who are involved in criminality (under section 14 of the Asylum and immigration (Treatment of Claimants etc) Act 2004), limited to those who commit offences under the Immigration Acts, and are of interest to the police.

5. In those circumstances where a police officer is not in attendance, the provisions in clauses 1 and 2 will ensure that designated immigration officers at the border are able to exercise a primary intervention capability in respect of individuals who are the subject of a warrant for arrest, or who may otherwise be liable to arrest by a police constable. The detaining immigration officer will then be obliged to have a constable attend as soon as reasonably practicable to decide whether to arrest, deal with the substantive aspects of the case and to progress any criminal investigation.

6. The associated powers - to be able to search the individual concerned for anything that may cause harm or assist escape and to be able to retain such items together with anything found that the immigration officer thinks may be evidence of the commission of an offence - are primarily aimed at securing the detention of the person and ensuring his or her safety, as well as that of any other person with whom the person is in contact.

7. The new powers in clauses 1 and 2 will ensure that those subject to arrest by the police do not evade intervention simply because a police officer is not in the immediate vicinity.

Q2: Please provide more information about the limitations on the new power of immigration officers to detain.

8. The power to detain under clause 2 may only be exercised in the specific circumstances specified in that clause and only by immigration officers who are designated by the Secretary of State for this purpose. The Secretary of State may only designate officers who he thinks are fit and proper for the purpose and are suitably trained. These conditions will be factored into the designation process which we will develop in collaboration with police colleagues. Designated officers will be required to follow Standard Operating Procedures. These will be drafted in conjunction with police colleagues and will provide a clear framework within which officers will be expected to operate within. Designation may be revoked at any time if an officer fails to perform to required standards.

9. Although the maximum period that an individual may be detained under these powers is three hours, the designated immigration officer will be legally obliged to arrange for a police constable to attend as soon as reasonably practicable. The three hour timeframe was identified as a reasonable maximum period during which a police officer can reach a port. It is anticipated that in most cases individuals detained under this power will be held by a designated immigration officer for much less than three hours.

Q3: Will the relevant PACE Code of Practice apply?

10. No. We do not believe that it is necessary for immigration officers exercising powers under clause 2 to be subject to PACE codes of practice.

Q4: If not, why not, and will equivalent requirements apply?

11. Whether immigration officers should be subject to PACE codes of practice will depend upon the functions that they are undertaking. In exercising certain specified powers under the Immigration Acts, including powers to arrest, question, search or take fingerprints from a person, to enter and search premises or to seize property found on a person or premises, immigration officers must have regard to the codes of practice in force under the PACE and the equivalent legislation in Northern Ireland. This requirement is set out in Section 145 of the Immigration and Asylum Act 1999 and the Immigration (PACE Codes of Practice) Direction.

12. The power to detain under clause 2 is specifically intended to support the police at the border by enabling designated immigration officers to detain individuals of interest pending the arrival of a police constable. It is not intended that officers will take on the substantive tasks of a constable, such as questioning, arrest, investigation or specific evidence collection. It will be for the constable to make all substantive enquiries about the person and to take the decision whether the person should actually be arrested. Designated immigration officers are simply requiring a person to wait for the arrival of a police officer. The designated immigration officer is under a duty to arrange for a constable to attend as soon as is reasonably practicable. No questioning or investigation will occur during this period.

13. Immigration officers' existing powers to detain for immigration reasons under Schedule 2 of the Immigration Act 1971 are not subject to PACE codes of practice – similarly, neither does the power under clause 2 need to be subject to PACE codes of practice.

14. Immigration officers exercising the power to detain under clause 2 will be required to follow Standard Operating Procedures, referred to above (paragraph 9). They will, for example, set out when it is appropriate for officers to use the powers of detention and what the limitations are when

exercising them. They will also give detailed instructions on the processes that officers must follow.

Q5: What training will an immigration officer receive in order to be eligible for designation by the Secretary of State as having the additional powers of detention, search and seizure?

15. Specific training requirements are under development. The training for designated officers will be similar in many respects to the training that is currently given to immigration officers who exercise powers of arrest under the Immigration Acts. The training will be tailored, however, to the specific detention functions that designated officers will be exercising. It is important to stress that any action to *arrest* an individual detained by a designated immigration officer under the power in clause 2 will be effected by a police constable. Designated immigration officers will not be undertaking any action to arrest individuals where the sole reason for their detention is one of the reasons specified in clause 2.

16. The Home Office is content to make the detail of the training schedule available when it is developed.

Q6: Will these powers to search and seize be subjected to as rigorous controls as those contained in the PACE codes of practice in relation to the equivalent police powers (Code A)?

17. The purpose of the search provisions in clause 2 is to allow designated officers to search and retain any items that an individual may use to assist escape or to cause physical injury to him or herself or to another person. The provisions are not intended as a means of gathering evidence for investigation.

18. If however during the course of a designated officer's search he or she found anything which may be considered evidence of the commissioning

of an offence, he or she would retain it and deliver it to the constable when he or she arrived.

19. The powers to search and seize mirror those which exist for Authorised Search Officers under s.40 of the Immigration, Asylum and Nationality Act 2006 and are also not subject to PACE codes of practice.

20. Standard Operating Procedures will set out the processes that immigration officers should follow when exercising the powers of detention under clause 2. This will include the processes that should be followed when searching individuals.

(2) Biometric registration of persons subject to immigration control

Q7: Please provide more details about the Government's precise intentions with a view to enabling the Committee to assessing the likely compatibility of the new powers with Article 8 ECHR.

21. The Government wishes to reassure the Committee that we consider that the proposals in the UK Borders Bill for requiring those subject to immigration control to register their biometric samples and apply for a biometric immigration document (BID) would be compatible with Article 8 of the ECHR; and that any secondary legislation and powers provided will be compatible with Article 8, although, at present, the detail of these Regulations is still to be finalised.

22. The main objective which we are intending to achieve by introducing the biometric provisions is to ensure that all those who are subject to immigration control have a secure BID which confirms their immigration status and identity. Production of the BID will only be required in specified situations where immigration status needs to be established, rather than relying on existing less secure evidence.

23. The requirement for providing biometric samples and applying for a BID forms part of our improvements to security and border control, which will link in to the national identity scheme, and will enable other government departments to realise benefits. These benefits include increased document security, by making forgery and counterfeiting more difficult, therefore reducing the number of fraudulent immigration applications and simplifying, for employers and other government agencies, the process of establishing whether a person is eligible for employment or state benefits. We expect a significant increase in the detection of illegal applicants. By taking biometric samples – and by providing a verification service to employers – we expect to significantly reduce the scope for illegal working. This will substantially reduce fraud through the use of multiple identities and fraudulently obtaining a national insurance number.

24. The Government also intends to rely on these powers to comply with an EC Regulation, currently under revision in Brussels, which will require a grant of leave for more than six months to be a uniform residence permit – in the form of a card incorporating biometric identifiers (by amending Council Regulation (EC) 1030/2002)).

25. As acknowledged in paragraph 133 of the Explanatory Notes, the Government recognises that taking biometric or other information from a person, and storing that information and requiring a BID to be used for specific immigration purposes, may be an interference in the right to respect for private life. However, we have considered, and remain of the view, that if there were any interference, we would ensure that this was necessary and proportionate.

26. Whilst the detail of the secondary legislation is still to be finalised, we expect the BID to be a highly secure card which will contain the holder's unique biometric data samples (for example, fingerprints and facial image) and biographical information (for example, name, immigration status, nationality, date and place of birth). Some of this information will appear on the face of the card, together with a facial image, whilst other

information, notably some of the biometric information, will be contained in a secure microchip. The biometric samples will be collected by an authorised person, such as a specially trained contractor. The BID will only remain valid for the duration of a person's limited leave, or for a maximum of ten years (five years for those under 16 years of age). Where a person has already provided their biometrics, we would expect to use those biometrics or a copy of those biometrics without needing to take the biometrics again. We will not be collecting DNA under these provisions.

27. It will not be compulsory to carry the BID at all times. However, BID holders will need to notify the Department if their card is lost, stolen, damaged, tampered with, or destroyed. We also expect a person who is in possession of a BID without lawful authority of the person to whom it was issued, to surrender the document.

28. Information provided will be stored securely on a central database. The biometric data held on the cards will be protected by a secure international encryption system known as a Public Key Infrastructure (PKI). Searching or verifying a person's biometric details against a central database will be done through a secure communications portal. There will be a requirement to put the security keys (PKI) on the device that is making the request to be authenticated as a trusted party. The biometric data stored on the central database will be stored separately and will not be accessible through the internet : this will ensure the information is not changed nor the system corrupted. In this regard the Border and Immigration Agency will comply with all relevant legislation including the *Data Protection Act 1998* and *Human Rights Act 1988*, to ensure the safe and secure storage of personal data.

29. It is our intention that biometric data can be retained for as long as it is used for purposes under the immigration Acts. We will also use the biometric information for non-immigration purposes – such as for nationality-related purposes (i.e. to verify a person's details when they apply for British citizenship), or for uses under the Immigration Acts which

relate to the prevention of crime. However, the biometric information collected under the provisions in the *UK Borders Bill* will be destroyed if it is no longer of use for the purposes being sought, and also if the person proves they are a British citizen.

30. We will ensure compliance with the provisions by:

I. disregarding or refusing an application for a BID (for example, where the person provides incomplete information);
II. disregarding or refusing a simultaneous application for leave, or by curtailing existing leave (for example, where a person refuses to provide biometric or other information required); and
III. using a civil penalty regime – which would be considered after determining whether an immigration sanction would first be more appropriate, and would not be punitive or revenue-raising.

31. Where a person were liable to a civil penalty, we would issue a notice of penalty. The person would have a right to object to the notice of penalty, and, additionally, a right of appeal to the county court or sheriff. We shall be issuing a code of practice setting out these matters, which will be subject to public consultation.

32. As the Committee might recall, all subsequent Regulations being introduced as a result of these biometric powers will be subject to the affirmative resolution procedure and thereby subject to debate and scrutiny by both Houses.

Q8: Please provide more information about the "rational criteria" according to which the Government intends to phase the implementation of this requirement.

33. From 2008, we will progressively roll out BIDs to qualifying foreign nationals subject to immigration control, who are already in the UK and reapplying to stay here. We will commence the roll out by testing the

biometric recording and card production processes. By 2011 we will cover all new in-country applications for permission to stay in the UK.

34. Categories of individuals who will be required to register their biometrics include:
    - Students from outside the EU;
    - Those seeking to settle in the UK having completed the 5 year qualifying period;
    - Those applying for extensions to work permits;
    - Those who volunteer to apply for a document, such as those applying for a Transfer of Conditions or No Time Limit stamp;
    - Specialist groups such Working Holiday Makers and Ministers of Religion; and
    - Those seeking leave on the basis of marriage to a UK citizen;

35. The precise order and categories that will be introduced into the gradual roll out have yet to be finalised. Closer to the time of implementation (and in advance of secondary regulations being made) we will review the latest risk assessments to understand where there is abuse of immigration control. Additionally, we will examine the practical implications of prioritising particular groups for early implementation. We will of course also seek legal advice on the lawfulness of our proposals, including compatibility with the Human Rights Act.

36. Examples of rational criteria that we will use to identify which groups should be prioritised for early implementation include:

    - Select applicants from within immigration categories where there is evidence of abuse of the system;
    - Volumes of applicants within particular immigration categories (in order to keep the numbers manageable in the initial years);
    - Impact on employers and other sponsors;
    - Impact on communities and individual applicant groups; and

- Operational ease of processing applicants from particular immigration categories.

(3) Deportation of foreign criminals

Q9: Please provide a more detailed explanation of why, in the Government's view, the provision in Clause 44 does not have retrospective effect.

37. Clause 44 provides that the provisions on automatic deportation may be applied to persons convicted of offences before the Bill is passed who are in custody at the time of commencement. The Government does not accept that clause 44 engages Article 7 of ECHR.

38. Persons are currently liable to deportation if the Secretary of State deems their deportation to be conducive to the public good (section 3(5) of the Immigration Act 1971). Any person who would fall within the Bill's provisions on automatic deportation is currently capable of being deported under these powers. This may be because they are recommended for deportation by a court or are otherwise considered for deportation on discretionary grounds. Therefore, even if deportation were a penalty for the purposes of article 7 (which is not accepted), it is a penalty which could be imposed now under existing legislation on the persons to whom the automatic provisions will apply.

39. The Government does not consider that the change to make the making of a deportation order mandatory in certain circumstances has the effect of imposing a heavier sentence than was applicable at the time of commission of the offence.

(4) Reverse onus

Q10: Please explain why in the Government's view the reverse onus provision in clause 38(3) is compatible with the presumption of innocence in Article 6(2) ECHR.

40. The department considers that clause 38(3) is compatible with Article 6(2) of ECHR, applying the test set out in *DPP v Sheldrake* [2004] UKHL 43. The imposition of the burden of proof on the defendant is reasonable and proportionate as the statutory code of confidentiality for taxpayer information (an integral part of which is the offence for wrongful disclosure of taxpayer information) is an important safeguard to protect the rights and freedoms of others, particularly the taxpayer's Article 8 rights.

41. It is the disclosure of the taxpayer's information which is the act which constitutes the offence and the prosecution must prove that action beyond reasonable doubt. However, we consider that the question of whether or not the defendant reasonably believed he/she had lawful authority to disclose the information or that it had already lawfully been disclosed should be relevant and that consequently this should not be a strict liability offence. Given the importance of safeguarding the taxpayer's rights and that what the defendant believed when they disclosed the relevant information is something which only the defendant has knowledge of we consider that this defence is appropriate and fair.

42. The Joint Committee on Human Rights has scrutinised a very similar provision to this clause when it reviewed the Commissioners for Revenue and Customs Bill, considered in 2005. Section 19 of that Act was used as a template for constitutes the offence and the prosecution must prove that action beyond reasonable doubt. The Department considers that the question of whether or not the defendant reasonably believed he/she had lawful authority to disclose the information or that it had already lawfully been disclosed should be relevant and that consequently this should not be a strict liability offence. Given the importance of safeguarding the tax

clause 38(3). The report produced by the Joint Human Rights Committee, in relation to the information sharing provisions of that Bill, recognised the importance of protecting taxpayer confidentiality in meeting the requirements of Article 8 of the ECHR and even suggested that HMRC should include further provisions in addition to the criminal sanction, to protect taxpayer confidentiality. Therefore the inclusion of this clause in the UK Borders Bill reflects the concerns about taxpayer confidentiality already raised in relation to the Commissioners for Revenue and Customs Bill.

(5) Search for evidence of nationality

Q11: Please explain what safeguards will apply to ensure that the exercise of this power does not involve an undue risk of discrimination against visible minorities.

43. Where a person has been arrested for a criminal offence and taken to a police station, there is a need to establish their nationality at an early stage in order to then consider whether the person is a foreign national who may be liable to deportation.

44. A custody officer must have reasonable grounds to suspect that a person may not be a British citizen, and therefore may be liable to deportation, before a search may be authorised.

45. If a person is questioned because of their racial appearance then this will amount to unlawful race discrimination. Therefore race or colour can never be the basis of the officer's "reasonable suspicion" that someone is not a British citizen.

46. The Border and Immigration Agency will provide guidance to police on what questions to ask regarding nationality to avoid inappropriate questions. Enquiries will be made to see whether information on

nationality is already held elsewhere in police or immigration records before a search is authorised.

47. Where a police custody officer is not satisfied that a person's nationality can be ascertained or confirmed, it may be necessary for immigration officers to examine the person, and in combination with this for immigration or police officers to be able to search the person's premises for documents which might establish the person's nationality.

48. Safeguards are being put in place to ensure that this power is not applied disproportionately. The power to search will be authorised by a senior officer; either at least a chief immigration officer or a police inspector or above, and a written record must be made of the reason the search is authorised.

49. We will be conducting a pilot, the results of which will be published, to ensure that these powers are conducted both appropriately and proportionately.