



# Joint Committee on Human Rights

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From Dr Hywel Francis MP, Chair

The Rt Hon Theresa May, MP,  
Home Secretary,  
Home Office,  
Peel Building,  
2 Marsham Street,  
London SW1P 4DF

Tuesday 28 June 2011

*Dear Theresa,*

## ***The Sexual Offences Act 2003 (Remedial) Order 2011***

The Joint Committee on Human Rights is scrutinising this proposal for a draft Remedial Order which would introduce an opportunity for review of the application of life-long notification requirements under the Sexual Offences Act 2003. This proposal is the Government's response to the judgment of the Supreme Court in *F & Thompson v Secretary of State for the Home Department* [2010] UKSC 17, that indefinite notification requirements imposed by Section 82(1) Sexual Offences Act 2003 are incompatible with the right to respect for private life, in so far as the Act fails to provide any opportunity for review of the necessity for continuing notification. Lord Phillips explained in his judgment that significant weight was to be placed on measures designed to protect individuals against sexual offences. However:

*There must be some circumstances in which an appropriate tribunal could reliably conclude that the risk of an individual carrying out a further sexual offence can be discounted to the extent that continuance of notification requirements is unjustified. As the courts below have observed, it is open to the legislature to impose a high threshold for review. Registration systems are not uncommon in other jurisdictions.<sup>1</sup>*

I am writing to draw your attention to the Committee's call for evidence in relation to the Remedial Order (attached). We would welcome any evidence you may wish to submit in relation to any of the issues identified in our call for evidence. **In addition to the general questions posed in the Call for Evidence, we would be grateful if you could provide us with some further information on particular aspects of the proposal.**

### ***Independent review by an appropriate tribunal***

The review mechanism introduced in Scotland earlier this year provides for an initial review by the Chief Police Officer, followed by a full merits appeal to the Sherriff Court. In Northern Ireland, Gareth Johnston, Head of the Justice Strategy Directive at the Northern Ireland Executive gave evidence to the Northern Ireland Assembly Justice Committee on future justice legislation,

<sup>1</sup> *F & Thompson*, para 57.

including legislation to remedy the violation of Convention rights identified in this case. He explained that the system in Northern Ireland would involve an initial review by the police, but would provide for the final determination to be made by the courts. Questioned on the differences between this approach and the Government's proposals for England and Wales, he explained that the difference of approach is based on legal advice on human rights compatibility and a preference expressed by the police:

*Our proposal is that, after the police stage, there would still be a right of application to the courts rather than an appeal. That is for two reasons, the first of which is based on legal advice on human rights. The position is that Parliament can do whatever it wants and consider any human rights-based challenge later. The Assembly requires certification from the Minister that something is human rights-compliant before a Bill is laid...Therefore, we are partly basing our position on legal advice. However, we are also basing it on what the police are saying they would prefer, ... We want to say that an application can be made to the court as the second stage but that there is the list of things that a court must take account of in reaching its decisions. Those will be exactly the same things that the police would have had to take account of at their stage. Therefore, the court would be required to take a structured approach, rather than the approach that would be taken in a judicial review, where any arguments could be made.<sup>2</sup>*

- 1. Please confirm whether the proposed decision of the Chief Police Officer on any review (In particular, under Section 91 C) will be subject to judicial review.**
- 2. We would be grateful if you could provide a fuller analysis of the Government's view that its approach removes the underlying violation of Article 8 of the Convention, including that it provides for an independent review by an appropriate tribunal? (Please include any Government analysis of relevant case-law of the European Court of Human Rights).**
- 3. Please provide an estimate of costs associated with likely challenges by way of judicial review to decisions by Chief Police Officers under this proposed scheme. (We note that the comparable costs in the Regulatory Impact Assessment for review by the Magistrates, include costs of appeals through to the Crown Court).<sup>3</sup>**

### ***Time-scales for review***

#### *The evidence base for the timescales in the proposal*

The Impact Assessment accompanying the proposal provides a limited assessment of the appropriateness of the timescales adopted for a first review. It explains that the Government's position is based on a number of academic studies on the risk of reoffending by sexual offenders. The Impact Assessment explains:

*The three studies considered suggest that the risk of reconviction persists throughout the follow-up period. The risk of reconviction after ten years decreases to approximately 3% for any sexual offence and 5% for any violent and sexual offence.*

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<sup>2</sup> Evidence to Committee on Justice, Northern Ireland Assembly, 16 June 2011. [http://www.niassembly.gov.uk/record/committees2011/Justice/110616\\_PlannedJusticeLegislation.htm](http://www.niassembly.gov.uk/record/committees2011/Justice/110616_PlannedJusticeLegislation.htm)

<sup>3</sup> The Impact Assessment explains that the costs to the Ministry of Justice associated with judicial review of Chief Police Officers' decisions or with the discharge of SOPOs connected with applications for review have not been quantified. We have copied this correspondence to the Secretary of State for Justice for information.

**4. We are grateful to the Home Office for providing us with copies of the supporting academic materials which inform the Government's evidence base for this proposal. However, we would be grateful for a fuller explanation of the Government's view that the timetable proposed in the draft Order (with first review after either 15 or 8 years from release) is appropriate. In particular, we would be grateful for an explanation of:**

- **the Government's decision to set fixed trigger dates for review;**
- **why these dates are supported by the evidence produced on risk of re-offending;**
- **why the Government considers that it is appropriate for any second review to be on a similarly long time-scale; and**
- **the Government's reasons for proposing that the Chief Police Officer should have discretion as to whether any second review takes place after 8 or up to 15 years.**

#### *Sexual Offences Prevention Orders and Notification Requirements*

The Impact Assessment accompanying the proposal for a draft Order explains that any offender requesting a review, if subject to a Sexual Offences Prevention Order (SOPO), would need to apply to discharge the relevant SOPO before seeking a review. This is in contrast with the model in Scotland where any SOPO falls away if the review of risk leads to the conclusion that any relevant risk is sufficiently diminished to remove any relevant reporting requirements (See Article 4, SSI 45/2011). The effect of this is that in England and Wales, under this proposal, offenders will have to apply once to the Magistrates Court, which will assess risk in connection with the SOPO and again to the Chief Police Officer, who will assess risk connected with the notification requirements (registration). The Government has explained that it considers that this two stage process is proportionate because the discharge of SOPO would be covered by criminal legal aid (See Impact Assessment, page 13).

**5. Please provide a fuller explanation of the Government's decision that offenders who are subject to SOPO must make an independent application to discharge any relevant SOPO before applying to the Chief Police Officer for a review of whether it is proportionate to continue to require registration?**

**6. If you have any statistics about the likely number of offenders who will be required to undergo this two stage assessment, including the current number of offenders subject to indefinite notification who are also subject to a SOPO, please provide full details to us.**

**7. We note that the costs of the discharge of any relevant SOPO have not been included in the Impact Assessment. We would be grateful if you could provide an estimate of the additional cost incurred by not following the Scottish model, where a SOPO would fall away after any relevant discharge of the notification. (We note that these costs and the costs associated with judicial review would fall on the Ministry of Justice and copy this letter to the Secretary of State for Justice).**

#### **Child Offenders and the Convention on the Rights of the Child**

The Impact Assessment explains that the Government has set a different timescale for child offenders and that the proposed 8 year period is set by analogy with the existing provisions in the Sexual Offences Act 2003. In the Act, where fixed-term notification requirements are imposed, the time-scale is halved for offenders aged 18 years or under at the time of conviction or the relevant finding. This analogy is not exact however, as the reduction in timescale for review is applied from

the date of release, which could mean that some offenders who were under 18 years at the time of conviction will be treated as adults for the purposes of review.

- 8. Please provide a fuller explanation of the Government's decision that some offenders aged under 18 years at the time of conviction should be treated as adults for the purposes of review.**
- 9. In particular, please expand on the analysis provided in the required information and the Impact Assessment by explaining why the Government considers that the proposal to treat some child offenders in the same way as adult offenders is compatible with the obligations of the UK under the UN Convention on the Rights of the Child (Article 40).**

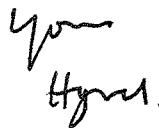
#### **Comparative experience**

In the Impact Assessment accompanying the proposal, the Government refers to comparative experience mentioned by Lord Philips in the judgment in this case. The Government notes that "mechanisms differ across the various jurisdictions. A number of the systems include a review undertaken by the Court, while in France, the review is undertaken by a prosecutor". We note that in France, as the Supreme Court recognised in its judgment, review by the prosecutor is accompanied by the right to appeal to an independent and impartial tribunal.

- 10. Please provide us with fuller information on the mechanisms for review operating in each of the countries referenced in the Impact Assessment (Ireland, France, Australia, Canada, South Africa and the US).**
- 11. Please provide a fuller explanation of the role comparative experience played in shaping the Government's proposal, if any. Please include further information about the Government's consideration of the model adopted in Scotland and any discussions which the Northern Ireland Executive about their proposed approach.**

We note that the Home Office has worked with ACPO and NOMS in the preparation of this proposal. We will be contacting both organisations separately to encourage them to respond to our Call for Evidence.

It would be helpful if we could receive your reply by **19 July 2011**. I would also be grateful if you could provide the Committee secretariat with a copy of your response in Word format, to aid publication.



**Dr Hywel Francis MP  
Chair**

CC: Rt. Hon. Kenneth Clarke QC, MP, Secretary of State for Justice.