House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny:
Policing and Crime Bill
(gangs injunctions)

Fifteenth Report of Session 2008-09

Report, together with formal minutes and
written evidence

Ordered by The House of Lords to be printed 27 April 2009
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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current membership

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<td>Lord Bowness</td>
<td>John Austin MP (Labour, Erith &amp; Thamesmead)</td>
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The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

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The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Rebecca Neal (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Assistant Legal Advisers), James Clarke (Senior Committee Assistant), Emily Gregory and John Porter (Committee Assistants), Joanna Griffin (Lords Committee Assistant) and Keith Pryke (Office Support Assistant).

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Summary

We have followed up our earlier report on the Policing and Crime Bill by scrutinising Government amendments which would permit a court to grant an injunction to prevent gang-related violence. We express concern that these amendments were published towards the end of the Committee stage in the first House, thus making effective parliamentary scrutiny more difficult.

“Gang” is not a precise or legal term and we are concerned that gangs injunctions could be used on a wider basis than is currently envisaged. We recommend that the term should be defined in the Bill or, failing that, explained clearly and in detail in guidance.

In our view, the Government has failed to explain the need for the new injunctions, particularly as the Court of Appeal has concluded that a range of powers already exists for dealing with gangs. We make the following detailed points about the proposal:

- the Bill should explicitly require use of the criminal law to be considered before gangs injunctions, which are civil law instruments, are deployed;

- an exhaustive list of prohibitions and requirements which may be imposed by means of a gangs injunction should be set out in the Bill;

- there should be a maximum limit on the duration of a gangs injunction, that renewal after the expiry of the maximum period be prohibited and injunctions should be subject to annual review by the courts;

- interim injunctions should last no more than four weeks and should not be renewable;

- it is proposed that gangs injunctions should be based on the civil standard of proof: we argue that the higher, criminal, standard should be used, in particular to mirror anti-social behaviour orders, which are very similar; and

- the Government considers that gangs injunctions are not enforceable against under-18s but is looking to find ways of using civil injunctions against children. We recommend that the Bill should be amended explicitly to exclude under-18s and we are not persuaded that new provision is needed to deal with children, given the range of powers already at the disposal of the courts.
Government Bills

Bills drawn to the special attention of each House

1 Policing and Crime Bill

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1.1 We recently reported on a number of areas of the Policing and Crime Bill which, in our view, raise significant human rights issues. During the Public Bill Committee (“PBC”), the Government introduced a new Part 4 providing for injunctions for gang-related violence (“gangs injunctions”). We were unable to scrutinise effectively these new provisions and the Minister’s views of their human rights compatibility in our first Report on the Bill but stated that we intended to scrutinise them more fully in a future Report.1 We address these provisions now. In our view, the new provisions for gangs injunctions raise a number of issues of compatibility with human rights standards.

Gangs injunctions

1.2 Under Part 4 of the Bill, a court may grant an injunction to prevent gang-related violence. Two conditions must be met. The first is that the court must be satisfied on the balance of probabilities that the respondent has engaged in or has encouraged or assisted in gang-related violence. The second is that the court considers it necessary to grant the injunction to prevent the respondent from engaging in or encouraging or assisting in gang-related violence and/or to protect the respondent from gang-related violence.2 Injunctions may prohibit certain conduct (such as being in a particular place or with particular persons or wearing particular clothing), or require the respondent to take certain steps (such as notifying the authorities of a change of address, reporting at a particular time and place or participating in particular activities of no more than 8 hours per day). The types of terms which may be included in such injunctions are set out in indicative, not exhaustive, lists.3 The court must specify in relation to each term of the injunction, whether it lasts until further order or until the end of a specified period.4 It may attach a power of arrest to any term of the injunction, except one requiring the respondent to engage in particular activities.5 The court may order a review hearing to consider whether to vary or discharge an injunction, to which both the applicant and respondent must be invited.6 An application to vary or discharge an order may be made by either party to the proceedings.7

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2 Clause 32.
3 Clauses 32 and 33.
4 Clause 34(2).
5 Clause 34(5).
6 Clause 34(3) and (4).
7 Clause 40(2).
1.3 An injunction may be applied for without the respondent being given notice (a “without notice” application).\(^8\) Where an application is made without notice, the court must either dismiss the proceedings or adjourn them to a hearing of which the respondent will be given notice.\(^9\) In the meantime, the court may grant an interim injunction “if it thinks that it is necessary to do so”, but must set a time limit for any prohibition or requirement it imposes and may not require the respondent to engage in particular activities.\(^10\)

1.4 Alternatively, a respondent may be notified of an application for an injunction (a “with notice” application). In these circumstances, the court may either consider the application at a full hearing, or adjourn the hearing. Where it chooses to adjourn the hearing, it may grant an interim injunction if it “thinks that it is just and convenient to do so”.\(^11\) Again, the court may not impose any terms which do not contain a time limit,\(^12\) but it may impose the full range of prohibitions and requirements.\(^13\)

1.5 We wrote to the Minister on 18 February 2009 asking him to set out the Government’s view of the human rights compatibility of the provisions.\(^14\) The Minister helpfully provided a swift reply on 23 February 2009.\(^15\) Having considered the Minister’s reply, we were concerned that the proposed injunctions, as drafted, risked being incompatible with the right to a fair hearing (Article 6 ECHR and the common law) and/or the right to respect for private and family life (Article 8 ECHR). We again wrote to the Minister on 9 March 2009 seeking his response to 19 specific questions.\(^16\) We received a further reply on 23 March 2009.\(^17\) **We are grateful to the Minister for his full and timely response.** However, we express our concern that these provisions, which are highly significant for individual liberties and human rights, were not published at the time that the Bill was published, but only during the latter part of the Committee stage. As we have stated on a number of previous occasions, late publication of clauses makes effective Parliamentary scrutiny, including for compatibility with human rights, much more difficult.

1.6 During the PBC and in correspondence with us, the Government explained that the new provisions were needed because of a judgment of the Court of Appeal.\(^18\) In *Birmingham City Council v Shafi*, the Court of Appeal considered an appeal by a local authority. The council sought civil injunctions\(^19\) against individuals who it was alleged were involved in gang-related offences and public nuisance. The County Court judge dismissed the injunction applications, deciding that there was no evidence that the defendants had behaved in a way which would justify making the injunctions and that the Court did not have the power to grant the injunctions. Hearing the appeal, the Court of

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\(^8\) Clause 37.
\(^9\) Clause 37(4).
\(^10\) Clause 39.
\(^11\) Clause 38(2).
\(^12\) Clause 38(3).
\(^13\) Clause 38(4).
\(^15\) Ibid, Ev 15.
\(^16\) Ibid, Ev 16.
\(^17\) Ibid, Ev 18.
\(^18\) *Birmingham City Council v Shafi* [2008] EWCA Civ 1186.
\(^19\) Under section 222 Local Government Act 1972.
Appeal noted that the terms of the injunctions which were sought were identical or almost identical to an anti-social behaviour order (ASBO). It noted the “striking feature” that the local authority sought ASBOs against those under 18 and injunctions in identical terms against those over 18. The Court recognised that Parliament had laid down a number of specific safeguards which apply to the grant of ASBOs, some of which might not apply to injunctions granted at common law. It stated:

Where, as here, Parliament has legislated in detail to deal with a particular problem, the courts should in general leave the matter to be dealt with as Parliament intended and, save perhaps in exceptional circumstances, refuse to grant injunctive relief of the kind which can be obtained by an ASBO.

1.7 The Court held that the council should therefore seek an ASBO so “the detailed checks and balances developed by Parliament and in the decided cases” would apply. Given that these applications were in the “same corner of the law” as ASBOs, the Court considered that it would be bizarre if a different standard of proof applied. As the order sought was essentially the same as an ASBO, the County Court had been correct to apply the same standard of proof which applied in proceedings for an ASBO: that the Court had to be sure that the defendants had acted in the anti-social way alleged. However, the Court also recognised that there may be cases in which the injunctions sought were not identical or almost identical to an ASBO or where there were more complicated facts. In such cases, the Court held, the ordinary civil standard of proof may apply.

Legal certainty

1.8 Whilst gang-related violence is defined in Clause 32(5), there is no definition of what constitutes a “gang”. This was the subject of much debate in PBC. During the debates, the Minister agreed to consider whether a definition could be incorporated into the Bill. Given this commitment, we wrote and asked the Minister whether the Government intended to set out the definition of a gang on the face of the Bill. The Minister replied that the Government did not intend to define gangs as they vary from city to city, and behaviour varies from place to place and changes over time. He considered that the term “gang” was well understood and expected its ordinary interpretation to apply. The Government proposed to develop this further in guidance.

1.9 The Secretary of State is required to issue and publish guidance to which those who are permitted to apply for gangs injunctions must have regard. The Minister confirmed in PBC that the “code of practice” would need to be published in draft and put before Parliament for scrutiny. In correspondence, the Minister told us that the Government

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20 Ibid, paras 44-5.
21 Ibid, para. 44.
22 Ibid, para. 60.
23 Ibid, paras 50-52.
24 Ibid, para. 64.
25 Ibid, para. 65.
26 PBC, 26 February 2009, col 594.
28 Ibid, Ev 18.
29 Clause 45.
30 PBC, 26 February 2009, col 595.
was considering whether to lay guidance before Parliament before the Act enters into force.\(^{31}\) He also told us that the draft guidance would be published as soon as possible and, in any event, before the commencement of the legislation.\(^{32}\)

1.10 We are concerned that the power to interfere with various Convention rights by imposing a gangs injunction is insufficiently defined in law to satisfy the requirement of legal certainty which is also a fundamental feature of human rights law, including the ECHR. “Gang” is not a precise or legal term. We are concerned at its potentially wide application in the future beyond the category of people currently envisaged to be covered and the broad discretion which it gives to those seeking applications and the courts as to how the term is interpreted. We consider that, in the interests of legal certainty, the term should be defined in the Bill. If the Government continues to propose only to deal with the definition in guidance, we recommend that such guidance:

- be clear and detailed;
- sets out the boundaries of the term, including those groupings of individuals which the term will not encompass (such as protesters);
- is regularly reviewed and updated (at least annually) to take account of changing circumstances and evolving caselaw; and
- is published in draft alongside the Bill as it goes through its remaining Parliamentary stages.

1.11 In correspondence with us, the Government only agreed to publish the draft guidance before the commencement of the Act. It appears to be backtracking on its commitment in PBC to allow Parliament to scrutinise the draft guidance before the Act comes into force. We urge the Government to reconsider. Given the significant issues which the guidance is intended to cover, it is vital for effective scrutiny for Parliament to have an opportunity to consider both the Act and the draft guidance in order to ascertain how the two will operate in practice and whether, taken together, they are compatible with human rights standards. We propose an amendment to the Bill to draw attention to this issue:

> Page 31, line 5, [Clause 45] at end insert-

> “(2A) Before publishing or revising guidance issued under this section, the Secretary of State must publish its proposals in draft and consult:

> (a) the Lord Chief Justice; and

> (b) any other person whom the Secretary of State considers to be appropriate.

1.12 We asked the Minister why Part 4 contained only an indicative and not an exhaustive list of the prohibitions or requirements that may be granted. The Minister suggested that a significant benefit of a non-exhaustive list was flexibility.\(^{33}\) In his view:


\(^{32}\) Ibid.
… making the suggested list of prohibitions and restrictions exhaustive would tie the courts’ hands leaving them unable to respond appropriately to particular gang problems in particular areas. The Government cannot be certain that the ways in which gang violence is perpetrated will remain the same, such that this should be pre-established in the provisions.  

1.13 Whilst we appreciate that gang methods may evolve and gang violence may change over time, we are unconvinced that they will do so with such rapidity that open-ended provisions are necessary. In our view, there is a danger that Clause 33 provides to wide a discretion as to the types of prohibitions or requirements which may be imposed by a court. In order to ensure legal certainty and protection for individual rights, we recommend that the Bill be amended to set out an exhaustive list of prohibitions and requirements which may be imposed. In the event of changes in the future, amendments could be proposed to Parliament in subsequent legislation.

**Necessity**

1.14 In *Shafi*, the Court concluded:

> We do not wish to minimise in any way the problems identified by the council. However, we are confident that the courts have ample powers to deal with them. The difficulty for the council here was that, as was submitted on behalf of the respondents, the case against these individuals was very thin on the facts. There is no reason why an ASBO should not be made against those against whom the evidence is sufficient, which must be true in many cases. Moreover, there may be exceptional cases where it would be appropriate to grant an injunction.

1.15 Given the findings of the Court of Appeal, we asked the Minister to explain why the existing law was inadequate. Referring to Clause 32(3)(b), we asked for examples of the types of circumstances in which it was envisaged that an injunction would be necessary to protect a respondent from himself. We also asked the Minister to explain why it was proposed to use the civil law to tackle what was effectively criminal behaviour. We also requested an explanation of why the Government had opted not to require those seeking an injunction to explain why criminal prosecution, in an individual case, was impossible.

1.16 Relying on the experience in Birmingham, the Minister replied that an injunction was a “flexible, preventive tool which was able to provide immediate relief from a particular problem without criminalising young people.” He suggested that the use of injunctions in Birmingham had led to a reduction in the incidents of serious gang-related crime. During the PBC, the Minister referred to the Court of Appeal judgment and explained why, in the Government’s view, the provisions were necessary:

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33 Ibid.
34 Ibid.
35 Ibid, para. 68.
37 Ibid, Ev 18.
38 Ibid.
The judgment … from the Court of Appeal said that the injunction was being used to tackle antisocial behaviour, rather than violent behaviour. Anti-social behaviour orders tackle antisocial behaviour, but injunctions can be used to tackle violent behaviour,… Essentially, it is about injunctions being used to tackle antisocial behaviour rather than violent behaviour, and the need for Parliament to make it clear that the courts can impose injunctions to tackle gang-related violent behaviour.39

1.17 On Clause 32(3)(b), the Minister suggested during PBC that “the point of the injunction is to protect the individual from themselves … and to prevent the respondent from engaging, assisting or facilitating gang-related violence, and from being a victim of such violence”.40 He provided the example of a gang member putting himself at risk of a reprisal attack, explaining that the Government wanted to prevent gang-related violence for the potential victim as well as the effects on innocent bystanders and further tit-for-tat violence.41

1.18 In our view, the Government has failed to provide a satisfactory explanation of the need for these provisions, including the unusual Clause 32(3)(b) (protecting the respondent from himself). Although the Minister points anecdotally to the experiences in Birmingham as demonstrating the beneficial effects of injunctions against alleged gang members, the Government has not published any statistically robust evidence which shows why the existing law is inadequate. As the Court of Appeal in Shafi concluded, a range of powers already exists to deal with gangs, including the criminal law, anti-social behaviour orders and injunctions in exceptional circumstances. In our view, the Government has not made the case for Part 4 of the Bill.

1.19 The Minister told us that using the criminal law to deal with gang-related violence remained the preferred option.42 However, he did not go so far as to rule out seeking an injunction against an individual as a precursor to criminal proceedings. Instead he stated that “an injunction provides a first step to reducing gang behaviour while evidence of criminality is sought”.43 The Minister suggested that injunctions would not normally be sought against people where the criminal justice system is engaged. However, he said that the Government considered that it was not advisable to make it a pre-requisite that the Crown Prosecution Service (CPS) gives an explanation as to why it was impossible to charge an individual as: it may be at the initial stages of a police investigation; further investigation may be required or the CPS may have decided not to charge but might review that decision at a later date.44 In those circumstances, the Minister told us:

We do not feel that we can properly wait until these processes have been completed in every case as this would result in an ongoing risk to the public in the interim.45

However, the Minister stated that the Government was clear that injunctions should not short circuit the criminal justice process and safeguards and that statutory guidance would be issued to make clear that the criminal justice system should be used where possible.46

39 PBC, 26 February 2009, cols 593-594.
40 PBC, 26 February 2009, col 597.
42 Ibid. See also PBC, 26 February 2009, col 589.
43 Ibid.
44 Ibid.
45 Ibid.
46 Ibid.
1.20 In previous reports, we have drawn attention to the unsustainability in the long term of resort to methods of control which are outside of the criminal process and which avoid the appropriate standards of fairness.\(^{47}\) We are concerned that the introduction of gangs injunctions represents yet another step in this direction. We note that one of the possible terms in the indicative list would prohibit an individual from using the internet to facilitate or encourage violence.\(^{48}\) In our view, the civil law is an inappropriate tool to deal with what is effectively criminal behaviour. Whilst we are pleased to note the Government’s commitment to the use of the criminal law as “the preferred option”, we are concerned that the Bill does not make this explicit and that there are no safeguards on the face of the Bill to ensure that this occurs. In particular, there is no requirement for those seeking an injunction to demonstrate that criminal prosecution had been considered as an option. We do not consider that an issue of such importance, and with such serious consequences for the individual, should be left to guidance, but instead should be made explicit on the face of the Bill. We recommend that the Bill be amended to impose an express duty on the applicant for a gangs injunction, throughout the period during which the injunction has effect, to ensure that the question of whether there is a reasonable prospect of successfully prosecuting the subject of the injunction for a gang-related violence offence is kept under review at least every 3 months. We suggest an amendment below:

Page 26, line 5, \([\text{Clause 32}]\), leave out “two” and insert “four”.

Page 26, line 13, \([\text{Clause 32}]\), at end insert –

“(3A) The third condition is that the applicant has demonstrated that prosecution of the respondent for a criminal offence was considered but not proceeded with.”

**Children and young people**

1.21 During the PBC, the Minister suggested that Part 4 injunctions would not be practically enforceable against under 18 year olds. He quoted from legal opinion obtained by the Government which stated:

> This injunction can apply to under 18s. However, injunctions must be enforceable and it is unlikely in practice that this would be enforceable for under 18s because the court cannot fine someone without a source of income (and most gang members will not have a legitimate source of income). Nor can it sentence an under 18 to detention in a YOI for a civil contempt of court.\(^{49}\)

1.22 However, the Minister also explained that he had asked his officials to work with other Departments to:

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\(^{44}\) Ibid.


\(^{48}\) Clause 33(2)(e).

\(^{49}\) PBC, 26 February 2009, col 582.
… see whether we can amend how civil injunctions work to enable the provision to be used for under-18s. We should find a way, no matter how difficult or controversial, to legislate and create a civil preventive tool that prevents a 16-year old from going to an area, wearing colours, associating with others or being used by people over 18 to do their errands or dirty work.50

1.23 In correspondence with us, the Minister confirmed that the Government does not intend to amend this Bill to cover children and young people explicitly.51 We asked the Minister to explain what evidence existed of the inadequacy of other civil orders such as ASBOs to deal with gang-related violence by children and young people, and why new orders to deal with them are necessary.52 The Minister told us that the Government appreciates that there are “difficulties and sensitivities” involved in dealing with children and young people involved in gang-related violence, and that cross-departmental discussions are being held to carefully consider the options available. However, beyond pointing to the experience in Birmingham, the Minister did not provide us with the evidence we had requested of the inadequacy of other measures to deal with the problems raised by the Government.53

1.24 We welcome the Government’s commitment not to amend the current Bill so as to cover children and young people explicitly. However, we do not agree with the Government’s contention that Part 4 will not be applied to children or young people. Whilst the majority of young people would not have the means to pay a fine for breach of an injunction, there are some young people who may be able to do so. It is unclear whether young people with assets may therefore be targeted by these provisions. If the Government does not wish these provisions to be applied to children, we recommend that the Bill be amended to say so directly, and to set a minimum age limit for respondents. We suggest an amendment below:

Page 26, line 13, [Clause 32], at end insert –

“(3B) The fourth condition is that the respondent is aged 18 or over.”

1.25 In addition, we are concerned by the Government’s ongoing discussions as to whether civil injunctions can be amended to apply to children and young people. The Court of Appeal in Shafi made clear that the authorities have ample powers to deal with this behaviour. In particular, it drew comparisons between the injunctions which were sought in that case and ASBOs in identical or nearly identical terms being sought against those under the age of 18. The Court was quite clear that, in those circumstances, it was inappropriate for courts to grant injunctions where ASBOs could be made. We therefore do not understand why the Government considers additional provisions to be necessary to deal with the particular position of children and young people. In addition, given the comments of the Court of Appeal, we are doubtful whether further legislation in this area would be compatible with the Court’s judgment.

50 PBC, 26 February 2009, col 566.
52 Ibid, Ev 16.
Applicable standards of due process

1.26 The Bill proposes that the civil standard of the balance of probabilities will apply to the grant of gangs injunctions. A court must be satisfied (1) on the balance of probabilities that the respondent has engaged in, or has encouraged or assisted, gang-related violence and (2) that it is necessary to grant the injunction to prevent the respondent from engaging in, or encouraging or assisting gang-related violence and/or to protect the respondent from gang-related violence.\(^{54}\)

1.27 In relation to interim injunctions, a much simpler test is envisaged. The court does not have to be satisfied of the first condition above. The tests to be applied depend on whether or not the respondent is given notice of an application for an interim injunction. If the respondent is given notice, the court may grant the interim injunction if it “thinks that it is just and convenient to do so”.\(^{55}\) For without notice applications, the court may grant the interim injunction “if it thinks that it is necessary to do so”.\(^{56}\)

1.28 Breach of an injunction is a civil offence which will be treated as civil contempt of court, punishable by a fine or imprisonment. Breach must be proved to the criminal standard of beyond reasonable doubt, although no criminal conviction flows from it.\(^{57}\)

1.29 In the leading ASBO case of *R (McCann) v Crown Court at Manchester*,\(^{58}\) the House of Lords upheld the Government’s argument that proceedings leading to the making of an ASBO do not involve the determination of a criminal charge for the purposes of Article 6 ECHR. It held that proceedings for ASBOs were civil, not criminal;

b) There was no formal accusation of a breach of criminal law;

c) They were initiated by a civil complaint;

d) It was unnecessary to establish criminal liability;

e) The true purpose of the proceedings was preventive;

f) The making of an ASBO was not a conviction or condemnation that a person was guilty of an offence;

g) Hearsay evidence was admissible.

1.30 Although the House of Lords held that proceedings for an ASBO were civil not criminal, they also held that they should carry the criminal standard of proof. In all cases in which an ASBO was applied for, magistrates should apply the criminal standard of proof: that is, they must be *sure* that the individual in question has acted in an anti-social manner before they can make an order.\(^{59}\)

1.31 We had particular concerns about the Government’s proposed civil standard of proof. We asked the Minister to explain why it did not consider that criminal fairness guarantees

\(^{54}\) Clause 32(3).
\(^{55}\) Clause 38(2).
\(^{56}\) Clause 39(2).
\(^{57}\) Col. 592, 26.2.09.
\(^{58}\) [2003] 1 AC 787.
\(^{59}\) Ibid, paras 37 (Lord Steyn) and 83 (Lord Hope).
are appropriate, given the criminal nature of the underlying allegations, the breadth of the requirements and/or restrictions that may be imposed and the indefinite duration of the proposed injunctions. We also asked whether the Government hoped to use the gangs injunctions to avoid applicants having to prove their case to an enhanced civil standard, as required by McCann, in relation to applications for ASBOs.

1.32 In reply, the Minister noted that the proposed injunctions were civil, and that the burden of proof should therefore be the civil balance of probabilities. He suggested that just because criminal activity is alleged to have taken place, this did not make the proposed injunctions criminal. He stated that courts were well versed in using injunctions where allegations of some criminal behaviour arose. He also relied, as evidence of the Government’s awareness of the need to ensure safeguards, on the proposals for a right of appeal, the possibility to apply to vary or discharge injunctions and the fact that courts may set review hearings. In addition, he suggested that there was “only one civil standard of proof”, that the proposed injunctions were distinguishable from ASBOs as breach of an injunction was not a criminal offence and that any overlap with ASBOs was minimal, as the gangs injunctions should not be used for anti-social behaviour.

1.33 We consider the proposed gangs injunctions to be very similar to anti-social behaviour orders. The analogy with ASBOs is particularly acute, given the judgment of the Court of Appeal, which recognised that ASBOs in identical or almost identical terms could be sought. In some respects, gangs injunctions go further, both in terms of the seriousness of the conduct in which the individual must have been involved and in the severity of the possible requirements and restrictions which can be imposed, which are inexhaustively defined and of indefinite duration. Whilst the Court of Appeal in Shafi agreed with the Government’s contention that there was only one civil standard of proof, this is not relevant. The proposed injunctions are identical to or more severe than ASBOs which require proof on the criminal standard that the individual has behaved in an anti-social manner. We recommend that Clause 32(2) be amended to require the court to be satisfied beyond reasonable doubt that the respondent has engaged in, or encouraged or assisted, gang-related violence. This would be consistent with the House of Lords’ decision in McCann and the Court of Appeal in Shafi. We suggest an amendment below:

Page 26, line 6, [Clause 32], leave out “on the balance of probabilities” and insert “beyond reasonable doubt.”

1.34 We also question the proposed threshold for the grant of without notice interim injunctions which is, in our view, too low. On the Government’s case, there may be circumstances in which it may be necessary, for reasons of urgency, to grant an interim injunction on a without notice basis, although we welcome the Government’s stated intention that without notice interim injunctions are to be used sparingly. We recommend that the Bill be amended to make clear that an interim injunction should

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61 Ibid.
62 Op Cit, para. 53.
only be granted without notice being given to the respondent where it is both urgent and necessary to do so. We suggest an amendment below:

Page 29, line 11, [Clause 39], after “is” insert “urgent and”.

**Proportionality**

1.35 We asked why the Government considered it to be necessary and proportionate to permit injunctions of indefinite duration and whether it had considered setting out, on the face of the Bill, the maximum duration of an individual injunction. The Minister said that the Government had considered this possibility carefully but had concluded that indefinite injunctions might be necessary for some respondents. According to the Minister, “it may not be possible, at the time of granting the full injunction, to assess in any accurate sense how the behaviour of the respondent may change or develop.” The Minister also expressed concerns that if injunctions of maximum duration might be sought without consideration being given to the merits of the individual case. In addition, he was concerned that injunctions could not be extended at the end of their maximum length, even if it were necessary to do so. On this basis, the Minister stated that the Government was satisfied that “leaving the question of duration to the courts is both preferable and reasonable, thereby ensuring that applicants and courts consider in each case what duration is really warranted.”

1.36 The Minister suggested that individual rights were safeguarded by permitting applications by either party to vary or discharge an injunction and the holding of review hearings by the court. Review hearings are not mandatory, but may be ordered by the court. During the PBC, the Minister opined that:

> It is unlikely that the courts will grant an order with indefinite conditions without setting a review hearing. The guidance will also encourage the setting of review hearings for longer or indefinite injunctions.

1.37 We asked the Minister whether the Government had considered specifying a maximum period by which a review hearing must take place, and if so, why it had rejected this approach. In the Minister’s view, courts are best placed to determine the appropriate system of reviews and that setting a time limit would “tie[...] the courts’ hands in a way which is inconsistent with the purpose of the flexibility of these injunctions.” He suggested that time limits for reviews could encourage courts to grant injunctions for the maximum time permitted before a review was required or could overburden courts with

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67 Ibid.
68 Ibid.
69 Ibid.
70 Clause 34(4).
71 PBC, 26 February 2009, col 597.
73 Ibid, Ev 18.
unnecessary hearings.\textsuperscript{74} He state that the Government’s “strong preference” was to set these matters out in guidance to ensure flexibility.\textsuperscript{75}

1.38 As for interim injunctions, we also asked the Government why it did not propose to subject them to a maximum time limit before they would be automatically discharged if not brought to the court for a full application.\textsuperscript{76} The Minister suggested in correspondence that this was an area which was “too subjective to be governed by statutory rules.” In his view, the courts were best placed to decide whether an interim injunction should be granted and for how long. He referred to the fact that some evidence may take time to obtain and that, as some courts were very busy, the Government did not wish to set unreasonable time limits.\textsuperscript{77}

1.39 We have considered examples of similar injunction or order making powers. ASBOs may be of indefinite duration, but are subject to a minimum length of two years.\textsuperscript{78} Violent Offender Orders (VOOs), which we considered during the passage of the Criminal Justice and Immigration Bill last year, are also subject to a minimum 2 year and maximum 5 year period, with the possibility of renewal.\textsuperscript{79} As originally drafted, interim VOOs (IVOOs) were proposed to be subject to a four week maximum period, although could be renewed an unlimited number of times. We recommended that the Bill be amended to reduce the maximum length of an IVOO to a more limited period than the four weeks proposed and to provide that IVOOs be non-renewable.\textsuperscript{80} In the event, the Criminal Justice and Immigration Act 2008 was amended by the Government during its passage through Parliament to remove the maximum length of IVOOs and to prevent their renewal. In our continued scrutiny of control orders, we recommended that there ought to be a maximum limit on the duration of a control order, and Parliament should debate what that limit should be.\textsuperscript{81}

1.40 We accept that the question of whether there should be a maximum limit on the duration of a gangs injunction is a difficult one. However, we are unconvinced by the Government’s arguments as to why injunctions of indefinite duration are necessary. For example, justifying the need for indefinite injunctions, the Government told us that it would be difficult for applicants or the courts to assess how an individual’s behaviour might change over time. In our view, such a problem could be resolved by the applicant seeking to vary an injunction to take account of any future changes, and the court holding a review hearing at which the respondent could make submissions. The Government assert that they are concerned that having a maximum duration for a gangs injunction might lead to applicants seeking injunctions for the maximum period without regard to the individual circumstances of the case. Alternatively, in our view, the availability of a gangs injunction for a finite period might also serve to focus the efforts of investigators to obtain material

\textsuperscript{74} Ibid.
\textsuperscript{75} Ibid.
\textsuperscript{76} Ibid, Ev 16.
\textsuperscript{77} Ibid, Ev 18.
\textsuperscript{78} Section 1(7) Crime and Disorder Act 1998.
\textsuperscript{79} Section 98(1)(b) Criminal Justice and Immigration Act 2008.
\textsuperscript{80} Fifth Report of Session 2007-08, Legislative Scrutiny: Criminal Justice and Immigration Bill, HL Paper 37, HC 269, para 1.99.
which can be used as evidence in a criminal prosecution rather than rely on the indefinite availability of a gangs injunction.

1.41 We do not believe that it is sufficient to rely on the courts to ensure that the operation of an individual gangs injunction is not indefinite or so intrusive that it breaches human rights obligations. Having considered comparable powers and the Government’s arguments on the proposed injunctions, we are in favour both of a maximum limit on the duration of an individual gangs injunction and of a prohibition on its renewal after the expiry of the maximum period. These limits would operate both as an important safeguard of the right to respect for private and family life (Article 8 ECHR) of the individuals concerned, and as a discipline on the investigative and enforcement authorities to find material capable of being the basis for a criminal prosecution within a reasonable time. Beyond prohibiting severe controls of indefinite duration, however, human rights law does not provide any clear answer as to what that time limit should be. We recommend that Parliament should debate the principle of whether there should be a maximum limit on the duration of a gangs injunction, and if so what that limit should be. We propose an amendment to enable such a debate to take place:

Page 27, line 16, [Clause 34], at end insert –

“(2A) The period specified in subsection (2) above must not exceed three years.

(2B) Injunctions granted under section 32 may not be renewed.”

1.42 In addition, we recommend that the Bill be amended to require courts to specify the length of each term of a gangs injunction, whether interim or full. We also recommend that the Bill be amended to require a court to review any injunction at least annually for the entire duration of the injunction and that both the applicant and the respondent be permitted to attend a review hearing and make submissions. We suggest amendments below:

Page 27, line 14, [Clause 34], leave out from “injunction,” to the end of line 16 and insert “the period for which it shall be in force.”

*Annual review of injunctions*

To move the following clause –

“An injunction granted under section 32 is subject to an annual review hearing by the court, to which the applicant and the respondent shall be permitted to attend and to make written and oral submissions.”

1.43 In relation to interim injunctions however, given the lower threshold before they may be granted and the possibility that they may be made without notice being given to the respondent, we recommend that an individual interim injunction should be subject to a maximum period of four weeks or less and should be non-renewable. We propose an amendment below:

*Interim injunctions: duration*
To move the following clause –

“(1) An interim injunction granted under sections 38 or 39 must include the period for which it shall have effect.

(2) The period specified in subsection (1) above must not exceed four weeks.

(3) Interim injunctions granted under sections 38 or 39 may not be renewed.”
Conclusions and recommendations

Gangs injunctions

1. We are grateful to the Minister for his full and timely response. However, we express our concern that these provisions, which are highly significant for individual liberties and human rights, were not published at the time that the Bill was published, but only during the latter part of the Committee stage. As we have stated on a number of previous occasions, late publication of clauses makes effective Parliamentary scrutiny, including for compatibility with human rights, much more difficult. (Paragraph 1.5)

Legal certainty

2. We are concerned that the power to interfere with various Convention rights by imposing a gangs injunction is insufficiently defined in law to satisfy the requirement of legal certainty which is also a fundamental feature of human rights law, including the ECHR. “Gang” is not a precise or legal term. We are concerned at its potentially wide application in the future beyond the category of people currently envisaged to be covered and the broad discretion which it gives to those seeking applications and the courts as to how the term is interpreted. We consider that, in the interests of legal certainty, the term should be defined in the Bill. If the Government continues to propose only to deal with the definition in guidance, we recommend that such guidance:

- be clear and detailed;
- setting out the boundaries of the term, including those groupings of individuals which the term will not encompass (such as protesters);
- be regularly reviewed and updated (at least annually) to take account of changing circumstances and evolving caselaw;
- be published in draft alongside the Bill as it goes through its remaining Parliamentary stages.

In correspondence with us, the Government only agreed to publish the draft guidance before the commencement of the Act. It appears to be backtracking on its commitment in PBC to allow Parliament to scrutinise the draft guidance before the Act comes into force. We urge the Government to reconsider. Given the significant issues which the guidance is intended to cover, it is vital for effective scrutiny for Parliament to have an opportunity to consider both the Act and the draft guidance in order to ascertain how the two will operate in practice and whether, taken together, they are compatible with human rights standards. We propose an amendment to the Bill. (Paragraphs 1.10 and 1.11)

3. In order to ensure legal certainty and protection for individual rights, we recommend that the Bill be amended to set out an exhaustive list of prohibitions and requirements which may be imposed. In the event of changes in the future,
amendments could be proposed to Parliament in subsequent legislation. (Paragraph 1.13)

**Necesstiy**

4. In our view, the Government has failed to provide a satisfactory explanation of the need for these provisions, including the unusual Clause 32(3)(b) (protecting the respondent from himself). Although the Minister points anecdotally to the experiences in Birmingham as demonstrating the beneficial effects of injunctions against alleged gang members, the Government has not published any statistically robust evidence which shows why the existing law is inadequate. As the Court of Appeal in *Shafi* concluded, a range of powers already exists to deal with gangs, including the criminal law, anti-social behaviour orders and injunctions in exceptional circumstances. In our view, the Government has not made the case for Part 4 of the Bill. (Paragraph 1.18)

5. In previous reports, we have drawn attention to the unsustainability in the long term of resort to methods of control which are outside of the criminal process and which avoid the appropriate standards of fairness. We are concerned that the introduction of gangs injunctions represents yet another step in this direction. We note that one of the possible terms in the indicative list would prohibit an individual from using the internet to facilitate or encourage violence. In our view, the civil law is an inappropriate tool to deal with what is effectively criminal behaviour. Whilst we are pleased to note the Government’s commitment to the use of the criminal law as “the preferred option”, we are concerned that the Bill does not make this explicit and that there are no safeguards on the face of the Bill to ensure that this occurs. In particular, there is no requirement for those seeking an injunction to demonstrate that criminal prosecution had been considered as an option. We do not consider that an issue of such importance, and with such serious consequences for the individual, should be left to guidance, but instead should be made explicit on the face of the Bill. We recommend that the Bill be amended to impose an express duty on the applicant for a gangs injunction, throughout the period during which the injunction has effect, to ensure that the question of whether there is a reasonable prospect of successfully prosecuting the subject of the injunction for a gang-related violence offence is kept under review at least every 3 months. (Paragraph 1.20)

**Children and young people**

6. We welcome the Government’s commitment not to amend the current Bill so as to cover children and young people explicitly. However, we do not agree with the Government’s contention that Part 4 will not be applied to children or young people. Whilst the majority of young people would not have the means to pay a fine for breach of an injunction, there are some young people who may be able to do so. It is unclear whether young people with assets may therefore be targeted by these provisions. If the Government does not wish these provisions to be applied to children, we recommend that the Bill be amended to say so directly, and to set a minimum age limit for respondents. (Paragraph 1.24)
7. In addition, we are concerned by the Government’s ongoing discussions as to whether civil injunctions can be amended to apply to children and young people. The Court of Appeal in *Shafi* made clear that the authorities have ample powers to deal with this behaviour. In particular, it drew comparisons between the injunctions which were sought in that case and ASBOs in identical or nearly identical terms being sought against those under the age of 18. The Court was quite clear that, in those circumstances, it was inappropriate for courts to grant injunctions where ASBOs could be made. We therefore do not understand why the Government considers additional provisions to be necessary to deal with the particular position of children and young people. In addition, given the comments of the Court of Appeal, we are doubtful whether further legislation in this area would be compatible with the Court’s judgment. (Paragraph 1.25)

**Applicable standards of due process**

8. We consider the proposed gangs injunctions to be very similar to anti-social behaviour orders. The analogy with ASBOs is particularly acute, given the judgment of the Court of Appeal, which recognised that ASBOs in identical or almost identical terms could be sought. In some respects, gangs injunctions go further, both in terms of the seriousness of the conduct in which the individual must have been involved and in the severity of the possible requirements and restrictions which can be imposed, which are inexhaustively defined and of indefinite duration. Whilst the Court of Appeal in *Shafi* agreed with the Government’s contention that there was only one civil standard of proof, this is not relevant. The proposed injunctions are identical to or more severe than ASBOs which require proof on the criminal standard that the individual has behaved in an anti-social manner. We recommend that Clause 32(2) be amended to require the court to be satisfied beyond reasonable doubt that the respondent has engaged in, or encouraged or assisted, gang-related violence. This would be consistent with the House of Lords’ decision in *McCann* and the Court of Appeal in *Shafi*. (Paragraph 1.33)

9. We also question the proposed threshold for the grant of without notice interim injunctions which is, in our view, too low. On the Government’s case, there may be circumstances in which it may be necessary, for reasons of urgency, to grant an interim injunction on a without notice basis, although we welcome the Government’s stated intention that without notice interim injunctions are to be used sparingly. We recommend that the Bill be amended to make clear that an interim injunction should only be granted without notice being given to the respondent where it is both urgent and necessary to do so. (Paragraph 1.34)

**Proportionality**

10. We do not believe that it is sufficient to rely on the courts to ensure that the operation of an individual gangs injunction is not indefinite or so intrusive that it breaches human rights obligations. Having considered comparable powers and the Government’s arguments on the proposed injunctions, we are in favour both of a maximum limit on the duration of an individual gangs injunction and of a prohibition on its renewal after the expiry of the maximum period. These limits
would operate both as an important safeguard of the right to respect for private and family life (Article 8 ECHR) of the individuals concerned, and as a discipline on the investigative and enforcement authorities to find material capable of being the basis for a criminal prosecution within a reasonable time. Beyond prohibiting severe controls of indefinite duration, however, human rights law does not provide any clear answer as to what that time limit should be. We recommend that Parliament should debate the principle of whether there should be a maximum limit on the duration of a gangs injunction, and if so what that limit should be. (Paragraph 1.41)

11. In addition, we recommend that the Bill be amended to require courts to specify the length of each term of a gangs injunction, whether interim or full. We also recommend that the Bill be amended to require a court to review any injunction at least annually for the entire duration of the injunction and that both the applicant and the respondent be permitted to attend a review hearing and make submissions. (Paragraph 1.42)

12. In relation to interim injunctions however, given the lower threshold before they may be granted and the possibility that they may be made without notice being given to the respondent, we recommend that an individual interim injunction should be subject to a maximum period of four weeks or less and should be non-renewable. (Paragraph 1.43)
Annex: Proposed Committee Amendments

Legal certainty

Page 31, line 5, \textit{Clause 45} at end insert-

“(2A) Before publishing or revising guidance issued under this section, the Secretary of State must publish its proposals in draft and consult:

(a) the Lord Chief Justice; and

(b) any other person whom the Secretary of State considers to be appropriate.

Necessity

Page 26, line 5, \textit{Clause 32}, leave out “two” and insert “four”.

Page 26, line 13, \textit{Clause 32}, at end insert –

“(3A) The third condition is that the applicant has demonstrated that prosecution of the respondent for a criminal offence was considered but not proceeded with.”

Children and young people

Page 26, line 13, \textit{Clause 32}, at end insert –

“(3B) The fourth condition is that the respondent is aged 18 or over.”

Applicable standards of due process

Page 26, line 6, \textit{Clause 32}, leave out “on the balance of probabilities” and insert “beyond reasonable doubt.”

Page 29, line 11, \textit{Clause 39}, after “is” insert “urgent and”.

Proportionality

Page 27, line 16, \textit{Clause 34}, at end insert –

“(2A) The period specified in subsection (2) above must not exceed three years.

(2B) Injunctions granted under section 32 may not be renewed.”

Page 27, line 14, \textit{Clause 34}, leave out from “injunction,” to the end of line 16 and insert “the period for which it shall be in force.”

Annual review of injunctions

To move the following clause –
“An injunction granted under section 32 is subject to an annual review hearing by the court, to which the applicant and the respondent shall be permitted to attend and to make written and oral submissions.”

*Interim injunctions: duration*

To move the following clause –

“(1) An interim injunction granted under sections 38 or 39 must include the period for which it shall have effect.

(2) The period specified in subsection (1) above must not exceed four weeks.

(3) Interim injunctions granted under sections 38 or 39 may not be renewed.”
Draft Report (Legislative Scrutiny: Policing and Crime Bill (gangs injunctions)), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.43 read and agreed to.

Annex read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Fifteenth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

[Adjourned till Tuesday 5 May at 1.30pm.]
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