House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill

Fourth Report of Session 2013–14

HL Paper 56
HC 713

Joint Committee on Human Rights

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Contents

Report

Summary

The Anti-social Behaviour, Crime and Policing Bill was introduced in the House of Commons on 9 May 2013. Its Report Stage in the Commons is scheduled for 14 and 15 October. It is a substantial Bill containing many provisions with significant human rights implications including in particular, those concerning anti-social behaviour, forced marriage, powers to stop, question, search and detain at ports and compensation for miscarriages of justice.

Information provided by the Government

The Government provided a detailed and thorough ECHR memorandum and supplementary ECHR memoranda in relation to Government amendments. We are grateful for the ways in which the Bill team has facilitated our scrutiny, subject to three qualifications. First, we doubt whether the mechanisms for ensuring that a systematic analysis of the impact of laws and policies on children's rights is carried out are yet embedded across Whitehall. We repeat our call for the Government to reassure Parliament that in future it will conduct a thorough assessment of the impact of legislation on the rights of children under the UN Convention on the Rights of the Child before the legislation is introduced. We propose to raise with the Children's Commissioner the question of what can be done, in practical terms, to accelerate the Government's progress towards implementing its undertaking to Parliament of nearly three years ago.

Second, the number of significant Government amendments to the Bill with potentially significant human rights implications has made our scrutiny of the Bill's human rights compatibility more difficult, an issue we are pursuing with the Leader of the House of Commons.

Third, the Government has not always provided us with information it has promised in sufficient time to enable us to scrutinise it adequately. We call on the Government, once again, to ensure in future that we are provided with the information we request in time to inform our scrutiny of Government Bills.

Anti-social behaviour (Parts 1 to 6)

Parts 1 to 6 of the Bill reform the range of measures that currently deal with anti-social behaviour. Preventive measures against anti-social behaviour are, in principle, a welcome fulfilment of the positive obligation on the state to protect people against having their rights interfered with by others. This is the important context in which we consider the human rights implications of the anti-social behaviour provisions of the Bill.

Injunctions to prevent nuisance and annoyance (Part 1)

In this Report, we consider the human rights compatibility of the new civil injunction to prevent nuisance and annoyance ("IPNA"). The Bill provides that an IPNA may be imposed if the court considers it "just and convenient" to prevent anti-social behaviour. This is a lower test than the test of "necessity", as required by human rights law. We also consider that the new IPNA definition of anti-social behaviour is broad and unclear. In addition, the current drafting of the Bill in relation to the prohibitions and requirements that can be

attached to an injunction is far too broad. Furthermore, we are not persuaded as to why it is necessary to expressly provide that prohibitions and requirements in an IPNA must, "so far as practicable", avoid any conflict with religious beliefs because the freedom to hold religious beliefs is an absolute right that cannot be interfered with. In addition, the power to exclude a person from his or her home through the use of an IPNA is a severe measure. Further provision is required to ensure that this power is only used when necessary.

As IPNAs can be imposed on children as young as ten, we also scrutinised the provisions to consider their impact on the specific rights of children. In order to reduce the potential negative impact on children of the IPNA measures, we recommend that the courts must take into account the best interests of the child as a primary consideration in any IPNA legal proceedings.

Criminal Behaviour Orders (Part 2)

We recommend that the appropriate standard of proof required to establish anti-social behaviour for the purposes of a Criminal Behaviour Order ("CBO") should be made clear on the face of the Bill. The Bill provides that a CBO may be imposed if the court considers it "will help in preventing" anti-social behaviour. We do not consider this to be an appropriate or clear legislative test, and recommend that it is amended. As with IPNAs, we consider that the broad and open-ended definition of the prohibitions and positive requirements that may be included in a CBO do not satisfy the requirement of legal certainty, and recommend that the Bill is amended to achieve greater certainty.

Police Dispersal Powers (Part 3)

Part 3 of the Bill creates a new police dispersal power to direct people away from an area in order to prevent anti-social behaviour. We welcome the Government's amendment to make clear that the authorising police officer's belief must be "reasonable" in order to use the dispersal power. In our view, this is essential to ensure that any use of the powers is properly circumscribed. Furthermore, it is essential that the dispersal power is only used when necessary and proportionate. It is important that the dispersal power is not used for any purpose other than to address the anti-social behaviour defined in the Bill. For example, it must not be used in a way that targets peaceful assemblies. We also note that this power is likely to affect children disproportionately, and impact particularly on their rights to freedom of movement and assembly.

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

While we recognise the seriousness of riot-related offences, we are not persuaded by the Government's justification for the new discretionary ground of possession for riot-related anti-social behaviour. We are concerned about its potential serious implications for family members, and consider that it may disproportionately affect women and children. We also consider that it amounts to a punishment rather than a genuine means of preventing harm to others. We therefore recommend that this provision is removed from the Bill.

Forced marriage (Part 9)

We cautiously accept the Government's reasoning for the criminalisation of forced marriage. However, it is essential that criminalisation is accompanied by additional

measures to ensure that the new law is effectively implemented and that it is not counter-productive for victims. Careful implementation and monitoring will be required.

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

We are disappointed by the Government's refusal to publish the responses to its consultation on Schedule 7 in full, in light of our recommendation in our Report on the Justice and Security Green Paper that in future such consultations should make clear that responses will be published unless confidentiality is expressly sought.

We also regret the lack of opportunity for pre-legislative scrutiny of the changes to Schedule 7 powers. The Independent Reviewer has expressed concern about the operation of these powers in three consecutive reports, and in our view the publication of draft clauses would have provided more opportunity for thorough parliamentary scrutiny of the Government's proposals.

We welcome the improvements to the powers in Schedule 7, which narrow the very wide scope of the powers and so reduce the potential for them to be found incompatible with Convention rights. In our view, however, a number of significant human rights compatibility concerns remain about the Schedule 7 powers, even after these changes have been made.

In our view, a statutory power to stop, question and search travellers at ports and airports, without reasonable suspicion, is not inherently incompatible with the right to liberty in Article 5 ECHR or the right to respect for private life in Article 8 ECHR. The Government has clearly made out a case for a without suspicion power to stop, question and search travellers at ports and airports, given the current nature of the threat from terrorism, the significance of international travel in the overall threat picture, and the evidence seen by the Independent Reviewer demonstrating the utility of non-suspicion stops at ports in protecting national security.

We are not persuaded that the Government has demonstrated the necessity for the more intrusive powers (to detain for up to 6 hours; to access, search, seize, copy and retain all the information on personal electronic devices such as mobile phones, laptops and tablets; and to take and retain fingerprints and DNA samples without consent) being exercisable without reasonable suspicion. In our view, the legal framework should distinguish between powers which can be exercised without reasonable suspicion, such as the power to stop, question, request documentation, and physically search persons and property, and more intrusive powers such as detention, strip searching, searching the contents of personal electronic devices, the taking of biometric samples, seizure and retention of property, including personal information on personal electronic devices. In our view, the latter set of more intrusive powers should be exercisable only if the examining officer reasonably suspects that the person is or has been involved in terrorism.

We therefore recommend that the Bill be amended to introduce a reasonable suspicion requirement before the more intrusive powers under Schedule 7 are exercisable. We recommend that the reasonable suspicion threshold be introduced at the point at which the person being examined is formally detained, which the Bill requires to happen after an hour of questioning.

We consider that the current powers to access, search, examine, copy and retain data held on personal electronic devices, such as mobile phones, laptops and tablets, are so wide as not to be "in accordance with the law". In our view the powers to search personal electronic devices are so intrusive, given the nature of the information held on those devices, that they should only be exercisable on reasonable suspicion. We also call on the Government to explain to Parliament during debates on the Bill why the provisions in s. 49 of RIPA, concerning the disclosure of passwords to electronic information, do not apply in the context of border searches.

We also recommend that the Government bring forward proposals which would introduce adequate safeguards for categories of material, such as material subject to legal professional privilege, parliamentary privilege or which would disclose a journalist's sources, which enjoy protection under other legal frameworks such as the Police and Criminal Evidence Act.

We recommend that the Government discuss the draft revised Code of Practice with the Equality and Human Rights Commission to identify whether there is scope for further guidance which will make it less likely in practice that the powers will be exercised in a way which has an unjustifiably disproportionate impact on Muslims and other minority groups. We also recommend that the revised Code should provide that records of examinations should include the self-declared religion of the person examined, if given, as well as their self-declared ethnicity. We welcome the Government's commitment to amend the Code of Practice to make clear that recording of interviews is best practice where the facilities are available, but note that this is not in fact clear in the current working draft. To ensure that progress is made towards that goal, we recommend that the Bill be amended to require all Schedule 7 examinations at ports to be recorded, to be brought into force on whatever day the Secretary of State appoints by order. This would be in keeping with other changes made by the Bill which remove the distinction between detention at a police station and detention at a port under Schedule 7.

We do not see any reason of principle for taking a different approach in relation to the periodic review of detention under Schedule 7 compared to detention under Schedule 8 of the Terrorism Act 2000. We recommend that the Bill be amended so as to specify the intervals for the review of detention, rather than leave them to be specified in the Code of Practice.

Compensation for miscarriages of justice (Part 12)

In our view, requiring proof of innocence beyond reasonable doubt as a condition of obtaining compensation for wrongful conviction is incompatible with the presumption of innocence, which is protected by both the common law and Article 6(2) ECHR. We recommend that clause 143 be deleted from the Bill because it is on its face incompatible with the Convention.

Miscellaneous

We consider the human rights implications of a variety of measures in the Bill concerning dangerous dogs (Part 7), firearms (Part 8), the powers of the Independent Police Complaints Commission (Part 10) and the retention of personal samples (Part 10). On the last of these, while we note the Bill's proposed safeguards, we recommend additional measures to protect against the potential for prolonged retention of samples, particularly on a precautionary or

speculative basis.

1 Introduction

Background

1. The Anti-social Behaviour, Crime and Policing Bill was introduced in the House of Commons on 9 May 2013.[1] The Bill received its Second Reading in the House of Commons on 10 June 2013[2] and completed its Committee stage on 16 July. Its Report Stage is scheduled for 14 October.

2. The Rt Hon Theresa May MP, Home Secretary, has certified that, in her view, the Bill is compatible with Convention rights.

3. We wrote to the Home Secretary three times concerning different aspects of the Bill: on 26 June concerning Parts 1–10, on 10 July concerning Parts 11 and 12, and on 16 July concerning Part 11. The Government responded by letters dated 16 and 29 July and 7 October. The correspondence is appended to this Report.

4. We received written evidence and representations about the Bill, or specific aspects of it, from a number of people and organisations, including the Office of the Children's Commissioner for England, the Equality and Human Rights Commission, Zin Derfoufi (Research Fellow at the University of Warwick), StopWatch, the JAN Trust, JUSTICE, Fair Trials International, the British Psychological Society, the Criminal Justice Alliance and the Standing Committee on Youth Justice. Copies of all evidence and submissions we received are available on our website.[3] We are grateful to all those who engaged with our scrutiny of the Bill. We have taken all evidence and submissions into account in reaching the conclusions we set out in this Report.

Information provided by the Government

5. The Government published an ECHR memorandum summarising the Government's assessment of the compatibility of the Bill's provisions with the European Convention on Human Rights, which is available on the Bill webpage of the Home Office website.[4] The ECHR Memorandum was published in place of the relevant part of the Explanatory Notes to the Bill, a practice that we encourage as best practice. The Memorandum was prepared jointly by the Home Office, the Department for Communities and Local Government, the Department for Environment, Food and Rural Affairs and the Ministry of Justice and was published at the same time as the Bill itself. The Memorandum is detailed and thorough and we commend the various departments involved for co-ordinating their input into a joint memorandum which has greatly assisted us in our scrutiny of the Bill. The Bill team also made itself available to meet our staff at an early stage in the Bill's passage and has been helpful in responding to queries about the Bill. Supplementary ECHR memoranda were provided in relation to Government amendments to the Bill, concerning the retention

1 HC Bill 7.

2 HC Deb 10 June 2103 c66–128.

3 http://www.parliament.uk/business/comittees-a-z/joint-select/human-rights-committee/legislative-scrutiny-2013-14/anti-social-behaviour-crime-and-policing-bill/

4 https://www.gov.uk/government/organisations/home-office/series/anti-social-behaviour-crime-and-police-bill

of personal samples,[5] powers to seize invalid passports and extradition.[6] We are grateful for the ways in which the Bill team has facilitated our scrutiny, subject to three qualifications.

6. First, many of the Bill's provisions have significant implications for the human rights of children, particularly Parts 1-6 concerning anti-social behaviour and Part 9 concerning forced marriage. The Children's Commissioner has conducted a "Child Rights Impact Assessment" of those Parts of the Bill.[7] The Government, however, does not appear to have carried out any such systematic assessment. The Government undertook on 10 December 2010 to have due regard to the UN Convention on the Rights of the Child when developing law and policy. We have received from the Government memoranda accompanying other Bills which demonstrate that it has honoured that commitment by setting out a detailed analysis of the Bill's compatibility with the UNCRC, most recently in relation to the Children and Families Bill. We did not, however, receive such a memorandum in relation to this Bill, notwithstanding that it has very significant implications for the rights of children.

7. We therefore asked the Government to provide us as soon as possible with a memorandum setting out the Government's analysis of the compatibility of Parts 1 to 6 and 9 of the Bill with the UNCRC, and to include in the memorandum the Government's analysis of the relevance to Parts 1 to 6 of the Bill of any reports of the UN Committee on the Rights of the Child, including its General Comment No. 10 (2007) on Children's Rights in Juvenile Justice and its 2008 Concluding Observations on the UK, and of any other international standards the Government considers relevant such as the UN Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules"). The Government's letter to us dated 16 July did contain detailed analysis of the compatibility of the Forced Marriage provisions (Part 9 of the Bill) with the UNCRC. However, it did not provide any further detail in relation to Parts 1 to 4 of the Bill concerning key anti-social behaviour provisions, particularly the IPNA, CBO and police dispersal power, which have a significant impact on the rights of children, nor did it provide any analysis of the compatibility of the Bill with the other international standards concerning children's rights which we had identified as relevant.

8. **In our Report on the Children and Families Bill in June this year, we said that we looked to the Government to reassure Parliament that it will continue to conduct its own assessment of the impact of laws and policies on children's rights**, in accordance with its undertaking to Parliament on 10 December 2010, and will not leave it to the Office of the Children's Commissioner to do so.[8] **Our experience of scrutinising the current Bill, which has very significant implications for children's rights, does not encourage us to believe that the mechanisms for ensuring that such a systematic analysis is carried out are yet embedded across Whitehall. We repeat our call for the Government to reassure Parliament that in future it will conduct a thorough assessment of the impact of legislation on the rights of children under the UN Convention on the Rights of the Child before any legislation is introduced. We propose to raise with the Children's**

5 Supplementary ECHR Memorandum by the Home Office, 28 June 2013.

6 Supplementary Memorandum by the Home Office, 11 July 2013.

7 http://www.childrenscommissioner.gov.uk/content/publications/content_670

8 Third Report of Session 2013–14, *Legislative Scrutiny: Children and Families Bill; Energy Bill*, HL Paper 29/HC 452, para. 12.

Commissioner the question of what can be done, in practical terms, to accelerate the Government's progress towards implementing its undertaking to Parliament of nearly three years ago.

9. Second, the number of significant Government amendments to the Bill with potentially significant human rights implications has made our scrutiny of the Bill's human rights compatibility more difficult. Although the Government did provide us with supplementary ECHR memoranda in relation to the most significant amendments, which we were grateful to receive, there has not always been as much time as in our view there should be to subject amendments to through and rigorous scrutiny of their human rights compatibility. On 8 October, for example, the eve of our agreeing this Report, the Government tabled amendments to the Bill to reform the civil orders under the Sexual Offences Act 2003. We were provided with a supplementary ECHR memorandum, but had been given no warning in advance that the Government intended to introduce such amendments which clearly have human rights implications. **We are pursuing with the Leader of the House of Commons our concerns about the recurring inadequacy of the time available to scrutinise the human rights compatibility of significant Government amendments to Bills.**

10. Third, the Government has not always provided us with information it has promised in sufficient time to enable us to scrutinise it adequately. In its responses to our questions about Schedule 7 to the Bill, for example, the Government said on 16 July that it would make available to us a draft of the revised Code of Practice for Examining Officers under the Terrorism Act 2000. It also promised on 29 July to provide a memorandum setting out the Government's assessment of the compatibility of the Bill's provision on compensation for miscarriages of justice with the presumption of innocence in Article 6(2) ECHR in light of the judgment of the European Court of Human Rights in *Allen v UK*.[9] **We regret to report that these two significant pieces of further information were only sent to us on 7 October, less than 48 hours before the meeting at which we considered this Report. We have done our best to take account of the further information in this Report, but this is not sufficient time to enable us to do our job of scrutinising legislation for human rights compatibility, and we call on the Government, once again, to ensure in future that we are provided with the information we request in time to inform our scrutiny of Government Bills.**

9 Letter from Damian Green MP dated 29 July 2013.

2 Anti-social Behaviour (Parts 1–6)

11. Parts 1 to 6 of the Bill reform the "toolkit" of measures that currently deal with anti-social behaviour.[10] The Government states that the purpose of these provisions is to "sweep away the existing powers and replace them with a streamlined, flexible framework" to provide a remedy that is timely, effective, easier, quicker and more victim-focused.[11] As such, the measures in Parts 1 to 6 of the Bill seek to fulfil positive obligations which rest on the State under Article 8 ECHR. Simplifying the remedies available against anti-social behaviour, making them speedier to obtain, and broadening their reach, should all provide greater protection against such interferences. Introducing positive requirements into such measures, as well as prohibitions, can also be seen, in principle, as a welcome step in the implementation of the positive obligation on the State to protect people from anti-social behaviour. **Preventive measures against anti-social behaviour are in principle a welcome fulfilment of the positive obligation on the state to protect people against having their rights interfered with by others. This is the important context in which we consider the human rights implications of the anti-social behaviour provisions of the Bill.**

12. Questions inevitably arise, however, about the impact of the measures on other competing rights, including the rights of those who are subjected to such measures to respect for their private and family life, their home, their religious beliefs and practices, their freedom of expression and their freedom of association, as well as their right to a fair hearing. Questions also arise about the implications for the specific rights enjoyed by children, against whom many of these measures are applied. We consider these questions further in this Report.

Injunctions to prevent nuisance and annoyance (Part 1)

13. Part 1 of the Bill introduces Injunctions to Prevent Nuisance and Annoyance ('IPNAs'). IPNAs replace a range of existing anti-social behaviour orders, including the Anti-social Behaviour Order ('ASBO') and the Anti-social Behaviour Injunction ('ASBI').

(a) Children

Move away from automatic criminalisation for breach

14. IPNAs are civil orders, with civil sanctions. Breach of IPNAs will be punishable as contempt of court. Although this is punishable by up to two years imprisonment, it does not result in a criminal record—unlike Anti-social Behaviour Orders. The Government highlighted this in its response to our questions.[12] Compared to ASBOs, which are being replaced, IPNAs carry less risk of the inappropriate criminalisation of children and young people. We welcome the Government's aim of reducing the inappropriate criminalisation

10 Secretary of State for the Home Department, *A plan to fight crime*, 5 October 2010.See House of Commons Library Research paper 13/34, *Anti-social Behaviour, Crime and Policing Bill* (4 June 2013) for information on the history of previous anti-social behaviour measures and a summary the key differences between those measures and the proposals in the Bill.

11 Home Secretary, Second Reading, HC Deb 10 June c68; Letter to the Chair from Jeremy Browne MP, Minister for Crime Prevention, dated 9 May 2013.

12 Letter to the Chair from Damian Green and Jeremy Browne, 16 July 2013, Q. 2

of children and young people. However, a number of significant human rights issues are raised by this Part of the Bill, which we consider below.

Best interests of the child

15. Questions arise as to the compatibility of the following provisions of the Bill with the UN Convention on the Rights of the Child:

— The imposition of civil injunctions on children as young as ten;

— The use of detention as a sanction for breach of an injunction for children aged 14 and over, and the risk that the Bill might lead to children being imprisoned in respect of conduct falling far short of criminal behaviour; and

— The power of the courts to decide whether or not to allow the reporting of a child's case in relation to IPNA proceedings.

16. When considering whether to impose a civil injunction on children aged between 10 to 17 years old, there is no requirement on the face of the Bill to consider the best interests of the child in accordance with Article 3 of the UNCRC.[13] The Children's Commissioner highlighted this:

> "The use of formal orders for children as young as ten years, with no requirement to consider children's best interests, specific needs or learning difficulties, or to demonstrate that all possible alternative routes for addressing problem behaviour have been considered, is not age appropriate and is in breach of the UNCRC requirement that children's best interests must be a primary consideration in decisions affecting them."[14]

17. In relation to the ASBO regime, the UN Committee on the Rights of the Child found that the imposition of ASBOs did not appear to be in the best interests of the child. In the information provided, **the Government has not set out how it will ensure that the best interests of the child are a primary consideration when imposing IPNAs against children. In our view, an express guarantee in the Bill is necessary to ensure that relevant agencies and the courts apply this principle.**

18. In relation to a breach of an injunction, the courts may decide to impose either a supervision order (available for 10–17 year olds) or a detention order (available for children aged 14 and over). A range of measures can be included in supervision orders, such as electronic monitoring, curfews, and specified activities. These measures will not be imposed on adults who breach IPNAs. While some of the positive requirements contained in supervision orders may be trying to address behaviour (e.g. requirements to attend specific activities), there is a risk that children may find it difficult to comply with the requirements and therefore risk breaching the supervision order, which may then lead to further supervision orders being imposed, or a detention order for those aged 14-17.[15] **The**

13 Article 3 provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration

14 OCCE, A Child Rights Impact Assessment of the Anti-Social Behaviour, Crime and Policing Bill, June 2013, para 4.3.1

15 OCCE, A Child Rights Impact Assessment of the Anti-Social Behaviour, Crime and Policing Bill, June 2013, para 4.3.2

use of detention as a sanction for breach of an injunction for children aged 14 and over, including the risk that the Bill might lead to children being imprisoned in respect of conduct falling far short of criminal behaviour, is not in accordance with the UNCRC requirement under Article 37 that children should be imprisoned only for the most serious offences.

19. The Bill provides for a power of the courts to decide whether or not to allow the reporting of a child's case in relation to IPNA proceedings. This is a departure from the normal restriction that applies on the reporting of legal proceedings in relation to children under Section 49 of the Children and Young Persons Act 1933. The Government has said that the decision to name an individual under the age of 18 should be taken by the courts when it is right to do so for the protection of victims and communities.[16] However, the UN Committee on the Rights of the Child found that 'naming and shaming' children subject to ASBOs is in direct conflict with the UNCRC rights to privacy.[17] **We are concerned about the potential impact of reporting on children's privacy rights.**

20. **In order to reduce the potential negative impact of these provisions on children, and in accordance with the UK's obligation under Article 3 UNCRC, we recommend that the Bill is amended to include an express requirement that the courts must take into account the best interests of the child as a primary consideration when deciding whether to impose the following: any injunction; the terms of any prohibition or requirement; sanctions for breach; and when determining reporting of a child's case.** The text of such an amendment is set out below.

New Clause to be inserted in Part 1 of the Bill:

Part 1 in respect of under-18s

Best Interests of the child

The courts must take into account the best interests of the child as a primary consideration when deciding whether to impose the following:

- an injunction;
- the terms of any prohibition or requirement;
- sanctions for breach of an injunction; and
- when determining reporting of a child's case.

(b) Legal certainty

21. The Government states that Part 1 of the Bill may engage Articles 5, 6, 8, 9, 10 and 11.[18] These Convention rights require that any interference must be 'in accordance with the law' or 'prescribed by law'. The effect of this is that any rules interfering with these Convention rights must be sufficiently certain and accessible to allow people to understand what is

16 Government Response to the Home Affairs Committee Twelfth Report of Session 2013–13, page 10

17 Articles 16 and 40(2)(vii); UN Committee on the Rights of the Child, 49th Session, 3 October 2008

18 Anti-social Behaviour, Crime and Policing Bill, Government Memorandum, para 4

expected of them and when an interference will be justified. Legal certainty is also a well established common law legal principle.[19]

22. The IPNA will use a wide definition of anti-social behaviour ("conduct capable of causing nuisance or annoyance to any person"). This definition raises a question as to whether it is sufficiently precise to allow people to understand what is expected of them. It potentially encompasses a very wide range of behaviour. There may also be a risk that the interpretation and application of this definition may not be consistent across the relevant agencies. We wrote to the Government to ask whether this definition is sufficiently precise to satisfy the requirements of legal certainty.

23. The Government's response stated that the meaning of "nuisance and annoyance" is "well known in the county court and is supported by 15 years of case law in our civil legal system". The Government is therefore satisfied that the threshold for the injunction "is not arbitrary, but rather satisfies the common law principles of legal certainty and human rights law".[20]

24. "Nuisance and annoyance" is the definition currently used for the imposition of Anti Social Behaviour Injunctions (ASBIs). However, there are important differences to note between ASBIs and the proposed IPNAs, to which the Government does not refer in its response. The differences are:

— ASBIs apply in the housing context where the conduct must relate to, or affect, the housing management functions of a relevant landlord.[21] It concerns specifically housing-related conduct. The ASBI definition is therefore sufficiently clear in this context, and it is limited in its application and use. By contrast, IPNAs will apply in any context. Therefore, conduct in any situation which is capable of "causing nuisance or annoyance" may be subject to an IPNA.

— Only Local Authorities, Registered Social Landlords and Housing Action Trusts can apply for ASBIs. By contrast, IPNAs are available to a wide range of agencies.[22]

— IPNAs will be able to impose positive requirements as well as prohibitions. Failure to comply with either a positive requirement or a prohibition may amount to a breach of an IPNA.

— Importantly, IPNAs will be available to use against under 18s, and children as young as 10.[23] While the legislation on ASBIs does not explicitly exclude juveniles, the civil courts have no power to imprison children, and they are unlikely to impose a fine on a child. However, breach of an IPNA could result

19 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, HL, at 638 per Lord Diplock

20 Letter from Damian Green and Jeremy Brown to Chair, 16 July 2013, Q. 3

21 s153A Housing Act 1996 (inserted by s13, Anti-social Behaviour Act 2003)

22 While relevant landlords can apply for ASBIs, the police, transport police, local authorities, Transport for London the Environment Agency and NHS Protect in England (and the equivalent body in Wales) will be able to apply for IPNAs. This list is similar to the list of relevant authorities which can currently apply for ASBOs.

23 Clause 11 and Schedule 2 deal with enforcement of breaches for under 18s

in a youth court imposing a supervision order (which is available for children aged 10 or over) or a detention order (which is available for children aged 14 or over).

25. IPNAs will replace Anti Social Behaviour Orders, which define anti-social behaviour as conduct causing (or likely to cause) "harassment, alarm or distress", which is a higher threshold of anti-social behaviour. We asked the Government what would be the disadvantage of using this definition of anti-social behaviour. The Government response stated that the adoption of the "harassment, alarm and distress" definition would "make the evidence gathering process for injunction applications more onerous for agencies and would cause needless delay in stopping problems and protecting victims."[24]

26. **While we acknowledge the practical issues raised by the Government in relation to evidence gathering, we are not satisfied with the Government's response concerning its justification for the use of the ASBI definition of anti-social behaviour in the context of IPNAs. We consider that "conduct capable of causing nuisance or annoyance to any person" is not sufficiently precise to satisfy the requirement of legal certainty required by both human rights law and the common law. We recommend that the Bill be amended to make the test for anti-social behaviour more precise.**

Amendment to Clause 1(2):

Page 1, line 8, after "conduct" insert "that might reasonably be regarded as"

27. The broad and open-ended definition of the prohibitions and requirements that may be included in an injunction, in clause 1(4) of the Bill, also raises questions about legal certainty. An injunction may prohibit the person "from doing anything described in the injunction" and may require the person "to do anything described in the injunction". The only constraint on this broad power is that it must be "for the purpose of preventing the respondent from engaging in anti-social behaviour", which is not very much of a constraint bearing in mind the breadth of the definition of anti-social behaviour (see above). This approach contrasts with the approach taken in the TPIMs legislation, which includes an exhaustive list of the sorts of prohibitions and requirements that can be included in a TPIMs order.

28. We wrote to the Government to ask whether clause 1(4) satisfies the prescribed by law requirement and why it has not taken the approach taken in the TPIMs Act. The Government response stated that it considers it important that the Bill is not "proscriptive so that the restrictions or requirements can be tailored to the individual circumstances of a case and take account of new innovative means of tackling anti-social behaviour." It argues that all requirements in an IPNA are "in accordance with the law" because they "will be made following an order of the court, empowered to do so by legislation." The Government considers that because the purpose of an IPNA is to prevent an individual from engaging in anti-social behaviour, the range of requirements and prohibitions "can be reasonably anticipated and must be justifiable". The Government does not consider that any issue as to a lack of legal certainty arises here. It says that guidance will be issued setting

24 Letter from Damian Green and Jeremy Brown to Chair, 16 July 2013, Q.3

out examples of the prohibitions and positive requirements that could be included in an injunction.

29. The current ASBO legislation contains a similar provision in relation to prohibitions. Section 1C(2) of the Crime and Disorder Act 1998 states that an order can prohibit an offender from doing anything described in the order. This wide power has been the subject of a number of legal challenges, which have established important legal principles concerning the validity of ASBO prohibitions. These principles reflect the legal certainty requirement. The Crown Prosecution Service has also issued detailed guidance to which prosecutors must have regard when drafting prohibition applications.[25]

30. Case law has established the following legal principles in relation to ASBO prohibitions:

- It is necessary to show a link between the anti-social behaviour that the offender has engaged in and the prohibitions that are sought.[26]
- The terms of the order must be precise and easy to understand so that the individual knows exactly what he is prohibited from doing.[27]
- The terms of the order must be reasonable and proportionate, realistic and practical and must be worded in such a way to make it easy to determine and prosecute a breach.[28]
- Generic prohibitions should not be imposed in an order. Prohibitions should identify and prohibit the particular type of anti-social behaviour that gives rise to the necessity of an order.[29]
- A prohibition that interferes with one or more ECHR rights - such as freedom of expression, freedom of assembly and association, or the right to respect for private and family life - may be justifiable, provided it is necessary, prescribed by law, and proportionate.[30]

31. There is no equivalent guidance concerning positive requirements in injunctions, as distinct from negative prohibitions, because these are introduced for the first time by this Bill. It is important to note that the inclusion of positive requirements in a civil order is rare, and a departure from the ASBO regime. The Government's response does not specifically state whether the legal principles which have been established in relation to ASBOs will apply equally to the new IPNA prohibitions and positive requirements.

32. **Bearing in mind the breadth of the Bill's definition of "anti-social behaviour", we consider that the broad and open-ended definition of the prohibitions and positive requirements that may be included in an injunction in clause 1(4) of the Bill does not satisfy the requirement of legal certainty. In order to satisfy that requirement, it is not**

25 http://www.cps.gov.uk/legal/a_to_c/anti_social_behaviour_guidance/#an11

26 *R v Boness* [2005] EWCA Crime 2395

27 *R v Boness* [2005] EWCA Crime 2395

28 *R v Boness* [2005] EWCA Crime 2395

29 *W v DPP* [2005] EWCA Civ 1333 where it was held that a prohibition 'not to commit any criminal offence' was too wide and therefore invalid

30 *Avery, Avery, Nicholson and Medd-Hall* [2009] EWCA Crim 2670

sufficient simply to state that any requirements in an injunction will be contained in an order of the court authorised by statute. The quality of the law which authorises the making of such orders must satisfy minimum standards of foreseeability.

33. **We recommend that the Bill be amended to achieve greater legal certainty on the face of the Bill, by stating that any prohibition or requirement must identify specified actions which are related to the anti-social behaviour that the respondent has engaged or threatened to engage in.** The following amendments to clause 1(4) of the Bill would give effect to this recommendation.

Amendments to clause 1(4)(a)

Page 2, line 1, leave out "doing anything" and insert "specified actions"

Page 2, line 2, after "injunction" insert "which relate to the anti-social behaviour which the respondent has engaged or threatened to engage in"

Amendment to clause 1(4)(b)

Page 2, line 3, leave out "anything" and insert "specified actions"

Page 2, line 3, after "injunction" insert "which relate to the anti-social behaviour which the respondent has engaged or threatened to engage in"

(c) Adequacy of safeguards to ensure necessity and proportionality of interferences

34. Any interference with an individual's Convention rights under Articles 8, 9 (in relation to the right to manifest belief), 10 and 11 must be necessary and proportionate to the legitimate aim it is sought to achieve. However, there is no requirement that the imposition of an IPNA be "necessary" to protect people from anti-social behaviour or that the terms of the injunction be proportionate to the aim of protecting the public. The Home Office draft Guidance, *Reform of anti-social behaviour powers: draft guidance for frontline professionals,* highlights that there is "no need to prove necessity, unlike ASBOs".[31] Instead, an IPNA may be imposed if the court considers it "just and convenient" to grant the injunction in order to prevent anti-social behaviour.[32] A similar issue arises with the use of the word "practicable" in clause 1(5) in order to determine whether prohibitions and requirements in an injunction are justifiable interferences with religious beliefs.

35. We therefore wrote to the Government to ask for its justification for the use of the "just and convenient" and 'practicability' standards set out in clauses 1(3) and 1(5) of the Bill.

36. The Government response relied on section 6 of the Human Rights Act: the courts will exercise the power to impose injunctions, along with any prohibitions or requirements, compatibly with Convention rights, and the Government does not therefore consider that the word "necessary" needs to be used in the legislative tests.

31 Home Office draft Guidance, *Reform of anti-social behaviour powers: draft guidance for frontline professionals*, October 2013, p. 22

32 Clause 1(3) of the Bill

37. **A test of "just and convenient" for the imposition of measures which interfere with Convention rights is not compatible with the ECHR, because it is a considerably lower test than the requisite test of "necessary and proportionate". We do not consider that the Government's reliance on section 6 of the Human Rights Act is a satisfactory response, as Parliament has the opportunity to define the test appropriately on the face of the legislation.**

Amendment to clause 1(3):

Page 1, line 10, leave out "and" and insert ",", and after "convenient" insert "and proportionate"

(d) Absolute right to hold religious beliefs

38. As currently drafted, clause 1(5)(a) provides that prohibitions and requirements in an IPNA must, "so far as practicable", avoid any conflict with the respondent's religious beliefs. We wrote to the Government about the compatibility of this clause with Article 9 ECHR, which permits justifiable interferences with the freedom to manifest one's religion or belief under Article 9(2), but does not permit interferences with the right to hold religious beliefs (which is an absolute right under Article 9(1)). We also asked the Government to explain the purpose of the selective restrictions in clause 1(5): in other words, why is express provision made in relation to certain Convention rights like religious belief, but not for others, such as the right to respect for private life or freedom of association. The Government's response did not engage with this question, but focused instead on the justification for the restriction in clause 1(5)(a) concerning religious belief.

39. The Government's response acknowledged that it is obliged to adhere to the absolute right guaranteed under Article 9(1) in relation to the freedom to hold religious beliefs, and that the manifestation of religious beliefs can be subject to certain restrictions that are in accordance with law and necessary in a democratic society. However, it did not acknowledge that there is an issue with the drafting of the clause, and stated that the courts will interpret clause 1(5) in a Convention-compatible manner.

40. We do not consider that this is a satisfactory response. **In our view, Parliament should ensure that legislative provisions are compatible with Convention rights, rather than rely on the courts to render laws compatible by interpretation. We are not persuaded as to why it is necessary to single out religious belief in clause 1(5), particularly as the freedom to hold religious beliefs is an absolute right. We recommend that this provision is deleted.**

Amendment to clause 1(5)

Page 2, line 6, leave out clause 1(5)(a)

(e) Right to respect for home and family life

41. When introduced, the Bill originally provided that in granting an IPNA to a housing provider (or local authority carrying out its housing management function), the court may

attach a power to exclude the respondent from his or her home or specified area.[33] The home had to be owned or managed by the local authority or housing provider and the exclusion could only be applied for by the relevant local authority or housing provider. The court may exclude the respondent if it thinks that they have been violent or threatened violence to other persons or if there is a significant risk of harm from the respondent to other persons.[34]

42. We wrote to the Government about the justification for confining the scope of the power in clause 12 to tenants of a local authority or housing provider. The Government's response explained that it has limited the use of the power to those who live in social accommodation, because it considers that it may not be appropriate for the State to exercise a power to exclude people from their home when it has no direct stake in that housing arrangement. It said "only local authorities and social housing providers should be able to exclude tenants in clause 12 of the Bill because excluding individuals from their homes could lead to an inappropriate use of the power with unintended legal consequences if they were excluded by an agency other than the landlord."[35]

43. In the Public Bill Committee ("PBC"), concerns were raised about the lack of parity between the sanctions available in social housing and in the private rented sector, also highlighting that there should be effective means of providing protection from violent antisocial behaviour regardless of tenure.[36]

44. At the PBC, and in its response to our questions, the Government said that it would consider further whether to extend the power in clause 12 to cover other forms of tenure, in particular the private rented sector. **We welcome the Government's amendment to clause 12 to apply the exclusion powers without regard to tenure. We also note the Government's statement in relation to the amendment that it expects this power to be "rarely used".**[37]

45. We also asked the Government to clarify whether the violence, threatened violence or significant risk of harm must concern someone who lives in the same premises as the respondent. The Government's response confirms that it is possible to exercise the power of exclusion where the conduct occurs in respect of a victim or person at risk outside the premises. The Government states that "this is for the clear policy imperative to address anti-social behaviour caused by a person which affects neighbours."[38] In stating that this power complies with Convention rights, the Government relies on the duty of the local authorities and courts to exercise their powers compatibly with Convention rights.

46. We consider that further provision is required in the Bill to ensure that the power to exclude a person from his or her home is necessary and proportionate. The text of such an amendment is set out below.

33 Clause 12 of the Bill

34 ENs para 101

35 Letter from Damian Green and Jeremy Brown to Chair, 16 July 2013, Q.9

36 Public Bill Committee, *Tuesday 25 June 2013,*col.195-206

37 Letter to Rt Hon David Hanson P from Rt Hon Damian Green MP, Minister of State for Policing and Criminal Justice, 7 October, p. 2

38 Letter from Damian Green and Jeremy Brown to Chair, 16 July 2013, Q. 10

Amendment to clause 12

Page 6, line 29

In clause 12(1)(c) after "the court" insert "is satisfied that the exclusion is necessary and proportionate, and"

Criminal Behaviour Orders (Part 2)

47. Part 2 of the Bill creates the Criminal Behaviour Order ('CBO'), which a court can impose upon a person convicted of any offence. This replaces the current post-conviction ASBO (known as 'CRASBO'), and also the drink banning order on conviction.

48. The Government's human rights memorandum states that these provisions may engage rights under Articles 5, 6, 8, 9, 10 and 11 of the ECHR.[39] In relation to Articles 8, 9, 10 and 11, the Government states that the legitimate aim of CBOs is to prevent disorder, and that the courts will take into account proportionality issues when determining whether to impose a CBO and any prohibitions or requirements.

(a) Standard of proof

49. We wrote to the Government to ask for clarification about the standard of proof that is to be applied in order to establish anti-social behaviour for the purposes of a Criminal Behaviour Order ("CBO"). The CBO uses the higher threshold of anti-social behaviour, which is behaviour that caused, or was likely to cause, "harassment, alarm or distress".[40]

50. Clause 21(3) states that the court must be "satisfied" that the offender has engaged in anti-social behaviour. The Explanatory Notes state that as "the order would be made on conviction, the standard of proof would be "beyond reasonable doubt",[41] but this is not made explicit on the face of the Bill.

51. The Government response confirmed its intention "that the fact of anti-social behaviour having taken place will, in practice, have to be established beyond reasonable doubt."[42] This would continue the precedent established by the House of Lords in the *McCann* case, which held that the standard of proof applicable to the determination of whether anti-social behaviour has occurred for the purposes of ASBOs is the equivalent of the criminal standard of beyond reasonable doubt, even though the proceedings for ASBOs were civil proceedings.[43]

52. The Government explained that it did not consider it necessary to include the applicable standard of proof "because of the similarity of the criminal behaviour order with the ASBO on conviction" and because "the courts are able to take into account relevant

39 Anti-social Behaviour, Crime and Policing Bill, Government Memorandum, para 30

40 Clause 21(3).

41 ENs para 108

42 Letter from Damian Green and Jeremy Brown to Chair, 16 July 2013, Q. 12

43 *Clingham (formerly C (a minor)) v Royal Borough of Kensington & Chelsea, R v Manchester Crown Court ex parte McCann* [2002] UKHL 39; [2003] 1 AC 787

case law to make their own judgment on the applicable standard of proof".[44] **We believe that the Government should make the appropriate standard of proof clear on the face of the Bill, rather than leave the courts to make their own judgment on the applicable standard of proof, particularly as the standard of proof is specified in relation to IPNAs. We recommend that clause 21(3) be amended to specify the criminal standard of proof.**

Amendment to clause 21(3)

Page 11, line 24, after" satisfied", insert ", according to the criminal standard of proof,"

(b) Necessity

53. In addition to the court being "satisfied" that the offender engaged in anti-social behaviour under clause 21(3), a CBO can only be imposed if the court considers that making the order "will help in preventing the offender from engaging in such behaviour".[45] Again, the Home Office draft Guidance highlights that there is "no need to prove necessity unlike ASBOs."[46] We wrote to the Government to ask for its explanation as to why the higher standard of "necessity" is not used instead.

54. In its response, the Government stated:

> "The disadvantage to using "necessary" instead of "will help" is a question of the time it takes gathering evidence to prove necessity to a court. Front line professionals have told us that securing an ASBO can be a slow, bureaucratic and expensive process. The level of evidence needed to prove necessity is disproportionately time consuming. Dropping the level of the test for an order to *help* instead of *necessary* as is the case with ASBOs will speed up the application process. Practitioners have welcomed this change to the test telling us that it will allow them to act quickly to protect victims and communities."[47]

55. **We acknowledge the practical points that the Government makes in its response to us, particularly its concerns regarding the difficulty in obtaining evidence. However, any interferences with the rights protected by Articles 8, 9 (in relation to the manifestation of religion or belief), 10 and 11 of the Convention must be "necessary", which means there must be a pressing social need for the interference. We therefore recommend an amendment to this clause to require that the CBO will prevent the offender from engaging in anti-social behaviour.**

Amendment to clause 21(4)

Page 11, line 27, after "will" leave out "help in preventing" and insert "prevent"

44 Letter from Damian Green and Jeremy Brown to Chair, 16 July 2013, Q. 12

45 Clause 21(4) of the Bill

46 Home Office draft Guidance, *Reform of anti-social behaviour power: draft guidance for frontline professionals*, October 2013, p. 29

47 Letter from Damian Green and Jeremy Brown to Chair, 16 July 2013, Q. 13

(c) Legal certainty

56. Clause 21(5) provides for the same broad and open-ended definition of the prohibitions and requirements that may be included in a CBO as set out in clause 1(4) in relation to IPNAs. This raises the same question about legal certainty discussed above. **We consider that the broad and open-ended definition of the prohibitions and positive requirements that may be included in a CBO in clause 21(5) of the Bill does not satisfy the requirement of legal certainty, for the reasons we have given above. We recommend that the Bill be amended to achieve greater legal certainty on the face of the Bill.**

Amendment to clause 21(5)(a)

Page 11, line 31, leave out "doing anything" and insert "specified actions"

Page 11, line 31, after "order" insert "which relate to the anti-social behaviour which the respondent has engaged in"

Amendment to clause 21(5)(b)

Page 11, line 32, leave out "anything" and insert "specified actions"

Page 11, line 32, after "order" insert "which relate to the anti-social behaviour which the respondent has engaged in"

(d) Absolute right to hold religious beliefs

57. Clause 21(9) provides for selective restrictions on the scope of prohibitions and requirements that may be included in a CBO. This is the same issue as discussed in relation to clause 1(5) of the Bill above. The Government response refers to the response it gave in respect of clause 1(5). **We recommend the same amendment to clause 21(9) as we recommended in relation to clause 1(5) above, for the same reasons.**

Amendment to clause 21(9)

Page 12, line 3, leave out clause 21(9)(a)

(e) Reporting in children's cases

58. Part 2 of the Bill also contains a power for the courts to decide whether or not to allow the reporting of a child's case in relation to CBO proceedings.[48] As noted in relation to IPNAs above, this is a departure from the normal restriction that applies on the reporting of legal proceedings in relation to children under Section 49 of the Children and Young Persons Act 1933. **We are concerned about the potential impact of reporting on children's privacy rights. We therefore recommend that the Bill contains a**

48 Clause 22 (8) and clause 29(5)

requirement that the courts must take into account the best interests of the child as a primary consideration when determining reporting of a child's case.

Amendment to clause 22

Page 12, after line 44 insert:

(9) The courts must take into account the best interests of the child as a primary consideration when determining reporting of a child's case.

Amendment to clause 29

Page 16, after line 40 insert:

(7) The courts must take into account the best interests of the child as a primary consideration when determining reporting of a child's case.

Police Dispersal Powers (Part 3)

59. Part 3 of the Bill creates a new police dispersal power which replaces two existing powers to direct people away from an area in order to prevent anti-social behaviour.

60. Under the Bill's provisions, officers no longer need reasonable belief that the public have actually been harassed or intimidated in the area. Instead, they need to consider that use of the power may be necessary to remove or reduce the likelihood of anti-social behaviour, crime or disorder in the locality. Authorising officers no longer have to believe that anti-social behaviour is a persistent problem in the area, and there is no time limit on the authorisation (currently dispersal authorisations cannot exceed six months). A new dispersal order may be imposed for a 48-hour period.[49]

61. The new dispersal power could be widely used due to the broad discretion given to the police in relation to the new power and the possibility of an extensive definition of the area subject to the dispersal powers. In our view, granting authorisation for the use of these dispersal powers should be exceptional, and appropriate safeguards should be in place to ensure that there is no arbitrary use of the provisions. We therefore wrote to the Government to ask whether the power to authorise the use of these exceptional powers is sufficiently tightly circumscribed and whether the very broad discretion left to the authorising officer could be narrowed in certain ways.

(a) Reasonable belief

62. In particular, we asked whether the Government would consider amending clause 32(2) of the Bill to make clear that the authorising officer's belief that the statutory condition for authorising the use of the dispersal power is met must be "reasonable". The Government response acknowledges that the Committee's question raises an important point and that it will consider the inclusion of "reasonable" in clause 32(2) in advance of the Bill's Report Stage. **We welcome the Government's amendment to clause 32(2) of the Bill to make clear that the authorising officer's belief must be "reasonable" in order to use the dispersal powers provided in Part 3 of the Bill. In our view, this is essential to ensure that any use of the powers is properly circumscribed.**

49 Clauses 32 to 34 of the Bill

(b) Necessity

63. Part 3 of the Bill engages the rights under Articles 8, 9 (in relation to manifestation of religion or belief), 10, 11 and Article 1 of Protocol 1. Any interference with these rights must be necessary and proportionate in order to be justified. We therefore asked the Government for its justification for providing in clause 32(2) that an authorisation can be made if the authorising officer considers that use of the dispersal powers "may be necessary" rather than "is necessary".

64. The Government's response explained that: "the dispersal power is intended to be used preventatively, and "may be necessary" offers more flexibility than determining whether it is necessary to use the power before granting the authorisation. To restrict the authorisation to an area where it "is necessary" to use the dispersal power would imply that the authorising officer definitely expects the power to be used."[50]

65. **We accept the legitimate aim of these measures. However, as these measures interfere with individuals' privacy rights and freedom to assemble, it is essential that the dispersal powers are only exercised when necessary and proportionate. We also accept the Government's point that these are intended to be preventive powers and therefore the condition for authorisation must be defined in terms of future events. We recommend, therefore, that:**

- **there is clear guidance for the police on the use of this dispersal power; and that**
- **there is a review of the use of this dispersal power after 2 years of its operation, and periodically thereafter.**

(c) The right to freedom of assembly and association

66. The Bill contains an express provision which states that the dispersal powers cannot be used against individuals taking part in lawful picketing or public processions of a kind prescribed by section 11(1) of the Public Order Act 1986.[51] The Government states that it is satisfied that any interference with Article 11 pursues legitimate aims (namely, the prevention of crime and disorder, and the protection of the rights of others) and that any interference is proportionate to this aim.[52]

67. We welcome the protection given in this Bill to lawful picketing under section 220 of the Trade Union and Labour Relations (Consolidation) Act 1992 and processions under the Public Order Act 1986. However, the drafting of this clause remains narrow. As a result, the dispersal powers could be used to target other forms of peaceful assembly, such as static assemblies and impromptu protests. In a recent report on the UK, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association noted the absence of any legal provision that protects spontaneous processions.[53] He also noted that

50 Letter from Damian Green and Jeremy Brown to Chair, 16 July 2013, Q. 17

51 Clause 34(4) of the Bill

52 HR MEMO, para 50

53 Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, 17 June 2013, para 11

the Protection from Harassment Act 1997, which was designed to address stalking, has developed over time to be used to deal with protestors.[54] Similarly, there are concerns that, due to the Bill's broad definition of anti-social behaviour, there is a risk that protests and assemblies may be dealt with under the Bill's anti-social behaviour powers rather than under public order legislation, which has higher thresholds and levels of protection.[55]

68. The Children's Commissioner has also stated that while there may be potential benefits of the new dispersal powers for some children affected by anti-social behaviour, it considers that children may be at risk of disproportionate restrictions on their freedoms of movement and assembly.[56]

69. The UN Committee on the Rights of the Child has stated that the concept of "dispersed zones" may violate the rights of children to freedom of movement and peaceful assembly, the enjoyment of which is essential for the children's development and may only be subject to very limited restrictions as enshrined in Article 15 of the UN Convention on the Rights of the Child.[57]

70. **We welcome the protections given in this Bill to lawful picketing and processions under the Trade Union and Labour Relations (Consolidation) Act 1992 and the Public Order Act 1986. In our view, however, the protections offered in this Bill remain too narrow. It is important that there is a clear connection between the use of the dispersal powers with the legitimate aims pursued of addressing anti-social behaviour. The powers must not be used in a way that targets peaceful assemblies. We recommend that clause 34(4) of the Bill is amended to make this clear.**

Amendment to clause 34(4)

Page 20, after line 17 insert: "(c) any other form of peaceful assembly."

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

71. Part 5 introduces a new discretionary ground of possession for riot-related anti-social behaviour to enable landlords of dwelling-houses in England to apply for possession where a tenant or person living in the property has been convicted of a riot related offence committed anywhere in the UK. The court may only order possession on this discretionary ground where it considers it "reasonable" to do so.[58]

72. We wrote to the Government to ask for its view as to whether, in the absence of any requirement that there be a connection between the particular dwelling-house and the riot-

54 Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, 17 June 2013, para 47; Joint Committee on Human Rights, Seventh Report of Session 2008-09, *Demonstrating respect for rights? A human rights approach to policing protest*, para 99

55 Submission to the JCHR from Mr. Matthew Varnham, 22 August 2013

56 OCCE, A Child Rights Impact Assessment of the Anti-Social Behaviour, Crime and Policing Bill, June 2013, pp 22–24

57 UN Committee on the Rights of the Child 'Concluding Observations: United Kingdom of Great Britain and Northern Ireland', 2008, paras 34–35

58 Clause 91, inserting new Grounds 2ZA and 14ZA into Part 1 of Schedule 2 to the Housing Act 1985.

related offence, the new riot-related grounds for possession introduced by clause 91 amounts to a punishment rather than a means of preventing harm to others.

73. The Government's response stated that "the intention is that the proposal will send a strong signal and carry a deterrent effect to potential rioters who are tenants or members of their household."[59] It considers that seeking possession against those convicted of rioting beyond the local area is "only likely to happen exceptionally". Further, the Government stated that the courts must be satisfied that it is reasonable to grant possession, and that "the absence of any connection between the dwelling house and the riot-related offence will be a factor for the court in exercising its discretion".

74. Concerns have been expressed about the proportionality of these measures. For example, where one member of a family has been convicted of a riot-related offence, there is a risk that other family members and children may be made homeless. [60]

75. We also asked the Government for its justification for interfering with the Article 8 rights of other family members, including children, who live in the home. The Government's response explained that the riot-related ground for possession is discretionary, and the court will therefore take into account the rights of other family members, including the rights of any children under Article 16 UNCRC, when deciding whether it is reasonable to grant possession. While the case of *Pinnock* establishes that tenants of public authorities or of landlords exercising public functions are currently able to raise Article 8 as a defence to possession proceedings,[61] we consider that it is better to draft legislation in a way that does not give rise to unnecessary interferences with rights, rather than to rely on the courts to render laws compatible by interpretation.

76. **We are not persuaded by the Government's justification for this discretionary ground of possession for riot-related anti-social behaviour. In our view, it is unnecessary and disproportionate. We are concerned about its potential serious implications for family members, and consider that it may disproportionately affect women and children. We also consider that it amounts to a punishment rather than a genuine means of preventing harm to others. We recognise the seriousness of riot-related offences. However, we believe that the custodial sentences imposed by the courts in relation to these offences act as a sufficient deterrent. We recommend that this provision is removed from the Bill.**

Amendment to clause 91
Page 61, after line 21, leave out clause 91

59 Letter from Damian Green and Jeremy Brown to Chair, 16 July 2013, Q. 19

60 Liberty, Anti-social Behaviour, Crime and Policing Bill Commons Briefing, para 48

61 *Manchester City Council* v *Pinnock* [2010] UKSC 45

3 Forced marriage (Part 9)

77. The Bill has two provisions concerning forced marriage: one criminalising the breach of a forced marriage protection order, and one criminalising forcing someone to marry.[62]

Criminal offence for a breach of a forced marriage protection order

78. Clause 103 criminalises a breach of a forced marriage protection order ("FMPO"). Part 4A of the Family Law Act 1996 empowers a court to make a FMPO for the purpose of protecting a person from being forced into a marriage or a person who has been forced into a marriage. Currently, a breach of a FMPO is punishable as a civil contempt of court. Clause 103 makes the breach of a FMPO a criminal offence for which arrest without warrant is possible. This mirrors the existing offence of breach of a non-molestation order in section 42A of the Family Law Act 1996.

79. The Government states that the new offence will allow the breach of a FMPO to be dealt with more efficiently and effectively. At the moment, if no power of arrest was attached to the original order, the victim has to apply to the civil court for an arrest warrant. According to the Government, making the breach of a FMPO an offence for which arrest without warrant is possible will allow for more effective enforcement action.[63] **We welcome the criminalisation of a breach of a forced marriage protection order as a positive measure in improving the effectiveness of the current civil mechanism.**

Forced marriage as a criminal offence

80. In its Impact Assessment, the Government outlined that the new criminal offence of forced marriage is necessary, in addition to the civil regime, "to act as an effective deterrent, to properly punish perpetrators and to fulfil our international obligations under the Council of Europe -Convention on preventing and combating violence against women and domestic violence".[64]

81. We wrote to the Government to request further information about its rationale for the criminalisation of forced marriage, and to ask the Government to explain the steps it intends to take to ensure that criminalisation is not counter-productive.

82. In response, the Government referred to its consultation. It stated that the majority view expressed was that forced marriage should be criminalised.[65]

83. The Government also set out detail as to why it considers Part 9 to enhance rights contained in the UNCRC, particularly the following rights:

— Article 16, which guarantees a child's right to privacy and family life.

62 Clauses 103 and 104 of the Bill

63 Impact Assessment, Anti-social, Crime and Policing Bill, 8 May 2013, p 20–21

64 Impact Assessment, Anti-social, Crime and Policing Bill, 8 May 2013, p 19

65 Letter to the Chair from Damian Green and Jeremy Browne, 16 July 2013, Q 24; Home Office Forced Marriage Consultation—summary of responses, June 2012

— Article 19(1), which ensures the protection of the child from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation, including sexual abuse

— Article 24(3), which requires state parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

— Article 34, which requires state parties to undertake to protect children from all forms of sexual exploitation and sexual abuse.

— Article 35, which requires state parties to take all appropriate national, bilateral and multilateral measures to prevent the abduction of children for any purpose or in any form.

— Article 36, which requires state parties to protect the child against all other forms of exploitation prejudicial to any aspect of their welfare.[66]

84. The Government's UNCRC analysis is welcome. However, it fails to address significant concerns that the criminalisation of forced marriage may be counter-productive.[67] 37% of responses to the Government consultation were opposed to criminalisation.[68]

85. The Office of the Children's Commissioner for England has highlighted a number of arguments to suggest that criminalisation of forced marriage would not necessarily have a positive impact on children's best interests.[69] In its *Child Rights Impact Assessment* of the Bill, it concluded:

> "There is limited evidence on which to assess the likely impact on children of a creation of an offence of Forced Marriage. Where children are involved, forced marriage must be understood and addressed as an integral part of child protection policy and practice, and a range of laws already exists which make this possible. We recognise the symbolic value of an offence of forced marriage, however, it is not clear how this provision will translate into practical action which is in children's best interests. There are significant concerns about the impact of criminalisation on the willingness of children to seek help. Careful monitoring of the impact of this change on children will be required."[70]

86. Some organisations do not agree with the Government's view that criminalisation of forced marriage is required to enable the UK to ratify the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence,[71] as the

66 Letter to the Chair from Damian Green and Jeremy Browne, 16 July 2013, Q 1

67 As outlined in the Home Office Consultation response by the following organisations: Odysseus Trust, Response to the Home Office Consultation on Forced Marriage, paras 61—65; Liberty, Anti-social Behaviour, Crime and Policing Bill Commons Briefing; Southall Black Sisters, Response to the Home Office Consultation on Forced Marriage, March 2012; Odysseus Trust, Response to the Home Office Consultation on Forced Marriage; OCCE, A Child Rights Impact Assessment of the Anti-Social Behaviour, Crime and Policing Bill, June 2013, pp 31–34

68 Home Office Forced Marriage Consultation— summary of responses, June 2012 p.5

69 OCCE, A Child Rights Impact Assessment of the Anti-Social Behaviour, Crime and Policing Bill, June 2013, pp 31–34

70 OCCE, A Child Rights Impact Assessment of the Anti-Social Behaviour, Crime and Policing Bill, June 2013, p. 34

71 The UK signed the Convention on 8 June 2012.Article 37 of the Convention requires Parties to take necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised.

behaviour employed in forcing an individual to marry against their will is already criminalised (for example, violence, kidnap, psychological and sexual abuse, aiding and abetting rape), and that the introduction of a specific aggravating factor of procuring a marriage to existing offences would satisfy the Convention's requirement.[72]

87. The Government acknowledges that there is already a range of criminal offences that tackle the behaviour typically associated with forcing someone to marry, but that a specific offence of forcing someone to marry is required.[73] In its response to us, the Government points out that the current civil remedy will continue to exist alongside the new criminal offence, which means that a victim could choose to take the civil route, or go to the police.

88. The Government's response goes on to set out some of its recent policy work in relation to forced marriage education and prevention. It states that this work will inform how it engages with communities ahead of, and following, enactment of the new law on forced marriage.

89. **We cautiously accept the Government's reasoning for the criminalisation of forced marriage. However, given the concerns expressed about criminalisation during the Government consultation process, it is clear that careful implementation and monitoring of the new law will be required. It is essential that criminalisation is accompanied by additional measures to ensure that the law is effectively implemented. There has not been a successful prosecution of female genital mutilation since it was criminalised 28 years ago, and it appears that the practice remains widespread, which demonstrates that criminalisation alone is not sufficient. We therefore recommend that:**

- **the Crown Prosecution Service develops a strategy on prosecutions of forced marriage. In developing such a strategy, there should be consultation with relevant stakeholders; and**
- **the Government reports to Parliament annually on the effectiveness of the criminalisation of forced marriage.**

72 Odysseus Trust, Response to the Home Office Consultation on Forced Marriage, paras 61–65

73 Impact Assessment, Anti-social, Crime and Policing Bill, 8 May 2013, p 19

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

Background

90. Part 10 of the Bill contains the provisions[74] which amend the port and border security powers in Schedule 7 to the Terrorism Act 2000. Schedule 7 includes very wide powers to stop, question, search and detain people (including UK nationals) at ports and airports in order to ascertain whether they are a terrorist, which for this purpose means "a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism".[75]

91. There is no requirement that the officer have reasonable grounds for suspicion that the person is involved in terrorism before the powers can be exercised. The person being questioned is required to answer questions and provide information and documents on pain of criminal penalty. They can be detained for questioning for up to 9 hours. The person can be searched, as can any property they have on them (including personal electronic devices such as laptop computers, tablets and mobile phones). Property can be seized and retained for examination. Failure to comply with any duties or requests is a criminal offence, punishable by imprisonment for up to 3 months. The powers are used on a considerable scale (approximately 80,000 stops a year) and, according to the EHRC, the ethnic breakdown of those subjected to the power suggests a statistical disproportionality in terms of race and, probably, religion.

92. The Independent Reviewer of Terrorism Legislation, David Anderson QC, in his Reports on the Operation of the Terrorism Acts in 2010 and 2011, raised a number of concerns about the operation of the powers in Schedule 7 and called for a thorough review and public consultation. In September 2012 the Home Office announced a consultation on proposals to reform Schedule 7.[76] On 16 October 2012 the Independent Reviewer, in oral evidence, encouraged us to carry out more detailed scrutiny of the Schedule 7 power and of the Government's proposals for its reform. He had no doubt that the power is a very useful one but he identified a number of controversial features about its scope. He described the Home Office's proposals for trimming the scope of the power as "limited".

93. In his 2013 Report on the Operation of the Terrorism Acts in 2012, published in July this year, the Independent Reviewer welcomed the changes to Schedule 7 proposed in the Bill, and accepted that there were justifications for having a no-suspicion power to stop and examine at ports.[77] However, he regretted that the Government's public consultation had not extended to some fundamental issues that he had recommended should be considered: in particular, to include the possibility that further elements of the Schedule 7 power might

74 Clause 127 and Schedule 7 to the Bill.

75 The powers in Schedule 7 are available "for the purpose of determining whether he appears to be a person falling within section 40(1)(b)" Terrorism Act 2000: para. 2(1).

76 Home Office, *Review of the Operation of Schedule 7*, 13 September 2012.

77 *The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, by David Anderson QC (July 2013), chapter 10.

be made dependent on reasonable suspicion,[78] and to cover the safeguards governing the practice of copying and retaining data from laptops and mobile phones.[79]

94. On 11 July the Government published its response to the public consultation, including its summary of consultation responses.[80]

95. On 18 August, the Schedule 7 powers were used by the Metropolitan Police to detain and question David Miranda, the Brazilian partner of Guardian journalist Glenn Greenwald (the author of the Guardian newspaper stories based on classified intelligence material leaked by Edward Snowden), as he was in transit at Heathrow airport on his way from Berlin to Rio de Janeiro. Mr. Miranda was detained and questioned for 9 hours and his electronic devices were seized and detained by the police pursuant to the powers in Schedule 7. The devices are understood to contain material provided by Snowden to the Guardian, including, the Government says, some 58,000 classified UK intelligence documents, which Mr Miranda was in possession of as a "courier" between Mr Greenwald and Laura Poitras, a documentary film-maker in Berlin. Judicial review proceedings have been brought by Mr Miranda against the Home Secretary and the Metropolitan Police challenging the legality of the use of the Schedule 7 powers against Mr Miranda and in relation to material which is said to enjoy journalistic privilege, and seeking to restrain the use made by the Government and the police of the seized material. The hearing is likely to take place in October. The Independent Reviewer of Terrorism Legislation is conducting an investigation into the use of the Schedule 7 powers in the Miranda case. His Report is unlikely to be published before the legal proceedings have concluded and is therefore unlikely to be available to inform debate on the Bill during its passage.

96. The reforms to Schedule 7 were hardly debated in Public Bill Committee: the only substantive consideration was of the Government's amendment to the Bill to provide an express statutory basis for the copying and retention of property seized in a Schedule 7 examination.[81]

The consultation process and pre-legislative scrutiny

97. The Government's consultation on reform of the Schedule 7 powers closed in December 2012. In January 2013 we wrote to the Home Secretary making clear our interest in scrutinising the proposed reforms and asking the Government to place in the public domain the responses to its consultation, and not merely the Government's summary of them. This was in keeping with our recommendation in our Report on the Justice and Security Green Paper, that in future similar consultations should make clear that responses will be made public, in order to assist debate and scrutiny, unless a request to the contrary was made.

98. In March the Home Secretary refused our request for publication of the responses to the Government's consultation because responses received from police forces and individual police officers contain operationally sensitive details that cannot be published

78 Ibid at paras 10.50–10.62.

79 Ibid at paras 10.65–10.80.

80 *Review of the Operation of Schedule 7: A Public Consultation —The Government Response* (Home Office, July 2013).

81 PBC 9 July 2013 c 454–6.

for security reasons. The Government's response to the public consultation, including its summary of the responses it received, was finally published in July, two months after publication of the Bill containing the amendments which were the product of the Government's consultation.

99. In his most recent Report on the operation of the Terrorism Acts, the Independent Reviewer of Terrorism Legislation was critical of the Government's refusal of our request, describing it as, in his view, regrettable: "An informed and productive public debate is best ensured if each participant in that debate knows what the others have been saying."[82]

100. **We are disappointed by the Government's refusal to publish the responses to its consultation in full, in light of our recommendation in our Report on the Justice and Security Green Paper that in future such consultations should make clear that responses will be published unless confidentiality is expressly sought.**

101. **We also regret the lack of opportunity for pre-legislative scrutiny of the changes to Schedule 7 powers. The Independent Reviewer has expressed concern about the operation of these powers in three consecutive reports, and in our view the publication of draft clauses would have provided more opportunity for thorough parliamentary scrutiny of the Government's proposals.**

Human rights enhancing changes to the Schedule 7 powers

102. In its ECHR memorandum, the Government states that it considers Schedule 7 powers to be fully compliant with the ECHR as it stands, but it wishes to strengthen their compliance by a number of reforms which are designed to reduce the level of interference possible under Schedule 7 powers, to more tightly prescribe their use, and to increase the level of safeguards relating to their use. To this end the provision in Schedule 7 to the Bill would make a number of welcome changes to the powers in Schedule 7 Terrorism Act 2000, including:

- providing that the powers can only be exercised by designated immigration officers who must undergo training which will be set out in a revised Code of Practice;[83]
- reducing the maximum amount of time for which a person may be detained under the power from nine hours to six hours;
- requiring that after one hour of questioning the person must be formally detained, which triggers the applicability of certain legal entitlements and safeguards;
- introducing new rights for a person detained at a port under Schedule 7 to have a person informed of his detention and to consult a solicitor;
- prohibiting intimate searches and removing the power to take an intimate sample, and requiring reasonable suspicion before a strip search may be conducted;

82 *The Terrorism Acts in 2012* (July 2013), para. 10.40.

83 A working draft of a revised Code of Practice was made available by the Government on 7 October "for illustrative purposes", and without prejudice to the draft which the Government will be required to publish and lay before Parliament in due course: *Draft Code of Practice for examining officers under Schedule 7 to the Terrorism Act 2000* (October 2013)