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

Fourth Report of Session 2013–14
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

Report, together with formal minutes and written evidence

Ordered by the House of Lords
to be printed 9 October 2013
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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.

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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. The Bill received its Second Reading in the House of Commons on 10 June 2013 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. 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. 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 of...
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of personal samples, powers to seize invalid passports and extradition. 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. 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 of 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. 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
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 thorough 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.

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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. 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. 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. 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 of children and young people.
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. 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.”

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.

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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. 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. 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. 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

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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
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 ASBIs.
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.”

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
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.  

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.  
- The terms of the order must be precise and easy to understand so that the individual knows exactly what he is prohibited from doing. 
- 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. 
- 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. 
- 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.

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.

<table>
<thead>
<tr>
<th>Amendments to clause 1(4)(a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Page 2, line 1, leave out “doing anything” and insert “specified actions”</td>
</tr>
<tr>
<td>Page 2, line 2, after “injunction” insert “which relate to the anti-social behaviour which the respondent has engaged or threatened to engage in”</td>
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</tbody>
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<tr>
<th>Amendment to clause 1(4)(b)</th>
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</thead>
<tbody>
<tr>
<td>Page 2, line 3, leave out “anything” and insert “specified actions”</td>
</tr>
<tr>
<td>Page 2, line 3, after “injunction” insert “which relate to the anti-social behaviour which the respondent has engaged or threatened to engage in”</td>
</tr>
</tbody>
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(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”.

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.

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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.

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.

(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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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.”\textsuperscript{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.

\begin{itemize}
  \item \textsuperscript{33} Clause 12 of the Bill
  \item \textsuperscript{34} ENs para 101
  \item \textsuperscript{35} Letter from Damian Green and Jeremy Brown to Chair, 16 July 2013, Q.9
  \item \textsuperscript{36} Public Bill Committee, Tuesday 25 June 2013, col.195-206
  \item \textsuperscript{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
  \item \textsuperscript{38} Letter from Damian Green and Jeremy Brown to Chair, 16 July 2013, Q. 10
\end{itemize}
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. 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.”

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’, 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.” 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.

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”. 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,“

**Amendment to clause 21(4)**

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

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**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”. Again, the Home Office draft Guidance highlights that there is “no need to prove necessity unlike ASBOs.” 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.”

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.

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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

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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.”

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. 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.

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. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{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

\textsuperscript{55} Submission to the JCHR from Mr. Matthew Varnham, 22 August 2013

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

\textsuperscript{57} UN Committee on the Rights of the Child ‘Concluding Observations: United Kingdom of Great Britain and Northern
Ireland’, 2008, paras 34–35

\textsuperscript{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

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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.

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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

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


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


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.

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

94. On 11 July the Government published its response to the public consultation, including its summary of consultation responses.\textsuperscript{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.\textsuperscript{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

\textsuperscript{78} Ibid at paras 10.50–10.62.
\textsuperscript{79} Ibid at paras 10.65–10.80.
\textsuperscript{80} Review of the Operation of Schedule 7: A Public Consultation —The Government Response (Home Office, July 2013).
\textsuperscript{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.”

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;
- 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;

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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)
• requiring the Secretary of State to issue a Code of Practice which will include provision about the training to be undertaken by examining officers; and.

• providing a new duty to keep detention under Schedule 7 under periodic review at such intervals as may be specified in the Code of Practice.

103. **We welcome these improvements to the powers in Schedule 7.** Although some will make no practical difference (for example, there are no known examples of intimate searches ever having been conducted under Schedule 7, or intimate samples taken, and the current Code of Practice already requires reasonable suspicion before a strip search is conducted), nevertheless, as the Government’s ECHR memorandum rightly claims, **the amendments narrow the very wide scope of the powers and so reduce the potential for the powers to be found incompatible with Convention rights.**

104. **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.**

**The scope of the powers: lack of reasonable suspicion requirement**

105. In its response to our questions, the Government accepts that the powers in Schedule 7 are “unusually wide-ranging” and that, even after the changes made by the Bill, there are no other powers to stop, question, search and detain UK citizens without reasonable suspicion which are wider in scope than, or comparable to, these powers. However, the Government says that Schedule 7 is “a key part of the UK’s border security arrangements”, and although it accepts that the powers are unusually wide it considers that such wide powers are both necessary and proportionate “given the current terrorist threat, in relation to which numerous terrorist plots have involved individuals undertaking, or planning to undertake, international travel to plan and prepare for acts of terrorism.” The Government says that people are aware that they might be subjected to questioning and searches when they go through ports and airports.

106. The Government says that introducing a reasonable suspicion test for Schedule 7 would expose the public to an increased risk of terrorism because it would reduce the capability of the police to detect and deter individuals travelling to and from the UK to plan, train or raise funds to carry out or otherwise engage in terrorism. The Government is opposed to introducing a reasonable suspicion test at the point when a person is formally detained after one hour of questioning because, it says, an examination is sometimes prolonged beyond one hour, not because of any reasonable suspicion, but because of matters such as language or interpretation issues, evasive responses about the purpose of travel, inconsistencies in the information provided, or the need to examine property.

107. The EHRC, which has undertaken extensive work on stop and search powers under other statutory provisions,84 argues that Schedule 7 is inherently incompatible with Articles 5 and 8 ECHR because without a requirement of prior reasonable suspicion it is

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84 In particular s. 1 Police and Criminal Evidence Act 1984, s. 44 Terrorism Act 2000 and s. 60 Criminal Justice and Public Order Act 1994. The stop and search power in Schedule 7 Terrorism Act 2000 has only been the subject of work by the EHRC more recently.
incompatible with the Convention requirements that interferences with those rights be “prescribed by law” (Article 5) and “in accordance with the law” (Article 8).

108. A challenge to the Convention compatibility of Schedule 7 on this basis is pending in Strasbourg. On 28 May 2013 the European Court of Human Rights declared admissible a complaint by a British citizen, Mr. Malik, that the use of Schedule 7 powers against him at Heathrow airport on his return to the UK from Saudi Arabia violated his right to liberty under Article 5 ECHR and his right to respect for private life under Article 8 ECHR. The applicant’s argument is that Schedule 7 is incompatible on its face with Articles 5 and 8 ECHR, because the absence of a reasonable suspicion requirement in the legal framework leaves too much discretion to the executive: the quality of the law which allows for his examination and detention without suspicion, it is argued, is insufficiently specific and concrete and therefore open to arbitrary and discriminatory use. The Court will now go on to consider the merits of Mr. Malik’s complaints that, without a reasonable suspicion requirement, Schedule 7 is inherently incompatible with Articles 5 and 8 ECHR. On 28 August, however, in the case of Bheghal, the High Court considered and rejected a similar legal challenge to the compatibility of Schedule 7 with Articles 5, 6 and 8 ECHR.

109. 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. As we said in our Reports on the reform of the stop and search power in s. 44 Terrorism Act 2000, following the decision of the European Court of Human Rights in Gillan v UK, a without suspicion stop and search power is in principle capable of being compatible with Articles 5 and 8 ECHR. Whether it is so compatible, however, depends on whether there has been shown to be a very clear need for such a power, and whether the power is sufficiently narrowly defined and subject to sufficiently robust safeguards to ensure that it is confined to the exceptional circumstances in which it is shown to be needed. It follows that the wider the scope of the powers available, and the fewer the legal safeguards, the greater the risk of incompatibility with the right to liberty and the right to respect for private life.

110. In our view, 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. The retention of a without suspicion power in Schedule 7 of the Terrorism Act 2000 is therefore not inherently incompatible with Articles 5 and 8 ECHR.

111. The question we have gone on to consider, however, is whether the powers which will continue to be available under the amended Schedule 7 are still too widely defined and subject to too few legal safeguards to satisfy the Convention requirement spelt out in the Gillan case, that they must be sufficiently tightly circumscribed and subject to adequate legal safeguards. We note that the Bill does introduce a requirement for reasonable

85 Sabure Malik v UK, Application no. 32968/11 (28 May 2013).
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suspicion, but only in relation to one of the Schedule 7 powers: strip searches. The examining officer will be required to have “reasonable grounds to suspect” that the person is concealing something which may evidence that they are a terrorist before a strip search can be carried out. However, this is just one of a number of highly intrusive powers which will continue to be available under the broadly worded powers in the reformed Schedule 7. In addition to the power to stop, question and search the luggage of travellers, examining officers will still have the power, without reasonable suspicion, to:

- detain for up to 6 hours;
- access, search, seize, copy and retain all the information on personal electronic devices such as mobile phones, laptops and tablets;
- take and retain DNA samples and fingerprints without consent.

112. We have considered carefully whether the Government has demonstrated the necessity for these more intrusive powers being exercisable without reasonable suspicion, and we are not persuaded that they have. 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.

113. 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. The following amendment would give effect to this recommendation in relation to detention and the taking of fingerprints and non-intimate samples without consent:

Schedule 7 paragraph 2, page 147, line 25, after new paragraph 6A(2) insert:

“(2A) A person questioned under paragraph 2 or 3 may not be detained under paragraph 6 unless the examining officer has reasonable grounds to suspect that he is a person falling within section 40(1)(b).”

114. This amendment would introduce a requirement of reasonable suspicion before a person being questioned under Schedule 7 powers can be detained. The power to take fingerprints and non-intimate samples without consent (under para 10 of Schedule 8 to the Terrorism Act 2000) would also be limited as a consequence of this amendment. Separate
amendments are required to limit the power to access, search, examine, copy and retain data on personal electronic devices.

**Accessing, searching, examining, copying and retention of data on personal electronic devices**

115. The Independent Reviewer in his 2011 Report on the operation of the Terrorism Act 2000 identified as one of the important issues concerning the operation in practice of Schedule 7 whether search powers should extend to mobile phone records. The issue was not included, however, in the Government’s consultation about the operation of Schedule 7. In his recent 2013 Report on the operation of the Terrorism Act, the Independent Reviewer said “it is of vital importance that the copying and retention of data from mobile phones and other devices should be provided for by a law that is clear, accessible and foreseeable, and that there should be sufficient safeguards and sufficient guidance to ensure that it is practised only when this is necessary in a democratic society.”

116. We asked the Government whether copying the contents of a person’s mobile phone SIM card during a Schedule 7 search is compatible with the right to respect for private life in Article 8 ECHR, and what provision in Schedule 7 is relied upon as the lawful authority for such copying of personal information.

117. In response, the Government accepted that copying information from a person’s mobile phone SIM card is “capable of constituting an interference with a person’s right to respect for their private life.” The lawful authority for copying the content of electronic devices such as mobile phones is said to be contained in the existing paragraphs 5(a) and (d) of Schedule 7, which require a person under examination to give the examining officer any information or document in his possession which the examining officer requests, and paragraph 8, under which the examining officer may conduct a search of the person under examination, and a search of anything the person has with him that is on, has been or is likely to be on a ship, aircraft or train. The Government also appears to rely on paragraph 11 of Schedule 7, which already expressly provides for the detention of property obtained in a Schedule 7 examination, and it says that new paragraph 11A of Schedule 7, inserted by Government amendment of the Bill in Committee, ensures that any interference with Convention rights is “more clearly in accordance with law that is adequately accessible and foreseeable”, by expressly providing for the copying and retention of information from examined property.

118. The justification for any interference with the right to respect for private life is said to be “the need to protect the public from terrorism”. Information is now largely stored electronically on mobile devices, rather than on paper as it was until recently, and without the power to examine the contents of such devices, the Government says, “the police would be severely curtailed in their ability to determine whether or not a person appears to be or has been involved in terrorism.” The power is only exercised, the Government says, when it is “necessary and proportionate to do so.” Moreover, information obtained in this way is subject to the safeguards contained in the Data Protection Act and the statutory Code of Practice on the Management of Police Information.

119. The powers in the amended Schedule 7 to access, search, seize, copy and retain copies of anything the person has with them, including personal information held on personal
electronic devices such as mobile phones, tablets and personal computers, remain extremely wide and are accompanied by few legal safeguards. A personal electronic device such as a mobile phone or a laptop contains a significant amount of personal information, including, often, an individual’s filing cabinet, their entire address book as well as their electronic conversations with family and friends. This is why most personal electronic devices are password-protected.

120. Yet there is no reasonable suspicion requirement attached to the powers to access and search such material, and they are without limitation in terms of the type of material concerned (there is no exception, for example, for any categories of material which enjoy legal protection in other contexts, such as legally professionally privileged material, journalistic material which would disclose a journalist’s sources, or material subject to parliamentary privilege). Nor are there any legal safeguards such as a requirement of judicial or other independent authorisation before any of the more intrusive powers (such as searching and reading a person’s personal e-mail correspondence on their electronic device) are exercised. The safeguards in the Data Protection Act, relied on by the Government, do not apply in relation to personal data being processed for the purposes of safeguarding national security, due to the wide exemption in s. 28 of that Act. There are no specific safeguards in the Management of Police Information Guidance which relate to the retention, review and disposal of personal data obtained pursuant to the Schedule 7 powers, and the adequacy of that Guidance for the purposes of providing the level of legal certainty required by Article 8 has recently been doubted in two judicial decisions, including one by the European Court of Human Rights.88

121. The working draft of the revised Code of Practice states that the decision on whether or not to use the power to examine and detain mobile phones and/or other electronic devices is “at the discretion of the examining officer. However, this power should not be used routinely but only when the examining officer consider it to be necessary and proportionate.”89

122. 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”. We welcome the express references to necessity and proportionality in the working draft of the revised Code of Practice, but since examining officers are already required by the Human Rights Act to act compatibly with the right to respect for private life in Article 8 ECHR they do nothing to restrict the wide scope of the powers. In our view, the powers to search personal electronic devices are so intrusive, given the nature of the information held on those devices, that we do not consider these references in the Code to be sufficient to circumscribe the width of the powers. In our view they should only be exercisable on reasonable suspicion. The following amendments to the Bill would give effect to this recommendation:

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88 MM v UK, application no. 24029/97 (13 November 2012); and R (RMC & FJ) v Metropolitan Police Commissioner [2012] EWHC 1681 (Admin). In both cases it was noted that the Guidance permits retention of data for a long period (a minimum of six years), subject only to infrequent reviews.

89 Draft Code of Practice for examining officers under Schedule 7 to the Terrorism Act 2000 (October 2013), para. 66
123. These amendments would limit the power to access, search and examine data stored on personal electronic devices to cases where a person is detained under Schedule 7 and therefore to cases where the examining officer has reasonable grounds to suspect that the person is a terrorist. The power to make and retain copies of such data would also be limited as a consequence of this amendment.

124. We note in passing that the current Code of Practice envisages that the information which can be requested by an examining officer under paragraph 5 of Schedule 7 includes passwords to personal electronic devices and to data held on those devices. The working draft of the revised Code of Practice contains the same advice. However, section 49 of the Regulation of Investigatory Powers Act 2000 contains a bespoke regime, with detailed safeguards, for requiring the disclosure of a “key” to electronic information which has come into the possession of any person by means of the exercise of a statutory power. We call on the Government to explain to Parliament during debates on the Bill why s. 49 of RIPA does not apply in the context of border searches.

125. 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.

Adequacy of other legal safeguards

(a) Selection for examination

126. The current Code of Practice, drawn up in 2009, states that “a person’s perceived ethnic background or religion must not be used alone or in combination with each other as the sole reason for selecting the person for examination.” One of the major concerns about the operation of Schedule 7 in practice, however, is the disproportionate effect on Muslims and other minority groups, and the way in which individuals are selected for examination. The EHRC in particular has expressed strong concerns about this aspect of Schedule 7.

127. There is nothing in the Government’s proposals which specifically addresses this concern. The revised Code of Practice is in almost identical terms to the current Code of Practice in this respect. The EHRC has conducted extensive work on the operation in practice of stop and search powers. We recommend that the Government discuss paragraphs 15 to 18 of the draft revised Code with the Equality and Human Rights Commission with a view to identifying 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 of Practice should provide that records of examinations should include the self-declared religion of the person examined, if given, in addition to their self-declared ethnicity as already provided for in the Code.93

(b) Recording of interviews

128. Currently only Schedule 7 examinations conducted at police stations are recorded. The Government consulted on whether all examinations of those detained under Schedule 7 should be recorded. 70% of respondents were in favour of recording all Schedule 7 examinations. The police, however, were concerned about the logistical difficulties and cost because many ports do not have recording equipment. The Committee asked the Government for the justification for distinguishing between Schedule 7 interviews at a police station and those at a port in this respect.

129. The Government acknowledges the clear indication of opinion in favour of recording Schedule 7 interviews, but in view of the practical problems due to limited facilities at smaller ports it proposes not to require all such interviews to be recorded, but rather to amend the Code of Practice to indicate that recording of interviews is best practice where the facilities are available. It is also exploring with the police at which ports and airports the introduction of recording facilities would have most impact. The working draft of the revised Code of Practice says that “examining officers should consider whether to audio record at a port where recording facilities are available at the port”, but it does not say that this is “best practice”.94

93 Draft Code of Practice for examining officers under Schedule 7 to the Terrorism Act 2000 (October 2013), para. 44.
94 Draft Code of Practice for examining officers under Schedule 7 to the Terrorism Act 2000 (October 2013), para. 46.
130. The recording of police interviews is an important safeguard, both for those being interviewed and for those conducting the interview. We acknowledge the Government’s concerns about the cost and practicality of introducing such capacity at all ports, but in view of developments in modern technology, including the ready availability of mobile devices which have the capacity both to audio and video-record, we question how significant a practical issue it is to provide recording facilities at all ports and airports.

131. 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 we 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.95 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. The following amendment would give effect to this recommendation:

| Schedule 7, page 148, line 39, after paragraph 4 insert new paragraph: |
| “Audio- and video-recording of interviews |
| 4A In paragraph 3(6) of Schedule 8 to the Terrorism Act 2000, the words “if the interview takes place in a police station” are omitted.” |

132. This amendment to paragraph 3(6) of Schedule 8 to the Terrorism Act 2000 would apply to Schedule 7 interviews of detained people at ports the same arrangements for audio-and video-recording as currently apply to such interviews at police stations.

(c) Review of detention

133. The Bill provides for statutory review of ongoing detention under Schedule 7, by requiring that a supervising officer should review the need for continued examination following detention.96 It leaves the details of when and how such reviews should occur to be set out in the new Code of Practice. The working draft of the revised Code of Practice provides that the first review will take place not more than one hour from the start of detention and the second no more than two hours after the first review.97

134. We asked why the Bill provides that the intervals at which Schedule 7 detention will be reviewed by a review officer are to be specified in the Code of Practice, rather than on the face of the legislation itself as it is in Schedule 8 for reviews of detention under s. 41 of the Terrorism Act 2000.

135. The Government replied that it took this approach “in view of the degree of operational detail involved, to include setting out the review periods and the role of the review officer.”

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95 The Bill’s commencement provision already permits the Secretary of State to appoint the day on which different provisions in the Bill come into force: clause 152(1) and (2).

96 New para. 20K(2) in Part 1A of Schedule8 to the Terrorism Act 2000, inserted by para. 7(3) of Schedule 7 to the Bill.

97 Draft Code of Practice for examining officers under Schedule 7 to the Terrorism Act 2000 (October 2013), para. 42.
136. It is not clear to us why there is any more “operational detail” involved in specifying the review periods for detention under Schedule 7 than is involved in specifying the periods for detention under Schedule 8, where the periods are prescribed on the face of the legislation.

137. *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. The following amendment would give effect to this recommendation:*

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Schedule 7, page 150, line 2, after “officer” leave out “at such intervals as may be specified in, and otherwise in accordance with, the code of practice” and insert:

“(2A) The first review shall be carried out as soon as is reasonably practicable after the time of the person’s detention and not more than one hour from that time.

(2B) Subsequent reviews shall be carried out at intervals of not more than 2 hours.”
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138. These proposed new paragraphs 20K(2A) and (2B) of Schedule 8 to the Terrorism Act 2000 would specify on the face of the legislation the intervals at which the reviewing officer should review the justification for continued detention, rather than leave them to be specified in the Code of Practice.

**(d) Public notification**

139. We think it is important that the travelling public be aware of the existence of Schedule 7 powers, and we recommend that a written notice should be displayed at all ports and airports explaining in simple and accessible terms the possibility of examination under Schedule 7.
5 Compensation for miscarriages of justice (Part 12)

Background

140. Clause 143 of the Bill would reverse a recent decision of the Supreme Court concerning the test to be applied when deciding whether a person whose conviction has been quashed is entitled to compensation for a miscarriage of justice. The new clause would make it a condition of compensation that the new or newly discovered fact “shows beyond reasonable doubt that the person was innocent of the offence” of which they were convicted.

141. Under the current law, section 133 of the Criminal Justice Act 1988 requires the Secretary of State to pay compensation where a person’s conviction for a criminal offence has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice. That statutory provision was enacted to implement Article 14(6) of the International Covenant on Civil and Political Rights (“ICCPR”), which provides:

14(6) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

142. Article 3 of Protocol 7 to the ECHR makes almost identical provision for a right to compensation for wrongful conviction. Although the UK is not a signatory to Protocol 7 to the ECHR, this is not because of any concern that UK law is not compatible with Article 3 of that Protocol. The UK ratified the ICCPR in May 1976.

143. The Criminal Justice Act 1988 does not define the term “miscarriage of justice” and the test to be applied by the Secretary of State when determining applications for compensation for miscarriages of justice has been the subject of litigation. In the case of Adams in 2011, the UK Supreme Court interpreted s. 133 of the Criminal Justice Act to mean that there is a right to compensation in two categories of case:

(1) where the new (or newly discovered) fact showed the applicant to be “clearly innocent”; and

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99 The reason given for the UK not ratifying Protocol 7 to the ECHR in the Government’s Review of International Human Rights Treaties in 2004 was that UK law was not compatible with Article 5 of Protocol 7, concerning equality between spouses (an obstacle to ratification which a Government amendment to the Equality Act 2010 was intended to remove).
(2) where the new fact “so undermines the evidence against the applicant that no conviction could possibly be based on it.”

144. In the subsequent case of Ali, the Divisional Court agreed with the Supreme Court’s interpretation of the statutory provision, but reformulated the second category of case in order to make it more readily understood by lawyers advising claimants for compensation and the Secretary of State:100 in addition to the “clearly innocent”, there is a statutory right to compensation for claimants who have “established, beyond reasonable doubt, that no reasonable jury (or magistrates) properly directed as to the law, could convict on the evidence now to be considered.”

145. The Bill would reverse these court judgments and insert instead a statutory definition of “miscarriage of justice”, according to which the Secretary of State would only pay compensation for a miscarriage of justice where the new or newly discovered fact (on the basis of which the conviction was reversed) “shows beyond reasonable doubt that the person was innocent of the offence” of which they were convicted.101 In Public Bill Committee, the Minister explained that the purpose of the clause is to “restore the definition of a miscarriage of justice to the pre-Adams position”, in other words the test of “clear innocence [...] based on the judgment of Lord Steyn in the case of Mullen.”102

146. According to the Explanatory Notes to the Bill, about 40 to 50 applications for compensation under s. 133 are received each year, of which some 2 or 3 are found to be eligible for compensation.103

147. JUSTICE, which has historically campaigned on miscarriages of justice and was instrumental in the setting up of the Criminal Cases Review Commission in 1997, is opposed to the change.104 It argues that none of the notorious miscarriages of justice which led to the establishment of the Criminal Cases Review Commission would qualify for compensation under the proposed new test, which it says is perverse. It says that restricting compensation for miscarriages of justice to cases where the applicant can demonstrate his innocence is unduly narrow and does not provide adequate redress in cases where the criminal justice system has gone seriously wrong. It can see no justifiable reason for overturning the decisions of the courts in Adams and Ali:

“Many of those who have had their convictions overturned have spent significant periods in prison and have endured hardship, stigma and deprivation as the result of wrongful conviction. It is unfair and unreasonable to deny them compensation for that treatment.”

148. Narrowing eligibility for compensation for miscarriages of justice raises a very significant human rights issue: whether it is compatible with the presumption of innocence, as protected by Article 6(2) ECHR, the common law, and Article 14(6) ICCPR.

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101 Clause 132(1) of the Bill, inserting new subsection (1ZA) into s, 133 of the Criminal Justice Act 1988.
102 PBC 11 July 2012 c463 (Damian Green MP).
103 EN para. 69.
104 JUSTICE, Anti-social Behaviour, Crime and Policing Bill: Written evidence to the Joint Committee on Human Rights and the Public Bill Committee, paras 55–66 (June 2013).
The presumption of innocence

149. Article 6(2) ECHR provides that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” The presumption of innocence is also a constitutional principle long recognised as fundamental by the common law. As Baroness Hale said in Adams, the wider test preferred by the Supreme Court in that case:

“is the more consistent with the fundamental principles upon which our criminal law has been based for centuries. Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty. A person is only guilty if the state can prove his guilt beyond reasonable doubt ... He does not have to prove his innocence at his trial and it seems wrong in principle that he should be required to prove his innocence now.”

150. JUSTICE points out that the European Court of Human Rights has applied the presumption of innocence to a variety of scenarios following acquittal and found violations of the right to be presumed innocent where a statement or decision reflects an opinion that the person is guilty, unless he has been proved so according to law. It regards it as a clear interference with the presumption of innocence if compensation is not awarded following the quashing of a conviction because the Secretary of State is not satisfied of the applicant’s innocence.

151. The Government’s human rights memorandum, however, said that it had considered whether the new “innocence” test in the Bill would interfere with the right protected by Article 6(2) ECHR to be presumed innocent until proven guilty but had concluded that it would not.105 Its reasoning was that Article 6(2) does not apply to an application for compensation for a miscarriage of justice. In the Government’s view, Article 6(2) applies to criminal proceedings, or to proceedings closely linked to them, and it is unlikely that a court would hold that the Secretary of State’s determination of an application for compensation for a miscarriage of justice would be sufficiently closely linked to the original criminal proceedings for Article 6(2) to apply. Indeed, the Government contended that the Supreme Court has already so held, citing those parts of the judgments in Adams in which the Supreme Court held that the presumption of innocence is not infringed by the statutory scheme in s. 133 Criminal Justice Act 1988.

152. In the case of Y v Norway, Article 6(2) has been held by the Strasbourg Court to be engaged in civil proceedings for compensation payable following a person’s acquittal.106 The Government acknowledged that authority but argued that it is different because in that case there was significant proximity between the criminal trial and the compensation proceedings, which were conducted in the same forum and decided within a day of each other.107 A determination of an application for compensation for a miscarriage of justice, in the Government’s view, is sufficiently distinct from the criminal process as not to engage the presumption of innocence in Article 6(2).

153. The Government was therefore satisfied about the compatibility of the proposed scheme with the presumption of innocence in Article 6(2) ECHR. Its reasons for the

105 Human Rights Memorandum, paras 220–224.
107 Human Rights Memorandum, para. 222.
proposed new test being compatible with the presumption of innocence was therefore the essentially technical argument that Article 6(2) does not apply to a determination by the Secretary of State of an application for compensation, because such a determination does not constitute “criminal proceedings” or is not sufficiently closely linked to such proceedings.

154. Since the introduction of the Bill, the Government’s argument has been considered and rejected by the Grand Chamber of the European Court of Human Rights in the case of Allen v UK. In that case the Court held that Article 6(2) applies to an application for compensation for a miscarriage of justice (rejecting the Government’s argument that it does not apply), and in reaching its decision that there had been no violation of the applicant’s right to be presumed innocent the Court said “what is important above all is that the judgments of the High Court and the Court of Appeal did not require the applicant to satisfy Lord Steyn’s test of demonstrating her innocence” – the very test that would be reinstated by the provision in the Bill.

155. We asked the Government to provide a supplementary memorandum setting out the Government’s assessment of the compatibility of clause 143 of the Bill with the presumption of innocence in Article 6(2) ECHR in light of the judgment in Allen v UK, and in its letter dated 29 July the Government promised to provide a substantive response once it had considered the implications of the judgment. The Government provided this assessment in a letter dated 7 October 2013 from Rt Hon Damian Green MP. The Government says that in light of the judgment of the European Court of Human Rights in Allen v UK, it has reconsidered whether the proposed amendment to s. 133 of the Criminal Justice Act 1988 would interfere with the right protected by Article 6(2) and concluded that it does not. The Government acknowledges that in the passage cited above “the Court [...] looks to be signalling its objection to a clear innocence type test”, but the Government “does not consider these statements to be determinative of the question”, for a number of different reasons. The Government argues that the Court cannot be taken to have determined the compatibility of the proposed new test with the presumption of innocence in Article 6(2) because that was not the exact issue that was before the Court. It argues that the test of which the Court clearly disapproved in Allen, that the applicant for compensation must be able to demonstrate their innocence, is not the same as the test proposed by the amendment in clause 143 of the Bill: the effect of the provision in the Bill, it says, is not that the applicant has to “demonstrate [their] innocence”, but that the Secretary of State has to be satisfied that the new fact on which the conviction was quashed shows clearly that the applicant did not commit the offence for which he or she had been convicted.

156. We have considered the Government’s reasons for concluding that the proposed new test is compatible with the presumption of innocence in Article 6(2), but we are not persuaded by them. In our view it is now clear beyond doubt from the recent judgment of the Grand Chamber of the European Court of Human Rights in the case of Allen v UK that the proposed new test in clause 143 of the Bill is incompatible with the right to be presumed innocent in Article 6(2) ECHR. The Court accepted that more than a mere acquittal is required in order for a miscarriage of justice to be established, but subject to an important proviso: “provided always that they did not call into question the applicant’s
innocence”. Application of the proposed new test for a miscarriage of justice (if and only if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent) will inevitably call into question the applicant’s innocence where the application is refused. The real substance of the concern about the presumption of innocence is that a rejection of an application for compensation for a miscarriage of justice on the ground that the new or newly discovered fact does not establish the person’s clear innocence suggests that the person may still have been guilty of the offence even though that has not been proved beyond reasonable doubt.

157. **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.

<table>
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<th>Clause 143, page 115, line 19</th>
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<td>Leave out clause 143</td>
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158. The Government’s answers to our other questions about this provision indicate that the Government does not expect the new clause to have a significant impact on the number of applicants who prove eligible for compensation, and it is not therefore intended to save significant sums in the amount paid out in compensation. The savings anticipated are in the region of £100,000 per annum in the form of legal costs which the Government says will be saved because of the greater certainty that the new definition will bring. Deleting the clause as we recommend therefore will not give rise to significant costs.

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109 Ibid. at para. 129.

110 Letter dated 29 July 2013 from Rt Hon Damian Green MP,
6 Miscellaneous

Dangerous Dogs (Part 7)

159. Clause 98 of the Bill amends the Dangerous Dogs Act 1991 by extending the current offence of having a dog that is dangerously out of control in a public place, or in a private place where the dog is not permitted to be, to all places, including private property. The extension of the offence to private premises is a response to the significant number of attacks, including fatal attacks, by dogs inside private premises, both on family members and visitors. By extending the offence in this way, the Government says it aims to protect people from dog attacks by way of deterrent.

160. In its Human Rights Memorandum the Government says that the provision engages the right to respect for private life and home, but that any interference with that right is justified in the interests of public safety and to protect the rights of others, including the right to life under Article 2. The interference is said to be necessary given the significant number of serious dog attacks inside the home, and the number of people, including children, who have suffered serious injury or even died as a result. We welcome the extension of the dangerous dogs offence to private property as a human rights enhancing measure, because it improves the protection provided by the criminal law for people’s life and physical integrity which are protected by Articles 2 and 8 ECHR.

161. The Bill also, however, creates an exemption from this extended protection for “householder” cases. These are cases where a dog becomes dangerously out of control when a trespasser is inside or in the process of entering a building. It does not matter whether the person actually is a trespasser; it is sufficient that the owner is in the building when the dog becomes out of control and that the owner believes that the person is a trespasser. “Trespasser” takes the common law meaning as someone trespassing against the occupier of the land.

162. Liberty has called on the Government to remove the subsection (2)(b) exclusion of criminal liability in “householder cases”, which it argues is unnecessary and encourages a disproportionate level of force to be used in the home. The Government’s Human Rights Memorandum does not refer to this exemption. We asked the Government to provide its analysis of the compatibility of the “householder exemption” in clause 98(2)(b) of the Bill with the UK’s obligation to ensure that its criminal law provides adequate protection for the right to life in Article 2 ECHR and the right to physical integrity in Article 8 ECHR.

163. The Government said in reply that it is extending protection for non-trespassers, but in not doing so for trespassers (save for in grossly disproportionate circumstances) “we are balancing the trespasser’s human rights with the householder’s Article 8 ECHR right to peaceful enjoyment of his or her dwelling.” It says that in making this assessment, the Government has taken into consideration the protection of the trespasser’s Article 2 and 8 ECHR rights by the availability of alternative routes to prosecution, such as the Offences

111 Human Rights Memorandum, para. 158.
112 Clause 98(2)(b), inserting new subsections (1A) and (1B) in s. 3 Dangerous Dogs Act 1991.
113 Bill 7 ENs para 206
Against the Person Act 1861 if the dog is set on the trespasser with intent to injure, and the alternative civil remedy of destruction of the dog under the Dogs Act 1871.

164. Our predecessor Committee reported that if the criminal law permitted the use of disproportionate force in self defence or to prevent crime, the UK would be in breach of its obligation to ensure that its criminal law provides adequate protection for the right to life in Article 2 ECHR and the right to physical integrity in Article 8 ECHR.114

165. In our view, to extend the protection of the criminal law against dangerous dogs but exempt from the scope of that legal protection trespassers, or anyone believed by the householder to be a trespasser, is on the face of it incompatible with the UK’s positive obligations to protect life and physical integrity under Articles 2 and 8 ECHR, and to ensure the enjoyment of those rights without unjustifiable discrimination under Article 14 ECHR. We recommend that further consideration be given to clause 98(2)(b) in order to prevent such incompatibility.

Clause 98, page 70, line 4:
Leave out clause 98(2)(b)

Firearms (Part 8)

166. Human rights law imposes positive obligations on States to protect people from violence, including gun crime. The proliferation of small arms is increasingly recognised as a human rights problem. The UN has appointed a Special Rapporteur on the subject, whose reports refer to the growing urgency to ensure that States are accountable for failure to establish reasonable regulation of the private ownership of small arms.115

167. To the extent that the provisions in the Bill close a gap in the current legal framework in relation to those who possess firearms with the intention of supplying them to another, we welcome them as a positive step taken by the Government pursuant to its responsibility to protect its citizens from gun-related violence.

168. As far as the increase in sentence for the illegal importation of firearms is concerned, from 10 years to life, the Government has acknowledged that “the evidence on deterrence effect is weak”, but says that “tougher sentences may contribute to reduce gun crime.”116 In our view, the Government should have a firmer evidence base when increasing maximum sentences from 10 years to life, especially bearing in mind that the offence would attract the mandatory minimum sentences provided for in the Firearms Act 1968, and reflect on whether an alternative maximum sentence might be appropriate.117

117 Section 51A.
169. Clause 102 of the Bill would allow British Transport Police officers to carry firearms without requiring an individual certificate. The Government says that this would merely put them in the same position as officers of other police forces. This provision of the Bill concerns the State’s responsibility for its own use of potentially lethal force. This directly engages the right to life in Article 2 ECHR and other international standards which have been elaborated to guide the use of firearms by law enforcement officials, such as the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

170. We asked the Government what consideration had been given to the UN Basic Principles in drafting clause 102 of the Bill, and whether the British Transport Police will receive the same training in the use of firearms as other police forces, including training in the relevant human rights standards contained in Article 2 ECHR, as interpreted by the European Court of Human Rights, and the UN Basic Principles. The Government said that the British Transport Police have adopted a series of Standard Operating Procedures which reflect the UN Basic Principles. We welcome the Government’s reassurance that the relevant human rights standards have been properly respected in the development of an armed capability by the British Transport Police.

IPCC’s powers (Part 10)

171. The Bill provides for the extension of the powers of the Independent Police Complaints Commission (“IPCC”) to cover private contractors. Like the express provision made in the Children and Families Bill to ensure that certain of the Children’s Commissioner’s powers apply to private contractors, which the Government agreed to insert into that Bill at our suggestion, this is a positive human rights enhancing measure which we welcome.

172. We also welcome as a human rights enhancing measure the Bill’s provision requiring police forces to respond to IPCC recommendations about complaints or conduct matters, setting out what action they are taking in response, or explaining why they are not taking any action: it strengthens the powers of the IPCC which will often be making recommendations which concern the State’s positive obligations under Articles 2 and 3 ECHR.

173. The Bill provides the IPCC with a power to serve an information notice on a person requiring the person to provide it with information that it reasonably requires for the purposes of an investigation. It also provides a right of appeal against the notice to the First Tier Tribunal on the ground that the information notice is “not in accordance with the law”. The Explanatory Notes to the Bill state that this right of appeal “acts as a further safeguard to ensure all data requests are necessary, proportionate and justified.”

118 Clause 116.
120 Clause 120.
121 Clause 118.
122 New para 19ZC(1) of Schedule 3 to the Police Reform Act 2002, as inserted by clause 118.
123 EN para. 287.
174. “In accordance with the law” is a term of art in the law of the European Convention on Human Rights: it concerns questions of legal certainty and foreseeability, but does not include questions of necessity, proportionality and justification. Article 8(2) ECHR, for example, provides that there shall be no interference with the right to respect for private and family life, home and correspondence “except such as is in accordance with the law and is necessary in a democratic society.”

175. Bearing in mind that most appeals against information notices are likely to take the form of complaints that the request for information is not necessary, proportionate or justified, and may well be put in terms of disproportionate interferences with the right to respect for private life in Article 8 ECHR, we asked the Government whether it would consider defining the ground of appeal against an information notice differently to avoid the risk of it being interpreted too narrowly.

176. The Government said that the right of appeal against an information notice reflects the existing equivalent provision in both the Data Protection Act and the Freedom of Information Act, and is therefore consistent with established appeal rights in other parallel statutory schemes which govern the disclosure of information. However, to avoid any doubt about the scope of the new appeal right, the Government said that it will update the Explanatory Notes on this clause to the effect that the appeal right is based on the wider meaning of the wording, namely an error of law which includes but is not limited to a breach of Article 8.

177. We welcome the Government’s promise to clarify the scope of the new appeal right against information notices issued by the IPCC in the Explanatory Notes accompanying the Bill.

Retention of personal samples (Part 10)

178. The Government introduced amendments to the Bill at Committee Stage concerning the retention of personal samples.124 The Government provided a supplementary human rights memorandum on these amendments, setting out in detail its analysis of the compatibility of the amendments with human rights law, in particular the right to respect for his private and family life.

179. Clause 125 of the Bill provides that the requirement to destroy personal samples within 6 months under the Police and Criminal Evidence Act 1984 (“PACE”) does not apply to a sample which is, or which may become, disclosable under the Criminal Procedure and Investigations Act 1996 (“the CPIA”) or its accompanying Code of Practice.

180. The 6-month requirement was established by the Protection of Freedoms Act 2012 (“POFA”) in order to comply with the judgment in S and Marper v UK. This case held that the existing provisions in the UK which allowed the indefinite retention of DNA samples and profiles taken from innocent people, including children, constituted a disproportionate interference with the right to private life, in violation of Article 8 ECHR.

124 Clause 125, Part 10 of the Bill
In particular, the genetic material contained in DNA samples was recognised as particularly sensitive.125

181. The proposal concerns samples (both intimate and non-intimate samples)126 that are taken for the purposes of a criminal investigation. The provision states that such samples will be retained if the CPIA is applicable. Under POFA, these samples are required to be deleted within 6 months. In certain serious sexual, violent or terrorist offences, a court order can be made to allow longer retention of the sample.

182. The retention of personal samples engages the right to respect for private life.127 We wrote to the Government to request its analysis of the compatibility of clause 125 with this right. The Government’s response sets out reasons why it considers that samples may be required to be retained longer than 6 months. The reasons given include representations from the police and Crown Prosecution Service that:

- the destruction of samples within six months will prevent relevant evidence being available in court proceedings;
- it may not be possible to identify and process relevant samples within a six month window; and
- it is excessively costly and bureaucratic for both the police and courts if a court order has to be obtained every time a sample might be needed in evidence more than six months after it was taken.128

183. We consider that some of the Government’s reasons in relation to costs and bureaucracy are not sufficient to establish that there is a pressing social need to retain samples, particularly as the Government has said that “in practice, it is likely that only a small proportion of samples will need to be protected as evidence”.129 However, we understand the importance of ensuring effective criminal proceedings, and we note the practical considerations that there may be some situations where samples are required to be retained for longer than six months.

184. Clause 125 sets out the following safeguards in relation to the proposed retention:

- the sample must only be used for the purposes of any proceedings for the offence in connection with which the sample was taken;
- once the CPIA no longer applies (i.e. when the relevant proceedings have concluded), the sample must be destroyed; and

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125 S and Marper v UK, Applications nos. 30562/04 and 30566/04, 4 December 2008, paras 70–77
126 ‘Intimate samples’ means: (a) a sample of blood, semen or any other tissue fluid, urine or pubic hair; (b) a dental impression; (c) a swab taken from any part of a person’s genitals (including pubic hair) or from a person’s body orifice other than the mouth. ‘Non-intimate samples’ means: (a) a sample of hair other than pubic hair; (b) a sample taken from a nail or from under a nail; (c) a swab taken from any part of a person’s body other than a part from which a swab taken would be an intimate sample; (d) saliva; (e) a skin impression.
127 Article 8 ECHR
128 Letter to the Chair from the Minister of State for Policing and Criminal Justice, Rt Hon Damian Green MP, 29 July 2013, pp 4–5
129 Supplementary human rights memorandum, Home Office, 28 June 2013, para 7
samples that are retained will be held only in case files. Neither the samples nor the DNA profiles derived from the samples will be stored on searchable databases.\textsuperscript{130}

185. However, the potential application of CPIA is broad. The CPIA and its Code of Practice provide for the retention by the police of information and other material obtained in the course of a criminal investigation. The Code of Practice states that “material may be relevant to an investigation if it appears to an investigator…that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case.”\textsuperscript{131}

186. The new clause therefore widens the circumstances in which personal samples may be retained and removes the judicial oversight required under POFA, as it will no longer be necessary to obtain a court order to retain the sample. Given the wording of the current CPIA code, there is a risk that all samples collected may be retained pending an investigation as a precautionary measure.

187. The Information Commissioner’s Office (“ICO”) has stated that the broad wording of the current CPIA Code of Practice “may lead to a very cautious approach being adopted with prolonged retention of samples becoming the norm irrespective of real need.”\textsuperscript{132} It suggests that, if it is decided to allow longer retention of samples on the basis of the CPIA and the Code of Practice, the Code of Practice could be revised “to provide clearer guidance on when it is appropriate to delete samples”.\textsuperscript{133}

188. We note the Bill’s proposed safeguards in relation to the retention of samples. We recommend the following additional safeguards to protect against the prolonged retention of samples, particularly on a precautionary or speculative basis:

- a robust process is established to ensure that each sample is considered and a determination is made as to whether or not it is required for the purposes of the CPIA. If it is not required, it should be destroyed within the PACE time limits.

- a robust independent audit regime of retained samples under CPIA is established to help ensure against unnecessary prolonged retention. HMIC or ICO could carry out this function. Similar independent oversight is provided for under Regulation of Investigatory Powers Act 2000.

189. We also asked the Government about whether it had consulted with the Information Commissioner about the amendments. In its response, the Government confirmed that a representative of the ICO had been involved in discussion about the retention of personal samples. The Government also said that it consults with the ICO about proposed legislation within the ICO’s remit.\textsuperscript{134} We welcome the Government’s stated policy of consulting with the Information Commissioner’s Office about proposed legislation within the ICO’s remit. We recommend, as good practice, that the Government

\textsuperscript{130} Supplementary human rights memorandum, Home Office, 28 June 2013, para 11
\textsuperscript{131} CPIA Code of Practice, para 2.1
\textsuperscript{132} ICO submission to JCHR, 12 July 2013, p 3
\textsuperscript{133} ICO submission to JCHR, 12 July 2013, p 3
\textsuperscript{134} Letter to the Chair from the Minister of State for Policing and Criminal Justice, Rt Hon Damian Green MP, 29 July 2013, p 6
ensures that this policy is applied consistently by Government Departments to ensure that the ICO is consulted at early stages of policy and legislative proposals on relevant provisions concerning data and information powers.

**Extradition (Part 11)**

190. On 10 July the Government tabled amendments to the Bill which would amend the Extradition Act 2003 to make it more human rights compatible. They would require the judge to be satisfied not only that the extradition would be compatible with Convention rights, but that it would not be disproportionate, taking into account the seriousness of the offence, the likely penalty and the possibility of the foreign authorities taking measures which would be less coercive than extradition of the suspect.\(^{135}\) They would also prohibit surrender unless there has been a decision to charge and a decision to try the suspect, to prevent extradition from occurring when the case is still at the investigative stage, and so prevent suspects from being subjected to lengthy pre-charge detention in the issuing state.

191. *We welcome as human rights enhancing measures the Government’s introduction of an express “proportionality” requirement into the Extradition Act in order to ensure that extradition only happens when the offence is serious enough to justify it, and the bar on extradition if there is no prosecution decision in the requesting state, which should help to prevent people from spending long periods in pre-trial detention following their extradition.*
Conclusions and recommendations

Introduction

1. 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. 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 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. (Paragraph 8)

2. 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. (Paragraph 9)

3. 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. (Paragraph 10)

Anti-social Behaviour (Parts 1–6)

4. 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. (Paragraph 11)

5. 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. (Paragraph 17)

6. The 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. (Paragraph 18)

7. We are concerned about the potential impact of reporting on children’s privacy rights. (Paragraph 19)

8. 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. (Paragraph 20)

9. 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. (Paragraph 26)

10. 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 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. (Paragraph 32)

11. 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 (Paragraph 33).

12. 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. (Paragraph 37)

13. 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. (Paragraph 40)
14. 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”. (Paragraph 44)

15. 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 (Paragraph 52).

16. 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. (Paragraph 55)

17. 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. (Paragraph 56)

18. We recommend the same amendment to clause 21(9) as we recommended in relation to clause 1(5) above, for the same reasons. (Paragraph 57)

19. We are concerned about the potential impact of reporting on children’s privacy rights. We therefore recommend that the Bill contains a 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. (Paragraph 58)

20. 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. (Paragraph 62)

21. 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: (Paragraph 65)

- 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.
22. 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. (Paragraph 70)

23. 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. (Paragraph 76)

**Forced marriage (Part 9)**

24. 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. (Paragraph 79)

25. 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: (Paragraph 89)

- 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.

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

26. 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. (Paragraph 100)
27. 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. (Paragraph 101)

28. We welcome these improvements to the powers in Schedule 7. The amendments narrow the very wide scope of the powers and so reduce the potential for the powers to be found incompatible with Convention rights. (Paragraph 103)

29. 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. (Paragraph 104)

30. 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. (Paragraph 109)

31. In our view, 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. The retention of a without suspicion power in Schedule 7 of the Terrorism Act 2000 is therefore not inherently incompatible with Articles 5 and 8 ECHR. (Paragraph 110)

32. We have considered carefully whether the Government has demonstrated the necessity for these more intrusive powers being exercisable without reasonable suspicion, and we are not persuaded that they have. 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. (Paragraph 112)

33. 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. The following amendment would give effect to this recommendation in relation to detention and the taking of fingerprints and non-intimate samples without consent. (Paragraph 113)

34. 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”. We welcome the express references to necessity and proportionality in the working draft of the revised Code of Practice, but since examining officers are already required by the Human Rights Act to act compatibly with the right to respect for private life in Article 8 ECHR they do nothing to restrict the wide scope of the powers. In our view, the powers to search personal electronic devices are so intrusive, given the nature of the information held on those devices, that we do not consider these references in the Code to be sufficient to circumscribe the width of the powers. In our view they should only be exercisable on reasonable suspicion. The following amendments to the Bill would give effect to this recommendation. (Paragraph 122)

35. We call on the Government to explain to Parliament during debates on the Bill why s. 49 of RIPA does not apply in the context of border searches. (Paragraph 124)

36. 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. (Paragraph 125)

37. We recommend that the Government discuss paragraphs 15 to 18 of the draft revised Code with the Equality and Human Rights Commission with a view to identifying 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 of Practice should provide that records of examinations should include the self-declared religion of the person examined, if given, in addition to their self-declared ethnicity as already provided for in the Code. (Paragraph 127)

38. 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 we 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.

39. 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. The following amendment would give effect to this recommendation. (Paragraph 137)
Compensation for miscarriages of justice (Part 12)

40. 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 (Paragraph 157).

Miscellaneous

41. We welcome the extension of the dangerous dogs offence to private property as a human rights enhancing measure, because it improves the protection provided by the criminal law for people’s life and physical integrity which are protected by Articles 2 and 8 ECHR. (Paragraph 160)

42. In our view, to extend the protection of the criminal law against dangerous dogs but exempt from the scope of that legal protection trespassers, or anyone believed by the householder to be a trespasser, is on the face of it incompatible with the UK’s positive obligations to protect life and physical integrity under Articles 2 and 8 ECHR, and to ensure the enjoyment of those rights without unjustifiable discrimination under Article 14 ECHR. We recommend that further consideration be given to clause 98(2)(b) in order to prevent such incompatibility. (Paragraph 165)

43. To the extent that the provisions in the Bill close a gap in the current legal framework in relation to those who possess firearms with the intention of supplying them to another, we welcome them as a positive step taken by the Government pursuant to its responsibility to protect its citizens from gun-related violence. (Paragraph 167)

44. In our view, the Government should have a firmer evidence base when increasing maximum sentences from 10 years to life, especially bearing in mind that the offence would attract the mandatory minimum sentences provided for in the Firearms Act 1968, and reflect on whether an alternative maximum sentence might be appropriate. (Paragraph 168)

45. We welcome the Government’s reassurance that the relevant human rights standards have been properly respected in the development of an armed capability by the British Transport Police. (Paragraph 170)

46. Like the express provision made in the Children and Families Bill to ensure that certain of the Children’s Commissioner’s powers apply to private contractors, which the Government agreed to insert into that Bill at our suggestion, this is a positive human rights enhancing measure which we welcome. (Paragraph 171)

47. We also welcome as a human rights enhancing measure the Bill’s provision requiring police forces to respond to IPCC recommendations about complaints or conduct matters, setting out what action they are taking in response, or explaining why they are not taking any action: it strengthens the powers of the IPCC which will often be making recommendations which concern the State’s positive obligations under Articles 2 and 3 ECHR. (Paragraph 172)
48. We welcome the Government’s promise to clarify the scope of the new appeal right against information notices issued by the IPCC in the Explanatory Notes accompanying the Bill. (Paragraph 177)

49. We consider that some of the Government’s reasons in relation to costs and bureaucracy are not sufficient to establish that there is a pressing social need to retain samples, particularly as the Government has said that “in practice, it is likely that only a small proportion of samples will need to be protected as evidence”. However, we understand the importance of ensuring effective criminal proceedings, and we note the practical considerations that there may be some situations where samples are required to be retained for longer than six months (Paragraph 183)

50. We note the Bill’s proposed safeguards in relation to the retention of samples. We recommend the following additional safeguards to protect against the prolonged retention of samples, particularly on a precautionary or speculative basis: (Paragraph 188)

- A robust process is established to ensure that each sample is considered and a determination is made as to whether or not it is required for the purposes of the CPIA. If it is not required, it should be destroyed within the PACE time limits.

- A robust independent audit regime of retained samples under CPIA is established to help ensure against unnecessary prolonged retention. HMIC or ICO could carry out this function. Similar independent oversight is provided for under Regulation of Investigatory Powers Act 2000.

51. We welcome the Government’s stated policy of consulting with the Information Commissioner’s Office about proposed legislation within the ICO’s remit. We recommend, as good practice, that the Government ensures that this policy is applied consistently by Government Departments to ensure that the ICO is consulted at early stages of policy and legislative proposals on relevant provisions concerning data and information powers. (Paragraph 189)

52. We welcome as human rights enhancing measures the Government’s introduction of an express “proportionality” requirement into the Extradition Act in order to ensure that extradition only happens when the offence is serious enough to justify it, and the bar on extradition if there is no prosecution decision in the requesting state, which should help to prevent people from spending long periods in pre-trial detention following their extradition. (Paragraph 191)
Formal Minutes

Wednesday 9 October 2013

Members present:

Dr Hywel Francis, in the Chair

Mr Robert Buckland  Baroness Berridge
Rt Hon Simon Hughes  Lord Faulks
Sir Richard Shepherd  Baroness Lister of Burtersett

Baroness O’Loan

Draft Report (Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill), proposed by the Chairman, brought up and read.

Ordered, That the Chair’s draft Report be now considered.

Paragraphs 1 to 191 read and agreed to.

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

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 2 July, 16 July and 10 September.

[Adjourned till Wednesday 16 October 9.30 am]
Declaration of Lords’ Interests

No members present declared interests relevant to this Report

A full list of members’ interests can be found in the Register of Lords’ Interests: http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm
## List of written evidence

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Written evidence

1. Letter from the Chair, to Rt Hon Theresa May MP, Secretary of State for the Home Department, Home Office

The Joint Committee on Human Rights is currently scrutinising the Anti-social Behaviour, Crime and Policing Bill in light of the requirements of human rights law.

Information provided by the Government

The Committee is grateful to you for the human rights memorandum you have provided summarising the Government’s consideration of the Bill’s provisions in light of the European Convention on Human Rights. It is also grateful to the Bill team which has made itself available to meet the Committee’s staff.

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 Government undertook on 10 December 2010 to always have due regard to the UN Convention on the Rights of the Child when developing law and policy. The Committee has been pleased to receive from the Government memoranda accompanying 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 have not received such a memorandum in relation to this Bill, notwithstanding that it has very significant implications for the rights of children.

Q1: I would be grateful if you could provide the Committee 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.

- It would be helpful if you could 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”).

I would also be grateful if you could answer the following specific questions about Parts 1 to 10 of the Bill. The Committee may be in touch further about Parts 11 and 12 of the Bill when it has had the opportunity to consider them.

Anti-social Behaviour (Parts 1–6)

Injunctions to prevent nuisance and annoyance (Part 1)

Q2: What is the Government’s justification for making injunctions to prevent nuisance and annoyance available against children as young as 10?

- Bearing in mind that the punishment for breach of such an injunction includes imprisonment, and children cannot be imprisoned until they reach the age of 14, will the Government consider raising the minimum age in clause 1(1) of the Bill from 10 to 14?

Q3: Please explain why the Government is satisfied that defining the threshold for an injunction in terms of “conduct capable of causing nuisance or annoyance” in clause 1(2) of the Bill is sufficiently precise to satisfy the requirement of both the common law principle of legal certainty and human rights law, that any interferences with rights must be defined with sufficient precision to enable individuals to anticipate the consequences of their actions?
Q4: Does the Government envisage that the court, when deciding under clause 1(2) whether, on the balance of probabilities, the person has engaged or threatens to engage in anti-social behaviour, will apply a flexible civil standard of proof, depending on the seriousness of the behaviour alleged?

Q5: Although paragraph 1(6) of Schedule 2 gives procedural effect to the requirement in Article 37(b) UNCRC that the imprisonment of a child shall be used only as a measure of last resort, is the substance of that requirement undermined by the breadth of the Bill’s definition of anti-social behaviour because it may lead to children being imprisoned for breach of the terms of injunctions imposed in respect of conduct falling far short of criminal behaviour?

Q6: In view of the express requirement in the ECHR that all interferences with the rights protected by Articles 8, 9, 10 and 11 of the Convention must be “necessary”, what is the justification for making the second condition in clause 1(3) of the Bill that the court considers it “just and convenient”, rather than “necessary”, to grant the injunction?

Q7: Bearing in mind the breadth of the Bill’s definition of “anti-social behaviour”, why is the Government satisfied that 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, satisfies the requirement of both the common law principle of legal certainty and human rights law, that any interferences with rights must be defined with sufficient precision to enable individuals to anticipate the consequences of their actions?

Q8: Please explain in more detail than is provided in the Explanatory Notes to the Bill or the ECHR memorandum, the purpose of the selective restrictions in clause 1(5) on the scope of the prohibitions and requirements that may be included in an injunction.

Q9: What is the justification for confining the scope of the power in clause 12, to exclude a person from their home in cases of violence or risk of harm, to tenants of a local authority or a housing provider?

Q10: Is it the Government’s intention that the power in clause 12 to include a provision in an injunction excluding a person from their own home should only be available to the court where it is satisfied that there has been violence or threatened violence against someone who lives in the premises, or someone who lives in the premises is at significant risk of harm from the person, as the Government’s ECHR memorandum suggests at paragraph 20?

If so, will the Government amend clause 12(1)(c) to make this explicit on the face of the legislation and so ensure that this extraordinary power to interfere with the right to respect for home in Article 8 ECHR is “tightly drawn and proportionate” as the Government intends?
Q11: What is the justification for disapplying the usual restrictions on reporting legal proceedings in which children are concerned for the purposes of injunctions to prevent nuisance and annoyance (clause 17)?

- Please explain why in the Government’s view the disapplication of the usual presumption against reporting is compatible with the child’s right to respect for privacy in Article 8 ECHR and Article 16 UNCRC and, in the case of proceedings relating to breach of an injunction, the State’s obligation under Article 40(2)(vii) UNCRC to ensure that the child’s privacy is fully respected at all stages of proceedings in which the child is alleged to have infringed the penal law.

- Should the best interests of the child be the primary consideration when a court decides whether or not to allow reporting of proceedings concerning children under Parts 1 and 2 of the Bill?

Criminal Behaviour Orders (Part 2)

Q12: If the Government’s intention is that the court must be satisfied to the criminal standard of proof (i.e. beyond reasonable doubt) that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress, as the Explanatory Notes (para. 108) suggest, is there any reason why this should not be made explicit in clause 21(3) of the Bill?

Q13: In view of the express requirement in the ECHR that all interferences with the rights protected by Articles 8, 9, 10 and 11 of the Convention must be “necessary”, what is the justification for making the second condition in clause 21(4) of the Bill that the court considers that making a criminal behaviour order “will help” in preventing the offender from engaging in behaviour that caused or was likely to cause harassment, alarm or distress, rather than is “necessary” to prevent such behaviour?

- What in the Government’s view would be the disadvantage of requiring the court to be satisfied that a criminal behaviour order is “necessary” for the purpose of preventing the offender from engaging in such behaviour?

Q14: Please answer Q8 above in relation to clause 21(9).

Q15: Please answer Q11 above in relation to clause 22(8).

Dispersal powers (Part 3)

Q16: Is it the Government’s intention that the authorising officer must have objective grounds for his view that the statutory condition for authorising the use of dispersal powers is met?

- If so, will the Government amend clause 32(2) of the Bill to make clear that the authorising officer’s belief that the condition is met must be “reasonable”?

Q17: What is the justification for providing in clause 32(3) that an authorisation can be made if the authorising officer considers that use of the dispersal powers “may be necessary” rather than “is necessary”?

- Why has the Government not taken the same approach to defining the threshold for authorising this exceptional power as it has taken to the exceptional power to stop and search without reasonable suspicion in s. 47A of the Terrorism Act 2000?

Community Protection (Part 4)

Q18: Please explain why the description in clauses 40 and 55 of the Bill of “unreasonable conduct having a detrimental effect on the quality of life of those in the locality” is sufficiently precise to satisfy the requirement of both the common law principle of legal certainty and human rights law, that any interferences with rights must be defined with sufficient precision to enable individuals to anticipate the consequences of their actions.

Recovery of possession of homes on anti-social behaviour grounds (Part 5)
Q19: In the absence of any requirement that there be a connection between the particular dwelling house and the riot-related offence, please explain why in the Government’s view the new riot-related grounds for possession introduced by clause 91 of the Bill do not amount to a punishment rather than a means of preventing harm to others.

Q20: Where possession of a dwelling house is ordered on the ground that the tenant or person living there has been convicted of a riot-related offence, what is the justification for interfering with the Article 8 rights of other family members, including children, who live in the home?

**Dangerous dogs (Part 7)**

Q21: Please provide the Government’s analysis of the compatibility of the “householder exemption” in clause 98(2)(b) with the UK’s obligation to ensure that its criminal law provides adequate protection for the right to life in Article 2 ECHR and the right to physical integrity in Article 8 ECHR.

**Firearms (Part 8)**

Q22: In the drafting of clause 102, what consideration has been given to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials?

Q23: Before the change in clause 102 comes into force, will British Transport Police receive the same training in the use of firearms as other police forces, including training in the relevant human rights standards contained in Article 2 ECHR, as interpreted by the European Court of Human Rights, and the UN Basic Principles?

**Forced marriage (Part 9)**

Q24: Please identify the evidence the Government relies upon to demonstrate that criminalisation will enhance effectiveness and what steps the Government intends to take to ensure this measure is not counter-productive for victims.

**IPCC’s powers (Part 10)**

Q25: Bearing in mind that most appeals against information notices issued by the IPCC under clause 118 are likely to take the form of complaints that the request for information is not a necessary, proportionate or justified interference with the right to respect for private life in Article 8 ECHR, and that “in accordance with the law” is a term of art with a particular meaning in the context of Article 8 ECHR, will the Government consider defining the ground of appeal against an information notice differently to avoid the risk of it being interpreted too narrowly?

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

Q26: Why has the Government not published its summary of responses to its consultation on the reform of Schedule 7, or its response to the consultation, more than 6 months after that consultation closed and before introducing its reforms in this Bill?

Q27: When will the summary of consultation responses and the Government’s response to the consultation be published?

Q28: In addition to publishing the summary of responses, will the Government now place in the public domain, in full not summary form, the responses to its consultation for which confidentiality was not claimed by the respondent? If not, please explain why not.

Q29: In view of the significance of the human rights issues raised by the powers in Schedule 7, reflected in the attention they have received from the Independent Reviewer, why has the Government not afforded a better opportunity for thorough pre-legislative scrutiny before introducing the measures in Schedule 6 to the Bill?
Q30: Even after the changes made by the Bill to the Schedule 7 powers, are there any powers to stop, question, search and detain UK citizens without reasonable suspicion which are wider in scope than, or comparable to, these powers? If so, please specify.

Q31: What is (are) the main purpose(s) of the powers in Schedule 7?

- Is gathering intelligence which is useful in the fight against terrorism one of the purposes relied on by the Government to justify the powers?

Q32: How useful in practice are stops based on risk factors rather than specific intelligence?

Q33: What proportion of examinations culminate in an intelligence report being compiled? Please provide a breakdown of this answer as between ports and airports.

Q34: What is the Government’s justification for saying that each of the following powers is necessary without reasonable suspicion:

- a power to stop and question
- a power to detain
- a power to compel answers to questions on pain of imprisonment
- a power to search the person and items of property including mobile phones?

Q35: Why, after a person has been examined for one hour under the Schedule 7 power, is there no requirement of reasonable suspicion before they can be detained for the purposes of ascertaining whether they appear to be a person involved in terrorism?

Q36: Are there any equivalent provisions to that in Schedule 7, requiring people to answer an examining officer’s questions on pain of imprisonment, in other contexts?

- What is the justification for such an unusual power in this particular context?

Q37: Is it the Government’s view that answers provided under such legal compulsion can be relied upon in proceedings such as TPIMs or asset-freezing proceedings?

Q38: When will the new draft Code of Practice be made available?

Q39: Will the Code of Practice make clear that the scope of questioning must be limited to the purpose of it, namely to ascertain whether the person appears to be a person involved in terrorism?

Q40: Will the Code of Practice make clear that searches of the person must also be confined to the purpose of the power, namely to ascertain whether the person being examined is involved in terrorism?

Q41: What is the justification for the period of detention being as long as 6 hours?

Q42: What is the reason for the Bill providing that intervals at which detention under Schedule 7 is periodically reviewed will be specified in the Code of Practice, rather than on the face of the legislation itself, as it is in para. 21 of Schedule 8 to the Terrorism Act 2000 for reviews of detention under s. 41?

Q43: What is the justification for distinguishing between Schedule 7 interviews at a police station and those at a port for the purposes of audio or video-taping the interview?

- Is there any reason why the words “if the interview takes place in a police station” should not be deleted from paragraph 3(6) of Schedule 8 to the Terrorism Act 2000, in line with other changes the
Bill makes to the legal framework which remove the distinction between detention at a police station and detention at a port under Schedule 7?

Q44: Is the power in paragraph 8 of Schedule 7 to search anything the person being examined has with them, or belonging to them, the lawful authority relied upon to authorise copying the contents of the person’s mobile phone? If not, what other lawful authority is relied upon?

Q45: Does the Government consider that copying the contents of a mobile phone SIM card during a Schedule 7 search is compatible with Article 8 ECHR? If so, please explain the Government’s reasons for its view.

Q46: Will the training to be received by designated officers in the exercise of Schedule 7 powers be co-ordinated by ACPO and uniform across all the officers with the authority to use them?

Q47: Will the Government agree to share the Schedule 7 training materials with the EHRC and permit the EHRC to witness the training itself?

It would be helpful if we could receive your reply to these questions by 12 July 2013

26 June 2013

2. Letter from the Chair, to Rt Hon Theresa May MP, Secretary of State for the Home Department, Home Office

I wrote to you on 26 June about Parts 1 to 10 of the Bill. My Committee has now had the opportunity to consider Parts 11 and 12 of the Bill and I would be grateful for your answers to the following questions. It may be necessary to write further in relation to Part 12 of the Bill after the Grand Chamber of the European Court of Human Rights has delivered its judgment in the case of Allen v UK on Friday 12 July.

Extradition (Part 11)

Q1: What mechanism will be used to assess whether the proposal to remove the automatic right of appeal reduces the number of unmeritorious appeals or merely reduces the number of appeals?

Q2: What measures are in place to ensure that requested persons receive adequate legal advice when preparing an application for leave to appeal?

Compensation for miscarriages of justice (Part 12)

Q3: How much public money does the Government estimate will be saved annually by making the change in eligibility for compensation for miscarriages of justice?

Q4: Leaving aside the question of whether or not Article 6(2) ECHR applies to a determination of an application for compensation under s. 133 Criminal Justice Act 1988, please explain the Government’s reasons for its view that it is compatible with the presumption of innocence to require proof of innocence beyond reasonable doubt as a condition of such compensation.

Q5: What can the Government point to in the text of the Covenant, the travaux preparatoires, or the case-law or General Comments of the Human Rights Committee that support its view that the proper meaning of Article 14(6) ICCPR is that a person whose conviction has been quashed is only entitled to compensation if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent of the offence?

Q6: What is the Government’s justification for retrospectively depriving claimants for compensation for miscarriages of justice of the benefit of the court judgments in Adams and Ali in clause 132(2)(b) of the Bill?

Q7: Have the applications for compensation in the Adams and Ali cases themselves been finally determined?

Q8: How many applications for compensation under s. 133 Criminal Justice Act are currently pending?
• How many such pending applications does the Government estimate would succeed on the Adams test but not on the proposed new statutory test?

Q9: How much public money does the Government estimate will be saved by making the change in eligibility for compensation for miscarriages of justice apply to any application which has not been finally determined on the date the change comes into force?

It would be helpful if we could receive your reply to these questions by 31 July 2013.

10 July 2013

3. Letter from the Chair, to Rt Hon Theresa May MP, Secretary of State for the Home Department, Home Office

Further to my letters to you about this Bill on 26 June and 10 July, I am writing to you about two more matters on which the Committee would appreciate your assistance, one arising from a recent court judgment and the other from Government amendments to the Bill.

Compensation for miscarriages of justice (clause 132)

First, as I anticipated in my letter of 10 July, the judgment of the Grand Chamber of the European Court of Human Rights in the case of Allen v UK on 12 July makes it necessary to seek further explanation from the Government about the compatibility of clause 132 of the Bill with the presumption of innocence in Article 6(2) ECHR.

In the Government’s human rights memorandum it said that it was satisfied about the compatibility of the proposed scheme with Article 6(2) ECHR because that Article does not apply to an application for compensation for a miscarriage of justice. That argument has now been considered and rejected by the Grand Chamber (paras 103-108).

Moreover, the Court also held (para. 133) that “references [in the Explanatory Report to Protocol 7] to the need to demonstrate innocence must now be considered to have been overtaken by the Court’s intervening case-law on Article 6(2).” In reaching its decision that there had been no violation of the applicant’s right to be presumed innocent in the case itself, the Court said “what is important above all is that the judgments of the High Court and the Court of Appeal did not require the applicant to satisfy Lord Steyn’s test of demonstrating her innocence.”

Q: In light of the judgment of the Grand Chamber of the European Court of Human Rights in Allen v UK, I would be grateful if you could provide a supplementary memorandum setting out the Government’s assessment of the compatibility of clause 132 of the Bill with the presumption of innocence in Article 6(2) ECHR.

Retention of DNA samples (new clause 10)

Q: What evidence does the Government rely on in support of its argument that there is a pressing social need to widen the circumstances in which DNA samples may be retained and removing the judicial oversight currently provided for by section 63R of PACE?

Q: What is the justification for retention of DNA samples in all cases raising CPIA concerns when in some cases there may be scope for obtaining a further sample in the future?

Q: Will the Government consider strengthening the safeguards in the CPIA Code of practice, as recommended by the Information Commissioner?

Q: Did the Government consult the Information Commissioner’s Office about new clause 10 and the retention of DNA samples?
Q: Please explain the Government’s policy in relation to consulting the Information Commissioner’s Office about proposed legislation within the ICO’s remit.

It would be helpful if we could receive your reply to these questions by 31 July 2013.

16 July 2013

4. Letter to the Chair, from Rt Hon Damian Green MP, Minister of State for Policing and Criminal Justice, and Jeremy Browne MP, Minister of State for Crime Prevention, Home Office

Thank you for your letter of 26 June to the Home Secretary regarding the Anti-social Behaviour, Crime and Policing Bill. In your letter you ask a number of questions regarding the provisions in the Bill. We provide answers to each of these in turn.

Q.1: I would be grateful if you could provide the Committee as soon as possible with a memorandum setting out the Government’s analysis of the compatibility of Part 1 to 6 and 9 of the Bill with the UNCRC.

- It would be helpful if you could 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")

An analysis of any rights under the UNCRC engaged by Parts 1 to 4 of the Bill are contained in the ECHR Memorandum already provided to the JCHR (see paragraphs 10, 55 and 56).

The Government acknowledges the relevance of Article 16 of the United Nations Convention on the Rights of the Child (UNCRC) to Part 5 of the Bill, as a child’s right to respect for his family life and his or her home will be affected by an eviction. Article 16(1) states that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence.

Any interference, however, by the provisions of Part 5 with a child’s rights under Article 16 will be in accordance with the law and in pursuit of the legitimate aims of the protection of the rights and freedoms of others, the prevention of disorder and crime, and public safety.

There will be clear provision in primary legislation about the additional circumstances in which landlords will be able to seek possession, and the landlord will only be able to gain possession of the property by obtaining an order for possession from the court.

In addition, in Manchester City Council v Pinnock the Supreme Court held that any person who risked losing his home in possession proceedings involving a public authority had a right to raise Article 8 of the European Convention on Human Rights and have the matter determined by an independent tribunal.

This is significant in terms of Article 16 of the UNCRC, as in making a proportionality assessment under Article 8 the best interests of the child must be a primary consideration. When a child’s Article 8 rights are engaged, they must be looked at in the context of the UNCRC, or as it has been put “through the prism of Article 3(1)” of the UNCRC.

Finally, it is important to note that the new ground for possession for riot related anti-social behaviour committed anywhere in the UK is a discretionary ground. This means that the court will only be able to grant possession where it considers it reasonable to do so. Reasonableness has been held to require the judge to take into account all relevant circumstances as they exist at the date of the hearing in a broad commonsense way. It is
the Government’s view that this will ensure that any interference with a child’s rights under Article 16 of the
UNCRC will be taken into account at the time that the order is made.

The Government is, therefore, satisfied that the provisions in Part 5 are compliant with Article 16.

The Government considers that the provisions in Part 9 are fully compatible with the UN Convention on the
Rights of the child, and indeed that they enhance the rights contained within that Convention.

Pursuant to clause 104(3), “marriage” means any religious or civil ceremony of marriage, whether or not
legally binding. This includes marriages where one party is a child, and therefore incapable of entering into a
valid marriage. For this purpose, please note section 2 of the Marriage Act 1949, which confirms that a
marriage where one party is under 16 will be considered void. In this way, the forced marriage offences in
section 104(1) and (2) cover cases where a child is forced into marriage.

The Government’s view is that the offences in section 104 afford protection to child victims of forced
marriage, which is entirely consistent with the principle in Article 3 of the UNCRC that in all actions
concerning children, the best interests of the child shall be a primary consideration.

Article 16(2) of the UNCRC confirms that a child has the right to the protection of the law against any
unlawful interference with his right to privacy and family life. In the Government’s view, this extends to the
scenario of a forced marriage where the interference with the child’s right to respect for private life and family
life is caused by the actions of their parents or other family members. The criminalization of forced marriage
and the enforcement of these criminal offences by the state affords the child the protection of the law against
that interference.

Article 19(1) of the UNCRC requires states to take all appropriate measures (including legislative measures) to
protect the child from all forms of physical or mental violence, injury or abuse, maltreatment or exploitation,
including sexual abuse, while in the care of parents or other persons who have the care of the child. Article
19(2) states that these protective measures include (inter alia) prevention, investigation and judicial
involvement.

Clause 104(1) will criminalize the use of violence, threats, or other forms of coercion for the purpose of
causing another person (including a child) to enter into a marriage. This measure is compatible with Article
19(1) because forced marriage can involve physical and mental violence, injury and abuse. This abuse
specifically extends to sexual abuse, given that where a child is forced into marriage, they may also be forced
into sexual acts to which they do not consent, which may constitute rape or other sexual offences. The
introduction of the offences in section 104 constitutes a protective measure for the purposes of Article 19(2),
because such offences will be investigated and prosecuted. The involvement of the courts in making forced
marriage protection orders also arguably falls within the reference to “judicial involvement” in Article 19(2).

Article 24(3) of the UNCRC requires state parties to take all effective and appropriate measures with a view to
abolishing traditional practices prejudicial to the health of children. The Government’s view is that forced
marriage can be characterized as a traditional practice for this purpose, and one which is prejudicial to the
health of children, both in terms of their physical health (due to the risk that they may be physically assaulted)
and in terms of their mental health, due to the risk that being forced into marriage will adversely affect their
mental health, for example a child victim of forced marriage might suffer depression or anxiety in the
aftermath of the forced marriage. The Government’s intention is that the criminalization of forced marriage
may contribute to the abolition of the practice of forced marriage by acting as a strong deterrent, and thus
dissuading the communities who practice it from continuing to do so.

Article 34 of the UNCRC requires state parties to undertake to protect children from all forms of sexual
exploitation and sexual abuse. It also requires state parties to take all appropriate measures to prevent children
being coerced to engage in unlawful sexual activity. Forcing a child into marriage can lead to their being raped
or sexually assaulted once they are married, and therefore the criminalization of forced marriage contributes
to the objective behind Article 34.
Article 35 of the UNCRC 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. Clause 104(2) criminalizes the practicing of deception with the intention of causing another person to leave the UK. Forced marriage can involve child abduction, in that a child victim of forced marriage may be forced against their will to travel abroad to be married in another country, or may be deceived or lured into doing so. In fact, clause 104(2) aims to implement the obligation in Article 37 of the Istanbul Convention to criminalise the intentional luring of an adult or a child into the territory of a state in which they do not reside, with the purpose of forcing them to enter into marriage.

Finally, Article 36 of the UNCRC requires state parties to protect the child against all other forms of exploitation prejudicial to any aspect of their welfare. Forced marriage can involve the exploitation of a child, for example, the child may be exploited for their immigration status as a UK national where the intention is that the spouse will derive a benefit in terms of their immigration status from the marriage. Forced marriage can be deeply prejudicial for the welfare of the child victim, for the reasons addressed at above.

Q.2: What is the Government’s justification for making injunctions to prevent nuisance and annoyance available children as young as 10?

- Bearing in mind that the punishment for breach of such an injunction includes imprisonment, and children cannot be imprisoned until they reach the age of 14, will the Government consider the raising the minimum age in clause 1 (1) of the Bill from 10 to 14?

Children aged between 10 and 17 can be arrested and taken to court if they commit a crime. We therefore consider it is right that they should be held equally responsible if they commit anti-social behaviour—much of which is actually crime, from graffiti on people’s walls, public drunkenness on our streets or harassment and intimidation of members of the public. The Government expects that, in the main, agencies will continue to use informal interventions to deal with young people who behave anti-socially and we will make this clear in the accompanying guidance.

Where informal approaches have been tried and have not worked we want agencies to have effective powers, backed up with tough sanctions on breach to deal with the minority of offenders who persistently engage in anti-social behaviour. However, as a purely civil remedy, with civil sanctions, there is no risk of criminalising a young person if they breach a condition in their injunction – unlike Anti-Social Behaviour Orders.

As identified imprisonment is only one option available. For those under 14 but over the age of 10 there are other options available to encourage compliance with the injunction such as a supervision order.

Q.3: Please explain why the Government is satisfied that defining the threshold for an injunction in terms of “conduct capable of causing nuisance and annoyance” in clause 1(2) of the Bill is sufficiently precise to satisfy the requirement of both the common law principle of legal certainty and human rights law, that any interferences with rights must be defined with sufficient precision to enable individuals to anticipate the consequences of their actions?

The “nuisance and annoyance” test is taken from the current test for the Anti-Social Behaviour Injunction, which is well known in the county court and is supported by 15 years of case law in our civil legal system. It is for these reasons we are content that the threshold for the injunction is not arbitrary, but rather it satisfies the common law principle of legal certainty and human rights law.

- What in the Government’s view would be the disadvantage of defining “anti-social behaviour” as conduct causing or likely to cause harassment, alarm or distress, rather than conduct capable of causing nuisance or annoyance?

The disadvantage would be that the adoption of the “harassment, alarm and distress” anti-social behaviour test would make the evidence gathering process for injunction applications more onerous for agencies and would cause needless delay in stopping problems and protecting victims.
Moreover, as mentioned, the “nuisance and annoyance” test is based on the current statutory test for the Anti-social Behaviour Injunction that has worked well in the housing sector. It is readily understandable by the courts and practitioners and will allow agencies to act quickly to protect victims and communities from more serious harm and the Government is keen not to interfere with this existing expertise.

Q.4: Does the Government envisage that the court, when deciding under clause 1(2) whether, on the balance of probabilities, the person has engaged or threatens to engage in anti-social behaviour, will apply a flexible civil standard of proof, depending on the seriousness of the behaviour alleged?

No. Whilst this is a decision for the courts, the civil standard of proof is used in Anti-Social Behaviour Injunctions which the courts have issued against anti-social individuals for over a decade and we are content that the civil standard of proof should apply to the IPNA on this basis. Also, breach of the new injunction will not be a criminal offence (unlike the Criminal Behaviour Order) and that is why we in the Government’s view the normal the civil standard of proof for applications for the injunction applies.

Q.5: Although paragraph 1(6) of Schedule 2 gives procedural effect to the requirement in Article 37(b) UNCRC that the imprisonment of a child shall be used only as a measure of last resort, is the substance of that requirement undermined by the breadth of the Bill’s definition of anti-social behaviour because it may lead to children being imprisoned for breach of the terms of the injunction imposed in respect of conduct falling far short of criminal behaviour because it may lead to children being imprisoned for breach of the terms of injunctions imposed in respect of conduct falling far short of criminal behaviour.

The Bill explicitly says that the court can only imprison a young person for breaching an injunction if satisfied that “In view of the severity or extent of the breach, no other power available to the court is appropriate”. Such an assessment requires the court to consider in detail the individual circumstances of both the conduct and the child’s personal circumstances. In relation to the conduct, the court will take into account its severity, and where the power to detain seems appropriate, in many cases the conduct will not fall short of criminal behaviour or at least come very close to it. Alternatively or additionally, the conduct will often have been extremely persistent and non-responsive to other types of intervention. These are matters for the court to consider carefully. It is also worth noting that the higher, criminal standard of proof applies to breach proceedings for the injunction. For these reasons, the Government does not believe that the substance of the requirement in Article 37(b) of the UNCRC is undermined.

Additionally, an important point is that a young person will not be criminalised if they breach their injunction which was supported by the Home Affairs Select Committee (HASC) in its report following pre-legislative scrutiny of the draft Anti-social Behaviour Bill, where it stated that it welcomed the move away from the automatic criminalisation for breaching the injunction.

Q.6: In view of the express requirement in the ECHR that all interferences with the rights protected by Articles 6, 9, 10 and 11 of the Convention must be “necessary”, what is the justification for making the second condition in clause 1(3) of the Bill that the court considers it “just and convenient”, rather than “necessary”, to grant the injunction?

- What in the Government’s view would be the disadvantage of requiring the court to be satisfied that an injunction is “necessary” for the purpose of preventing the respondent from engaging in anti-social behaviour, rather than “just and convenient”?

It is already incumbent on the courts to exercise their functions compatibly with Convention rights (section 6 of the Human Rights Act 1998). It therefore does not follow that the word “necessary” must be used in the legislative tests. In particular, it is possible that even where a court determines that Convention rights are either not engaged or are engaged and are not infringed, it may nonetheless conclude that it is not “just or convenient” to grant an injunction.

Q.7: Bearing in mind the breadth of the Bill’s definition of “anti-social behaviour”, why is the Government satisfied that 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, satisfies the requirement of both the
common law principle of legal certainty and human rights law, that any interference with rights must be defined with sufficient precision to enable individuals to anticipate the consequences of their actions?

- What are the Government’s reasons for not taking the same approach as it has taken in the Terrorism Prevention and Investigation Measures Act, by including in the legislation an exhaustive list of the types of prohibitions and requirements that can be included in an injunction to prevent nuisance and annoyance?

The purpose of the Terrorism Prevention and Investigation Measures Act was to abolish control orders and introduce a new regime to protect the public from terrorism, whereas the purpose of our anti-social behaviour reforms is to improve agencies’ response to problems by giving them more effective powers to better protect victims and communities and reduce breaches of formal orders in the long term. The anti-social behaviour measures in the Bill take forward many of the aspects of previous powers that have worked well.

The aim of the injunction is to prevent someone from engaging or threatening to engage in anti-social behaviour and the Government considers that it is important that the court should be allowed to include a range of prohibitions in the injunction to stop the behaviour. The court could also include positive requirements in an injunction to get an individual to address the underlying causes of their anti-social behaviour. The guidance that will accompany the Act will set out examples of prohibitions and positive requirements that could be included in an injunction. However, the Government considers it important that the Bill is not prescriptive 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. All requirements will be made following an order of the court, empowered to do so by legislation. They are therefore in accordance with the law. Such orders must have as their aim the purpose of preventing an individual from engaging in anti-social behaviour. As such, 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. The absence of a definitive list of prohibitions in respect of the Anti-social Behaviour Order and the Anti-social Behaviour Injunction has been the subject of a successful challenge.

Q.8: Please explain in more detail than is provided in the Explanatory Notes to the Bill or the ECHR memorandum, the purpose of the selective restrictions in clause 1(5) on the scope of the prohibitions and requirements that may be included in an injunction.

- Specifically, is clause 1(5) (a) of the Bill compatible with Article 9 of the Convention, which permits justifiable interferences with the freedom to manifest one’s religion or belief but does not permit interferences with religious beliefs as such.

Clause 1(5), as originally introduced, sets out factors which are difficult or impossible to work around when implementing a prohibition or requirement. Freedom to hold one’s religious belief under Article 9 is an absolute right and the Government is obliged to adhere to this. However, the manifestation of one’s religious beliefs is a qualified right and can be subject to certain restrictions that are “in accordance with law” and “necessary in a democratic society”, for example, to protect the public from crime and disorder, requirements at work at certain times or to carry out certain tasks. As mentioned above, the courts are bound to exercise their functions compatibly with Convention rights and will approach clause 1(5) accordingly.

We believe that practicability under clause 1(5) is a sufficiently high threshold for the courts in deciding whether limitations on the exercise of individuals’ beliefs are justifiable in order to protect victims and communities from harm. As mentioned above, the courts are bound to exercise their functions compatibly with Convention rights and will approach clause 1(5) accordingly.

The purpose of the injunction is to stop and prevent negative behaviour. Therefore we want, as far as is possible, individuals subject to an injunction to be able to comply with the terms of their injunction.
Q.9: What is the justification for confining the scope of the power in clause 12, to exclude a person from their home in cases of violence or risk of harm, to tenants of a local authority or a housing provider?

This power is restricted on the basis that it should only apply in exceptional circumstances involving the relationship between landlords and their tenants. On one view, 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. For instance, if a tenant does not occupy the residence as their main or principal accommodation this could be a breach of their tenancy agreement and thus we would need to consider carefully what the implications were to other agencies able to obtain injunctions excluding tenants from their homes. That said, following the debate on this clause in Public Bill Committee the Government has undertaken to consider further whether to extend the power in this clause to cover other forms of tenure, in particular the private rented sector.

Q.10: Is it the Government’s intention that the power in clause 12 to include a provision in an injunction excluding a person from their own home should only be available to the court where it is satisfied that there has been violence or threatened violence against someone who lives in the premises, or someone who lives in the premises is at significant risk of harm from the person, as the Government’s ECHR memorandum suggests at paragraph 20?

- If so will the Government amend clause 12(1) to make this explicit on the face of the legislation and so ensure that this extraordinary power to interfere with the right to respect for home in Article 8 ECHR is “tightly drawn and proportionate” as the Government intends.

The Memorandum describes one situation where clause 12 might be engaged (where the violence, threat of violence or risk of significant harm relates to a person in the premises). However, it is possible to exercise the power where such conduct occurs in respect of a victim or person at risk outside the premises. This is for the clear policy imperative to address anti-social behaviour caused by a person which affects neighbours. As mentioned, the local authorities (and courts reviewing decisions made) are bound to exercise their powers compatibly with Article 8 of the Convention.

We are satisfied that clause 12 is adequately drafted and proportionate and does not need amending as far its intent is concerned. However, under the current Anti-Social Behaviour Injunction, social landlords are able to exclude people from their own homes if there is, or is likely to be, a threat of violence or a significant risk of harm to others. This can include those in the locality who are not tenants (for instance neighbours in the private rented sector or owner occupiers) where their behaviour prevents the social landlord from carrying out their housing management function. We have only given the power to exclude in clause 12 to social landlords, but following the debate in committee we are considering extending the power to include anti-social individuals who live in privately rented accommodation in exceptional cases where there is a threat of violence or significant risk of harm to others.

Q.11: What is the justification for disapplying the usual restrictions on reporting legal proceedings in which children are concerned for the purposed of injunctions to prevent nuisance and annoyance (clause17)?

- Please explain why in the Government’s view the disapplication of the usual presumption against reporting is compatible with the child’s right to respect for privacy in Article 8 ECHR and Article 16 UNCRC and, in the case of proceedings relating to breach of an injunction, the State’s obligation under Article 40(2)(vii) UNCRC to ensure that the child’s privacy is fully respected at all stages of proceedings in which the child is alleged to have infringed the penal law.

- Should the best interests of the child be the primary consideration when a court decides whether or not to allow reporting of proceedings concerning children under Parts 1 and 2 of the Bill?

The Government acknowledges that reporting information in cases involving young offenders, such as their name, address or school, is a sensitive issue. The Committee has noted, the Bill provides that the normal automatic reporting restrictions established by section 49 of the Children and Young Persons Act 1933, do not
apply. However, section 39 of that Act does apply, which gives the court the discretion to prohibit the publication of certain information that would identify the child or young person. In other words, it will be for the court to decide what information should be reported. So while the Bill does disapply the usual presumption against reporting of young people, the court is still left with the ability to prohibit publication of information relating to young person.

Though decisions to allow reporting in cases with young people are likely to be rare, there are some circumstances when it may be appropriate. This could include: to provide local people with the information they need to identify and report breaches; to reassure the public about their safety and that action will be taken if they report anti-social behaviour; as well as being a deterrent to the subject of the order not to breach the order as the details are in the public domain.

During pre-legislative scrutiny the Home Affairs Select Committee recommended that it should be for the court to decide whether it is right to name a young person when issuing an order. The Government has accepted this recommendation which will allow the court to decide what is best on a case by case basis. The best interests of the child will of course require very careful consideration, but should be weighed up against the needs of the victims and the community. The court will have in mind its obligations under Article 8 of the ECHR when considering this issue.

Q.12: If the Government's intention is that the court must be satisfied to the criminal standard of proof (i.e. beyond all reasonable doubt) that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress, as the Explanatory Notes (para. 108) suggest, is there any reason why this should not be made explicit in clause 21(3) of the Bill?

It is the Government's intention that the fact of anti-social behaviour having taken place will, in practice, have to be established beyond reasonable doubt. The Criminal Behaviour Order is a civil order, and generally, the civil standard of proof is on the balance of probabilities rather than beyond reasonable doubt. However, it would be expected that the courts would follow the reasoning in the McCann case of 2002, when considering the evidence before them, and apply the criminal standard.

In the McCann case, the Law Lords held that the criminal standard should be applied because the facts needed to be demonstrated were of a criminal or quasi-criminal nature and there were serious implications for the individual if an ASBO was imposed. It is expected that the same will hold true for the criminal behaviour order which shares many characteristics with the ASBO on conviction. In contrast, a breach of the injunction to prevent nuisance and annoyance will not be a criminal offence, hence we have applied the civil standard of proof for applications for it.

With the Injunction to Prevent Nuisance and Annoyance (Part 1), which is a newer type of power to deal with anti-social behaviour, it was felt important to make clear the applicable standard on the face of the Bill (including having regard to the fact that breach is not a criminal offence, unlike the breach of an order under section 1 of the Crime and Disorder Act 1998, which the injunction replaces). Because of the similarity of the criminal behaviour order with the ASBO on conviction, there isn’t a need to include within the legislation the applicable standard of proof; the courts are able to take into account relevant case law to make their own judgment on the applicable standard of proof.

Q.13: In view of the express requirement in the ECHR that all interferences with the rights protected by Articles 8, 9, 10 and 11 of the Convention must be “necessary”, what is the justification for making the second condition in clause 21(4) of the Bill that the court considers that making a criminal behaviour order “will help” in preventing the offender from engaging in behaviour that caused or was likely to cause harassment, alarm or distress, rather than is “necessary” to prevent such behaviour?

- What in the Government’s view would be the disadvantage of requiring the court to be satisfied that a criminal behaviour order is “necessary” for the purpose of preventing such behaviour?

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.

Q.14: Please answer Q8 above in relation to clause 21(9).

Please see the response to question 8.

Q.15. Please answer Q11 above in relation to clause 22(8).

Please see the response to question 11.

Q.16. Is it the Government’s intention that the authorising officer must have objective grounds for his view that the statutory condition for authorising the use of the dispersal power is met?

- If so, will the Government amend clause 32(2) of the Bill to make clear that the authorising officer’s belief that the condition is met must be “reasonable”?

The question raises an important point and we will consider the inclusion of “reasonable” in clause 32(2) in advance of Report.

Q.17. What is the justification for providing in clause 32(3) that an authorisation can be made if the authorising officer considers that use of the dispersal powers “may be necessary” rather than “is necessary”?

- Why has the Government not taken the same approach to defining the threshold for authorising this exceptional power as it has taken to the exceptional power to stop and search without reasonable suspicion in s.47A of the Terrorism Act 2000?

It is intended that an authorisation can be given to use the dispersal power in an area where there may be problems with anti-social behaviour, crime or disorder. 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.

As currently drafted, use of the dispersal power involves a three-part test:

- The authorising officer must consider that use of the powers may be necessary.

The officer giving the direction also needs to satisfy two conditions:

- first, to have reasonable grounds to suspect that the behaviour is likely to contribute to harassment, alarm or distress or the occurrence of crime or disorder in the locality; and

- second, that the direction is necessary to remove or reduce the likelihood of that behaviour.

The dispersal may be used in relation to behaviour that is occurring or is likely to occur. We consider this to be a proportionate test when issuing a direction.

Section 47A of the Terrorism Act 2000 allows stop and search powers to be used where there is no reasonable suspicion of the presence of articles which could be used in connection with terrorism. The authorisation under section 47A therefore requires a higher test: that the person giving the authorisation reasonably suspects an act of terrorism will take place and considers the powers are necessary to prevent such an act. Stop and search powers require an officer of at least the rank of assistant chief constable to authorise use of the power.
We do not consider that this level of authorisation is required for the use of the dispersal power. We have built a number of safeguards into the power, in particular:

- The officer must have reasonable grounds to believe that the person concerned are causing, or likely to cause, harassment, alarm or distress, crime or disorder,
- The dispersal is targeted at the time when the behaviour is occurring and a direction can be given for a maximum of 48 hours,
- The dispersal should be given in writing, but in exceptional circumstances it can be given orally, and
- The person given a direction cannot be prevented from having access to the place where they live, attending their place of employment, education or training, medical treatment, or a place they are required to attend by a court order or tribunal.

Q.18. Please explain why the description in clauses 40 and 55 of the Bill of “unreasonable conduct having a detrimental effect on the quality of life of those in the locality” is sufficiently precise to satisfy the requirement of both the common law principle of legal certainty and human rights law, that any interferences with rights must be defined with sufficient precision to enable individuals to anticipate the consequences of their actions.

Litter, graffiti, public drunkenness and other forms of environmental anti-social behaviour can have a devastating effect on communities, especially when targeted and persistent. The definition of this behaviour in the tests for both the community protection notice (CPN) and public spaces protection order (PSPO) reflects this and is designed to allow professionals maximum flexibility to determine on a case by case basis what behaviour is having a detrimental effect on the quality of life of those in the locality. The wording broadly reflects that used in legislation relating to the litter clearing notice which was introduced through the Clean Neighbourhoods and Environment Act 2005 and the graffiti removal notices established by section 48 of the Anti-social Behaviour Act 2003. Both have been used effectively for a number of years and have been used and interpreted by frontline professionals and the courts without difficulty. In the Government’s view, the description used in clauses 40 and 55 uses language which is readily understandable, clear and precise enough for the public to understand what type of behaviour might result in a CPN or PSPO being imposed. In particular, the word “unreasonable” is a commonly used word which frontline professionals and the courts are used to interpreting, and imports a necessary degree of discretion into the decision making process. Moreover, the remaining words “detrimental effect on the quality of life in the locality” are sufficiently precise and understandable words and phrases to satisfy the requirement of legal certainty.

Q.19: In the absence of any requirement that there be a connection between the particular dwelling-house and the riot-related offence, please explain why in the Government’s view the new riot-related grounds for possession introduced by clause 91 do not amount to a punishment rather than a means of preventing harm to others.

The Government believes that it is right that landlords should have the powers to seek to evict a tenant where they or a member of their household chooses to inflict damage, not only in their own neighbourhood, but also in other people’s communities. 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. This proposal found a significant level of support from social landlords who responded to the consultation on this proposal. They in particular felt that this was an appropriate sanction for rioting and looting and would send out a clear message that this sort of behaviour would not be tolerated wherever it took place.

However, responses to the consultation from landlords also suggested that, whilst the messaging was important, seeking possession against those convicted of rioting beyond the local area was only likely to happen exceptionally. The riot-related ground is discretionary, in that the court must be satisfied that it is reasonable to grant possession (see section 84 of and Schedule 2 to the Housing Act 1985 and section 7 of and Schedule 2 to the Housing Act 1988). 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.
It is worth noting that the existing discretionary ground for possession for anti-social behaviour (Ground 2 in the Housing Act 1985 and Ground 14 in the Housing Act 1988) is drafted in broad terms. It enables landlords to seek possession if the tenant, a member of the tenant’s household or a visitor has been convicted of an indictable offence in, or in the locality of, the dwelling-house. Other than the location of the offence, there need be no connection between the dwelling-house and the offence. We are not aware that this has been used inappropriately.

Q.20: Where possession of a dwelling-house is ordered on the ground that the tenant or a person living there has been convicted of a riot-related offence, what is the justification for interfering with the Article 8 rights of other family members, including children, who live in the home?

The riot-related ground for possession pursues the legitimate aim of the prevention of disorder, and public safety. As explained above, it is intended to act as a deterrent to potential rioters.

It is the Government’s view that, as the new ground is discretionary, the requirement on the court to consider whether it is reasonable to grant possession will ensure that any interference with the Article 8 rights of other family members, including children, will be taken into account by the court at the time that the possession order is made.

In considering whether it is reasonable to grant possession the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing in a broad, commonsense way giving such weight as he or she thinks right to the various factors in the situation (Cumming v Danson [1942] 3 All ER 653. It has been held that the consideration of proportionality in relation to Article 8 is unlikely to cause the courts to reach substantially different decisions from those which they reach in considering reasonableness (Lambeth LBC v Howard [2001] EWCA Civ 468).

Q.21. Please provide the Government’s analysis of the compatibility of the “householder exemption” in clause 98(2)(b) with the UK’s obligation to ensure that its criminal law provides adequate protection for the right to life in Article 2 ECHR and the right to physical integrity in Article 8 ECHR.

The “householder exemption” in clause 98(2)(b) reflects the current status quo, namely that there is currently no offence committed under section 3 of the Dangerous Dogs Act 1991 when a dog attacks a trespasser on private property where the dog has a right to be. We are extending protection for non-trespassers but in not doing so for trespassers (save for in grossly disproportionate circumstances) we are balancing the trespasser’s human rights with the householder’s Article 8 ECHR right to peaceful enjoyment of his or her dwelling. In making this assessment the Government has taken into consideration the protection of the trespasser’s Article 2 and 8 ECHR rights by the availability of alternative routes to prosecution, such as the Offences Against the Person Act 1861 should the dog be set on the trespasser with intent to injure. The Dogs Act 1871 also offers an alternative civil remedy, namely the destruction of a dangerous dog.

Q.22: In drafting of clause 102, what consideration has been given to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials?

The development of a British Transport Police armed capability was announced in a written ministerial statement in May 2011. This armed capability has been in place since February 2012, when the first operational patrols were conducted. In putting that capability in place, the British Transport Police have adopted a series of Standard Operating Procedures which reflect the UN Basic Principles, including on recruitment and selection, management and training, deployment, rules of engagement and command arrangements, incident management and reporting.

Although it has been possible to develop that capability, progress has been hampered by the current firearms licensing arrangements, which place British Transport Police officers in a different position to that enjoyed by officers from the territorial police forces in England and Wales and the Police Service of Scotland. Clause 102 amends section 54(1) of the Firearms Act 1968 in order to bring British Transport Police officers (and employees of the British Transport Police Authority under the control of the Chief Constable of British Transport Police), within the definition of a “Crown servant”, putting them in the same position as other police officers in relation to certification requirements for firearms under the Firearms Act 1968.
addresses the current anomaly, removing burdensome and unnecessary bureaucracy. The Clause simply defines the licensing process to be followed.

Q.23: Before the change in clause 102 comes into force, will British Transport Police receive the same training in the use of firearms as other police forces, including training in the relevant human rights standard contained in Article 2 ECHR, as interpreted by the European Court of Human Rights, and the UN Basic Principles?

Extensive discussions were undertaken with the then National Policing Improvement Agency regarding the requirements for setting up, operating and maintaining a firearms capability for the British Transport Police prior to the operational deployment of British Transport Police firearms officers by the British Transport Police Authority.

The British Transport Police seconded firearms experts from the Metropolitan Police Service, Essex Police and the National Policing Improvement Agency to assist with the creation of the firearm unit and to staff the British Transport Police Firearms Training and Development Unit.

Recruitment of British Transport Police firearms officers was undertaken using approved national guidelines which have since been set out in a "Standard Operating Procedure". During the original recruitment phases eleven experienced firearms officers were recruited from Home Office forces, five of whom were also experienced Operational Firearms Commanders, Firearms Instructors and Tactical Advisors.

The initial training for British Transport Police firearms officers was sourced from Cheshire Police. All the training was delivered in exactly the same way as Cheshire Police delivers training to its own staff under its firearms training license. Refresher training for British Transport Police firearms officers has been delivered by City of London Police Firearms instructors and has been signed off by the City of London Police Chief Firearms Instructor.

The BTP has now established an in house firearms training capability, with a bespoke in-house training unit, staffed with accredited firearms trainers. The College of Policing, who set the standards for the police service on training, development, skills and qualifications, has awarded BTP a provisional license. The provisional licence is the standard starting point and provides for assessment oversight of the training programme by the College of Policing before the final award of a full licence. The award of a provisional licence is confirmation that all policies and procedures are in now in place as required by the Authorised Professional Practice—Armed Policing, the National Police Firearms Training Curriculum and the Home Office Codes of Practice on the Police Use of Firearms and Less Lethal Weapons.

Q.24. Please identify the evidence the Government relies upon to demonstrate that criminalisation will enhance effectiveness and what steps the Government intends to take to ensure this measure is not counter-productive for victims.

The Government wanted to be absolutely certain that any changes made were in the best interests of victims. The consultation was launched to consider all of the evidence afresh and the majority view expressed was that forced marriage should be criminalised. In addition to the outcome of the consultation, the Government has also taken into account the legislative provisions required to enable the UK to ratify the Istanbul Convention (see note at Annex A).

In order to enhance effectiveness, the civil remedy will continue to exist alongside a new criminal offence. This means that a victim could choose to take the civil route, or go to the police (as they can now). If they choose to go to the police and the police refer the case to the CPS, it will then be for the CPS to decide whether to proceed with the prosecution.

We know that legislation alone is not enough, but it sends a clear message that this brutal practice is totally unacceptable and will not be tolerated in the UK. We will also work with communities to ensure they understand that should a forced marriage occur, there will be severe penalties for doing so.
We have already carried out a first phase nationwide engagement programme focused and education and prevention, through a series of regional road shows and debates. The agreed outcomes from these events will inform how we engage with communities ahead of and following enactment of the new law on forced marriage. Practitioners will also continue to receive additional awareness training, enabling them to utilise both the civil remedies and criminal sanctions more effectively and we will continue to work with our partners to strengthen the message within all communities that forced marriage is unacceptable and will not be tolerated in the UK.

Q.25: Bearing in mind that most appeals against information notices issued by the IPCC under clause 118 are likely to take the form of complaints that request for information is not a necessary, proportionate or justified interference with the right to respect for private life in Article 8 ECHR, and that “in accordance with the law” is a term of art with a particular meaning in the context of Article 8 ECHR, will the Government consider defining the ground of appeal against an information notice differently to avoid the risk of it being interpreted too narrowly?

The provision in clause 118 (specifically in new paragraph 19ZC of Schedule 3 to the Police Reform Act 2002) relating to the right of appeal against an information notice reflects the existing provision in section 49 of the Data Protection Act 1998 and section 58 of the Freedom of Information Act 2000. In each case, the Tribunal can allow an appeal against an enforcement or other notice (under the 1998 Act) or a decision notice (under the 2000 Act) and shall allow it if, amongst other things, the notice against which the appeal is brought is not in accordance with the law. We have been mindful that the appeal rights in each case relate to notices which may be given to a person in respect of the disclosure (or non-disclosure) of information (like the appeal right in clause 118), and are correspondingly likely in each case to relate to appeals about the lawfulness of the notice under Article 8 of the ECHR.

We are, therefore, satisfied that the prescribed appeal right in new paragraph 19ZC in clause 118 is appropriate and consistent with established appeal rights in other parallel statutory schemes which govern the disclosure of information. However, to ensure that there can be no doubt whatsoever about the scope of the new appeal right, we will update the Explanatory Notes relating to this clause to the effect that the appeal right is based on the wider meaning of the wording, namely an error of law which includes but is not limited to a breach of Article 8.

Q26: Why has the Government not published its summary of responses to its consultation on the reform of Schedule 7, or its response to the consultation, more than 6 months after that consultation closed and before introducing its reforms in this bill?

The Government published its response to the public consultation on the operation of Schedule 7 on 11 July. Ahead of that the focus of work had been on bringing forward legislative proposals at the earliest opportunity.

Q27: When will the summary of consultation responses and the Government’s response to the consultation be published?

The Government’s response was published on 11 July and is available at https://www.gov.uk/government/consultations/review-of-the-operation-of-schedule-7.

Q28: In addition to publishing the summary of responses, will the Government now place in the public domain, in full not in summary form, the responses to its consultation for which confidentiality was not claimed by the respondent? If not please explain why not.

Publication of a summary is in line with Cabinet Office Guidance. In this case some responses received from police officers contain operationally sensitive details that it would be inappropriate to publish.

Q29: In view of the significance of the human rights issues raised by the powers in Schedule 7, reflected in the attention they have received from the independent Reviewer, why has the Government not afforded a better opportunity for thorough pre-legislation scrutiny before introducing the measures in Schedule 6 to the bill?
The consultation provided the opportunity for comment on indicative proposals. To raise awareness of the consultation we wrote to a wide range of community, faith and interest groups. Alongside the consultation, with the help of the police and local authorities we undertook a series of community engagement events throughout the UK—in Birmingham, Bradford, Gatwick, Manchester, Rotherham, Stirling, Tower Hamlets and Westminster.

These public meetings and the consultation provided for public scrutiny of the operation of Schedule 7 to the Terrorism Act 2000 and potential changes to the legislation ahead of Parliament’s scrutiny of the proposals contained in the Bill.

Q30: Even after the changes made by the bill to the Schedule 7 powers, are there any powers to stop, question, search and detain UK citizens without reasonable suspicion which are wider in scope than, or comparable to these powers. If so please specify.

No. However Schedule 7 is a key part of the UK’s border security arrangements, helping counter the threat from terrorism and protect public safety by allowing the police to question individuals travelling through ports and airports to determine if they are or have been involved in terrorism.

People are aware that without reasonable suspicion they are potentially subject to being searched by port security when intending to travel, to being examined by an immigration officer on arrival or to being examined by police under Schedule 7 when they enter a port with the intention of travel or on arrival.

The powers in Schedule 7 are considered necessary and proportionate given the current terrorist threat, in relation to which numerous terrorist plots have involved individuals undertaking, or planning to undertake, international travel to plan and prepare for acts of terrorism.

Schedule 7 powers are unusually wide ranging but the importance of protecting the UK borders from national security threats means that their use is both necessary and proportionate.

Q31: What is (are) the main purpose(s) of the powers in Schedule 7?

- Is gathering intelligence, which is useful in the fight against terrorism, one of the purposes relied on by the Government to justify the powers?

Schedule 7 powers may only be used to determine whether a person is or has been involved the commission, preparation or instigation of terrorism. This can result in the obtaining of intelligence relevant to the individual concerned or more generally about the terrorist threat to the UK or UK interests abroad. The Government considers that this is an important purpose justifying the powers.

Q32: How useful in practice are stops based on risk factors rather than specific intelligence?

Examinations that are based on risk factors rather than specific intelligence are a valuable tool in the detection of “clean skins”. These are people who have the intention to travel prepare for or to carrying out an act of terrorism but about whom the police have no prior knowledge. There may be an absence of specific intelligence in relation to a person who is travelling on a specific route when there is specific intelligence about that route. Or there may be no specific intelligence in relation to a person who is a travelling companion of a person in respect of whom there may be specific intelligence. Individuals’ behaviour is also a factor that is assessed as a reason to undertake an examination. Such examinations have identified individuals with links to terrorism.

Q33: What proportion of examinations culminate in an intelligence report being compiled? Please provide a breakdown of this answer as between ports and airports.

It is a long standing principle that the Government does not comment on intelligence matters.

Q34: What is the Government’s justification for saying that each of the following powers is necessary without reasonable suspicion:
- **A power to stop and question**

Against the background of the threats posed by international terrorism and Northern Irish related terrorism, the power to stop and question individuals at ports without reasonable suspicion is necessary to detect individuals travelling through our ports and borders who are or have been involved in terrorism and who may be travelling for the purposes of involvement in terrorism; to deter people from travelling for the purposes of involvement in terrorism; to obtain information about persons who are or have been involved in terrorism who are travelling through our borders, and – most importantly – to protect the public from terrorism.

- **A power to detain**

The power to detain enables the examination of individuals who do not wish to be examined, and who insist on leaving the examination. The provisions in the Bill would, for the first time, ensure that all detained individuals will have the right to consult a publicly funded solicitor privately and the right to have person informed of their detention.

- **A power to compel answers to questions on pain of imprisonment,**

Compulsion to answer questions put in examination is critical to the utility of the Schedule 7 powers identifying individuals who are or have been engaged in terrorism. If there were no such compulsion the power would be fruitless. Individuals’ answers given under compulsion would not generally be admissible in criminal proceedings.

- **A power to search the person and items of property including mobile phones?**

The ability to undertake searches of persons and their property, as part of an examination, is likewise critical to the utility of the Schedule 7 in identifying individuals who are or have been engaged in terrorism.

The Bill would introduce further safeguards. Before undertaking a strip search, an examining officer will require reasonable grounds to suspect that the person may be concealing something which may be evidence that the person is involved in terrorism and require the prior authority of a supervising officer. The current power to conduct intimate searches would be repealed by the Bill.

**Q35: Why after a person has been examined for one hour under the Schedule 7 power, is there no requirement of reasonable suspicion before they can be detained for the purposes of ascertaining whether they appear to be a person involved in terrorism?**

Introducing a reasonable suspicion test for Schedule 7 would reduce the capability of the police to detect and deter individuals travelling to and from the UK to plan, train and raise funds to carry out or otherwise engage in terrorism. That, in turn, would place the public at an increased risk from acts of terrorism.

Requirements for an examination to extend beyond an hour can include language or interpretation issues, evasive responses about the purpose of travel, inconsistencies in the information provided requiring clarification, and need to examine property. Those requirements for prolonging the examination may not directly amount to a reasonable suspicion of involvement in terrorism.

**Q36: Are there any equivalent provisions to that in Schedule 7, requiring people to answer questions on pain of imprisonment, in other contexts?**

There is, for example, the investigation powers available to the Director of the Serious Fraud Office under section 2, Criminal Justice Act 1987.

- **What is the justification for such an unusual power in this particular context?**

The justification for that power in Schedule 7 to the Terrorism Act 2000 is at question 34, third bullet.
Q37: Is it the Government’s view that answers provided under such legal compulsion can be relied upon in proceedings such as TPIMS or asset freezing proceedings?

It is the Government’s view that material gathered through the lawful exercise of Schedule 7 powers is in principal admissible in TPIM or asset freezing proceedings. These are not criminal proceedings but administrative proceedings conducted in the High Court analogous to judicial review. It would be a matter for the senior judge hearing the case whether or not to admit such material and, if so, to decide how much weight to place upon it.

Q38: When will the new draft code of practice be available?

An initial draft of a Code of Practice for examining officers reflecting the amendments to the powers contained in the Bill will be finalised ahead of Report Stage.

Q39: Will the Code of Practice make clear that the scope of questioning must be limited to the purpose of it, namely to ascertain whether the person appears to be a person involved in terrorism?

Yes.

Q40: Will the Code of Practice make clear that the searches of the person must also be confined to the purpose of the power, namely to ascertain whether the person appears to be a person involved in terrorism?

Yes.

Q41: What is the justification for the period of detention being as long as 6 hours?

The vast majority of all examinations (97%) are completed in one hour. Sampling indicates that of those examinations most (60%) are completed within fifteen minutes. However, in rare cases, the examining officers may consider it necessary to search a large volume of property including material on electronic devices. The provisions in the Bill reduce the current statutory maximum period of examination by a third, from nine hours.

Q42: What is the reason for the Bill providing that intervals at which detention under Schedule 7 is periodically reviewed will be specified in the Code of Practice, rather than on the face of the legislation itself, as it is in para. 21 of Schedule 8 for reviews of detention under s41?

Currently Schedule 7 does not provide for review of detention. The Bill introduces review of detention under Schedule 7 and for the periods of review to be specified in the statutory Code of Practice. This approach was taken in view of the degree of operational detail involved, to include setting out the review periods and the role of the reviewing officer.

Q43: What is the justification for distinguishing between Schedule 7 interviews at a police station and those at a port for the purposes of audio or video-taping the interview?

Interview facilities at ports and airports do not replicate those at police stations. Currently there are very limited capabilities for recording interviews at ports and airports. The Government is exploring with the police where the introduction of recording facilities would have most impact.

Q44: Is the power in paragraph 8 of Schedule 7 to search anything the person being examined has with them, or belonging to them, the lawful authority relied upon to authorise copying the contents of the person's mobile phone? If not what other lawful authority is relied upon?

The relevant provisions are paragraphs 5 (a) and (d) of Schedule 7 which respectively require a person under examination to give the examining officer any information or document in his possession which the officer requests. Under paragraph 8 an examining officer may conduct a search of the person under examination, a search of anything the person has with him that is on, has been or is likely to be on an aircraft, ship or train.
Q45: Does the Government consider that copying the contents of a mobile phone SIM card during a Schedule 7 stop is compatible with Article 8 ECHR? If so please explain the Government’s reasons for its view.

Yes. The Government accepts that the copying of information from a mobile phone SIM card is capable of constituting an interference with a person’s right to respect for private life. However that interference is justified by the need to protect the public from terrorism and that the power is only exercised when necessary and proportionate to do so. Information is now largely stored electronically on mobile devices rather than on paper as it would have been in the recent past. Without the power to examine the contents of a SIM card, the police would be severely curtailed in their ability to determine whether or not a person appears to be or has been involved in terrorism. Information obtained in this way would be subject to the provisions of the Data Protection Act and the statutory Code of Practice on the Management of Police Information. Paragraph 11 of Schedule 7 already makes express provision for the detention of property obtained in an examination to determine whether a person or goods being examined is or has been concerned, or used in terrorism. New paragraph 11A of Schedule 7 to the 2000 Act added to the Bill in Committee, makes express provision for the copying and retention of information from examined property ensuring such interference with convention rights is more clearly in accordance with law that is adequately accessible and foreseeable.

Q46: Will the training to be received by designated officers in the exercise of Schedule 7 powers be co-ordinated by ACPO and uniform across all the officers with the authority to use them?

Schedule 7 training will be required to meet a national standard to be agreed with and co-ordinated by the National Police lead for counter-terrorism and the College of Policing.

47: Will the Government agree to share the Schedule 7 training materials with the EHRC and permit the EHRC to witness the training itself?

Government officials and police officers have met with the EHRC to discuss Schedule 7 training. Sharing of training materials and witnessing of training will be possible subject to safeguarding of sensitive operational techniques and matters of national security.

16 July 2013

ANNEX

Note on the Istanbul Convention and Forced Marriage provision

In June 2012, the Government signed the Council of Europe Convention on preventing and combating violence against women and domestic violence, with a view to future ratification. It is the Government’s view that before we can ratify this convention, we will need to introduce new offences in order to ensure that our domestic legislation is compliant, and to avoid the possibility of any legal challenges alleging that our domestic legislation is incompatible. When designing the new offences, the Government therefore had in mind the relevant articles of the Istanbul Convention (which are set out below) and the need to ensure compliance with this Convention.

Chapter 5 of the Istanbul Convention contains the substantive law provisions. Article 37(1) requires parties to take the necessary legislative measures to ensure that the intentional conduct of forcing an adult or child to enter into marriage is criminalised. Article 37(2) requires parties to take the necessary legislative measures to ensure that the intentional conduct of luring an adult or child to the territory of a party or state other than the one they reside in, with the purpose of forcing this adult or child to enter into a marriage, is criminalised.

Article 44 deals with jurisdiction, including extra-territorial jurisdiction. Article 44(1) requires parties to take the necessary legislative measures to establish jurisdiction over any offence established in accordance with the Istanbul Convention, when the offence is committed by one of their nationals or by a person who has habitual residence in their territory. Article 44(2) states that parties shall endeavour to take legislative measures to establish jurisdiction over any offence where it is committed against one of their nationals or someone
habitually resident in their territory. In this context, the term “endeavour” has been interpreted to mean that no absolute legal obligation is imposed on the parties.

Article 44(3) states that, for the prosecution of the forced marriage offences in Article 37, parties must take the necessary legislative measures to ensure that their jurisdiction is not subordinated to the condition that the acts are criminalised in the territory where they were committed.

Article 78 deals with reservations. Article 78(2) allows a state, when depositing its instrument of ratification, to declare that it reserves the right not to apply the provisions laid down in Article 44, paragraphs 1, 3 and 4.

In terms of the draft clauses in the Bill, clause 104(1) is intended to implement Article 37(1) of the Istanbul Convention and clause 104(2) is intended to implement Article 37(2). We do not have a pre-existing concept of “luring” within our criminal law, so the “deception” formula in clause 104(2) was the closest approximation to the concept of luring that we were able to devise.

5. Letter to the Chair, from Rt Hon Damian Green MP, Minister of State for Policing and Criminal Justice, Home Office

Thank you for your further letters of 10 and 16 July to the Home Secretary regarding the Anti-social Behaviour, Crime and Policing Bill. In your letters you ask a number of questions regarding the provisions in Parts 11 and 12 of the Bill. Our response to these questions is set out below.

Questions from letter dated 10 July

Q1: What mechanism will be used to assess whether the proposal to remove the automatic right of appeal reduces the number of unmeritorious appeals or merely reduces the number of appeals?

In his review of the UK’s extradition arrangements, Sir Scott Baker found that the success rate of appeals in extradition case was extremely low, less than 13 per cent in 2010, and therefore recommended that the unfettered right of appeal to the High Court be replaced with an appeal filter. We agree with that recommendation.

The appeal filter does not remove any person’s right to seek leave to appeal, but will ensure that appeals without merit are disposed of at the earliest opportunity. This is in line with the process in judicial reviews and criminal cases.

As is the case at the moment, the courts will continue to provide information on the number of appeals where leave has been granted and the subsequent number of appeals that were successful at the High Court; and this will be reviewed on a regular basis.

Q2: What measures are in place to ensure that the requested persons receive adequate legal advice when preparing an application for leave to appeal?

As at present, any person wanted for extradition has a right to legal representation at any time in the extradition process, including when preparing an application for leave to appeal.

Q3. How much public money does the Government estimate will be saved annually by making the change in eligibility for compensation for miscarriages of justice?

The Government does not expect the creation of a statutory definition of a miscarriage of justice to have a significant impact on the number of applicants who prove eligible for compensation. However, we believe that a clearer and more accessible definition will reduce the number of unsuccessful attempts to seek judicial review of the Secretary of State’s decisions, and thus save legal costs to the tax payer of around £100,000 per annum.

Q4. Leaving aside the question of whether or not Article 6(2) ECHR applies to a determination of an application for compensation under s.133 Criminal Justice Act 1988, please explain the Government’s...
reasons for its view that it is compatible with the presumption of innocence to require proof of innocence beyond reasonable doubt as a condition of such compensation.

The Committee has asked further questions about this issue in its letter of 16 July in light of the judgment of the European Court of Human Rights in the case of Allen v the UK (application number 25424/09), handed down on 12 July 2013. We are considering the implications of that judgment on the issues raised by the Committee. We will provide the Committee with a more substantive response to this question, and to the questions in your letter of 16th July, once this consideration is complete. We anticipate this will be before Report stage of the Bill in the autumn.

Q5. What can the Government point to in the text of the Covenant, the travaux preparatoires, or the case-law or General Comments of the Human Rights Committee that support its view that the proper meaning of Article 14(6) ICCPR is that a person whose conviction has been quashed is only entitled to compensation if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent of the offence?

As the Supreme Court considered in Adams, it is difficult to glean from the travaux preparatoires to the ICCPR what its framers intended "miscarriage of justice" to mean for the purposes of Article 14(6). Lord Phillips, for example, considered that the travaux are "inconclusive" so far as the precise meaning of "miscarriage of justice" is concerned (see paragraph 19 of the judgment).

The text of the Covenant supports the Government’s view, in stating that compensation should be paid where a new fact shows "conclusively" that there has been a miscarriage of justice. There is nothing that we have found in the case-law or General Comments of the United Nations Human Rights Committee (comments 13 and 32) which suggests that what is proposed is incompatible with the ICCPR. Nor is there international consensus on what the ICCPR requires in this regard. The UK, having a dualist legal tradition, gives effect to its international obligations through incorporating legislation. The courts have recognised the term "miscarriage of justice" is an ambiguous term open to differing views about the right interpretation. A treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. In the Government’s view this is what the proposed test achieves.

Q6. What is the Government’s justification for retrospectively depriving claimants for compensation for miscarriages of justice of the benefit of the court judgments in Adams and Ali in clause 132(2)(b) of the Bill?

There is a degree of retrospective effect but the test will apply in exactly the same way as a change in approach resulting from a fresh decision of the courts. In such cases a new approach would apply to undecided cases just as it would to new applications. We also consider it right and appropriate that where cases have not been finally determined compensation should be paid in accordance with the UK’s interpretation of its international obligations.

Q7. Have the applications for compensation in the Adams and Ali cases themselves been finally determined?

The applications for compensation in the Adams case have been finally determined by the Secretary of State.

The application of Ian Lawless (the only applicant in Ali who won his case in the Divisional Court) has not been finally determined since it is to be remitted to the Secretary of State for reconsideration following the Divisional Court’s decision in Ali. The applications for compensation for three of the unsuccessful applicants in Ali have been given permission to appeal the decisions of the Divisional Court. Their applications have been determined by the Secretary of State but if his decisions in those cases are quashed on appeal then their cases will be treated as not having finally been determined by the Secretary of State. In the event that they fall to be reconsidered once the legislation has come into force the provisions of clause 143(2)(b) (as it now is following the reprinting of the Bill post Committee stage) will apply to them.
Q8. How many applications for compensation under s.133 Criminal Justice Act 1988 are currently pending? How many such pending applications does the Government estimate would succeed on the Adams test but not on the proposed new statutory test?

At the moment, twelve applications are under consideration. Since the eligibility of pending applications has, necessarily, not yet been fully considered, it would be impossible to say how many would succeed under different tests, but we do not expect the creation of a statutory definition to make a significant change to the numbers of applications which ultimately prove eligible for compensation.

Q9. How much public money does the Government estimate will be saved by making the change in eligibility for compensation for miscarriages of justice apply to any application which has not been finally determined on the date the change comes into force?

As explained in the answers to question 3 and 8 above, the Government does not expect any significant savings to result from the application of the transitional provision.

Questions from letter dated 16 July

Q: In light of the judgment of the Grand Chamber of the European Court of Human Rights in Allen v UK, I would be grateful if you could provide supplementary memorandum setting out the Government’s assessment of the compatibility of clause 132 of the Bill with the presumption of innocence in Article 6 (2) ECHR.

Please see response to question 4 above.

Q: What evidence does the Government rely on in support of its argument that there is a pressing social need to widen the circumstances in which DNA samples may be retained and removing the judicial oversight currently provided for by section 63R of PACE?

Section 63R of PACE currently requires the destruction within six months not only of ‘DNA samples’ but also of ‘any other sample to which this section applies’. Samples’ include both:

- ‘Intimate samples’ (which means: (a) a sample of blood, semen or any other tissue fluid, urine or pubic hair; (b) a dental impression; (c) a swab taken from any part of a person’s genitals (including pubic hair) or from a person’s body orifice other than the mouth); and

- ‘Non-intimate samples’ (which means: (a) a sample of hair other than pubic hair; (b) a sample taken from a nail or from under a nail; (c) a swab taken from any part of a person’s body other than a part from which a swab taken would be an intimate sample; (d) saliva; (e) a skin impression).

Section 63R currently requires all these sample types, if taken under Part 5 of PACE or if taken consensually by the police in connection with the investigation of an offence, to be destroyed within six months. This requirement applies even if they are or may be needed as evidence in court, unless a court order is obtained extending the six month period.

The evidence the Government relies on in relation to destruction of DNA and non-DNA samples consists of representations from the police and the Crown Prosecution Service (CPS) that the destruction of samples within six months will prevent relevant evidence being available in court proceedings. It is difficult to meet defence (or prosecution) arguments about samples if they are made after the sample has been destroyed. For example, a defendant might argue that his state of mind had been affected because he had taken a prescription drug. With no sample taken at the time of the offence remaining, it would be difficult to rebut this argument.

It may also not be possible to identify and process relevant samples within a six month window. Police forces may take a number of samples during an investigation but not process all of them until CPS advice has been received about which are most relevant to the presentation of a case in court. Force advice is that CPS takes about 16 weeks to deal with a case file, and in the case of processing to determine drug and alcohol levels, it
may take months to obtain a result from the laboratories. Forces cannot send all samples which might be relevant to laboratories in advance of CPS advice as this would be financially prohibitive.

While there is a provision for a court order to be obtained extending the six month period, this has two disadvantages. First, it depends on any issue which might require use of the sample in evidence being raised in time for a court order to be obtained before six months from the date on which the sample was taken. It is common for issues to be raised after this period. Second, several thousand cases per year involve use of samples, often a number in each case. For example, in 2012/13 there were 1,227 referrals to Metropolitan Police Sexual Assault Referral Centres, almost all of which involve taking samples. It would be excessively costly and bureaucratic for both the police and courts if a court order had to be obtained every time a sample might be needed in evidence more than six months after it was taken.

In addition, as section 63R currently applies, whether the person consents to the supply of the sample is irrelevant - it must still be destroyed. By virtue of section 63U(6), though, samples taken from one person to get material from another person can be retained. The result of this is that samples taken from victims (e.g. of rape or other sexual assault) which relate to the victim themselves must be destroyed whereas samples taken from the victim which relate to the offender do not. The Department of Health has pointed out that this could threaten the work of sexual assault referral centres, in particular where a victim initially does not wish to involve the police but later changes their mind.

Q: What is the justification for retention of DNA samples in all cases raising CPIA concerns when in some cases there may be scope for obtaining a further sample in the future?

The general principle is that the retention of DNA and fingerprint data on the national databases continues to be governed by PACE, while evidence for use in court is governed by the CPIA.

Section 63(3A) of PACE, as inserted by the Crime and Security Act 2010, provides that if a defendant disputes that a DNA profile derives from a sample taken from him or her, another sample may be taken. However there are many cases where this is of no value. For example, in the case of a sample taken to determine drug or alcohol levels, there is no power to resample, nor would this be of any use as a sample taken later would not replicate drug or alcohol levels which existed at the relevant time. In the case of DNA, reanalysis may be required when profiles are derived from material which mixes several persons' DNA, rather than where a profile is derived from a sample from a single individual who then disputes the derivation of the profile.

Q: Will the government consider strengthening the safeguards in the CPIA Code of practice, as recommended by the Information Commissioner?

The Government's amendment dealing with samples contains two safeguards. First, that a sample which is retained because of the application of the CPIA must not be used other than for any proceedings for the offence in connection with which the sample was taken. Second, if a sample is protected from destruction by CPIA, but CPIA then ceases to apply, the sample must be destroyed. The Government is willing to discuss any concerns with the ICO and to consider adding further safeguards to the CPIA Code of Practice.

Q: Did the government consult the Information Commissioner’s Office about new clause 10 and the retention of DNA samples?

Yes. The ICO are permanently represented on the National DNA Database Strategy Board precisely so that they can be involved in discussion about the retention of DNA samples and profiles. The ICO representative was involved in detailed discussion of the proposed change in sample retention at the meetings of the Board on 12 March and 5 June 2013.

Q: Please explain the Government’s policy in relation to consulting the Information Commissioner’s Office about proposed legislation within the ICO’s remit.

The Government’s policy is to consult the ICO about proposed legislation within the ICO’s remit.
6. Supplementary ECHR Memorandum from the Home Office

The Home Office published an ECHR memorandum on introduction of the Anti-Social Behaviour, Crime and Policing Bill in the House of Commons on 9 May 2013. This further supplementary memorandum addresses the issues arising from Government amendments tabled on 27 June for Commons Committee Stage.

**New clause 10: “Retention of personal samples that are or may be disclosable”**

1. This new clause amends the Police and Criminal Evidence Act 1984 (“PACE”) to provide that the requirement to destroy DNA and other samples that have been taken by the police under Part 5 of that Act, or which have been taken consensually in connection with the investigation of an offence, does not apply to a sample which is, or which may become, disclosable under the Criminal Procedure and Investigations Act 1996 (“the CPIA”) or its attendant Code of Practice. Under section 63R(4) and (5) of PACE, prospectively inserted by the Protection of Freedoms Act 2012, a DNA sample must be destroyed as soon as a DNA profile has been derived from the sample, and in any event within 6 months of being taken, and any other sample must be destroyed within 6 months of being taken.

2. Equivalent amendments are also made to the Terrorism Act 2000.

3. This new clause will therefore have the effect that samples are treated consistently with DNA profiles, fingerprints and impressions of footwear, which under section 63U of PACE can similarly be retained if they are or may become disclosable under the CPIA.

4. The CPIA and its Code of Practice provide for the retention by the police of information and other material obtained in the course of a criminal investigation. The Code of Practice states that “material may be relevant to an investigation if it appears to an investigator… that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case” and paragraphs 5.8 and 5.9 provide for material to be retained at least until proceedings have completed, and in some cases, until a person is released from custody. In practice where DNA or fingerprint evidence is used in a case, copies of the DNA profiles or fingerprints from other persons of interest in a criminal investigation are normally considered to meet the test of relevance and included in the schedule of material disclosed to the defence. These case files are then retained in line with the time limits in the Code.

5. Section 63R of PACE already provides for samples to be retained if they might be needed as evidence in court, but this requires a court order for each sample and the police and CPS have argued this will be costly and bureaucratic. The new clause protects samples from destruction as long as they are subject to the CPIA which protects evidence. Once this no longer applies, the samples will have to be destroyed.

6. The new clause further provides that samples which are retained by virtue of the fact that they are disclosable under the CPIA may only be used for the purposes of any proceedings for the offence in connection with which they were taken. In this way the safeguard currently provided by section 63R(11) of PACE is maintained.

7. In practice it is likely that only a small proportion of samples will need to be protected as evidence. The great majority of DNA samples which were held at the time of the enactment of the Protection of Freedoms Act have in fact already been destroyed, in anticipation of Part 1 of that Act being brought into force in October 2013.

**ECHR Article 8**

8. The Government accepts that this new clause clearly engages ECHR Article 8, which confers on everyone the right to respect for his private and family life. Article 8(2) prohibits interference by a public authority with the exercise of this right “except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms
of others”. In *S and Marper v United Kingdom* (2008) 48 EHRR 1169 it was held at paragraph 73 that the retention of cellular samples must of itself be regarded as interfering with the right to respect for the private lives of the individuals concerned.

9. The Government accordingly accepts that the amendment will be lawful only if it is in accordance with the law, in pursuit of a legitimate aim and is a proportionate means of achieving that aim. The Government is satisfied that the provisions will be “in accordance with the law” because they will be set out in primary legislation in detail. It relies on *Marper* as authority that retention for the purposes of the detection and prevention of crime pursues a legitimate aim (see paragraph 100), but also considers that retention of samples subject to the CPIA pursues the legitimate aim of protecting the rights and freedoms of others, as it will make material available to the defence which can exonerate as well as indicate guilt, and will assist the integrity of the criminal justice system.

10. For a number of reasons the Government is also satisfied that the proposed retention regime is proportionate.

11. It is important to note that samples which are retained because they are disclosable under the CPIA would be held only in case files, and neither the samples nor profiles derived from them would be searchable in the same way as the National DNA Database. The material would be retained not because of the likelihood that it could be matched against a future crime scene, or in reliance on statistics suggesting that people who have previously been arrested or convicted for an offence are more likely to offend in future. Instead, the material would be retained solely because it might be needed for disclosure in criminal proceedings for the same offence in relation to which the material was obtained—for example, for use by a defendant or for the purposes of responding to a challenge by a defendant about the admissibility of evidence. Accordingly, the Government considers that to a great extent some of the concerns which led the Grand Chamber in *Marper* to conclude that there was not a fair balance between the competing public and private interests—namely the risk of stigmatisation and the perception that people whose data were retained were not being treated as innocent (see paragraph 122) – do not apply to the same extent here.

12. The Government further notes that the position in Scotland (cited with apparent approval in paragraphs 109 and 110 of Marper) does not require the destruction of samples in the same way as section 63R of PACE would do. In Scotland both DNA samples and DNA profiles are retained if a person is convicted and destroyed if they are not. The new clause adopts a more rigorous approach to sample destruction than this, as only DNA samples which may be needed for evidence in court are retained.

13. In conclusion, the Government is satisfied that the proposed amendment is proportionate and compatible with Article 8.

28 June 2013

7. *Supplementary ECHR Memorandum from the Home Office*

The Home Office published an ECHR memorandum on introduction of the Anti-Social Behaviour, Crime and Policing Bill in the House of Commons on 9 May 2013. This further supplementary memorandum addresses the issues arising from Government amendments tabled on 10 July for Commons Committee Stage.

**New clause 22 and new Schedule 1: “Powers to seize invalid passports etc”**.

2. This new clause and Schedule provide two new search and seizure powers.

3. The first of these is a power (“the first power”) given to examining officers to enable them to require a person to hand over, search for, inspect and retain invalid travel documents. This power is set out in paragraph 2 of the new Schedule. Examining officers are constables and persons appointed as immigration officers or designated as customs officials. This power is only available at a port which is defined in paragraph 1(4) of the Schedule. That definition includes airports, seaports and railway stations which are used by trains travelling internationally. The power may only be exercised in relation to a person whom the officer believes to be entering or leaving Great Britain or Northern Ireland or travelling by air within Great Britain and
Northern Ireland. The search power is to search the person, anything that the person has with them or any vehicle in with the examining officer believes the person to have been travelling or to be about to travel.

4. The second power (“the second power”) is available only to constables who reasonably believe that a person is in possession of a British passport that has been cancelled by the Secretary of State on the basis that the person to whom it was issued is involved in activities so undesirable that it is against the public interest for him or her to have access to passport facilities. It is further subject to an authorisation by the Secretary of State for the use of the second power. In these limited circumstances the power is available at any place in the United Kingdom that is not a port. The content of the second power is identical to the first power except that there is in addition a power to search any premises on which the constable is lawfully present. The exercise of the Royal Prerogative on public interest grounds is likely to be exercised in relation to persons suspected of being involved in terrorist activity and the use of second power will be similarly exercised. Reasonable force may be used only where necessary for the purpose of exercising either power.

**ECHR Article 5**

5. Article 5 provides that everyone has the right to liberty and security of person. No one shall be deprived of their liberty unless the detention falls within one of the six specified exceptions in Article 5(1) and is in accordance with a procedure prescribed by law. The case law, such as Gillan & Quinton v UK, has established that a power to stop and search does not inevitably involve a breach of Article 5. Each case will depend on whether the stop in question amounts to a deprivation of liberty or a restriction of movement.

6. In the proper exercise of these new powers there will be no deprivation of liberty but rather restriction in movement for the short period while the power is exercised. Even if Article 5 is engaged the use of targeted powers in the interests of preventing crime or protecting lives and security could not amount to the kind of arbitrary detention proscribed by Article 5.

7. The first power may only be used to search for invalid travel documents at ports. Members of the public will expect to be liable to be stopped and asked to show their travel documents in this setting. It is likely in the vast majority of cases to take only a very short period to establish whether the document is valid or not. A power to stop, question and detain a person for the purpose of determining whether he or she is a terrorist, without any requirement for suspicion that he is such a person already exists under Schedule 7 to the Terrorism Act 2000.

8. The Government has a legitimate interest in securing the national borders and ensuring that those not entitled to travel do not do so. The use of these powers will help to prevent those seeking to travel in order to commit crime or to evade justice in the United Kingdom. It is a legitimate aim for the Government to wish to ensure that those seeking to leave or enter the country or to travel by air within it have the proper authorisation to do so.

9. The checking of any travel document retained under either power must be carried out as quickly as possible (see paragraph 4(1)), so this will limit any restriction on a person’s movement while the checking is carried out. Further, a valid or expired passport must be returned to the person straight away (paragraph 4(2)).

10. The second power is more widely available in the geographic sense as it can be exercised anywhere in the United Kingdom. However, this power is only available in very limited circumstances. It can only be used to search for or seize a passport cancelled by the Secretary of State, under the Royal Prerogative, on public interest grounds – where the passport holder has or may have been, or will or may become, involved in activities so undesirable that it is contrary to the public interest for the person to have access to passport facilities - and where the Secretary of State has authorised the use of the second power in respect of a specified passport. In these circumstances it is necessary for there to be a power which would enable a constable to search for and seize a cancelled passport in accordance with the authorisation issued by the Secretary of State. Such cases will be extremely rare. Where the Secretary of State has made a decision to refuse passport facilities to a person and has made a separate decision that the exercise of the in-country power should be available in the case, then it must be possible to take the appropriate steps to secure the return of that passport. Currently such powers do not exist.

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136 Gillan v UK [2010] 50 EHRR 45 2
11. In contrast to the first power, the second power may only be exercised in the case of a person whom the constable reasonably believes to be in possession of a passport to which the paragraph containing the power applies. This adds a safeguard for the individual by requiring an element of objectivity to the constable’s belief that the person is in possession of the passport.

**ECHR Article 8**

12. Article 8 is prima facie engaged in all cases of search and seizure. The ECHR found in Gillan & Quinton v UK that searches conducted under powers in the Terrorism Act 2000 which „require an individual to submit to a detailed search of his person, his clothing and his personal belongings” constituted an interference with the individual’s Article 8 rights. These new powers provide only for the search for very specific articles. In the House of Lords decision on the same case, Lord Bingham remarked:137 I am, however, doubtful whether an ordinary superficial search of the person can be said to show a lack of respect for private life. It is true that "private life" has been generously construed to embrace wide rights to personal autonomy. But it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms, and I incline to the view that an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach that level.

13. Depending on the nature of the search and the circumstances there may well be cases where Article 8 is not engaged by the new powers, but in some, article 8 is likely to be engaged. The Government considers however that any interference with that right will be justified under Article 8(2).

14. The provisions will be „in accordance with the law” because they will be contained in primary legislation and formulated with sufficient precision to enable a person to know in what circumstance the powers can be exercised. The powers also pursue the legitimate aims of national security, public safety and the prevention of disorder or crime, as the search powers are directed at the prevention of travel using invalid documents. Such searches will help protect national security, prevent crime and facilitate the bringing of criminal proceedings.

15. The powers are also necessary in a democratic society in that they are proportionate to the aim pursued and meet a pressing social need. The pressing social need that this clause addresses is the need to ensure that effective border controls are available and that powers exist to ensure that invalid travel documents are not held or used by those not entitled to do so and that those whose activities are contrary to the public interest have had their passport facilities cancelled are not able to facilitate travel by retaining possession of their passport.

**ECHR Article 1 Protocol 1**

16. Article 1, Protocol 1 might be engaged where these new powers are used to seize property. There is no entitlement to a British passport and United Kingdom passports remain the property of the Crown at all times. However, there may be documents or items seized using these new powers that are the property of the holder. Where these documents are invalid then it is likely that there will be no 4 entitlement for the holder to remain in possession. If seized documents are valid or are only invalid because they have expired then paragraph 4 of the Schedule provides that they must be returned straight away in accordance with paragraph 4(2) of the Schedule.

17. The test for justification of a control of use of property is that the control must be in accordance with the law and that the control must be for the public interest. The measure must also be proportionate to the aim pursued. The powers of seizure in this clause will be in accordance with the law because they are to be contained in primary legislation and are formulated with sufficient precision to enable a person to know in what circumstance they can be exercised. The seizures will be in the public interest because the powers are to seize documents which are not validly held. The powers are strictly targeted and are therefore proportionate. Any validly held documents must be returned as soon as that has been established and in any event within 7 days.

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137 Gillan v Met Pol Comr [2006] UKHL 12 at para 28
18. In conclusion, it is therefore the Government’s view that the new clause and Schedule are compatible with Articles 5 and 8 of the Convention and Article 1, Protocol 1.

**Extradition**

**New clause 23: “Proportionality”**


20. The new section will apply in cases where a European Arrest Warrant (“EAW”) has been issued in order to prosecute the person for an offence. In addition to requiring the judge to be satisfied that extradition would be compatible with the Convention rights (which is already the case, under existing section 21), the section will require the judge to be satisfied that extradition would not be disproportionate. In deciding whether extradition would not be disproportionate, the judge will have to take into account (so far as the judge thinks appropriate) the seriousness of the conduct, the likely penalty and the possibility of the issuing State taking less coercive measures.

21. The Government considers that new section 21A of the 2003 Act is compatible with the Convention rights. In particular, it will ensure that extradition – which, of course, entails a person being sent to another country and being arrested and likely detained for that purpose – only happens when the offence is serious enough to justify this.

**New clause 24: “Extradition barred if no prosecution decision in requesting territory”**

22. New clause 24 amends the 2003 Act by inserting new section 12A.5

23. New section 12A will apply in cases where an EAW has been issued in order to prosecute the person for an offence. Where it appears to the judge that there are reasonable grounds for believing that a decision to charge and/or a decision to try has not been taken in the issuing State (and that the person’s absence from that State is not the only reason for that), extradition will be barred by section 12A unless the issuing State can prove that those decisions have been made (or that the person’s absence from that State is the only reason for the failure to take the decision(s)).

24. The Government considers that new section 12A of the 2003 Act is compatible with the Convention rights. In particular, by helping to ensure that extradition only takes place where the issuing State has reached the point in proceedings where it has made (or is ready to make) a decision to charge and a decision to try the person, it will help prevent people spending potentially long periods in pre-trial detention following their extradition, whilst the issuing State continues to investigate the offence.

*11 July 2013*

**8. Letter to the Chair, from Rt Hon Damian Green MP, Minister of State for Policing and Criminal Justice, Home Office**

In my letter to you of 29 July, in response to yours of 10 and 16 July, I undertook to write to the Committee further once we had had an opportunity to consider the implications for the provisions in clause 143 of the Bill on compensation for miscarriages of justice of the decision of the Grand Chamber of the European Court of Human Rights in Allen v UK. I set out below our further assessment of the compatibility of clause 143 with the presumption of innocence in Article 6(2) ECHR.

2. Article 6(2) guarantees that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Following domestic case law, the Government had previously considered that

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138 Section 21 of the Act, as currently drafted, requires the judge to look at human rights in cases where the person is wanted for prosecution and in cases where the person is wanted to serve a sentence. Section 21 will continue to apply in cases where the person is wanted to serve a sentence. However, section 21A will in future apply in cases where the person is wanted for prosecution, and will cover both human rights and proportionality.
Article 6(2) did not apply to a determination by the Secretary of State under section 133(1) of the Criminal Justice Act 1988 on the basis that such determinations were not criminal proceedings, nor closely linked to such proceedings. The ECtHR in Allen was asked to consider whether Article 6(2) did apply to a determination under section 133 and found that a decision to award compensation under section 133 was sufficiently linked to the concluded criminal proceedings such that Article 6(2) applied.

3. The question the court was concerned with (see paragraph 83) was whether the domestic courts' decisions in Allen infringed Article 6(2). It found they did not. The ECtHR was satisfied that neither section 133 itself (as currently drafted), nor the language used by the courts offended Article 6(2). The Government considers that the basis of the decision is that the language used by the decision-maker or the courts is key:

"In all cases, and no matter what the approach applied, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with article 6(2)." (paragraph 126; see also paragraph 129 below)

4. In light of the ECtHR's judgment, the Government has reconsidered whether the proposed amendment to section 133 would interfere with the right protected by Article 6(2) and concluded that it does not. The Government notes the Court's statement, "But what is important above all is that the judgments of the High Court and the Court of Appeal did not require the applicant to satisfy Lord Steyn's test of demonstrating her innocence." (paragraph 133), and its views about the Explanatory Report of the Committee of Ministers to the ECHR. The Court in this passage looks to be signalling its objection to a clear innocence type test. However, the Government does not consider these statements to be determinative of the question, for the following reasons.

5. While the domestic concept of obiter dicta is not so clearly a part of the jurisprudence of the ECtHR, it is appropriate to consider the context in which the ECtHR made the statement, and its relevance to the issue in question. The issue before the court was Mrs Allen's complaint that the refusal by the domestic courts in her case was based on reasons which gave rise to doubts about her innocence (paragraph 80). She complained about references to the fact that the new evidence "might" have led to a different result, that there was still "powerful evidence against" her and that the Court of Appeal had said "there was no basis for saying that on the new evidence there was no case to go to a jury" (paragraph 110). The appropriate test for a "miscarriage of justice" was not for determination. Nor was the present question—compatibility of the proposed test with Article 6(2)—central to the facts or how the case was put and the decision made. Indeed, the ECtHR itself said:

"It was for the domestic courts to interpret the legislation in order to give effect to the will of the legislature and in doing so they were entitled to conclude that more than an acquittal was required in order for a "miscarriage of justice" to be established, provided always that they did not call into question the applicant's innocence. The Court is not therefore concerned with the differing interpretations given to that term by the judges in the House of Lords in Mullen and, after the judgment of the Court of Appeal in the present case, by the judges in the Supreme Court in Adams. What the Court has to assess is whether, having regard to the nature of the task that the domestic courts were required to carry out, and in the context of the judgment quashing the applicant's conviction (see paragraph 127 above), the language they employed was compatible with the presumption of innocence guaranteed by Article 6 § 2." (paragraph 129)

6. The Government does not consider that the ECtHR can have intended to have delivered an authoritative statement on the interpretation that can be given to a miscarriage of justice - or its compatibility per se with Article 6(2)—where it has said in the same judgment that it is not concerned with the differing interpretations.

7. Further, the ECtHR's description of the test in paragraph 133 differs materially from the proposed amendment to section 133. The effect of the amendment is not that the applicant has to "demonstrate [their] innocence", but that the Secretary of State has to be satisfied that the new fact on which the conviction was quashed shows clearly that the applicant did not commit the offence for which he or she had been convicted. The Government considers this to be an important distinction, and one identified by Lord Phillips in Adams ([2011] UKSC 18) when considering whether the presumption of innocence may be infringed:
8. The Government infers from the Court's judgment that the presumption of innocence means that a decision to quash the conviction may not be questioned in linked proceedings (when quashed on the ground a conviction is unsafe, the presumption is reinstated). The Court recognises, however, that compensation proceedings will of course draw on and utilise the findings of the decision of the Court of Appeal, Criminal Division (CACD). In the Government's view, there is nothing in the proposed amendment to section 133 which would either question or undermine the decision of the CACD to quash a person's conviction because it was unsafe. This is because the question whether a new fact conclusively demonstrates there has been a miscarriage of justice, howsoever defined, is a fundamentally different issue to whether a conviction is safe, upon which the reinstatement of the presumption of innocence rests.

9. The ECtHR accepts that Article 3 of Protocol 7 and section 133 can be interpreted narrowly, and that more than an acquittal is required for a miscarriage of justice to have occurred (paragraphs 128 and 129). That being so, the Government is not clear as to the basis upon which the ECtHR could legitimately make a distinction between a definition of miscarriage which focuses on whether a new fact shows conclusively the person was innocent of the offence from any of the other interpretations offered up by domestic courts. With the possible exception of Lord Justice Dyson's category 4 relating to procedural defect (see Adams, paragraph 9), every interpretation involves the decision-maker examining whether the new fact leaves open the question whether the applicant may have committed the crime. As the court explained, the key point is the language used: it is just as possible therefore to have a refusal on the proposed test that would not cross the Article 6(2) line yet have a refusal on a lower threshold that does cross the line.

10. In the Government's view it is difficult to discern an entirely consistent thread behind the decision in Allen and the judgment appears to contradict itself in paragraphs 129 and 133. As Judge de Gaetano also stated in his separate opinion "the judgment leaves unresolved the question—perhaps the most important question from a domestic court's point of view—of what may or may not be said in civil compensation proceedings [...]."

11. The Court has said the key to construing whether in a particular case there has been a breach of the presumption of innocence is to focus on the language used. As such, there is nothing incompatible in the proposed approach in clause 143. It is quite capable of being exercised compatibly with Article 6.

12. The Government respects the presumption of innocence. And as the Court has said, States "are entitled to conclude that more than an acquittal was required for a "miscarriage of justice" to be established". If the legislation is passed, where the new fact shows clearly that the individual did not commit the offence, compensation will be paid. Where it does not, the Secretary of State is not bound to compensate. Whether or not there is a breach of the presumption of innocence in a particular case depends on the language used.

13. The proposed test does not require the applicant to demonstrate his or her innocence. It focuses on the new fact and whether it shows conclusively there was a miscarriage of justice.

14. While further litigation on Article 6 can be expected, the Government remains of the view that the proposed amendment to section 133 is compatible with the Convention rights.

15. On a separate matter, in my letter of 16 July I indicated that an initial draft of a Code of Practice (under Schedule 7 to the Terrorism Act 2000) for examining officers reflecting the amendments to the Schedule 7 powers contained in the Bill will be made available to Parliament ahead of Commons Report stage. This is attached. It is a working draft for illustrative purposes and is without prejudice to the draft required by the 2000 Act to be published and laid before Parliament for approval by both Houses (under the affirmative resolution procedure) before being issued.
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