HOUSE OF LORDS

Select Committee on the Constitution

22nd Report of Session 2008–09

Parliamentary Standards Bill & Policing and Crime Bill: Government Responses to the Committee's 17th, 18th and 16th Reports of Session 2008–09

Report

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Government Responses to the Committee's Reports on the Parliamentary Standards Bill and Policing and Crime Bill

1. On 6 and 8 July we published reports on the Parliamentary Standards Bill.[1] The Government response was received on 15 October 2009 in the form of a letter from the Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, to the Chairman of the Committee. The response is reproduced here, for the information of the House, as Appendix 1.

2. On 2 July we published a report on the Policing and Crime Bill.[2] The Government response was received on 19 October 2009 with a covering letter from Lord West of Spithead, Parliamentary Under Secretary of State, Home Office, to the Chairman of the Committee. The response and the covering letter are reproduced here, for the information of the House, as Appendix 2.

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1 17th Report (2008–09): Parliamentary Standards Bill (HL Paper 130) and 18th Report (2008–09): Parliamentary Standards Bill: implications for Parliament and the courts (HL Paper 134).

2 16th Report (2008–09): *Policing and Crime Bill* (HL Paper 128).

APPENDIX 1: GOVERNMENT RESPONSE TO 17TH & 18TH REPORTS

I would like to thank you and your colleagues on the Lords' Constitution Committee for your reports on the Parliamentary Standards Bill, published on 6 and 8 July.

You will be aware of the changes made to the Bill during its passage, which were informed by the views of your Committee as well as discussion in both Houses. I believe that the issues raised in the report were answered during the debates in the House of Lords.

The process of setting up the Independent Parliamentary Standards Authority (IPSA) has begun, the members of which will be appointed through fair and open competition, and I believe this is a significant achievement and will go a long way to restore public confidence in Parliament.

I would like, however, to address your overall criticism of the decision to fast-track this piece of legislation. I am afraid I do not accept the strictures of your Committee (17th Report) that "this was no way in which to legislate on matters which raise complex constitutional and legal issues" and that because of the timescale there was a "lack of public consultation" and limited opportunities for Parliamentary scrutiny (paragraphs 9 and 20). This assessment does not fully take account of the imperatives of the situation we all faced. The leaders of all three main parties required urgent action. Our constituents were loud in their calls for urgent action. The Committee on Standards and Privileges also concluded in April that "while a transitional period may be necessary for any major changes. this should not extend beyond the next general election"—all this meant that fast-track legislation was inevitable.

I have, over the years been the sponsoring Minister of a number of pieces of emergency legislation. None was more complex than this one. To meet this, and to maintain an all-party consensus, I chaired a series of all-party meetings. Drafts of clauses and much else were circulated, raw, to all members of this group as soon as I received them. Discussion in the House did not always reflect positions in these meetings. I make no complaint about this—far from it—but this did make handling of aspects of the Bill interesting at times. The Bill was recast in real time to take account of changing opinions on it, as colleagues on all sides considered how the new system should best operate.

In fact, this Bill was subject to a high level of scrutiny in the Commons and, informally but crucially, in the all-party meetings. The Bill received unopposed Second and Third Readings in the Commons, which is an indication of the consensus that was achieved. While the passage of emergency legislation may at times be uncomfortable, the end result has been the right result, and I am pleased to note your 18th Report expresses broad satisfaction with the Independent Parliamentary Standards Authority's institutional and procedural arrangements.

APPENDIX 2: GOVERNMENT RESPONSE TO 16TH REPORT

I write in response to the Constitution Committee's Report of 2nd July 2009 in which the Committee sets out its views on a number of provisions within the Policing and Crime Bill. The Government is grateful for the views of the Committee and we have considered them carefully over the summer recess.

We have identified five substantive recommendations and conclusions in the Constitution Committee report on the Policing and Crime Bill. We have set out below our response to each of the issues raised.

Preventative injunctions

1. We reiterate our general concern about the trend of addressing problems associated with criminal activity and other anti-social behaviour through preventative injunctions. (Paragraph 3)

The Government understands that the Committee is concerned about a new preventative injunction. The Government is very clear that these civil injunctions are not being introduced as an alternative to prosecuting gang- related violence, when such prosecutions are available. However, the granting of injunctions in Birmingham prior to the Court of Appeal decision in *Birmingham City Council v Shafi and Ellis* showed in some cases an acceptance by local authorities and courts that there was a need for immediate injunctive relief in cases which involved gang-related violence. The injunctions provided a flexible, preventive tool which was able to provide immediate relief from a particular problem without criminalising young people. It was particularly important to the community in Birmingham that these injunctions were flexible and could be granted for a short period of time (there being no minimum term) and that any breach did not result in a criminal record. Some mothers of gang members even gave evidence in support of an injunction as this did not involve the criminal justice system in any way. Evidence from the use of these injunctions in Birmingham showed that incidents of serious gang-related crime fell (Col 590, PBC, 26.02.09).

Where prosecution is possible, the use of criminal law to deal with gang- related violence will always be the preferred option. These injunctions will be aimed at those against whom, for a variety of reasons, criminal proceedings have not been brought. It may be that there is some evidence of criminal behaviour, but that either the investigation is still on-going or that the CPS has not yet decided whether to charge an individual or that a decision not to charge has been taken. In all these circumstances, although the criminal justice system is the preferred option, the Government recognises that injunctions can offer the immediate relief required as well as the opportunity to offer an escape route from further violent behaviour. We know that some gangs are sophisticated in their criminal behaviour, they are practised in destroying all evidence that could implicate them, and that they systematically intimidate witnesses. The civil justice system complements the criminal justice system as it can be an effective driver for change or prevention rather than delivering punishment; the responsibility for which lies within the criminal justice system. For all of these reasons we believe that an injunction provides a first step to reducing gang behaviour while evidence of criminality is sought.

Gang-related violence injunctions

2. We accept that preventative orders cover a wide range of different situations, some of which have more serious consequences than others.

There may be some preventative orders in respect of which the civil standard or a sliding-scale of the standard of proof is appropriate. Gang-related violence injunctions are, however, in the category of preventative orders with the most serious consequences. We are therefore concerned that the bill states expressly that the standard of proof is the civil standard rather than the criminal standard. In our view minimum considerations of due process should require the criminal standard of proof ("beyond reasonable doubt") to be applied in applications for gang-related violence injunctions. (Paragraph 9)

As stated in our above response where prosecution is possible, the use of criminal law to deal with gang-related violence will always be the preferred option. These injunctions will be aimed at those against whom, for a variety of reasons, criminal proceedings have not been brought.

The proposed injunction is a civil order and whilst the Government acknowledges the serious nature of gang-related violence we feel that the only appropriate burden of proof to be applied is the civil balance of probabilities. We feel that this is appropriate because the injunction will be granted in the civil courts and any breach of which will be dealt with as a civil contempt of court. The Government is satisfied that civil court procedure adequately safeguards individuals' ECHR Article 6 rights.

Civil courts are well versed in using injunctions to deal with allegations involving criminal or quasi-criminal behaviour for example, housing disputes and domestic violence. An allegation of criminal activity taking place is not enough to put this injunction into the arena of the criminal justice system. The Government is aware of the need to ensure that there are adequate safeguards, especially bearing in mind the nature of the requirements and prohibitions and the duration of the injunctions. It is for these reasons that, in addition to the right to appeal, express provision has been made allowing applications to discharge or vary the injunction to be made by either party as well as enabling the courts to set review hearings.

The Government has carefully considered both the case of *McCann* and the subsequent House of Lords case of *Re B* in which it was clarified that there is only one civil standard of proof. Since it is not a criminal offence to breach an injunction, the Government is content that the situation is distinguished from that of ASBOs. These injunctions are not the tool to be used for anti-social behaviour and therefore the Government is satisfied that any overlap with ASBOs is minimal.

As previously highlighted, should there be proof to the criminal standard of criminal activities, the Government would expect criminal proceedings to be considered. However, given these are civil injunctions granted in civil courts, breach of which is a civil contempt of court, the Government is content that the balance of probabilities is the appropriate burden of proof.

Retention and destruction of samples

3. Clause 96 of the bill seeks to amend the Police and Criminal Evidence Act 1984 by inserting new powers for the Secretary of State, by regulations, to "make provision as to the retention, use and destruction of material". It is in our view wholly unacceptable that the important matter of retention of samples is to be dealt with by delegated legislation. The Government's proposals as to how they intend to implement the *Marper* judgment raise important and controversial questions, which the House will want to debate fully. Clause 96, if agreed to, will not allow that debate to happen.

The principles governing samples should be set out on the face of primary legislation to enable Parliament to scrutinise them and, if needs be, to seek to amend them. Unamendable delegated legislation will not provide a sufficient opportunity for parliamentary oversight and control over the legal framework for the Government's policy. (Paragraph 15)

We call on the Government to think again and bring forward proposals in a separate bill to regulate the National DNA Database. (Paragraph 16)

The Government has always acknowledged that this important topic arouses strongly held views and that there was a case for saying that the detail of the retention periods should be set out in primary legislation. However, against that we had to weigh the importance of responding to the European Court of Human Rights judgment in *S and Marper v United Kingdom* within a reasonable time frame. We judged that the approach taken in the Policing and Crime Bill provided a sensible opportunity for us to demonstrate we were committed to implementing the judgment, to consult swiftly but thoroughly on the detail of the policy, and for us to give Parliament an opportunity to approve this through the affirmative resolution procedure.

We have however considered the Committee's views on Clauses 96-98 over the summer, alongside the views expressed by the JCHR, the DPRRC, members in both Houses and importantly, the responses received to the Home Office Consultation Document 'Keeping the right people on the DNA database', published on 7 May 2009. While we remain committed to implementing the judgment of the European Court of Human Rights at the earliest opportunity, we accept the concerns raised by the Committee and other stakeholders around the approach of making the necessary changes to the law through an enabling power.

Given the strength of feeling on this issue and the importance that we move forward with consensus on this issue we therefore accept the view that this issue would be more appropriately dealt with in primary legislation and have decided to invite Parliament to remove clauses 96-98 from the Bill when it comes to consider them in Committee in the Lords. We will then look to bring forward appropriate measures which will place the detail of retention periods on the face of primary legislation, allowing full debate and scrutiny on the issue in both Houses, as soon as Parliamentary time allows.

Clause 99: border controls

4. In the light of Lord West's explanation, we are content that the proposal does not infringe constitutional principle. That said, we remind the House that the new powers are part of a package of changes that seek to integrate customs and immigration functions of government. We have expressed some concerns about features of this process in an earlier report (Part 1 of the Borders, Citizenship and Immigration Bill, 5th Report of 2008–09, HL 41). It will be important to monitor these developments to ensure that they do not impinge, whether inadvertently or otherwise, on constitutional principles. (Paragraph 18)

The Government is pleased that the Committee is content that the proposal does not infringe constitutional principle. The measure is key to delivering improved border security as recommended in the O'Donnell report on the UK's border arrangements. That said, we acknowledge the concern expressed and will work closely with the Crown Dependencies to ensure the arrangements do not impinge on constitutional principles.

5. It is a matter of concern that there does not appear to be in place a robust system for ensuring that the Crown Dependencies, which are British Islands, are properly consulted by departments of the United Kingdom Government in respect of policy proposals that may have an impact on the rights of British citizens living in those islands or the constitutional relationship with the islands. The Ministry of Justice has overarching responsibility for the Government's relations with the Crown Dependencies. We recommend that the Ministry of Justice carries out a review of the processes across Government for ensuring that the views of the Crown Dependencies are sought during policymaking and legislative drafting on proposals that may affect them. (Paragraph 26)

The Ministry of Justice is currently in the process of developing and updating protocols for how consultation with Crown Dependencies should be carried out. These will be circulated to other government departments for departments to refer to when consulting with the Crown Dependencies, through the appropriate channels within the Ministry of Justice, on the extension of UK regulations; UK primary legislation and international instruments to the Crown Dependencies. The dissemination of these protocols forms part of the ongoing work the Ministry of Justice is undertaking to raise awareness across Government of the necessity of consulting with the Crown Dependencies on any proposed policy—whether it be UK legislation or international conventions or treaties and complement the Cabinet Office Guide to Making Legislation which states that if a department wishes its Bill to extend to the Crown Dependencies it will need to seek the consent of the Insular Authorities via the Ministry of Justice.