House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: Criminal Justice and Immigration Bill

Fifth Report of Session 2007–08

Drawing special attention to:

Criminal Justice and Immigration Bill

HL Paper 37
HC 269

House of Lords
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Joint Committee on Human Rights

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Report, together with formal minutes and appendices

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Joint Committee on Human Rights

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

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

Current Membership

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The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

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

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), Jackie Recardo (Committee Assistant), Karen Barrett (Committee Secretary) and Jacqueline Baker (Senior Office Clerk).

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Summary

The Committee draws to the special attention of both Houses the Government's Criminal Justice and Immigration Bill. The Explanatory Notes on its very significant human rights implications were largely helpful, but the Government's response to the Committee's questions was late and we were unable to report in time for Report stage in the House of Commons. There was little opportunity at Report stage in the Commons for scrutiny, especially of Government amendments carrying serious implications for rights and liberties. This report will inform debate on the Second Reading in the House of Lords and the Committee suggests some amendments to give effect to its recommendations (paragraphs 1.1-1.4 and Annex).

It is not always clear if the Government's justification for measures in this Bill is that public safety really is being prejudiced or that public perception needs reassurance. The Committee urges caution (paragraphs 1.5-1.7).

The Committee welcomes in principle the introduction of Youth Rehabilitation Orders, a new community sentence for juvenile offenders. But it expresses concerns on human rights grounds about the legal framework (paragraphs 1.8-1.28).

The Committee has two concerns about proposals relating to criminal appeals: it questions the necessity for restricting the powers of the Court of Appeal to allow an appeal against a conviction and the apparent restriction on the ability of the Court of Appeal to review the safety of convictions. In addition, the Committee recommends that the Bill be amended to allow expressly for the re-opening of criminal proceedings in appropriate cases following a finding by the European Court of Human Rights that there has been a breach of the right to a fair trial (paragraphs 1.29-1.35)

The Committee is concerned that the new Commissioner for Offender Management and Prisons will not be truly independent and recommends amendments (paragraphs 1.36-1.40).

The Committee does not accept that there is any rational connection between limits on compensation for miscarriages of justice and limits on compensation for victims of crime: it recommends that the cap on the amount of compensation for miscarriages of justice be deleted from the Bill (paragraphs 1.41-1.44).

The Committee is concerned by the vagueness of the definition of the new offence of possession of extreme pornographic images (paragraphs 1.45 -1.51).

The Committee welcomes the motivation behind the Bill's provisions on prostitution but is concerned that these measures may in fact lead to the detention of women for up to 72 hours for failing to attend a meeting, and may eventually lead to their imprisonment for failure to comply with the terms of court orders (paragraphs 1.52-1.55).

The Committee welcomes the proposed abolition of the offences of blasphemy and blasphemous libel (paragraphs 1.56-1.60).

The Committee welcomes the creation of the new offence of stirring up hatred on the grounds of sexual orientation and considers it sufficiently narrowly defined to allow appropriate protection of freedom of speech (paragraphs 1.61-1.65).

The Committee welcomes as a clarification of the existing law the new clause on self-defence and the use of force to prevent crime. But it will take up with the Minister human rights concerns arising from the inclusion of "honest belief" as part of the defence (paragraphs 1.66-1.73).

As with, for example, Control Orders, provisions to create new Violent Offender Orders (VOOs) raise human rights concerns over legal certainty, due process and fairness. The Committee expresses reservations and recommends changes (paragraphs 1.74-1.102).

Provisions dealing with Anti-Social Behaviour include new Premises Closure Orders (PCOs) and a new offence of causing nuisance or disturbance on NHS premises. In the Committee's view they both raise human rights concerns. It recommends changes, in particular to ensure that PCOs are proportionate to interferences with Convention rights and to clarify the circumstances in which the new offence will not apply (paragraphs 1.103-1.122).

On special immigration status, the Committee welcomes the Government's clarification that the Secretary of State's designation of a person under clause 181 would be unlawful if, in the opinion of a court, the effect of designation would breach the UK's obligations under the Refugee Convention but again raises concerns about the statutory construction of the Convention (paragraphs 1.123 to 1.126).

Provisions brought forward as late Government amendments to prohibit industrial action by prison officers raise questions which the Committee plans to pursue with the Minister (paragraphs 1.127-1.131).

The Committee considers that the Government's Pensions Bill does not raise human rights issues of sufficient significance to warrant further scrutiny (paragraph 2.1).

Bill drawn to the special attention of both Houses

1 Criminal Justice and Immigration Bill

Date introduced to first House	7 November 2007
Date introduced to second House	9 January 2008
Current Bill Number	HL Bill 16
Previous Reports	None

Background

1.1 This is a Government Bill first introduced in the House of Commons in the last session on 26 June 2007 and carried over into the current session. The Government has made a compatibility statement under s.19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying the Bill explain that the Government considers that the Bill engages a number of Convention rights, but that all of the Bill's provisions are compatible with the ECHR.[1] Although we are critical of some aspects of the Explanatory Notes in this Report, including certain omissions, it is worth noting that the extent of the analysis of compatibility issues in the Notes is unprecedented and they have assisted us greatly in our scrutiny of a very long and detailed Bill. The Bill was considered in a Public Bill Committee between 16 October and 29 November 2007 and passed all remaining stages in the House of Commons on 9 January 2008. The Bill is due to have its Second Reading in the House of Lords on 22 January 2008.

1.2 This is an important Government Bill containing many provisions with very significant human rights implications. We wrote to the Minister on 29 October 2007 asking a number of questions concerning what we considered to be the most significant human rights issues raised by the Bill as published.[2] We asked for a response by 15 November, that is, within two weeks, to enable us to report in time to inform debate on the Bill before Report stage in the Commons. Unfortunately the Government's response took almost six weeks to reach us, the Minister responding in a letter dated 6 December 2007.[3] This made it impossible for us to report on the Bill in time for Report stage in the Commons.

1.3 The Government also tabled a large number of new clauses and amendments to the Bill (without Explanatory Notes) at a very late stage in its passage through the Commons, including some which have very significant human rights implications, and moved a programme motion which seriously truncated debate at Report stage in the House and gave no opportunity whatsoever for debate on some of the new clauses. **We add our voice to the many Members who complained at Report stage that the House of Commons has been deprived of the opportunity to conduct, in the case of many clauses, any scrutiny at all of provisions which have serious implications for the rights and liberties of the citizen.**

1 EN paras 1049-1260.

2 Appendix 1.

3 Appendix 3.

1.4 In this Report, we publish the Minister's response to our inquiries about the Bill as published and report on the human rights issues which we consider to be significant in light of that response. We have also sought to indicate briefly some of the most important human rights issues raised by the new clauses, in relation to some of which we will be writing to the Minister. Further scrutiny may reveal other human rights issues raised by the new clauses on which we may also write to the Minister and report further in due course. We include in an annex some suggested amendments to the Bill to give effect to some of our recommendations in this Report.

Purpose of the Bill

1.5 Parts of the Bill follow on from earlier Government consultations, including the *Criminal Justice Review: Rebalancing the criminal justice system in favour of the law-abiding majority*.[4] Speaking when the Bill was published, David Hanson MP, Minister for Justice, said:

> Today's Bill builds on the considerable reforms to the Criminal Justice System over the past ten years to rebalance the system in favour of the victim and the law abiding majority".[5]

1.6 As we stated when we considered the Criminal Justice Review consultation:

> There is assumed to be, or perceived to be, an imbalance between the right of the public to be safe and the rights of individuals, and on the basis of this assumption or perception there is asserted a need to redress this imbalance. The Government does not always make clear whether the justification for its proposals for change is that public safety is *actually* being prejudiced, or that the public *perceives* that its safety is being prejudiced so that action is required to provide reassurance.[6]

1.7 At the time, and on the basis of oral evidence from Baroness Scotland, then Minister of State in the Home Office, we stated that we welcomed the fact that the Government did not appear to be asserting that there was an actual imbalance in the criminal justice system.[7] Considering the Minister's comments when introducing the Bill and the evidence that we have received from the Government, it is not clear to us whether this remains the case. **We urge the Government to exercise caution in this contentious area of policy and to proceed only on the basis of objective evidence. We ask the Government again to clarify their position on this issue.**

Youth Justice

1.8 The Bill introduces Youth Rehabilitation Orders ("YROs"), a new community sentence for juvenile offenders.[8] The proposal to create YROs came out of the consultation on the Government's 2003 Green Paper, "*Youth Justice – the next steps*", which accompanied the

4 Published July 2006.

5 26 June 2007.

6 Thirty Second Report of 2005-06, *The Human Rights Act: the DCA and Home Office Reviews*, HL Paper 278, HC 1716, para. 110.

7 Ibid., para. 111.

8 Part 1, Clauses 1-8 and Schedules 1-4.

"*Every Child Matters*" Green Paper. A YRO combines several existing community sentences into one generic community sentence, enabling the sentencing court to choose from a menu of 15 different requirements with which the juvenile offender must comply. One of the main aims is to seek to ensure that the requirements imposed in a community sentence are more closely tailored to the individual circumstances of the juvenile offender.

1.9 **We welcome, in principle, the introduction of a generic community sentence for children and young offenders, because it has the potential to enhance the legal protection for the human rights of children and young people in the criminal justice system. Indeed, Article 40(4) of the UN Convention on the Rights of the Child ("the CRC") requires that a variety of dispositions shall be available "to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." In particular, seeking to ensure that the requirements imposed in a community sentence are more closely tailored to the individual circumstances of the juvenile offender, which is said to be one of the main aims of this Part of the Bill, should help to make the requirements imposed on juvenile offenders more proportionate.**

1.10 However, we do have a number of human rights concerns about the legal framework for the new community sentence for juveniles set out in the Bill.

Adequacy of safeguards to ensure that custody of children is a last resort

1.11 The CRC requires that the use of custody for children should be a last resort. Article 37(b) CRC provides "The … detention or imprisonment of a child shall be … used only as a measure of last resort and for the shortest appropriate period of time." The Explanatory Notes to the Bill contain a detailed analysis of the compatibility of YROs with the ECHR but do not consider compatibility with the CRC.[9]

1.12 In its most recent observations on the UK in 2002, the UN Committee on the Rights of the Child was:

> … deeply concerned at the increasing number of children who are being detained in custody at earlier ages for lesser offences and for longer sentences imposed as a result of the recently increased court powers to issue detention and training orders. The Committee is therefore concerned that deprivation of liberty is not being used only as a measure of last resort and for the shortest appropriate period of time, in violation of Article 37(b).[10]

1.13 Our predecessor Committee's Report on the UK's compliance with the CRC, urged the Government to re-examine, with renewed urgency, sentencing policy and practice (and in particular the use of detention and training orders) and alternatives to custodial sentences, with the specific aim of reducing the number of young people entering custody and with a commitment to implementing Articles 37(b) and 40(4) of the Convention to the fullest extent possible.[11]

9 EN paras 1050-1068.

10 Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 9 October 2002, CRC/C/15/Add.188, para. 59.

11 Tenth Report of 2002-03, *The UN Convention on the Rights of the Child*, HL Paper 117, HC 81, para. 41.

1.14 The Bill's introduction of a YRO with "intensive supervision and surveillance" ("YRO with ISS")[12] as an alternative to custody could represent an important step towards the fulfilment of this recommendation. To implement the recommendation, the Bill should require that a YRO with ISS should *always* be tried before custody is ordered, unless the offence is exceptionally serious. However, the Bill does not do this. We asked the Government why not. The Government replied that it agrees that custody for young people should only be used as a last resort, but considers that adequate and appropriate safeguards already exist to ensure that courts only use custody where it is a necessary and proportionate response to the offence or offending of the young person.[13]

1.15 The Government argues that these safeguards are to be found in the Bill itself, and in the restriction on custody contained in the Criminal Justice Act 2003 which states that courts must not pass custodial sentences unless of the opinion that the offence, or combination of offences, was so serious that neither a fine alone nor a community sentence can be justified for the offence.[14] We have considered whether the safeguards relied on by the Government are adequate. However, we note that the Government has not identified which specific provision of the Bill provides the necessary safeguard. Moreover, the provision in the Criminal Justice Act restricting the use of custody is a general restriction applying to all offenders, rather than one aimed at ensuring that custody is only ever used as a genuinely last resort in relation to juveniles. In our view, a much more specific safeguard is required in order to ensure that the obligation in Article 37(b) CRC is properly implemented.

1.16 **We note the Government's statement that it strongly believes that custody for young people should only be used as a last resort. However, we note that in the Government's response to our predecessor Committee's recommendation, it said that "intensive supervision and surveillance would be the first option for courts, and custody would be available as a second option only where the offences were so serious that only a physical restriction of liberty could be justified."[15] As presently drafted, however, there is nothing in the Bill to require that a YRO with ISS be the first resort, before custody, other than in exceptionally serious cases.**

1.17 **In our view, such a requirement would be an important additional safeguard to ensure that custody of children is only used as a last resort. Moreover, such a safeguard is arguably necessary to counter the risk that a single community sentence may lead to a quicker escalation to custody if the order is breached. We recommend that the Bill be amended to require that a YRO with ISS should always be tried before custody, unless the offence is so exceptionally serious that a custodial sentence is necessary to protect the public.**

Adequacy of safeguards to ensure proportionality of YRO

1.18 As well as requiring that custody of children must only be used as a last resort, the CRC also requires that such custody should be only for "the shortest appropriate period of

12 Clause 1(3)(a).

13 Appendix 3, para. 1.

14 Section 152(2).

15 Eighteenth Report of Session 2002-03, *The Government's Response to the Committee's Tenth Report of Session 2002-03 on the UN Convention on the Rights of the Child*, HL Paper 187, HC 1279, Appendix 1, p. 18.

time"[16] and that "children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence".[17]

1.19 We are concerned that certain aspects of the YRO framework in the Bill may give rise to disproportionate use of custody for children and young offenders. For example, the Bill contains a requirement that YROs should be proportionate in relation to the seriousness of the offence, but not in relation to the child's age and emotional and intellectual maturity. The provisions in the Bill concerning the consequences of breach also contain very little discretion which gives rise to the risk that breach of a YRO may quickly lead to custody even where custody could not have been an option in relation to the original offending behaviour.

1.20 We asked the Government whether there are any reasons why more judicial discretion could not be provided for in the provisions in the Bill concerning the consequences of breach. The Government replied that while it appreciates that sentencers wish to have freedom to decide on the appropriate action to take on breach of a YRO, it is necessary for it to set clear standards in order to maintain confidence in community sentences. In the Government's view, it is essential that community sentences are subject to "rigorous enforcement action" when breaches occur. It is said to be essential to the integrity of the YRO that the Government ensures that the courts have robust enforcement options to deal with wilful and persistent breach. The Government also does not believe that breach of a YRO could quickly lead to custody. It says that where the original offence was not imprisonable, custody is only available where there has been a persistent and wilful breach of the first YRO, followed by a persistent and wilful breach of the YRO with ISS, at which point the court may make a Detention and Training Order for up to 4 months.[18]

1.21 **The Government's response to our inquiry has confirmed our concern that the Bill lacks adequate safeguards to ensure that the use of custody is proportionate, not only to the offence, but to the child's age and intellectual and emotional maturity, as required by the CRC. The Government's emphasis on robust enforcement for wilful and persistent breaches of a YRO, coupled with its assertion that it "needs to maintain confidence in community sentences", appears to us to give rise to a considerable risk that young people will be accelerated into custody not because of the seriousness of their offence but because of their persistent failure to comply with the terms of their community sentences. We recommend that the Bill be amended to include an explicit reference to the requirement of the CRC that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.**

Children's right to legal representation in criminal proceedings

1.22 The Bill expressly provides that a fostering requirement in a YRO (that is, a requirement that the child live for a specified time with one or more named local authority foster parents) cannot be imposed unless the child has had the opportunity to be legally represented.[19] There is, however, no general requirement that children be legally

16 CRC Article 37(b).

17 CRC Article 40(4).

18 Appendix 3, paras. 8-9.

19 Schedule 1, para. 19(1).

represented in criminal proceedings. This seems surprising to us given the obligation in the CRC to ensure that the best interests of the child shall be a primary consideration in all actions concerning them.[20] We therefore asked the Government why the right of children to legal representation is so confined and whether there are any reasons why children should not enjoy a general right to legal representation in criminal proceedings.

1.23 The Government replied that there are already a number of safeguards in place to ensure that a young person will be granted publicly funded representation where necessary, mainly in the form of the "interests of justice" test in the Access to Justice Act 1999: that legal representation is available to anyone facing criminal proceedings where it is in the interests of justice that public funding should be granted. Accompanying guidance states that the Court should give consideration to whether the defendant is of a young age and to the defendant's ability to understand the proceedings or to state his own case. The Government also stated that extending the scope of publicly funded representation for children "could impact significantly on legal aid funding".

1.24 **We are surprised to learn that there is not a presumption that children are entitled to publicly funded legal representation in criminal proceedings, given the seriousness of the consequences for them and the complex and intimidating nature of those proceedings for the child. We recommend that the Government amend the Bill to provide for a general right of legal representation for children in criminal proceedings.**

Sentencing

1.25 The Bill provides that where a court is dealing with an offender aged under 18 in respect of an offence, it must have regard primarily to the principal aim of the youth justice system, which is to prevent offending or re-offending by under 18s, and must also have regard to the purposes of sentencing, which are the punishment of offenders, the reform and rehabilitation of offenders, the protection of the public and the making of reparation by offenders to persons affected by their offences.[21] The court must also have regard to the welfare of the offender, as required by s. 44 of the Children and Young Persons Act 1933,[22] but that duty is expressly made *subject to* the new duty to have regard to the principal aim of the youth justice system.[23]

1.26 The Explanatory Notes to the Bill state that the Government "does note that Article 3 CRC provides that in all actions concerning children their best interests are to be a primary consideration."[24] They state that the duty in the Children and Young Persons Act 1933 to have regard to the welfare of the particular child or young person will continue to apply, but clause 9 clarifies that where the court is sentencing a juvenile offender it must primarily have regard to the principal aim of the youth justice system.

1.27 We asked the Government why it considers that this provision is compatible with the obligation in Article 3 CRC to ensure that the best interests of the child shall be a primary consideration in all actions concerning children. The Government's response is that it is

20 CRC Article 3.

21 Clause 9(1), inserting new s. 142A of the Criminal Justice Act 2003.

22 New s. 142A(3)(b).

23 Clause 9(3), inserting new subsection (1A) into s. 44 of the Children and Young Persons Act 1933.

24 EN para. 1071.

right that the courts should have regard primarily to the principal aim of the youth justice system when sentencing a young offender, and the intention of this provision in the Bill is to clarify the current law and remove any confusion. The welfare of the young person "will be considered as a supporting factor".[25] The Government sees no incompatibility with Article 3 CRC, because that Article only requires the welfare of the child to be *a* primary consideration in sentencing, not *the* primary consideration.

1.28 **We recognise that the obligation in the CRC is to ensure that the best interests of the child are a primary consideration in all decisions affecting children, not the sole primary consideration. In our view, however, the effect of clause 9 of the Bill is to subordinate the best interests of the child to the status of a secondary consideration below the primary consideration of crime prevention. To treat the welfare of the child as a mere "supporting factor" is not, in our view, to treat it as a primary consideration. We recommend that the Bill be amended to delete the provision which subjects the duty to have regard to the welfare of the child to the primary duty to have regard to the principal aim of the youth justice system. We also recommend that the Bill be amended to make explicit that the sentencing court is required to have regard to the welfare of the child "as a primary consideration," as required by the CRC.**

Criminal Appeals

1.29 The Bill amends the test to be applied by the Court of Appeal when deciding whether to allow a criminal appeal.[26] The current test is that the Court of Appeal shall allow an appeal against conviction "if they think that the conviction is unsafe."[27] The Bill provides that a conviction is not unsafe if the Court of Appeal think that there is no reasonable doubt about the appellant's guilt.[28] However, this is qualified by a further provision which makes clear that even if the Court of Appeal thinks there is no reasonable doubt about the appellant's guilt, they still have discretion to allow the appeal if they think that "it would seriously undermine the proper administration of justice to allow the conviction to stand."[29]

1.30 The policy behind the change to the test is that "it is not right that the Court of Appeal should be obliged to quash convictions as unsafe because of procedural irregularities when there is no doubt that the appellant was guilty of the offence", but at the same time the Court of Appeal must retain discretion to allow an appeal if it thinks that there has been serious misconduct by the investigating or prosecuting authorities.[30]

1.31 **We welcome the Government's willingness to amend the Bill, since its introduction, to acknowledge the important function of the appellate courts in upholding the rule of law by quashing convictions where there has been serious misconduct on the part of the State authorities. However, we still have two concerns about the new test for allowing criminal appeals.**

25 Appendix 3, para. 17.

26 Clause 42.

27 Criminal Appeal Act 1968, s.2(1)(a).

28 Clause 42(2), inserting new s. 2(1A) into Criminal Appeal Act 1968.

29 New s. 2(1B) Criminal Appeal Act 1968.

30 PBC Deb, 20 November 2007, col. 392 (Maria Eagle MP).

1.32 **The first is whether the necessity for restricting the powers of the Court of Appeal in this way has really been made out by the Government. There is no clear evidence that the mischief the provision is aimed at is a problem in practice: the Court of Appeal has not interpreted its powers to mean that any procedural irregularity or technical defect renders a conviction unsafe. On the contrary, the Court of Appeal has generally taken a fairly robust, common sense attitude to its "safety" jurisdiction.**

1.33 **Our second concern is that the clause appears to invite the Court of Appeal to set itself up as the arbiter of factual questions going to the guilt or innocence of the appellant, which is not the function of the Court of Appeal in criminal appeals. The role of the Court of Appeal is to review the safety of the conviction, and if it thinks that a conviction is unsafe it should quash a conviction and order a retrial. The new clause appears to restrict the ability of the Court of Appeal to do this.**

1.34 In our reports on monitoring the implementation of court judgments finding breaches of human rights, we have noted that in certain circumstances UK law does not allow for the re-opening of criminal proceedings following judgments of the European Court of Human Rights.[31] We pointed out the limits on the ability to re-consider convictions referred to the Court of Appeal by the Criminal Cases Review Commission where the incompatibility arises as a result of primary legislation or as a result of the substantive criminal law rather than a procedural breach. In such cases the Criminal Cases Review Commission does not have jurisdiction to refer the case back to the Court of Appeal. It is therefore impossible for the UK to fulfil its obligation to take individual measures to redress, so far as possible, the effects of the violation for the injured party in such cases, because there is simply no mechanism in national law for reviewing the safety of the conviction in light of the finding of a violation. The present Bill provides an opportunity to give effect to our recommendation in our earlier reports.

1.35 **We therefore recommend that the Bill be amended to allow expressly for the re-opening of criminal proceedings in appropriate cases following a finding by the European Court of Human Rights that there has been a breach of the right to a fair trial. We repeat our earlier observation that what is required is not an automatic right to have proceedings reopened following a finding of a violation of a Convention right by the Strasbourg Court, but a procedural mechanism for deciding whether proceedings should be reopened to review the safety of the conviction in the light of that judgment. We hope to propose an amendment to give effect to this recommendation in time for the Bill's Committee stage.**

Commissioner for Offender Management and Prisons

1.36 The Bill creates the new office of "Her Majesty's Commissioner for Offender Management and Prisons" to replace the non-statutory Prisons and Probation Ombudsman.[32] The Commissioner's main functions are to deal with eligible complaints from detainees about their treatment during detention, to investigate deaths in custody and to carry out other investigations at the request of the Secretary of State.[33] The Explanatory

31 See e.g. Sixteenth Report of 2006-07, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, HL Paper 128, HC 728, paras 147-150.

32 Part 4, Clauses 50-73 and Schedules 9-13.

33 Clause 50(2).

Notes to the Bill claim that the new Commissioner will be a statutory office-holder, "legally independent of the Secretary of State."[34] The Commissioner will perform an important investigative function as part of the institutional machinery ensuring, amongst other things, that the human rights of prisoners are respected in prisons. As such, it is important that the Commissioner is truly independent of those whose actions are likely to be the subject of investigation, including the Secretary of State himself or herself.

1.37 We are concerned about whether the Commissioner provided for in the Bill can truly be said to be independent of the Secretary of State, for the following reasons:

- the Secretary of State will set the budget of the new Commissioner;
- the Commissioner's staff shall be provided by the Secretary of State;[35]
- the Commissioner will be under a duty to investigate any matter which is requested by the Secretary of State;[36]
- the Secretary of State may give the Commissioner directions as to the scope of, and the procedure to be applied to, such investigations;[37]
- the reporting arrangements provide for the Commissioner to send his reports to the Secretary of State who shall lay them before Parliament.[38]

1.38 Before the publication of the Bill, we raised a similar point about independence in correspondence with the Home Secretary concerning the arrangements for setting the budgets of Her Majesty's Chief Inspectorate of Prisons ("HMIP") and the Prisons and Probation Ombudsman ("PPO"). In March 2007, we wrote to the Home Secretary querying whether the delegation of budget setting to the NOMS Board, on which both the Director General of Prisons and the Director of Probation sit, could be consistent with the independence of HMIP and the PPO when those who are inspected and investigated by those bodies are involved in setting their budgets.[39] The Government confirmed that this was the arrangement but did not accept that there was any problem, stating that "there has been no attempt by the Director General of the Prison Service or Director of Probation to influence the budgets of HMIP or the PPO."[40]

1.39 We wrote again to the Minister pointing out that, regardless of whether any actual influence had been brought to bear, the problem was that the budgetary arrangements undermined the appearance that those bodies are capable of functioning independently, and might therefore be inconsistent with the UK's obligations to maintain independent preventative mechanisms in the Optional Protocol to the UN Convention Against Torture.[41] The Government replied, again denying that there had been any actual or apparent undermining of the functional independence of these scrutiny bodies.[42] It also

34 HL Bill 16-EN, para. 32.
35 Schedule 9 para. 9.
36 Clause 58(7).
37 Clause 58(11).
38 Schedule 9, para. 12.
39 Letter to the Home Secretary, 19 March 2007, Appendix 8.
40 Letter from Mr Gerry Sutcliffe MP, 11 April 2007, Appendix 9.
41 Letter to Mr Gerry Sutcliffe MP, 14 May 2007, Appendix 10.
42 Letter from Mr Gerry Sutcliffe MP, 6 June 2007, Appendix 11.

pointed out that the independence of the two bodies in carrying out their duties is further protected by their freedom to determine the use to which funding is put, which is a key requirement of the Paris Principles on the status of national human rights institutions.[43]

1.40 **We share the concerns expressed by the Parliamentary and Health Service Ombudsman, in her letter to us dated 10 December 2007,[44] and by the Prisoner Ombudsman for Northern Ireland, in his letter dated 2 January 2008,[45] that the new Commissioner will not in fact be truly independent of those subject to investigation, particularly the Secretary of State, because of the various ways in which the Secretary of State can control and influence the new Commissioner, as summarised above. We are also concerned that the proposal will in fact diminish the overall level of protection for vulnerable prisoners because it removes investigations from the remit of an existing genuinely independent Ombudsman. We recommend that the Bill be amended to make the Commissioner truly independent of the Secretary of State and accountable directly to Parliament not the Secretary of State.**

Compensation for miscarriages of justice

1.41 The Bill imposes a cap of £500,000 on the total amount of compensation that may be paid to an individual[46] in respect of a particular miscarriage of justice.[47] It also caps the amount of compensation payable for a person's loss of earnings to one and a half times the median annual gross earnings. It also provides that the assessor may make deductions from overall compensation by reason of conduct that may have caused or contributed to the conviction, and any other convictions or punishment resulting from them.

1.42 Article 3 of Protocol 7 ECHR (which the UK has not ratified) provides that where there has been a miscarriage of justice the person who has suffered punishment shall be compensated according to the law or practice of the State concerned, unless they were responsible for the non-disclosure of the unknown fact at the time. Article 14 of the International Covenant on Civil and Political Rights is to similar effect. The Government's view is that the limits on the amount of compensation are compatible with these provisions, relying in particular on Strasbourg case law which suggests that relatively modest levels of compensation may be acceptable.[48] In its response to our letter, it accepts that there may be some cases where the effect of the cap is that the compensation an individual receives does not wholly reflect the extent of the individual's loss, but it takes the view that a cap of £500,000 cannot be said to impair the essence of the right.[49]

1.43 The Government also argues that there should be similar limits to the amount of compensation payable to victims of miscarriages of justice as there are to the amount payable to victims of crime under the criminal injuries compensation scheme.

43 *Principles relating to the Status of National Human Rights Institutions (The Paris Principles)*, Adopted by General Assembly resolution 48/134 of 20 December 1993.

44 Appendix 5.

45 Appendix 6.

46 Under s. 133 of the Criminal Justice Act 1988.

47 Clause 111(7), inserting new s. 133A into the Criminal Justice Act 1988.

48 EN para. 1152.

49 Appendix 3, para. 24.

1.44 **We do not accept that there is any rational connection between limits on compensation for miscarriages of justice and limits on compensation for victims of crime. In our view, where the State is responsible for a miscarriage of justice, there arises an obligation to restore the individual as closely as possible to the position he or she would have been in but for the miscarriage of justice. It is not difficult to imagine extreme cases in which a limit of £500,000 would fall far short of such an amount, for example where an innocent person has served a very long sentence for a very serious crime and so foregone a lifetime's opportunities. We recommend that the cap on the amount of compensation be deleted from the Bill.**

Extreme pornography

1.45 Clause 113 creates a new offence of possession of extreme pornographic images. During the Second Reading Debate, the Lord Chancellor explained that the new offence was required because of technological developments such as the emergence of the internet. He stated:

> We believe that those who produce and publish this vile material in the UK are already covered by current legislation, but we need the offences created by part 6 for those who possess it, because the makers and distributors are very often operating across borders ...[50]

1.46 Prosecution for possession of extreme pornographic images interferes with an individual's private life (Article 8) and his/her right freely to receive and impart information (Article 10). Included in the protection of Article 10 is speech which is offensive or unpalatable.[51] In addition, the mere threat or possibility of prosecution would similarly interfere with Articles 8 and 10.[52] In the Explanatory Notes to the Bill, the Government accepts that the new offence interferes with rights under Articles 8 and 10 ECHR, but believes that any such interferences are justified.[53]

1.47 The Committee wrote to the Minister raising concerns about the proposed new offence, including (1) whether the definition of the new offence is sufficiently precise and foreseeable to satisfy the requirement that interferences with the right to respect for private life (Article 8 ECHR) and the right to freedom of expression (Article 10 ECHR) be "in accordance with the law"; and (2) whether the offence is necessary in a democratic society and proportionate so as to be compatible with those rights.

Legal certainty

1.48 We asked the Minister to explain how an individual user of pornography is able to know whether or not his or her possession of a particular image would constitute a criminal offence.

50 HC, 8 October 2007, col. 60.

51 *Mueller v Switzerland* (1991) 13 EHRR 212, para. 33. Article 10 "constitutes one of the essential foundations of a democratic society … it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population."

52 *Norris v Ireland* (1988) 13 EHRR 186, para. 31.

53 EN para. 1154.

1.49 In reply, the Minister stated that material caught by the offence must meet three thresholds, namely, it must be pornographic, contain an extreme image and be real or appear to be real. He stated that the Government believed that the individual user of such material would have "no difficulty in recognising pornography" and that extreme images would be "recognisable" or "easily recognisable".[54] However, the Minister noted concerns which were expressed during the Committee stages as to whether there was sufficient precision "in limiting the scope of the offence to material which is extreme and explicit" and stated that "we are considering how the drafting may be clarified".[55] To date, however, no amendments have been made to the original text. There was no debate about the new offence at Report stage in the Commons.

1.50 **Our concerns about the vagueness of the definition of the offence, which we expressed in correspondence with the Minister, remain. It is in our view questionable whether the definition of the new offence in clause 113 is sufficiently precise and foreseeable to meet the Convention test of "prescribed by law". The offence requires the pornographic image in the individual's possession to be "extreme". An assessment of whether an image is or is not "extreme" is inherently subjective and may not, in every case, be, as the Government suggests, "recognisable" or "easily recognisable". This means that individuals seeking to regulate their conduct in accordance with the criminal law cannot be certain that they will not be committing a criminal offence by having certain images in their possession. We look forward to the Government bringing forward an amendment to make the scope of the new offence more precise.**

Proportionality

1.51 The Explanatory Notes to the Bill state that the proposed new offence is intended to (1) protect individuals from participating in degrading staged activities or acts of bestiality[56] (2) break the demand and supply cycle of the material[57] and (3) protect others, such as children and vulnerable adults from inadvertently coming into possession of the material on the internet.[58] We intend to return to this matter in a future report.

Prostitution

1.52 The Bill amends the offence of loitering or soliciting for the purposes of prostitution so that the offence is committed only if the woman acts persistently, which means on two or more occasions in any three-month period.[59] It also introduces a new penalty for those convicted of the offence, allowing courts to make "orders to promote rehabilitation" instead of imposing a fine or other penalty.[60] The purpose of the rehabilitation orders is said to be to assist the offender, through attendance at a series of three meetings with a named supervisor, to address the causes of their involvement in prostitution and to find ways out of it.[61] If the order appears to have been breached without reasonable excuse, a

54 Appendix 3, paras 26-28.
55 Appendix 3, para. 29.
56 EN para. 1156.
57 EN para. 1157.
58 EN para. 1158.
59 Clause 123, amending s. 1 of the Street Offences Act 1959.
60 Clause 124.
61 EN paras 622-623.

warrant for the offender's arrest may be issued,[62] and they can be detained for up to 72 hours before being brought before the appropriate court.[63] If the court is satisfied that the order has been breached without reasonable excuse, it must revoke the order and has power to deal with the offender in any way that it could have dealt with them on conviction.[64]

1.53 In its letter responding to our inquiries about the Bill, the Ministry of Justice stated that breach of a rehabilitation order will not result in a significant increase in the number of vulnerable women being imprisoned because breach of such an order will not be punished with a sentence of imprisonment.[65] Detention for up to 72 hours following arrest was said not to be a penalty for loitering or soliciting, nor a penalty for breaching the order, but part of a mechanism for ensuring that offenders can be brought back to the right court to deal with any breaches. It says that the maximum period of detention has been set at 72 hours in order to give the police an opportunity to bring the offender before the appropriate court, even if the arrest occurs over, say, a bank holiday weekend. We note, however, that in Committee, the Minister, Mr Coaker, appeared to refer to the provision for detention for up to 72 hours as a "sanction" of last resort, to be used should someone completely fail to comply with a rehabilitation order:

> We do not wish the 72 hours provision to be used often, but at the end of the day it is important to make available a sanction should somebody knowingly, deliberately and wilfully choose to ignore the fact that they are subject to an order. [66]

1.54 We also note that no justification is offered for why as long as 72 hours may be needed in order to bring an offender before the right court, other than the reference to the possibility of an arrest taking place on a bank holiday weekend.

1.55 **We welcome the motivation behind the Bill's provisions on prostitution, in particular the emphasis on rehabilitation and its attempt to facilitate assistance for those vulnerable women who are forced to resort to prostitution. Such measures have the potential to enhance the human rights of such women. However, we are concerned that these measures may in fact lead to the detention of women for up to 72 hours for failing to attend a meeting, and in fact may eventually lead to their imprisonment for failure to comply with the terms of court orders.**

Blasphemy

1.56 At Report stage in the Commons one of our members, Dr Evan Harris MP, moved an amendment that "the offences of blasphemy and blasphemous libel are abolished."[67] The Government indicated that it has every sympathy for the case for formal abolition and, subject to a "short and sharp" consultation with the Church of England, undertook to

62 Schedule 25, para. 2(2)(b).
63 Ibid., para. 9(2)(a).
64 Ibid., para. 4(2).
65 Appendix 3, para. 39.
66 PBC Deb, 27 November 2007, cols 569-570.
67 HC Deb, 9 January 2008, col. 437.

bring forward amendments to the Bill in the House of Lords to achieve the aims of the Harris amendment.[68]

1.57 We welcome the Government's commitment, subject to its consultation with the Church of England, to abolish the offences of blasphemy and blasphemous libel. In our view the continued existence of these common law offences gives rise to an ongoing risk of violations of the right to freedom of expression (contrary to Article 10 ECHR) and of the right not to be discriminated against, on grounds of religion, in the enjoyment of the right to freedom of thought, conscience and religion (contrary to Article 14 ECHR in conjunction with Article 9).

1.58 The risk to freedom of expression arises partly because the scope of the offence is uncertain and it does not require any intention to blaspheme to be proved as an element of the offence, which makes it potentially very wide in scope. This combination of lack of legal certainty and the potential breadth of the offence can have a considerable chilling effect on freedom of speech. Although no actual prosecution has been brought since 1976,[69] the continued existence of the offences makes private prosecution a possibility, as was recently demonstrated by the attempt by Christian Voice to bring a private prosecution against the BBC in respect of "*Jerry Springer: the Opera*".

1.59 The offences also discriminate on grounds of religion because they only protect the Christian religion, and even within that religion they only protect the tenets of the Church of England. Unlike the narrowly drawn offence of incitement to religious hatred, which protects people of all religions and none against intentionally threatening words and behaviour,[70] the offences of blasphemy and blasphemous libel provide no protection to people of other religions. The only conceivable justification which might be offered for such differential treatment on grounds of religion can be the historical one that the Church of England is the established church of this country, but in our view such a reason cannot be a sufficient justification even in a modern ethnically mixed society comprised of many people of different faiths and none. We note that even the established church itself does not apparently seek to justify the continued existence of the blasphemy laws.

1.60 Although the old European Commission of Human Rights (now replaced by the reformed European Court of Human Rights) declined to find the UK's blasphemy laws to be in breach of freedom of expression or discriminatory, that was more than 25 years ago.[71] **In our view, for the reasons we have summarised above, the continued existence of the offences can no longer be justified, and we are confident that this would also, in today's conditions, be the view of the English courts under the Human Rights Act and the Strasbourg Court under the ECHR.[72] We therefore look forward to the Government amendment to the Bill in the Lords abolishing the offences of blasphemy and**

68 Ibid., col. 454.

69 *R v Lemon* [1979] AC 617.

70 Part 3A of the Public Order Act 1986, as amended by the Racial and Religious Hatred Act 2006.

71 *Gay News Ltd. and Lemon v UK* (1983) 5 EHRR 123, 7 May 1982 (common law offence of blasphemous libel held to be a proportionate restriction on freedom of expression and restriction of the law to Christianity held to involve no discrimination).

72 This was also the view of our predecessors, who expressed similar views about the common law offence of blasphemous libel in November 2001, commenting on the proposal in the Anti-Terrorism Crime and Security Act 2001 to introduce an offence of incitement to religious hatred: Second Report of 2001-02, *Anti-Terrorism Crime and Security Bill*, HL Paper 37, HC 372, para. 60. The Committee observed that the dynamic interpretation of the ECHR as a living instrument may lead to a change of view by the Strasbourg Court.

blasphemous libel. The amendment proposed in the Commons had the virtue of simplicity, by just abolishing the two offences. We recommend that the Bill be amended to similar effect.

Incitement to hatred on grounds of sexual orientation

1.61 The Bill makes it a criminal offence to stir up hatred on the grounds of sexual orientation.[73] Hatred on grounds of sexual orientation means hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both).[74]

1.62 **We welcome the creation of the new offence as a human rights enhancing measure. As Stonewall has demonstrated, there is now considerable evidence that gay people in particular are often the subject of material inciting people to violence against them. Where such clear evidence of harm exists, there is a positive obligation on the State under Articles 2, 3 and 8 ECHR (right to life, prohibition of inhuman and degrading treatment, and right to respect for private and family life) to ensure that the criminal law is adequate to protect people from such harm. We are gratified to see that there was a clear cross-party consensus in the Commons that there is an obligation on the State to act to protect against such harm.**

1.63 The new offences are modelled on the recently enacted offence of incitement to religious hatred and are therefore narrower than the offences of stirring up racial hatred in two respects. First, the offences apply only to "threatening" words or behaviour, rather than "threatening, abusive or insulting" words or behaviour. Second, the offences apply only to words or behaviour if the accused "intends" to stir up hatred on grounds of sexual orientation, rather than if hatred is either intentional or "likely" to be stirred up.

1.64 In our report on the Racial and Religious Hatred Bill, we expressed concern about the impact on freedom of expression of a broadly drafted offence of incitement to religious hatred and recommended that the offence be narrowed by specific reference to advocacy that constitutes incitement to hostility, violence and discrimination.[75] **We welcome the fact that the new offences concerning incitement to hatred on grounds of sexual orientation are narrowly defined so as to apply only to threatening words or behaviour intended to incite hatred against people on the basis of their sexuality. In our view this provides an appropriate degree of protection for freedom of speech.**

1.65 The Bill does not extend to incitement to hatred on transgender grounds. On Third Reading the Minister expressed "considerable sympathy" for the view that the Bill should be amended to include such incitement and agreed to meet with parliamentarians who are concerned about the omission.[76] We are aware that Press for Change, the campaigning organisation concerned with transgender issues, amongst others, submitted evidence to the Public Bill Committee suggesting that incitement to hatred on transgender grounds is also a very real problem. **We sympathise with this viewpoint, but legislation must be firmly**

73 Clause 126 and Schedule 26, amending Part 3A of the Public Order Act 1986 (hatred against persons on religious grounds).

74 New s. 29AB of the Public Order Act 1986, inserted by Schedule 26, para. 4.

75 First Report of 2005-06 on Racial and Religious Hatred Bill, HL Paper 48, HC 560, paras 5.1-5.2.

76 HC Deb, 9 January 2008, col. 485.

based on evidence. We will therefore be writing to the Minister to ask about the evidence the Government has about the extent of the problem of incitement to hatred on transgender grounds and may return to the issue in a future report.

Self defence and use of force to prevent crime

1.66 The Bill was amended at Report stage to include a provision intended to clarify the law on self-defence.[77] The new provision applies where in proceedings for a criminal offence an issue arises as to whether a person charged with the offence is entitled to rely on the common law defence of self-defence or the statutory defence of "use of force in prevention of crime or making an arrest"[78], and there arises in those proceedings the question whether the degree of force used by the person charged was reasonable in the circumstances.

1.67 The Government's purpose in introducing the provision is to respond to public concern about the operation of the law on self defence, not by amending the law, but by clarifying the operation of the existing defences.[79] It provides that the question whether the degree of force used was reasonable in the circumstances is to be decided by reference to the circumstances as the person using force believed them to be,[80] regardless of whether that belief was mistaken or, if mistaken, whether that mistake was reasonable.[81] The degree of force used is not to be regarded as having been reasonable if it was disproportionate in the circumstances as the person believed them to be,[82] but in deciding that question two considerations are to be taken into account if they are relevant:

a) that a person acting for a legitimate purpose may not be able to "weigh to a nicety" the exact measure of any necessary action; and

b) that evidence of a person's having only done what they honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.[83]

1.68 **We are satisfied that the new clause clarifies rather than amends the existing law, by articulating clearly in statutory form some of the most important elements of the case-law interpreting the scope of the defences in question. As such, in our view the clause is to be welcomed as a clarification of the existing law. To this extent we consider the clause to be a human rights enhancing measure because it brings greater precision to the scope of a defence to a criminal charge and therefore improves legal certainty in the criminal law.**

1.69 However, this beneficial clarification of the current law on self defence and use of force to prevent crime brings sharply into focus a potentially significant human rights concern about the current law, as now restated in the Bill.

77 Clause 128.

78 Section 3(1) of the Criminal Law Act 1967 and Northern Ireland equivalent.

79 Clause 128(7) and the Secretary of State for Justice, HC Deb, 9 January 2008, col. 347.

80 Clause 128(3).

81 Clause 128(8).

82 Clause 128(4).

83 Clause 128(5). The relevant considerations spelt out in the Clause are not the only considerations that might be relevant in deciding whether the degree of force used was reasonable: Clause 128(6).

1.70 The current position, reflected in the Bill, is that the question whether the degree of force used was reasonable in the circumstances is to be decided by reference to the circumstances as the person subjectively believed them to be, regardless of the reasonableness of that belief.[84] This would mean, for example, that in a situation such as the shooting of Jean Charles de Menezes, a policeman or other agent of the state who used lethal force against an individual of Muslim appearance, in part because he honestly believed Muslims to be more likely to be terrorists, would be entitled to have that honest belief taken into account when deciding whether the degree of force used was reasonable, no matter how unreasonable his mistaken belief.

1.71 Similarly, a racist householder who used lethal force against a black man who came to his door, in part because the householder honestly believed that black men are more likely to be robbers, would also be entitled to have that honest belief taken into account when deciding whether his response was reasonable, notwithstanding that the basis for the honest belief is a mistaken racial stereotype.[85] In both cases, on the current law, so long as the force used is reasonable given what the person honestly thought was about to happen, he would be entitled to be acquitted no matter how mistaken and unreasonable his belief about the circumstances.

1.72 **The human rights issue which this raises is whether the right to life is adequately protected by the defence as it currently stands in the Bill, or whether the inclusion of "honest belief" as part of the defence risks putting the UK in breach of the positive obligation under Article 2 ECHR to ensure that its criminal law provides adequate protection for the right to life. This is an obligation which applies even to protect life against the unjustified use of force by other individuals, but it applies with particular strength where the use of force is by state agents.**

1.73 **Because the provision was inserted by Government amendment at Report stage, we have not yet corresponded with the Minister about this issue. We will write to him shortly and report further in due course.**

Violent Offender Orders

1.74 Part 9 of the Bill creates new Violent Offender Orders ("VOOs"). These orders are designed along similar lines to anti-social behaviour orders ("ASBOs") and other civil orders,[86] allowing a court to impose prohibitions, restrictions or conditions on qualifiying offenders in order to prevent serious violent harm. Whilst VOOs are intended to be civil orders, granted in civil proceedings, breach of the order is a criminal offence. Such preventive orders raise human rights questions similar to those on which the Committee has already reported frequently to Parliament in the context of, for example, control orders[87] and serious crime prevention orders.[88]

84 Clause 128(3) and (8).

85 Cf. the American case of Bernard Goetz, who in 1982 shot four black men who asked him for money on the New York subway.

86 Such as football banning orders and sexual offences prevention orders.

87 See e.g. Eighth Report of Session 2006-07, *Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007*, HL Paper 60, HC 365.

88 Twelfth Report of Session 2006-07, *Legislative Scrutiny: Fifth Progress Report*, HL Paper 91, HC 490.

1.75 During Committee stage, the Government defended its intention to create a new type of civil order, suggesting that ASBOs had been generally successful and stating:

> … the cry about the use of civil orders in my and other people's constituencies is not that we should not have them because they are civil orders but that they want more of them. They do not argue about whether antisocial behaviour orders are civil or criminal orders. They just see them as a useful way to control antisocial behaviour … Civil orders make a real difference to preventing harm in our communities and, therefore, to protecting the public.[89]

1.76 The Minister set out the principal aim of VOOs:

> ... to protect the public from the most dangerous violent offenders who still present a risk of serious, violent harm at the end of their sentences, when there is no other risk management mechanism in place.[90]

1.77 Violent offender orders were not debated on Report stage in the House of Commons.

1.78 In our view, the Bill's provisions on VOOs raise three significant human rights issues:

a) whether the power to make VOOs is defined with sufficient precision to satisfy the requirement that interferences with Convention rights be "in accordance with the law" or "prescribed by law";

b) whether VOOs meet the fairness requirements of Article 6 ECHR, and whether the more stringent criminal standards of due process should apply; and

c) whether the Bill contains sufficient safeguards to ensure that an individual is not retrospectively punished for an offence committed before the Act came into force (contrary to Article 7 ECHR).

Legal certainty

1.79 Clause 148(1) provides that a court may make an order containing "such prohibitions, restrictions or conditions as the court making the order considers necessary for the purpose of protecting the public from the risk of serious violent harm".[91] VOOs will last for at least two years, unless renewed or discharged. The Government accepts that, depending on the conditions imposed by a court, VOOs may engage Convention rights, including Articles 5 (deprivation of liberty) and 8 (right to respect for private and family life) ECHR but considers that no breach would occur.[92] **We are concerned that the power to interfere with various Convention rights by imposing a VOO is insufficiently defined in law to satisfy the requirement of legal certainty which is also a fundamental feature of human rights law, including the ECHR.**

1.80 In our view, there is a danger that clause 148 provides the court with an entirely open-ended discretion as to the types of prohibitions, restrictions or conditions that a court may

89 PBC Deb, 27 November 2007, col. 596.

90 PBC Deb, 27 November 2007, col. 598.

91 Clause 148(1)(a).

92 EN paras 1204-1205.

attach to an order. The only limit on the order that may be imposed is that the court must consider them to be necessary for the prevention of serious violent harm by the offender. We can find nothing in the Bill which restricts the scope of this discretion other than the purpose for which such terms can be imposed. Further, the Bill does not contain a list of the sorts of prohibitions, restrictions or conditions which may be placed on an individual. Unlike other legislation empowering courts to make civil preventive orders,[93] no examples are provided. Both the Serious Crime Act 2007 (for serious crime prevention orders) and the Prevention of Terrorism Act 2005 (for control orders) contain indicative lists of the sorts of restrictions, conditions or prohibitions that may be imposed. The Crime and Disorder Act 1998 (dealing with ASBOs) does not. We consider violent offender orders to be analogous to the more serious orders (i.e. serious crime prevention orders and control orders). **In our view, in order to provide the requisite degree of legal certainty, the Bill should be amended to provide, at the very least, an indicative list of the types of prohibitions, conditions or restrictions which may be imposed, although we consider that it would be more appropriate, and offer greater protection for individual rights, if an exhaustive list were set out.**

The applicable standards of due process

1.81 Clause 151 sets out the test for the making of a VOO. A court may make a VOO if it is satisfied that:

a) the individual is a qualifying offender (i.e. that he meets the requirements set out in clause 149 of having committeed a specified offence or having done an equivalent act); and

b) the individual has "acted in such a way as to make it necessary to make a violent offender order for the purpose of protecting the public from the risk of serious violent harm".[94]

1.82 In the leading ASBO case of *R (McCann) v Crown Court at Manchester*,[95] the House of Lords upheld the Government's argument that proceedings leading to the making of an ASBO do not involve the determination of a criminal charge for the purposes of Article 6 ECHR. It held that:

a) proceedings for ASBOs were civil, not criminal:

   i) there was no formal accusation of a breach of criminal law;

   ii) they were initiated by a civil complaint;

   iii) it was unnecessary to establish criminal liability;

   iv) the true purpose of the proceedings was preventive;

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

93 E.g. serious crime prevention orders and control orders.

94 Clause 151(2).

95 [2003] 1 AC 787.

b) hearsay evidence was admissible.

1.83 Although the House of Lords held that proceedings for an ASBO were civil not criminal, they also held that they should carry the criminal standard of proof. In all cases in which an ASBO was applied for, magistrates should apply the criminal standard of proof: that is, they must *be sure* that the individual in question has acted in an anti-social manner before they can make an order.[96]

1.84 In the Explanatory Notes to the Bill, the Government accepts that VOOs engage Article 6 ECHR, but only in relation to the determination of an individual's civil rights.[97] As it has argued previously in relation to other civil orders, the Government relies on the fact that VOOs are civil preventive orders stating that they are "not punitive and do not constitute a criminal sanction".[98]

1.85 In correspondence with the Minister, we questioned three issues relating to the fairness of VOOs under Article 6 ECHR:

a) what distinguishes VOOs from indeterminate sentences for public protection (IPPs);

b) why the Government considers it to be appropriate for civil proceedings to be used, in circumstances where an individual has been convicted of an offence; and

c) why the Government does not consider that criminal fairness guarantees are appropriate in the light of the judgment of the House of Lords in *McCann*.

1.86 We asked the Government to explain the distinction between VOOs and indeterminate sentences for public protection ("IPPs"), which clearly amount to punishment and to which the criminal fair trial standards apply. In his letter to us, the Minister stated that VOOs may be issued in three situations where IPPs would not be applicable and so VOOs "will be the only means of protecting the public", namely:

a) where individuals were convicted of a qualifying offence prior to the introduction of IPPs;

b) where at the point of conviction, an individual's risk level was not seen to be sufficiently high to warrant an IPP but s/he was now deemed to present a risk of serious violent harm; and

c) where an individual's sentence for a qualifying offence has expired but agencies believe, on the basis of the individual's behaviour, that s/he poses a risk of serious violent harm.[99]

1.87 The classification of proceedings as civil in national law is of course not in itself determinative of whether those proceedings determine a criminal charge within the autonomous Convention meaning of that phrase. As a matter of Convention case-law, whether a particular measure amounts to a criminal charge or penalty, so as to attract criminal fair trial guarantees including the presumption of innocence, depends on the

96 [2003] 1 AC 787 at paras 37 (Lord Steyn) and 83 (Lord Hope).

97 EN para. 1202.

98 Appendix 3, para. 40.

99 Appendix 3, para. 41.

application of criteria which have been spelt out in the case-law of the European Court of Human Rights. Significantly, although the classification of the proceedings as a matter of domestic law is a relevant criterion, it is not the decisive factor. Other, more substantive criteria include the nature and severity of the sanctions attached to the offence in question.

1.88 The criteria for obtaining a VOO differ in one major respect from an ASBO and some other civil preventive orders, namely that a prerequisite for obtaining a VOO is demonstrating that the individual has been convicted of a specified offence.[100] One factor that the House of Lords took into account in *McCann* in determining that the proceedings were civil was case-law of the European Court of Human Rights which recognised that proceedings to obtain an order designed to prevent future harmful conduct, *but not to impose a penalty for past offences*, did not constitute the bringing of a criminal charge. However, the situation is markedly different in relation to VOOs in that a criminal offence must have been committed before an application for a VOO can be made.[101] We asked the Government to explain its justification for using civil penalties in respect of individuals convicted and punished for previous criminal offences. In reply, the Government stated that a VOO "is not an additional punishment for a past offence. It relates to the risk of future violent harm."[102]

1.89 On the issue of its assertion that criminal guarantees are not appropriate, the Government relies on the decision of the House of Lords in *McCann*, noting that "the criminal standard of proof is applied in an application for an ASBO" but that "the criminal fairness guarantees set out in Article 6 do not apply to an application for an ASBO". It concludes "the Government does not think that it is appropriate for the criminal fairness guarantees to apply to a civil order such as a VOO".[103] ASBOs generally involve relatively low-level anti-social behaviour which may not even be criminal. **We consider VOOs to be a different matter, more akin to control orders and serious crime prevention orders, both in terms of the seriousness of the conduct in which the individual must have been involved before the order can be made and in the severity of the possible restrictions which can be imposed.** In the Explanatory Notes to the Bill, the Government refers to the possibility of a VOO imposing a 12-hour curfew on an individual,[104] analogous in our view to some of the control orders which were the subject of challenge in the recent House of Lords cases. In one of those cases, whilst the House of Lords found that non-derogating control order proceedings do not amount to the determination of a criminal charge for the purposes of Article 6(1) ECHR, Lord Bingham stated that the procedural protections must be commensurate with the gravity of the consequences for the controlled individual.[105]

1.90 **In our view, the combination of the fact that a VOO will only be made where an individual has already been convicted of a serious violent offence, the risk being protected against is the risk of that person causing serious violent harm in the future by committing a serious criminal offence, the severity of the restrictions to which an individual may be subject under a VOO, and the possible duration of such an order (up**

100 Or has been acquitted of it by reason of insanity or has been found to have done the act charged and been found to be under a disability (Clause 149).

101 Or an equivalent finding have been made (Clauses 149(2)(b) and (c)).

102 Appendix 3, para. 42.

103 Appendix 3, para. 44.

104 EN para. 1205.

105 *Secretary of State for the Home Department v MB* [2007] UKHL 46, para. 24.

to 2 years and indefinitely renewable) means that in most cases an application for a VOO is likely to amount to the determination of a criminal charge for the purposes of Article 6 ECHR and therefore to attract all the fair trial guarantees in that Article.

1.91 **In our recent work on counter-terrorism policy and human rights we have drawn attention to the unsustainability in the long term of resort to methods of control which are outside of the criminal process and which avoid the application of criminal standards of due process. We are concerned that the introduction of VOOs represents yet another step in this direction.**

1.92 Article 6 ECHR does not expressly state that the standard of proof required in criminal proceedings is proof beyond a reasonable doubt. However, the European Court of Human Rights has emphasised on a number of occasions that "any doubt should benefit the accused"[106] and it can therefore be said to be implicit in the case-law that proof beyond a reasonable doubt is necessary.

1.93 The Bill does not expressly state the standard of proof to be applied by the court in making a VOO. In correspondence with us the Government stated that whilst the criminal standard of proof applies in applications for ASBOs, criminal fair trial guarantees do not. Based on this analogy, the Government concludes that it "does not think that it is appropriate for the criminal fairness guarantees to apply to a civil order such as a VOO".[107]

1.94 During the Committee stage, there was considerable debate as to whether or not the standard of proof beyond reasonable doubt should be on the face of the Bill.[108] Relying on *McCann,* the Minister stated:

> ... there is a sliding scale and ... a standard of proof virtually indistinguishable from the criminal standard should be the standard of proof that is used.[109]

1.95 **We welcome the Government's acceptance in debate that the criminal standard of proof applies. However, this acceptance should be spelt out on the face of the Bill to provide that before making a VOO, the court must be satisfied beyond reasonable doubt that the person has "acted in such a way as to make it necessary to make a violent offender order" (clause 151(2)(b)). As we have stated on previous occasions, we do not consider that issues of such importance, and with such serious consequences for the individual, should be left to guidance, but instead should be made explicit on the face of the Bill.**

1.96 During the Committee stage, an amendment to insert the words "beyond reasonable doubt" after "satisfied" in clause 151(1) was proposed. The amendment was opposed by the Government and negatived by 8 votes to 5.[110] **We consider that amending the Bill in this way would make express the Government's intention that the criminal standard of proof would apply to the making of a VOO. We therefore recommend that the Bill be amended in the manner proposed in Committee to make explicit that the appropriate**

106 E.g. *Barbera, Messegue and Jabardo v Spain* (1989) 11 EHRR 360, para. 77.

107 Appendix 3, para. 44.

108 PBC Deb, 27 November 2007, col. 607-614.

109 PBC Deb, 27 November 2007, col. 613.

110 Amendment No. 364, PBC Deb, 27 November 2007, cols. 607-614.

standard of proof for an application for a VOO be the criminal standard, in accordance with the decision of the House of Lords in *McCann*.

1.97 In Committee, when asked what evidence would be admissible, the Minister confirmed that, as with ASBOs, hearsay evidence would be admissible,[111] that written rather than oral evidence would be the norm[112] and that guidance would be issued which would relate, amongst other things, to issues of evidence and how applications are to be made.[113] The Minister also stated that guidance would refer to the fact that orders must be proportionate[114] as courts will have to act in line with the Human Rights Act 1998.[115] **We are concerned that VOOs may be made without oral evidence or the opportunity for the individual to cross examine witnesses. We recommend that there needs to be a full adversarial hearing in order to ensure that the fairness guarantees in Article 6 ECHR are met.**

Interim Violent Offender Orders

1.98 Clause 153 permits a court to make an interim VOO ("IVOO") if it is:

a) satisfied that the individual is a qualifying offender under clause 149; and

b) considers it just to do so.

1.99 Unlike full VOOs, where proof is required that an individual has acted in such a way as to make it necessary to impose a VOO (clause 151(2)(b)), IVOOs do not require such proof of an individual's behaviour. IVOOs may be imposed for a maximum period of four weeks, and are subject to unlimited renewal.[116] This power raises serious questions about its compatibility with Article 6 ECHR. **We recommend that clause 153(3) be amended to include, as a third requirement, that prima facie evidence be provided to the court that the individual has engaged in the behaviour set out in clause 151(2)(b). Further, we suggest that the period for which an individual IVOO may be granted be reduced from four weeks to a more limited period, and that IVOOs be non-renewable.**

Retrospective punishment

1.100 VOOs and IVOOs can be made in respect of specified offences committed before the coming into force of the Criminal Justice and Immigration Bill. The fact that any individual convicted of a specified offence, whenever the offence was committed, may be subject to a VOO or IVOO, leads to a risk of retrospective punishment of individuals convicted of specified offences before the coming into force of the Act, contrary to Article 7 ECHR, especially where the terms of the VOO or IVOO are particularly onerous.

1.101 In the Explanatory Notes to the Bill, the Government disputed that VOOs even engaged Article 7 ECHR, but stated that, even if Article 7 were engaged, there would be no breach as any breach of a VOO would be a criminal offence at the time that the breach

111 PBC Deb, 27 November 2007, col. 613.
112 PBC Deb, 27 November 2007, col. 612.
113 PBC Deb, 27 November 2007, col. 612.
114 PBC Deb, 27 November 2007, col. 601.
115 PBC Deb, 27 November 2007, col. 598.
116 Clause 153(5) and (6).

occurred. We asked the Government to explain the safeguards that it would put in place to ensure that an individual was not retrospectively punished. The Government reiterated that VOOs are not punishments but preventive measures, which will be made on the basis of an up to date assessment of risk and only imposed where the court considers an order to be necessary to protect the public from serious violent harm.[117] Whilst breach of an order would be a criminal offence, this would be a new offence and there would be no question of retrospective punishment. It concluded:

> Therefore, we do not need to introduce any additional safeguards to ensure that an individual is not retrospectively punished for an offence committed before the coming into force of the Act.[118]

1.102 **We remain to be convinced that the imposition of a VOO or IVOO, particularly one with especially onerous terms, would always comply with Article 7 ECHR. We are disappointed that the Government has chosen not to put in place safeguards to ensure that an individual is not retrospectively punished and we recommend that the Government reconsiders its opposition to introducing safeguards in this regard.**

Anti-Social Behaviour

1.103 Part 10 of the Bill deals with anti-social behaviour. It includes two sets of provisions which, in the Committee's view, raise human rights concerns: first, the power to permit closure of premises associated with persistent disorder or nuisance and secondly, the creation of a new offence of causing nuisance or disturbance on NHS premises.

Premises closure orders

1.104 Clause 169 and Schedule 30 of the Bill insert a new provision into the Anti-social Behaviour Act 2003 to permit closure of premises (including homes, whether tenanted or owner-occupied) associated with persistent disorder or nuisance (similar to the existing provisions for closure of premises where drugs are unlawfully used). In order to apply for an order, a senior police officer or a local authority must have reasonable grounds for believing that a person has engaged in anti-social behaviour on the premises in the preceding three months and that the premises are associated with significant and persistent disorder or persistent serious nuisance. A magistrates' court may grant an order if it is satisfied of the grounds above, and considers that an order is necessary to prevent further disorder or serious nuisance. Premises may be closed for a maximum of three months, with the possibility of extensions of further three month periods. Remaining on or entering premises on which a closure notice has been effected is a criminal offence.

1.105 The effect of a closure order on residential property would be likely to be that residents would become homeless for the duration of the order.[119] Whilst the Government has consistently stated that closure orders should only be used as a matter of last resort, this is not made plain on the face of the Bill, and the authorising officer is under no express

117 Appendix 3, para. 45.

118 Appendix 3, para. 46.

119 The Government's own regulatory impact assessment states that "it is anticipated that most people who become homeless as a result of premises closure are likely to be found by the local authority to have become homeless intentionally" (Regulatory Impact Assessment, p. 119).

requirement to demonstrate that other measures have been taken and failed or are not appropriate, although a court may conclude that it is required to undertake such an analysis in order to satisfy itself that the order is "necessary". There is no explicit requirement in the Bill for the authorising officer or the court to consider whether an order would make someone homeless (and if they could find alternative accommodation) or the vulnerabilities of children or some adults.

1.106 We wrote to the Government, outlining our concerns that the proposed measures carry a real risk of violations of the right to respect for family life and the home (Article 8 ECHR), and the protection of property (where the premises are privately owned) (Article 1 of Protocol 1). We expressed our particular concerns about the effects on children and vulnerable adults and questioned the necessity of the measures, given the range of other measures available to deal with anti-social behaviour.

1.107 In the Explanatory Notes to the Bill, the Government accepts that Article 8 and Article 1 of Protocol 1 ECHR are engaged by closure notices and orders.[120] The Government relies on the fact that the applicants for premises closure orders will be public authorities who are required to act compatibly with Convention rights[121] as are courts, who will grant the applications.[122] The Notes state that premises closure orders will not affect property rights as owner occupiers or tenants can return to the property after the order comes to an end.[123]

1.108 In his letter to us, the Minister stated that any interference with private life was "justified in the prevention of disorder or the protection of rights and freedoms of others"[124] and would protect vulnerable adults and children.[125] He also stated that any interference with the peaceful enjoyment of property would be limited by the temporary nature of the order and may safeguard neighbours' peaceful enjoyment of their own premises.[126] The Minister stressed that such orders would only be used as a last resort.[127]

1.109 Concerns were expressed during the Committee stage about the effect of closure orders on family members (especially children) and other residents not associated with the behaviour which was the basis for the closure order and "cuckooing" (the displacement of people who then move into other premises where there are vulnerable people).[128] In reply, the Minister stated that the orders would be the subject of:

> … robust guidance on how the orders operate and how the process is put into practice. I will ensure that we include housing considerations as part of the guidance … The guidance will say that this process is only appropriate if it is an absolute last resort and nothing else seems to be appropriate ... We have to protect children and

120 EN paras. 1212 and 1214.
121 EN para. 1213.
122 EN para. 1214.
123 EN para. 1214.
124 Appendix 3, para. 55.
125 Appendix 3, paras. 52-3.
126 Appendix 3, para. 57.
127 Appendix 3, para. 59.
128 PBC Deb, 27 November 2007, col. 618-620.

vulnerable people. I believe that through guidance we can ensure that we do that, even though the safeguards are not necessarily on the face of the Bill.[129]

1.110 **We are pleased to note that the Government intends to produce guidance dealing more fully with the operation of premises closure orders in practice. However, in our view, this guidance will set out requirements which, for reasons of legal certainty and to ensure the proportionality of the measures with Convention rights, should be contained in the Bill itself. In particular, we are disappointed that the Government does not propose to include, on the face of the Bill, the requirement that a premises closure order only be imposed as a last resort, and that the needs of children and vulnerable adults be taken into account. We encourage the Government to reconsider its position in order to ensure that premises closure orders are proportionate to the interference with the rights to respect for family and home life (Article 8 ECHR) and the peaceful enjoyment of property (Article 1 of Protocol 1).**

Nuisance or disturbance on NHS premises

1.111 Clause 170 creates a new offence of causing nuisance or disturbance on NHS premises, which consists of three elements:

a) A person on NHS premises, causes a nuisance or disturbance to NHS staff, without reasonable excuse; and

b) The person refuses, without reasonable excuse, to leave the premises when asked to do so; and

c) The person is not there to obtain personal medical assistance. A person who has been provided with medical help or who was refused assistance during the previous eight hours will not be classed as being on the premises to obtain personal medical assistance.

1.112 Clause 171 creates the power to remove a person, who it is believed has committed a Clause 170 offence, from the premises. The Secretary of State may issue guidance on the exercise of the power to remove.[130]

1.113 We were concerned that this new offence and the power to remove could adversely affect the ability of some vulnerable people (such as those with mental health problems) to access medical treatment, which raises issues under Article 2 (the right to life) and 8 (including respect for physical and psychological integrity), as well as the right not to be discriminated against in the enjoyment of Convention rights (Article 14 in conjunction with Articles 2 and 8). We therefore wrote to the Government asking it to explain (1) the necessity for the new offence, (2) why a criminal penalty was chosen to address the suggested problem and (3) how such a measure is proportionate to ensuring that all members of the public have equal access to basic medical treatment. In addition, given the Government's positive duties to protect life and prevent ill-treatment and the possibility that an individual might avoid seeking help for medical problems, including those that are life threatening, for fear that s/he would face a criminal sanction,[131] we asked the

129 PBC Deb, 27 November 2007, col. 621.

130 Clause 172.

131 E.g. someone with mental health problems at risk of suicide or self-harm.

Government to indicate the steps that it proposed to take to ensure that it complied with its positive obligations.

1.114 In its reply, the Government justified the new offence in part by pointing to the following gaps in current legal protection:

a) Existing anti-social behaviour law is inadequate to deal with low level nuisance and disturbance occurring on hospital premises, in particular because it requires a court order and therefore cannot be used to deal with an incident as it occurs;

b) Existing criminal offences such as drunkenness and Public Order Act offences are relevant, but require a police response to arrest and remove the person committing the offence, leaving hospital staff to deal with the offender unless and until the police arrive;

c) Hospitals may apply for civil law injunctions against individuals, but this is time-consuming, slow and costly and is not appropriate for dealing with an incident as it occurs.[132]

1.115 The Government concluded by noting that:

> There is no existing offence dealing with nuisance or disturbance behaviour, with an attendant power of removal exercisable on the commission of the offence conferred on persons other than police officers. There is a need for both the offence, and a power of removal by an authorised NHS staff member where a person has committed or is committing the offence. It will meet the dual objectives of ensuring that persons who cause a nuisance or disturbance on NHS premises to NHS staff and refuse to leave when asked to do so by NHS staff members can be prosecuted for that specific offence … and NHS staff can be empowered to take immediate action against offenders by exercising the power of removal.[133]

1.116 The Government therefore considers a criminal sanction to be necessary:

> … in order that offenders who prevent NHS staff from delivering healthcare can be prosecuted and deterred from engaging in such behaviour in the future … The creation of the new offence in combination with the attendant power of removal … will enable incidents to be dealt with more quickly and thus have a positive impact on the delivery of healthcare.[134]

1.117 In a lengthy section of the Explanatory Notes to the Bill, the Government accepts the "potential application" of Articles 2, 3, 6, 8, 9, 10, 11 and 14 ECHR to the new offence and power to remove, and explains that the Government believes that any interferences with Convention rights can be justified.[135]

1.118 In its correspondence with the Committee and in the Explanatory Notes, the Government contends that sufficient safeguards are built into the legislation or will be contained in guidance to ensure that all members of the public have equal access to medical treatment. Suggesting that the measures are a proportionate and targeted response,

132 Appendix 3, paras. 65-67.

133 Appendix 3, para. 68.

134 Appendix 3, para. 71.

135 EN paras. 1220-1228.

the Government relies heavily on the fact that the measures are aimed at people who are on NHS premises, but who are not seeking medical attention for themselves.[136] The safeguards relied on by the Government include:

a) No offence will be committed by an individual attending the premises to obtain medical advice, care or treatment;[137]

b) A person on NHS premises cannot be removed if an authorised officer believes that the person may need medical treatment, care or advice, or removal would endanger his or her physical or mental health.[138] The Government states that guidance will provide that the officer should be a medical practitioner and will indicate, amongst other things, the matters to be taken into account;[139] and

c) A person only commits an offence if he or she causes nuisance or disturbance without reasonable excuse and fails to leave when asked to do so, again without reasonable excuse. The Government states that a reasonable excuse would include committing nuisance or disturbance because of a mental health condition or another condition which affects behaviour and will set out examples in guidance.[140] Other examples include receiving distressing news or a communication problem due to language barriers.[141]

1.119 Clause 172 provides that guidance will be published setting out how to exercise the power to remove on at least nine issues.

1.120 During Committee stage, an amendment was suggested by Mr David Heath to remove Clause 170(1)(c). In debate, he suggested that it was "extraordinary" that a hospital could not remove an individual who was causing nuisance or disturbance from NHS premises if s/he required medical treatment.[142] He stated:

> I suspect that it is to avoid any potential human rights implications of effectively refusing treatment to someone who has suffered a serious injury.[143]

1.121 The Minister, Mr Vernon Coaker, responded by defending the right of patients to access medical treatment stating:

> I do not think that it is acceptable to deny medical treatment to those who need it. It may be vital to that person's health and well-being that they receive the medical advice or treatment that they have sought by attending hospital. Their need for treatment may far outweigh any need to remove them from the premises for having committed the offence of causing a nuisance or disturbance on the premises.[144]

136 Appendix 3, para. 77.
137 Clause 171(c) and EN para. 1222.
138 Clause 171(4).
139 Appendix 3, para 75.
140 Appendix 3, para. 76.
141 EN para. 1227.
142 PBC Deb, 27 November 2007, col. 625.
143 PBC Deb, 27 November 2007, col. 625.
144 PBC Deb, 27 November 2007, cols. 627-8.

1.122 **We consider that the Government has made its case for the necessity of a new power to deal with individuals who cause a nuisance or disturbance on NHS premises. The proposed new offence appears to attempt to strike a balance between the desire for staff and patients not to suffer nuisance and disturbance and the needs of those requiring medical attention to be treated. We welcome the safeguards which the Government has proposed and its commitment to ensuring that the rights of individuals to access medical treatment or advice are protected. The question is whether the proposed measures put into effect the Government's commitment. We are concerned to see that the manner in which the power to remove may be exercised is to be contained in guidance, rather than on the face of the Bill and encourage the Government to reconsider this omission. In particular, we suggest that the Bill should be amended to include express provisions on the matters currently covered by Clause 172(2)(d) to (g), as the exercise of the powers in relation to these issues has the capacity to seriously interfere with an individual's Convention rights. We recommend that the Bill set out an indicative list of the factors which would constitute a reasonable excuse for the purposes of Clause 170(1). Whilst the Government has told us that nuisance or disturbance caused by an individual suffering a mental or physical condition will prevent the commission of an offence or removal, it is unclear whether this would include behaviour due to an addiction (e.g. to drugs or alcohol). We propose to write to the Minister to seek clarification on this matter.**

Special Immigration Status

1.123 The Bill introduces a new "special immigration status" for designated "foreign criminals" who are liable to deportation but cannot be removed from the UK because of s. 6 of the Human Rights Act 1998 (e.g. because they face a real risk of torture in the receiving country).[145] "Foreign criminals" are defined to include those who are excluded from the protection of the Refugee Convention under Article 1F of that Convention, or who are guilty of "serious criminality" in or outside the UK.[146] The effect of designation is that the individual does not have leave to enter or remain in the UK, and can be made subject to various conditions concerning residency, reporting, employment or occupation.

1.124 The measure is the Government's response to the decision of the courts in the so-called Afghani hijackers case. The Court of Appeal in that case expressly indicated that it would be open to Parliament to create a new statutory category to accommodate people who it was felt by their conduct had disentitled themselves to any discretionary leave to remain in the UK.[147]

1.125 The Bill provides that the Secretary of State may not designate a person "if the Secretary of State thinks that" an effect of designation would breach the UK's obligations under the Refugee Convention.[148] The Explanatory Notes to the Bill describe the effect of this provision as being that a person may not be designated where the effect of designation would breach the UK's obligations under the Refugee Convention.[149] We were concerned

145 Part 12, clauses 181-188.

146 Clause 182.

147 *S v Secretary of State for the Home Dept* [2006] EWCA Civ 1157 at para. 47.

148 Clause 181(5)(a).

149 EN paras 649 and 873.

by the subjective language used in this provision and therefore wrote to the Government. **We welcome the Government's clarification that the Secretary of State's designation of a person under clause 181 of the Bill would be unlawful if, in the opinion of a court, the effect of designation would breach the UK's obligations under the Refugee Convention.**

1.126 In our view, however, the clause still gives rise to a significant human rights issue, because of its reliance on the so-called statutory construction of Article 1F of the Refugee Convention by s. 54 of the Immigration, Asylum and Nationality Act 2006.[150] The Government confirmed in its response to our inquiry that this statutory construction of Article 1F of the Refugee Convention would apply in any court proceedings when deciding whether the effect of designation would breach the UK's obligations under the Convention.[151] In a previous report we have reported that this statutory construction undermines the protection afforded by the Refugee Convention because it expands the scope of the exclusions from refugee protection well beyond the narrow scope given to those exclusions in the Convention itself. These concerns continue to be shared by the UNHCR.[152] **We are therefore concerned that this Part of the Bill gives rise to a further risk of breaches of the Refugee Convention by the UK and we recommend that the statutory construction of Article 1F of that Convention be repealed.**

Prohibition on industrial action by prison officers

1.127 By means of a Government amendment at Report stage, the Bill reintroduces a statutory prohibition on prison officers taking industrial action.[153] The prohibition is not merely on strike action: "industrial action" is defined to include the withholding of services as a prison officer "and any other action likely to affect the normal working of a prison."[154]

1.128 The right to freedom of association in Article 11 ECHR expressly includes the right to form and join trade unions for the protection of a person's interests. Although the right to strike as such has never been held by the European Court of Human Rights to be included in the scope of Article 11, the right of union members to take collective action to protect their interests has at least implicitly been acknowledged as important to enable the enjoyment of the right to freedom of association. The right to strike is not expressly recognised in any of the ILO Conventions, but is expressly recognised in the European Social Charter 1961,[155] as an example of the collective action to which workers are entitled in order to ensure the effective exercise of the right to bargain collectively.

1.129 Article 11(2) ECHR expressly provides that Article 11 "shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State." Although the European Court of Human Rights has held that the phrase "administration of the State" should be interpreted narrowly, prison officers are clearly "members of the administration of the State." Article 11(2) does not, however, provide the State with carte blanche to impose whatever

150 See Third Report of 2005-06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75, HC 561.

151 Appendix 3, para. 83.

152 PBC Deb, 27 November 2007, cols 643-4 (Harry Cohen).

153 Clause 189, amending s. 127 of the Criminal Justice and Public Order Act 1994.

154 New s. 127(1A), inserted by Clause 189(3).

155 Article 6(4).

restrictions it wishes on the association rights of those involved in the administration of the State. To be "lawful", such restrictions must satisfy the usual requirements that they be prescribed by law, necessary in a democratic society and proportionate to the legitimate aim it is sought to achieve. The Explanatory Notes to the Bill acknowledge this but do not go on to explain why the new prohibition satisfies those requirements.[156]

1.130 The Government's justifications for the prohibition of industrial action by prison officers are to be found in the speech of the Secretary of State introducing the amendment on Report: they are because of the risks posed by such action to both public safety and the welfare of prisoners.[157] The evidence referred to by the Government of the consequences of the industrial action taken by prison officers in August 2007 certainly suggests that such action can have very serious consequences for the welfare of prisoners, many of whom have mental health problems, require regular medication or are otherwise vulnerable.[158] **We consider that the duty on the State to ensure the safety and well-being of prisoners is a fairly compelling consideration capable in principle of justifying some restriction on the right of prison officers to take some forms of collective action to protect their interests. The question is whether the restrictions contained in the Bill are proportionate to the pursuit of that aim.**

1.131 Before we can reach a view on the proportionality question we would like to know the answer to two questions which we have not yet had an opportunity to ask the Minister because of the late stage at which the amendment was introduced. **First, why is it necessary, in order to protect the welfare of prisoners, to prohibit all forms of industrial action by prison officers rather than just strike action? Second, has the point of last resort been reached, or is there still a possibility that a voluntary agreement with the Prison Officers Association could be reached? We will write to the Minister in relation to these points and may return to the matter in a future report.**

156 EN paras 1249-1250.

157 HC Deb, 9 January 2008, col 328 (Secretary of State for Justice).

158 Ibid., col. 329.

Bill not requiring to be brought to the attention of either House on human rights grounds

2.1 We consider that the following Government Bill does not raise human rights issues of sufficient significance to warrant us undertaking further scrutiny of it:

- Pensions Bill.

Annex: Proposed Committee Amendments

In this Annex, we suggest amendments to the Criminal Justice and Immigration Bill to give effect to some of our recommendations and to assist parliamentarians in ensuring that some of the matters we have raised are debated in Parliament.[159]

Custody of children only used as last resort[160]

After Clause 1

Insert the following new Clause—

"**Custody of children: conditions to be met**

A court must not pass a custodial sentence unless—

(a) the offender has already been the subject of an order, or orders, mentioned in subsection (3)(a) or (b), or

(b) the offence, or the combination of the offence and one or more offences associated with it, was so serious that, notwithstanding the age of the offender, an order under subsection 3(a) or (b) cannot be justified for the offence."

Youth Rehabilitation Orders: breach[161]

Schedule 2, Page 170, line 35, at end insert, ", the age of the offender and the intellectual and emotional maturity of the offender".

Schedule 2, Page 173, line 7, at end insert, ", the age of the offender and the intellectual and emotional maturity of the offender".

Youth Rehabilitation Orders: legal representation[162]

Schedule 1, Page 155, line 37, leave out from "not" to "a" in line 38 and insert "make".

Schedule 1, Page 155, line 40, leave out "at the relevant time".

Schedule 1, Page 156, line 6, leave out sub-paragraph (3).

Sentencing of children[163]

Clause 9, Page 7, Line 9, leave out lines 9 to 17 and insert—

159 Page, clause and line references are to the Bill as introduced in the House of Lords (HL Bill 16).
160 Para 1.17.
161 Para 1.21.
162 Para 1.24.
163 Para 1.28.

"(2) The court must have regard primarily to the welfare of the offender, in accordance with section 44 of the Children and Young Persons Act 1933.

(3) The court must also—

(a) have regard to aim of preventing offending (or re-offending) by persons aged under 18, and

(b) have regard to the purposes of sentencing mentioned in subsection (4), so far as it is not required to do so by paragraph (a)."

Clause 9, Page 7, Line 41, leave out subsection (3).

Blasphemy[164]

After Clause 129

Insert the following new Clause—

"**Blasphemy**

The offences of blasphemy and blasphemous libel are abolished.".

Violent Offender Orders: standard of proof[165]

Clause 151, Page 109, line 3, after "satisfied" insert "beyond reasonable doubt".

Violent Offender Orders: court process[166]

Clause 151, Page 109, line 13, at end insert—

"(3A) A violent offender order may not be made unless there has been a full adversarial hearing, including the opportunity for P to appear before the court and to cross-examine witnesses."

Interim Violent Offender Orders[167]

Clause 153, Page 110, Line 27, after "offender," insert—

"(aa) is satisfied that there is prima facie evidence that the person has engaged in the behaviour set out in section 151(2)(b),"

Clause 153, Page 110, line 39, leave out ", unless renewed,".

Clause 153, Page 110, line 40, leave out "4" and insert "2".

Clause 153, Page 110, line 42, leave out paragraph (a).

164 Para 1.60.
165 Para 1.96.
166 Para 1.97.
167 Para 1.99.

Premises Closure Orders[168]

Schedule 30, Page 283, Line 30, at end insert—

"(3A) An authorisation under subsections (2) or (3) above may only be given after—

(a) all other reasonable steps have been taken to deal with the anti-social behaviour and the persistent disorder or serious nuisance referred to in subsection (1), and

(b) the needs of any children or vulnerable adults residing at the premises have been taken into account.".

168 Para 1.110.

Conclusions and recommendations

1. We add our voice to the many Members who complained at Report stage that the House of Commons has been deprived of the opportunity to conduct, in the case of many clauses, any scrutiny at all of provisions which have serious implications for the rights and liberties of the citizen. (Paragraph 1.3)

2. We urge the Government to exercise caution in this contentious area of policy [rebalancing the criminal justice system] and to proceed only on the basis of objective evidence. We ask the Government again to clarify their position on this issue. (Paragraph 1.7)

3. We welcome, in principle, the introduction of a generic community sentence for children and young offenders, because it has the potential to enhance the legal protection for the human rights of children and young people in the criminal justice system. Indeed, Article 40(4) of the UN Convention on the Rights of the Child ("the CRC") requires that a variety of dispositions shall be available "to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." In particular, seeking to ensure that the requirements imposed in a community sentence are more closely tailored to the individual circumstances of the juvenile offender, which is said to be one of the main aims of this Part of the Bill, should help to make the requirements imposed on juvenile offenders more proportionate. (Paragraph 1.9)

4. We note the Government's statement that it strongly believes that custody for young people should only be used as a last resort. However, we note that in the Government's response to our predecessor Committee's recommendation, it said that "intensive supervision and surveillance would be the first option for courts, and custody would be available as a second option only where the offences were so serious that only a physical restriction of liberty could be justified." (Paragraph 1.16) As presently drafted, however, there is nothing in the Bill to require that a YRO with ISS be the first resort, before custody, other than in exceptionally serious cases. (Paragraph 1.16) In our view, such a requirement would be an important additional safeguard to ensure that custody of children is only used as a last resort. Moreover, such a safeguard is arguably necessary to counter the risk that a single community sentence may lead to a quicker escalation to custody if the order is breached. We recommend that the Bill be amended to require that a YRO with ISS should always be tried before custody, unless the offence is so exceptionally serious that a custodial sentence is necessary to protect the public. (Paragraph 1.17)

5. The Government's response to our inquiry has confirmed our concern that the Bill lacks adequate safeguards to ensure that the use of custody is proportionate, not only to the offence, but to the child's age and intellectual and emotional maturity, as required by the CRC. The Government's emphasis on robust enforcement for wilful and persistent breaches of a YRO, coupled with its assertion that it "needs to maintain confidence in community sentences" appears to us to give rise to a considerable risk that young people will be accelerated into custody not because of

the seriousness of their offence but because of their persistent failure to comply with the terms of their community sentences. We recommend that the Bill be amended to include an explicit reference to the requirement of the CRC that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence. (Paragraph 1.21)

6. We are surprised to learn that there is not a presumption that children are entitled to publicly funded legal representation in criminal proceedings, given the seriousness of the consequences for them and the complex and intimidating nature of those proceedings for the child. We recommend that the Government amend the Bill to provide for a general right of legal representation for children in criminal proceedings. (Paragraph 1.24)

7. We recognise that the obligation in the CRC is to ensure that the best interests of the child are a primary consideration in all decisions affecting children, not the sole primary consideration. In our view, however, the effect of clause 9 of the Bill is to subordinate the best interests of the child to the status of a secondary consideration below the primary consideration of crime prevention. To treat the welfare of the child as a mere "supporting factor" is not, in our view, to treat it as a primary consideration. We recommend that the Bill be amended to delete the provision which subjects the duty to have regard to the welfare of the child to the primary duty to have regard to the principal aim of the youth justice system. We also recommend that the Bill be amended to make explicit that the sentencing court is required to have regard to the welfare of the child "as a primary consideration," as required by the CRC. (Paragraph 1.28)

8. We welcome the Government's willingness to amend the Bill, since its introduction, to acknowledge the important function of the appellate courts in upholding the rule of law by quashing convictions where there has been serious misconduct on the part of the State authorities. However, we still have two concerns about the new test for allowing criminal appeals. (Paragraph 1.31)

9. The first concern in relation to criminal appeals is whether the necessity for restricting the powers of the Court of Appeal in this way has really been made out by the Government. There is no clear evidence that the mischief the provision is aimed at is a problem in practice: the Court of Appeal has not interpreted its powers to mean that any procedural irregularity or technical defect renders a conviction unsafe. On the contrary, the Court of Appeal has generally taken a fairly robust, common sense attitude to its "safety" jurisdiction. (Paragraph 1.32) Our second concern is that the clause appears to invite the Court of Appeal to set itself up as the arbiter of factual questions going to the guilt or innocence of the appellant, which is not the function of the Court of Appeal in criminal appeals. The role of the Court of Appeal is to review the safety of the conviction, and if it thinks that a conviction is unsafe it should quash a conviction and order a retrial. The new clause appears to restrict the ability of the Court of Appeal to do this. (Paragraph 1.33)

10. We therefore recommend that the Bill be amended to allow expressly for the re-opening of criminal proceedings in appropriate cases following a finding by the European Court of Human Rights that there has been a breach of the right to a fair

trial. We repeat our earlier observation that what is required is not an automatic right to have proceedings reopened following a finding of a violation of a Convention right by the Strasbourg Court, but a procedural mechanism for deciding whether proceedings should be reopened to review the safety of the conviction in the light of that judgment. We hope to propose an amendment to give effect to this recommendation in time for the Bill's Committee stage. (Paragraph 1.35)

11. We share the concerns expressed by the Parliamentary and Health Service Ombudsman, in her letter to us dated 10 December 2007, and by the Prisoner Ombudsman for Northern Ireland, in his letter dated 2 January 2008, that the new Commissioner will not in fact be truly independent of those subject to investigation, particularly the Secretary of State, because of the various ways in which the Secretary of State can control and influence the new Commissioner, as summarised above. We are also concerned that the proposal will in fact diminish the overall level of protection for vulnerable prisoners because it removes investigations from the remit of an existing genuinely independent Ombudsman. We recommend that the Bill be amended to make the Commissioner truly independent of the Secretary of State and accountable directly to Parliament not the Secretary of State. (Paragraph 1.40)

12. We do not accept that there is any rational connection between limits on compensation for miscarriages of justice and limits on compensation for victims of crime. In our view, where the State is responsible for a miscarriage of justice, there arises an obligation to restore the individual as closely as possible to the position he or she would have been in but for the miscarriage of justice. It is not difficult to imagine extreme cases in which a limit of £500,000 would fall far short of such an amount, for example where an innocent person has served a very long sentence for a very serious crime and so foregone a lifetime's opportunities. We recommend that the cap on the amount of compensation be deleted from the Bill. (Paragraph 1.44)

13. Our concerns about the vagueness of the definition of the offence of possession of extreme pornographic images, which we expressed in correspondence with the Minister, remain. It is in our view questionable whether the definition of the new offence in clause 113 is sufficiently precise and foreseeable to meet the Convention test of "prescribed by law". The offence requires the pornographic image in the individual's possession to be "extreme". An assessment of whether an image is or is not "extreme" is inherently subjective and may not, in every case, be, as the Government suggests, "recognisable" or "easily recognisable". This means that individuals seeking to regulate their conduct in accordance with the criminal law cannot be certain that they will not be committing a criminal offence by having certain images in their possession. We look forward to the Government bringing forward an amendment to make the scope of the new offence more precise. (Paragraph 1.50)

14. We welcome the motivation behind the Bill's provisions on prostitution, in particular the emphasis on rehabilitation and its attempt to facilitate assistance for those vulnerable women who are forced to resort to prostitution. Such measures have the potential to enhance the human rights of such women. However, we are concerned that these measures may in fact lead to the detention of women for up to

72 hours for failing to attend a meeting, and in fact may eventually lead to their imprisonment for failure to comply with the terms of court orders. (Paragraph 1.55)

15. In our view, the continued existence of the offences of blasphemy and blasphemous libel can no longer be justified, and we are confident that this would also, in today's conditions, be the view of the English courts under the Human Rights Act and the Strasbourg Court under the ECHR. We therefore look forward to the Government amendment to the Bill in the Lords abolishing the offences of blasphemy and blasphemous libel. The amendment proposed in the Commons had the virtue of simplicity, by just abolishing the two offences. We recommend that the Bill be amended to similar effect. (Paragraph 1.60)

16. We welcome the creation of the new offence of incitement to hatred on grounds of sexual orientation as a human rights enhancing measure. As Stonewall has demonstrated, there is now considerable evidence that gay people in particular are often the subject of material inciting people to violence against them. Where such clear evidence of harm exists, there is a positive obligation on the State under Articles 2, 3 and 8 ECHR (right to life, prohibition of inhuman and degrading treatment, and right to respect for private and family life) to ensure that the criminal law is adequate to protect people from such harm. We are gratified to see that there was a clear cross-party consensus in the Commons that there is an obligation on the State to act to protect against such harm. (Paragraph 1.62)

17. We welcome the fact that the new offences concerning incitement to hatred on grounds of sexual orientation are narrowly defined so as to apply only to threatening words or behaviour intended to incite hatred against people on the basis of their sexuality. In our view this provides an appropriate degree of protection for freedom of speech. (Paragraph 1.64)

18. We will be writing to the Minister to ask about the evidence the Government has about the extent of the problem of incitement to hatred on transgender grounds and may return to the issue in a future report. (Paragraph 1.65)

19. We are satisfied that the new clause clarifies rather than amends the existing law, by articulating clearly in statutory form some of the most important elements of the case-law interpreting the scope of the defences in the use of force to prevent crime. As such, in our view the clause is to be welcomed as a clarification of the existing law. To this extent we consider the clause to be a human rights enhancing measure because it brings greater precision to the scope of a defence to a criminal charge and therefore improves legal certainty in the criminal law. (Paragraph 1.68)

20. The human rights issue which this matter raises is whether the right to life is adequately protected by the defence as it currently stands in the Bill, or whether the inclusion of "honest belief" as part of the defence risks putting the UK in breach of the positive obligation under Article 2 ECHR to ensure that its criminal law provides adequate protection for the right to life. This is an obligation which applies even to protect life against the unjustified use of force by other individuals, but it applies with particular strength where the use of force is by state agents. (Paragraph 1.72) Because the provision was inserted by Government amendment at Report stage, we

have not yet corresponded with the Minister about this issue. We will write to him shortly and report further in due course. (Paragraph 1.73)

21. We are concerned that the power to interfere with various Convention rights by imposing a VOO is insufficiently defined in law to satisfy the requirement of legal certainty which is also a fundamental feature of human rights law, including the ECHR. (Paragraph 1.79)

22. In our view, in order to provide the requisite degree of legal certainty, the Bill should be amended to provide, at the very least, an indicative list of the types of prohibitions, conditions or restrictions which may be imposed, although we consider that it would be more appropriate, and offer greater protection for individual rights, if an exhaustive list were set out. (Paragraph 1.80)

23. We consider VOOs to be more akin to control orders and serious crime prevention orders, both in terms of the seriousness of the conduct in which the individual must have been involved before the order can be made and in the severity of the possible restrictions which can be imposed. (Paragraph 1.89)

24. In our view, the combination of the fact that a VOO will only be made where an individual has already been convicted of a serious violent offence, the risk being protected against is the risk of that person causing serious violent harm in the future by committing a serious criminal offence, the severity of the restrictions to which an individual may be subject under a VOO, and the possible duration of such an order (up to 2 years and indefinitely renewable) means that in most cases an application for a VOO is likely to amount to the determination of a criminal charge for the purposes of Article 6 ECHR and therefore to attract all the fair trial guarantees in that Article. (Paragraph 1.90)

25. In our recent work on counter-terrorism policy and human rights we have drawn attention to the unsustainability in the long term of resort to methods of control which are outside of the criminal process and which avoid the application of criminal standards of due process. We are concerned that the introduction of VOOs represents yet another step in this direction. (Paragraph 1.91)

26. We welcome the Government's acceptance in debate that the criminal standard of proof applies. However, this acceptance should be spelt out on the face of the Bill to provide that before making a VOO, the court must be satisfied beyond reasonable doubt that the person has "acted in such a way as to make it necessary to make a violent offender order" (clause 151(2)(b)). As we have stated on previous occasions, we do not consider that issues of such importance, and with such serious consequences for the individual, should be left to guidance, but instead should be made explicit on the face of the Bill. (Paragraph 1.95)

27. We recommend that the Bill be amended in the manner proposed in Committee to make explicit that the appropriate standard of proof for an application for a VOO be the criminal standard, in accordance with the decision of the House of Lords in *McCann*. (Paragraph 1.96)

28. We are concerned that VOOs may be made without oral evidence or the opportunity for the individual to cross examine witnesses. We recommend that there needs to be a full adversarial hearing in order to ensure that the fairness guarantees in Article 6 ECHR are met. (Paragraph 1.97)

29. We recommend that clause 153(3) (relating to interim violent offender orders) be amended to include, as a third requirement, that prima facie evidence be provided to the court that the individual has engaged in the behaviour set out in clause 151(2)(b). Further, we suggest that the period for which an individual IVOO may be granted be reduced from four weeks to a more limited period, and that IVOOs be non-renewable. (Paragraph 1.99)

30. We remain to be convinced that the imposition of a VOO or IVOO, particularly one with especially onerous terms, would always comply with Article 7 ECHR. We are disappointed that the Government has chosen not to put in place safeguards to ensure that an individual is not retrospectively punished and we recommend that the Government reconsiders its opposition to introducing safeguards in this regard. (Paragraph 1.102)

31. We are pleased to note that the Government intends to produce guidance dealing more fully with the operation of premises closure orders in practice. However, in our view, this guidance will set out requirements which, for reasons of legal certainty and to ensure the proportionality of the measures with Convention rights, should be contained in the Bill itself. In particular, we are disappointed that the Government does not propose to include, on the face of the Bill, the requirement that a premises closure order only be imposed as a last resort, and that the needs of children and vulnerable adults be taken into account. We encourage the Government to reconsider its position in order to ensure that premises closure orders are proportionate to the interference with the rights to respect for family and home life (Article 8 ECHR) and the peaceful enjoyment of property (Article 1 of Protocol 1). (Paragraph 1.110)

32. We consider that the Government has made its case for the necessity of a new power to deal with individuals who cause a nuisance or disturbance on NHS premises. The proposed new offence appears to attempt to strike a balance between the desire for staff and patients not to suffer nuisance and disturbance and the needs of those requiring medical attention to be treated. We welcome the safeguards which the Government has proposed and its commitment to ensuring that the rights of individuals to access medical treatment or advice are protected. The question is whether the proposed measures put into effect the Government's commitment. We are concerned to see that the manner in which the power to remove may be exercised is to be contained in guidance, rather than on the face of the Bill and encourage the Government to reconsider this omission. In particular, we suggest that the Bill should be amended to include express provisions on the matters currently covered by Clause 172(2)(d) to (g), as the exercise of the powers in relation to these issues has the capacity to seriously interfere with an individual's Convention rights. We recommend that the Bill set out an indicative list of the factors which would constitute a reasonable excuse for the purposes of Clause 170(1). Whilst the Government has told us that nuisance or disturbance caused by an individual

suffering a mental or physical condition will prevent the commission of an offence or removal, it is unclear whether this would include behaviour due to an addiction (e.g. to drugs or alcohol). We propose to write to the Minister to seek clarification on this matter. (Paragraph 1.122)

33. We welcome the Government's clarification that the Secretary of State's designation of a person under clause 181 of the Bill would be unlawful if, in the opinion of a court, the effect of designation would breach the UK's obligations under the Refugee Convention. (Paragraph 1.125) We are concerned that this Part of the Bill gives rise to a further risk of breaches of the Refugee Convention by the UK and we recommend that the statutory construction of Article 1F of that Convention be repealed. (Paragraph 1.126)

34. We consider that the duty on the State to ensure the safety and well-being of prisoners is a fairly compelling consideration capable in principle of justifying some restriction on the right of prison officers to take some forms of collective action to protect their interests. The question is whether the restrictions contained in the Bill are proportionate to the pursuit of that aim. (Paragraph 1.130) First, why is it necessary, in order to protect the welfare of prisoners, to prohibit all forms of industrial action by prison officers rather than just strike action? Second, has the point of last resort been reached, or is there still a possibility that a voluntary agreement with the Prison Officers Association could be reached? We will write to the Minister in relation to these points and may return to the matter in a future report. (Paragraph 1.131)

Formal Minutes

Monday 21 January 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Dubs	Mr Douglas Carswell MP
Lord Morris of Handsworth	Dr Evan Harris MP
Earl of Onslow	Virendra Sharma MP
Baroness Stern	

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Draft Report [Legislative Scrutiny: Criminal Justice and Immigration Bill], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph. Paragraphs 1.1 to 2.1 read and agreed to.

Annex read and agreed to.

Summary read and agreed to.

Several Papers were ordered to be appended to the Report.

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

Ordered, That the Chairman make the Report to the House of Commons and that Baroness Stern make the Report to the House of Lords.

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[Adjourned till Tuesday 22 January 2008 at 1.30pm.

Appendices

Appendix 1: Letter dated 29 October 2007 from the Chairman to the Rt Hon David Hanson MP, Minister of State, Ministry of Justice

The Joint Committee on Human Rights is considering the human rights compatibility of the Criminal Justice and Immigration Bill. Having carried out an initial examination of the Bill, the Committee would be grateful if you could provide answers to the following questions concerning the human rights compatibility of some of the Bill's provisions, and some missed opportunities to implement human rights obligations. The Committee may have further questions when the Government brings forward its amendments to Part 3 of the Bill concerning criminal appeals and to extend the offence of incitement to racial hatred to cover hatred against persons on the basis of their sexuality.

Youth Rehabilitation Orders

In principle the introduction of a generic community sentence for children and young offenders has the potential to enhance the legal protection for the human rights of children and young people in the criminal justice system. Indeed, we note that Article 40(4) CRC requires that a variety of dispositions shall be available "to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." In particular, seeking to ensure that the requirements imposed in a community sentence are more closely tailored to the individual circumstances of the juvenile offender, which is said to be one of the main aims of this Part of the Bill, should help to make the requirements imposed on juvenile offenders more proportionate. However, the legal framework set out in the Bill does raise a number of human rights concerns.

Adequacy of safeguards to ensure that custody of children is a last resort

The UN Convention on the Rights of the Child ("CRC") requires that the use of custody for children should be a last resort. Article 37(b) CRC provides "The … detention or imprisonment of a child shall be … used only as a measure of last resort and for the shortest appropriate period of time." The Explanatory Notes to the Bill contain a detailed analysis of the compatibility of YROs with the ECHR but do not consider compatibility with the CRC.[1]

In its most recent observations on the UK in 2002, the UN Committee on the Rights of the Child was "deeply concerned at the high and increasing numbers of children in custody, at earlier ages for lesser offences, and for longer custodial sentence imposed by the recent increased court powers to give detention and training orders. Therefore, it is the concern of the Committee that deprivation of liberty is not being used only as a measure of last resort and for the shortest appropriate period of time, in violation of Article 37(b)."

In our predecessor Committee's Report on the UK's compliance with the CRC, it urged the Government to re-examine, with renewed urgency, sentencing policy and practice (and in particular the use of detention and training orders) and alternatives to custodial sentences,

1 EN paras 729-747.

with the specific aim of reducing the number of young people entering custody and with a commitment to implementing Articles 37(b) and 40(4) of the Convention to the fullest extent possible.[2]

The Bill's introduction of a YRO with "intensive supervision and surveillance" ("YRO with ISS")[3] as an alternative to custody represents an important step towards the fulfilment of this recommendation. However, the Bill does not require that a YRO with ISS should always be tried before custody is ordered, unless the offence is exceptionally serious. We note that in the Government's response to our predecessor Committee's recommendation, it said that "intensive supervision and surveillance would be the first option for courts, and custody would be available as a second option only where the offences were so serious that only a physical restriction of liberty could be justified." As presently drafted, however, there appears to be nothing in the Bill to require that a YRO with ISS be the first resort, before custody, other than in exceptionally serious cases. Such a requirement would be an important additional safeguard to ensure that custody of children is only used as a last resort. Moreover, such a safeguard is arguably necessary to counter the risk that a single community sentence may lead to a quicker escalation to custody if the order is breached.

Q1. Why does the Bill not contain a requirement that a YRO with ISS should always be tried before custody is ordered, unless the offence is exceptionally serious, to make it more likely in practice that custody of children will only be used as a last resort?

Adequacy of safeguards to ensure proportionality of YRO

The CRC requires that custody of children should be only for "the shortest appropriate period of time"[4] and that "children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence".[5]

The Committee is concerned that certain aspects of the YRO framework in the Bill may give rise to disproportionate use of custody for children and young offenders. For example, the Bill contains a requirement that YROs should be proportionate in relation to the seriousness of the offence, but not in relation to the child's age and emotional and intellectual maturity. The provisions in the Bill concerning the consequences of breach also contain very little discretion which gives rise to the risk that breach of a YRO may quickly lead to custody even where custody could not have been an option in relation to the original offending behaviour.

Q2. Will the sentencing guidelines for judges be made available in draft during the passage of the Bill?

Q3. If not, will a draft will be made available to the Committee for its comment?

2 Joint Committee on Human Rights Tenth Report of 2002-03, The UN Convention on the Rights of the Child, at para. 41.

3 Clause 1(3)(a).

4 CRC Article 37(b).

5 CRC Article 40(4).

Q4. Are there any reasons why more judicial discretion could not be provided for in the provisions concerning the consequences of breach of a YRO?

Children's right to legal representation

The Bill expressly provides that a fostering requirement in a YRO (that is, a requirement that the child live for a specified time with one or more named local authority foster parents) cannot be imposed unless the child has had the opportunity to be legally represented.[6] There is, however, no general requirement that children be legally represented in criminal proceedings. This seems surprising given the obligation in the CRC to ensure that the best interests of the child shall be a primary consideration in all actions concerning them.[7]

Q5. Why is the right of children to legal representation confined in the Bill to the fostering requirement?

Q6. Are there any reasons why children should not enjoy a general right to legal representation in criminal proceedings?

Sentencing

The Bill provides that where a court is dealing with an offender aged under 18 in respect of an offence, it must have regard primarily to the principal aim of the youth justice system, which is to prevent offending, and must also have regard to the purposes of sentencing, which are the punishment of offenders, the reform and rehabilitation of offenders, the protection of the public and the making of reparation by offenders to persons affected by their offences.[8] The court must also have regard to the welfare of the offender, as required by s. 44 of the Children and Young Persons Act 1933, but that duty is expressly made *subject to* the new duty to have regard to the principal aim of the youth justice system.[9]

The Explanatory Notes to the Bill state that the Government "does note that Article 3 CRC provides that in all actions concerning children their best interests are to be a primary consideration."[10] They state that the duty in the Children and Young Persons Act 1933 to have regard to the welfare of the particular child or young person will continue to apply, but clause 9 clarifies that where the court is sentencing a juvenile offender it must primarily have regard to the principal aim of the youth justice system.

The Committee is concerned that the effect of clause 9 of the Bill is to subordinate the best interests of the child to the status of a secondary consideration below the primary consideration of crime prevention.

Q7. Please explain why the Government considers that clause 9 of the Bill is compatible with the obligation in Article 3 CRC to ensure that the best interests of the child shall be a primary consideration in all actions concerning children.

6 Schedule 1, para. 19(1).

7 CRC Article 3.

8 Clause 9(1), inserting new s. 142A of the Criminal Justice Act 2003.

9 Clause 9(3), inserting new subsection (1A) into s. 44 of the Children and Young Persons Act 1933.

10 EN para. 750.

Compensation for miscarriages of justice

Q8. Please explain the reasons for the Government's view that the cap on compensation for miscarriages of justice in clause 62 of the Bill is compatible with the right in Article 5(5) ECHR to have an enforceable right to compensation in respect of arrest or detention in breach of Article 5.

Extreme Pornography

The Committee is considering three compatibility issues which in its view arise from the Bill's creation of a new offence of possession of extreme pornographic images.[11] firstly, whether the definition of the new offence is sufficiently precise and foreseeable to satisfy the requirement that interferences with the right to respect for private life in Article 8 and the right to freedom of expression in Article 10 ECHR be "in accordance with the law"; second, whether the offence is necessary in a democratic society and proportionate so as to be compatible with those rights; and third, whether the offender should be subject to registration requirements.

Whether definition of new offence is sufficiently precise

The Committee is considering whether the definition of the new offence is sufficiently precise and foreseeable to meet the test of "prescribed by law". The offence requires the pornographic image in the individual's possession to be "extreme". An assessment of whether an image is or is not "extreme" is inherently subjective. This means that individuals seeking to regulate their conduct in accordance with the criminal law cannot be certain that they will not be committing a criminal offence by having certain images in their possession.

Q9. Please provide a more detailed explanation of how an individual user of pornography is able to know whether or not his or her possession of a particular image would constitute a criminal offence.

Whether the new offence is necessary in a democratic society and proportionate

The Committee is considering whether the new offence has been shown to be necessary in a democratic society and strikes a fair balance between the rights of the individual and the needs of the community. According to its consultation, the Government suggests that the new offence is necessary to (1) break the supply/demand cycle as the growth in the internet means that supply can no longer be regulated; (2) protect participants involved in the making of the images, who may be victims of criminal offences; and (3) protect children from exposure to such materials. The Committee is considering whether the two proposed offences in clauses 64(6)(a) and (b) can be justified, so long as the participants consent and there is no risk of physical harm.[12] The Government accepts that there is no proof that the use of such images causes or induces violence.

11 Clause 64

12 Laskey, Jaggard and Brown v United Kingdom (1997) 24 EHRR 39

Q10. Please provide, in light of the above, the weighty reasons required to justify prosecuting people for viewing these images privately.

Sex Offender registration

An individual convicted under Clause 64 who is 18 years or over at the time of the offence and receives a sentence of at least two years imprisonment, will be subject to the registration requirements under the Sexual Offences Act 2003.[13] Registration requirements interfere with an individual's right to respect for private life (Article 8 ECHR) and must therefore be shown to be necessary and proportionate.

Q11. Why are registration requirements considered to be justified for the offences in Clause 64(6)(a) and (b) or for any consensual activity not leading to physical harm?

Orders to promote rehabilitation

Q12. Please explain why, in the Government's view, compulsory rehabilitation orders for those convicted of "street offences" (clause 72 of the Bill) will not result in a significant increase in the number of vulnerable women being imprisoned.

Violent Offender Orders ("VOOs")

The applicable standards of due process

The Committee is considering whether proceedings for obtaining a VOO meet the fairness requirements of Article 6, and whether the more stringent criminal standards of due process should apply. The Government's position is that the criminal fair trial standards do not apply because a Violent Offender Order will be civil in nature, imposing conditions which are necessary to protect the public from the risk of serious violent harm identified and it will not have any punitive purpose.

Q13. What distinguishes VOOs from indeterminate sentences for public protection, which clearly amount to punishment and to which the criminal fair trial standards therefore apply?

Q14. Why does the Government considers it to be appropriate for civil proceedings to be used, in circumstances where an individual has been convicted of an offence?

Q15. Why does the Government not consider that criminal fairness guarantees are appropriate in light of the judgment of the House of Lords in the case of *McCann*?.

Retrospective punishment

The Committee is concerned by the fact that any individual convicted of a specified offence, whenever the offence was committed, may be subject to a VOO. It appears to the Committee that this gives rise to a risk of retrospective punishment of individuals convicted of specified offences before the coming into force of the Act contrary to Article 7 ECHR, especially where the terms of the VOO are particularly onerous.

13 Clause 67(5)

Q16. What safeguards will be put in place to ensure that an individual is not retrospectively punished for an offence committed before the coming into force of the Act?

Anti-Social Behaviour

Compatibility of Premises Closure Orders with the right to respect for family life and home

It is proposed that a new provision be inserted into the Anti-social Behaviour Act 2003 to permit closure of premises (including homes, whether tenanted or owner-occupied) associated with persistent disorder or nuisance (similar to the existing provisions for closure of premises where drugs are unlawfully used). There is no explicit requirement in the Bill for the authorising officer or the court to consider whether an order would make someone homeless (and if they could find alternative accommodation) or the vulnerabilities of children or some adults, although it is anticipated that the Government will issue guidelines. The Committee is concerned that the proposed measure may carry a real risk of violations of the right to family life and respect for the home, and the protection of property (where the premises are privately owned).

Q17. What is the Government's justification for the introduction of such measures, particularly when children and vulnerable adults will be affected?

Q18. What safeguards does the Government intend to put in place to ensure that the safety of children and vulnerable adults is not compromised?

Q19. Why are these measures considered necessary, given the range of other measures available to deal with anti-social behaviour?

Impact of new offence of causing nuisance or disturbance on NHS premises

The creation of the new offence of causing nuisance or disturbance on NHS premises has the potential to affect the ability of some vulnerable people (such as those with mental health problems) to access medical treatment, which raises issues under Articles 2 (the right to life) and 8 ECHR (which includes respect for physical and psychological integrity), as well as the right not to be discriminated against in the enjoyment of Convention rights (Article 14 in conjunction with Articles 2 and 8).

Q20. Please explain the necessity for the new offence, identifying the gap in the current scope of the criminal law.

Q21. Please explain why the Government has chosen to adopt a criminal sanction to deal with the suggested problem.

Q22. How is such a measure proportionate to the need to ensure that all members of the public have equal access to basic medical treatment?

The Committee is also concerned that the proposed measures create the possibility that an individual would avoid seeking help for medical problems, including those that are life threatening, for fear that s/he would face a criminal sanction.

Q23. What steps does the Government propose to take to ensure that it complies with its positive obligations to protect life and prevent ill-treatment?

Special Immigration Status

The Bill provides that the Secretary of State may not designate a person a "foreign criminal" if the Secretary of State "thinks that" an effect of designation would breach the UK's obligations under the Refugee Convention.[14] The Explanatory Notes to the Bill describe the effect of this provision as being that a person may not be designated where the effect of designation would breach the UK's obligations under the Refugee Convention,[15] but the Committee is concerned that this overlooks the significance of the subjective words "if the Secretary of State thinks that".

The Committee is also concerned by the Bill's reliance on the so-called statutory construction of Art. 33(2) of the Refugee Convention by s. 72 of the Nationality, Immigration and Asylum Act 2002 and the Particularly Serious Crimes Order,[16] and of Article 1F of the Refugee Convention by s. 54 of the Immigration, Asylum and Nationality Act 2006.[17] In previous reports the Committee has reported that both statutory constructions undermine the protection afforded by the Refugee Convention because they expand the scope of the exclusions from refugee protection well beyond the narrow scope given to those exclusions in the Convention itself. These concerns are shared by the UNHCR.

Q24. Please clarify whether the Secretary of State's designation of a person under clause 115 of the Bill would be unlawful if in the opinion of a court the effect of designation would breach the UK's obligations under the Refugee Convention?

Q25. In the Government's view would the courts be bound by the statutory construction of Articles 1F and 33(2) of the Refugee Convention when deciding whether the effect of designation would breach the UK's obligations under the Refugee Convention?

I am copying this letter to the Secretary of State for Children, Schools and Families because of his department's obvious interest in questions 1-7 above concerning juvenile offenders and the UN Convention on the Rights of the Child.

14 Clause 115(5)(a).

15 EN paras 649 and 873.

16 See JCHR, 22nd Report of 2004-05.

17 See JCHR, 3rd Report of 2005-06.

Appendix 2: Letter dated 25 November 2007 from Rt Hon David Hanson MP, Minister of State, Ministry of Justice

Thank you for your letter, dated 29 October, asking a number of questions about the existing provisions of the Criminal Justice and Immigration Bill. Unfortunately the letter was only received in this office on 15 November, that is after the date on which you asked for a response. I will endeavour to let you have a full reply as soon as I can. In the meantime, you will be aware that I tabled a number of amendments to the Bill on 14 November. Amongst other things these amendments seek to add a number of new provisions to the Bill. The attached note sets out our assessment of the compatibility of these new provisions with the Convention rights.

In your letter you indicated that the Committee may have further questions on Part 3 of the Bill once the Government has tabled amendments to the provisions concerning criminal appeals. As you may have seen, I tabled amendments to clause 26 on 14 November, which were agreed in Committee on 20 November.

I am copying this letter to members of the Public Bill Committee.

Memorandum to The Joint Committee On Human Rights From The Ministry Of Justice - Criminal Justice And Immigration Bill

Hatred on the grounds of sexual orientation (New clause 34 and new Schedule 2)

1. The Government has tabled amendments to this Bill which would amend Part 3A of the Public Order Act 1986, which deals with stirring up hatred on religious grounds (and was itself based on Part 3 of that Act, which deals with stirring up racial hatred). The proposed measures would put incitement to hatred on the grounds of sexual orientation on substantially the same grounds as incitement to religious hatred. Hatred on the grounds of sexual orientation would be defined as meaning "hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both)". As a result, the following activities would become criminal offences-

- using threatening words or behaviour, or displaying any written material which is threatening with the intention of stirring up hatred on grounds of sexual orientation;
- publishing or distributing written material which is threatening with the intention of stirring up hatred on grounds of sexual orientation;
- presenting or directing a public performance of a play which involves the use of threatening words or behaviour with the intention of stirring up hatred on grounds of sexual orientation;
- distributing, showing or playing a recording of visual images or sounds which are threatening with the intention of stirring up hatred on grounds of sexual orientation;
- providing a broadcasting programme service which includes a programme, or producing or directing a broadcast programme, which involves the use of

threatening visual images or sounds, or using threatening visual images or sounds on such a programme, with the intention of stirring up hatred on grounds of sexual orientation;

- being in possession of material which is threatening, or a recording of visual images or sounds which are threatening, with a view to it being displayed, published, distributed, shown, played, broadcast or included in a programme service, with the intention of stirring up hatred on grounds of sexual orientation.

2. Other measures would provide for powers for magistrates to authorise entry and search by a constable for offending material, and to order its forfeiture. The offence would be triable either way with a maximum penalty on conviction of seven years' imprisonment or a fine or both.

3. On three recent occasions Parliament and the Joint Committee have considered measures similar to the ones proposed, in each case in relation to clauses on stirring up religious hatred. When the Committee looked at Part 5 of the Anti-terrorism, Crime and Security Bill it concluded, at paragraph 56 of the Second Report of 2001-02, that "it seems likely that this extension of an existing interference with the right to freedom of expression under Article 10 of the ECHR would be held to be capable of being justifiable". The Committee then examined similar provisions in the Serious Organised Crime and Police Bill and advised, in paragraph 2.64 of the Eighth Report of 2004-05, that "Having given careful consideration to the issue in the light of developments since 2001, we have come to the same conclusion as we did then: the proposed measures appear to us to be unlikely to give rise to a violation of Convention rights". On the Racial and Religious Hatred Bill, the Committee was more guarded, concluding (at paragraph 5.2 of the First Report of 2005-06) that without amendment to make specific reference to advocacy of religious hatred that constitutes incitement to hostility, violence and discrimination, it had concerns about the potential adverse impact of broad offences on freedom of expression, including their compatibility with the principles of legal certainty and proportionality anchored in Article 10 of the Convention, and that as they stood, without amendment, the new offences could arguably have an adverse effect on free speech.

4. For the reasons set out in paragraph 10 below the Government considers that the current proposals are significantly more targeted than the provisions which the Committee examined in the three Reports cited above. Accordingly, the new offences have less of a restrictive effect on free speech and are even more clearly demonstrable as being compatible with the principles of legal certainty and proportionality.

5. The new provisions engage in particular the right to freedom of thought, conscience and religion under ECHR Article 9(1) and the right to freedom of expression under Article 10(1), but the Government considers that this interference is justified under Articles 9(2) and 10(2) respectively. The provisions would be prescribed by law, and so capable of being justified under Articles 9(2) and 10(2) if they have a legitimate

aim and are a proportionate response to a pressing social need to advance that aim. The legitimate aims would be the protection of the rights of others to be free from abuse, and the protection of public order.

6. The Government considers that a compelling case can be made that there is a pressing social need because of the evidence of hatred against homosexual people being stirred up by, amongst others, some extreme political groups and song lyrics, and of widespread violence, bullying and discrimination against homosexual people. The Government considers that legislation which prohibits the stirring up of hatred will deter such behaviour and send a message that it is unacceptable, leading to homophobic hatred becoming less widespread and in turn reducing the number of incidents of violence, bullying and discrimination.

7. Examples of written material appearing to incite hatred in the form of homophobic lyrics, leaflets and magazines has been provided to the Department. In addition, oral evidence to this effect was provided to the Public Bill Committee by the gay rights lobby organisation Stonewall on 16 October 2007. The Department believes it is widely accepted that incidences of homophobic behaviour (including violence, bullying and discrimination) are relatively commonplace. It has also received representations from Stonewall (including "The School Report", 2007, on bullying in schools) and the LGBT community safety organisation Galop.

8. The Government is persuaded that there is a link between the availability of material liable to incite homophobic hatred and levels of homophobic violence, and considers that there is a gap in the law in that incitement which is directed at stirring up hatred against the community as a whole rather than specific offences against individuals is not covered.

9. In concluding that the proposed new provisions are a proportionate response to this need, the Government notes the following.

10. The offences are modelled on the existing offences of incitement to racial and religious hatred. The latter have only very recently been brought into force, but the former are relatively long-standing provisions whose ECHR compatibility has not been successfully challenged. Moreover, in two key respects the current proposals represent a lesser interference with the Convention rights than the racial hatred offence. First, they apply only to "threatening" conduct rather than "threatening, abusive or insulting" conduct, and secondly they apply only to conduct "intended" to stir up hatred rather than conduct intended or "likely" to stir up hatred. The offences of stirring up racial hatred have been prosecuted only rarely with a total of 84 prosecutions (resulting in 60 convictions) between 1988 and 31st August 2007, and it can reasonably be anticipated that if the new, narrower, offence is enacted the equivalent figures will be even lower.

11. The proposed offences do not contain a provision analogous to section 29J of the Public Order Act 1986. This provides that the offences of stirring up religious hatred do

not prohibit or restrict discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or belief systems or the beliefs and practices of their adherents. It also provides that those offences do not apply to proselytisation or attempts to convert people to a different belief or to cease holding a belief. Such a provision is considered unnecessary: the Human Rights Act ensures that an appropriate balance is struck between the freedom of speech and the prevention of homophobic incitement, and there is no need in an offence which applies only to "threatening" conduct for a saving for ridicule or abuse.

12. As with the existing offence of incitement to racial hatred, under the tabled amendments any prosecutions in relation to homophobic hatred will require the consent of the Attorney General. In taking this decision the Attorney General as a public authority will be obliged by the Human Rights Act to consider the ECHR. Similarly, in a prosecution for homophobic incitement courts will be required to act in a way that is compatible with Convention rights and interpret legislation as far as is possible compatibly with such rights. The Government considers that the offences and, in particular, the term "hatred" can, and will, be interpreted by the courts in a way that respects Convention rights.

13. In considering the offence the Attorney and the courts would have regard to Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 17 (prohibition of abuse of rights). Article 9 includes a right to manifest one's religion. This includes the right to proselytise which the Government considers can be carried out without stirring up hatred.

14. The effect of Article 17 is to deprive people of the freedom of expression under Article 10 insofar as they use that freedom in a matter which is "incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination", as the European Court of Human Rights held in its admissibility decision in *Norwood v United Kingdom* 89 (App. No. 23131/03, decision of 16 November 2004, Eur. Ct. HR (Second Section), unreported). The Government notes the Joint Committee's previous conclusion that "Where words, signs, etc., are used with the intention of stirring up religious hatred, we cannot imagine circumstances in which such behaviour would fall outside Article 17" (paragraph 2.61, Eighth Report of 2004-05) and considers that this view has equal force in respect of the proposed new offence, which, as previously noted, will apply only in cases of intentional incitement.

Persistent sales of tobacco to persons under 18 (New clause 41)

15. This new clause introduces provisions under which Magistrates' courts may prohibit the use of property for the purposes of selling tobacco or cigarette papers. The Government is of the view that Article 1 of the First Protocol to the ECHR is engaged.

16. Under the new clause the power of restriction arises where a court is satisfied that, at particular premises, a person has on three occasions sold tobacco or cigarette

papers to under-aged persons or has committed a tobacco related vending machine offence. Since 1 October 2007 persons have been under-aged if they have been aged less than 18 years.

17. The Government considers that the restrictions which may be imposed on the use of property under the new clause are reasonable, proportionate and fully justified. The principal justification is a public health benefit from a reduction in the amount of tobacco sold to under-aged persons. Public health will benefit from fewer young people becoming addicted to tobacco, something which can result in early death from cancer and other smoking related illnesses.

18. In addition, the Government considers that the provision included in the new clause will make any restrictions imposed under it both reasonable and proportionate. First, restrictions on the purposes for which premises may be used are temporary (the maximum period of a prohibition is fixed by the new clause at one year); there is no provision for property to be confiscated. Second, the restriction can only be imposed on premises which have been used persistently for criminal purposes (selling tobacco or cigarette papers to under-aged persons or tobacco related vending machine offences). Third, provision is included to enable aggrieved persons to make representation to the court before and after a prohibition is imposed, and for appeals to the Crown Court. Finally, provision for the registration of restrictions as local land charges has been included to protect prospective purchasers or lessees of premises which are subject to a prohibition and those who are considering using the premises as security for a mortgage or other loan.

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The duty on MAPPA authorities to consider disclosure (New clause 38)

19. The new clause *(Disclosure of information about convictions etc of child sex offenders to members of the public)*, inserting new sections 327A and 327B into the Criminal Justice Act 2003, will place a duty on MAPPA authorities to consider disclosure of specified child sex offences to members of the public when they are managing a child sex offender. There is a presumption that the MAPPA authorities will disclose such information where the offender poses a risk of causing physical or psychological harm to a child from the commission of further child sex offences and the disclosure is necessary to protect that child. The information that must be considered includes information on service convictions, spent convictions and convictions for corresponding offences committed abroad, where the MAPPA authorities have this information in their possession. The authorities may still disclose other information, such as convictions for other offences or other intelligence, where these are linked to current risk, under their existing powers of disclosure.

20. The MAPPA authorities must record the reasons for their decision to disclose information or not, as well as details of any information disclosed.

21. Disclosure of an offender's previous convictions to members of the public is likely to engage an offender's right to a private and family life under Article 8.

22. However, the new sections do not affect the MAPPA authorities' power to disclose such convictions. The requirement is simply that they consider disclosing the convictions in relevant cases. To have the power to disclose an offender's previous convictions, the disclosure must necessarily satisfy the requirements of Article 8 of the Human Rights Act 1998. So, in the case of R v (1) Chief Constable for the North Wales Police Area Authority (2) Secretary of State for the Home Office (3) National Association for the Care and Resettlement of Offenders ex parte AB & CD sub nom R v Chief Constable of North Wales Police ex part Thorpe[18], the Court of Appeal held that the police had the power to disclose the background of two child sex offenders to a caravan site owner where the offenders were staying on the basis that the police had a duty to prevent crime. The test to be applied was whether it was reasonable to conclude that there was a pressing need for disclosure to protect the public from crime. Even though this test was satisfied, disclosure was still subject to compliance with the Human Rights Act 1998 and Data Protection Act 1998.

23. Similarly, where the presumption to disclose applies under new section 327A(3), the authorities must still balance the need for disclosure against the potential harm to the offender of having his convictions disclosed to members of the public. However, the starting point will be that where a child is at risk of harm from an offender committing further sexual offences, disclosure should normally occur, if it is necessary to protect the child from that harm.

24 By putting the duty to consider disclosure on a statutory footing and requiring the recording of the reasons for decisions taken to disclose or not, it is hoped that there will be greater consistency in the decision making process across MAPPA areas, and indeed, it is likely to encourage more explicit recording of human rights considerations.

SFO's pre-investigation powers in relation to bribery and corruption: foreign officers etc. (New clause 32)

25. This new clause gives effect to a proposal in the Home Office consultation '*Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials*', published in December 2005, to extend investigatory powers (under section 2 of the Criminal Justice Act 1987) of the Serious Fraud Office (SFO) to the vetting stage in any cases involving allegations of bribery or corruption of overseas officials.

26. The powers under section 2 of the Criminal Justice Act 1987 fall within 3 categories:

18 (1998) 3 All ER 310

- Section 2(2) allows the SFO to serve a notice requiring information to be given or a person to come for interview;
- Section 2(3) allows the SFO to serve a notice requiring the production of specified documents; and
- Section 2(4) allows the SFO to seek a search warrant where, for example, the service of a notice which thereby put a suspect on alert that SFO was involved, might seriously prejudice the investigation.

Under the current law these powers can only be used once the SFO has commenced an investigation. They cannot be used to gather information in order to assess whether an investigation is justified. Where there are identifiable victims to a fraud who can give information as to what has occurred, an assessment may not be unduly hindered by the lack of compulsory powers. However in cases involving allegations of bribery or corruption of overseas officials there are no such identifiable victims as the "loss" will generally have been to the economy of the bribed official's country.

27. The purpose for which the new powers would be applied is not to gather evidence but to allow the SFO to make a proper assessment of whether an investigation should be undertaken in respect of an allegation of overseas corruption. The extended powers will resemble those enacted in Chapter 1 of Part 2 of the Serious Organised Crime and Police Act 2005 in relation to certain serious and organised crime offences.

28. Section 2 itself provides some safeguards:

- Section 2 (13) allows for a defence to a charge of non-compliance with a notice based on reasonable excuse;
- Section 2 cannot bite in circumstances where a person would be entitled to refuse to disclose information or to produce a document on the grounds of legal professional privilege; and
- A person bound by banking confidentiality will not be required to disclose information or produce a document unless either the person to whom the obligation of confidence is owed consents or the Director of the Serious Fraud Office has authorised the making of the requirement.

29. The Government considers that the use of the extended powers would not engage Article 6 at the stage when information was gathered, as the SFO would not be seeking legal evidence in respect of a criminal charge. In the event that a prosecution occurred at a later stage, information obtained by use of section 2 powers may be admissible. Article 6 considerations may arise at that time and the use of compulsory powers may be relevant in the overall assessment of whether a fair trial has occurred. However the powers themselves do not breach Article 6, subject to the limitation in respect of *the right of anyone charged with a criminal offence to remain silent and not to contribute to incriminating himself.* Consequently information obtained from a compulsory interview cannot be used against that individual in the event that he is charged with an offence.

30. The Government also considers that the use of the extended powers may engage Article 8 and Article 1 of the First Protocol. SFO would seek to ensure, by its training, guidance and authorising processes, that the powers were used in accordance with the law and only where necessary and in a proportionate way in pursuit of legitimate aims. In the case of Article 8 those aims are the prevention of crime and the protection of the rights and freedoms of others (where overseas corruption is concerned, such rights and freedoms would include those of the citizens of developing countries whose economies are undermined by such corruption), and in the context of Article 1 Protocol 1 the aim is upholding the public interest with respect to possessions that are not being peacefully enjoyed.

Appendix 3: Letter dated 6 December 2007 from Rt Hon David Hanson MP, Minister of State, Ministry of Justice

Further to my letter of 25 November, I am pleased to enclose a memorandum responding to the questions posed in your letter of 29 October.

I look forward to seeing the Committee's report on the Bill.

Memorandum by the Ministry of Justice in response to the letter from the Chairman of 15 November 2007

Q1. Why does the Bill not contain a requirement that a YRO with ISS should always be tried before custody is ordered, unless the offence is exceptionally serious, to make it more likely in practice that custody of children will only be used as a last resort?

1. The Government strongly believes that custody for young people should only be used as a last resort. That is why we are seeking to strengthen the community sentencing framework through the YRO. We do not believe that we should restrict courts' use of the Detention and Training Order (DTO) to only those cases in which YRO with ISS has already been given. The Bill provides adequate safeguards to ensure that ISS is used as a direct alternative to custody and that therefore a custodial sentence will only be passed where it is necessary to protect the public or prevent persistent offending.

2. There will be cases where immediate custody is warranted because the offence or series of offences is so serious. Before making a custodial sentence the courts must also take into account the restrictions on custody contained in the Criminal Justice Act 2003. This is by virtue of section 152(2) of the Criminal Justice Act 2003 which states that:

> 'The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence'

3. This means that appropriate safeguards are already in place to ensure that Courts only use custody where it is a necessary and proportionate response to the offence or offending of the young person.

Q2. Will the sentencing guidelines for judge be made available in draft during the passage of the Bill?

Q3. If not, will a draft be made available to the Committee for its comment?

4. We will be producing guidance for practitioners to ensure that the YRO is used appropriately. We will also ask the Sentencing Guidelines Council (SGC) to produce a guideline to assist courts in how to use the sentence. These guidelines cannot be produced until the Bill has received Royal Assent. The SGC will consult widely in order to inform the final guidelines and the Committee will be able to comment on the draft guidelines when they are issued.

Q4. Are there any reasons why more judicial discretion could not be provided for in the provisions concerning the consequences of breach?

5. While the Government appreciates that sentencers wish to have freedom to decide on the appropriate action to take on breach of an YRO, it is necessary for the Government to set clear standards in order to maintain confidence in community sentences. It is essential that community sentences are subject to rigorous enforcement action when breaches occur and it is right and appropriate that we should set baselines in the Bill for dealing effectively with breaches.

6. The Government notes the Committee's point about the risk that breach of a YRO could quickly lead to custody. We do not believe that this will be the case. In the vast majority of cases breach will lead to the statutory warning procedure we have built into the Bill. Court action will only result where the breach is sufficiently serious or there are repeated breaches in a 12 month period. If the matter does get to court in most cases we expect it to lead to a further community sanction. However, there will be some occasions where custody is needed to reinforce the seriousness of the penalty and the courts must have the power to order this where it is appropriate.

7. The circumstances where custody becomes an option for breach of a YRO are circumscribed. Under the Bill, where a young offender wilfully and persistently breaches their YRO the court is able to impose a YRO with ISS. If the young offender is already on a YRO with ISS, imposed as an alternative to custody where the offence was imprisonable, then the courts have the power to order custody for wilful or persistent breach.

8. Where the original offence was not imprisonable, custody is only available in the following circumstances. There must have been a wilful and persistent breach of the first YRO. The court can then impose a YRO with ISS for that persistent and wilful breach. Custody is not available at this point if the original offence was not imprisonable.

9. The young offender then has to again wilfully and persistently breach the YRO with ISS – imposed in the first place because of his wilful and persistent breach of the

first order. Only then does custody become available to the court which may make a Detention and Training Order for up to 4 months.

10. It is essential for the integrity of the YRO that we ensure that the courts have these robust enforcement options to deal with what is specifically described as wilful and persistent breach. This is not just turning up 5 minutes late. This would only apply in the worst cases where the young offender is clearly and repeatedly not responding or engaging with their community sentence. The Youth Offending Team will have made every effort to get the young offender to respond prior to taking the case back to court.

Q5. Why is the right of children to legal representation confined in the Bill to the fostering requirement?

Q6. Are there any reasons why children should not enjoy a general right to legal representation in criminal proceedings.

11. We believe it is right that where the court is considering removing a young person from his or her family environment into fostering or any other accommodation (as part of the fostering requirement or the Local Authority Residence Requirement) the young person should have been legally represented in court in order that both they and their family can understand the consequences of the sentence.

12. More generally, under the Access to Justice Act 1999, legal representation is available to anyone facing criminal proceedings before any Court where it is in the Interests of Justice that public funding be granted. The Interests of Justice test is set out in Schedule 5 to the Access to Justice Act 1999. The Court must consider the following factors:

- Whether the individual would, if any matter arising in the proceedings is decided against him, be likely to lose his liberty or livelihood or suffer serious damage to his reputation;
- Whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law;
- Whether the individual may be unable to understand the proceedings or to state his own case;
- Whether the proceedings may involve the tracing, interviewing or expert cross examination of witnesses on behalf of the individual, and
- Whether it is in the interests of another person that the individual be represented.

13. Accompanying guidance, which can be found on the Legal Services Commission's website, states that the Court should give consideration to whether the defendant is of a young age and to the defendant's ability to understand the proceedings or to state his or her own case.

14. Since 2 October 2006, defendants appearing before the magistrates' court and youth court have been required to pass an additional financial eligibility test to qualify for publicly funded representation. Defendants under the age of 16 and those under the age of 18 and in full time education have been exempt. From 1 November 2007, all defendants under the age of 18 will be passported through the means test.

15. There are therefore a number of safeguards in place to ensure that a youth will be granted publicly funded representation where necessary. We would not want to extend the scope because:

- It would sideline the "Interests of Justice test" under the Access to Justice Act 1999. This is widely accepted to be a fair and transparent test and it is ECHR compliant; and
- It could impact significantly on legal aid funding.

Q7. Please explain why the Governement considers that clause 9 of the Bill is compatible with the obligation in Article 3 CRC to ensure that the best interests of the child shall be a primary consideration in all actions concerning children.

16. Clause 9 provides that when dealing with an offender aged under 18 in respect of an offence the court must have regard primarily to the principal aim of the youth justice system as set out in the Crime and Disorder Act 1998, namely, the 'prevention of offending by children and young people'. When sentencing a young offender it is right that the courts should have regard primarily to the principal aim of the youth justice system. The provisions as drafted in the Bill will clarify the current law in order to remove any confusion and will bring sentencing into line with the rest of the youth justice system.

17. Courts will also, as at present, be required to have regard to the welfare of the young person and these issues will be considered as a supporting factor. We believe it is right that welfare should not be the primary purpose of sentencing and Article 3 of the CRC does not require that it should be. It requires that the best interests of the child shall be a primary consideration. It is. That is why the welfare of the child is specifically mentioned in clause 9 as something the courts must have regard to when sentencing. A justice system exists to tackle crime. Then it must also consider the needs and interests of victims and the wider community which is why punishment must remain a purpose of sentencing. We have ensured that courts will be required to have regard to the welfare of the young person and these issues will be considered as a supporting factor. Ultimately, we believe that making the prevention of offending the statutory purpose of sentencing is not incompatible with the UN Committee on the Rights of the Child as we are satisfied that work to prevent offending will operate in the best interests of the young person.

Q8. Please explain the reasons for the Government's view that the cap on compensation for miscarriages of justice in clause 62 of the Bill is compatible with the right in Article 5(5) ECHR to have an enforceable right to compensation in respect of arrest or detention in breach of Article 5.

18. Clause 62 (now clause 92) amends section 133 of the Criminal Justice Act 1988. Section 133 provides a scheme for compensating those who have had their convictions reversed on the ground that "a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice".

19. A person eligible to claim under section 133 will not necessarily have suffered an infringement of his or her Article 5 rights. The reversal of a conviction on the ground that an appellate court found it to have been based on a error of fact does not cause the detention consequent on that conviction to be retroactively unlawful for the purposes of Article 5 – see, for example, *Benham v UK* (1996) 22 EHRR 293 at paragraph 42.

20. Conversely, a person whose Article 5 rights have been infringed will not necessarily be eligible for compensation under section 133. Article 5 is of much wider effect than section 133. If a person's Article 5 rights have been infringed and either he is ineligible under section 133 or that section provides inadequate compensation, he may obtain a remedy by bringing a civil action for damages under the Human Rights Act against the relevant wrongdoer.

21. As clause 62 does not in any way limit the right to bring such a civil action, it is the Government's view that the clause raises no issue under Article 5.

22. Article 3 of Protocol 7, and Article 14 of the International Covenant on Civil and Political Rights which is expressed in similar terms, provide for compensation for victims of miscarriages of justice. Although Article 3 of Protocol 7 has not been ratified by the UK (and is not a "convention right" for the purposes of the 1998 Act) the Government has considered whether clause 62 is compliant with these provisions.

23. Neither Article 3 of Protocol 7 nor Article 14 prescribes the level of compensation. Both provisions envisage the compensation payable to victims of miscarriages of justice being subject to the law or practice of the State. In light of this, it must be open to the State to adopt a scheme which regulates how much compensation is payable.

24. The cap in clause 62 has been set at a high level (£500,000). The Strasbourg caselaw on Article 3 of Protocol 7 suggests that relatively low levels of compensation may be acceptable – see, for example, *Shilayev* v *Russia* (App No 9647/02). The Government accepts that there may be some cases where the effect of the cap is that the compensation an individual receives does not wholly reflect the extent of the individual's loss. Nonetheless, capping compensation at the level proposed cannot be said to impair the essence of Article 3 of Protocol 7 or Article 14.

25. It is therefore the Government's view that clause 62 complies with Article 3 of Protocol 7 and Article 14.

Q9. Please provide a more detailed explanation of how an individual user of pornography is able to know whether or not his or her possession of a particular image would constitute a criminal offence.

26. The offence covers material which meets three thresholds: it must be pornographic, it must contain an extreme image and it must be real or appear to be real to the viewer, in other words it must be convincing.

27. An image is "pornographic" if it appears to have been produced solely or principally for the purpose of sexual arousal. We believe that the individual pornography user will have no difficulty in recognising pornography.

28. An "extreme image" is an image of:

- "(a) an act which threatens or appears to threaten a person's life." We consider that these acts, given the pornographic context, will be easily recognisable since extreme pornographic scenarios frequently contain scenes of throttling, asphyxiation, hanging or threats with a knife or other weapon.

- "(b) an act which results in or appears to result (or be likely to result) in serious injury to a person's anus, breasts or genitals." The focus of this paragraph is on the act which does or may cause serious injury. No medical knowledge is required to understand what a 'serious' injury is likely to be. 'Serious' will have its normal meaning. In the pornographic context, the infliction of injury to these parts of the body will be recognisable. The insertion of a sharp object into the vagina or anus, is an example of an act which would be caught.

- "(c) an act which involves or appears to involve sexual interference with a human corpse". We consider that this material would be easily recognisable.

- "(d) a person performing or appearing to perform an act of intercourse or oral sex with an animal." We believe that this will also be easily recognisable.

29. The Government is aware of concerns which have been articulated during the oral evidence sessions on the Bill that the clause as drafted may not be sufficiently precise in limiting the scope of the offence to material which is extreme and explicit. We are considering how the drafting may be clarified.

Q10. Please provide, in the light of the above, the weighty reasons required to justify prosecuting people for viewing these images privately.

30. The focus of this offence is on the images themselves and the effect they may have on those who view them, not on any underlying criminal offence which may or may not have been committed. In the context of pornography, a convincing, consensual depiction of an activity can have the same impact on the viewer as an image of that activity actually taking place. Moreover, for the viewer, the question of consent is largely irrelevant, since they can have no reliable means of verification, unless they happen to know (or themselves to be one of) the participants. Once an image has been created, it is

capable of being passed beyond those who actively consented (lawfully or not) to the activities shown, and of being circulated to a much wider audience via new technologies. For those reasons, the Government considers that a focus on the lawful consent of those who participated in the creation of the image is misguided.

31. There is evidence that we have reason to be concerned about this material. The Ministry of Justice and Department of Health jointly published a research study on 28 September 2007 entitled "The evidence of harm to adults relating to exposure to extreme pornographic material: a rapid evidence assessment (REA)". This research found that some people who accessed extreme pornography suffered some harmful effects. These included increased risk of developing pro-rape attitudes, beliefs and behaviours, and committing sexual offences. The research also showed that men who are predisposed to aggression, or have a history of sexual and other aggression were more susceptible to the influence of extreme pornographic material. The REA found no formal research studies of the effects on those who participate in making extreme pornography but referred to evidence which supported the argument that participants in extreme pornographic material may be harmed in its making.

32. In addition to the evidence referred to above of the harmful effects of extreme pornography there is also an argument that such material normalises and legitimises a culture of sexual violence. Proportionate interference is permitted under both Articles 8 and 10 not just for the purposes of preventing crime, protecting health and protecting the rights of others, but also for the protection of morals. Extreme pornographic material arguably has a negative impact on morals, and very little to justify it in other respects. As Baroness Hale of Richmond pointed out in the recent case of *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 which concerned licences for sex shops, "My Lords, there are far more important human rights in this world than the right to sell pornographic literature and images in the backstreets of Belfast City Centre. Pornography comes well below celebrity gossip in the hierarchy of speech which deserves the protection of the law. Far too often it entails the sexual exploitation and degradation of women for the titillation of men."

33. The Government believes that it is justified in acting to control the circulation of this material for the reasons set out above.

Q11. Why are registration requirements considered to be justified for the offences in clause 64(6)(a) and (b) or for any consensual activity not leading to physical harm.

34. The answer to Q10 is also relevant. The focus of this offence is on the images themselves and the effect they may have on those who view them. For the reasons given above, our concerns about the impact of the material on the viewer remain the same, if the activities shown were convincing consensual depictions of sexual violence.

35. No one will be subject to registration requirements unless sentenced to two years imprisonment or more. On a maximum three year sentence, this is a high threshold

which is intended to target those about whom the courts have particular concerns either because of the nature and extent of their collection of extreme pornography, their frequency of offending or for some other reason.

36. There is some evidence of harm to some people who access extreme pornography (see above) and those who are already predisposed to aggression are most at risk. In this circumstance, and in respect of only the most serious offenders, we believe that notification requirements are justified.

Q12. Please explain why, in the Government's view, compulsory rehabilitation orders for those convicted of "street offences" (clause 72 of the Bill) will not result in a significant increase in the number of vulnerable women being imprisoned.

37. All that the new order requires is that the offender attends three meetings. It involves no element of imprisonment.

38. If the order is breached, the Court can only deal with the offender in the same way that it could have dealt with him/her on conviction for the offence (see paragraph 4(2) of Schedule 14 (now Schedule 21)). Breach will not, therefore, be punished with a sentence of imprisonment.

39. Concerns have been expressed about the possibility of detention for 72 hours under paragraph 9(2) of Schedule 14. Such detention is not a penalty for loitering or soliciting, or a penalty for breaching the order; it is part of a mechanism for ensuring that offenders can be brought back before the right court to deal with a reported breach. If the supervisor reports to the court that, in his or her opinion, the offender has breached the order, the court may issue a warrant for the arrest of the offender. On arrest, the offender should be brought immediately before the appropriate court. If, and only if, this is not possible, the police will have the power to detain the offender for no more than 72 hours and must, within that time, bring the offender before the appropriate court or, if that is not reasonably practicable, an alternative court. The maximum period of detention has been set at 72 hours in order to give the police an opportunity to bring the offender before the appropriate court, even if the arrest occurs over, say, a bank holiday weekend. A similar mechanism (and the same 72-hour period) is already used on breach of other types of orders – see, for example, paragraph 4 of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000.

Q13. What distinguishes VOOS from indeterminate sentences for public protection, which clearly amount to punishment and to which the criminal fair trial standards therefore apply?

40. Violent Offender Orders differ from indeterminate sentences for public protection in that they are civil preventative orders, issued after an individual's sentence has expired rather than at the point of sentencing. Violent Offender Orders are intended to protect the public from the most dangerous violent offenders who still present a risk

of serious violent harm after their licence has expired and who are not subject to any other measure (e.g. community sentences) to manage that risk. They are not punitive and do not constitute a criminal sanction.

41. There are certain scenarios in which Violent Offender Orders will be the only means of protecting the public from the most dangerous violent offenders – indeterminate sentences will not be applicable. These are as follows:

- Violent Offender Orders will be used to protect the public from individuals presenting a risk of serious violent harm that were convicted of a qualifying offence prior to April 2005 when public protection sentences were introduced;
- Violent Offender Orders will be used to protect the public from individuals whose risk level was not considered high enough to warrant a public protection sentence at the point of conviction but is now deemed to present a risk of serious violent harm; and
- Violent Offender Orders will be used to protect the public from individuals whose sentences for the qualifying offence have already expired but their behaviour has come to the attention of the police (or other MAPPA agencies) as posing a risk of serious violent harm.

Q14. Why does the Government consider it to be appropriate for civil proceedings to be used, in circumstances where an individual has been convicted of an offence?

42. A Violent Offender Order is a civil preventative order designed to protect the public from serious violent harm, and not a punishment for an offence committed. The requirement that an individual must have committed a qualifying offence in order to be eligible for a Violent Offender Order is necessary to ensure that they only apply to the most dangerous and violent offenders. However, a Violent Offender Order is not an additional punishment for a past offence. It relates to the risk of future violent harm.

43. Violent Offender Orders will impose certain restrictions on individuals who still pose a risk of serious violent harm after their licence has expired and who are not subject to any other measures (e.g. public protection sentences, community sentences, other civil orders) to manage that risk. A Violent Offender Order will always be made on the basis of an up to date assessment of risk and only when the court considers it necessary to protect the public from serious violent harm. The Government considers it entirely appropriate to protect the public from such individuals who pose a risk of serious violent harm.

Q15. Why does the government not consider the criminal fairness guarantees are appropriate in the light of the judgement of the House of Lords in the case of *McCann*?

44. Following the decision in *McCann*, the criminal standard of proof is applied in an application for an Anti-Social Behaviour Order under section 1 of the Crime and

Disorder Act 1998. The House of Lords did not see any conflict with this ruling and their decision that an application for an Anti-Social Behaviour Order does not involve the determination of a criminal charge for the purposes of Article 6 ECHR. Therefore, the criminal fairness guarantees set out in Article 6 do not apply to an application for an Anti-Social Behaviour Order. The Government does not think that it is appropriate for the criminal fairness guarantees to apply to a civil order such as a Violent Offender Order.

Q16. What safeguards will be put in place to ensure that an individual is not retrospectively punished for an offence committee before the coming into force of the Act?

45. Violent Offender Orders are not imposed as an additional punishment for an offence. They are a preventative measure aimed to protect the public from the most dangerous violent offenders who still present a risk of serious violent harm after their licence has expired and who are not subject to any other measures (e.g. public protection sentences, community sentences, other civil orders) to manage that risk. A Violent Offender Order will always be made on the basis of an up to date assessment of risk and only when the court considers an Order necessary to protect the public from serious violent harm. Further, the terms of the Order must be directly linked to the risk of future harm.

46. Breach of an order will be a criminal offence punishable by up to five years' imprisonment. An individual could breach an order by failing to meet one or more of its conditions without reasonable excuse or by failing to comply with the notification requirements without reasonable excuse, for example. Breach would be a new criminal offence and therefore not constitute retrospective punishment. We therefore do not need to introduce any additional safeguards to ensure that an individual is not retrospectively punished for an offence committed before the coming into force of the Act.

Q17. What is the government's justification for the introduction of such measures, particularly when children and vulnerable adults will be affected?

47. Families and vulnerable adults may be affected by the closure of certain premises where significant and persistent anti-social behaviour occurs, but such orders are only to be used as a matter of last resort after other interventions have been tried or considered. This is why the police and local authority must consult all interested parties before a notice is issued.

48. It is this disorder and the desire to protect the rights and freedoms of the community at large which may justify the use of these measures. The premises would have to have been associated with anti-social behaviour and either significant and persistent disorder or persistent serious nuisance. Before issuing a closure notice the police and local authorities, both public authorities bound to act in compliance with

ECHR, would consider the needs of any vulnerable people and children as well as the wider public. The court would also weigh up such interests in its capacity as a public authority under the HRA but also in satisfying itself of the statutory test that the making of an order is necessary to prevent such disorder or nuisance.

49. The focus of these orders is intended to be the troublesome premises rather than the individuals involved (in the context of crack house closures see *Chief Constable of Merseyside Police v Harrison*). Each order's duration is also strictly limited and they are thought to be more proportionate than, for example, private and social landlords pursuing possession orders against tenants. In fact, it is hoped that the closure orders might serve as the catalyst to ensure greater protection for those caught up in and around anti-social behaviour in all premises.

Q18. What safeguards does the government intend to put in place to ensure that the safety of children and vulnerable adults is not compromised?

50. Local authorities of course remain under a duty to ensure that advice and information about homelessness and prevention of homelessness are available free of charge to everyone in their district, irrespective of their tenure.

51. Where applicants eligible for assistance fall within a priority need group (for example, if they have dependent children or are vulnerable in some way), but are intentionally homeless, the authority must ensure they are provided with advice and assistance to help them obtain accommodation for themselves and must ensure they have accommodation available for long enough to give them a reasonable opportunity of obtaining accommodation.

52. It is anticipated that the closure will actually help those vulnerable people who have become victims of "cuckooing", for example (where the property may have been taken over by a more dominant individual who is perpetrating the anti-social behaviour). The order will mean that the "safe haven" can be taken out of action while any vulnerable people caught up in such a property, and any children, will be offered help and support. This will in turn help them to regain control of the property on their return. This has already been the experience with crack house closures.

53. We will provide robust guidelines for the consideration and operation of the process. The police, local authority and other agencies will be expected to show that consideration has been given to whether a closure is the most appropriate course of action, particularly in cases where children and vulnerable young people are involved. It's important to recognise that the closure will in many cases protect those children and vulnerable adults caught up in anti-social households and provide the catalyst for perpetrators to finally accept the help and support on offer to them. The welfare of children and vulnerable adults in these premises is already compromised by the significant and persistent levels of disorder and nuisance.

54. Agencies are already under duties to safeguard and protect the welfare of children (Children's Act 2004) and this will be backed up robustly in operational guidance, as with the existing crack house closures.

55. We are satisfied that any interference with private life will be proportionate to the significant and persistent anti-social behaviour giving rise to the order and justified in the prevention of disorder or the protection of rights and freedoms of others.

56. The court would only be able to issue an order following the notice if it is satisfied that:

- a person has engaged in anti-social behaviour on the premises;
- the use of the premises is associated with significant and persistent disorder or persistent serious nuisance to members of the public; and
- the making of the order is necessary to prevent the occurrence of such disorder or nuisance for the period specified in the order.

57. Any impact on enjoyment of property is limited by the temporary nature of the order. In addition, the police, local authorities and the courts will be required to act compatibly with convention rights in making orders and will take into account the likelihood of homelessness and interference with property rights. Article 1 of the first protocol to the ECHR articulates *everyone's* entitlement to the *peaceful* enjoyment of his possessions. These powers, as a matter of last resort, will target premises that are not being used peacefully and to that end may safeguard neighbours' peaceful enjoyment of their own premises.

Q19. Why are these measures considered necessary, given the range of other measures available to deal with anti- social behaviour?

58. This legislation has been brought forward following strong support from a range of partner agencies across England and Wales. 86% of those who responded to consultation agreed that it would be a useful new tool to tackle anti-social behaviour. This included responses from the Police Federation of England and Wales, the Local Government Association, ACPO Youth Issues Group and the National Housing Federation, as well as individual police forces and local authorities. These measures will be available to local authorities, as well as the police, in recognition of their neighbourhood management and community safety responsibilities. This follows the precedent already set in the application for and use of ASBOs and injunctions.

59. This tool is based on the existing crack house closure power and the wider application of the closure power which is already operating successfully in Scotland. This will be a last resort tool and pursued after other interventions have been used or considered and rejected for good reason.

60. However, where other interventions have failed to make an impact and the premises continues to be used as a centre for continued and significant anti-social behaviour, practitioners believe that this new power will provide the means through which to close it and ensure some respite for the suffering neighbours and wider community.

61. The cost for agencies responding to reports of anti-social behaviour is estimated at around £3.4 billion a year but this does not take in to account the emotional and social impact of anti-social behaviour.

62. 96% of those suffering from noisy neighbours report a range of emotional reactions including annoyance, frustration, anger and worry but some report more serious emotional reactions and a third (32%) point to more serious emotional impacts such as: shock, fear, stress, depression, anxiety or panic attacks and crying. Over a quarter even considered moving away from the area.

Q20. Please explain the necessity for the new offence, identifying the gap in the current scope of the criminal law.

63. There is existing legislation that deals with incidents of anti-social behaviour but it is inadequate to deal with many of the low level nuisance and disturbance behaviour that occurs on hospitals premises. For example the police or another relevant authority may apply for an Anti-Social Behaviour Order (ASBO) under section 1 of the Crime and Disorder Act 1998 in circumstances where a person has acted in "a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not in the same household as himself" and where such an Order is necessary to protect persons from further anti-social acts by him. Whilst disruptive behaviour on hospital premises may form a sufficient basis for the making of an ASBO by a court, this legislation is not sufficient to deal with an incident as it occurs. It is only once there is a relevant ASBO in place that a person who is on NHS premises and is behaving in such a manner as to breach the ASBO can commit an offence.

64. There are a number of offences relating to drunkenness and public order already on the statute book, the most relevant of which for the purposes of tackling low level nuisance and disturbance behaviour on hospital premises would seem to be the offence under section 5 of the Public Order Act 1986. Under that section, it is an offence to use threatening, abusive or insulting words or behaviour, or disorderly behaviour, within the hearing or sight of a person likely to be caused harassment, alarm or distress by that behaviour. However, this offence and other such offences require a police response to arrest and thus remove a person who has committed the offence.

65. Consultation responses stated that police are often unable to respond when needed or will not respond unless the incident becomes violent. When a low level nuisance or disturbance then occurs, which might fall within the definition of an existing public order offence, unless and until the police arrive, hospitals and their staff

are unable to take any action against the offender in relation to the offence committed. The offender can remain on site creating an atmosphere which makes the occurrence of a more serious incident more likely, putting patients and staff at risk. This gives the misleading impression that the NHS tolerates such bad behaviour.

66. A case from a health body illustrates this:

> "A Local Security Management Specialist within a health body told how he and his security staff often felt like 'toothless tigers' when waiting for the police to attend and remove nuisance individuals: The police are under constant pressure to deal with serious incidents. When we request assistance in the removal of individuals for this type of behaviour, more often than not the police give this a low priority and we can end up babysitting these individuals for hours before we are able to remove them with police assistance".

67. NHS bodies can resort to the use of the civil law to obtain injunctions against individuals compelling them to do or refrain from doing acts where otherwise the NHS body would suffer or continue to suffer wrongful injury for which an award of damages would not adequately compensate the NHS body. However, this can often be time-consuming, slow and costly and is more appropriate to deal with persistent offenders rather than to deal with an incident as it occurs.

68. There is no existing offence dealing with nuisance or disturbance behaviour, with an attendant power of removal exercisable on the commission of the offence conferred on persons other than police officers. There is a need for both the offence, and a power of removal by an authorised NHS staff member where a person has committed or is committing the offence. It will meet the dual objectives of ensuring that persons who cause a nuisance or disturbance on NHS premises to NHS staff and refuse to leave when asked to do so by NHS staff members can be prosecuted for that specific offence (and other would-be offenders can be deterred from committing the specific offence) and NHS staff can be empowered to take immediate action against offenders by exercising the power of removal.

69. The 2006 public consultation 'Tackling nuisance or disturbance behaviour on NHS healthcare premises' was designed to obtain a broad picture of the nature, scale and extent of this type of behaviour in NHS organisations. More than three quarters (78%) of respondents to the consultation agreed that a new offence was needed to improve the situation of nuisance behaviour in hospitals and give NHS staff the power to take action immediately and prosecute offenders for this specific offence. This in turn will send a clear deterrent message to those that have no regard for NHS services and staff.

Q21. Please explain why the Government has chosen to adopt a criminal sanction to deal with the suggested problem.

70. The 2006 public consultation 'Tackling nuisance or disturbance behaviour on NHS healthcare premises' was designed to obtain a broad picture of the nature, scale and extent of this type of behaviour in NHS organisations. The majority of NHS bodies who responded to the consultation felt that existing law was inadequate to deal with the problem of low level nuisance behaviour on hospital premises. Based on their own experiences, they felt powerless to deal with such behaviour as it happened and felt the police were often unable to respond to incidents unless they escalated to violence.

71. A criminal sanction is considered necessary to deal with the problem of nuisance and disturbance behaviour on NHS premises in order that offenders who prevent NHS staff from delivering healthcare can be prosecuted and deterred from engaging in such behaviour in the future. This, in turn, will deter other would-be offenders from engaging in such behaviour. The creation of the new offence in combination with the attendant power of removal conferred on authorised NHS staff will enable incidents of nuisance or disturbance behaviour to be dealt with more quickly and thus have a positive impact on the delivery of healthcare. It will help to create an environment which is safe for staff to work in and for patients to be treated in, help to prevent such behaviour escalating to violence against NHS staff and relieve pressure on police resources.

72. This low level behaviour may not be seen to be as immediately damaging as more serious incidents of violence, but the impact in terms of sickness, low staff morale and recruitment and retention is significant. Dealing with these incidents diverts NHS staff away from providing care and there is also the potential for these incidents to escalate into more serious situations such as assaults on staff. As a result it is considered that the adoption of a criminal sanction to deal with such behaviour is a proportionate response to a specific and serious problem (subject to the safeguards detailed in the responses to the following two questions).

Q22. How is such a measure proportionate to the need to ensure that all members of the public have equal access to basic medical treatment?

73. Important safeguards are built in to clauses 104-106 (now clauses 146-148) to ensure that all members of the public have equal access to medical treatment.

74. A person will not commit the offence (and thus the power of removal will not be available) if he or she is on NHS premises for the purpose of obtaining medical advice, care or treatment or is otherwise there in accordance with medical advice.

75. Even if a person had not entered onto hospital premises with the purpose of seeking medical advice or obtaining treatment and had committed the offence, an authorised officer will not be able to authorise his or her removal if he or she has reason to believe that the person may need medical treatment, care or advice or removal would endanger his or her physical or mental health. In addition, the guidance which NHS bodies and the authorised officer will be under a duty to have regard to will provide that

the authorised officer himself or herself should be a medical practitioner and will provide guidance on the matters to be taken into account when deciding whether there is reason to believe that a person may need medical treatment or advice or that removal may endanger a person's physical or mental health. It will also consider situations when further input from other medical practitioners may be needed, to ensure that this safeguard is robust. Other safeguards relating to the training of authorised officers and procedures to be in place with regard to the exercise of the power of removal will also be outlined in the guidance.

76. It should also be noted that a person will only commit the offence if he or she causes the nuisance or disturbance to an NHS staff member on hospital premises without reasonable excuse and refuses to leave when asked to do so by a police constable or NHS staff member without reasonable excuse. If a person causes a nuisance or disturbance due to a mental health condition or another condition which affects behaviour, then this would constitute a reasonable excuse for the behaviour and the person would not commit the offence even if they were not on the premises for the purpose of obtaining medical advice, treatment or care. Examples of what may constitute a reasonable excuse for behaviour or a refusal to leave when asked to do so will be set out in the guidance under clause 106 (now clause 148) after consultation with mental health groups and other similar stakeholders.

77. The offence is aimed at dealing with nuisance or disturbance behaviour on NHS premises caused by persons who accompany patients to hospital or who are otherwise on NHS premises for non-medical reasons. It will not apply to those seeking medical treatment or care or to those who need medical treatment or care. It is therefore a proportionate and targeted response to a specific problem.

Q23. What steps does the Government propose to take to ensure that it complies with its positive obligations to protect life and prevent ill-treatment?

78. Our overriding concern is the provision of high quality healthcare. If a patient is in need of medical care, treatment or advice, it is vital they receive that care. These measures are aimed at low-level nuisance and disturbance behaviour displayed by those not seeking, or in need of, medical treatment or care. It would not be appropriate to deny a person treatment because they have engaged in nuisance or disturbance behaviour on NHS premises and, as outlined in the answer to question 22, the offence will not apply to persons on NHS premises for the purpose of obtaining medical treatment, advice or care, and the power of removal will not be exercisable where the authorised officer reasonably suspects that the person requires medical treatment, advice or care or removal would endanger the person's physical or mental health. The fact that the provisions will not apply to people seeking treatment and the powers of removal will not be exercisable in relation to persons in need of treatment are important safeguards, particularly for vulnerable groups such as those with mental health or learning disabilities.

79. In addition, as outlined previously, if a person has mental health problems, or a learning disability, or another condition which has caused the nuisance or disturbance behaviour in question, they will not have committed an offence. It is explicitly stated in the legislation that a person will only commit the offence if they do not have a reasonable excuse for their behaviour. This means that if a person's behaviour is attributed to a physical or mental health condition then they will not be able to commit the offence.

80. Guidance to be issued under clause 106 (now clause 148) will emphasise the need to be objective in assessing whether a person may be committing or have committed an offence and whether the power of removal can be exercised. It will detail attributes and unusual behaviour that could be characteristic of mental health conditions, learning difficulties and autistic spectrum disorders in order to safeguard potential patients. Guidance will also recommend that the authorised officer, who is responsible for assessing whether a person has committed the offence and authorising subsequent removal (including whether the person requires medical advice, treatment or care and whether removal would endanger the person's physical or mental health) will be a clinician themselves and therefore be best placed to make the initial assessment of a person's behaviour and seek further medical advice if necessary. The Guidance will be developed in full consultation with organisations representing those with physical and mental health conditions.

81. Removal by reasonable force will be a last resort should the person committing the offence refuse to leave the premises after non-physical methods have been exhausted. Guidance will recommend that should force need to be used, it will be at the minimum level appropriate to the situation, not excessive and carried out by NHS staff members who have received proper training in methods of how to remove a person by force without causing physical harm. This training will minimise any risk involved in removal by force both to the person being removed and the NHS staff carrying out the removal.

Q24. Please clarify whether the Secretary of State's designation of a person under clause 115 of the Bill would be unlawful if in the opinion of a court the effect of designation would breach the UK's obligations under the Refugee Convention?

82. Yes. Designation under Part 11 (now Part 12) would have to have regard to any ruling by a court that the person in question was a refugee under the terms of the Convention

Q25. In the Government's view would the courts be bound by the statutory construction of articles 1F and 33(2) of the Refugee Convention when deciding whether the effect of designation would breach the UK's obligations under the Refugee Convention?

83. Section 54 of the Immigration Nationality and Asylum Act 2006 makes it clear that in the construction and application of Article 1F(c) of the Refugee Convention, the reference to acts "contrary to the purposes and principles of the United Nations" shall

be taken as including acts of committing, preparing or instigating terrorism, and acts of encouraging or inducing others to commit, prepare or instigate terrorism. This construction would apply equally in any court proceedings.

84. The statutory construction of Article 33(2) is not relevant to this point. Article 33 of the Convention prohibits the *refoulement* of a refugee to the frontiers of a country where his life or freedom would be threatened, subject to certain exceptions which are set out in Article 33(2). Article 33(2) is therefore only be relevant if we are seeking to remove someone from the UK, and, as clause 115(2)(b) makes clear, the designation power is intended to apply only to people who cannot be removed.

Appendix 4: Letter dated 19 December 2007 from Rt Hon David Hanson MP, Minister of State, Ministry of Justice to Edward Garnier QC MP

I am writing to let you and other opposition spokesmen have details of Government amendments to the Bill for Report Stage on 9 January. Many of the amendments respond to points raised in Committee and which Maria Eagle, Vernon Coaker or I undertook to consider further. I attach a copy of those amendments I have tabled today.

The amendments address the following matters (references to clause numbers are to those in the Bill as amended in Committee).

Youth Rehabilitation Orders: Intoxicating substance misuse requirement (amendments to clauses 1 and 7 and to Schedule 1)
The Bill already provides that one of the requirements that a court may attach to a Youth Rehabilitation Order (YRO) is a drug treatment requirement. In Committee, amendments were tabled seeking to add either a substance treatment requirement or an alcohol treatment requirement. In response I agreed to consider amending the YRO provision to include such a requirement (Official Report, Public Bill Committee, 23 October 2007, col. 208). These amendments insert a new intoxicating substance treatment requirement into Part 1. I have concluded that it would be sensible to retain the existing drug treatment, and associated drug testing, requirements; accordingly the new requirement will cover other intoxicating substances, including alcohol.

Purpose of sentencing (amendments to clause 9)
Clause 9 provides that when sentencing young offenders the court must have regard to the principal aim of the Youth Justice System, namely 'to prevent offending by children and other persons aged under 18'. In Committee, I undertook to reflect on one aspect of new clause 13 (tabled by David Heath) which sought to clarify that the reference to the prevention of offending includes the prevention of re-offending (Official Report, Public Bill Committee, 25 October 2007, col. 320). I agree that this would be a helpful clarification and these amendments amend clause 9 accordingly.

Indeterminate sentences: determination of tariffs (amendment to clause 12)
Clause 12 confers greater discretion on the judiciary in setting the tariff when they are imposing an indeterminate sentence in exceptionally serious cases. In Committee, I expressed some sympathy for amendment 137 (tabled by David Heath) which sought to

limit the change to offenders over 18. I agree that tariff regimes should bear less heavily on young offenders on the grounds that they are more subject to change and development than adult offenders. The Criminal Justice Act 2003 already makes such a distinction in relation to murder tariffs. The amendment to clause 12 will disapply the discretion conferred by the clause when a person under 18 is being sentenced.

Early removal of prisoners from the United Kingdom (amendments to clauses 19 and 20 and to Schedule 34)
These clauses amend the criteria for eligibility for the early removal scheme, under which offenders liable to be deported may be removed from custody early. In Committee (Official Report, Public Bill Committee, 20 November 2007, col. 362-363) I advised that in amending the Criminal Justice Act 2003, clause 20 inadvertently removes the requirement that offenders must serve at least a quarter of their sentence before they can be removed under the scheme and that I would bring forward an amendment to rectify this. In addition to addressing this point, the amendments make minor technical changes to both clauses 19 and 20.

Referral Orders (New clauses *(Referral orders: power to revoke a referral order)* and *(Referral orders: extension of period for which young offender contract has effect)* and amendments to Schedule 32)
This clause extends the circumstances when a Referral Order (the main disposal for young offenders before the courts for the first time) may be imposed. In Committee, David Burrowes argued for courts to be given some latitude to extend the duration of a Referral Order by up to 3 months where circumstances require. I indicated that I saw some merit in the proposal and undertook to consider it in detail (Official Report, Public Bill Committee, 20 November 2007, col. 386). New Clause (*Referral orders: extension of period for which young offender contract has effect)* would confer such latitude on the court and thereby avoid the need in some cases to revoke a Referral Order which had not been completed in the required time and re-sentence the offender. As I indicated in Committee, to ensure that Referral Orders are completed within a reasonable time frame we do not propose to confer on courts the power to extend the current overall 12 month maximum duration for such orders.

As a complement to this power, we also propose to allow a court to revoke a Referral Order in the interests of justice, for example where the offender has responded exceptionally well. This is a power which will apply to the Youth Rehabilitation Order and there is an existing power to revoke a Reparation Order. New Clause (*Referral orders: power to revoke a referral order*) amends the Powers of Criminal Courts (Sentencing) Act 2000 to this end.

Her Majesty's Commissioner for Offender Management and Prisons and The Northern Ireland Commissioner for Prison Complaints (amendments to clauses 36, 37, 39, 40, 42, 49, 51, 54, 55, 59, 60, 61, 65, 67, 72, 77 and 79, and Schedule 9 and new clause *(Amendments consequential on Part 5)*
These amendments make minor drafting, technical and consequential amendments to Parts 4 and 5. In addition, with the agreement of the Scottish Executive, the amendments clarify the Commissioner's remit to investigate deaths in immigration custody in Scotland while safeguarding the roles of the Lord Advocate and procurator fiscal in relation to criminal investigations and the investigation of deaths.

In Committee (Official Report, Public Bill Committee, 22 November 2007, col. 463-465) there was some discussion of clause 47 which makes provision for the Commissioner to co-operate with other specified ombudsman. David Heath suggested that the Independent Police Complaints Commission should be referred to on the face of the clause. We agree that it would be sensible to do so and aim to table further amendments for Report to address this point. We will, at the same time, aim to make some technical changes to the clause to ensure that the joint working can operate as intended and also add the Commissioner for Older People in Wales to the list of specified ombudsman.

SFO's pre-investigation powers in relation to bribery and corruption (amendment to clause 90)

This provision, which was added to the Bill in Committee, is currently confined to England and Wales and Northern Ireland, whereas the Serious Fraud Office's existing investigatory powers under section 2 of the Criminal Justice Act 1987 extend throughout the UK. With the agreement of the Scottish Executive, we propose to amend the clause so that the extended powers of the SFO apply throughout the UK.

Content of an accused's defence statement (amendment to clause 91)
Clause 91, which was added to the Bill in Committee, extends the requirements as to the content of the statement which the accused must submit before a case comes to trial in the Crown Court, and may submit voluntarily in magistrates' courts cases. Under the clause, defence statements must set out not only the information required at present – including the defences on which the accused intends to rely and matters of fact on which he takes issue with the prosecution – but also particulars of the matters of fact that he intends to rely on in his defence. This consequential amendment provides that, as with the existing defence statement duties, where the accused fails to comply with the new requirement the court or any other party can both comment and draw adverse inferences in deciding whether the accused is guilty.

Street offences: orders to promote rehabilitation (amendments to clause 105 and Schedule 32)
The Bill removes the outdated term 'common prostitute' and introduces a new order, as an alternative to a fine, for those convicted of soliciting or loitering. The purpose of the new order is to help an offender to address the causes of his or her offending behaviour. The amendment to clause 105 clarifies the terminology used to describe the new order.

The amendment to Schedule 32, which in turn amends the Bail Act 1976, provides that the usual rules on bail for non-imprisonable offences (which essentially say that the defendant has a right to bail unless certain criteria are met) will apply when a magistrate is dealing with an offender who has breached the new order.

Offences relating to nuclear material and nuclear facilities (amendment to Schedule 23)
Schedule 23 currently includes a power to extend certain provisions of the Customs and Excise Management Act 1979 (CEMA) to any of the Channel Islands, the Isle of Man or any British overseas territory. The Isle of Man Government has indicated that it would prefer to amend its own equivalent of CEMA and not to have the 1979 Act extended to the Isle of Man; the amendment to Schedule 23 makes the appropriate change.

Imprisonment for unlawfully obtaining etc. personal data (amendment to clause 109)
This technical amendment removes the transitional provision in new section 60(3B)(b) of the Data Protection Act 1998. This is no longer required as the section 45(1) of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 is now in force.

Mutual recognition of financial penalties (amendments to clauses 110, 112, 119, 121 and 174 and to Schedule 25)
These amendments make minor drafting and technical amendments to these provisions.

Violent Offender Orders and Sex Offender Prevention Orders – notification requirements (amendments to clauses 135, 140, 167, 170 and 174 and to Schedule 33)
Under the Bill it is an offence for a person subject to a Violent Offender Order to fail to comply, without reasonable excuse, with any prohibition, restriction or condition attached to the Order or with the notification requirements. At present, the offence is confined to England and Wales. Following discussions with the Scottish Executive and the NIO it is now proposed to extend this so that failure to comply with the terms of an Order while in Scotland or Northern Ireland would also be an offence. This touches on a point David Heath raised in Committee on 27 November (Official Report, col 616).

In Committee we amended the Bill to introduce a power to add to the notification requirements in respect of Sex Offenders and those subject to Violent Offender Orders by secondary legislation. We propose to make two changes to these provisions. First, we wish to provide for a requirement on homeless persons subject to notification requirements to report more regularly to a police station. In the case of Sex Offenders, the need for this amendment has arisen from the Review of the Protection of Children from Sex Offenders and we consider it would be sensible to impose the same requirement on violent offenders.

Second, as currently drafted, the new order-making powers are subject to the negative resolution procedure. On reflection, we have concluded that affirmative procedure would be more appropriate given the order-making powers could be used to impose quite onerous additional requirements on sex and violent offenders.

Police misconduct and performance procedures (amendments to Schedule 28)
Schedule 28 provides, amongst other things, for the Home Secretary to issue guidance concerning disciplinary proceedings to police authorities, chief constables and members of police forces. This amendment would extend this provision so that guidance may also be given to police staff.

Disclosure of information about convictions of child sex offenders to members of the public (amendments to clause 165)
This clause places a duty on MAPPA authorities to consider the disclosure of a child sex offender's convictions to members of the public and introduces a presumption in favour of disclosure if a sex offender poses a risk of causing harm to any child or children generally. In Committee, David Heath tabled an amendment to the Government's new clause which, amongst other things, sought to alter the disclosure test so that it referred to '**serious** harm'. Vernon Coaker undertook to consider this point (Official Report, 29 November 2007, col 696). It is indeed the case that the Home Office Review of the Protection of Children from Sex Offenders referred to the risk of 'serious' harm to a child or children generally, accordingly we are content to make this change.

Extent/Commencement (amendments to clauses 174 and 175)
These amendments make minor technical amendments to these clauses.

New Provisions

Self-defence (New clause (*Reasonable force for purposes of self-defence etc.)* and amendments to clause 174 and to Schedule 33)
As Jack Straw announced at Second Reading, we are also tabling amendments on self-defence. New clause (*Reasonable force for purposes of self-defence etc.)* is the key amendment in this group. The new clause is intended to improve understanding of how the current law should work in practice. It uses key elements of existing common law to build a clearer picture of how and when the defence is to be employed, whilst retaining the integrity of the current test. It aims to give the public confidence that the law is on their side if they act reasonably using force in self defence, including the fact that:

- they acted instinctively;
- they feared for their safety or that of others, and acted based on their perception of the threat faced and the scale of that threat; and,
- the level of force used was not excessive, gratuitous or disproportionate in the circumstances as they viewed them.

The new clause retains a single test for self defence which can be applied to the full range of circumstances.

We have arrived at the new clause through an iterative process and very close engagement with interested parties, including senior practitioners. Discussions with you and other Opposition colleagues to date have been helpful in refining the approach.

Repatriation of Prisoners
These amendments to the Repatriation of Prisoners Act 1984 will enable the UK to ratify the Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons. In particular, the amendments provide:

- for the issue of a warrant to authorise execution abroad of a sentence imposed in the UK where an individual has fled to that other jurisdiction;

- for the issue of a warrant to authorise execution in the United Kingdom of a sentence imposed in a jurisdiction from which an individual has fled;

- a power to arrest and detain in the United Kingdom, subject to appropriate safeguards, a person who is suspected of having fled the execution of a sentence imposed abroad;

- for time spent in detention under the power of arrest is deducted from the length of the sentence to be served in the UK following formal transfer; and,

- for a warrant to authorise a prisoner to be taken outside the United Kingdom by the UK authorities, rather than requiring handover to the enforcing authorities within the UK.

With the agreement of the Scottish Executive, the amendments also extend to Scotland section 44 of the Police and Justice Act 2006 which amended the Repatriation of Prisoners Act to provide for the transfer of prisoners under international agreements without their consent.

Other matters
Following the concerns raised in Committee about the ambit of the new offence of possession of extreme pornographic images (clause 94), we are continuing to examine how best to clarify the offence so that it is clear that it is limited to extreme and explicit pornographic images. If it does not prove possible to table amendments in time for Report stage in the Commons we will seek to return to this provision in the Lords.

Finally, you will be aware that Jack Straw announced in his oral statement on 5 December that we will be bringing forward amendments to the Bill to make the changes to the sentencing framework proposed in Lord Carter's Review of Prisons. The proposed changes are summarised in Annex E to Lord Carter's report. I aim to table these amendments in due course.

I am copying this letter and enclosures to former members of the Public Bill Committee, Andrew Dismore (Chairman of the Joint Committee on Human Rights), Lord Kingsland and Lord Thomas of Gresford. I am also placing a copy in the Library and on the Ministry of Justice website.

Copies also go to Roger Gale, Patrick Mercer, Anne McIntosh and Shailesh Vara as previous sponsors of Private Members' Bills on self-defence.

Appendix 5: Letter dated 10 December 2007 from Ann Abraham, Parliamentary Ombudsman

I have written to the Lord Chancellor and Secretary of State for Justice today setting out my concerns about Government proposals to amend the existing statutory public sector Ombudsman arrangements through the Criminal Justice and Immigration Bill, by making provision for the establishment of Her Majesty's Commissioner for Offender Management and Prisons.

I am concerned that:

- The proposed new Commissioner would not be truly independent of those subject to investigation by the Ombudsman;
- The proposals would remove from the investigative reach of an existing independent Ombudsman large areas of state provision for some of the most vulnerable people in our society;
- The proposals would create further complexity in a system which is already overly complex and difficult for complainants to access.

As such, the proposals diminish rather than enhance the protection currently available for people in prison custody by way of access to an independent Ombudsman; and therefore

make the Government vulnerable to potential criticism both within in the UK and beyond that, at best, it does not understand the concept of Ombudsmen; or, at worst, that it is intent on removing protection from some of the most vulnerable people in our society.

In view of these concerns I am circulating my letter and the accompanying paper widely to help inform those likely to be engaged in the debate.

Appendix 6: Letter dated 2 January 2008 from Brian Coulter, Prisoner Ombudsman for Northern Ireland

I am writing to you in my capacity as Prisoner Ombudsman for Northern Ireland to express my concerns about aspects of the Ministry of Justice sponsored Criminal Justice & Immigration Bill. The part of this Bill which causes me concern is that which proposes to put the Office which I have held since May 2005 on a statutory footing. The proposed designation in the Bill is Northern Ireland Commissioner for Prison Complaints. The Bill also proposes doing this for the Prisons and Probation Ombudsman for England & Wales who would become Her Majesty's Commissioner for Offender Management and Prisons.

Firstly may I say that I agree strongly that it is proper that the Office of Prisoner Ombudsman should be placed upon a statutory footing. The essence of the reasons for this is that only by doing this can the Office be regarded as truly independent of the service to be scrutinised. I welcome this intent of the Bill therefore as an advance on the present status of the Office. The present arrangement where my substantive working link is almost exclusively to the Northern Ireland Prison Service is not sustainable.

My welcome for the statutory footing proposed in the Bill however is more than offset by my concerns that the independence of the Office of the Commissioner is to be seriously constrained. The Bill proposes to make the Office dependent upon the Secretary of State for resources and proposes that the Office Holder will be accountable to the Secretary of State. I have voiced my concerns on this to the Northern Ireland Office but am told that they are following provisions in the Bill for the Prisons and Probation Ombudsman for England & Wales. Having discussed this matter with the latter I can say that he shares my concerns regarding the diminished independence for our Offices which this legislation will entrench. Neither of us will be able to satisfy

Neither the British and Irish Ombudsman's criteria for an Ombudsman, or the standards for independence required for National Monitoring Bodies under the Optional Protocol on the Convention Against Torture (OPCAT). Furthermore the requirement of full independence for those appointed to monitor public services is clearly envisaged in virtually all international and domestic human rights law and structures and will not be delivered by the Bills proposals. The Lord Chief Justice for Northern Ireland has recently underscored the crucial nature of such transparent independence in Application for Judicial Review by C, A, W, M and McE, Neutral Citation No [2007] NIQB101 related to alleged surveillance of legal consultations in the case of those in custody. The courts judgement declared that the person providing the key safeguard in such situations must be located **outside** the statutory body applying the said surveillance. I think I can safely say that the required standard of independence for the Office of Northern Ireland Commissioner for Prison Complaints can only be satisfied by making the Office Holder

accountable to Parliament and ultimately to the Northern Ireland Assembly following devolution of Criminal Justice.

The provisions in the Bill unless amended as I suggest will perpetuate and indeed make worse a very messy scrutiny landscape. For example the proposed Commissioner will continue to be subordinate to the Parliamentary Ombudsman until devolution of Criminal Justice to Northern Ireland and thereafter to the Assembly Ombudsman. Furthermore my existing ability to deal with prisoner healthcare complaints will disappear. The effect of this will be to have two 'ombudsmen' dealing with aspects of prisoner healthcare complaints. I will no longer be able to provide a simple, holistic complaints service. If full statutory footing had been provided for in the Bill there would be no need to exclude prisoner healthcare complaints from my remit since I would be able to deal with them on the same basis as and instead of the Health Service Ombudsman or upon devolution of criminal justice the Assembly Ombudsman/NI Commissioner for Complaints.

The Parliamentary Ombudsman has articulated similar concerns to my own regarding aspects of the Criminal Justice & Immigration Bill proposals and I am enclosing her comments together with related correspondence.

I am certain that the intention of Government in the Bill is to be seen to strengthen scrutiny of prisons. The provisions in the Bill which I have identified will have the opposite effect. This raises the question, why have specialist ombudsmen for prisons? The emergence of this specialism in England & Wales, in Northern Ireland and notably in Canada typically followed periods of particular difficulty in managing prisons. Furthermore the relevant international and domestic human rights legislation and associated jurisprudence clearly require enhanced scrutiny of custodial settings. It is beyond argument that custodial settings are high risk institutions and can only benefit from the specialist scrutiny which an Ombudsman for Prisons can bring.

I apologise for writing at such length but hope you will agree that this is an important issue. I am advised that the next parliamentary stage for this Bill is scheduled for 13th January 2008 and I hope you will feel able to influence its ultimate form in favour of a more appropriate model for scrutiny of custodial settings in Northern Ireland and England & Wales.

Appendix 7: Letter dated 3 December 2007, from Dr Tuppy Owens, The Outsiders Trust

I am writing to comment on the proposals in the Criminal Justice and Immigration Bill to criminalise the Possession of extreme pornographic images.

Once again, the government is attempting to restrict the sexual freedom of consenting adults through unnecessary and badly drafted laws.

I write as the director of a charity, The Outsider's Trust, the purpose of which is to help physically disabled people to enjoy sex just like anybody else. I therefore speak as someone with a considerable amount of experience on the subject of how physical disability can restrict individual's sex lives.

Section 64 on the possession of extreme pornographic images would criminalise the downloading and possession of some images of BDSM sex (Bondage, Domination, Sadism & Masochism. Disabled people have a hard enough time enjoying more conventional sexual lives, but fetishistic sex can be even more out of reach, both because of the rejection and prejudice they face in society generally, and because of often limited access to appropriate venues. Because of this, disabled people often need to rely on the internet and films for their satisfaction and mental and physical well-being. These proposals will therefore have a disproportionate impact on many people with a physical disability, by adding yet another barrier.

I was therefore also extremely disappointed that the needs of people with a disability have been overlooked in the context of these proposals – there is no mention of the disproportionate impact it will have on them, either in the Explanatory Memoranda or the Rapid Evidence Assessment.

I would also suggest that we have quite enough laws and efforts need to be made to reduce the number (especially as many laws about sexual behaviour are contradictory) and to simplify the laws, so that ordinary people know where they stand. Because the boundaries of what will and will not be illegal under this proposal will need to be tested in the courts, this Bill, if it became law, could criminalise enthusiasts without them even knowing they were breaking any law, which is unfair. These people are harming no-one and risk losing their careers and having their lives ruined - possibly being sent to prisons which are already overcrowded.

The Home Office admits that there is no reliable evidence that the possession or availability of violent pornography causes any harm.. It says the proposal is being made because 'We believe the material which is under consideration would be abhorrent to most people and has no place in our society'. This could have been said about images of mixed-race couples in the southern states of the USA under racial segregation. It is a principle of bigoted intolerance.

I therefore ask the Committee to ensure that Section 64 criminalising the possession of "extreme pornography" be deleted from this Bill.

I would be willing to present evidence to the Committee, if asked.

Appendix 8: Letter dated 19 March 2007 from the Chairman to Rt Hon Dr John Reid MP, Secretary of State for the Home Department

HMCIP and Prisons and Probation Ombudsman budget

My Committee understands that there has been a recent change in the arrangements for setting budgets of Her Majesty's Chief Inspectorate of Prisons and the Prisons and Probation Ombudsman, with decisions having been delegated to the MOMS Board. This means that both the Director General of Prisons and the Director of Probation, who sit on the NOMS Board, have a direct say in setting the budgets of the bodies that inspect them.

I would be grateful if you could confirm that our information is correct, and let us know how this arrangement can be consistent with the need for MMCIP and PPO to exercise their functions effectively and independently.

Appendix 9: Letter dated 11 April 2007 from Gerry Sutcliffe MP, Parliamentary Under Secretary of State, Ministry of Justice

Thank you for your letter of 19 March to the Home Secretary about the delegation of budgets to HM Chief Inspector of Prisons (HMIP) and the Prisons and Probation Ombudsman (PPO).

The budgets for HMIP and the PPO are delegated by the NOMS Chief Executive and before that were delegated by the Head of Correctional Services, which preceded NOMS, so there is no real change in the process. The Chief Executive takes advice from the NOMS Board, in particular on budget allocation issues, from the Director of Corporate Services, but the budget is delegated by the Chief Executive. There has been no attempt by the Director General of the Prison Service, or Director of Probation to influence the budgets of HMIP or the PPO.

HMIP and the PPO have to be linked to a Unit in the Home Office for the purpose of administering Home Office resources and providing policy advice and this link is currently within NOMS where there is a greater understanding of their work. The Chief Executive and the unit which deals with their budgets etc have working relationships with these bodies but do not use the budget to seek to influence their work.

Appendix 10: Letter dated 14 May 2007 from the Chairman to Gerry Sutcliffe MP, Parliamentary Under Secretary of State, Ministry of Justice

HMCIP and Prisons and Probation Ombudsman

Thank you for your letter dated 11 April 2007. In your letter, you explained that although the budgetary decisions for HMCIP and the Prisons and Probation Ombudsman ("PPO") are delegated to the Chief Executive of NOMS, the Chief Executive does not use the budget to seek to influence their work. You explained that the Chief Executive "takes advice from the NOMS Board" and that there has been "no attempt by the Director General of the Prison Service, or the Director of Probation to influence the budgets of HMIP or the PPO".

My Committee considered your letter at a recent meeting and remains unpersuaded that the funding arrangements for HMCIP and PPO are satisfactory and in accordance with the UK's international obligations. We are concerned that the current budgetary arrangements for both of these institutions have the potential to endanger their independence and could lead to a breach of the United Kingdom's obligations under the Optional Protocol to the United Nations Convention against Torture ("UNCAT").

The UNCAT Optional Protocol requires the United Kingdom to establish certain national preventative mechanisms, including an independent body with the power to examine the treatment of persons in detention. The independence of these bodies must be guaranteed,

taking due consideration of the Paris Principles on the status of national institutions for the promotion and protection of human rights.[19] These principles require that funding must enable those bodies to be independent of Government and, in particular, "not subject to financial control which might affect their independence".

To be considered independent, public bodies must be seen to be independent. We are concerned that the potential involvement of the management of the prisons and probation services in the setting of the budget for the bodies appointed to inspect and monitor their actions may, at the very least, undermine the appearance that those bodies are capable of functioning independently.

I would be grateful if you could provide a more detailed assessment of how the funding arrangements for the HMCIP and PPO do not undermine their independence from Government and, in particular, are compatible with the UNCAT Optional Protocol.

Appendix 11: Letter dated 6 June 2007, from Gerry Sutcliffe MP, Parliamentary Under Secretary of State, Ministry of Justice

HMCIP and Prisons and Probation Ombudsman

Thank you for your letter dated 14 May. In your letter you express concern on behalf of the Committee that the budgetary arrangements for HM Chief Inspector of Prisons (HMCIP) and the Prisons and Probation Ombudsman (PPO) have the potential to endanger their independence and could lead to a breach of the United Kingdom's obligations under the Optional Protocol to the United Nations Convention Against Torture ("the Protocol").

We were the third country in the world to ratify the Protocol. Since ratification in December 2003, we have been active in encouraging other States to sign and ratify the Protocol. We see implementation of the Protocol, including the establishment of the UK National Preventive Mechanism (NPM), and worldwide promotion of the Protocol as an important part of our Anti-torture initiative for the worldwide eradication of torture, which we launched in October 1998.

Preparatory to the establishment of the UK NPM, officials in the Ministry of Justice have been holding discussions with representatives of the various inspection bodies operating in the UK and with representatives of civil society who have an interest in the Protocol. Positive progress has been made, and we hope to announce the composition of the NPM to Parliament by the end of June.

Article 18 of the Protocol requires that "States Parties shall guarantee the functional independence of the national preventative mechanism as well as the independence of their personnel" and "States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights." Section B2 of the Paris Principles provides that "The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular, adequate funding. The purpose of this funding should be to enable it to have its own staff and

19 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 18.

premises, in order to be independent of the Government and not be subject to financial control which might affect its independence".

We consider that the current budgetary arrangements for HMCIP and the PPO do not conflict with the above. The government, Parliament and public servants including HMCIP and the PPO have a responsibility for the proper use of tax-payers money. This is achieved through the use of proper financial control in accordance with Parliamentary and Treasury procedure and these arrangements do not restrain the fundamental independence of HMCIP or the PPO.

I must be very clear that there has been no attempt by the Chief Executive of NOMS, Director General of HM Prison Service, or Director of Probation to use financial procedures to limit in any way the independence of HMCIP or the PPO.

The Director General of HM Prison Service and the Director of Probation are not responsible for setting the budgets of either of these bodies. The Chief Executive does take advice from the NOMS Board, which includes the Director General of HM Prison Service and Director of Probation, but it is the Chief Executive who allocates funds to HMCIP and the PPO, and this is properly done on behalf of the Secretary of State. It is also worth repeating that there has been no real change to the budget setting process for these bodies with the introduction of NOMS, and there has long been an entirely appropriate need to consider the budgets of these bodies in the context of wider prison and probation spending.

It is also the case that adequate funding has, and will, continue to be made available to HMCIP and the PPO in order for them to perform their functions. The independence of HMCIP and the PPO in carrying out their duties is further protected by their freedom to determine the use to which funding is put, which is a key requirement of section B2 of the Paris Principles as described above. Furthermore, HMCIP and the PPO are able to publicise their findings through their annual and other published reports.

The independence of HMCIP is also safeguarded by having a remit that is defined in statue under Section 5A of the Prison Act 1952. The PPO is currently an administrative appointment but, as you will be aware, our intention is to legislate to put this office on a statutory footing at the next appropriate opportunity. We are aiming to find a suitable Bill in this session or next.

Both HMCIP and the PPO enjoy a well founded reputation for providing robust and wholly effective scrutiny and I do not agree that there has been any undermining of the functional independence of these bodies or the appearance thereof.

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty–First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269

Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court	HL Paper 128/HC 728

	Judgments Finding Breaches of Human Rights	
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter–Terrorism Policy and Human Rights: 28 days, intercept and post–charge questioning	HL Paper 157/HC 394
Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993
Twenty-first Report	Human Trafficking: Update	HL Paper 179/HC 1056

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/ HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098

Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716