



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: Policing and Crime Bill

Tenth Report of Session 2008-09

*Report, together with formal minutes and
Written Evidence*

*Ordered by The House of Lords to be printed 31 March 2009
Ordered by The House of Commons to be printed 31 March
2009*

**HL Paper 68
HC 395**

Published on 16 April 2009
by authority of the House of Lords and
the House of Commons London:
The Stationery Office Limited
£15.50

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

HOUSE OF LORDS

Lord Bowness
Lord Dubs
Lord Lester of Herne Hill
Lord Morris of Handsworth OJ
The Earl of Onslow
Baroness Prashar

HOUSE OF COMMONS

John Austin MP (Labour, *Erith & Thamesmead*)
Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
Mr Virendra Sharma MP (Labour, *Ealing, Southall*)
Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)
Mr Edward Timpson MP (Conservative, *Crewe & Nantwich*)

Powers

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), Rebecca Neal (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Assistant Legal Advisers), James Clarke (Senior Committee Assistant), Emily Gregory and John Porter (Committee Assistants), Joanna Griffin (Lords Committee Assistant) and Keith Pryke (Office Support Assistant).

Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is jchr@parliament.uk

Contents

Report	<i>Page</i>
Summary	3
Government Bills	5
1 Policing and Crime Bill	5
Background	5
Explanatory Notes	5
The effect of the Bill	6
Significant human rights issues	6
Inspection regime and human rights	7
Appointment of senior officers	8
Sexual offences and sex establishments	8
<i>Strict liability offence</i>	10
<i>Rehabilitation orders</i>	15
<i>Premises closure orders</i>	18
<i>Extensions to preventative orders under the Sexual Offences Act</i>	21
<i>Children involved in prostitution</i>	23
Alcohol misuse	26
<i>Directions to individuals to leave a locality</i>	26
Gangs injunctions	28
Proceeds of crime	29
Extradition	32
<i>Undertakings to return an individual to a state from which he has been extradited</i>	32
<i>Extension of period before which an individual under provisional arrest must be brought before a judge</i>	34
<i>Use of live links in extradition hearings</i>	36
Miscellaneous	38
<i>Listing of care workers under the Safeguarding Vulnerable Groups Act</i>	38
<i>Retention, use and destruction of biometric data</i>	39
<i>Recommendations arising from our inquiry into policing protest</i>	41
Conclusions and recommendations	45
Annex: Proposed Committee Amendments	53
Formal Minutes	57
List of written evidence	58

List of Reports from the Committee during the current Parliament

Summary

We have a number of human rights concerns about the Government's Policing and Crime Bill.

Sexual offences and sex establishments

Strict liability

We welcome the Government's attempts to protect the rights of people trafficked for sexual services. However, introducing a strict liability offence for buying sexual services from prostitutes who are being controlled for gain by a third person risks inappropriately interfering with the right to respect for a private life. We conclude that:

- The Government should publish evidence to support the need to make the offence one of strict liability, to show why the existing criminal law is inadequate to deal with the targeted conduct and how the proposed new offence is proportionate.
- Making the offence one of strict liability makes it difficult for people to be certain about the law, and therefore difficult for people to know how to regulate their behaviour, which contravenes the European Convention on Human Rights and the common law.
- The Bill should be amended to ensure, as an element of the offence, that the individual was aware or ought to have been aware that the prostitute was controlled for gain.

Criminalisation of children

The United Nations Committee on the Rights of the Child has recently recommended that the UK should view child prostitutes as victims and not as criminals. This Bill continues to criminalise children, which we believe is unacceptable. We recommend that the Bill be amended to decriminalise children involved in prostitution.

Other issues

We also express concerns about rehabilitation orders for prostitutes, premises closure orders and extensions to preventative orders under the Sexual Offences Act 2003.

Protest and the Serious Organised Crime and Police Act 2005 (SOCPA)

We propose amendments to this Bill to promote the right to protest. SOCPA should be amended so that the Secretary of State can only designate sites, as protected, if she is convinced that it is "necessary" to do so.

SOCPA provisions relating to protest around Parliament should be repealed. The Public Order Act 1986 should govern protest in this area, although with amendments to reflect the particular circumstances of Parliament.

Other issues

We also raise human rights issues related to alcohol misuse, proceeds of crime, extradition, listing of care workers under the Safeguarding Vulnerable Groups Act 2006, and retaining, using and destroying biometric data and other information.

We will publish our conclusions on gangs injunctions in a future Report.

Government Bills

Bills drawn to the special attention of each House

1 Policing and Crime Bill

Date introduced to first House	18 December 2009
Date introduced to second House	
Current Bill Number	Bill 66

Background

1.1 This is a Government Bill introduced in the House of Commons on 18 December 2008. The Home Secretary, Rt Hon Jacqui Smith MP has made a statement of compatibility under s.19(1)(a) of the Human Rights Act 1998 (HRA). The Explanatory Notes accompanying the Bill set out the Government's view of the Bill's compatibility with the Convention rights at paragraphs 546-614. The Bill had its Second Reading on 19 January 2009. It completed its Committee stage on 26 February 2009.

1.2 We wrote to the Home Office Minister, Vernon Coaker MP, on 22 January 2009 asking for a fuller explanation of the Government's view of the human rights compatibility of the Bill.¹ We received the Minister's response on 9 February 2009.² Following the Government's publication of new clauses on gang-related injunctions on 12 February 2009, we again wrote to the Minister on 18 February 2009 requesting an explanatory memorandum on the human rights compatibility of the new clauses.³ The Minister replied on 23 February 2008.⁴ We wrote again on 9 March 2009 seeking further explanation of the proposed new clauses on gangs injunctions⁵ and received the Minister's response on 23 March 2009.⁶ The Minister has also copied us into his correspondence with the Public Bill Committee. **We welcome the full and prompt responses provided by the Minister.**

1.3 Following our recent practice, we published our correspondence with the Minister on our website and invited further submissions on the human rights implications of the Bill.⁷ We publish the submissions received together with this Report. **We welcome the engagement of the public and interested organisations in our legislative scrutiny work.**

Explanatory Notes

1.4 We are pleased to report that the Explanatory Notes accompanying this Bill provide a relatively full account of the Government's view on the Bill's compatibility with the European Convention on Human Rights (ECHR). Although we disagree with some aspects of the Government's analysis, the Explanatory Notes generally identify relevant human rights issues, apply the correct tests, refer to relevant caselaw and briefly present the

¹ Ev 2.

² Ev 6.

³ Ev 15.

⁴ Ev 15.

⁵ Ev 16.

⁶ Ev 18.

⁷ Press Notice No. 10, 28 January 2009.

Government's reasons for concluding that the provisions in the Bill are human rights compatible. **We welcome the inclusion of detailed Explanatory Notes on the implications of the Bill for Convention rights and we commend to other Departments the approach taken in relation to this Bill.**

The effect of the Bill

1.5 As originally drafted, the Bill covered a number of topics, principally police reform, sexual offences and sex establishments, alcohol misuse, proceeds of crime, extradition, aviation security, criminal records and border controls. Speaking when the Bill was published, the Home Secretary said:

The public is our best weapon in fighting crime and this bill gives them the right to expect the police to focus on the crimes that matter to their community. Real progress has been made on reducing crime by more than a third over the last decade and the risk of becoming a victim of crime is at its lowest ever level.

The measures in the new policing and crime bill will ensure that the police and local authorities tackle the issues that matter to you, such as alcohol related crime and disorder, prostitution and lap dancing clubs.⁸

1.6 Since publication, the Bill's remit has expanded to encompass gangs injunctions and retention and destruction of biometric data (including DNA samples).

Significant human rights issues

1.7 There are a number of significant human rights issues that arise in the context of this Bill which relate to:

- a) police inspection regime and human rights;
- b) appointment of senior officers to the Police Senior Appointments Panel;
- c) sexual establishments and sex offences, including the new strict liability offence, rehabilitation orders, premises closure orders, preventative orders and children involved in prostitution;
- d) reducing the age at which an individual may be directed to leave a public place from 16 years to 10 years;
- e) new injunctions to deal with gang-related violence;
- f) new powers to search for and seize personal property before criminal conviction;
- g) extradition, including undertakings to return individuals to states, extending period of provisional arrest and use of live links in initial and remand hearings;
- h) listing of care workers under the Safeguarding Vulnerable Groups Act 2006; and
- i) the retention, use and destruction of biometric data and other information.

⁸ Home Office press release, 18 December 2008.

1.8 In addition, in our view, the Bill provides an opportunity to give effect to recommendations arising out of our recently concluded inquiry into the policing of protest.⁹

Inspection regime and human rights

1.9 The Bill imposes a new duty on police authorities to have regard to the views of the public concerning policing in their area.¹⁰ It also gives Her Majesty's Inspectorate of Constabulary (the Inspectorate) the power to inspect and report to the Secretary of State on a police authority's compliance with the new duty to have regard to the views of the public.¹¹

1.10 Since 14 March 2008, police authorities have had new duties to monitor the performance of police forces in complying with the duties imposed by the HRA¹² and to promote equality and diversity within its police force.¹³ This was introduced in the light of the experience in Northern Ireland where the Policing Board has fulfilled a similar role for a number of years. However, the Order imposing these new duties in England and Wales did not make any provision requiring the Inspectorate to inspect and report on the police authority's compliance with those important duties. The Inspectorate has a power to inspect and report in relation to these duties, but is not *required* to do so.¹⁴

1.11 Both the Inspectorate and police authorities are public authorities under the HRA.¹⁵ On previous occasions, we have sought to ensure that human rights compliance is written into other inspection regimes.¹⁶ We consider that such an approach is appropriate in this context, given the vital interests that the police are required to protect. **We therefore recommend that the Bill be amended to strengthen the human rights monitoring machinery by requiring the Inspectorate of Constabulary to inspect and report on a police authority's performance of its new duties in respect of human rights and equality and diversity. We suggest an amendment below:**

Human rights framework for Inspectorate

To move the following clause –

After section 54(2A) of the Police Act 1996 (c. 16) (inspection and report powers of inspectors of constabulary) there is inserted:

“(2AA) The Inspectors of Constabulary shall inspect and report to the Secretary of State on a police authority's performance of its duties to monitor the performance of its police force in complying with the duties imposed by the Human Rights Act 1998

⁹ Seventh Report of Session 2008-09, *Demonstrating respect for rights? A human rights approach to policing protest*, HL Paper 47-I, HC 320-I.

¹⁰ Clause 1(1).

¹¹ Clause 1(2).

¹² Police Authorities (Particular Functions and Transitional Provisions) Order 2008 (SI 2008/82), Article 3.

¹³ *Ibid.*, Article 5.

¹⁴ Section 54(2A) Police Act 1996. The Inspectorate is under a *duty* to inspect and report on the efficiency and effectiveness of every police force.

¹⁵ Section 6 Human Rights Act 1998.

¹⁶ E.g. Eighth Report of Session 2007-08, *Legislative Scrutiny: Health and Social Care Bill*, HL Paper 46, HC 303, para. 1.28.

and to promote equality and diversity within its police force and within the authority.”

Appointment of senior officers

1.12 The Bill establishes a statutory Police Senior Appointments Panel.¹⁷ The functions of the Panel include advising the Secretary of State and police authorities about “ways to increase the pool of potential candidates for appointment as a senior officer.”¹⁸ In the Public Bill Committee (PBC), the Minister said “we want a proper balance among the various people who are nominated to the panel.”¹⁹

1.13 Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provides for a right of equal access to public service. In its most recent comments on compliance of the UK with the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD), the UN Committee welcomed the initiatives taken for further reforms within the police force but encouraged the UK “to adopt measures conducive to integrating the different ethnic and racial representation within the police force”.²⁰

1.14 Given the recent controversy about the lack of diversity amongst the senior ranks of UK police forces, we welcome the proposal to establish a panel to provide advice about ways to increase the pool of potential candidates as appointment as a senior officer as a potentially human rights enhancing measure. However, we recommend that the Bill be amended to require the Senior Appointments Panel, in discharging its functions under subsection (2)(a), to have regard to Article 25 ICCPR. This is consistent with other statutory provisions which require certain bodies to have regard to unincorporated human rights treaties.²¹ We suggest an amendment below:

Page 3, line 12, clause 2, insert -

“(4A) In discharging its functions under subsection (2)(a) the panel must have regard to Article 25 of the International Covenant on Civil and Political Rights (right of equal access to public service).”

Sexual offences and sex establishments

1.15 Part 2 of the Bill deals with sexual offences and sex establishments. In our view, human rights concerns arise which relate to four aspects of this Part:

- a) the creation of a strict liability offence of paying for the sexual services of a prostitute controlled for gain;
- b) detention for breach of a rehabilitation order imposed for persistently loitering or soliciting for the purposes of prostitution;

¹⁷ Clause 2(1), inserting new s. 53A into the Police Act 1996.

¹⁸ New s. 53C(2)(a) Police Act 1996.

¹⁹ PBC, 3 February 2008, col 193.

²⁰ *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland*, CERD/C/63/CO/11, para. 18.

²¹ E.g. Section 2(11) Children Act 2004 requires the Children’s Commissioner to have regard to the UN Convention on the Rights of the Child in considering what constitutes the interests of children.

- c) closure orders in relation to premises used for prostitution or pornography related activities; and
- d) extensions to preventative orders under the Sexual Offences Act.

1.16 In addition, the Bill presents an opportunity to address the criminalisation of children involved in prostitution. We deal with each of these matters below in turn. We recognise that both men and women may provide or pay for sexual services. However, for the sake of clarity, we refer in the following paragraphs to the provider of sexual services as female and to the recipient as male.

1.17 During the last Session, the Government introduced clauses to deal with some aspects of prostitution in the Criminal Justice and Immigration Bill, but withdrew them.²² At the time, we said:

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.²³

1.18 However, we also expressed concern about some aspects of the provisions concerning prostitution, including rehabilitation orders, which have now been reintroduced in a slightly different form, in the Policing and Crime Bill.²⁴ **We are disappointed that our previous recommendations on prostitution were not followed when the current Bill was drafted.**

1.19 We received a number of submissions from interested organisations on the prostitution aspects of this Bill.²⁵ Some witnesses welcomed some of the prostitution measures in the Bill as potentially human rights enhancing.²⁶ Rights of Women drew attention to international human rights law which:

... outlines the myriad of positive obligations on States to tackle prostitution, trafficking and sexual violence. Positive obligations require States to do more than simply exercise due diligence in the investigation of criminal activity. Rather, they require States to analyse and respond to the causes of violence against women which in this case are the causes of prostitution, trafficking and sexual violence. This includes the demand to sexually exploit women.

Fulfilling positive obligations may require legislative action, such as the proposal's new offence, but that also involve non-legal measures, such as the development of safe exit strategies for women who wish to leave prostitution.²⁷

However, Liberty argued that some of the ways in which the Government seeks to reduce the stigma of prostitution and assist those engaged in prostitution are “questionable”²⁸ and,

²² Twenty-third Report of Session 2007-08, *Legislative Scrutiny: Government Replies*, HL Paper 126, HC 755, para. 76.

²³ Fifth Report of Session 2007-08, *Legislative Scrutiny: Criminal Justice and Immigration Bill*, HL Paper 37, HC 269, para. 1.55.

²⁴ *Ibid*, para. 1.55.

²⁵ Ev 27, 32 and 46.

²⁶ Ev 32 and 46.

²⁷ Ev 46.

according to Justice, will be “counter-productive” and make conditions less safe for sex workers.²⁹ We consider some of these concerns below.

1.20 We welcome any initiative aimed at protecting the rights of those who are trafficked for the purposes of sexual exploitation, or who are otherwise engaged in sex work without their consent. As we and others have said, measures aimed at preventing prostitution, rehabilitating victims and prosecuting those who control prostitution, especially if coupled with initiatives to provide alternatives to prostitution for those engaged in it, have the potential to enhance the human rights of a very vulnerable group in society. However, we question whether the precise methods chosen by the Government meet its positive human rights obligations and we are concerned that they run the real risk of making those engaged in prostitution even more vulnerable.

Strict liability offence

1.21 Clause 13 introduces a new Section 53A into the Sexual Offences Act 2003, creating a strict liability offence of paying or promising payment for the sexual services of a prostitute who is controlled for gain by a third person. The offence is extremely broadly drafted. It applies whether or not the person alleged to have committed the offence knew or ought to have known that any of the prostitute’s activities were controlled for gain (“strict liability”), whether sexual services were in fact provided and irrespective of where in the world the services were or are to be provided.³⁰ The proposed new offence raises issues about whether the interference with the right to respect for private life (Article 8 ECHR), which includes sexual conduct,³¹ is sufficiently certain to satisfy the ECHR requirement that such interferences be “prescribed by law”.

Necessary in a democratic society

1.22 We wrote to the Minister to ask why the Government considers it necessary for the proposed new offence to be one of strict liability.³² In reply, Vernon Coaker MP noted that the Government had considered the issue carefully before deciding on the new strict liability offence but had concluded that the offence was:

... the most effective way of ensuring that those who pay for sex consider the circumstances of the prostitute who will be providing the sexual services. This is because it places the risk on the sex buyer of paying for sex with someone who is being controlled for gain. The CPS advised that this would be the most effective way of enforcing a provision that aimed to shift responsibility onto the potential sex buyer in this way.³³

1.23 The Minister also suggested that the offence “is not entirely one of strict liability in that it does require an intention on the part of the offender to either pay or make promise

²⁸ Ev 32, para. 7.

²⁹ Ev 27.

³⁰ Clause 13.

³¹ E.g. *Dudgeon v UK* (1981) 4 EHRR 149.

³² Ev 2.

³³ Ev 6..

of payment for sexual services. The strict liability element is confined to whether or not the prostitute was controlled for gain”.³⁴

1.24 The proposed new offence occupied a significant amount of the Public Bill Committee’s (PBC) time. The Minister explained the Government’s rationale for the creation of the new offence as follows:

You have to change the dynamic of how the man thinks when he purchases the sex. You can have a cosmetic offence, which will make no difference, or you can say “I’m going to make a real difference and try to change that dynamic.” That is the choice that people have got.”³⁵

1.25 Amendments to the offence which were proposed in the PBC were rejected by the Government on the basis that the alternative approaches proposed in the amendments (i.e. removing the strict liability aspect of the offence or replacing strict liability with knowledge or recklessness as to whether the prostitute is controlled for gain) would be much less effective in achieving the aim of shifting emphasis to the demand for prostitution.³⁶

1.26 The Government was also criticised in the PBC for not having published the evidence on which the decision to proceed with the strict liability offence was based.³⁷ The Minister, Alan Campbell MP, confirmed that the review of the evidence had not been published but stated that the Government had not made a commitment to publish and the evidence was currently being collated. However, he also said:

If we decide to publish it then we will do so in due course, but we should not read too much into the fact that the evidence has not been published. It does not mean that it contradicts the propositions that the Government are bringing forward.³⁸

1.27 It is evident from the debate in the Public Bill Committee and the submissions made to the PBC that there is controversy about the need for the new offence, its likely efficacy and the likelihood of unintended consequences including the driving of prostitution further underground and increasing the vulnerability of prostitutes.

1.28 We are disappointed that the Government has failed to provide the evidence which, in its view, demonstrates the necessity for the new strict liability offence. As we have said on a number of previous occasions, legislation should be firmly based on evidence. We consider this to be particularly important when new criminal offences are proposed, to show why the existing criminal law is inadequate to deal with the targeted conduct and how the proposed new offence tackles the behaviour in a proportionate way. In our view, it is even more imperative when the proposed new offence is one of strict liability. We recommend that the evidence be published without further delay so that Parliament can be properly informed when debating the need for this new strict liability offence.

³⁴ Ev 6.

³⁵ PBC, 29 January 2009, cols 118-119.

³⁶ PBC, 5 February 2009, col 257.

³⁷ PBC, 29 January 2009, col 112.

³⁸ PBC, 29 January 2009, col 113.

Prescribed by law

1.29 We wrote to ask the Minister whether the Government was satisfied that the offence complies with the requirement of both the ECHR and the common law that the scope of the criminal law affecting private life be sufficiently certain to enable individuals to regulate their conduct accordingly.³⁹ The Minister, Vernon Coaker MP, confirmed that the Government is satisfied that the new offence complies with the ECHR and the common law. On legal certainty, he stated:

We consider that the law will be sufficiently certain... If the individual has any doubt over whether the person is controlled or not, they should not pay for sex with that individual.⁴⁰

1.30 Some submissions we received criticised the definition of “controlled for gain” in the proposed offence.⁴¹ Justice was concerned that the definition failed to differentiate between exploitative and non-exploitative forms of prostitution which it considered to be extremely counter-productive, in that it might deter men from reporting circumstances of violence to the police.⁴² They told us:

We believe that the priority should be the protection of the rights of sex workers and others under Articles 2, 3 and 8 ECHR and therefore to ensure that sex work is carried out only by willing participants, in a safe environment. We believe that these provisions are likely to have the opposite effect.⁴³

1.31 In our Report on *Human Trafficking*, we concluded that men who have used the services of trafficked prostitutes should not be discouraged from reporting to the authorities their suspicions that the women concerned may have been trafficked. We recommended that the Government adopt the Italian approach of a free telephone number for victims to self-refer and for those who use prostitutes to refer women whom they think may have been trafficked.⁴⁴ During the PBC, the Minister confirmed that he was open to the suggestion of an anonymous hotline.⁴⁵ **We welcome the Government’s agreement to consider the possibility of a free hotline to report instances of trafficked women as we recommended in our *Human Trafficking* Report more than two years ago, although we question whether it would be of any use if the clients who called the number would inevitably be admitting a criminal offence.**

1.32 Both Justice and Liberty considered that the strict liability aspect of the proposed new offence, combined with the overbroad requirement of “controlled for gain”, was problematic, as it was “difficult for a potential client to know how to order his conduct so as to avoid a criminal sanction”.⁴⁶ As Liberty put it:

³⁹ Ev 2.

⁴⁰ Ev 6.

⁴¹ Ev 27 and 32.

⁴² Ev 27, para. 8-9.

⁴³ Ev 27, para. 10.

⁴⁴ Twenty-sixth Report of Session 2005-06, *Human Trafficking*, HL Paper 245, HC 1127-I, paras. 1.46 and 1.48.

⁴⁵ PBC, 29 January 2009, col 112.

⁴⁶ Ev 27, para. 14.

Strict liability offences should be used very sparingly and should only apply to minor offences where it seems obvious in the circumstances that an offence has been committed. It should not apply when a person is unable to ascertain whether what they are doing is unlawful. Given it is not an offence to pay for sexual services of a person who is not controlled for gain, it would be unfair to impose a strict liability offence on someone who pays for the sexual services of a person who is controlled for gain but whom the offender does not know is controlled.⁴⁷

1.33 The European Court of Human Rights has held that strict liability offences are generally compatible with Article 6(2) ECHR, provided that the prosecution retains the burden of proving the commission of the offence. In *Salabiaku v France*, the applicant was convicted of a strict liability customs offence of importing goods in breach of the Customs Code, which carried a penalty of three months imprisonment. Under the Code, an accused who was proven to have physically imported prohibited drugs was presumed to have known that the drugs were in his possession, and therefore to be guilty of the offence of importation.⁴⁸ The European Court of Human Rights held that the presumption of knowledge did not violate Article 6(2) ECHR (the presumption of innocence) as the prosecution bore the burden of proving that the accused had imported prohibited drugs (the *actus reus*), and it was a defence for the accused to prove that he was unaware of the contents of the consignment. As the Court held:

States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.⁴⁹

Unlike *Salabiaku*, proving that an individual did not know that the person was controlled for gain is explicitly ruled out as a defence.⁵⁰

1.34 Penalties for strict liability offences are generally lower than for an offence where an individual's guilty state of mind must be proven. We note that the proposed penalty for conviction of the offence of paying or promising payment for the sexual services of a prostitute who is controlled for gain by a third person is very low for a sexual offence (a fine not exceeding level 3).⁵¹ Were this not to be a strict liability offence,⁵² a stronger penalty should apply.

1.35 We conclude that the fact that the offence is one of strict liability will make it difficult for an individual to know how to regulate his conduct given that his knowledge is not an element of the offence. We have concerns about the breadth of the new offence and its potential impact beyond the group that the Government seeks to target. In our view, the proposed offence has the potential to put women into more exploitative or unsafe situations, may not address the problem which the offence aims to target (namely exploitative prostitution) and may discourage reporting of such prostitution.

⁴⁷ Ev 31, para. 8.

⁴⁸ *Salabiaku v France* (1981) 26 DR 171.

⁴⁹ *Ibid*, para. 27.

⁵⁰ Clause 13.

⁵¹ Clause 13.

⁵² See our recommendations below.

1.36 In its response to our Report on *Human Trafficking*, the Government commented on our conclusion that it would be inconsistent for men who use the services of a prostitute who has been trafficked to face potential prosecution for rape, whilst at the same time being encouraged to report such activities to the authorities or a helpline. It stated that it did not consider it inconsistent to encourage those paying for sexual services to report concerns about women they have encountered who may have been trafficked or working under duress to the police, but suggested that the decision to prosecute such men for rape would only proceed “where the woman did not consent to having sex with the man and he did not reasonably believe that she did”.⁵³ **We note the Government’s statement, in its response to our Report, that prosecutions for rape would only proceed where an individual did not reasonably believe that a woman had consented to sexual intercourse. We therefore suggest that the proposed offence be amended to ensure that the individual was aware or ought to have been aware that the prostitute was controlled for gain. We suggest an amendment below:**

Page 15, [Clause 13] leave out lines 33 to 37 and insert –

(1) A person (A) commits an offence if -

- (a) A makes or promises payment for the sexual services of a prostitute (B), and
- (b) any of B's activities relating to the provision of those services are intentionally controlled for gain by a third person (C), and
- (c) A is aware, or ought to be aware, that B's activities are controlled for gain."

(1A) Whether A ought to be aware that B's activities are controlled for gain is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B is controlled for gain.

(2) It is irrelevant where in the world the sexual services are to be provided and whether those services are provided.

Page 16, [Clause 14] leave out lines 14-18 and insert –

(1) A person (A) commits an offence if -

- (a) A makes or promises payment for the sexual services of a prostitute (B), and
- (b) any of B's activities relating to the provision of those services are intentionally controlled for gain by a third person (C), and
- (c) A is aware, or ought to be aware, that B's activities are controlled for gain."

(1A) Whether A ought to be aware that B's activities are controlled for gain is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B is controlled for gain.

(2) It is irrelevant where in the world the sexual services are to be provided and whether those services are provided.

⁵³ *Government Reply to Joint Committee on Human Rights Twenty-sixth Report Human Trafficking*, Cm 6996, p. 12.

If our amendments are accepted, the penalty associated with this offence would need to be increased to reflect the severity of the offence.

1.37 The lack of certainty in the proposed new offence is also contributed to by the wide and uncertain definition of "controlled". The term stems from sections 53 and 54 of the 2003 Sexual Offences Act:

53 Controlling prostitution for gain

(1) A person commits an offence if—

- (a) he intentionally controls any of the activities of another person relating to that person's prostitution in any part of the world, and
- (b) he does so for or in the expectation of gain for himself or a third person.

...

54 Sections 52 and 53: interpretation

(1) In sections 52 and 53, "gain" means—

- (a) any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount; or
- (b) the goodwill of any person which is or appears likely, in time, to bring financial advantage.

1.38 The statute does not therefore further define the term "control" or "controlled" and the meaning is clearly wider than that required to capture trafficked prostitutes or those who are the victims of violence, threat, intimidation and coercion. However the statute is not clear that the definition of controlled for gain does not extend to circumstances where prostitutes group together for safety and - on a voluntary basis - employ, or are employed by, a "madam" who organises their activities.

1.39 The absence of sufficient clarity about the circumstances which would be caught by this offence makes it difficult for an individual to know how to regulate his conduct so as to avoid criminality and, as such, the offence in its current form is overbroad and lacks certainty.

Rehabilitation orders

1.40 Clause 15 effectively reintroduces the withdrawn provisions of the Criminal Justice and Immigration Bill by amending the Street Offences Act 1959 to provide that a person loiters or solicits for the purposes of prostitution if she acts persistently. Clause 16 amends the possible penalties which may be imposed for the offence by permitting a court to impose an order requiring an offender to attend three supervised meetings to assist the offender to address the causes of her involvement in prostitution and find ways to stop engaging in prostitution in the future. If an individual breaches an order, by failing, in the opinion of the supervisor, without reasonable excuse, to attend any of the three supervised meetings, she may be summoned to appear before a Youth or Magistrates' court. If the

individual fails to answer the summons, the court may issue a warrant for the offender's arrest. Where an offender is arrested under a warrant but cannot be brought immediately before the court named in the summons, she may be detained, but must be brought before any relevant court "as soon as practicable".⁵⁴ If it is proved that the individual failed, without reasonable excuse, to comply with the order, the court must revoke the order and may deal with the offender for the original offence in any way that the court would have been able to had she been convicted of the original offence.⁵⁵

1.41 In our view, two human rights issues arise. First, the consequences of breaching an order are highly uncertain for the individual to whom it applies. Whether the person is brought back before the court depends on whether their supervisor is of the opinion that she has failed to comply with the rehabilitation order "without reasonable excuse".⁵⁶ What counts as a reasonable excuse for not complying is not defined. Many of those subject to rehabilitation orders are likely to be highly vulnerable people leading chaotic lives⁵⁷ which may include drug dependency and severe economic deprivation.

1.42 We wrote to the Minister, Vernon Coaker MP, to ask what, in the Government's view, would constitute a reasonable excuse for failing to comply with a rehabilitation order and how the Government will ensure that breach of an order does not lead to the undue criminalisation of vulnerable people involved in prostitution.⁵⁸ Replying, the Minister noted that "reasonable excuse" was an established term and that it would be for the courts to determine. He also explained that it was not the Government's aim to subject vulnerable people to undue criminalisation and that breach of an order was not a criminal offence.⁵⁹ During the PBC, the Government expanded on the aim of the proposed order as follows:

The aim of the order ... is to provide an alternative to a fine. That may help to break the cycle of people being fined for loitering or soliciting and having to return to the streets to earn money to pay the fine... It is intended to allow those who are willing to engage with support services to access such services without the pressure of paying off a fine.⁶⁰

1.43 However, the Minister, Alan Campbell MP, also suggested that the use of the criminal law might be necessary as:

[Prostitutes] sometimes resist so-called tough love and other forms of intervention, and have to be gently pushed out of prostitution, encouraged to leave, or even coerced a little.⁶¹

1.44 We understand that the term "reasonable excuse" is used in a number of other legislative contexts. However, we are concerned that whether or not an individual is brought back to court is solely dependent on the subjective opinion of her supervisor as

⁵⁴ Sch. 1, para. 9(2).

⁵⁵ Sch. 1, para. 4(2)(b).

⁵⁶ Para. 2(1) of new Schedule 1 to the Street Offences Act 1959, inserted by Schedule 1 of the Bill.

⁵⁷ This was confirmed by the Home Office's impact assessment and by the Minister in Public Bill Committee (PBC, 29 January 2009, col 115 and 10 February 2009, col 316).

⁵⁸ Ev 2.

⁵⁹ Ev 6.

⁶⁰ PBC, 10 February 2009, col 326.

⁶¹ PBC, 10 February 2009, col 316.

to whether or not the individual has a reasonable excuse for failing to comply with the order. We were pleased that the Government, in correspondence, suggested that the aim of the order was not to subject vulnerable people to undue criminalisation, but were concerned by the Minister’s statement in the PBC that prostitutes might need to be “coerced” out of prostitution. We recommend that the Government publish guidance for supervisors and the courts on examples of circumstances which it considers would constitute reasonable excuses for failing to comply with a rehabilitation order and the factors that the courts should take into account when considering an individual who has been returned to the court.

1.45 The second human rights issue relates to the length of time for which a person may be detained following breach of a rehabilitation order. The current Bill proposes to permit detention of an offender for an open-ended period of time before she must be brought before a court, simply stating that she must be produced “as soon as practicable”.⁶² In our view, this is in potential breach of Article 5 ECHR (the right to liberty). Surprisingly, the Explanatory Notes fail to address any human rights issues in relation to this provision, despite our concerns about the equivalent provision in the Criminal Justice and Immigration Bill. That Bill provided that an individual in breach of a rehabilitation order could be detained for a maximum period of 72 hours before being brought before a court. At the time, we noted our concern 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”.⁶³ During the PBC, the Minister, Alan Campbell MP, set out the aim of the detention provisions as follows:

Detention ... may be necessary ... in order to ensure that an offender who has not only breached a court order but ignored a summons to appear at court can be brought before a court to be re-sentenced for the original offence of loitering or soliciting for the purposes of prostitution.⁶⁴

1.46 Given our previous concerns, we wrote to ask the Minister to explain why no time limit is set out in the Bill within which an individual detained for breach of a rehabilitation order must be brought before a court.⁶⁵ The Minister, Vernon Coaker MP, replied that this was a response to the criticism expressed in Parliament about the equivalent provision in the Criminal Justice and Immigration Bill. He noted that the new provision requiring that an individual be brought before a court as soon as is practicable meant that the police would not be able to detain an offender for any longer than is necessary to comply with the requirement.⁶⁶ During the PBC, the Minister, Alan Campbell MP, described “as soon as practicable” as a safeguard, saying:

⁶² Schedule 1, para. 9(2).

⁶³ Fifth Report of Session 2007-08, *Legislative Scrutiny: Criminal Justice and Immigration Bill*, HL Paper 37, HC 269, para. 1.55.

⁶⁴ PBC, 10 February 2009, col 333.

⁶⁵ Ev 2.

⁶⁶ Ev 6.

We are confident that that will provide sufficient safeguards against undue detention without imposing an upper limit with which, in certain circumstances the police, through no fault of their own, would be unable to comply.⁶⁷

1.47 We are perplexed by the Government’s approach to the detention provision. We cannot understand how having an open-ended period within which a detained individual must be brought before a court is a safeguard. In our view, the new provision is even more troubling than the 2008 provision. We repeat our concerns that these measures may in fact lead to the detention of women for substantial periods of time for not attending a meeting. Reaching this conclusion, we have in mind the fact that those who may be least able to comply with rehabilitation orders and therefore be detained before being brought in front of a court, are likely to be the most vulnerable. We recommend that, in line with the current law on arrest for breach of bail conditions (section 7 Bail Act 1976), the Bill be amended to provide that an individual must be brought before a court as soon as practicable and in any event within 24 hours after her arrest. We suggest an amendment below:

Page 134, line 2, [Schedule 1] after “practicable” insert “and in any event within 24 hours after the offender’s arrest.”.

Premises closure orders

1.48 Clause 20 and Schedule 2 together insert a new Part into the Sexual Offences Act 2003 granting courts the power to close premises being used for activities related to specified prostitution or pornography offences. The Government’s aims are “to increase the powers of police officers to tackle these brothels and prevent their impact being diluted through the rapid reopening of such premises, to prevent further exploitation of trafficked women who have been forced into prostitution and to decrease the harm that brothels cause to the local community”.⁶⁸ During the PBC, the Minister, Alan Campbell MP, stated that:

This legislation should be used proportionately in those instances where women might have been trafficked and are subject to exploitation and control for gain, or where there is child pornography or prostitution involving children.⁶⁹

1.49 During our scrutiny of the Criminal Justice and Immigration Bill, we expressed our concerns at the proposal to introduce closure orders in relation to premises associated with antisocial behaviour.⁷⁰ In many respects, premises closure orders raise similar concerns. **Whilst the policy intention is to protect trafficked women who have been forced into prostitution, which we welcome, we are concerned that a premises closure order will have much wider application and effect.** In our view, the proposed measures carry a real risk of violations of the right to family life and respect for the home (Article 8 ECHR), and the protection of property (Article 1 of Protocol 1 ECHR) (where the premises are privately owned). We therefore wrote to the Minister to ask him to explain why premises closure orders are necessary and what safeguards will be in place to ensure that the safety of

⁶⁷ PBC, 10 February 2009, col 333.

⁶⁸ *Impact assessment of brothel closure provisions in the Policing and Crime Reduction Bill*, 1 December 2008.

⁶⁹ PBC, 10 February 2009, col 342.

⁷⁰ Fifth Report of Session 2007-08, *Legislative Scrutiny: Criminal Justice and Immigration Bill*, HL Paper 37, HC 269, para. 1.104-1.110.

vulnerable people is not compromised. We also asked a number of questions about safeguarding the rights of third parties who will be affected by premises closure orders.⁷¹

1.50 During the PBC, the Minister, Alan Campbell MP, explained that premises closure orders are necessary to disrupt criminal activity and exploitation.⁷² In correspondence with us, Vernon Coaker MP noted that, except where premises are associated with the use of Class A drugs or persistent disorder or nuisance, the police do not currently have the power to prevent people from returning to and reopening premises following police entry and arrests.⁷³ In the Government's view:

These provisions are therefore intended to give [the police] the power to close premises for 3 months in order to fully disrupt the criminal activity.⁷⁴

1.51 On safeguards for vulnerable people, Vernon Coaker MP reminded us of the steps that must be taken before a closure notice can be issued and a closure order made. He also pointed to the rights of affected persons to make representations, the right of appeal against the making of an order, the possibility to apply for an order to be discharged and compensation.⁷⁵ **Whilst these are all important aspects of the framework of the proposed new orders, we do not consider that they go far enough to safeguard the rights of those who may be affected by closure notices and orders.** We have a number of points of concern. **We note that the Bill does not make clear that closure orders should only be made as a last resort. This is significant as, when designing policy, the state is required, as part of the proportionality exercise, to take the least restrictive measure to achieve its aim.** The authorising officer is under no express 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”.

1.52 In their evidence to us, Liberty referred to the unfortunate consequences on some vulnerable people who are not involved in the criminal conduct. Offenders whose premises have been closed down as a result of drugs related closure orders have taken over the property of vulnerable people (this is known as “cuckooing”). Liberty have suggested that “closure does not necessarily end a problem but can merely displace it”.⁷⁶ Justice said that orders risked being counter-productive as they could lead to unsafe working practices such as women working on the streets or in their own or clients' homes.⁷⁷ **We are concerned that 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 so, if they could find alternative accommodation) or to consider all those affected by an order,** although the court may hear from people with an interest in the premises as to why an order should not be made. **We recommend that the Bill be amended to explicitly require the authorising officer and the court, when considering the making of an order, to take these issues into account. We suggest amendments below:**

⁷¹ Ev 6.

⁷² PBC, 10 February 2009, col 342.

⁷³ Ev 6.

⁷⁴ Ev 6.

⁷⁵ Ev 6.

⁷⁶ Ev 32, para. 11. Justice agree (Ev 27, para. 19).

⁷⁷ Ev 27, para. 21.

Page 138, line 23, [Schedule 2], at end insert: “, and

(c) that any persons identified under paragraph (b) have been consulted.”

Page 138, line 27, [Schedule 2], at end insert:

“(8A) In authorising the issue of a closure notice, the authorising officer must have regard to the views of any persons consulted under subsection (7)(c).”

1.53 Liberty also expressed concern about the proposal, in Schedule 2, for the Secretary of State to extend, by order, the power to authorise the issue of a closure notice to people who are not police officers.⁷⁸ They argue that, as the power to order the closure of premises could have serious implications for the right to respect for private and family life and the home, “its use should be carried out by trained professionals and any extension of the power to make such orders should not be extended lightly”.⁷⁹ We note that the proposal relates to the power to issue a closure notice, but not to impose a closure order, which will remain with the court. However, **given the fundamental rights at stake and the effects that issuing a closure notice will have on individual rights before the matter is brought before a court, we share the concerns expressed in relation to the proposal for the Secretary of State to amend, by order, the power to authorise a closure notice to persons other than members of the police service. We recommend that new clause 136Q be deleted from the Bill and suggest an amendment below:**

Page 147, [Schedule 2] leave out lines 13 to 20.

1.54 In his letter, the Minister, Vernon Coaker MP, referred to guidance which the Secretary of State may issue relating to the discharge of the functions of an authorising officer⁸⁰ noting that this would “make clear the need to identify any adverse circumstance that may arise affecting the victims of offences committed on the premises and the need to ensure appropriate support for those victims”.⁸¹ During the PBC, the Minister, Alan Campbell MP, stated that the guidance would need to make clear when an order would be appropriate⁸² and that “the orders are not used disproportionately and that we minimise disruption”.⁸³ Responding to a question during the PBC on whether guidance would contain criteria stipulating that a brothel would be closed down if it was premises where child pornography or prostitution, trafficking, control for gain or drug abuse were taking place, the Minister replied simply that it would “depend on the circumstances of the case”.⁸⁴ Some, but not all, of the concerns which we raise in the preceding paragraph may be covered in guidance. **Even if guidance were sufficient to allay our concerns about how these provisions are applied by an authorising officer, it would not, in our view, assist a court in determining an application for an order, and therefore our concerns remain valid. We therefore recommend that the Bill be amended to require the court to be satisfied that the making of an order is necessary as a last resort and that other measures have been taken and failed or are not appropriate. In addition, we**

⁷⁸ Schedule 2, inserting new Clause 136Q into the Sexual Offences Act 2003.

⁷⁹ Ev 32, para. 12.

⁸⁰ Sch. 2, para. 136P.

⁸¹ Ev 6.

⁸² PBC, 10 February 2009, col 346.

⁸³ PBC, 10 February 2009, col 342.

⁸⁴ PBC, 10 February 2009, col 343.

recommend that the Bill be amended to require the court to consider the effect of the making of an order on the human rights of those directly affected as well as those of interested parties in order that these powers are used only against exploitative prostitution involving trafficking, violence, threat, intimidation, coercion or drug addiction, we recommend that as far as the prostitution offences are concerned (but not in respect of child prostitution or child pornography) that the power is used in narrower circumstances to reflect these vulnerabilities. We suggest amendments below:

“Page 140, line 17, [Schedule 2], at end insert “, and that no other measures will prevent the premises from being used for such activities”.

Page 140, line 21, [Schedule 2], at end insert:

“(10A) In making a closure order, the court must consider the effect of making the order on the human rights of any person who owns or resides in the premises, and anyone else likely to be affected by the order.

(10B) In this section, “human rights” mean the Convention rights set out in the Schedule to the Human Rights Act 1998 (c. 42).”

Extensions to preventative orders under the Sexual Offences Act

1.55 A number of preventative orders may be made under the Sexual Offences Act 2003 (sexual offences prevention orders, foreign travel orders, risk of sexual harm orders and notification orders). An application for such an order is made to the Magistrates’ Court. Under section 127 of the Magistrates Courts Act 1980, a court is prevented from hearing a complaint unless the complaint was made within six months from the time when the matter of complaint arose. Clause 21 of the Bill proposes to disapply this time limit in relation to these orders. The Explanatory Notes suggest that whilst such orders interfere with the right to respect for family life (Article 8 ECHR), because the orders are preventative not punitive and given the existing safeguards, such interferences are justified.⁸⁵

1.56 In our view, this change to the current regime has the potential to weaken the existing safeguards which apply to preventative orders under the Sexual Offences Act by permitting applications for orders to be made in respect of events that have taken place more than 6 months previously. Potentially this would allow an order to be made at any point after the initial conviction or caution, even if that conviction or caution was many years ago. When we asked the Government about this, the Minister, Vernon Coaker MP, confirmed that it would be “theoretically possible” for an order to be founded on behaviour occurring ten or twenty years before the application was made and not subsequently repeated. However, he suggested that it would be unlikely for a court to make such an order as there needed to be evidence to show that the individual poses a current risk.⁸⁶ Amplifying the Government’s reason for wishing to disapply section 127, the Minister told us that Home Office consultation with the Association of Chief Police Officers (ACPO) had “highlighted that

⁸⁵ EN, para. 556.

⁸⁶ Ev 6.

the six month time limit could cause particular difficulty”.⁸⁷ During the PBC, the Minister, Alan Campbell MP, stated that:

[If section 127 applied] that could pose problems in relation to certain sex offenders who are in custody or coming to the UK after being convicted abroad, as there may be little evidence of any concerning behaviour during the previous six months, although the police may still be concerned that their past behaviour indicates that they pose a high risk. Expressly disapplying the time limit will make it clear that the police can apply for such orders whether or not they have evidence of relevant behaviour in the last six months.⁸⁸

1.57 Whilst we appreciate the Government’s desire to ensure that people are protected from individuals who pose a risk of sexual harm, we question whether an open-ended disapplication of the time limit is a proportionate response to the problem which the Government has identified. We do not consider that the Government has provided sufficient reasons as to why the existing regime causes or has the potential to cause problems in practice. We recommend that it publishes the information (including examples of where the problem has occurred in practice) on which that decision was based. We are not opposed in principle to an extension to the time limit, if it can be shown to be necessary on the basis of the evidence. If the published evidence demonstrates the need for an extension to the time limit, we recommend that there be a maximum time limit within which the alleged conduct must have taken place. We do not believe that this should present an insurmountable burden in relation to offenders who have been in prison abroad and return to the UK, as evidence of any continuing risk could be obtained from recognised professionals in transferring states (such as probation officers or medical professionals). In the absence of such information, we do not understand on what basis the police would be able to conclude that an individual posed a continuing risk requiring steps to be taken to protect the public.

1.58 Currently, foreign travel orders have effect for a fixed period of no more than six months. Clause 23 proposes to extend that six month period to five years. This provision represents a significant interference with individual rights and raises issues of respect for private and family life (Article 8 ECHR) and freedom of movement (Article 12 ICCPR). As Liberty told us, “increasing the amount of time that a person can be banned from leaving the country (and stripping them of their passport as is proposed by clause 24) for up to 5 years is a much greater interference with the right to freedom of movement than the current time of 6 months”.⁸⁹ When we asked the Minister to explain the Government’s evidence base for the need for the extension, the Minister, Vernon Coaker MP, replied that the Government was concerned at the low use of foreign travel orders (as at August 2008, only five orders had been made). He continued:

Consultation with the Association of Chief Police Officers (ACPO) and Child Exploitation and Online Protection Centre has indicated that the police are wary of

⁸⁷ Ev 6.

⁸⁸ PBC, 10 February 2009, col 353.

⁸⁹ Ev 32, para. 13.

applying for these orders because of their limited duration, particularly given the amount of work that goes into preparing an application for such an order.⁹⁰

1.59 We also asked the Minister to explain how the proposed extension was proportionate to the interference with the rights to respect for private and family life and freedom of movement.⁹¹ Vernon Coaker MP responded by referring to section 6 of the Human Rights Act 1998 which requires that public authorities, such as courts imposing foreign travel orders, are required to act compatibly with human rights. He stated that there was:

... a requirement that the prohibitions in the order are those that the court is satisfied are necessary and proportionate for the prevention of crime... it is only where the proposed interference with the offender's right to private and family life can be justified as being necessary and proportionate on these grounds that the court would be able to impose a foreign travel order of 5 years' duration. This will have to be assessed in each individual case.⁹²

He did not specifically address our question on the proportionality of the extension with freedom of movement.

1.60 We note the Government's reliance on section 6 of the Human Rights Act as a safeguard. Although we agree with the Minister that section 6 requires a court to act compatibly with human rights when deciding whether or not to grant a foreign travel order, this does not absolve the Government from responsibility. Whilst the court must apply legislation in a manner that is compatible with human rights, it is for the Government to show why legislation is necessary and ensure that it is drafted in sufficiently precise and clear terms and with sufficient safeguards to ensure that it will in practice be exercised in ways that are proportionate to the aim sought to be achieved. This is a recurring generic issue in our scrutiny work and one which we again draw to the Government's attention.

1.61 On foreign travel orders specifically, we note that a significant extension to interferences with individual freedom of movement and private and family life is being justified by administrative inconvenience to police officers alone. In view of the lack of published evidence to date, we recommend that the Government reconsider whether a period of five years is necessary. In addition, we urge the Government to publish, without delay, the evidence on which its opinion that there is a need for an extension is based. We also recommend that the Government commit to reviewing the operation of this provision within one year of enactment and to publishing the results of that review and its response to it. Such a review should take into account the human rights concerns raised above.

Children involved in prostitution

1.62 The Government has repeatedly stated its intention to make clear that involving children in prostitution is a form of child abuse. During the passage of the Criminal Justice and Immigration Bill, the Minister stated that he wished to give the "clear message that

⁹⁰ Ev 6.

⁹¹ Ev 2.

⁹² Ev 6.

child sexual exploitation is a grave crime that will not be tolerated, and that the child is always a victim”.⁹³ The UN Committee on the Rights of Child, in its most recent concluding observations, recommended that the UK should consider child victims of prostitution as victims and not as offenders.⁹⁴ In their evidence to us, Justice noted its concern that the Government had failed to take the opportunity of this Bill to decriminalise child prostitution stating:

We believe that the continued criminalisation of children involved in prostitution is likely to deter them from seeking assistance from the authorities and plays into the hands of abusers. We therefore believe that even if the offence of loitering/soliciting is retained for adult prostitutes it should be repealed for children.⁹⁵

1.63 We asked the Minister why the Government had decided not to use the Bill to abolish the power to prosecute a child over the age of ten for offences under the Street Offences Act 1959.⁹⁶ In reply, Vernon Coaker MP explained that children are rarely prosecuted for prostitution, but suggested that their continued criminalisation meant that the state could respond effectively to this form of abuse:

Where agencies fail to engage with young people who, for whatever reason, spurn offers of support and protection, the Criminal Justice System enables us to remove those young people from the street and any immediate danger and offer them the intervention that may actually make a difference. The Government has no wish to criminalise children and young people but believe this offence allows us to help protect some of our most vulnerable citizens who may otherwise not be reached.⁹⁷

1.64 During the PBC, Dr Evan Harris MP proposed an amendment to the Bill to ensure that the offence of loitering only applied to people aged 18 and over.⁹⁸ Disagreeing with the amendment, the Minister, Alan Campbell MP, stated:

We recognise that children who become involved in prostitution are victims of a sexual offence and should be offered appropriate support. We do not want children in those circumstances being subject to punitive criminal sanctions.

... By decriminalising under-18s, we risk sending out a message that although we do not think it acceptable for adults to be involved in street prostitution, we somehow accept that children can be. We recognise that in the overwhelming majority of cases children involved in prostitution should be treated solely as victims...

However ... there might be exceptional cases where criminal justice intervention is necessary to prevent a harmful situation and allow a child to access support. That is why we want to retain the ability for criminal justice agencies to intervene as a very

⁹³ PBC, 27 November 2007, col 537.

⁹⁴ Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, CRC/GBR/CO/4, paras. 73-74.

⁹⁵ Ev 27, para. 17.

⁹⁶ Ev 2.

⁹⁷ Ev 6.

⁹⁸ PBC, 10 February 2009, col 305.

last resort... Our overwhelming priority is supporting rather than prosecuting children who are involved in prostitution.⁹⁹

He also said that guidance on this would be updated in the spring.¹⁰⁰

1.65 We asked Baroness Morgan of Drefelin, the Parliamentary Under-Secretary of State, Department of Children, Schools and Families, about the criminalisation of children involved in prostitution, when she gave evidence to us on 24 March 2009 as part of our inquiry into children's rights. **We are pleased to note that the Minister agreed that a child prostitute is a victim not a criminal¹⁰¹ and that the issue should be addressed "entirely from the perspective of the child and the safeguarding needs of that child".¹⁰²** However, she failed to respond to our central concern which is the ongoing criminalisation of children involved in prostitution. Instead, she referred to the development of new guidance. **We are very disappointed that the Minister with responsibility for the UN Convention on the Rights of the Child was unable to explain adequately how the Government proposes to address the UN Committee's recommendation to decriminalise children involved in prostitution.**

1.66 As the Minister said during the PBC, the "nub" of the Government's argument is that the continued criminalisation of children involved in prostitution is necessary to enable children to access support. The type of support which the Government envisages is not specified, although the Minister mentioned the criminal justice power to "remove those young people from the street and any immediate danger" where other agencies fail to engage with young people.¹⁰³ We therefore assume that the Government is referring to social, educational and welfare support. We find it surprising that the Government proposes to rely on the criminal justice system to address institutional or individual failures within the services available to children and young people. It appears to us to be more appropriate to strengthen the duties and capabilities of children's services to respond to children involved in prostitution, rather than criminalise children for the state's failures. The Government has not provided any evidence that retaining the option of arrest and prosecution of children involved in prostitution is of any benefit, and we note from submissions we received from our inquiry into children's rights that children's welfare organisations are of the view that the criminalisation of children makes them more vulnerable. **We are therefore unconvinced by the Government's explanation of the continuing need for the criminalisation of children involved in prostitution, which is in direct opposition to the conclusions of the UN Committee on the Rights of the Child. In particular, we are not persuaded by the assertion that the criminal justice system may be needed to enable children to access support. The provision of revised guidance is insufficient to address our central point of concern. We recommend that the Government reconsider its opposition to decriminalising children involved in prostitution and suggest an amendment to the Bill below:**

Page 16, line 28, clause 15 after "person" insert "aged 18 or over".

⁹⁹ PBC, 10 February 2009, cols 306-7.

¹⁰⁰ PBC, 10 February 2009, col 306.

¹⁰¹ Uncorrected transcript of Oral Evidence, *Children's Rights*, 24 March 2009, HC 338, Ev 41.

¹⁰² Uncorrected transcript of Oral Evidence, *Children's Rights*, 24 March 2009, HC 338, Ev 44.

¹⁰³ PBC, 10 February 2009, col 306.

Alcohol misuse

1.67 In our view, Part 3 of the Bill, which deals with alcohol misuse, raises one issue of human rights concern relating to directions to individuals to leave a locality.

1.68 On the general point of why new powers in relation to alcohol misuse are necessary, the Minister, Alan Campbell MP, said in the PBC:

When we draft and pass legislation it does not always have the full effect that we intended ... One of the real difficulties relates to age differences and the fact that when people buy alcohol under age, or have it bought for them, they are often in mixed-age gangs ... If police are called to an incident, it is not always possible to treat all of the people in that gang, or group of people, similarly... It is a case of trying to acknowledge the practical difficulties that the police are telling us about... that I think lies behind these measures.¹⁰⁴

Directions to individuals to leave a locality

1.69 Clause 30 proposes an amendment to the Violent Crime Reduction Act 2006 to reduce the age at which an individual may be directed to leave a public place from 16 years to 10 years. When the initial power¹⁰⁵ was proposed in the Violent Crime Reduction Bill, we expressed our concerns about the adequacy of the safeguards accompanying the power in the following terms:

... we consider that the safeguards to which the Government refers may not be adequate to provide the necessary assurance that the new summary power to give directions to leave a locality would only be used where it is necessary and proportionate to do so for the prevention of disorder and crime, The risk of arbitrariness and disproportionality would be greatly diminished by the introduction of additional safeguards, such as requiring that the police officer be satisfied that the person has already engaged in criminal or disorderly conduct while under the influence of alcohol, preventing the immediate renewal of a direction which has expired, and requiring the authorisation of a more senior police officer.¹⁰⁶

1.70 The Explanatory Notes conclude that the amendment is compatible with Articles 8 and 11 (peaceful assembly) ECHR.¹⁰⁷ However, we sought further clarification from the Minister. In particular, we asked why the power was necessary, in view of the existing power to move people on for anti-social behaviour and to return children to their homes. We also asked whether, in drafting the clause, the Government had given consideration to the additional safeguards we proposed during the passage of the Violent Crime Reduction Bill.¹⁰⁸ The Minister's response reiterated the Government's view that the power in clause 30 can be effectively distinguished from existing powers. Vernon Coaker MP noted that the Government had given careful consideration to the additional safeguards we proposed to what became section 27 of the Violent Crime Reduction Act 2006, but was "not

¹⁰⁴ PBC, 29 January 2009, col 121.

¹⁰⁵ Which applied to those aged 16 years or over.

¹⁰⁶ Fifth Report of Session 2005-06, *Legislative Scrutiny: Second Progress Report*, para. 3.33.

¹⁰⁷ EN, para. 559.

¹⁰⁸ Ev 2.

persuaded that any of these safeguards are essential” and believed “that any of these could in fact significantly weaken the effectiveness of the measure”. He also referred to the “extensive guidance” which had been issued by the Home Office on the exercise of the power.¹⁰⁹

1.71 In their evidence to us, both Liberty and Justice expressed the view that extending the power to disperse younger people might endanger them by forcing them to move on to unsafe areas.¹¹⁰ Justice said:

The use of this power against children as young as 10 may result in their being directed to leave a place of relative safety (a town centre for example) with the result that they instead gather in isolated places where they can avoid police attention but are also at far greater risk. If children as young as 10 are posing a risk of alcohol-related disorder, this is a matter of concern for their legal guardian(s) and for health and welfare services; simply banishing them from public sight is an entirely inappropriate remedy.¹¹¹

1.72 The proposed power does not require officers to return children to their homes or to a place of safety (unlike Clause 28 for example) but simply authorises an officer to direct children to leave an area. This could lead them to moving to locations which are less safe. There is nothing in Clause 30 to ensure that a police officer takes into account the effect of a direction on the welfare of the child to whom the direction is given.

1.73 We note the UN Committee on the Rights of the Child’s recent observations that there is a “general climate of intolerance and negative public attitudes towards children” in the UK.¹¹² We are particularly concerned by the proposed application of section 27(1) of the Violent Crime Reduction Act 2006 to very young people and the potential risks to their safety this could create. This provision appears to target children as potential offenders rather than as children with welfare needs. We recommend that clause 30 be deleted from the Bill. Alternatively, we recommend that section 27 of the Violent Crime Reduction Act 2006 be amended to require an officer considering making a direction against a child who is under 16 years of age to consider the effect on the child’s welfare and safety before making the direction. This should be strengthened in the guidance issued in relation to this section. We suggest amendments below:

Page 25, Line 30, leave out Clause 30.

Page 25, Line 33, [Clause 30] at end insert –

(2) In the Violent Crime Reduction Act 2006, after subsection (2) there is inserted:

“(2A) In making a direction under this section to an individual aged under 16, a constable in uniform must consider the effect of making the direction on the individual’s welfare and safety.”

¹⁰⁹ Ev 6.

¹¹⁰ Ev 32 para 16; Ev 27, para. 24.

¹¹¹ BILLS 84, para. 24.

¹¹² Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland, CRC/GBR/CO/4*, para. 24.

1.74 In addition, as we concluded when we scrutinised section 27 of the then Violent Crime Reduction Bill, we consider that the use of the power as currently drafted may not be confined to the prevention of disorder or crime. In our view, as previously expressed, section 27 contains insufficient safeguards to guard against arbitrariness and disproportionality. We therefore recommend that the Bill provides an opportunity to amend section 27 so as to require that a police officer be satisfied that the person has already engaged in criminal or disorderly conduct while under the influence of alcohol, to prevent the immediate renewal of a direction which has expired, and to require the authorisation of a more senior police officer.¹¹³ We suggest an amendment below:

Directions to individuals engaged in criminal or disorderly conduct

To move the following clause –

(1) Section 27 of the Violent Crime Reduction Act 2006 is amended as follows.

(2) The test in paragraph (2)(a) is replaced by the following test:

“(a) that the individual has caused or contributed to alcohol-related crime or disorder in that locality.”

(3) At the end of paragraph (2)(b) the following words are inserted:

“; and

(c) the giving of a direction has been authorised by a police officer of the rank of Sergeant or above.”

(4) After paragraph (3)(f) the following paragraph is inserted:

“(g) may not be renewed within a period of 12 hours after its expiry.”

Gangs injunctions

1.75 During the Public Bill Committee, the Government introduced a new Part 4 providing for injunctions for gang-related violence.¹¹⁴ The Minister helpfully provided us with a letter setting out the Government’s view of the human rights compatibility of the provisions.¹¹⁵ On 9 March 2009, we wrote to the Minister seeking his response to a number of specific questions on areas which concerned us about these provisions.¹¹⁶ We received a reply on 23 March 2009¹¹⁷ and intend to scrutinise the Minister’s response and these provisions more fully in a future Report.

¹¹³ Our amendment proposes that a police officer of the rank of sergeant or above must authorise the giving of a direction. We base this on the fact that Safer Neighbourhood Teams are run by police sergeants.

¹¹⁴ Part 4 of the Bill as amended in PBC.

¹¹⁵ Ev 15.

¹¹⁶ Ev 16.

¹¹⁷ Ev 18.

Proceeds of crime

1.76 Clauses 52-54 contain new powers to search for and seize personal property. The Explanatory Notes explain that the powers are necessary “to prevent the dissipation of personal property ... in anticipation of a confiscation order being made”.¹¹⁸ Such powers may be exercised in advance of a criminal conviction being secured (or, for example, proceedings even having commenced, so long as the individual has been arrested).¹¹⁹ Realisable property may be seized if the officer has reasonable grounds for believing that the property may otherwise be made unavailable or the value of the property may be diminished by the defendant. However, cash and exempt property (which includes property required for the defendant to use personally in his employment, business or vocation or property which is necessary for satisfying the defendant or his family’s basic domestic needs) may not be seized. The powers to search for or seize property must be approved by a judge or appropriate officer unless “it is not practicable to obtain that approval before exercising the power”. Where the power is exercised without judicial approval, a written report must be made to a person appointed by the Secretary of State to report annually on the exercise of the powers.

1.77 During the PBC, the Minister, Vernon Coaker MP, set out the overall policy intention behind these proposals as follows:

The whole approach has been driven by a desire to balance judicial oversight, practical policing and the policy objective of ensuring that we prevent individuals dissipating assets ... It is about responding to what the police have said, whereby people in a number of cases get around the law because they get rid of the assets before a restraining order can be applied... The public policy objective is that we believe we can get more criminally gained assets off somebody if we make the retention of those assets possible.¹²⁰

1.78 Search and seizure of property interferes with the rights to peaceful enjoyment of possessions (Article 1, Protocol 1 ECHR) and to respect for private and family life (Article 8 ECHR). The Explanatory Notes record that the powers have the aim of preventing crime and recovering the proceeds of crime and the Government’s view that the safeguards in the Bill will “ensure that the powers will be exercised proportionately”.¹²¹ On a number of previous occasions, we have expressed concerns at the lack of safeguards in relation to other search and seizure powers and that such safeguards should appear on the face of Bills.¹²² The question here is whether the safeguards which accompany these powers are adequate to ensure that the interference with human rights is proportionate to the legitimate aim pursued.

1.79 In our view, there are a number of potentially significant defects and omissions in the safeguards envisaged. For example, whilst limits are placed on the types of property which may be seized, there is no explicit requirement that the powers of search and seizure be exercised proportionately. In addition, a warrant is not required for the search or initial

¹¹⁸ EN, para. 223.

¹¹⁹ There are seven possible scenarios in which the power may be exercised (see new section 47B).

¹²⁰ PBC, 29 January 2009, col 125.

¹²¹ EN, para. 564.

¹²² E.g. in relation to the Compensation Bill, Twentieth Report of Session 2005-06, *Legislative Scrutiny: Tenth Progress Report*, HL Paper 186-I, HC 1138.

seizure of property. We therefore wrote to the Minister to ask why further safeguards are not contained in the Bill and whether the Minister would give consideration to their inclusion.¹²³

1.80 The Minister, Vernon Coaker MP, agreed that the issue of safeguards was important,¹²⁴ noting during the PBC that “the powers are potentially invasive and intrusive and [...] the police and others must exercise restraint and caution when using them...”.¹²⁵ However, he stated in correspondence to us that there were “numerous safeguards” to protect individual rights, such as pre-conditions before the search and seizure powers could be exercised, the threshold tests for the seizure power and the requirement for prior approval unless not practicable. The Minister also pointed to the need for judicial approval of the detention of the property within 48 hours of it being seized and the right of appeal against the decision of the court. He noted that the new powers did not provide a new right to enter private premises.¹²⁶ During the PBC, the Minister also noted that if there was undue delay in proceeding, an individual could go back to court.¹²⁷ On proportionality, the Minister responded to us, as he did in the PBC:

It would not be normal practice to put into statute a specific requirement on law enforcement agencies to exercise their powers proportionately and compatibly with any Article of the ECHR. They are already required to do this by the Human Rights Act 1998. Codes of Practice will be issued which contain further details on the exercise of the powers, in order to ensure that they are exercised lawfully and proportionately.¹²⁸

1.81 The Secretary of State is required to issue a Code of Practice relating to the exercise of the new powers. The Delegated Powers Memorandum explains that “the Code will contain lengthy detailed provisions that are more suited to secondary legislation than primary legislation”.¹²⁹ Specific details of what that Code will cover are not included in the Bill or Memorandum. We therefore asked the Minister to provide details of the proposed contents of the Code of Practice, especially any safeguards which are intended to ensure compliance with human rights.¹³⁰ The Minister replied that the Code must cover the exercise of the search and seizure power by officers, the administrative power to detain property pending a court order and the continuing detention of property under a court order. It would set out “detail on how the powers should be exercised proportionately” including guidelines on how to assess the risk of dissipation, the care to be taken with low level offenders, the definition of “exempt property” and the fact that it should not be the default position that any person being arrested for an acquisitive crime should have their property seized. The Code would also provide for a periodic review by a senior officer of the continuing detention of property under a court order, to assess whether it remains appropriate to detain it. He noted that the Code needed to be published in draft and laid

¹²³ Ev 2.

¹²⁴ A view which was reiterated by the Government in the PBC (PBC, 29 January 2009, col 128).

¹²⁵ PBC, 12 February 2009, col 453.

¹²⁶ Ev 6.

¹²⁷ PBC, 29 January 2009, cols 125-6.

¹²⁸ Ev 6. See also PBC, 12 February 2009, col 453.

¹²⁹ Memorandum to the Delegated Powers and Regulatory Reform Committee, para. 22.

¹³⁰ Ev 2.

before Parliament. The order bringing it into force would be subject to the affirmative resolution procedure.¹³¹

1.82 Both Liberty and the Bar Council/Criminal Bar Association (CBA) provided evidence to us expressing their serious concerns as to the human rights compatibility of these provisions.¹³² Liberty said:

We do not see the need to have an additional power to seize property before a person has been convicted of any offence. ... These proposals necessarily involve direct or indirect findings of guilt on the part of the property holder or persons connected to the property, as there is a requirement to show that the person has benefited from conduct constituting the offence. This undermines the presumption of innocence... The Explanatory Notes to the Bill recognise this interference [with property and private and family life] but simply provided that a Code of Practice will be drafted “to cover the exercise of these powers, to ensure that they are exercised proportionately”. This is not adequate: Parliament should oversee the exercise of these powers and such broad powers should not be left to be regulated by secondary instruments.¹³³

1.83 In the Bar Council and CBA’s joint submission, a number of other significant points were raised. In particular, they questioned the necessity for the new detention power, given the existing powers once a restraint order has been made, arguing that the new power “should only be invoked where at least a real degree of necessity is demonstrated”.¹³⁴ On the specifics of how the power will operate, they expressed concern that the Magistrates’ Court rather than the Crown Court would oversee the operation of this power, and contrasted this with restraint orders which are granted by the Crown Court. They stated:

Given the degree of infringement with property rights involved in property detention simply against the possibility that a confiscation order will be made, the Bar Council/CBA considers that the appropriate level of “judicial oversight” in any case of prolonged detention (>48 hours) should be the Crown Court... We do not consider it to be satisfactory to leave it to Codes of Practice.¹³⁵

1.84 They concluded that proposed section 47M represents “a disproportionate interference with the right to peaceful enjoyment of property, without judicial scrutiny at a sufficient level” which cannot be cured by the possibility of discharging the order if proceedings for the offence are not started within “a reasonable time” as this is indeterminate.¹³⁶ In their view, the low level of court proposed to oversee the regime is fatal to its compatibility with the rights to peaceful enjoyment of possessions and to respect for private and family life (Article 1 of Protocol 1 and Article 8 ECHR respectively).¹³⁷ They consider that any Codes of Practice should set out that in any case where detention is sought, it must be shown that there is a high degree of risk and that the property

¹³¹ Ev 6.

¹³² Ev 23 and 32.

¹³³ Ev 32, para. 18.

¹³⁴ Ev 23, para. 8.

¹³⁵ Ev 23, para. 10.

¹³⁶ Ev 23, para. 11.

¹³⁷ Ev 23, para. 18.

cannot be adequately protected against the risk of dissipation, diminution or transfer by a restraint order.

1.85 We share the serious concerns which have been expressed about the effect of the proposed powers to search for and seize property before proceedings have even been commenced, considering them to constitute a disproportionate interference with the rights to respect for private and family life and to peaceful enjoyment of possessions. Whilst we do not consider that they constitute a finding of guilt, they come very close to putting in jeopardy the right in Article 6(2) to the presumption of innocence. We recommend that the Government publish the evidence which has led it to conclude that the new powers are necessary. Without this evidence, and given the authoritative views of those who practise in this area of law, we remain to be convinced that the power is necessary.

1.86 Should the Government be able to show satisfactorily that the power is needed, in view of the complexity of confiscation orders we recommend that the Bill be amended to ensure that orders may only be granted by a court of Crown Court level or above. Given the fundamental rights at stake, we do not consider that it is sufficient to deal with the proportionality of the measures in the Code of Practice alone. We recommend that the Bill be amended to set out, on its face, the matters that the Minister indicated would be included in the Code and to require those applying for an order to demonstrate that the property cannot be adequately protected against the risk of dissipation, diminution or transfer by a restraint order. We also recommend that the draft Code of Practice be published without delay, so that Parliamentarians have the opportunity to scrutinise it in conjunction with the Bill, and before the Bill completes its passage through both Houses.

Extradition

1.87 Part 6 of the Bill contains some fairly complicated provisions seeking to amend the Extradition Act 2003 regarding individuals sought to be extradited by European or other states and vice versa, relating, amongst other things, to their detention and return. Three main human rights issues arise:

- a) undertakings to return an individual to a state from which s/he has been extradited;
- b) extension of the period before which an individual under provisional arrest must be brought before a judge; and
- c) use of live links in extradition hearings.

Undertakings to return an individual to a state from which he has been extradited

1.88 Clause 71 provides that where a person sought by the UK is serving a sentence of imprisonment or in detention in another state, the Secretary of State may give an undertaking as to his return to that state. In addition, the Secretary of State may give an undertaking that someone who is extradited to the UK will be returned to the requested territory to serve any sentence of imprisonment imposed in the UK. The only

circumstances in which the Secretary of State is permitted not to return an individual (in breach of her undertaking) is where she is “not satisfied that the return is compatible with the Convention rights within the meaning of the Human Rights Act 1998”.¹³⁸ No mention is made of obligations under the Refugee Convention 1951 or other international human rights instruments (such as the International Covenant on Civil and Political Rights 1966) in the Bill or the Explanatory Notes. There is no requirement that the Secretary of State should have reasonable grounds for her opinion.

1.89 We asked the Minister to explain whether allowance would be made for changes in the situation of a requesting country (such as a deterioration in the conditions of detention) following the making of undertakings by the Secretary of State. We also requested an explanation of why breach of other international human rights instruments beyond the ECHR, including the Refugee Convention, are not specifically set out as preventing return.¹³⁹

1.90 Replying to our first question, the Minister, Vernon Coaker MP, noted that the Government took very seriously its duty to comply with human rights legislation when considering extradition requests. He confirmed that the Home Secretary must assess the human rights situation in a country prior to giving an undertaking and revisit that assessment immediately before returning someone. Therefore, the Minister concluded, any change in circumstances must be taken into account.¹⁴⁰ **We welcome the Government's clarification that the human rights situation in a country will be revisited by the Home Secretary immediately before returning someone to that country.**

1.91 During the PBC, the Minister stated:

One reason for this provision [proposed new section 153D] is the fact that I – along with the Home Office – am increasingly determined to ensure that human rights provisions are contained explicitly in legislation.¹⁴¹

1.92 On our second question, the Minister said:

The protection afforded by the ECHR encompasses the protection offered under the Refugee Convention, so return which is compatible with the ECHR would be compatible with the Refugee Convention.¹⁴²

1.93 During the PBC, the Minister amplified this statement. Whilst reiterating that he considered it to be implicit in the current drafting that return should not be incompatible with the Refugee Convention, he agreed to consider whether it was necessary to spell out the need to take into account other treaty obligations, such as the Refugee Convention.¹⁴³

1.94 We are pleased to note the Government's commitment to ensuring that its obligation not to extradite people in breach of their human rights is set out explicitly on the face of the Bill. We welcome the Minister's commitment to reconsidering whether

¹³⁸ Clause 71 inserting section 153D into Extradition Act 2003.

¹³⁹ New section 153D Extradition Act 2003, as inserted by Clause 71.

¹⁴⁰ Ev 6. A point reiterated by the Minister during the PBC, 24 February 2009, cols 516 and 518.

¹⁴¹ PBC, 24 February 2009, col 517.

¹⁴² Ev 6.

¹⁴³ PBC, 24 February 2009, cols 518-9.

new section 153D needs to refer to obligations under the Refugee Convention or other international human rights instruments, in addition to the ECHR. However, we disagree with the Government that the current drafting of clause 71 covers all situations which fall within the Refugee Convention. We therefore recommend that section 153D be amended to refer to compliance with the UK's human rights obligations more generally, including, but not limited to, the Refugee Convention, the ICCPR and the ECHR.

1.95 In their evidence to us, Liberty commented on the test to be applied by the Secretary of State when considering an undertaking to return (i.e. “the Secretary of State is *not satisfied* that the return is compatible with the Convention rights”). They argued that the Secretary of State’s discretion is “insufficient to fully protect the human rights of the extradited person”.¹⁴⁴ During the PBC, an amendment was proposed which sought to amend the test to an objective requirement that return would not be compatible with the ECHR.¹⁴⁵ The Minister, Vernon Coaker MP, considered that the amendment was unnecessary.¹⁴⁶

1.96 Whilst we note that the Secretary of State’s decision to give an undertaking would be subject to judicial review, we consider that the current formulation in clause 153D(1) will mean that her decision will be subject to a fairly low level of scrutiny on judicial review. We are concerned that the judicial oversight which is proposed will be inadequate to safeguard human rights. **We recommend that the Bill be amended to ensure that the courts, where invited on judicial review to do so, are enabled rigorously to scrutinise the Secretary of State’s decision. In our view, this requires the current subjective test to be amended to an objective test. This would afford greater protection for the human rights of the person facing extradition as it would require the court itself to consider whether return would be compatible with human rights. We propose an amendment below:**

Page 86, line 19, [Clause 71], leave out “Secretary of State is not satisfied that the return” and insert “the return is not compatible”.

Page 86, line 19, [Clause 71], after “with” insert “human rights, including”.

Page 86, line 21, at end insert “, the Refugee Convention and the International Covenant on Civil and Political Rights”.

Page 86, [Clause 71], leave out lines 22 to 27.

Extension of period before which an individual under provisional arrest must be brought before a judge

1.97 Clause 74 permits the time limits applicable in a provisional arrest case to be extended. As originally drafted, the clause provided that an individual’s production before a judge with certain documents (i.e. a copy of the full request for extradition) could be delayed by up to 48 hours if a judge decided, on the balance of probabilities, that it is not reasonable to

¹⁴⁴ BILLS 32, para. 23.

¹⁴⁵ PBC, 29 January 2009, col 127; PBC, 24 February 2009, col 512.

¹⁴⁶ PBC, 24 February 2009, col 517.

comply within the initial 48 hour period.¹⁴⁷ During the PBC, the Bill was amended following amendments tabled by the Government. The Minister, Vernon Coaker MP, explained the Government's view as to why the changes were required:

Clause 58, as drafted, sought to address these problems by allowing an application for an extension of 48 hours to be sought to both the period within which the full documents must be provided and the period in which the person must be brought before the court.

On reflection I felt that there is a better and fairer solution to these problems... The first change to note is that it is no longer open to the requesting state to apply for an extension of the 48-hour period within which the person in question must be brought before a UK court as the sole problem we are addressing here is that arising where the 48-hour period falls over a weekend or a public holiday. I felt that the better approach is simply to exclude these days from the calculation of the 48-hour period. We see no reason why the person arrested should not be brought before a UK court within the original 48-hour period where it does not fall on a weekend or a public holiday.

...

I hope that the Committee will feel that these amendments represent a careful and considered attempt to reduce the scope of the provisional arrest amendments so as to make absolutely sure that they strike the right balance between the need to safeguard the liberty of the subject while ensuring that the UK does everything possible to fight serious international crime.¹⁴⁸

1.98 The Government accepts that Article 5 ECHR (the right to liberty of the person) is engaged but suggests that it falls within one of the exhaustive permitted grounds for detention ("the lawful arrest or detention ... of a person against whom action is being taken with a view to ... extradition" in Article 5(1)(f)). It also notes that the individual will be informed of the reason for his or her detention and will be able to apply for bail.¹⁴⁹ However, the Explanatory Notes do not record the reason why the Government considers the proposed extension to be necessary, the legitimate aim which is being pursued or how the extension is proportionate to that aim.

1.99 We wrote to the Minister to ask why the Government considers the proposed extension to the time limits for provisional arrest to be necessary. We also sought information from the Government as to the legitimate aim which is being pursued and how the extension is proportionate to that aim. The Minister, Vernon Coaker MP, replied that it was sometimes difficult to obtain the necessary papers within the current 48 hour time-frame, especially if it fell during a weekend or Bank Holiday, and that this provision would allow the requesting state sufficient time to provide the full papers. He also noted that the power would be used sparingly. On the legitimate aim pursued, the Minister suggested that the proposed extension of time would "greatly reduce the risk of unwanted high risk offenders being released from custody". The Minister argued that the proposed

¹⁴⁷ Clause 58 of the Bill as published.

¹⁴⁸ PBC, 24 February 2009, cols 522-3.

¹⁴⁹ EN, para. 589.

measure was proportionate as an individual would be eligible to apply for bail and that an application for an extension would only be granted where a court was satisfied, on the balance of probabilities, that the full extradition papers could not reasonably be provided within 48 hours of arrest.¹⁵⁰ During the PBC, the Minister said:

I do not like the idea of provisional arrests. We all agree that if we are not careful, such procedures might lead to an unacceptable erosion of liberty. There is a balance to be struck between the role of the state in protecting the public and the need for citizens to be protected against the encroachment of the state.¹⁵¹

1.100 Both Justice and Liberty, in their evidence to us, expressed strong concerns as to the compatibility of the provisional arrest provisions with Article 5 ECHR.¹⁵²

1.101 We welcome the Government’s commitment to reviewing this provision. However, we note that the amended provisions may still lead to the detention of an individual for up to 48 hours during the week, or up to 96 hours if the period falls during a weekend or holiday period. This is a considerable period of time. On a number of occasions in relation to this and other Bills, we have criticised the Government for failing to provide evidence of the need for various provisions and recommended that such evidence be published to inform parliamentary scrutiny. In the case of a provision such as this, which would permit an individual to be deprived of his liberty, the absence of justification is even more significant and weighty justification is required. We do not consider that sufficient evidence of the current problem and the necessity for these provisions has been provided. We recommend that the Government publish the evidence on which it bases its assertion that the proposed extension of time is required. In the absence of such justification, we recommend that clause 74 be deleted from the Bill. We suggest such an amendment below:

Page 87, Line 30, leave out Clause 74.

Use of live links in extradition hearings

1.102 Clause 75 provides for the use of live links in certain hearings under the Extradition Act 2003. The Government accepts that the use of live links in domestic criminal proceedings potentially engages Article 6 ECHR (the right to a fair trial), but states that “Article 6 does not apply to extradition proceedings” and that no human rights issue is therefore raised.¹⁵³

1.103 We wrote to the Minister to ask why the Government considers it necessary to use live links in extradition hearings.¹⁵⁴ Replying, the Minister noted the continuing increase in the numbers of European Arrest Warrants and claimed that “the ability to hear initial and remand hearings via a live-link will remove a significant financial and administrative burden on a number of agencies and departments involved [in] the UK’s extradition system”.¹⁵⁵ The Minister suggested that this would be more efficient and mean that

¹⁵⁰ Ev 6.

¹⁵¹ PBC, 24 February 2009, col 523.

¹⁵² Ev 6, paras. 31-33; BILLS 71, para. 25.

¹⁵³ EN, para. 590.

¹⁵⁴ Ev 2.

¹⁵⁵ Ev 6.

subjects would not need to make potentially lengthy journeys for very short extradition hearings.¹⁵⁶ The Minister also noted that the subject of the extradition request would continue to attend the substantive extradition hearing and that the judge may not direct that the hearing take place via live link if he feels that the interests of justice will not be served.¹⁵⁷

1.104 The proposal to permit the use of live links in initial and remand extradition hearings raises issues under Articles 5 (right to liberty) and 6 (right to a fair trial) ECHR. Article 5 provides safeguards against arbitrary detention. Unless detention can be justified by the authorities under one of the grounds set out in Article 5(1), an individual must be released. Article 5(1)(f) permits the detention of an individual if action is being taken against him with a view to extradition. To ensure that the Article 5 safeguard is complied with, an individual must have access to a court so that he can test the legality of his detention. The European Court of Human Rights has made clear that the use of a live link is not inherently incompatible with the right to a fair trial, provided that the operation of such a link ensures that the accused is able to follow the proceedings, to be heard without technical impediments, and that effective and confidential communication with a legal adviser is provided.¹⁵⁸ Regardless of whether the Government is correct to assert that Article 6 does not apply to extradition proceedings, an individual retains due process rights under the common law which UK courts have held are no less extensive than those in Article 6 ECHR.

1.105 We are concerned at the Government's explanation of the need for these provisions, which appears to focus on administrative convenience. We accept that the requirement that a judge may not direct that a hearing take place by live link if it would be contrary to the interests of justice to do so provides a valuable safeguard for the right to liberty and the right to a fair hearing. Whilst we accept that some detainees might seek a direction from a judge for an initial hearing to be held by live link, in order to avoid lengthy journeys to court, others may not, particularly if they have had insufficient time to consult with their legal representatives before a court hearing. However, Clause 75 does not provide the possibility for an individual to object to a hearing by live link. **We are concerned that these provisions therefore risk being incompatible with Articles 5 and/or 6 ECHR and/or with the common law. We are particularly concerned, that not requiring an individual's consent to a live link hearing may lead to circumstances where the right to liberty will be engaged, but may be overlooked in the interests of administrative convenience.** The European Court of Human Rights has stressed that the operation of live links in practice will be key to their impact on the right to a fair trial. **We recommend that the Minister provide further explanation for why the Government considers there to be adequate evidence to show that live links will be operated in a manner which allows the individual to participate in the hearing and to consult and instruct his legal adviser in confidence.**

¹⁵⁶ Ev 6; PBC, 24 February 2009, col 525.

¹⁵⁷ Ev 6.

¹⁵⁸ *Sakhnovskiy v Russia*, App. No. 21272/03, Judgment of 5 February 2009, paras. 43 – 44, 54.

Miscellaneous

Listing of care workers under the Safeguarding Vulnerable Groups Act

1.106 The Bill amends the Safeguarding Vulnerable Groups Act 2006, which replaced the scheme for the listing of care workers established by the Care Standards Act 2000.

1.107 The House of Lords gave judgment on 21 January 2009, declaring section 82(4)(b) of the Care Standards Act 2000 to be incompatible with the right to a fair trial (Article 6 ECHR) and to respect for private life (Article 8 ECHR) in relation to the scheme for placing care workers employed in looking after vulnerable adults on a list of people considered unsuitable to work with such adults.¹⁵⁹ It concluded that the provisional listing of a care worker amounted to the determination of a civil right under the right to a fair trial (Article 6(1) ECHR) and that the scheme breached Article 6(1) as the process did not begin fairly by offering the care worker an opportunity to answer the allegations made against her before imposing upon her possibly irreparable damage to her employment or prospects. The Secretary of State's discretion to offer some care workers the opportunity to make representations, and not others, did not, in the House of Lords' view, cure the unfairness. The House of Lords also found a breach of the right to respect for private life (Article 8 ECHR): it concluded that given the possible effect on private life and the stigma attached to provisional listing, a fair system needed to be devised to prevent possible Article 8 breaches. In this case, the low threshold for provisional listing added to the risk of arbitrary and unjustified interferences and contributed to the overall unfairness of the scheme in breach of the right to respect for private life. The House of Lords made clear that it had not considered whether or not the new scheme under the Safeguarding Vulnerable Groups Act 2006 would be compatible with human rights.¹⁶⁰

1.108 We expressed concerns about the human rights compatibility of the barring provisions in our legislative scrutiny Report on the then Safeguarding Vulnerable Groups Bill.¹⁶¹ We return to consider these provisions in the light of the House of Lords judgment in *Wright*, continuing our practice of scrutinising the Government's implementation of adverse human rights judgments.

1.109 We wrote to the Minister to ask whether, in the light of the House of Lords judgment in *Wright*, the 2006 Act is compatible with human rights and whether it meets the problems identified by the House of Lords in relation to Articles 6 and 8 ECHR.¹⁶² In reply, the Minister concluded that the Government remained satisfied that the 2006 Act was compatible with human rights, as the new scheme does not involve any provisional listing and the Independent Safeguarding Authority (ISA) must invite representations before placing someone on the list. However, the Minister also noted that individuals would not be able to make representations where it was considered that they posed an immediate risk of harm.¹⁶³

¹⁵⁹ *R (Wright) v Secretary of State for Health* [2009] UKHL 3.

¹⁶⁰ *Ibid*, per Baroness Hale, para. 39.

¹⁶¹ Twenty-fifth Report of Session 2005-06, *Legislative Scrutiny: Thirteenth Progress Report*, HL 241/HC 1577, para. 1.38 onwards.

¹⁶² Ev 2.

¹⁶³ Ev 27.

1.110 In our view, aspects of the new scheme remain troubling from a human rights perspective. The fact that the individual will not be invited to make representations where it is deemed that she poses an immediate risk of harm before she is placed on the barred list appears, on its face, to be analogous to the Secretary of State's discretion to offer some care workers, but not others, the opportunity to make representations, which was part of the House of Lords' reasoning in *Wright*. Whilst the Minister is correct to note that the House of Lords acknowledged that an *ex parte* procedure could be justified where the need to protect vulnerable people was urgent, it continued that "one would then expect there to be a swift method of hearing both sides of the story and doing so before irreparable damage was done".¹⁶⁴ It is unclear how quickly a hearing involving the barred person, at which he could make representations, would take place under the new scheme. **We recommend that the Government consider whether the procedure needs to be amended to give effect to the judgment in *Wright* by ensuring that an individual who is placed on the barred list without the possibility of making representations is able to make representations at a full hearing as a matter of urgency and, as the House of Lords held, "before irreparable damage [is] done".**

Retention, use and destruction of biometric data

1.111 The Bill was amended in PBC to include new clauses, proposed by the Government, dealing with the retention of DNA samples, profiles and fingerprints.¹⁶⁵ The clauses enable the Secretary of State to make regulations on the retention, use and destruction of biometric data such as fingerprints and DNA collected as part of the investigation of a criminal offence. Such regulations will be subject to the affirmative resolution procedure.¹⁶⁶ In his letter to Members of the PBC, the Minister confirmed that the Government was not in a position to produce detailed proposals and that it would be consulting.¹⁶⁷

1.112 The Government intends the clauses and subsequent secondary legislation to implement the Grand Chamber decision of the European Court of Human Rights' in *Marper v United Kingdom*.¹⁶⁸ In *Marper*, the Court concluded that the authorities' retention of fingerprint and DNA samples following discontinuation of proceedings or acquittal violated Article 8 ECHR (the right to respect for private life). In a strongly worded unanimous judgment, the Court held:

... that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate

¹⁶⁴ *R (Wright) v Secretary of State for Health* [2009] UKHL 3, para. 29.

¹⁶⁵ Clauses 95-97.

¹⁶⁶ New Section 64C of the Police and Criminal Evidence Act 1984, as amended by Clause 95.

¹⁶⁷ In PBC, the Minister confirmed that a consultation paper would be published before the summer (PBC, 26 February 2009, col 611).

¹⁶⁸ Application Nos. 30562/04 and 30566/04, 4 December 2008.

interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.¹⁶⁹

1.113 During the PBC, the Minister, Alan Campbell MP, expressed the Government's disappointment at the judgment of the European Court of Human Rights, stating:

We continue to believe that DNA and fingerprints play an invaluable role in fighting crime, and will now carefully consider how best to give effect to the Court's findings.¹⁷⁰

1.114 Members of both opposition parties expressed serious concerns at the new clauses. In particular, Members were concerned at the late publication of the clauses and the fact that the substance of the changes would be in secondary not primary legislation (and so there would be a much reduced opportunity for parliamentary debate and scrutiny of the provisions).¹⁷¹

1.115 Setting out the Government's position, the Minister said:

Our proposal is the best way, within the time scale that the judgment gives us, to get the balance right between the rights of the individual, which the court case highlighted, and the rights of the rest of the community to be safe and be kept safe.¹⁷²

1.116 We wrote to the Home Secretary shortly after the European Court of Human Rights judgment, requesting the Government's proposals on implementation by 4 March 2009.¹⁷³ On 5 January 2009, the Home Secretary replied as follows:

Technological developments and, in particular, the use of DNA in investigations has been one of the breakthroughs for modern policing in which we had led the world. It has contributed to convictions for serious crimes and also to the exoneration of the innocent. However, I am conscious that we need to ensure that our policy enjoys public confidence. We need also, of course, to implement the judgment of the ECtHR. As you may be aware, I announced on 16 December at the Intellect trade association that we will consult via White Paper on Forensics next year on bringing greater flexibility and fairness into the system, using a differentiated approach to the retention of samples, DNA profiles and fingerprints.¹⁷⁴

1.117 We also received a submission from Dr C.N.M. Pounder focussing on these new clauses. In summary, Dr Pounder concluded that the new clauses would significantly reduce the protection afforded by the Data Protection Act 1998, noted that the clauses had been introduced in advance of a public consultation and suggested that the fact that secondary legislation would be used would lead to limited Parliamentary scrutiny.¹⁷⁵

1.118 We are concerned at the Government's approach to implementation of this important judgment. Whilst the Government is right to consider that the public may

¹⁶⁹ Ibid, para. 125.

¹⁷⁰ PBC, 26 February 2009, col 610.

¹⁷¹ PBC, 26 February 2009, cols 617 and 619.

¹⁷² PBC, 26 February 2009, col 631.

¹⁷³ Ev 1.

¹⁷⁴ Ev 2.

¹⁷⁵ Ev 40.

wish to be consulted on proposals for reform, we are alarmed that the substance of these proposals will not be contained in primary legislation, subject to the usual scrutiny by both Houses. We strongly urge the Government to think again and to ensure that there is sufficient time for scrutiny of measures which, as the European Court has held, substantially interfere with the right to respect for private life. In addition, given the Court's findings on the harmful effects on unconvicted minors of retaining their data,¹⁷⁶ we recommend that the Government considers a swifter solution for dealing with the position of those under 18 years of age.

Page 116, Line 16, leave out Clause 95.

Page 117, Line 32, leave out Clause 96.

Page 118, Line 3, leave out Clause 97.

1.119 We are also aware of a number of cases raising similar issues of inappropriate retention of personal data by the police, in which the Information Commissioner has challenged the police in relation to the failure to remove information from the Police National Computer, including reprimands of juveniles which ought to have been removed. The Information Tribunal has upheld the Information Commissioner's challenge in these cases, but the police have appealed the decision to the Court of Appeal. **We may return to this issue in the light of the Court of Appeal's judgment.**

Recommendations arising from our inquiry into policing protest

1.120 In our recent Report on policing and protest, we made a number of recommendations of legislative changes which would, in our view, facilitate a more human rights compliant approach to policing protests.¹⁷⁷ This Bill provides an opportunity to implement some of those recommendations.

Designated areas

1.121 During our inquiry, we received evidence from witnesses who expressed concerns about the blanket ban on protests in designated areas under the Serious Organised Crime and Police Act 2005 (SOCPA). The Act makes it a criminal offence to trespass on certain protected sites. These sites include nuclear facilities and certain other facilities which are designated by the Home Secretary if "it appears to the Secretary of State that it is appropriate to designate the site in the interests of national security".¹⁷⁸

1.122 When our predecessor Committee scrutinised the then Serious Organised Crime and Police Bill, it expressed doubts about whether the provision would, in practice, be operated in a manner compatible with the ECHR or that appropriate safeguards were in place to ensure compatibility, short of challenge before the courts.¹⁷⁹ Many of the concerns which our predecessor Committee expressed during the passage of the Bill have, in our

¹⁷⁶ *Marper v United Kingdom*, Application Nos. 30562/04 and 30566/04, 4 December 2008, para. 124.

¹⁷⁷ Seventh Report of Session 2008-09, *Demonstrating respect for rights? A human rights approach to policing protest*, HL Paper 47-I, HC 320-I.

¹⁷⁸ Section 128(3)(c) Serious Organised Crime and Police Act 2005.

¹⁷⁹ Fourth Report of Session 2004-05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224 and Eighth Report of Session 2004-05, *Scrutiny: Fourth Progress Report*, HL Paper 60, HC 388, especially paras. 2.68-2.69.

view, been borne out in practice. Some witnesses to our inquiry advocated repeal of section 128, suggesting that the existing law was sufficient. Others advocated the extension of section 128 to cover other facilities. Justice told us that they had concerns that the Act did not contain a safeguard which would permit the Secretary of State only to designate a site where it was necessary to do so. In our Report, we recommended that section 128(3)(c) be amended to permit the Home Secretary to designate sites on the ground of national security only where it is necessary to do so. **We consider that this Bill provides an opportunity to address this concern and suggest an amendment below:**

Offence of trespassing: designation of sites

To move the following clause:

“(1) Section 128 of the Serious Organised Crime and Police Act 2005 (c. 15) is amended as follows.

(2) In subsection (3)(c), after “appropriate” the words “and necessary” are inserted.”.

Protest around Parliament

1.123 The Government announced in July 2007 that it would review the current law on protest around Parliament and proposed in the Draft Constitutional Renewal Bill to repeal sections 132 to 138 of SOCPA.¹⁸⁰ It invited Parliament to consider whether specific provisions, over and above those contained in the Public Order Act 1986, were required to manage protest around Parliament.¹⁸¹

1.124 During our inquiry, we received a number of submissions which focused on protest around Parliament.¹⁸² The evidence we received was overwhelmingly of the view that the SOCPA provisions relating to protest around Parliament should be repealed. This accorded with the responses to the Government’s own consultation exercise, 95 per cent of which favoured repeal.¹⁸³ In our Report, we noted that Articles 10 (freedom of expression) and 11 (right to peaceful assembly) ECHR and well-established case law require that any restrictions on the right to protest and to peaceful assembly must be both necessary and proportionate to a legitimate aim. This is a high threshold which does not permit restrictions which are merely convenient or helpful. If measures already exist (such as under the Public Order Act) which could adequately deal with protest around Parliament, this would significantly reduce the likelihood that additional restrictions would be considered to be both necessary and proportionate. We noted that measures for dealing with protest around Parliament must comply with the ECHR, including the need for the law to be predictable and certain so as not to be arbitrary. We concluded:

In our view, the maintenance of access to Parliament is a persuasive reason to restrict the rights to protest and to freedom of assembly within the areas directly around the Palace of Westminster ... We share the view expressed by a range of witnesses that the Serious Organised Crime and Police Act 2005 provisions should be repealed,

¹⁸⁰ *The Governance of Britain: Constitutional Renewal*, March 2008, Cm 7342-1, clause 1.

¹⁸¹ *Ibid*, para. 29.

¹⁸² *Demonstrating Respect for Rights*, Op Cit, Chapter 5.

¹⁸³ *Governance of Britain: Managing Protest Around Parliament*, October 2007, Cm 7235, para. 12.

principally because they have proved too heavy-handed in practice, are difficult to police, and lack widespread acceptance by the public.¹⁸⁴

1.125 We also noted that access to Parliament for Members has long been the central concern of parliamentarians and the police in the management of protest around Parliament. We agreed that access to Parliament must be maintained at all times, by means of the entrances specified by the parliamentary authorities, however, we were not persuaded that this can and should be achieved by banning protest on specific areas of the road and pavement. We recommended that the parliamentary authorities work with the police to develop clear conditions which can be imposed on protestors under the Public Order Act, amended if necessary to achieve this aim, to ensure that access is maintained at all times. Conditions might include requiring protestors to keep clear of the vehicular access points, to permit access to Parliament and to ensure public safety around the gates. We considered that protest around Parliament should be governed by the Public Order Act, in particular the police power to impose conditions on protests under section 14. We suggested that there is a case for amending section 14 to deal with the specific circumstances of Parliament and enable conditions to be placed on static protests where they seriously impede, or it is likely that they will seriously impede, access to Parliament.

1.126 We concluded:

It is now four years since Parliament had the opportunity to debate the law on protest around Parliament, since which time the provisions passed in 2005 have been widely discredited. Debate on this issue now would ensure that the Government could hear and reflect on the views of both Houses while drawing up its own proposals and would encourage the Government to conclude its own consideration of the matter without undue delay.¹⁸⁵

1.127 We intend to table amendments to this Bill in order to prompt debate in both Houses. The amendments we suggest are essentially probing amendments, based on our recommendations, rather than a fully worked out scheme for tackling the problems outlined above. **We suggest amendments below which seek to give effect to our recommendations:**

Protest around Parliament: repeal of provisions in the Serious Organised Crime and Police Act 2005

To move the following clause:

“In the Serious Organised Crime and Police Act 2005 (c. 15), sections 132 to 138 are repealed.”

Imposing conditions on public assemblies: Parliament

To move the following clause:

“(1) The Public Order Act 1986 (c. 64) is amended as follows.

¹⁸⁴ *Demonstrating Respect for Rights*, Op Cit, paras. 126-127.

¹⁸⁵ *Ibid*, para. 138.

(2) At the end of section 14(1)(a) there is inserted “, if it takes place in the designated area or areas, it is a security risk, or”.

(3) After section 14(1)(b) there is inserted the following paragraph:

“(c) it is taking place or will take place in the designated area or areas and will seriously impede, or be likely to seriously impede, access to the Houses of Parliament,”.

(4) After section 14(2) there is inserted the following subsection:

“(2A) In subsection (1) “the designated area or areas” means the area or areas specified as such by the Secretary of State:

(a) by description, by reference to a map, or in any other way; and

(b) which lie within 300 metres of the perimeter of the Palace of Westminster or Portcullis House”.

Conclusions and recommendations

1. We welcome the full and prompt responses to our letters provided by the Minister. (Paragraph 1.2)
2. We welcome the engagement of the public and interested organisations in our legislative scrutiny work. (Paragraph 1.3)
3. We welcome the inclusion of detailed Explanatory Notes on the implications of the Bill for Convention rights and we commend to other Departments the approach taken in relation to this Bill. (Paragraph 1.4)

Inspection regime and human rights

4. We recommend that the Bill be amended to strengthen the human rights monitoring machinery by requiring the Inspectorate of Constabulary to inspect and report on a police authority's performance of its new duties in respect of human rights and equality and diversity. (Paragraph 1.11)

Appointment of senior officers

5. Given the recent controversy about the lack of diversity amongst the senior ranks of UK police forces, we welcome the proposal to establish a panel to provide advice about ways to increase the pool of potential candidates as appointment as a senior officer as a potentially human rights enhancing measure. However, we recommend that the Bill be amended to require the Senior Appointments Panel, in discharging its functions under subsection (2)(a), to have regard to Article 25 ICCPR. This is consistent with other statutory provisions which require certain bodies to have regard to unincorporated human rights treaties. (Paragraph 1.14)

Sexual offences and sex establishments

6. We are disappointed that our previous recommendations on prostitution were not followed when the current Bill was drafted. (Paragraph 1.18)
7. We welcome any initiative aimed at protecting the rights of those who are trafficked for the purposes of sexual exploitation, or who are otherwise engaged in sex work without their consent. As we and others have said, measures aimed at preventing prostitution, rehabilitating victims and prosecuting those who control prostitution, especially if coupled with initiatives to provide alternatives to prostitution for those engaged in it, have the potential to enhance the human rights of a very vulnerable group in society. However, we question whether the precise methods chosen by the Government meet its positive human rights obligations and we are concerned that they run the real risk of making those engaged in prostitution even more vulnerable. (Paragraph 1.20)

Strict liability offence

8. We are disappointed that the Government has failed to provide the evidence which, in its view, demonstrates the necessity for the new strict liability offence. As we have said on a number of previous occasions, legislation should be firmly based on evidence. We consider this to be particularly important when new criminal offences are proposed, to show why the existing criminal law is inadequate to deal with the targeted conduct and how the proposed new offence tackles the behaviour in a proportionate way. In our view, it is even more imperative when the proposed new offence is one of strict liability. We recommend that the evidence be published without further delay so that Parliament can be properly informed when debating the need for this new strict liability offence. (Paragraph 1.28)
9. We welcome the Government's agreement to consider the possibility of a free hotline to report instances of trafficked women as we recommended in our *Human Trafficking* Report more than two years ago, although we question whether it would be of any use if the clients who called the number would inevitably be admitting a criminal offence. (Paragraph 1.31)
10. We conclude that the fact that the offence is one of strict liability will make it difficult for an individual to know how to regulate his conduct given that his knowledge is not an element of the offence. We have concerns about the breadth of the new offence and its potential impact beyond the group that the Government seeks to target. In our view, the proposed offence has the potential to put women into more exploitative or unsafe situations, may not address the problem which the offence aims to target (namely exploitative prostitution) and may discourage reporting of such prostitution. (Paragraph 1.35)
11. We note the Government's statement, in its response to our Report, that prosecutions for rape would only proceed where an individual did not reasonably believe that a woman had consented to sexual intercourse. We therefore suggest that the proposed offence be amended to ensure that the individual was aware or ought to have been aware that the prostitute was controlled for gain. (Paragraph 1.36)
12. The absence of sufficient clarity about the circumstances which would be caught by this offence makes it difficult for an individual to know how to regulate his conduct so as to avoid criminality and, as such, the offence in its current form is overbroad and lacks certainty. (Paragraph 1.39)

Rehabilitation orders

13. We understand that the term "reasonable excuse" is used in a number of other legislative contexts. However, we are concerned that whether or not an individual is brought back to court is solely dependent on the subjective opinion of her supervisor as to whether or not the individual has a reasonable excuse for failing to comply with the order. We were pleased that the Government, in correspondence, suggested that the aim of the order was not to subject vulnerable people to undue criminalisation, but were concerned by the Minister's statement in the PBC that prostitutes might need to be "coerced" out of prostitution. We recommend that the Government

publish guidance for supervisors and the courts on examples of circumstances which it considers would constitute reasonable excuses for failing to comply with a rehabilitation order and the factors that the courts should take into account when considering an individual who has been returned to the court. (Paragraph 1.44)

14. We are perplexed by the Government's approach to the detention provision. We cannot understand how having an open-ended period within which a detained individual must be brought before a court is a safeguard. In our view, the new provision is even more troubling than the 2008 provision. We repeat our concerns that these measures may in fact lead to the detention of women for substantial periods of time for not attending a meeting. Reaching this conclusion, we have in mind the fact that those who may be least able to comply with rehabilitation orders and therefore be detained before being brought in front of a court, are likely to be the most vulnerable. We recommend that, in line with the current law on arrest for breach of bail conditions (section 7 Bail Act 1976), the Bill be amended to provide that an individual must be brought before a court as soon as practicable and in any event within 24 hours after her arrest. (Paragraph 1.47)

Premises closure orders

15. Whilst the policy intention is to protect trafficked women who have been forced into prostitution, which we welcome, we are concerned that a premises closure order will have much wider application and effect. (Paragraph 1.49)
16. Whilst these [safeguards] are all important aspects of the framework of the proposed new orders, we do not consider that they go far enough to safeguard the rights of those who may be affected by closure notices and orders. We note that the Bill does not make clear that closure orders should only be made as a last resort. This is significant as, when designing policy, the state is required, as part of the proportionality exercise, to take the least restrictive measure to achieve its aim. (Paragraph 1.51)
17. We are concerned that 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 so, if they could find alternative accommodation) or to consider all those affected by an order. We recommend that the Bill be amended to explicitly require the authorising officer and the court, when considering the making of an order, to take these issues into account. (Paragraph 1.52)
18. Given the fundamental rights at stake and the effects that issuing a closure notice will have on individual rights before the matter is brought before a court, we share the concerns expressed in relation to the proposal for the Secretary of State to amend, by order, the power to authorise a closure notice to persons other than members of the police service. We recommend that new clause 136Q be deleted from the Bill. (Paragraph 1.53)
19. Even if guidance were sufficient to allay our concerns about how these provisions are applied by an authorising officer, it would not, in our view, assist a court in determining an application for an order, and therefore our concerns remain valid.

We therefore recommend that the Bill be amended to require the court to be satisfied that the making of an order is necessary as a last resort and that other measures have been taken and failed or are not appropriate. In addition, we recommend that the Bill be amended to require the court to consider the effect of the making of an order on the human rights of those directly affected as well as those of interested parties in order that these powers are used only against exploitative prostitution involving trafficking, violence, threat, intimidation, coercion or drug addiction, we recommend that as far as the prostitution offences are concerned (but not in respect of child prostitution or child pornography) that the power is used in narrower circumstances to reflect these vulnerabilities. (Paragraph 1.54)

Extensions to preventative orders under the Sexual Offences Act

20. Whilst we appreciate the Government's desire to ensure that people are protected from individuals who pose a risk of sexual harm, we question whether an open-ended disapplication of the time limit is a proportionate response to the problem which the Government has identified. We do not consider that the Government has provided sufficient reasons as to why the existing regime causes or has the potential to cause problems in practice. We recommend that it publishes the information (including examples of where the problem has occurred in practice) on which that decision was based. We are not opposed in principle to an extension to the time limit, if it can be shown to be necessary on the basis of the evidence. If the published evidence demonstrates the need for an extension to the time limit, we recommend that there be a maximum time limit within which the alleged conduct must have taken place. We do not believe that this should present an insurmountable burden in relation to offenders who have been in prison abroad and return to the UK, as evidence of any continuing risk could be obtained from recognised professionals in transferring states (such as probation officers or medical professionals). In the absence of such information, we do not understand on what basis the police would be able to conclude that an individual posed a continuing risk requiring steps to be taken to protect the public. (Paragraph 1.57)
21. We note the Government's reliance on section 6 of the Human Rights Act as a safeguard. Although we agree with the Minister that section 6 requires a court to act compatibly with human rights when deciding whether or not to grant a foreign travel order, this does not absolve the Government from responsibility. Whilst the court must apply legislation in a manner that is compatible with human rights, it is for the Government to show why legislation is necessary and ensure that it is drafted in sufficiently precise and clear terms and with sufficient safeguards to ensure that it will in practice be exercised in ways that are proportionate to the aim sought to be achieved. This is a recurring generic issue in our scrutiny work and one which we again draw to the Government's attention. (Paragraph 1.60)
22. On foreign travel orders specifically, we note that a significant extension to interferences with individual freedom of movement and private and family life is being justified by administrative inconvenience to police officers alone. In view of the lack of published evidence to date, we recommend that the Government reconsider whether a period of five years is necessary. In addition, we urge the

Government to publish, without delay, the evidence on which its opinion that there is a need for an extension is based. We also recommend that the Government commit to reviewing the operation of this provision within one year of enactment and to publishing the results of that review and its response to it. Such a review should take into account the human rights concerns raised above. (Paragraph 1.61)

Children involved in prostitution

23. We are pleased to note that the Minister agreed that a child prostitute is a victim not a criminal and that the issue should be addressed “entirely from the perspective of the child and the safeguarding needs of that child”. We are very disappointed that the Minister with responsibility for the UN Convention on the Rights of the Child was unable to explain adequately how the Government proposes to address the UN Committee’s recommendation to decriminalise children involved in prostitution. (Paragraph 1.65)
24. We are therefore unconvinced by the Government’s explanation of the continuing need for the criminalisation of children involved in prostitution, which is in direct opposition to the conclusions of the UN Committee on the Rights of the Child. In particular, we are not persuaded by the assertion that the criminal justice system may be needed to enable children to access support. The provision of revised guidance is insufficient to address our central point of concern. We recommend that the Government reconsider its opposition to decriminalising children involved in prostitution and suggest an amendment to the Bill. (Paragraph 1.66)

Directions to individuals to leave a locality

25. We note the UN Committee on the Rights of the Child’s recent observations that there is a “general climate of intolerance and negative public attitudes towards children” in the UK. We are particularly concerned by the proposed application of section 27(1) of the Violent Crime Reduction Act 2006 to very young people and the potential risks to their safety this could create. This provision appears to target children as potential offenders rather than as children with welfare needs. We recommend that clause 30 be deleted from the Bill. Alternatively, we recommend that section 27 of the Violent Crime Reduction Act 2006 be amended to require an officer considering making a direction against a child who is under 16 years of age to consider the effect on the child’s welfare and safety before making the direction. This should be strengthened in the guidance issued in relation to this section. (Paragraph 1.73)
26. In addition, as we concluded when we scrutinised section 27 of the then Violent Crime Reduction Bill, we consider that the use of the power as currently drafted may not be confined to the prevention of disorder or crime. In our view, as previously expressed, section 27 contains insufficient safeguards to guard against arbitrariness and disproportionality. We therefore recommend that the Bill provides an opportunity to amend section 27 so as to require that a police officer be satisfied that the person has already engaged in criminal or disorderly conduct while under the influence of alcohol, to prevent the immediate renewal of a direction which has

expired, and to require the authorisation of a more senior police officer. (Paragraph 1.74)

Proceeds of crime

27. We share the serious concerns which have been expressed about the effect of the proposed powers to search for and seize property before proceedings have even been commenced, considering them to constitute a disproportionate interference with the rights to respect for private and family life and to peaceful enjoyment of possessions. Whilst we do not consider that they constitute a finding of guilt, they come very close to putting in jeopardy the right in Article 6(2) to the presumption of innocence. We recommend that the Government publish the evidence which has led it to conclude that the new powers are necessary. Without this evidence, and given the authoritative views of those who practise in this area of law, we remain to be convinced that the power is necessary. (Paragraph 1.85)
28. Should the Government be able to show satisfactorily that the power is needed, in view of the complexity of confiscation orders we recommend that the Bill be amended to ensure that orders may only be granted by a court of Crown Court level or above. Given the fundamental rights at stake, we do not consider that it is sufficient to deal with the proportionality of the measures in the Code of Practice alone. We recommend that the Bill be amended to set out, on its face, the matters that the Minister indicated would be included in the Code and to require those applying for an order to demonstrate that the property cannot be adequately protected against the risk of dissipation, diminution or transfer by a restraint order. We also recommend that the draft Code of Practice be published without delay, so that Parliamentarians have the opportunity to scrutinise it in conjunction with the Bill, and before the Bill completes its passage through both Houses. (Paragraph 1.86)

Undertakings to return as individual to a state from which he has been extradited

29. We welcome the Government's clarification that the human rights situation in a country will be revisited by the Home Secretary immediately before returning someone to that country. (Paragraph 1.90)
30. We are pleased to note the Government's commitment to ensuring that its obligation not to extradite people in breach of their human rights is set out explicitly on the face of the Bill. We welcome the Minister's commitment to reconsidering whether new section 153D needs to refer to obligations under the Refugee Convention or other international human rights instruments, in addition to the ECHR. However, we disagree with the Government that the current drafting of clause 71 covers all situations which fall within the Refugee Convention. We therefore recommend that section 153D be amended to refer to compliance with the UK's human rights obligations more generally, including, but not limited to, the Refugee Convention, the ICCPR and the ECHR. (Paragraph 1.94)
31. We recommend that the Bill be amended to ensure that the courts, where invited on judicial review to do so, are enabled rigorously to scrutinise the Secretary of State's

decision. In our view, this requires the current subjective test to be amended to an objective test. This would afford greater protection for the human rights of the person facing extradition as it would require the court itself to consider whether return would be compatible with human rights. (Paragraph 1.96)

Extension of period before which an individual under provisional arrest must be brought before a judge

32. We welcome the Government’s commitment to reviewing this provision. However, we note that the amended provisions may still lead to the detention of an individual for up to 48 hours during the week, or up to 96 hours if the period falls during a weekend or holiday period. This is a considerable period of time. On a number of occasions in relation to this and other Bills, we have criticised the Government for failing to provide evidence of the need for various provisions and recommended that such evidence be published to inform parliamentary scrutiny. In the case of a provision such as this, which would permit an individual to be deprived of his liberty, the absence of justification is even more significant and weighty justification is required. We do not consider that sufficient evidence of the current problem and the necessity for these provisions has been provided. We recommend that the Government publish the evidence on which it bases its assertion that the proposed extension of time is required. In the absence of such justification, we recommend that clause 74 be deleted from the Bill. (Paragraph 1.101)

Use of live links in extradition hearings

33. We are concerned that these provisions therefore risk being incompatible with Articles 5 and/or 6 ECHR and/or with the common law. We are particularly concerned, that not requiring an individual’s consent to a live link hearing may lead to circumstances where the right to liberty will be engaged, but may be overlooked in the interests of administrative convenience. We recommend that the Minister provide further explanation for why the Government considers there to be adequate evidence to show that live links will be operated in a manner which allows the individual to participate in the hearing and to consult and instruct his legal adviser in confidence. (Paragraph 1.105)

Listing of care workers under the Safeguarding Vulnerable Groups Act

34. We recommend that the Government consider whether the procedure needs to be amended to give effect to the judgment in *Wright* by ensuring that an individual who is placed on the barred list without the possibility of making representations is able to make representations at a full hearing as a matter of urgency and, as the House of Lords held, “before irreparable damage [is] done”. (Paragraph 1.110)

Retention, use and destruction of biometric data

35. We are concerned at the Government’s approach to implementation of this important judgment. Whilst the Government is right to consider that the public may wish to be consulted on proposals for reform, we are alarmed that the substance

of these proposals will not be contained in primary legislation, subject to the usual scrutiny by both Houses. We strongly urge the Government to think again and to ensure that there is sufficient time for scrutiny of measures which, as the European Court has held, substantially interfere with the right to respect for private life. In addition, given the Court's findings on the harmful effects on unconvicted minors of retaining their data, we recommend that the Government considers a swifter solution for dealing with the position of those under 18 years of age. (Paragraph 1.118)

Annex: Proposed Committee Amendments

Inspection regime and human rights

Human rights framework for Inspectorate

To move the following clause –

After section 54(2A) of the Police Act 1996 (c. 16) (inspection and report powers of inspectors of constabulary) there is inserted:

“(2AA) The Inspectors of Constabulary shall inspect and report to the Secretary of State on a police authority’s performance of its duties to monitor the performance of its police force in complying with the duties imposed by the Human Rights Act 1998 and to promote equality and diversity within its police force and within the authority.”

Appointment of senior officers

Page 3, line 12, clause 2, insert -

“(4A) In discharging its functions under subsection (2)(a) the panel must have regard to Article 25 of the International Covenant on Civil and Political Rights (right of equal access to public service).”

Strict liability offence

Page 15, [Clause 13] leave out lines 33 to 37 and insert –

(1) A person (A) commits an offence if -

- (a) A makes or promises payment for the sexual services of a prostitute (B), and
- (b) any of B's activities relating to the provision of those services are intentionally controlled for gain by a third person (C), and
- (c) A is aware, or ought to be aware, that B's activities are controlled for gain."

(1A) Whether A ought to be aware that B's activities are controlled for gain is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B is controlled for gain.

(2) It is irrelevant where in the world the sexual services are to be provided and whether those services are provided.

Page 16, [Clause 14] leave out lines 14-18 and insert –

(1) A person (A) commits an offence if -

- (a) A makes or promises payment for the sexual services of a prostitute (B), and

(b) any of B's activities relating to the provision of those services are intentionally controlled for gain by a third person (C), and

(c) A is aware, or ought to be aware, that B's activities are controlled for gain."

(1A) Whether A ought to be aware that B's activities are controlled for gain is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B is controlled for gain.

(2) It is irrelevant where in the world the sexual services are to be provided and whether those services are provided.

Rehabilitation orders

Page 134, line 2, [Schedule 1] after "practicable" insert "and in any event within 24 hours after the offender's arrest."

Premises closure orders

Page 138, line 23, [Schedule 2], at end insert: ", and

(c) that any persons identified under paragraph (b) have been consulted."

Page 138, line 27, [Schedule 2], at end insert:

"(8A) In authorising the issue of a closure notice, the authorising officer must have regard to the views of any persons consulted under subsection (7)(c)."

Page 147, [Schedule 2] leave out lines 13 to 20.

"Page 140, line 17, [Schedule 2], at end insert ", and that no other measures will prevent the premises from being used for such activities".

Page 140, line 21, [Schedule 2], at end insert:

"(10A) In making a closure order, the court must consider the effect of making the order on the human rights of any person who owns or resides in the premises, and anyone else likely to be affected by the order.

(10B) In this section, "human rights" mean the Convention rights set out in the Schedule to the Human Rights Act 1998 (c. 42)."

Children involved in prostitution

Page 16, line 28, clause 15 after "person" insert "aged 18 and over."

Directions to individuals to leave locality

Page 25, Line 30, leave out Clause 30.

Page 25, Line 33, [Clause 30] at end insert –

(2) In the Violent Crime Reduction Act 2006, after subsection (2) there is inserted:

“(2A) In making a direction under this section to an individual aged under 16, a constable in uniform must consider the effect of making the direction on the individual’s welfare and safety.”

Undertakings to return an individual to a state from which he has been extradited

Page 86, line 19, [Clause 71], leave out “Secretary of State is not satisfied that the return” and insert “the return is not compatible”.

Page 86, line 19, [Clause 71], after “with” insert “human rights, including”.

Page 86, line 21, at end insert “, the Refugee Convention and the International Covenant on Civil and Political Rights”.

Page 86, [Clause 71], leave out lines 22 to 27.

Extension of period before which an individual under provisional arrest must be brought before a judge

Page 87, line 30, leave out Clause 74.

Retention, use and destruction of biometric data

Page 116, Line 16, leave out Clause 95.

Page 117, Line 32, leave out Clause 96.

Page 118, Line 3, leave out Clause 97.

Recommendations arising from our inquiry into policing and protest

Offence of trespassing: designation of sites

To move the following clause:

“(1) Section 128 of the Serious Organised Crime and Police Act 2005 (c. 15) is amended as follows.

(2) In subsection (3)(c), after “appropriate” the words “and necessary” are inserted.”.

Protest around Parliament: repeal of provisions in the Serious Organised Crime and Police Act 2005

To move the following clause:

“In the Serious Organised Crime and Police Act 2005 (c. 15), sections 132 to 138 are repealed.”.

Imposing conditions on public assemblies: Parliament

To move the following clause:

“(1) The Public Order Act 1986 (c. 64) is amended as follows.

(2) At the end of section 14(1)(a) there is inserted “, if it takes place in the designated area or areas, it is a security risk, or”.

(3) After section 14(1)(b) there is inserted the following paragraph:

“(c) it is taking place or will take place in the designated area or areas and will seriously impede, or be likely to seriously impede, access to the Houses of Parliament,”.

(4) After section 14(2) there is inserted the following subsection:

“(2A) In subsection (1) “the designated area or areas” means the area or areas specified as such by the Secretary of State:

(a) by description, by reference to a map, or in any other way; and

(b) which lie within 300 metres of the perimeter of the Palace of Westminster or Portcullis House”.

Formal Minutes

Tuesday 31 March 2009

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Dr Evan Harris MP
Lord Lester of Herne Hill	Mr Edward Timpson MP
Lord Morris of Handsworth	
The Earl of Onslow	
Baroness Prashar	

Draft Report (*Legislative Scrutiny: Policing and Crime 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 1.127 read and agreed to.

Annex read and agreed to.

Summary read and agreed to.

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

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

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 27 January, 3 and 24 February, and 3 and 10 March.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 21 April at 1.30pm.]

List of written evidence

1	Letter from the Chair of the Committee to Rt Hon Jaqui Smith MP, Home Secretary, dated 9 December 2008	Ev 1
2	Letter from Rt Hon Jaqui Smith MP to the Chair of the Committee dated 5 January 2009	Ev 2
3	Letter from the Chair of the Committee to Vernon Coaker MP, Minister of State, Home Office, dated 22 January 2009	Ev 2
4	Letter from Vernon Coaker MP to the Chair of the Committee, dated 9 February 2009	Ev 6
5	Letter from the Chair of the Committee to Vernon Coaker MP, dated 18 February 2009	Ev 15
6	Letter from Vernon Coaker MP to the Chair of the Committee, dated 23 February 2009	Ev 15
7	Letter from the Chair of the Committee to Vernon Coaker MP, dated 9 March 2009	Ev 16
8	Letter from Vernon Coaker MP to the Chair of the Committee, dated 23 March 2009	Ev 18
9	General Council of the Bar	Ev 23
10	JUSTICE	Ev 27
11	Liberty	Ev 32
12	Dr C N M Pounder	Ev 40
13	Rights of Women	Ev 46

Written evidence

**Letter from the Chair of the Committee to Rt Hon Jacqui Smith MP, Home Secretary,
dated 9 December 2008**

**MONITORING THE GOVERNMENT'S RESPONSE TO HUMAN RIGHTS JUDGMENTS:
S AND MARPER V UNITED KINGDOM (APP NO 30562/04 AND 30566/04)**

During this session, the Joint Committee on Human Rights will be continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR).

I am writing to ask for further information about the Government's response to the judgment of the Grand Chamber of the European Court of Human Rights in *S and Marper v United Kingdom* (App No 30562/04 and 30566/04, 4 December 2008). In this case, the Grand Chamber noted that the UK is currently the only member State of the Council of Europe expressly to permit the systematic and indefinite retention of DNA profiles and cellular samples of persons who have been acquitted or in respect of whom criminal proceedings have been discontinued. The applicants in this case were two people who had never been convicted of a crime, but whose fingerprints and DNA samples had been retained. One of the applicants was a child when his samples were taken. Section 64(1A) of the Police and Criminal Evidence Act 1984 (PACE) provides that fingerprints or samples taken for the purposes of investigating a crime need not be destroyed when a person has been convicted of that crime and his samples were also collected during the investigation. This has allowed the samples of a significant number of people never convicted of any crime to be retained. The Grand Chamber concluded that:

“The blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests...the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society”. (paragraph 125)

While the Court accepted that different levels of interference with individuals' private lives could arise in respect of different types of sample, it was particularly concerned about the impact on private life interests of the retention of cellular samples. It concluded that despite the differences in the nature of these impacts, the open-ended and blanket retention scheme in place in England, Wales and Northern Ireland required careful scrutiny. The Grand Chamber rejected the Government's argument that innocent individuals suffered no detriment or stigma as a result of being treated in the same manner as individuals who had been convicted of an offence (paragraphs 121–122). Although the Court was particularly concerned about the implications of retention for those whose samples had been taken when they were minors, the Court's decision hinged on the implication of treating the applicants differently from other unconvicted persons (those who volunteer their DNA can request its destruction). The Court thought that weighty reasons would be necessary to justify treating the applicants differently (paragraphs 123–125). No such reasons had been provided by the Government.

This decision has received widespread coverage in the press and we note that the Government is “disappointed” by the decision that the current arrangements for the national DNA database are operating in a way which is incompatible with the right to respect for private life of certain individuals, in breach of the UK's obligations under Article 8 ECHR (the right to respect for private life).

I am writing to ask for further information on the Government's response to this judgment:

- What general measures does the Government consider are necessary in order to remove the breach of the Convention identified by the Grand Chamber?
- Does the Government now intend to destroy all fingerprints or samples currently held on the national DNA database, or otherwise held by the police, except those which were gathered during an investigation which led to the donor's conviction? If not, why not?
- Does the Government intend to amend the provisions of Section 64 (1A) PACE?
- Specifically, does the Government intend to bring forward proposals similar to those which currently apply in Scotland? If not, why not?¹

¹ The Criminal Procedure (Scotland) Act 1995 provides that DNA samples and resulting profiles must be destroyed if the individual is not convicted or is granted an absolute discharge. In 2006, special provision was made for the retention of samples of those suspected of certain sexual or violent offences, for an additional period of up to 3 or 5 years.

- If the Government considers that legislative changes are necessary to remove the breach, does the Government intend to (a) use the remedial order process provided for in the Human Rights Act; or (b) bring forward proposals in the expected Policing and Crime Bill.
- If the Government intends to use a remedial order, I would be grateful if you could explain whether the Government intends to use the urgent or non-urgent procedure.
- If the Government considers that legislative changes are necessary but does not intend to bring forward proposals in the Policing and Crime Bill or in a remedial order, I would be grateful if you could provide a detailed explanation for that view.
- If legislative reform is proposed, my Committee would be grateful for copies of the draft proposals as soon as they are available.
- If the Government does not consider that legislative changes are necessary, please provide a detailed explanation for that view.

Following the timetable we recommended in our earlier reports, we would expect the Government to write to us with their initial reaction to the judgment by 4 January 2008 and with their proposed response to the judgment, including any proposals for general measures which the Government considers necessary to remedy the breach before 4 March 2008.²

**Letter from Rt Hon Jacqui Smith MP, Home Secretary to the Chair of the Committee,
dated 5 January 2009**

**MONITORING THE GOVERNMENT'S RESPONSE TO HUMAN RIGHTS JUDGMENTS:
S AND MARPER V UNITED KINGDOM (APP NO 30562/04 AND 30566/04)**

Thank you for your letter of 9 December on the implementation of the judgment of the European Court of Human Rights in the case of S and Marper which was given on 4 December.

Technological developments and, in particular, the use of DNA in investigations has been one of the breakthroughs for modern policing in which we have led the world. It has contributed to convictions for serious crimes and also to the exoneration of the innocent. However, I am conscious that we need to ensure that our policy enjoys public confidence. We need also, of course, to implement the judgment of the ECtHR. As you may be aware, I announced on 16 December at the Intellect trade association that we will consult via a White Paper on Forensics next year on bringing greater flexibility and fairness into the system, using a differentiated approach to the retention of samples, DNA profiles and fingerprints.

You will be aware that implementation of ECtHR's judgments are overseen by the Committee of Ministers. I am informed that the first substantive consideration of the Government's response will be at the June meeting for which papers will be circulated in early/mid April. We will send plans for implementation to the JCHR when we send them to the Committee of Ministers.

**Letter from the Chair of the Committee to Vernon Coaker MP, Minister of State, Home Office,
dated 22 January 2009**

The Joint Committee on Human Rights is considering the human rights compatibility of the Policing and Crime 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 in due course, should the Government bring forward amendments to the Bill.

SEXUAL OFFENCES AND SEX ESTABLISHMENTS

Prostitution

(a) Strict liability offence

Clause 13 introduces a new Section 53A into the Sexual Offences Act 2003, creating a strict liability offence of paying or promising payment for the sexual services of a prostitute who is controlled for gain by a third person, which is very broadly drafted. The proposed new offence raises issues about whether the interference with the right to respect for private life (Article 8 ECHR), which includes sexual conduct, is sufficiently certain to satisfy the Convention requirement that such interferences be "prescribed by law".

² Sixteenth Report of Session 2006–07, paras 155–163.

Q1. *Given the broad nature of the offence and the uncertainty it creates, why does the Government consider that it is necessary for the offence to be one of strict liability?*

Q2. *Are you satisfied that the proposed offence complies with the requirement of both the ECHR and the common law that the scope of the criminal law affecting private life be sufficiently certain to enable individuals to regulate their conduct accordingly?*

(b) Consequences of breach of a rehabilitation order

Clause 15 effectively reintroduces the withdrawn provisions of the Criminal Justice and Immigration Bill by amending the Street Offences Act 1959 to provide that a person loiters or solicits for the purposes of prostitution if s/he acts persistently. Clause 16 permits a court to impose an order requiring an offender to attend three supervised meetings. If an individual breaches an order, by failing, in the opinion of the supervisor, without reasonable excuse,³ to attend any of the three supervised meetings, s/he may be summoned to appear before a youth or magistrates' court. If it is proved that the individual failed, without reasonable excuse, to comply with the order, the court must revoke the order and may deal with the offender for the original offence in any way that the court would have been able to if s/he had just been convicted of the original offence.

Q3. *In the Government's view, what will constitute a reasonable excuse for failing to comply with a rehabilitation order?*

Q4. *How will the Government ensure that breach of an order does not lead to the undue criminalisation of vulnerable people involved in prostitution?*

The Criminal Justice and Immigration Bill provided that an individual in breach of a rehabilitation order could be detained for a maximum period of 72 hours before being brought before a court. At the time, the Committee concluded:

... 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.⁴

The current Bill proposes that there should be no limit on the period for which an individual may be detained before s/he must be brought before a court, simply stating that s/he must be produced "as soon as practicable". This is in potential breach of Article 5 ECHR (the right to liberty). The Explanatory Notes fail to address any human rights issues in relation to this provision.

Q5. *Why is no time limit set out in the Bill within which an individual detained for breach of a rehabilitation order must be brought before a court?*

(c) Premises closure orders

Clause 2 and Schedule 20 insert a new Part into the Sexual Offences Act 2003 granting courts the power to close premises being used for activities related to specified prostitution or pornography offences. The proposed measures 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).

Q6. *Why, in the Government's view, are premises closure orders necessary?*

The Bill currently contains very few safeguards against abuse, such as those which we recommended in relation to closure orders under the Criminal Justice and Immigration Act 2008.

Q7. *What safeguards does the Government intend to put in place to ensure that the safety of vulnerable people is not compromised?*

Q8. *Why is a court not required, when considering an application for a closure order, to satisfy itself that the authorising officer has taken reasonable steps to satisfy himself of the identity of interested parties (under section 136B(7)(b)) and effected service on them (section 136C(3)(d))?*

Q9. *What will constitute a "reasonable excuse" (section 136G(3)) for the purposes of a defence to the offence of remaining on or entering premises for which a closure order has been made?*

An appeal against a closure order or an extended closure order must be made within 21 days of the order being made. An appeal may be made by a number of individuals including a person with an interest in the property but on whom the closure notice was not served.

³ Para 2(1) of new Schedule 1 to the Street Offences Act 1959, inserted by Schedule 1 of the Bill.

⁴ 5th Report of Session 2007–08, para 1.55.

Q10. *Are there any circumstances in which the 21 day time limit for an appeal against a closure order may be extended, for example, if an individual with an interest in the premises did not discover the existence of the order until after the 21 day period has expired?*

Q11. *What “reasonable steps” does the Government envisage could be taken by an owner or occupier of premises, who is not associated with its use, to prevent its use for prostitution or pornographic activities (for the purposes of an application for compensation for financial loss under section 136O)?*

(d) Extensions to preventative orders under the Sexual Offences Act

A number of preventative orders may be made under the Sexual Offences Act 2003 (sexual offences prevention orders, foreign travel orders, risk of sexual harm orders and notification orders). Clause 21 of the Bill proposes to disapply the time limit under section 127 of the Magistrates Courts Act 1980 in relation to these orders. The Explanatory Notes state:

The disapplication of section 127 of the Magistrates Courts Act 1980 is expressed to apply even if the matter of complaint arose more than six months before the making of the complaint. As this provision only serves to clarify the current law, there is no issue of quasi-retrospection.⁵

Q12. *Does the Government intend, through Clause 21, for it to be possible for an application for a preventative order under the Sexual Offences Act to be made based on evidence relating to events occurring more than six months before the application? For example, could an application for such an order be founded on behaviour occurring 10 or 20 years before the application was made, and not subsequently repeated?*

Q13. *Why does the Government consider the disapplication of section 127 Magistrates Courts Act 1980 to be necessary? Is there any evidence that section 127 has given rise to situations where the authorities have been unable to seek orders because of the six month time limit?*

Currently, foreign travel orders have effect for a fixed period of no more than six months. Clause 23 proposes to extend that six month period to five years. This raises issues of respect for private and family life (Article 8 ECHR) and freedom of movement (Article 12 ICCPR).

Q14. *What is the Government’s evidence basis for the need for the extension of foreign travel orders from six months to five years?*

Q15. *How is this proposed extension proportionate with the interference with the rights to respect for private and family life and freedom of movement?*

(e) Child Prostitution

The Government has repeatedly stated its intention to make clear that involving children in prostitution is a form of child abuse. We consider that this has the potential to enhance human rights for vulnerable young people. The UN Committee on the Rights of Child, in its most recent concluding observations, recommended that the UK should consider child victims of prostitution as victims and not as offenders.

Q16. *Why has the Government decided not to use this Bill to abolish the power to prosecute a child over the age of 10 for offences under the Street Offences Act 1959?*

ALCOHOL MISUSE

(a) Removal of a young person to his or her place of residence or a place of safety

Clause 28(3) proposes to amend the Confiscation of Alcohol (Young Persons) Act 1997 to permit police to remove children to their homes or to a place of safety. This would permit an officer who has confiscated alcohol from a person who is in a public place and appears to be under 16 to forcibly remove that person, regardless of whether any offence has been committed or if it is necessary to do so for the person’s safety or wellbeing or for public order.

Q17. *Given the existing anti-social behaviour and criminal powers available to the police, why does the Government consider this additional power of removal to be necessary?*

(b) Directions to individuals to leave a locality

Clause 30 proposes an amendment to the Violent Crime Reduction Act 2006 to reduce the age at which an individual may be directed to leave a public place from 16 years to 10 years.

⁵ EN, para 556.

Q18. *Why is it necessary to extend this power to children and young people, in particular in view of the existing power to move on people for anti-social behaviour and to return children to their homes?*

When the initial power⁶ was proposed in the Violent Crime Reduction Bill, we expressed our concerns about the adequacy of the safeguards accompanying it.⁷

Q19. *Has the Government given consideration to the additional safeguards we proposed during the passage of the Violent Crime Reduction Bill? If so, why has it rejected them? If not, what are its views of those proposed safeguards?*

PROCEEDS OF CRIME

Clauses 36–38 contain new powers to search for and seize personal property in England and Wales, Scotland and Northern Ireland. Search and seizure of property interferes with the rights to peaceful enjoyment of possessions (Article 1, Protocol 1 ECHR) and to respect for private and family life (Article 8 ECHR). On a number of previous occasions, the Committee has expressed concerns at the lack of safeguards in relation to other search and seizure powers.⁸ There appear to be a number of significant defects and omissions in the safeguards envisaged in the Bill. For example, whilst limits are placed on the types of property which may be seized, there is no requirement that the powers of search and seizure be exercised proportionately. A warrant does not appear to be required for the search or initial seizure of property and no consideration is given to the application of the search power in relation to documents subject to legal professional privilege.

Q20. *Why are further safeguards (such as those listed above) not contained in the Bill and will the Government give consideration to their inclusion?*

The Secretary of State is required to issue a Code of Practice relating to the exercise of the new powers. The Delegated Powers Memorandum explains that “the Code will contain lengthy detailed provisions that are more suited to secondary legislation than primary legislation”.⁹ Specific details of what that Code will cover are not included in the Bill or Memorandum.

Q21. *Please provide details of the proposed contents of the Code of Practice, especially any safeguards which are intended to ensure compliance with human rights*

EXTRADITION

(a) Undertakings to return an individual to a State from which s/he has been extradited

Clause 55 provides that where a person sought by the UK is serving a sentence of imprisonment or in detention in another state, the Secretary of State may give an undertaking as to his return to that State. In addition, the Secretary of State may give an undertaking that someone who is extradited to the UK will be returned to the requested territory to serve any sentence of imprisonment imposed in the UK. The only circumstances in which the Secretary of State is permitted not to return an individual (in breach of her undertaking) is where she is “not satisfied that the return is compatible with the Convention rights within the meaning of the Human Rights Act 1998.”¹⁰

Q22. *What allowance will be made for changes in the situation of a requesting country (such as a deterioration in the conditions of detention) since undertakings were made by the Secretary of State?*

Q23. *Why is breach of other international human rights instruments beyond the ECHR, including the Refugee Convention, not included in new section 153D Extradition Act 2003 (as inserted by Clause 55)?*

(b) Extension of period before which an individual under provisional arrest must be brought before a judge

Clause 58 permits the time limits applicable in a provisional arrest case to be extended by up to 48 hours if a judge decides, on the balance of probabilities, that it is not reasonable to comply within the initial 48 hour period.

⁶ Which applied to those aged 16 years or over.

⁷ Fifth Report of Session 2005–06, para 3.33.

⁸ Eg in relation to the Compensation Bill, Twentieth Report of Session 2005–06.

⁹ Memorandum to the Delegated Powers and Regulatory Reform Committee, para 22.

¹⁰ Clause 55 inserting section 153D into Extradition Act 2003.

Q24. *Why does the Government consider the proposed time limits extension to be necessary?*

Q25. *What is the legitimate aim which is being pursued and how is the extension proportionate to that aim?*

(c) Use of live links in extradition hearings

Clause 59 provides for the use of live links in certain hearings under the Extradition Act.

Q26. *Why are live links in extradition hearings necessary, in the Government's view?*

HUMAN RIGHTS JUDGMENTS

The High Court recently held that the Sexual Offences Act 2003 was incompatible with Article 8 ECHR in subjecting certain sex offenders to notification requirements indefinitely without the opportunity for review.¹¹ As this Bill already covers sexual offences and related matters, it creates the possibility for amending the law to give effect to this judgment.

Q27. *Does the Government intend to appeal against the declaration of incompatibility made in this case?*

Q28. *If not, does it intend to amend this Bill to give effect to the High Court judgment?*

As you will be aware, the House of Lords gave judgment yesterday, declaring s.82(4)(b) Care Standards Act 2000 to be incompatible with Articles 6 and 8 ECHR in relation to the scheme for placing care workers employed in looking after vulnerable adults on a list of people considered unsuitable to work with such adults. Giving the judgment of the court, Baroness Hale of Richmond noted:

Both the Care Standards Act 2000 and the Protection of Children Act 1999 will in due course be replaced by a completely different scheme laid down by and under the Safeguarding Vulnerable Groups Act 2006. While we have been informed of its existence, we have not heard argument upon whether or not that scheme is compatible with the Convention rights as the question does not arise on these appeals.¹²

Q29. *In the light of the House of Lords judgment in Wright, does the Government remain satisfied that the Safeguarding Vulnerable Groups Act 2006 is compatible with human rights?*

— *In particular, does the Act meet the problems identified by the House of Lords in relation to Articles 6 and 8 ECHR?*

Q30. *Does the Government propose to amend the Policing and Crime Bill to remedy the incompatibilities of the Care Standards Act identified by the House of Lords, to deal with cases arising before the relevant parts of the Safeguarding Vulnerable Groups Act comes into force?*

22 January 2009

Letter from Vernon Coaker MP, Minister of State, Home Office to the Chair of the Committee, dated 9 February 2009

SEXUAL OFFENCES AND SEX ESTABLISHMENTS (CLAUSES 13–25)

(a) Strict liability offence

1. *Given the broad nature of the offence and the uncertainty it creates, why does the Government consider that it is necessary for the offence to be one of strict liability?*

The Government considered this issue carefully before deciding on a new strict liability offence for paying for sex with a person “controlled for gain”. We believe that for too long the focus for tackling prostitution has been on the (primarily) women involved, criminalising them for loitering or soliciting as prostitutes. The new strict liability offence in the Bill seeks to shift the responsibility away from the prostitute and on to the people who are paying for sex and creating the demand.

The strict liability element of the offence is one of its key aspects. The Government believes it is the most effective way of ensuring that those who pay for sex consider the circumstances of the prostitute who will be providing the sexual services. This is because it places the risk on the sex buyer of paying for sex with someone who is being controlled for gain. The CPS advised that this would be the most effective way of enforcing a provision that aimed to shift responsibility onto the potential sex buyer in this way.

¹¹ *R (F) v Secretary of State for Justice; R (Thompson) v Secretary of State for Justice* [2008] EWHC 3170 (Admin).

¹² *R (Wright) v Secretary of State for Health* [2009] UKHL 3, para 39.

There is precedent for the use of a strict liability offence in areas which seek to protect vulnerable members of our society. The most relevant examples exist in relation to certain sexual offences against children under 13 (section 5 of the Sexual Offences Act 2003). A person is guilty of this offence whether or not they know the child is under 13. The House of Lords recently held that this offence was compatible with Article 6 (right to fair trial) and that it was open to Parliament to decide what the elements of an offence were and what defences ought to be available.

It is important to note that the offence is not entirely one of strict liability in that it does require an intention on the part of the offender to either pay or make promise of payment for sexual services. The strict liability element is confined to whether or not the prostitute was controlled for gain.

2. *Are you satisfied that the proposed offence complies with the requirement of both the ECHR and the common law that the scope of the criminal law affecting private life be sufficiently certain to enable individuals to regulate their conduct accordingly?*

We are satisfied that this new offence complies with both the ECHR and the principles of common law. We consider that the law will be sufficiently certain. It will place a responsibility on someone who intends to pay for sex to consider the circumstances of the prostitute and to ensure that if they have doubts as to whether someone is being controlled for gain they do not pay for sex with that person or else they face the possibility of committing a criminal act. If the individual has any doubt over whether the person is controlled or not, they should not pay for sex with that individual. As was recognised in *R v Mithun Muhamad* [2002] EWCA Crim 1856, Article 7 is concerned with legal certainty rather than factual certainty, and thus while the accused may not know for a fact that the prostitute is a person controlled for gain at the time he pays for sex he does know that if it is found out that she is such a person then he will be guilty of the offence.

The terms of the offence are used in existing legislation (notably controlling prostitution for gain, section 53 Sexual Offences Act 2003) and have been further defined in case law.

(b) Consequences of breach of a rehabilitation order

3. *In the Government's view, what will constitute a reasonable excuse for failing to comply with a rehabilitation order?*

"Reasonable excuse" is an established term which is used in existing legislation, for example in relation to breaches of community orders. Whilst ultimately it will be for the courts to decide whether the offender has a reasonable excuse for failing to comply with the order, if, for example, an offender was unable to attend a meeting due to illness and could provide evidence to this effect, we would expect this to be considered a reasonable excuse.

4. *How will the Government ensure that breach of an order does not lead to the undue criminalisation of vulnerable people involved in prostitution?*

It is not our aim to subject vulnerable people to undue criminalisation and we recognise the benefits of early intervention. However, we do believe there are circumstances in which criminal sanctions may be appropriate. These orders will not increase the use of criminal sanctions but provides an alternative to a fine. As such it will not lead to further or undue criminalisation.

Following a breach, the courts must revoke the order and may re-sentence the offender for the original offence. In doing so, the court must take into account the extent to which the offender has complied with the order. Breach of the order will not be a criminal offence and therefore it will not lead to further or undue criminalisation of the offender. The offender will be no worse off, and arguably better off, than if he or she had been given a different sentence to begin with as he or she will at least have been given the opportunity to address and find routes out of their offending behaviour.

5. *Why is no time limit set out in the Bill within which an individual detained for breach of a rehabilitation order must be brought before a court?*

When this measure was introduced previously as part of the Criminal Justice and Immigration Bill the limit for detention following a breach was 72 hours. This was criticised in Parliament during the passage of this Bill as there was not necessarily an incentive for the police to bring the prostitute before the court swiftly given the 72 hour time limit.

In order to respond to this point, paragraph 9(2) of Schedule 1 to the Policing and Crime Bill now requires the police to bring the offender before a court as soon as is practicable. This means that the police will not be able to detain an offender for any longer than is necessary to comply with that requirement. Even if an offender is arrested on a Friday evening, it should be practicable to bring them before a court on the Monday. The police's duty is to bring the offender before any magistrates' court or, if the offender is under 18, any youth court, not just the court specified in the warrant, which should help ensure that the offender is detained for as short a period as possible.

(c) Premises closure orders

6. *Why are premises closure orders necessary?*

Currently, the police may enter premises and arrest those who are committing prostitution or pornography related offences. However, in some circumstances the premises may reopen soon after the police leave. Unless the premises are associated with the use of Class A drugs or persistent disorder or nuisance, the police do not have the power to prevent those responsible from returning. These provisions are therefore intended to give them the power to close premises for three months in order to fully disrupt the criminal activity. This would, for example, prevent situations which exist currently where a brothel is raided, and the person responsible for owning a brothel is arrested, but the brothel re-opens the next day with a new brothel-keeper in charge.

7. *What safeguards does the Government intend to put in place to ensure that the safety of vulnerable people is not compromised?*

Before issuing a closure notice, the relevant officer must take reasonable steps to identify those with an interest in the premises and ensure that the local authority for the area has been consulted. Following the issue of a closure notice, the police will have to apply to the court for a closure order, which means that the orders will be subject to judicial scrutiny.

If an occupier, or any person with control of or responsibility for the property, or with any other interest in the property, wishes to make representations the court may adjourn the hearing to allow these representations to be made. Such people also have a right of appeal against the making of a closure order and can apply for it to be discharged at any time. Compensation can also be paid to those who have incurred financial loss as a result of a closure notice or order in appropriate circumstances.

Guidance for police will make clear the need to identify any adverse circumstance that may arise affecting the victims of offences committed on the premises and the need to ensure appropriate support for those victims. 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. It may be in many cases that a closure order will help vulnerable people by disrupting activity which has victimised vulnerable people who may include children. Agencies are already under a duty to safeguard and protect the welfare of children under the Children Act 2004.

The provisions in this Bill closely follow those found in Schedule 20 to the Criminal Justice and Immigration Act 2008.

8. *Why is a court not required, when considering an application for a closure order, to satisfy itself that the authorising officer has taken reasonable steps to satisfy himself of the identity of interested parties (under section 136B(7)(b)) and effected service on them (section 136C(3)(d))?*

If the authorising officer has failed to serve the closure notice on those who appear to him to have an interest in the property or he has failed to take reasonable steps to identify them, the notice will not have been validly served and the court would be expected to refuse to entertain the application for a closure order on these grounds. In this respect, the provisions are the same as those found in Schedule 20 to the Criminal Justice and Immigration Act 2008.

9. *What will constitute a “reasonable excuse” (section 136G(3)) for the purposes of a defence to the offence of remaining on or entering premises for which a closure order has been made?*

Whilst it will be for courts to determine what constitutes a “reasonable excuse” we believe they may consider it reasonable for an owner to have entered the premises for example in order to obtain medicine left in the property required to treat a medical condition.

10. *Are there any circumstances in which the 21 day time limit for an appeal against a closure order may be extended, for example, if an individual with an interest in the premises did not discover the existence of the order until after the 21 day period has expired?*

The 21 day time limit for an appeal cannot be extended but such a person could apply for the order to be discharged under new section 136J to be inserted into the Sexual Offences Act 2003 by Schedule 2 to the Bill. The discharge order would discharge the closure order so that it no longer had effect.

11. *What “reasonable steps” does the Government envisage could be taken by an owner or occupier of premises, who is not associated with its use, to prevent its use for prostitution or pornographic activities (for the purposes of an application for compensation for financial loss under section 136O)?*

We would envisage that the owner or occupier may be expected to act on concerns about the use of the property by making sure it was reasonably secure or reporting any suspicious behaviour of which he was aware to the police but ultimately this will be for the courts to judge depending on the circumstances.

(d) Extensions to preventative orders under the Sexual Offences Act

12. *Does the Government intend, through Clause 21, for it to be possible for an application for a preventative order under the Sexual Offences Act to be made based on evidence relating to events occurring more than six months before the application? For example, could an application for such an order be founded on behaviour occurring 10 or 20 years before the application was made and not subsequently repeated?*

The Government considers clause 21 necessary to clarify the existing law rather than representing a change in the current position. The effect of this clause will be to make clear that evidence of the risk an offender poses of causing sexual harm can be drawn from past activities and need not specifically include conduct within the last six months. However, in relation to sexual offences prevention orders, foreign travel orders and risk of sexual harm orders there must still be evidence to show that the risk the offender presents makes it necessary and proportionate to impose the order in order to prevent crime. Therefore, whilst theoretically possible, it appears unlikely that a court would make such an order based solely on behaviour occurring 10 or 20 years before the application was made because of the difficulties in showing that the offender poses a current risk of causing sexual harm to members of the public, or more specifically in the case of foreign travel orders and risk of sexual harm orders, to children.

13. *Why does the Government consider the disapplication of section 127 Magistrates Courts Act 1980 to be necessary? Is there any evidence that section 127 has given rise to situations where the authorities have been unable to seek orders because of the six month time limit?*

Consultation with the Association of Chief Police Officers has highlighted that the six month time limit could cause particular difficulty where an offender has been in prison abroad for the last six months and returns to the UK at the end of his sentence. In such cases, the police would be unable to provide evidence of conduct from within the last six months although they might have reasonable cause to believe that the individual poses a present risk of sexual harm to the public. We want to ensure that they can obtain appropriate civil orders in such circumstances, based on evidence that may be outside the six month period.

14. *What is the Government’s evidence basis for the need for the extension of foreign travel orders from six months to five years?*

As at August 2008, only five Foreign Travel Orders had been made since their introduction in 2004. We are concerned at this low use and consultation with the Association of Chief Police Officers (ACPO) and Child Exploitation and Online Protection Centre has indicated that the police are wary of applying for these orders because of their limited duration, particularly given the amount of work that goes into preparing an application for such an order. We consulted with ACPO on the extension to the maximum duration of Foreign Travel Orders. It should be remembered that the five year period is a maximum not a minimum and this will be assessed on a case by case basis. It accords with the minimum period of time for which a sexual offences prevention order can last.

15. *How is this proposed extension proportionate with the interference with the rights to respect for private and family life and freedom of movement?*

Section 6 of the Human Rights Act 1998 dictates that when deciding how long to impose a foreign travel order for the court, as a public authority, must act in a way which is compatible with the ECHR. A Foreign Travel Order is a preventative rather than a punitive measure. It is intended to prevent offenders with relevant convictions for sexual offences against children from travelling abroad when this is necessary in order to protect a child or children in another country from serious sexual harm. This clause extends the period of Foreign Travel Orders to a maximum of five years but there continues to be a requirement that the prohibitions in the order are those that the court is satisfied are necessary and proportionate for the prevention of crime. Indeed, section 114 of the Sexual Offences Act 2003 goes further in requiring the court to be satisfied that the order is necessary for the specific purpose of protecting children generally or any child from serious sexual harm from the defendant outside the United Kingdom. Therefore, it is only where the proposed interference with the offender’s right to private and family life can be justified as being necessary and proportionate on these grounds that the court would be able to impose a foreign travel order of five years’ duration. This will have to be assessed in each individual case. Once again, it should be remembered that the five year period is a maximum rather than a minimum.

(e) Child Prostitution

16. *Why has the Government decided not to use this Bill to abolish the power to prosecute a child over the age of 10 for offences under the Street Offences Act 1959?*

In practice, children and young people are rarely prosecuted for this offence, but retaining the offence for under 18's means we can respond effectively to this form of abuse. Where agencies fail to engage with young people who, for whatever reason, spurn offers of support and protection, the Criminal Justice System enables us to remove those young people from the street and any immediate danger and offer them the intervention that may actually make a difference. The Government has no wish to criminalise children and young people but believe this offence allows us to help protect some of our most vulnerable citizens who may otherwise not be reached.

ALCOHOL MISUSE (CLAUSES 26–31)

(a) Removal of a young person to his or her place of residence or a place of safety

17. *Given the existing anti-social behaviour and criminal powers available to the police, why does the Government consider the additional power of removal in clause 28(3) to be necessary?*

We believe that the power that clause 28(3) will add to the Confiscation of Alcohol (Young Persons) Act 1997 is necessary because we believe it to be significantly different from comparable existing powers.

Section 30(6) of the Anti-social Behaviour Act 2003 confers a power on a uniformed constable to remove a person to that person's residence if he reasonably believes they are under the age of 16 and are not under the effective control of a parent or a responsible person aged 18 or over. However there are important limitations on this power. Firstly, it is only exercisable between 9.00 pm and 6.00 am. And secondly, it is exercisable only in a locality where a police officer of superintendent rank or above has given an authorisation that the powers in this section are to be conferred on police officers.

Section 27 of the Violent Crime Reduction Act 2006 (directions to individuals who represent a risk of disorder), also gives constables in uniform a power to direct individuals to leave a locality, and when amended by this Bill will apply in the case of individuals aged 10 or over, but applies only where there is a risk of alcohol-related crime or disorder. So it does not cater for a case where an individual is at risk, not from crime or disorder, but because of their own intoxication.

By contrast the power in clause 28(3) of the Bill covers children up to the age of 18, it does not contain temporal restrictions, and it does not require a prior authorisation to have been given. Moreover, clause 28 deals specifically with individuals who are in possession of alcohol. It is particularly likely that there will be circumstances where a young person who has had their alcohol taken from them by a constable is vulnerable. In such circumstances, it is clearly in the person's interests that they be taken to their home or a place of safety, and the Government considers that the police's power to take such action should be available in all cases.

(b) Directions to individuals to leave a locality

18. *Why is it necessary to extend [the power in clause 30] to children and young people, in particular in view of the existing power to move on people for anti-social behaviour and to return children to their homes?*

As we set out in the Youth Alcohol Action Plan, published last year, the evidence suggests that 10–15 year olds who have been drunk once a month or more in the past year were over twice as likely to commit an offence as those who had not. It is important therefore that the police have powers to tackle these young people and again, we consider that the power extended by clause 30 can effectively be distinguished from existing powers. Any young person not causing or contributing, for example by being with a group of older children who may be drinking, to alcohol related crime and disorder will be unaffected by these provisions.

The power that already exists in section 30(4) of the Anti-social Behaviour Act to disperse groups for anti-social behaviour, as mentioned above, is exercisable only in a locality where a police officer of superintendent rank or above has given a prior authorisation that the powers in this section are to be conferred on police officers. The Government considers that the power in section 27 of the Violent Crime Reduction Act should be potentially available in any case where the tests in that section are met (in respect of a person aged 10 or over). It is perfectly possible for an individual, aged 10 or over, to present a risk of crime or disorder in a locality where there has not been a previous pattern of anti-social behaviour.

Similarly, the power in the Confiscation of Alcohol (Young Persons) Act 1997, as prospectively amended by this Bill, will not always be appropriate for a case where, in the judgement of the constable in question, what is appropriate is not to remove the young person, aged 10 or over, in question physically and for their own safety (which would require the constable, too, to leave a scene where his continued presence may be desirable) but simply to direct the person to leave.

19. *Has the Government given consideration to the additional safeguards we proposed during the passage of the Violent Crime Reduction Bill? If so, why has it rejected them? If not, what are its views of those proposed safeguards?*

The Government has indeed given careful consideration to the additional safeguards the Committee proposed in relation to what is now section 27 of the Violent Crime Reduction Act 2006 (directions to individuals who represent a risk of disorder), namely requiring that the police officer be satisfied that the person has already engaged in criminal or disorderly conduct while under the influence of alcohol, preventing the immediate renewal of a direction which has expired, and requiring the authorisation of a more senior police officer. However we are not persuaded that any of these safeguards are essential for the purposes of the compatibility with the ECHR or ICCPR, and it further believes that any of these could in fact significantly weaken the effectiveness of the measure.

For instance, a requirement for the police officer to be satisfied that there has already been past criminal or disorderly conduct would not be well suited to a provision that is intended to be preventative in nature, and it would hamper police in situations where the conduct is anticipated but has not yet occurred. It might even lead to a curious situation where a police officer was forced to wait for the onset of such behaviour, before taking action, which would clearly be undesirable.

Preventing the immediate making of a new direction after one has expired would, it seems to the Government, leave a loophole in cases, likely to be exceptional, where a renewed direction is appropriate. In deciding against expressly preventing a second successive order being made, we are also mindful of section 27(3) which expressly says that a direction may not be extended so as to apply for a period of more than 48 hours.

We have also decided against requiring the authorisation of a more senior officer. This reflects the reality that these directions are designed to allow police to respond immediately to a given situation, where it will be the constable on the ground who has to make the decision.

In coming to this view, the Government is also mindful of the existing safeguards in the provision. The requirement to leave a public place can be imposed only where the presence of the person in that locality is likely to cause or contribute to the occurrence of alcohol-related crime or disorder. The requirement can only be imposed if the direction is necessary for the purpose of removing or reducing the likelihood of such crime or disorder. The Home Office issued extensive guidance on the exercise of this power in August 2007. This guidance emphasises, among other things, that the maximum 48 hour period should not be imposed as a matter of course, that a direction should not be made in certain circumstances (for example, if it could leave an individual vulnerable to assault or robbery, or if it could prevent the individual from taking a child to a place where they may receive medical treatment), that the potential for simply displacing a problem should be borne in mind, and that the power should be used proportionately, reasonably and with discretion.

PROCEEDS OF CRIME (CLAUSES 32–46)

20. *Why are further safeguards not contained in the Bill and will the Government give consideration to their inclusion?*

We consider the issue of safeguards an important one and believe that there are numerous safeguards in clauses 36–38 to protect individual rights. These include the pre-conditions before the search and seizure powers can be exercised found in new sections 47B, 127B and 195B. These pre-conditions require a person to have been arrested, already be subject to criminal proceedings, or to be subject to an application for a confiscation order (or reconsideration of an existing order).

Additionally there are threshold tests for the seizure power, which vary according to the stage in the proceedings at which it is proposed to seize the property, are found in sections 47B, 127B and 195B. The seizure power is only exercisable if the officer has reasonable grounds for suspecting either that the property may (unless seized), not be available for satisfying any confiscation order, or that the value of the property may be diminished—sections 47C, 127C and 195C. Certain property is “exempt property” and may not be seized. The search powers also require reasonable grounds for suspicion before they may be exercised.

The search and seizure powers in clauses 36–38 require prior approval—of a justice of the peace or, where not practicable, of a senior officer—unless that is not practicable in the circumstances. Where the powers are exercised without prior judicial approval and seized property is released within 48 hours or no property is seized, the Bill imposes additional requirements on law enforcement to explain in writing to the Appointed Person why it was not practicable to obtain judicial approval. The Appointed Person must publish a report every year on the exercise of the powers in cases where officers are required to report to him.

Clauses 36–38 also require judicial approval of the detention of the property within 48 hours of it being seized. There is also the opportunity for the person from whom the property was seized or for any other person affected to apply to the court for its release. In addition there is a further right of appeal against the decision of the court.

In relation to premises, the search power will only be exercisable where the officer has lawful authority to be on the premises. It does not give a right of entry to private premises.

It would not be normal practice to put into statute a specific requirement on law enforcement agencies to exercise their powers proportionately and compatibly with any article of the ECHR. They are already required to do this by the Human Rights Act 1998. Codes of Practice will be issued which contain further details on the exercise of the powers, in order to ensure that they are exercised lawfully and proportionately (see question 21 below for further detail).

We think it is also worth noting that initial seizure of property without a warrant is not new. There is already provision in the Proceeds of Crime Act for property to be seized without a warrant in the confiscation context, in specified circumstances (section 45).

The search and seizure powers relate to the seizure of personal property such as vehicles which may be subsequently be sold to satisfy a confiscation order. There are no powers in these clauses to seize documents, since they would not fall within the type of property which may be seized, as set out in new sections 47C(1), 127C(1) and 195C(1). This point will also be addressed in the Code of Practice. The issue of legal professional privilege would not therefore arise under these powers.

21. Please provide details of the proposed contents of the Code of Practice, especially any safeguards which are intended to ensure compliance with human rights

We have provided for a Code of Practice and other safeguards to ensure that the powers are exercised proportionately in compliance with the ECHR.

A Code of Practice must be issued covering the exercise of the search and seizure powers by officers, including the prior approval powers of senior officers. The Code will also cover the administrative power to detain property for 48 hours pending a court order, and the continuing detention of property under a court order. The Code needs to be published in draft and the draft laid before Parliament. The order that brings it into force is subject to affirmative Parliamentary procedure. The Bill requires the Secretary of State to consider representations made about the draft.

The Code will set out detail on how the powers should be exercised proportionately. Before carrying out a seizure, there must be some estimate of the person's benefit from criminal conduct and of the value of any property to be seized to ensure that only property up to the value of the former is seized. There will also be guidelines on how to assess the risk of dissipation. The Code will make clear that it should not be the default position that any person being arrested for an acquisitive crime should have their property seized: it will be important to assess the degree of the person's criminality and the degree of their unexplained income, in order to establish whether this is the kind of case where a confiscation order is likely to be made. The Code will provide that particular care should be taken with low level offenders against whom a confiscation order is unlikely to be made. The Code will provide guidance on the definition of "exempt property" that may not be seized. The Code will also provide for a periodic review by a senior officer of the continuing detention of property under a court order, to assess whether it remains appropriate to detain it.

In Scotland the Lord Advocate has committed to issue Guidance covering the exercise of the same powers as will be covered by the Code of Practice. (section 127P).

We will consider the need for further safeguards for possible inclusion in the Code in the light of Parliamentary scrutiny of the new powers.

EXTRADITION (CLAUSES 48–59)

(a) Undertakings to return an individual to a State from which s/he has been extradited

22. What allowance will be made for changes in the situation of a requesting country (such as a deterioration in the conditions of detention) since undertakings were made by the Secretary of State?

Central to the extradition provisions is the need to ensure that they are compatible with human rights legislation and this is a duty we take very seriously in the day to day consideration of extradition requests.

New section 153D makes it clear that nothing in new section 153A or 153C will require the Secretary of State to return a person pursuant to an undertaking where this would be contrary to the ECHR. As part of her duties the Secretary of State must assess the human rights situation in a country prior to giving an

undertaking. Additionally the duty imposed on her under the Human Rights Act 1998 not to act incompatibly with rights under the ECHR means that she would also need to consider human rights issues immediately prior to returning someone pursuant to any undertaking given under the Extradition Act 2003. On this basis any change in conditions in the extraditing territory between the date the undertaking was given and the date of return to that territory must be taken into account in assessing whether return would breach the ECHR.

23. *Why is breach of other international human rights instruments beyond the ECHR, including the Refugee Convention, not included in new section 153D Extradition Act 2003 (as inserted by Clause 55)?*

The protection afforded by the ECHR encompasses the protection offered under the Refugee Convention, so return which is compatible with the ECHR would be compatible with the Refugee Convention.

Extension of period before which an individual under provisional arrest must be brought before a judge

24. *Why does the Government consider the proposed time limits extension to be necessary?*

Cases requiring provisional arrest involve those crimes considered most serious and most likely to threaten the safety of the general public in the UK. There are however, occasions where there are difficulties in obtaining the necessary papers within the current 48 hour time-frame—particularly where this falls over a weekend or bank holiday. This provision, although used very sparingly, will ensure that in these most serious cases, the requesting state has sufficient time to provide the full European Arrest Warrant (EAW) papers. This will provide an additional safeguard to the public and ensure that the UK plays a full role in tackling serious and organised crime through its co-operation with its EU partners.

25. *What is the legitimate aim which is being pursued and how is the extension proportionate to that aim?*

Once a provisional arrest has taken place, the UK or the requesting country is required to issue full EAW papers within 48 hours. Where a provisional arrest takes place at a weekend, or holiday period with bank holidays either in the UK or in the requesting member state and courts are not open, there can be difficulties in obtaining these papers within the specified time period. The option of applying for a further 48 hours in which to present the paperwork would greatly reduce the risk of wanted high risk offenders being released from custody.

An application for an extension would only be granted where a court was satisfied that the full extradition papers could not reasonably have been provided within the initial 48 hour period. When such an application is made the person affected by the decision would also be entitled to make a bail application. We are accordingly satisfied that the provisions strike the appropriate balance.

(c) Use of live links in extradition hearings

26. *Why are live links in extradition hearings necessary, in the Government's view?*

Judicial hearings that take place via a live-link are increasingly common in a number of jurisdictions. As the numbers of European Arrest Warrants rise, and we envisage this rising at a faster rate following the introduction of SIS II, it is vital that the UK benefits from a range of tools to manage these volumes effectively. The ability to hear initial and remand hearings via a live-link will remove a significant financial and administrative burden on a number of agencies and departments involved in the UK's extradition system. Currently extradition hearings only take place in the City of Westminster Magistrates Court which can result in the subject of the EAW or extradition request travelling potentially very long journeys for a short hearing; a live-link hearing for their initial and remand hearing would remove this need.

It is important to note that the subject of the request will continue to attend the substantive extradition hearing. Furthermore, the clause makes it clear that the judge may not direct that the hearing take place via live-link if he feels that the interests of justice will not be served.

HUMAN RIGHTS JUDGMENTS

27. *Does the Government intend to appeal against the declaration of incompatibility made in the case of R (F) v Secretary of State for Justice; R (Thompson) v Secretary of State for Justice?*

The Home Office is intending to appeal against the declaration of incompatibility in this case.

28. *If not, does it intend to amend this Bill to give effect to the High Court judgment?*

The Government does not intend to amend this Bill to give effect to the High Court judgment.

29. *In the light of the House of Lords judgment in Wright, does the Government remain satisfied that the Safeguarding Vulnerable Groups Act 2006 is compatible with human rights?*

— *In particular, does the Act meet the problems identified by the House of Lords in relation to Articles 6 and 8 ECHR?*

After careful consideration of the House of Lords judgment in *Wright*, the Government remains satisfied that the Safeguarding Vulnerable Groups (SVG) Act is compatible with human rights and in particular with Articles 6 and 8 of the ECHR. The scheme under the SVG Act does not include the feature of provisional listing, which was the focus of the challenge in the *Wright* case. In particular, whenever the Independent Safeguarding Authority (ISA) is exercising its discretion to place someone on a barred list, it must first invite their representations and also must send the individual the information on which it intends to rely. This is provided for in paragraphs 3(2), 5(2), 9(2), 11(2) and 16(1) of Schedule 3 to the Act. It would only be where a person had committed an offence which, by its nature, indicated that they posed an immediate risk of harm to the vulnerable (prescribed in the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009, SI 2009/37) that they would be barred before being given the right to make representations. This is provided for in paragraphs 1, 2, 7 and 8 of Schedule 3 to the Act (the offences prescribed under paragraph 1 include the rape of a child, for example). The judgment in *Wright* acknowledged that an “ex parte” procedure could be justified in such circumstances.

30. *Does the Government propose to amend the Policing and Crime Bill to remedy the incompatibilities of the Care Standards Act identified by the House of Lords, to deal with cases arising before the relevant parts of the Safeguarding Vulnerable Groups Act comes into force?*

The Government considers that it is not necessary to amend the Care Standards Act 2000 (“the 2000 Act”) or the Protection of Children Act 1999 (“the 1999 Act”) following the House of Lords judgment in *Wright* because the transition arrangements under the Safeguarding Vulnerable Groups Act 2006 are already in place and no new cases will be dealt with under the Protection of Vulnerable Adults (POVA)/Protection of Children Act (POCA) schemes of the 2000 and 1999 Acts.

In *Wright*, their Lordships declared section 82(4)(b) of the 2000 Act incompatible with Convention rights (Articles 6 and 8). Under the 2000 Act care providers must refer to the Secretary of State care workers who have been dismissed, suspended or transferred from their care position on grounds of misconduct which harmed or placed at risk of harm a vulnerable adult (or would have been dismissed or considered for dismissal on such grounds where the worker has left the employment for other specified reasons). Section 82(4)(b) requires the Secretary of State provisionally to include a care worker who has been so referred in the list of individuals considered to be unsuitable to work with vulnerable adults pending determination of the reference, where it appears from the information submitted with the reference that it may be appropriate for the worker to be included.

The transition to the new vetting and barring scheme, which will operate under the Safeguarding Vulnerable Groups Act 2006 (“the 2006 Act”), is now underway. Since 20 January 2009, all new cases arising under the 1999 and 2000 Acts will be referred to and dealt with by the Independent Safeguarding Authority (“ISA”) by virtue of the Safeguarding Vulnerable Groups Act (Transitory Provisions) Order 2009 (S.I. 2009/12) (“the Transitory Provisions Order”). There is no provision during the transitory phase, for provisional listing. Neither is provisional listing a feature of the new vetting and barring scheme.

As regards referrals made before 20 January currently in the system, the Transitory Provisions Order provides that where the Secretary of State has not yet invited representations or placed a person on the provisional list the case will be transferred to the ISA to be dealt with under the Transitory Provisions Order. The other cases will remain with the Secretary of State to be dealt with under the 1999 and 2000 Act provisions. Those cases which have been provisionally listed will be expedited with priority given to those where representations were not invited before the listing. The individual will then be removed from the provisional lists where it is appropriate to do so or confirmed on the POVA and/or POCA lists when they can exercise their right of appeal to the First-tier Tribunal (Care Standards). In this way individuals who have been provisionally listed will be afforded an opportunity to give their side of the story before their listing is confirmed (where appropriate) and have a right to a full hearing on appeal to an independent tribunal. The Government believes this is the most effective way of addressing the incompatibility declared by their Lordships in the *Wright* case.

**Letter from the Chair of the Committee to Vernon Coaker MP, Minister of State, Home Office,
dated 18 February 2009**

Thank you for your letter of 9 February replying to my letter of 22 January 2009.

I note that the Government has recently tabled amendments to the Policing and Crime Bill relating to gangs and I was grateful to be copied into the correspondence you sent to Members of the Public Bill Committee on this issue. As the clauses are not reflected in the Explanatory Notes to the Bill, please could you provide an explanatory memoranda on their human rights compatibility.

**Letter from Vernon Coaker MP, Minister of State, Home Office to the Chair of the Committee,
dated 23 February 2009**

Thank you for your letter of 18 February 2009 where you asked for supplementary explanatory memoranda relating to the gangs injunctions provisions which we have tabled as government amendments at Committee stage of the Bill.

As you will be aware, the Home Secretary made a statement of compatibility of the Bill under section 19(1)(a) of the Human Rights Act 1998. We believe these provisions are also compatible under section 19(1)(a) of the Human Rights Act 1998. I attach at **Appendix A**, a supplementary explanatory memorandum relating to the gangs injunctions provisions proposed for the Bill. This should be read in conjunction with the section on “European Convention on Human Rights (ECHR)” in the Explanatory Notes. The supplementary memorandum seeks to set out, in areas where in relation to the gangs injunctions provisions, Convention rights are engaged, our reasoning that the proposals are balanced, proportionate and that they can be justified under our ECHR obligations.

I am grateful to the committee for examining the Bill and welcome any further questions that you may have as result. Please do not hesitate to contact me and we will of course consider any further issues raised carefully.

APPENDIX A

1. *New clause NC11* sets out the test for granting an injunction. The respondent has the opportunity to make representations before an injunction is granted and a court may only grant an injunction once a two-stage test has been satisfied. The Government considers that Article 6 rights are fully respected by civil court proceedings as they provide for a fair and public hearing by an independent court (either the High Court or a county court).

2. *New clauses NC12 and NC13* set out in detail the contents of the injunction, including examples of the types of prohibitions and requirements that may be included. Any of the prohibitions and requirements could engage Articles 8, 10 and/or 11, all of which are qualified rights. The injunction is aimed at preventing gang-related violence which is a legitimate aim, namely the prevention of disorder and crime, in a democratic society. Since the court can only impose a prohibition or requirement that is necessary in order to prevent gang-related violence, the court will need to consider each respondent separately in relation to their own individual circumstances before deciding whether any particular prohibition or restriction is necessary in order to prevent gang-related violence in any particular case. There are no mandatory restrictions or prohibitions. The Government is therefore satisfied that any restriction will be proportionate and thus compliant with Articles 8(2), 10(2) and 11 (2).

3. Express provision is made in NC12 that the injunction must avoid, as far as practicable, any conflict with the respondent’s religious beliefs and/or any interference with the respondent’s work or attendance at an educational establishment. The Government considers that this is sufficient to ensure compatibility with Article 9 and Protocol 2, Article 2.

4. *New clauses NC16, NC17 and NC18* provide for applications to be made without notice and for interim injunctions to be granted, either when a hearing at which the respondent is present is adjourned, or where an application made without notice is successful.

5. An interim injunction may be granted when it appears “just and convenient” do to so, where an on notice hearing is adjourned. The “just and convenient” test is set out by the Supreme Court Act 1981 (section 37) in relation to any injunction and therefore the Government is retaining the test for these interim injunctions. The Committee will be aware that the court must consider it “just” to grant an interim ASBO under section 1D of the Crime and Disorder Act 1998.

6. A court must only grant an interim injunction made on a without notice application when the court considers it necessary to do so. The Government has set this higher test in order to ensure that these without notice interim injunctions are used sparingly. The Committee will be aware that the test of “necessary” is also used for without notice interim ASBOs in accordance with the Magistrates’ Courts (Anti-Social Behaviour) Rules 2002 (Rule 5; SI 2002/2784). The Court of Appeal has determined that Article 6 rights are not automatically engaged by without notice interim orders: *R(M) -v- Secretary of State for Constitutional Affairs [2004] EWCA Civ 312*.

7. *New clause NC19* is a further safeguard to ensure proportionality—a court may vary or discharge the injunction either on application from either the applicant or the respondent, or at a review hearing, set by the court. This enables the court to consider whether the injunction as a whole is still necessary to prevent gang-related violence and also whether each of the prohibitions and requirements are still necessary. This is an opportunity for the applicant to update the court on information it has obtained about the respondent's behaviour since the making of the injunction as well as an opportunity for the respondent to demonstrate to the court that he has changed, or is trying to change, his ways. The court retains the final decision as to whether to vary or discharge the injunction.

8. The Government is satisfied that these clauses are compliant with the ECHR.

9. *New clause NC20* sets out that a constable may arrest someone who is reasonably suspected of being in breach of a provision in an injunction to which the power of arrest is attached. *New clause NC22* provides for the remand (either on bail or in custody) of an individual should the court consider that a medical report is required.

10. *New clause NC23* inserts *new schedule NS2* which allows the court to remand an individual on bail (including conditional bail) or in custody and sets out time limits for remands in custody. All of these new clauses and the new schedule engage Article 5, however the Government is satisfied that these clauses provide for the lawful arrest and detention of a person for non-compliance with a lawful order of the court. The Committee will be aware that these clauses mirror provisions for arrest and remand in relation to housing injunctions obtained under the Housing Act 1996 (sections 155, 156 and Schedule 15). The Government is therefore satisfied that these clauses are compatible with the ECHR.

11. As a final point, all applicants (police or local authorities) and the courts, as public authorities, when applying for and granting an injunction are obliged to act compatibly with the ECHR.

**Letter from the Chair of the Committee to Vernon Coaker MP, Minister of State, Home Office,
dated 9 March 2009**

Thank you for your letter of 23 February 2009 enclosing a supplementary explanatory memorandum relating to the human rights compatibility of the proposed gangs injunctions. The Committee would be grateful if you could address some specific questions on the human rights compatibility of these provisions.

INJUNCTIONS: GANG-RELATED VIOLENCE

The provisions on gang-related violence are contained in Part 4 of the Bill, as amended in the Public Bill Committee (PBC). The Government has explained that the new provisions are necessary in the light of the Court of Appeal decision in *Birmingham City Council v Shafi* [2008] EWCA Civ 1186 and the “need for Parliament to make it clear that the courts can impose injunctions to tackle gang-related violent behaviour”.¹³

1. *Why is the existing civil and criminal law inadequate to protect society from, and to prosecute, gang-related violence?*

2. *Why has the Government chosen to use the civil law to tackle what will frequently be criminal behaviour?*

In the PBC, you explained that use of the criminal law remained the preferred option.¹⁴

3. *Why has the Government opted not to require those seeking the injunction to explain why criminal prosecution, in an individual case, is impossible?*

Injunctions to prevent gang-related violence may be granted by a court if two conditions are satisfied: that the court is satisfied on the balance of probabilities that the respondent has engaged in, or has encouraged or assisted, gang-related violence; and that the court thinks it is necessary to grant the injunction to prevent the respondent from engaging in such conduct and/or to protect the respondent from gang-related violence (Clause 32). In the PBC, you described the latter type of injunction as being “to protect the individual from themselves”.¹⁵ Injunctions may prohibit the respondent from engaging in certain conduct or require the respondent to undertake anything described in the injunction. Clause 33 sets out an indicative list of prohibitions or requirements. For each prohibition or requirement, the court must specify whether it lasts until further order or for a defined period (Clause 34).

¹³ Cols 593–594, PBC, 26.2.09.

¹⁴ Col 589, PBC, 26.2.09.

¹⁵ Col 597, PBC, 26.2.09.

-
4. *In order to give protection to individual rights and to provide legal certainty, why is there not an exhaustive list of the prohibitions or requirements that may be granted?*
 5. *Please provide examples of the types of circumstances in which it is envisaged that an injunction will be necessary to protect a respondent from himself.*
 6. *Why does the Government consider it to be necessary and proportionate to permit injunctions of indefinite duration? Has it considered setting out, on the face of the Bill, the maximum duration of an individual injunction? If so, why was this rejected?*

Whilst gang-related violence is defined in Clause 32(5), there is no definition of what constitutes a “gang”. This was the subject of much debate in Committee. You agreed to consider whether a definition could be incorporated into the Bill.¹⁶

7. *Does the Government propose to introduce amendments setting out the definition of “gang” in the Bill?*

The Bill makes clear that the standard of proof for granting an injunction is the civil standard. In the PBC, you confirmed that this would be the normal civil standard, rather than the enhanced civil standard in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787, but that the criminal standard would apply to breach proceedings.¹⁷

8. *Why does the Government consider that the criminal fairness guarantees of an enhanced civil standard are not appropriate, given the criminal nature of the underlying allegations, the breadth of the requirements/restrictions that may be imposed and the indefinite duration of the proposed injunctions?*
9. *Is the Government hoping to use the new gang-related injunctions to avoid applicants having to prove their case to an enhanced civil standard, as required by *McCann* in relation to applications for anti-social behaviour orders?*
10. *What type(s) of evidence does the Government anticipate will be relied on by applicants for gang injunctions? Please explain in relation to applications for both interim and full injunctions.*
11. *Does the Government envisage that there will be circumstances in which sensitive information may be relied on in support of the application for an injunction, which would not be disclosed to the respondent? If so, why does it consider such a procedure to be necessary and how will it ensure a fair procedure for the respondent?*

Injunctions may be applied for with or without notice being given to the respondent. Where notice is not provided to the respondent, the court may grant an interim injunction if it thinks it is “necessary” to do so and adjourn the hearing, but must set a time limit for any prohibition or requirement imposed, and must not require the respondent to participate in particular activities (Clause 39). If the respondent is given notice of the application, but the court decides to adjourn the hearing, it may grant an interim injunction if it considers it to be “just and convenient to do so”, but any prohibition or requirement in the injunction must be time limited (Clause 38). Unlike applications for a final injunction, the purposes for which an injunction may be sought are not set out on the face of the Bill.

12. *Why has the Government chosen not to specify for interim injunctions, the purposes for which they may be sought?*
13. *Why are interim injunctions not subject to a maximum time limit by which they must be brought before a court for a full hearing, or be automatically discharged?*

Review hearings are not mandatory, but may be ordered by the court (Clause 34(4)). In the PBC, you stated that “it is unlikely that the courts will grant an order with indefinite conditions without setting a review hearing. The guidance will also encourage the setting of review hearings for longer or indefinite injunctions”.¹⁸

14. *If this is the Government’s intention, why has this not been set out on the face of the Bill?*
15. *Has the Government considered specifying a maximum period by which a review hearing must take place, and if so, why has it rejected this?*

Both the applicant and respondent may apply for the injunction to be varied or discharged (Clause 40).

¹⁶ Col 594, PBC, 26.2.09.

¹⁷ Cols 592 & 596, PBC, 26.2.09.

¹⁸ Col 597, PBC, 26.2.09.

16. *Will a respondent always be able to make representations if he wishes, where an application is made to vary the injunction?*

The Secretary of State is required to issue and publish guidance to which those who are permitted to apply for gang-related injunctions must have regard (Clause 45). You confirmed in the PBC that the code of practice would need to be published in draft and put before Parliament for scrutiny.¹⁹

17. *When will the draft guidance be published?*

In the PBC, you explained that although children and young people are not explicitly excluded from this injunctions regime, in practice, they would not be used against under 18 year olds as they would be unenforceable against them.²⁰ However, you also said:

“I have asked my officials to work with others across Government to see whether we can amend how civil injunctions work to enable the provision to be used for under-18s . . . We should find a way, no matter how difficult or controversial, to legislate and create a civil preventive tool that prevents a 16-year old from going to an area, wearing colours, associating with others or being used by people over 18 to do their errands or dirty work”.²¹

18. *Do you propose that this Bill will be amended to give effect to your aim of including children and young people?*

19. *Given the existence of other civil orders such as ASBOs, what evidence is there of their inadequacy to deal with gang-related violence by children and young people and why are new orders necessary?*

I would be grateful if you could reply by 23 March 2009 and if an electronic copy of your reply, in Word, could be emailed to jchr@parliament.uk.

**Letter from Vernon Coaker MP, Minister of State, Home Office to the Chair of the Committee,
dated 23 March 2009**

POLICING AND CRIME BILL

Thank you for your letter of 9 March 2009 outlining some questions the committee has raised in relation to the human rights compatibility of the gangs injunctions provisions within the Policing and Crime Bill.

As before, I am grateful to the committee for examining the Bill and welcome your queries. Having carefully considered the issues, I attach our response to your questions which I hope are helpful to the committee.

If, upon further examination of the Bill, the committee have any additional questions or concerns, please do not hesitate to contact me and we will of course consider any further issues raised carefully.

**HOME OFFICE RESPONSE TO JOINT COMMITTEE ON HUMAN RIGHTS
POLICING AND CRIME BILL—GANGS INJUNCTIONS**

1. *Why is the existing civil and criminal law inadequate to protect society from, and to prosecute, gang-related violence?*

There are a number of civil and criminal law tools which can, and are used, to deal with gang-related violence and the Government is very clear that these civil injunctions are not being introduced as an alternative to prosecuting gang-related violence, when such prosecutions are available. However, the granting of injunctions in Birmingham prior to the Court of Appeal decision in Shafi and Ellis showed in some cases an acceptance by local authorities and courts that there was a need for immediate injunctive relief in cases which involved gang-related violence. The injunctions provided a flexible, preventive tool which was able to provide immediate relief from a particular problem without criminalising young people. It was particularly important to the community in Birmingham that these injunctions were flexible and could be granted for a short period of time (there being no minimum term) and that any breach did not result in a criminal record. Some mothers of gang members even gave evidence in support of an injunction as this did not involve the criminal justice system in any way.

Evidence from the use of these injunctions in Birmingham showed that incidents of serious gang-related crime fell (Col 590, PBC, 26.02.09). Examples of success include: In Handsworth/Lozells/Newtown, the level of robberies in the four months prior to the injunctions averaged 55 per month compared with 33 per month

¹⁹ Col 595, PBC, 26.2.09.

²⁰ Col 582, PBC, 26.2.09.

²¹ Col 566, PBC, 26.2.09.

while injunctions were in place. After injunctions were removed this rose again to 48. In Aston/Nechells, there was an average of 11 firearms incidents in the four months preceding the orders compared with 4 for the period the orders were in place. After the court judgment, this figure rose to 9 in March. In the city centre, firearms usage dropped from 8 in July 2007 to 1 in September 2007. Again, after injunctions were removed, there was then a rise leading to a peak of 9 incidents in May 2008. The Government believes it is important that these injunctions are available and that it is equally important, once an individual has been identified as being involved in the particular problem, that the opportunity provided by the injunctions is taken to engage positively with respondents to tackle their offending behaviour and draw them away from gang activity.

2. Why has the Government chosen to use the civil law to tackle what will frequently be criminal behaviour?

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

3. Why has the Government opted not to require those seeking the injunction to explain why criminal prosecution, in an individual case, is impossible?

The Government's stance is that these injunctions would not normally be sought against individuals where the evidence was such that the criminal justice system was already engaged. However, having carefully considered the issue we do not believe that it is advisable to make it a pre-requisite that the CPS explain why it is impossible to charge the individual in question before an injunction is sought. The police may be at the initial stages of an investigation, leaving it uncertain when CPS charging advice will be sought; the CPS may have considered the matter but have requested further investigation before taking a decision; the CPS may have decided not to charge an individual at a particular time but review that decision at a later stage. All of these are likely to be regular scenarios. This is because of the time police investigations and charging decisions can take. We do not feel that we can properly wait until these processes have been completed in every case as this would result in an on-going risk to the public in the interim. The ability to obtain immediate injunctive relief is essential given the very real risk that gang offenders pose to the community.

The Government is clear that these injunctions should not be used to shortcut the criminal justice process and its safeguards, when this process is available. For that reason, the guidance will make it clear that the criminal justice system should always be used where possible. This guidance is statutory and therefore all applicants must have regard to it. This is clearly then something the Courts will consider when deciding whether to grant an injunction or not.

The need to be able to respond immediately can be illustrated by a hypothetical example of an individual from a particular gang who has been shot at and seriously injured. A full criminal investigation is launched and community mediation services are deployed. Credible intelligence is received to warn that specific members of the opposing gang are planning a reprisal shooting. The gang members identified are well known to the police and there is previous evidence of gang membership and their links to gang violence. In order to try to prevent a reprisal shooting and to give breathing space for both the criminal investigation and for community intervention and mediation, the police could apply for a without notice injunction to prevent those thought to be planning the reprisal shooting from visiting certain areas or associating with each other.

4. In order to give protection to individual rights and to provide legal certainty, why is there not an exhaustive list of the prohibitions or requirements that may be granted?

The Government considers that one of the significant benefits of these injunctions will be their flexibility. We believe that making the suggested list of prohibitions and restrictions exhaustive would tie the courts' hands leaving them unable to respond appropriately to particular gang problems in particular areas. The Government cannot be certain that the ways in which gang violence is perpetrated will remain the same, such that this should be pre-established in the provisions.

For example, there has recently been an increase in the use of dogs to intimidate and injure rival gang members and other members of the community. The Government has therefore included a prohibition in the injunction about being in a public place with an animal. If this trend had emerged in 2010 rather than over 2008–09, it would not have been within the injunction and gang injunctions would have risked not being able to tackle this behaviour.

5. Please provide examples of the types of circumstances in which it is envisaged that an injunction will be necessary to protect a respondent from himself

The reason for this provision is that experience shows that victims in gang violence quickly become perpetrators and vice versa, particularly in retaliation attacks. In most cases, gang violence occurs between rival gang members—a person subject to an injunction would be a known gang member who had committed, encouraged or assisted gang violence. This provision focuses on the fact that in some cases a gang member is known to be putting themselves at risk of a reprisal attack.

A real case example is as follows: a young man was known to be the target of a gang attack. He was warned of this, yet he insisted on continuing to enter the area in which he was going to be attacked. In this scenario, the Government wants to prevent the gang-related violence. This is not just because of the individual respondent, who was both at risk of committing and being the victim of violence in the event of a confrontation, but also the risk to innocent bystanders and of further tit-for-tat violence. The Government therefore feels that it is necessary to have this option available. In reality, the injunction is most often likely to be needed both to prevent the respondent from engaging/ assisting/ facilitating gang-related violence and from being a victim of such violence.

6. Why does the Government consider it to be necessary and proportionate to permit injunctions of indefinite duration? Has it considered setting out, on the face of the Bill, the maximum duration of an individual injunction? If so, why was this rejected?

The Government considered this issue carefully and concluded that it may be necessary for certain respondents to be subject to injunctions of indefinite duration. This is because it may not be possible, at the time of granting the full injunction, to assess in any accurate sense how the behaviour of the respondent may change or develop. To safeguard the individual's rights in these cases the Government has expressly provided that an application to discharge or vary the injunction can be made by either party and also that the court can set review hearings.

If there was to be a maximum duration of, for example five years, the Government would be concerned that this could encourage injunctions to be sought and granted for five years without due consideration given to whether the individual circumstances merit this. On the other hand, the Government would also be concerned that, if information came to light towards the end of the five years suggesting that the respondent should still be subject to certain prohibitions or requirements, this would not be possible. Neither situation is desirable.

For these reasons, the Government has decided not to include a maximum duration on the face of the Bill and is satisfied that leaving the question of duration to the courts is both preferable and reasonable, thereby ensuring that applicants and courts consider in each case what duration is really warranted.

7. Does the Government propose to introduce amendments setting out the definition of "gang" in the Bill?

This is a difficult issue on which the Government has reflected very carefully and concluded that it does not intend to define a "gang" in the Bill. The reason for this is that gangs vary from city to city, the behaviours that they engage in are not uniform nationally and change over time. We do not want to undermine the flexibility of injunctions by prescribing the definition of a gang which may not include all persons we wish to include and may inadvertently capture organisations or persons we do not. Moreover, the Government considers that "gang" is a well-understood word—albeit one that is difficult to define—and, as the legislation does not intend it to mean anything different from what is meant in everyday language, it is justifiable and sensible on normal principles of statutory construction for the legislation to operate without a definition.

We will develop this complex issue further in the guidance to applicants, including a comprehensive list of examples of the types of groups which we do wish to cover with these injunctions (violent street gangs) and those we do not wish to cover (eg rowdy football supporters). We are doing this to help ensure that these injunctions are not used inappropriately. The Government is considering whether to lay guidance before Parliament before it comes into force.

8. *Why does the Government consider that the criminal fairness guarantees of an enhanced civil standard are not appropriate, given the criminal nature of the underlying allegations, the breadth of the requirements/restrictions that may be imposed and the indefinite duration of the proposed injunctions?*

The Government considers that since the injunction is a civil order, granted in the civil courts, breach of which is a civil contempt of court, the only appropriate burden of proof to be applied is the civil balance of probabilities. The Government is satisfied that civil court procedure adequately safeguards individuals' ECHR Article 6 rights.

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

9. *Is the Government hoping to use the new gang-related injunctions to avoid applicants having to prove their case to an enhanced civil standard, as required by McCann in relation to applications for antisocial behaviour orders?*

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

Of course, should there be proof to the criminal standard of criminal activities, the Government would expect criminal proceedings to be considered. However, as stated above in the answer to question 8, since these are civil injunctions granted in civil courts, breach of which is a civil contempt of court, the Government is content that the balance of probabilities is the appropriate burden of proof.

10. *What type(s) of evidence does the Government anticipate will be relied on by applicants for gang injunctions? Please explain in relation to applications for both interim and full injunctions*

The Government envisages that a wide variety of evidence may be relied upon by applicants; this may include direct evidence from witnesses, hearsay evidence from community members and/or police officers, documentary evidence, expert evidence, evidence contained in the statement of case and any other evidence admissible in the civil courts (CPR Parts 32 and 33 and the Civil Evidence Act 1995). The Government does not consider that this will vary significantly for interim injunctions.

11. *Does the Government envisage that there will be circumstances in which sensitive information may be relied on in support of the application for an injunction, which would not be disclosed to the respondent? If so, why does it consider such a procedure to be necessary and how will it ensure a fair procedure for the respondent?*

The Government anticipates that there may be such circumstances. In these circumstances, the Government considers that current procedures in the civil courts are adequate eg CPR 32.9 allows witness summaries to be relied upon omitting the witness' details (name and address) and CPR 39 allows hearing to be held not in public in certain circumstances. It is envisaged that without notice hearings may more frequently be heard in private in accordance with CPR 39.2 (3)(e). The Government considers that the existing rules do ensure a fair procedure for the respondent, the final decision on these matters resting with the courts.

12. *Why has the Government chosen not to specify for interim injunctions, the purposes for which they may be sought?*

The Government has chosen not to tie the courts' hands by trying to create a list of purposes for which an interim injunction can be sought. The reason is that the Government believes that the courts are best placed, with their considerable experience in granting injunctions and interim injunctions, to determine whether an interim injunction should be granted in the particular circumstances.

13. *Why are interim injunctions not subject to a maximum time limit by which they must be brought before a court for a full hearing, or be automatically discharged?*

This again is an area which the Government has decided is too subjective to be governed by statutory rules. The courts are best placed to determine whether an interim injunction should be granted. At the same time, the court will also be best placed to determine for how long the interim injunction should be granted. The court must be able to tailor the injunctions to the individual respondent. The Government is aware that

some evidence may take time to obtain and that some courts are extremely busy and therefore does not wish to set unrealistic time limits. However, setting longer time limits may not encourage less busy courts to list the matter as soon as practicable. Therefore the Government considers that the duration of interim injunctions is a matter that should be left to the courts.

14. *If this is the Government's intention, why has this not been set out on the face of the Bill?*

Please refer to the answer to question 13 above.

15. *Has the Government considered specifying a maximum period by which a review hearing must take place, and if so, why has it rejected this?*

The Government considers that the court is best placed to determine what system of reviews, if any, should be put in place in any particular case. On the same lines as the issue raised in question 6, setting a time limit on reviews of injunctions ties the courts' hands in a way which is inconsistent with the purpose of the flexibility of these injunctions. Setting a time limit could, in some circumstances, encourage a court to grant an injunction for the maximum time allowed without setting reviews. In other circumstances mandatory reviews could overburden busy courts with unnecessary hearings. The Government's strong preference is for all these matters to be set out in guidance, which ensures flexibility. This would enable the court to respond to a gang member who changes their behaviour both in terms of reducing offending and leaving the gang, or where offending behaviour escalates.

16. *Will a respondent always be able to make representations if he wishes, where an application is made to vary the injunction?*

Yes, the respondent will always be able to make representations if he wishes at any such application. The Government is aware of the need for natural justice, fairness and equality of arms principles throughout the injunction process. Clearly the power to vary or discharge an injunction is an important provision and the court will consider all the evidence put before it in order to determine whether the injunction should be varied or discharged.

17. *When will the draft guidance be published?*

It is intended that draft guidance will be published which will form the basis for consultation. After consultation, the Government is considering whether to lay the guidance before Parliament before it enters into force. The draft guidance will be published as soon as possible and, in any event, before the commencement of the legislation.

18. *Do you propose that this Bill will be amended to give effect to your aim of including children and young people?*

No, the Government does not intend to amend the Policing and Crime Bill to cover children and young people explicitly.

19. *Given the existence of other civil orders such as ASBOs, what evidence is there of their inadequacy to deal with gang-related violence by children and young people and why are new orders necessary?*

The Government appreciates the difficulties and sensitivities involved in dealing with gang-related violence by children and young people. It is for this very reason that cross-departmental discussions are being held and will continue, in order to consider very carefully the options available. As stated in our answer to question 1 above, the injunctions used in Birmingham provided a flexible, preventive tool which was able to provide immediate relief from a particular problem without criminalising young people. Also as explained above, in Birmingham, it was particularly important to the community that these injunctions could be granted for a short period of time (there being no minimum term) and that any breach did not result in a criminal record. Some mothers of gang members even gave evidence in support of an injunction as this did not involve the criminal justice system in any way. As indicated above in the response to question 18, the Government does not intend to amend this Bill to cover children and young people explicitly.

Memorandum submitted by the General Council of the Bar

POLICING AND CRIME BILL 2009

Observations on part 4

1. Part 4 contains a series of amendments to be made to Parts 2 and 5 (Ch 3) of the Proceeds of Crime Act 2002. In general terms, the principal amendments to Part 2 add a new power of detention of property to prevent dissipation pending the making or satisfaction of a confiscation order. To the detention of cash powers in Part 5 will be added a power of “summary forfeiture”, apparently reserved for cases where there is no objection to the cash being forfeited.

2. As regards the restraint regime (sections 40–47, 69), although the power is pre-emptive and provisional, it has been held not to amount to a disproportionate interference with Article 1 of the First Protocol; there is a reasonable balance between the public interest in ensuring assets are available for satisfying any confiscation order made or to be made and the restrained person’s right to unfettered enjoyment of his property. A factor in the balance is that a restraint order is a protective order; the holder of the property keeps and can use it, but cannot dispose of or dissipate it for the time being. Detention will deprive a person of use of the item against the possibility of a confiscation order being made. It will be possible to detain property even before any decision is made to charge. This is not detention of material as evidence, or that has been used to commit crime; rather it is equivalent to a warrant of distress before any debt has been proved!

3. One question is whether there is any real need for these powers, because the present regime already has powers that could be invoked to detain property once a restraint order has been made:

4. First there is section 41(7) POCA which provides:

“The court may make such order as it believes is appropriate for the purpose of ensuring that the restraint order is effective.”

5. Furthermore, by section 45 POCA (Seizure):

“(1) If a restraint order is in force a constable or a customs officer may seize any realisable property to which it applies to prevent its removal from England and Wales.

(2) Property seized under subsection (1) must be dealt with in accordance with the directions of the court which made the order.”

6. This power could be enlarged simply by adding the words “dissipation or disposal or” . . .” immediately before “removal from England and Wales”:

“(1) If a restraint order is in force a constable or a customs officer may seize any realisable property to which it applies to prevent its **dissipation or disposal or** removal from England and Wales.”

7. Yet further, where the court appoints a management receiver under section 48 POCA, the receiver may be empowered (under section 49) to:

(a) . . . to take possession of the property;

8. In other words, the need for a new power of detention of property is debateable in the first place, so it should only be invoked where at least a real degree of necessity is demonstrated.

GENERAL POINTS

Clause 33:

9. According to the Explanatory Notes, “Clause 33 amends the restraint order provisions of POCA to provide that an appropriate officer (as defined in new section 41A(3)) can continue to retain property that has been or may be seized under a specified seizure power if that property is also subject to a restraint order.” The example is given of property seized as evidence may continue to be detained, even after it is no longer required as evidence and would otherwise be returned. Property which was seized, for example, as evidence, and which is subject to a restraint order may therefore continue to be retained even when the evidential purpose for retention no longer exists. The Bar Council/CBA consider that if the retention of items of property is no longer required for any other reason, then it is incumbent on the applicant to show that a restraint order is unlikely to secure its retention (“only detention will do . . .”).

Clause 34:

10. According to the Explanatory Notes, “The [section 47A] seizure power is subject to judicial oversight.” The level of judicial oversight proposed is the magistrates’ court. Given the degree of infringement with property rights involved in property detention simply against the possibility that a confiscation order will be made, the Bar Council/CBA considers that the appropriate level of “judicial

oversight” in any case of prolonged detention (> 48 hours) should be the Crown Court. It is suggested that “. . . In recognition of the sensitivity of search and seizure powers, section 47P requires the Secretary of State to publish a Code of Practice setting out how the powers are to be exercised.” We do not consider it to be satisfactory to leave it to Codes of Practice to resolve the “. . . sensitivity of search and seizure powers” (which is surely a reference to the infringement of the right to peaceful enjoyment of property guaranteed by Article 1 of First Protocol). The magistrates do not have (nor should they) the power to grant a restraint order.

11. The Bar Council/CBA considers that the proposed section 47M creates a de facto restraint order on application to the magistrates and represents a disproportionate interference with the right to peaceful enjoyment of property, without judicial scrutiny at a sufficient level, ie a judge of the Crown Court. Indeed, the proposed power can be invoked where the relevant authority thinks that a restraint order (or variation thereof) would not be granted by a judge in the Crown Court (see section 47M(1)). Section 47N(3) (discharge if “proceedings for the offence . . . not started within a reasonable time”) does not provide sufficient protection to the holder of the property since “a reasonable time” is indeterminate, and may be many months.

12. The Court of Appeal recently observed (in *SFO v Lexi Holdings Ltd* [2007] EWCA Crim in relation to an application to vary a restraint order that this area of law can be highly complex:

“First, there can be little doubt that the issues which arose in this case concerning beneficial interests, equitable charges and tracing were far from straightforward. They are not part of the daily work of most Crown Court judges, and indeed this constitution of the Court of Appeal Criminal Division was deliberately arranged so as to ensure that appropriate expertise in matters normally falling within the jurisdiction of the Chancery Division was available. Sometimes issues may arise in restraint order proceedings about equitable interests which are not unduly complicated and can readily be dealt with in the Crown Court. In other cases the sums involved may not warrant any unusual steps. But there may be other times when the complexities are such that it may not be wise for the Crown Court judge to embark on seeking to decide those issues. In such a case where a relaxation of a restraint order is sought, consideration should be given to adjourning those variation proceedings to enable the issues to be determined in proceedings before a specialist Chancery Circuit judge or High Court judge of the Chancery Division. Alternatively, those arranging the listing of such cases in the Crown Court should seek to ensure that they are heard by a judge with the relevant experience and expertise.”

13. It must be remembered that the property subject of detention under POCA, part 2, need not form or be alleged to be the proceeds of crime, and the person from whom it is taken need not even be suspected of any crime, let alone charged or convicted: for example property could be taken from the innocent recipient of a gift. It is suggested that prolonged detention should only be available in circumstances where a restraint order has been granted. It is difficult to envisage proper circumstances where it is appropriate that a judge who does not consider a restraint order should be granted should be second-guessed by an application to magistrates for indefinite detention of property under these provisions.

Clause 39

14. Although this provision appears pragmatic (after all, why shouldn't detained property be realised once time to pay has elapsed) it fails to appreciate an important characteristic of the confiscation regime, which is that the order is made against the person, not against property. One reason for this is that the property available to the defendant may have nothing to do with any criminal conduct on his part (eg an inheritance or a lottery win), or it may be partly owned by someone else (eg a matrimonial home). The proposed power of sale is not restricted to “free property” (ie property in which no one other than the defendant has any interest).

15. It is only at the enforcement stage that a third party claiming an interest in assets of the defendant (which includes any property in which he has any interest or right) is entitled to be heard [section 51(8)]. The powers of a receiver appointed under section 50 must be exercised with a view to: “. . . allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him” [section 69(3)(a)]. In *R v Norris* [2001] 1WLR 1388, [2001] UKHL 34, Lord Hobhouse explained (in relation to DTA powers):

“16. The second type of power conferred upon the High Court is directed to realising the value of realisable property and applying the proceeds so that the sum payable under the confiscation order can be fully discharged. This is achieved through a receiver appointed by the High Court under section 11. The drafting of section 11 and the associated sections 12 and 13 acknowledge that others besides the defendant and the donee of a gift caught by the Act may have an interest in the relevant property and that, whilst the receiver is given the power to take possession of the relevant property and realise its value, the order does not override or confiscate the interests of others in the value of that property. Section 13(4) expressly provides that the powers shall be exercised with a view to allowing any person, other than the defendant or the recipient of a gift caught by the Act, “to retain or recover the value of any property held by him”. This would be implicit even in the absence of an express provision since the confiscation order only applies to the convicted defendant and,

indirectly through such defendant, donees caught by the Act. To apply it so as to confiscate the property of innocent third parties would be not only exorbitant but also outside the purpose of the Act. Any such confiscation would now also raise Human Rights issues.

...

23. The English system of criminal justice does not itself confer any civil jurisdiction upon the criminal courts and it takes a clear and express provision in a statute to achieve that result. The 1986 Act does not contain any such provision; indeed, as already explained, its clear intention is to preserve the distinction between the respective jurisdictions. The time and place for Mrs Norris to assert her civil law rights over 7 Berryfield Close was when the Customs and Excise attempted in the High Court to deprive her of her interest. It is at this stage that she becomes directly affected and has the right to invoke the remedies of the court in the defence of her civil law rights. In the criminal court she was a mere witness with no right of representation and no control of the proceedings and no right of appeal.”

16. The scheme of the POCA in relation to the “realisation” of property is materially identical to that of the CJA 1988 and the DTA 1994. Third parties claiming an interest in the property have no right to be heard at the confiscation proceedings (although such a person may be called as a witness by the defendant). Under POCA, it is only when application is made to enforce the confiscation order that another person claiming an interest in property can make representations in the Crown Court. The proposed power of summary realisation of detained property fails to reflect the balance, shifts forum down to the magistrates (despite the fact the third party claims to property are often complex), and contains no express entitlement to any party other than the applicant to be heard on the application for power to sell.

17. Creating a power of appeal power does not cure the lack of entitlement to make representations at first instance. As with any other appeal, the burden would ordinarily be on the appellant to show that the order should not have been made (there is no express indication that an appeal would be treated as a rehearing—cf Supreme Court (Senior Courts) Act 1981, section 79(3)). Moreover, the defendant is excluded and has no right of appeal.

18. Generally, the Bar Council/CBA does not see any real justification for this special power to sell, because an enforcement receiver, answerable to the Crown Court, can be clothed with a power to sell restrained assets. Given the observations of Lord Hobhouse, it is suggested that it is not appropriate for these issues to be determined by magistrates’ court.

Summary of Observations

<i>Section</i>	<i>Current wording</i>	<i>Comment</i>
32	Recovery of Expenses etc	<i>No observations</i>
33	Power to retain seized property: England and Wales ²² [<i>Insertion of section 41A</i>]	Insert before ss(3) and new provision as follows: “Provision under subsection (1) may be made only where the court is satisfied that (a) the property may otherwise be made unavailable for satisfying any confiscation order that has been or may be made against defendant, or (b) value of the property may otherwise be diminished as a result of conduct by the defendant or any other person.” The reason for this suggestion is that it inserts a requirement on the applicant to show a real need for detention, as opposed to restraint. The wording is copied from section 47C.
34	Power to retain seized property: Scotland [<i>Insertion of section 120A</i>]	<i>Identical amendment</i>
35	Power to retain seized property: Northern Ireland [<i>Insertion of section 190A</i>]	<i>Identical amendment</i>

²² If this power of detention is enacted, consideration should be given to amending section 77 of the CJA 1988 (and the DTA) to the same effect.

<i>Section</i>	<i>Current wording</i>	<i>Comment</i>
36	<p><i>Insertion of sections 47A–D</i></p> <p>Search Power: people [<i>Insertion of section 47E</i>]</p> <p><i>Insertion of sections 47F–I</i></p> <p>Further detention in other cases [section 47M]</p> <p><i>The proposal that indefinite detention of property may be ordered by magistrates is opposed in principle. No amendments are suggested because none could make the proposed power compatible with Article 1 of the First Protocol (or Article 8).</i></p> <p>Sections 47N and O: the same observations as above apply.</p> <p>Section 47P</p>	<p>See general comments above; other, no observations.</p> <p>The Bar Council/CBA doubts that a power of search independent of PACE powers is justified, particularly as it is not even restricted to the suspect or defendant.</p> <p>See general comments above; other, no observations</p> <p>The Bar Council/CBA regards this proposal (section 47M) as being wrong in principle. Under the POCA, Part 2, only the Crown court may make a restraint order. Section 47M would be “triggered” only where the investigating/prosecuting authority decides <i>not</i> to seek (or to vary) a restraint order [sections 47K & 47L]. In those circumstances application may be made to a magistrates’ court for indefinite detention.</p> <p>The Bar Council/CBA considers that any Codes of Practice should, inter alia, set out that in any case where detention is sought, it must be shown that the property cannot adequately be protected against the risk of dissipation/diminution/transfer etc, by a restraint order. It is submitted that a high degree of risk of dissipation must be shown.</p>
37	Search and Seizure of property: Scotland	<i>Identical observations</i>
38	Search and Seizure of property: Northern Ireland	<i>Identical observations</i>
39	Power to sell seized personal property: E & W [section 67A]	The Bar Council/CBA considers this provision to be inconsistent with the confiscation regime and to raise issues of compatibility with eg Art.1 of First Protocol. POCA expressly preserves the rights and interests of a third party (not being a donee of a gift within the meaning of the Act); this provision does not. As a matter of practicalities, an “appropriate officer” will not have the skill or experience of a receiver to sell detained assets and ensure the best price is obtained.
40	Power to sell seized personal property: Scotland	
41	Power to sell seized personal property: Northern Ireland	
42	Payment of compensation	<i>No observations</i>
43	Limitation	Given that a victim of an acquisitive crime must, in general terms, commence any action against the perpetrator within 12 years of the crime, it is difficult to see why the State should be in the privileged position of having a further 8 years to bring an action for civil recovery.
44	Power to search vehicles	<i>No observations</i>
45	Detention of seized cash	It is proposed that the magistrates will have power to authorise further detention for six instead of the current three months. The benefit of the current arrangement is that some level of judicial scrutiny is involved on a reasonably regular basis by which the court can satisfy itself that investigations are being conducted expeditiously. Extending the intervals to six monthly will diminish that scrutiny.

<i>Section</i>	<i>Current wording</i>	<i>Comment</i>
46	Forfeiture of detained cash	<i>No observations</i>
47	Detained cash investigations	<i>No observations</i>

12 February 2009

Memorandum submitted by JUSTICE

INTRODUCTION AND SUMMARY

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. This briefing is intended to highlight JUSTICE's main concerns regarding the Policing and Crime Bill. Where we have not commented upon a certain provision in the Bill, that should not be taken as an endorsement of its contents.

3. We welcome the decision not to include in the Bill proposals for directly elected police authority members. In our response to the Policing Green Paper, we opposed this measure on the grounds that it could lead to the politicisation of operational policing and the ceding of a measure of control over policing to extremist or even criminal elements. Our main human rights concerns about the Bill's provisions now centre upon the following areas:

- The Police Senior Appointments Panel should be sufficiently independent of the Home Secretary to provide objective and expert advice.
- Many of the provisions on prostitution will, we believe, be counter-productive and will make conditions less safe for sex workers, leading to a greater risk of violence against them.
- The Bill fails to decriminalise children who are victims of child sexual exploitation.
- The use of coercive powers relating to alcohol against children is an inappropriate response to underage drinking and may put children at further risk.
- Extradition provisions in Part 5 of the Bill risk the return of people to states where they are at risk of human rights abuses; the extended detention of provisional arrestees; and the inappropriate use of live links in extradition proceedings.

4. In addition to this briefing we endorse the submissions to the Committee of the Standing Committee for Youth Justice (SCYJ), of which JUSTICE is a member.

PART I: POLICE REFORM

Clause 2: Police Senior Appointments Panel (PSAP)

5. We note the concern of the Association of Chief Police Officers (ACPO) that:²³

Chiefs are very concerned at the unrelenting drift of policy and legislation toward weakening their status as office holders. Our advice to Government around maintaining processes such as chairmanship of the Senior Appointments Panel within the hands of a firmly independent HMIC (Her Majesty's Chief Inspector of Constabulary) stands.

We too are concerned that operational policing matters should not be subject to political control, in order to preserve the tripartite form of police governance. The arrangements under new section 53B of the Police Act 1996 would lead to the PSAP's being dominated by members nominated or appointed by the Secretary of State, including its Chair.

6. Since the PSAP's function in relation to senior appointments is to be an advisory one, it stands to reason that the members should have a high degree of independence and expertise. Independence from the Secretary of State is necessary so that advice is given, and is seen to be given, on proper grounds and not in fear of disagreement with the Secretary of State's preferences. A proper degree of independence and diversity of panel membership is in our view a better method of guaranteeing that human rights concerns such as non-discrimination and commitment of appointees to human rights principles are taken into account in the appointment process.

²³ ACPO statement on the publication of the Policing and Crime Bill, 18 December 2008.

PART 2: SEXUAL OFFENCES AND SEX ESTABLISHMENTS

Clauses 13 and 14: Paying for sexual services of a controlled prostitute

7. Clauses 13 and 14 would create new offences in England and Wales and Northern Ireland, respectively, where a person pays or promises payment for the sexual services of a prostitute whose provision of such services is controlled for gain by a third person. The offences are of strict liability, in that it is irrelevant whether or not the client was aware that the prostitute was controlled for gain.

8. It is important to note that the definition of “controlled for gain” fails, in our view, to differentiate between prostitution in the context of human trafficking, pimping, or in circumstances where the prostitute is simply employed by a third person—for example in an escort agency or brothel.

9. This failure is, we believe, extremely counter-productive, assuming that—as we hope—the aim of the legislation is to combat the coercion of trafficked people and others into prostitution and the exploitation and abuse of prostitutes by violent pimps. To criminalise the use of prostitutes who are willingly employed in sex work, for example in brothels, may lead both to more isolated working by prostitutes on the street or in their own homes or client’s homes— isolation leading to greater risks to their safety—and to the prostitution business going further “underground”—into the hands of organised criminals and in brothels away from the public eye, where prostitutes will be again at greater risk of violence and abuse.

10. JUSTICE has not taken a position on the morality of prostitution but we believe that—as in the case of controlled drugs—while it is possible that legal prohibition may deter some men from using prostitutes, many others—in particular those with less respect for the law in general—will not be so deterred. We believe that the priority should be the protection of the rights of sex workers and others under Articles 2, 3 and 8 ECHR and therefore to ensure that sex work is carried out only by willing participants, in a safe environment. We believe that these provisions are likely to have the opposite effect.

11. Respect for human dignity and autonomy and the realisation of Articles 3 and 8 ECHR mean that the coercion of people into sex work, whether in the context of human trafficking or pimping in general, should be regarded as a very serious criminal offence. “Control for gain” however is not a term which is confined to these circumstances.

12. Further, if someone uses a prostitute in the knowledge or belief that they are providing sexual services only because of the fear of violence or from a third person, they too should be regarded as committing a serious offence—perhaps one of rape/attempted rape or sexual assault. In these circumstances a summary only offence punishable by a level 3 fine, like those created in clauses 13 and 14, would not reflect the severity of the offending behaviour.

13. However, where the client is not aware that the prostitute is not acting of her own free will, to criminalise him may deter him from reporting circumstances of violence of which he becomes aware to the police. Further, offences of strict liability—which may be appropriate in regulatory or environmental law—are not appropriate in these circumstances. Effectively, these provisions will criminalise the use of any prostitute other than one who is self-employed. This may deter men from using prostitutes who are not working alone. This is counter-productive in relation to their safety.

14. Further, the element of strict liability combined with a broad interpretation of “controlled for gain” means that it is difficult for a potential client to know how to order his conduct so as to avoid criminal sanction, thereby compromising the guarantee of legality under Articles 7 and 8 ECHR.

15. We therefore believe firstly, that “control for gain” should be replaced with a definition that criminalises the use of a prostitute who provides sexual services against her free will for fear of violence or other reprisal (such as false imprisonment and/or a threat of being informed upon to the immigration authorities) and that the offence should only be committed where the client knew or believed this to be the case, or at the very least, where he was aware of a substantial risk that it was the case but used the prostitute anyway.

Clause 15: Amendment to offence of loitering etc for purposes of prostitution

16. This clause would mean that loitering or soliciting by a prostitute would only be an offence if it takes place on more than one occasion in any period of three months. However, this is in our view a largely meaningless change. The criminalisation, and use of ASBOs, against street sex workers is likely to make them more unsafe by: encouraging them to seek out more isolated areas in which to work; discouraging them from reporting dangerous clients or attacks; discouraging them from seeking help from services such as needle exchange; etc. While it is understandable that local authorities and communities do not welcome the presence of “red-light” areas, these will inevitably remain somewhere unless their causes are better addressed.

17. Further, we are seriously concerned at the government’s continuing failure to decriminalise child victims of sexual exploitation involved in prostitution. In its latest set of concluding observations on the UK’s compliance with the United Nations Convention on the Rights of the Child, the UN Committee on the Rights of the Child emphasised that:²⁴

²⁴ UN Doc CRC/C/GBR/CO/4, 20 October 2008, para 74.

The State party should always consider, both in legislation and in practice, child victims of these criminal practices, including child prostitution, exclusively as victims in need of recovery and reintegration and not as offenders.

This policy was acknowledged by the government in 2008 during the passage of the Criminal Justice and Immigration Bill, when the Minister said that he wished to give the:²⁵

clear message that child sexual exploitation is a grave crime that will not be tolerated and that the child is always the victim.

We believe that the continued criminalisation of children involved in prostitution is likely to deter them from seeking assistance from the authorities and plays into the hands of abusers. We therefore believe that even if the offence of loitering/soliciting is retained for adult prostitutes it should be repealed for children.

Clauses 18 and 19: Soliciting

18. We oppose the creation of these offences, for similar reasons to our opposition to clauses 13 and 14 above. Criminalisation of kerb-crawlers will not deter those with little respect for the law and is likely to lead to an increase in violence against sex workers: this has already occurred in Sweden after kerb-crawling was outlawed.²⁶ Like other prohibitory measures, it is likely to push street prostitution into more isolated areas. We believe that these provisions will have little effect on the numbers of men using prostitutes but will make prostitutes less safe. They therefore fail to provide a proper protective scheme for prostitutes' rights under Articles 2, 3 and 8 ECHR.

Clause 20: Closure orders

19. Where premises are being used for child sexual exploitation, clearly offences are being committed; in these circumstances the appropriate remedies must lie in arrest and prosecution of offenders and if necessary care proceedings in relation to the children. Closure orders cannot provide an adequate alternative in these circumstances, and we question whether they would in fact deter such activity—which could of course simply move to different premises not known to the authorities.

20. However, our objections to Schedule 2 centre upon the use of these orders against ordinary brothels. Again, the legislation fails to distinguish between premises where people are being forced into sex work by violent or coercive pimps and traffickers, and brothels where prostitutes are working of their own free will. In relation to trafficking and coercion, the appropriate remedy again lies in criminal proceedings against the pimps and traffickers concerned; undercover policing, surveillance and other techniques should suffice to facilitate prosecution of those responsible. We again question whether a closure order would do more than force determined traffickers or violent pimps to move the sex workers to other premises (perhaps further away from the public eye, where they may be even less safe).

21. Where a brothel is operating with the free consent of those working within it, however, different considerations should apply. The closure of brothels through closure orders is likely to have counter-productive effects: forcing some prostitutes into street prostitution, or into working in their own homes or client's homes, which is likely to be less safe and will also expose children of prostitutes to risk; pushing other brothels "underground" into further connection with organised criminals and in less safe, more isolated locations. Like other provisions related to prostitution, therefore, these orders are likely to be counter-productive. If the government wishes to remove brothels from residential areas for understandable reasons, they should provide a safe alternative (for example, licensed brothels in designated non-residential areas).

PART 3: ALCOHOL MISUSE

Clause 26: Increase in penalty for offence

22. This provision would increase the maximum fine for consuming alcohol in a designated public place from level 2 (currently £500) to level 4 (currently £2,500). We believe that a £2,500 fine is a disproportionate penalty for an offence of this type, even if committed persistently. We are concerned that hefty fines could be used against problem drinkers with alcohol addiction problems who may already have financial problems and for whom financial penalties will do nothing to counteract their dependence on alcohol and may result in further social exclusion. We therefore question the necessity of this provision and believe that it could result in a disproportionate penalty.

²⁵ *Hansard*, House of Commons Tuesday 27th November. Column 537ff.

²⁶ See www.prostitutescollective.net

Clause 29: Offence of persistently possessing alcohol in public place

23. We believe that children and young people who are drinking in public places should not, without more, be subject to criminal sanction; dragging them into the criminal justice system and giving them a criminal record will have damaging effects upon their future prospects for employment and will be little deterrent against common teenage behaviour. In relation to younger children in particular, public drinking suggests a lack of proper supervision and carries evident risks to their health. A welfare-oriented approach should therefore be used. Criminalising this behaviour may also lead to children seeking out isolated locations in which to drink in which they may be at risk, particularly at night.

Clause 30: Directions to individuals who pose a risk of disorder

24. We have serious concerns about the extension of section 27(1) Violent Crime Reduction Act 2006 to 10–15 year olds. Legislation and policy in recent years have shown a progressive intolerance for the presence of young people in groups in public places. The use of this power against children as young as 10 may result in their being directed to leave a place of relative safety (a town centre for example) with the result that they instead gather in isolated places where they can avoid police attention but are also at far greater risk. If children as young as 10 are posing a risk of alcohol-related disorder this is a matter of concern for their legal guardian(s) and for health and welfare services; simply banishing them from public sight is an entirely inappropriate remedy. The broad criteria for the use of this power could also result in its use in contravention of Articles 10 and 11 ECHR.

PART 5: EXTRADITION

Clauses 50–52—Deferral of extradition

24. The Bill's proposed amendments in clauses 50 to 52 deal with a gap in the application of the Extradition Act 2003 (EA) to circumstances where it is discovered that a person arrested has charges pending or is serving a sentence in the UK. The current power to defer exists only at the time of the extradition hearing and not before. We welcome the identification of this omission.

25. However, the Bill's amendment to each section of the EA proposes to replace the current deferral period "until the sentence has been served" with "until the person is released from detention pursuant to the sentence (whether on license or otherwise)". If a person is released from custody on license, their sentence has not been served and they are subject to recall. A license can be made subject to any number of conditions (which are contained in Part 12 of the Criminal Justice Act 2003). Where a condition is breached the prisoner can be recalled to prison. Furthermore, the insertion of "or otherwise" is worryingly vague. In this form it could encompass temporary release. We would recommend that the wording remain as currently drafted since it gives a finite period.

26. With respect to the deferral itself, we consider that all parties would benefit from the certainty of knowing whether there is a bar to extradition prior to a decision on deferral. This would prevent proceedings hanging in the balance pending the outcome of the intervening proceedings. The deferral itself could create a passage of time bar, in that where someone is serving a lengthy prison sentence the availability of evidence will diminish. With respect to sections 97 and 98, the Secretary of State is not obliged to consider these bars. This is an unfortunate omission, rendering a case where the Secretary of State makes the final decision subject to lesser safeguards. We believe that the bars should be replicated in these sections.

27. Neither the current provisions nor the proposed amendments provide indicators as to when a judge should exercise their power to defer. It is our view that where a person is already serving a sentence of imprisonment, this should not be disrupted, unless, where the charge is accepted, the issuing state agrees to the person serving their sentence in the UK (as envisaged in Article 5(3) of the Framework Decision), thereby extending rather than deferring their current sentence.

Clauses 53 and 54—Return to overseas territory

28. The proposed sub-sections (3) and (4) provide that if a person is remanded in custody in the issuing state during the extradited matter, this time can count as time served towards their custodial UK sentence. The same is not true for the license period. This is only suspended until the person's return. We consider that when a person is entitled to be released on licence, during which they are remanded in custody in a foreign jurisdiction for a crime they are subsequently acquitted of, that period of time should be reduced from the license period in the same way as it can be reduced from the custodial period. The proposed sub-section (6) treats serving prisoners more favourably where in our view they should be treated equally.

Clause 55—Extradition to UK

29. The proviso in section 153D as to Convention rights is particularly important given that the proposed amendments provide no limit on which territories may be granted an undertaking. By extending the ambit of the undertaking to territories outside the EU, many countries will not be signatories to the European Convention on Human Rights (ECHR). The decision maker must be required to consider the type of regime that is requesting the undertaking, and likely prison conditions. Furthermore, there is no consideration built into section 153C as to how the sentence passed in the UK will be served in the executing territory, whether early release will be available and what body permits release. A requirement to ensure Convention rights are complied with will not guarantee that the sentence will be carried out in accordance with UK law. We welcome the tabled amendment to the Bill to extend the qualification to any international treaty, or where it would be contrary to the interests of justice, as minimum safeguards.

30. We are most concerned that the Secretary of State is the proposed decision maker. It is disappointing that, despite the aims of the Framework Decision²⁷ to abolish extradition between EU Member States and to replace this with a system of surrender through judicial process, the Secretary of State is to be given this power rather than a judge at a hearing. We consider that the opportunity should be taken to amend the provisions to allow a hearing before a judge who will consider whether an undertaking should be given, at which the consent, or at a minimum the representations, of the affected person can be considered. Without such a measure the scheme is at risk of violating the right to a fair hearing under Articles 5 and 6 ECHR.

Clause 58—Provisional arrest

31. Section 6(3B) provides that a judge may allow an extension where they consider that the initial 48-hour period could not reasonably be complied with. The Explanatory Notes do not justify why this additional 48-hour period is necessary. Article 5(1)(c) ECHR provides that no one shall be deprived of his or her liberty save for (emphasis added):

... the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so...

As to Article 5(3) ECHR:

... Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.

32. The proposal envisages a period of provisional arrest that could last up to 96 hours. Detention without charge pursuant to section 41(1) of PACE is 24 hours. For an officer to exercise their powers under section 5 EA a warrant should be on its way. A warrant can be transmitted electronically pursuant to section 204, thereby instantaneously and with the introduction of SISII, this will be the normal means of transmission. We consider it inconceivable that any scenario could justify an arrest without warrant, on reasonable belief that a warrant will arrive rather than an offence having been committed, and remand for 96 hours. This is particularly so since the prospects of bail for an extradition offence are slim.

33. We believe that attention should be paid to narrowing section 5, not extending section 6. No amendment that further restricts the liberty of the arrestee can in our view be justified and we oppose clause 58 in its entirety.

Clause 59—Use of live link in extradition proceedings

34. The increasing use of live links in criminal proceedings have no doubt been fostered by the “CJSSS” (“Criminal Justice: Simple, Speedy, Summary”) objective of efficiency savings in court hearings. They reduce the risks of delay in persons being transported from prison to court and the pressure placed on cells in court centres. However, this push for expediency should not be to the detriment of a defendant receiving a fair hearing. We welcome the necessary provisos contained in the proposed section 206A(5) that the judge must be satisfied that it is in the interests of justice to give a direction for a live link and the proposed section 206B(2) that a judge must not give a direction until parties have been able to make representations.

35. However, we are concerned at the risk inherent in live link proceedings that ill-treatment, misconduct by public officials or other issues such as self-harm, illness, fitness to plead etc will not be noted by the court or lawyer and/or that the detainee may feel inhibited from confiding in the court or lawyer as to such matters. If a live link is used in an extended detention hearing it is likely to breach Article 5(3) ECHR. The European Committee for the Prevention of Torture (CPT) made the following comments in its report on its 2007 visit to the UK, regarding pre-charge detention in terrorism offence cases:²⁸

As the Committee has emphasised on previous occasions, one of the purposes of the judicial hearing should be to monitor the manner in which the detained person is being treated. From the point of view of making an accurate assessment of the physical and psychological state of a detainee, nothing can

²⁷ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18.7.02 P 1.

²⁸ CPT/Inf (2008) 27, paras 9–10.

replace bringing the person concerned into the direct physical presence of the judge. Further, it will be more difficult to conduct a hearing in such a way that a person who may have been the victim of ill-treatment feels free to disclose this fact if the contact between the judge and the detained person is via a video conferencing link.

*In their response to the report on the CPT's November 2005 visit, the United Kingdom authorities stated inter alia that the judicial authority concerned "has ultimate responsibility for deciding whether the physical presence of a detainee at a hearing is necessary". The CPT cannot agree with such an approach; the physical presence of the detainee should be seen as an obligation, not as an option open to the judicial authority. As regards more particularly the first possible extension of detention beyond 48 hours, the physical presence of the detained person at the judicial hearing would also appear to be a requirement by virtue of Article 5, paragraph 3, of the European Convention of Human Rights. In the Grand Chamber judgment of 12 May 2005 in the case of *Alcalá Aguinaga v. Spain*, the Court stated that the purpose of Article 5(3) is to ensure that "arrested persons are physically brought before a judicial authority promptly". The Court went on to comment that "Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment".*

36. We further question the suitability of live links for extradition proceedings. Firstly this is because of the complex nature of the proceedings, where the legal representative has to explain the intricacies of both the UK and issuing territory's legal systems. This is very difficult to achieve over a live link. Secondly, extradition cases are far more likely to involve persons who require an interpreter. The technical difficulties of attempting to interpret with a live link are numerous.

37. As drafted the proposed provisions will apply to the initial hearing, prior to which the person is being held at a police station. The equivalent provision under section 57C(7) of the Crime and Disorder Act 1998 (as amended) requires the consent of the accused, which should be extended to EA cases.

38. In any event, we consider that the provisions should not apply to initial hearings, as this is where instructions and advice are likely to be given for the first time. Nor should cases requiring an interpreter be dealt with through a live link. Finally appeals should be excluded since these are akin to an extradition hearing, which are themselves excluded under proposed section 206A(1)(a).

February 2009

Memorandum submitted by Liberty

OVERVIEW

1. Reform of the criminal justice system has been a central theme of this Government. This parliamentary session is no exception with the inclusion of two Bills concerning criminal justice: this Bill and the proposed Coroners & Justice Bill. This Bill is something of an omnibus with substantive amendments being made to over 20 Acts covering a range of subjects, including aviation security, sex offences, extradition, and alcohol misuse. It is a common complaint of Liberty that recent reforms have led to unnecessary and over broad criminalisation and a statute book that is overly politicised. Several clauses in this Bill fall within these two complaints. But perhaps of most concern are the clauses relating to extradition. The Extradition Act 2003 stripped away many fundamental principles of justice and eroded traditional protections against summary and unfair extradition. More than being just a missed opportunity for reform, this Bill contains amendments to that Act which seeks further to erode what safeguards are left. We believe that the rule of law is just as important today as it was 100 years ago. Indeed it is the foundation on which public faith in Britain's justice system is based.

PART 1—POLICE REFORM

2. Part 1 deals with police reform, placing a duty on police authorities to have regard to the views of the public, amending the method of appointment of senior officers and providing mechanisms for police cooperation. It does not include the proposal²⁹ to have directly elected representatives on Police Authorities (PA). We are pleased that this proposal has been shelved as we believe that direct elections of this kind could unnecessarily politicise PAs while removing local expertise. However, the compromise position contained in clause 1 appears unnecessary and motivated by a desire to be seen to be doing something rather than addressing a particular problem with the current arrangement. Clause 1 seeks to amend the *Police Act 1996* to provide that every police authority in discharging its function must have regard to the views of "the people" in the authority's area about policing in that area, and inspectors of constabulary can report to the Secretary of State as to whether this requirement is being complied with. However, the *Police Act 1996* already gives local communities the ability to significantly impact upon local policing issues. PAs already have to make arrangements for obtaining the views of local people on matters concerning the policing of

²⁹ Put forward in the Green Paper "From the Neighbourhood to the National: Policing Communities Together", July 2008.

their area and obtaining co-operation in preventing crime (section 96). The *Police and Justice Act 2006* also places local councillors under a duty to respond to a “community call for action” from anybody living or working in the area which they represent, on a matter concerning crime and disorder (including anti-social behaviour and behaviour adversely affecting the environment) or substance abuse in that area (section 19). The ward councillor’s response must indicate what (if any) action he or she proposes to take to resolve the matter.

3. As we said when these measures were introduced in 2006,³⁰ these overstep the boundary of legitimate community engagement in policing by giving local people wider powers to interfere in policing matters. While we believe that communities should be engaged in police matters, this increases the risk of a few people influencing the policing strategy to the detriment of others. The local community is already represented on PAs and it is through this route that the community should be engaged in policing. The proposal to make it a *duty* for PAs to have regard to the views of people in the area on policing matters is inappropriate as it further expands the potential for a small group of unrepresentative community members to interfere in policing matters. In addition, if it becomes a duty, how is a PA able to properly fulfil this duty: who represents “the people”? If just one or two people in the area express their opinion must the PA take that into account in discharging its function? The “community” may in reality consist of a number of communities and these in turn may be subdivided and cross cut by age, ethnicity, gender and socio-economic status. These divisions are represented in differential rates of participation and therefore there is a risk of a few unrepresentative people having a disproportionate impact over policing strategy. As this is cast as a duty on a PA it must be clear, workable and necessary, none of which appear to be the case in relation to clause 1.

4. Clause 2 sets up a Police Senior Appointments Panel which can advise the Secretary of State in connection with the appointment of a senior officer. The Panel is to consist of members appointed and nominated by the Secretary of State and persons nominated by the Association of Police Authorities and by the Association of Chief Police Officers (ACPO). We understand that such a Panel already exists on a non-statutory basis and this amendment seeks to place it on a statutory footing. While we have no particular problem with the establishment of such a Panel, we do have some concerns about ACPO being given a statutory role in advising on the appointment of senior police officers. ACPO is not governed by any statute, rather it is a company limited by guarantee. It is not a staff association but consists of members who are senior police officers in England, Wales and Northern Ireland, with around 280 members. The *Freedom of Information Act 2000* does not apply to it. The company’s objectives include “leading and coordinating” the direction and development of the police service and developing the ACPO brand. ACPO publishes advice and guidance on a wide range of policing issues and contributes “decisions” and “comments” to a wide range of contemporary debates. What is the constitutional role that ACPO has to play? Is it an external reference group for Home Office Ministers? Is it a professional association protecting the interests of senior officers? Is it a public authority which issues guidance and good practice to local forces? Is it a national policing agency? Is it a campaigning pressure group arguing for greater police powers? These are the questions that must be asked before ACPO should be given a statutory role. However, ACPO has also already been included as a body that the Secretary of State must consult with before making particular orders or regulations.³¹ It is time to reflect on the nature of ACPO and consider the appropriateness of involving it in decision-making processes. The Government has missed an opportunity properly to define the role of ACPO in this Bill and we believe that the constitutional role and makeup of ACPO has not been adequately debated and defined. Until this is done it is impossible to know if it is appropriate for a representative of ACPO to be consulted before any senior police appointments are made.

5. Clauses 7 and 8 amend the *Regulation of Investigatory Powers Act 2000* (RIPA) to enable a police officer from one police force who is authorised to obtain and disclose communications data or authorise directed or covert surveillance under the Act, to give an authorisation to a member of another police force to do the same. This applies if the two police forces have entered into a collaboration agreement (as introduced by clause 5). While we do not take issue with these specific amendments we take the opportunity to note again that the provisions in RIPA demonstrate a lack of independence in the authorisation process, with no judicial oversight at all in RIPA. While we do not suggest there should be independent authorisation when applying for all lower level communications data warrants, high level RIPA powers which rely on executive authorisation are concerning. Self-authorisation is a very weak privacy protection. Without some arm’s length independence from the authorising body, there will always be suspicions that proper protocol and safeguards are not being observed. Liberty believes that there is a need to overhaul the powers contained in RIPA to provide for greater levels of protection and oversight.³²

6. Clauses 11 and 12 raise some serious concerns about the ability of the Secretary of State to interfere in operational policing matters with regard to specific forces. Currently the *Police Act 1996* allows the Secretary of State to make regulations requiring *all* police forces to adopt particular practices and procedures. These regulations can only be made if the chief inspector of constabulary states that he or she

³⁰ See Liberty’s briefing on the Policing and Justice Bill, Lords, May 2006, available at: <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

³¹ See for example, sections 6ZA, 6ZB, 6ZC, 8A, 37A, 39B, 40B, 42A, 53, 53A, 57 and 96 of the *Police Act 1996* as amended by the *Police and Justice Act 2006*.

³² See Liberty’s report by Gareth Crossman, “Overlooked: Surveillance and personal privacy in modern Britain”, 2007, in particular Chapter 3 and pages 112 and 125-126, available at: <http://www.liberty-human-rights.org.uk/issues/3-privacy/pdfs/liberty-privacy-report.pdf>

is satisfied that it is necessary to do so to ensure cooperation between police forces, to ensure the proper procedure is carried out and that it is in the national interest. The proposal in clause 11 is to allow the Secretary to make regulations to this effect that only apply to one or more police forces, and would also allow regulations to be made if the chief inspector thinks its necessary to do so to promote the efficiency and effectiveness of a police force (rather than just to ensure cooperation). Similarly clause 12 seeks to amend the current position enabling the Secretary of State to make regulations requiring *all* police forces to use specified facilities and services if he or she thinks it to be in the interests of efficiency or effectiveness, to require just one or more specified police force to do so. Enabling the Home Secretary to direct the type of policies that apply to specific police forces to promote efficiency in that force, raises the specter of political interference in particular police forces. The current power does not allow the Secretary of State to pick and choose between police forces, which is some limit on the power of central government to control how a particular force operates. Liberty has consistently warned against political interference in policing. The police must remain able to investigate crime independently and to apply the laws made by Parliament free from political pressure. Liberty's position is that PAs should be responsible for setting the strategic direction of the police force and hold the chief constable of the force to account, without additional interference by central government. Liberty has frequently stated that police independence and the rule of law is best served by denying the Executive excessive control of operational policing matters. Similarly we also maintain that communities are best served when the police are able to act with an appropriate degree of independence.

PART 2—SEXUAL OFFENCES AND SEX ESTABLISHMENTS

7. Part 2 introduces a number of new offences in relation to prostitution and some mechanisms for sentencing those who provide sexual services as prostitutes. The measures proposed seem to be quite a piecemeal approach to the issue of prostitution, despite the Government's stated aim of putting in place a coordinated strategy to deal with the issues arising from prostitution.³³ While a number of the measures proposed are welcome as they are intended to help reduce the stigma of prostitution and assist those engaged in prostitution, some of the ways in which this is sought to be achieved are questionable.

8. Clause 13³⁴ introduces the offence of paying for the sexual services of a prostitute controlled by gain. This offence is drafted extremely broadly and applies regardless of whether the accused knew that any of the prostitute's activities were intentionally controlled for gain by a third person (strict liability). What "controlled for gain" means is also very broad, encompassing any activity controlled for in the expectation of gain for anyone. Presumably this would cover the owner of a brothel. An offence will be committed whether or not the services are actually provided: it is enough simply to make or promise payment. The offence also applies regardless of where in the world the sexual services are to be provided. This last provision could conceivably mean that a person who visits a prostitute in a brothel in a country where it is legal to do so (such as in the Netherlands, Greece and some states in Australia), on their return or entry to the UK they could be arrested for committing an offence under this proposed section.³⁵ There are some serious concerns about the broadly drafted nature of this offence and whether it is appropriate to make an offence of this nature one of strict liability, particularly in situations where there is no way of knowing whether a person is "controlled for gain". Strict liability offences should be used very sparingly and should only apply to minor offences where it seems obvious in the circumstances that an offence has been committed. It should not apply when a person is unable to ascertain whether what they are doing is unlawful. Given it is not an offence to pay for sexual services of a person who is not controlled for gain, it would be unfair to impose a strict liability offence on someone who pays for the sexual services of a person who is controlled for gain but whom the offender does not know is controlled.

9. Clause 15 seems to be a sensible amendment to the *Street Offences Act 1959* to amend reference to a "common prostitute" and to make the offence of soliciting for the purposes of prostitution only apply in cases where the prostitute "persistently" solicits (being on two or more occasions in three months). We do however query why section 2 of that Act is being omitted given the effect of this is to remove the ability of a person cautioned in respect of prostitution (ie the prostitute) to apply to a Magistrates' Court to ensure no record is made of this. No reason is given as to why this amendment is proposed.

10. Clause 20 and Schedule 2 amend the *Sexual Offences Act 2003* to give police the power to issue a temporary closure notice in respect of any premises if the officer reasonably believes that, within the previous three months, the premises had been used for activities related to particular offences and the closure is believed to be necessary to prevent the premises being used for activities related to those offences (although confusingly it does not matter whether the officer believes that the offences have or will be committed). These offences are: paying for the sexual services of a child; controlling or inciting a child to be involved in prostitution or pornography; arranging or facilitating child prostitution or pornography; causing or inciting prostitution more generally; or controlling a prostitute for gain. Apart from the first offence, all of these offences apply to activities undertaken anywhere in the world.

³³ See Green Paper from 2004, "Paying the Price: a consultation paper on prostitution".

³⁴ And the equivalent provision for Northern Ireland in clause 14.

³⁵ It is interesting to note that the legal power to impose such an offence is questionable under international law if the victim or offender is not a UK citizen (and as this is currently drafted it applies to anyone within the jurisdiction of the UK).

11. These provisions are very similar to those relating to closure orders for anti-social behaviour and drug offences. When closure orders were originally proposed Liberty agreed that they appeared a proportionate and potentially effective way of addressing a significant problem. However, as we said in our response to the proposal to introduce closure orders for anti-social behaviour,³⁶ drug related closure orders seem to have had unfortunate consequences with the offending behaviour being displaced and the offenders taking over properties of the vulnerable, a practice called “cuckooing”. This demonstrates that closure does not necessarily end a problem but can merely displace it. In relation to the adult prostitution offences a closure order, for example, of a brothel, may in fact increase the vulnerability of some women as they may then be forced onto the streets.³⁷ Some women band together to work in the relative safety of a private address and it may be that a closure order of this kind would increase street-based prostitution and the problems associated with kerb-crawling, loitering or soliciting.

12. Indeed, as we noted in our response to the proposal to introduce anti-social behaviour orders, inherent to the making of an order is the need for compliance with the *Human Rights Act 1998* (HRA). Any court making an order must be satisfied that in doing so none of the rights of those being removed is breached. The right to respect for private and family life under article 8 of the HRA³⁸ is most likely to be engaged. Any attempt to interfere with this must be for a legitimate purpose, in accordance with the law and proportionate. This is particularly the case where, as in this proposal, a person need not have been convicted of any offence. Proposed new sections 136B(8) and 136D(10) in Schedule 2 are particularly confusing as it appears to provide that although an officer and later the court must have reasonable grounds to believe that the closure order is necessary to prevent the premises being used for activities related to a specified offence, it does not matter whether the officer or court believe that the offence has or will be committed. This type of provision is not found in the drug related or anti-social behaviour closure order powers and its inclusion here should be explained. Proposed new section 136Q is also of concern as it would allow the Secretary of State to amend, by order, the power to authorise a closure notice to persons other than members of the police force. The Secretary of State should explain who it is envisaged might be given this power. The explanatory notes give an example of local authorities being given this power. The power to order the closure of premises, which could include a family home, has serious implications for the right to respect for private and family life and the home. Its use should be carried out by trained professionals and any extension of the power to make such orders should not be extended lightly.

13. Clause 22 amends the power to impose foreign travel banning orders on those who have been convicted of sex offences and, because of their subsequent behaviour, it is considered necessary to impose such bans to protect children in other countries. Currently this applies to protect children under 16. This amendment raises that to all children under 18. Clause 23 seeks to extend the length of the travel ban from the current six months to a maximum of five years. When foreign travel ban orders were introduced we did not take issue with them in principle as concerns about overseas child sex tourism are justified.³⁹ However, we did have some concerns about the way in which they applied and what safeguards there were. The requirements justifying the creation of an order are extremely broad as is the requirement that a person must have “acted in a way to give reasonable cause” which contains no comments on criminality. Banning a person from leaving the country is a serious step, particularly as it involves a potential limitation on the right under international law to freedom of movement.⁴⁰ Increasing the amount of time that a person can be banned from leaving the country (and stripping them of their passport as is proposed by clause 24) for up to five years is a much greater interference with the right to freedom of movement than the current time of six months. As such, greater safeguards should be built in to ensure more risk assessment is carried out in relation to an individual before an order can be made.

PART 3—ALCOHOL MISUSE

14. Clause 28(3), seeks to amend the *Confiscation of Alcohol (Young Persons) Act 1997* to give police the power to remove children from an area to their place of residence or a place of safety. Currently this Act comprises only two sections and applies only to confiscating alcohol from children under 18. This amendment would seek quite radically to amend the nature and purpose of this Act. It would allow a police officer who has confiscated alcohol from a person who is in a public place and appears to be under 16 to forcibly remove that person, regardless of whether any offence has been committed or if it necessary to do so in the for the person’s safety or well-being or for public order. The police already have the power under the *Anti-Social Behaviour Act 2003* to remove persons under 16 to their place of residence between 9.00 pm and 6.00 am if they are in a specified area (see section 30) and the power to remove children for their own

³⁶ See Liberty’s briefing in October 2007 on the Criminal Justice and Immigration Bill, available at <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>.

³⁷ For example, sadly in 2006 we saw the particular vulnerability of women engaged in street-based prostitution with the tragic murders of five women working as prostitutes in Ipswich.

³⁸ Article 8 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

³⁹ See Liberty’s *Second Reading Briefing on the Sex Offences (Amendment) Bill in the House of Commons*, July 2003, available at: <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

⁴⁰ See article 2 of the Fourth Protocol (1963) to the *European Convention on Human Rights* to which the UK is a signatory to and article 12 of the *International Covenant on Civil and Political Rights*, to which the UK is a party to. It should be noted that the right to freedom of movement is not a right incorporated into UK law by the *Human Rights Act 1998*. However, the UK remains bound under international law to comply with these provisions.

safety in an emergency (see section 46 of the *Children Act 1989*). We also note that the power in the *Anti-Social Behaviour Act 2003* has a small safeguard in it that is not present here, that allows for an exception to returning a child to their place of residence if to do so would mean the child is likely to suffer significant harm. Liberty is concerned that these proposed new powers could be open to abuse; that children will feel further alienated; and that they are unnecessary in light of existing laws to tackle problems of anti-social or criminal behaviour. If a child under 16 in possession of alcohol commits a breach of the peace, such as by threatening, abusive or insulting words or behaviour, this may constitute a breach of sections 4, 4A and 5 of the *Public Order Act 1986*. In addition, this Bill itself proposes making it an offence for a person under 18 to be in possession of alcohol in a public place on three or more occasions in a 12 month period, which in itself gives police greater criminal law powers. A power to move children on by the police when they have not committed any offence or disturbance is discriminatory and counter-productive.

15. Clause 29 introduces a new offence for a person under 18 to be in possession of alcohol in a public place on three or more occasions in a 12 month period without reasonable excuse. Criminalising teenagers for possessing alcohol will fast-track more children into the criminal justice system and is not the way to tackle the problem of under-age drinking. If children are inappropriately gaining access to alcohol this should be dealt with under child protection measures, not through counter-productive criminalisation of those that we are trying to protect.

16. Clause 30 seeks to amend section 27 of the *Violent Crime Reduction Act 2006* (which gives police the power to issue Directions to Leave which require a person to leave an area for 48 hours if there is a risk of an alcohol related disturbance) to apply it to all people aged over 10 years. Currently it only enables police to make such a Direction in relation to people aged 16 or over. No offence needs to have been committed in order for police to make such an order. We have seen that the police are using this power to disperse groups before any problems arise.⁴¹ The proposed power is overbroad, discriminatory and unnecessary as the police already have a wide array of criminal law powers to deal with problem behaviour. Section 27 allows police to make an assessment of possible future problems and to direct people to leave a locality whether or not those people have anything to do with any of the problems envisaged. This is unfair, divisive, and may be counter-productive. It also continues a worrying trend of using the civil law in a coercive way to target the young and the vulnerable.⁴² This power should not be further expanded by extending it to apply to 10 to 15 year olds. As stated above, there is already a power to move on people for anti-social behaviour and to return children to their homes. A power to disperse children may actually endanger them by forcing them to move on to potentially unsafe areas and is subject to misuse.

PART 4—PROCEEDS OF CRIME

17. The *Proceeds of Crime Act 2002* allows for a confiscation order to be made in respect of a person's property following conviction for an offence, if he or she has benefited from the criminal conduct. In addition, a restraint order can be made to restrain the use of the property in question pending the determination of the criminal conviction. As it presently stands, the property itself cannot be seized until a confiscation order is made (although it may be seized for other lawful reasons, such as for use as evidence). Clause 33 (and clauses 34–35 in relation to Scotland and Northern Ireland) seeks to allow property subject to a restraint order, that has been seized under another power, to be retained for the duration of the restraint order (enabling it to be sold if a confiscation order is subsequently made). Clause 36 (and clauses 37–38 in relation to Scotland and Northern Ireland) introduces a new power to enable police, customs authorities and financial regulators to search for and seize property (not necessarily subject to any order) before a person has been convicted, including before proceedings have even been commenced. It is enough simply for the person to have been arrested, criminal investigations to be ongoing and for there to be reasonable cause to believe that the person has benefited from conduct constituting the offence. If property has not been returned after 48 hours further retention must be ordered by a justice of the peace. However, under the current provisions in relation to restraint orders (which are less intrusive than this proposed measure) such orders must be approved by the Crown Court. No reason is given as to why, at the very least, the Crown Court is not involved in providing judicial oversight.

18. This proposed amendment clearly raises issues regarding the right to privacy and peaceful enjoyment of possessions under the HRA.⁴³ There are already ample powers under the criminal and civil law to search for and restrain property pending the outcome of criminal proceedings and seize property that is of evidential value. We do not see the need to have an additional power to seize property before a person has been convicted of any offence. The proposed amendments are far too broad in scope, particularly as they apply even before a person has been charged with any criminal offence. There is already a power to issue restraint orders restraining the use that can be made of certain property in similar circumstances. In addition,

⁴¹ See the case of up to 80 Stoke City football fans who were detained for up to 4 hours and forced to leave a pub although there were no reports of any disturbances. See Liberty media release at <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2008/18-12-08-liberty-and-the-fsf-fight-for-human-rights-of-football-fans.shtml>

⁴² Liberty's concerns regarding this trend are well documented. ASBOs and dispersal powers mix criminal and civil law, set people up to breach them, are increasingly counter-productive and used as panacea for all ills. For more information see: <http://www.liberty-human-rights.org.uk/issues/7-asbos/index.shtml>

⁴³ See article 8 of the ECHR regarding the right to privacy and article 1 of Protocol 1 to the ECHR regarding protection of property, as incorporated in the HRA.

these proposals necessarily involve direct or indirect findings of guilt on the part of the property holder or persons connected to the property, as there is a requirement to show that the person has benefited from conduct constituting the offence. This undermines the presumption of innocence, and the danger is that individuals will be “convicted” by the civil courts in the eyes of the public without the protections that would be available in the criminal courts. Such an extreme interference with property and potentially private and family life should be proportionate and necessary. The Explanatory Notes to the Bill recognise this interference but simply provide that a Code of Practice will be drafted “to cover the exercise of these powers, to ensure that they are exercised proportionately”. This is not adequate: Parliament should oversee the exercise of these powers and such broad powers should not be left to be regulated by secondary instruments.

PART 5—EXTRADITION

19. Part 5 seeks to amend the *Extradition Act 2003*. When this Act was introduced Liberty expressed serious concerns about the removal of a number of significant protections for individuals involved in extradition.⁴⁴ In particular the Act gave effect to the system of the European Arrest Warrant (EAW) which removes the requirement, for certain offences, for dual criminality—that is that the offence for which the person is sought to be extradited is also an offence in the UK. There is no need for a court in the UK to determine that a prima facie case has been made out, it is enough if an EAW has been issued by an EU country in respect of a listed offence. These offences include offences that are so extremely broad to the point of being meaningless (eg “computer related crime”, “swindling”) and potentially speech offences (“racism and xenophobia”). There have also been reports of people being extradited to a number of EU countries for extremely minor offences such as “piglet-rustling”.⁴⁵ The EAW is based on the presumption that EU countries all have fair and equal systems of justice which should remove the need for any other country to scrutinise the fairness of extradition to such a country. As we have said in the past, this presumption is seriously open to question. There is also a real problem with the ability of the Secretary of State, by Order in Council, to remove the need for specified non-EU countries⁴⁶ to produce prima facie evidence in support of the request for extradition. The amendments proposed here in relation to the *Extradition Act 2003* do not seek to remedy any of these problems. Instead they weaken some of the existing protections.

20. Clause 55 introduces amendments to the *Extradition Act 2003* that are very confusingly drafted. Reference is made to a sentence imposed by a UK court and a sentence imposed by a foreign court, but it is often unclear which sentence is being referred to. We are particularly concerned by the proposal to enable the Secretary of State to give an undertaking, when requesting extradition of a person from any country, that the person will be returned to that country either to serve the UK imposed sentence or after having served that sentence. Proposed section 153A empowers the Secretary of State to give an undertaking to return a person who at the time of the extradition application is serving a sentence of imprisonment in another country to serve the remainder of the sentence in that country on the conclusion of the UK proceedings (it is not entirely clear if this means to serve the UK sentence or the foreign sentence). It also enables the Home Secretary to give an undertaking as to the treatment of the person while in the UK and that the person would be kept in custody until the conclusion of the proceedings. Proposed section 153B provides that if a person had been returned to the foreign country but then returns to the UK, time served outside the UK does not count towards their sentence in the UK. Proposed section 153C provides that the Secretary can give an undertaking to return any person to the extraditing country in order to serve a sentence imposed by a UK court. The only safeguard built into this is found in proposed section 153D which provides that nothing requires the return of a person where the Secretary of State is not satisfied that the return is compatible with the HRA.

21. We are particularly concerned by the power to enable the Secretary of State to give an undertaking to return a person to any country in the world in which he or she is extradited from to serve a sentence of imprisonment. The way that this Bill is currently drafted this would also apply to UK nationals. To take a hypothetical example of how all of this would work in practice: A British citizen resident in China could be extradited to the UK to face criminal charges here and then forced to serve any sentence of imprisonment in a Chinese jail because of an undertaking given by the Secretary of State.

22. There is no way, as this is currently drafted, for the Secretary of State to be satisfied that the country of return has the same standards for incarceration as the UK. It is unclear how this would work in practice given a person sentenced by a UK court is generally given a custodial sentence setting out a minimum period before which the person can be released on licence. If that person is to serve the sentence in another country with a different penal system how will this work? It may also be that a person subject to extradition with such an undertaking is only found, once they have arrived in the UK, to have special needs that could not be met in the country to which they are to be sent back to. A topical example of this is the current request for extradition made by the USA in respect of Mr Gary McKinnon. Mr McKinnon suffers from Asperger’s syndrome and the medical evidence is that he is likely to suffer significantly if detained in the USA in a high

⁴⁴ See Liberty’s briefing on the Extradition Bill for 2nd Reading and Committee stages in the House of Lords, April 2003, available at: <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

⁴⁵ See the article in the *Guardian*, “Door thief, piglet rustler, pudding snatcher: British courts despair at extradition requests” by Afua Hirsch, 20 October 2008: <http://www.guardian.co.uk/uk/2008/oct/20/immigration-extradition-poland-lithuania-law>

⁴⁶ The Secretary of State has made such orders in relation to a number of countries, including those such as Azerbaijan, Georgia, the Russian Federation, Turkey and the USA.

security Supermax prison which usually involves severe isolation from others. If there was a similar situation where the UK was requesting the extradition of a person from another country this is they type of matter that the Secretary of State would be unlikely to be able to properly take into account at the time an undertaking is given to return that person.

23. Additionally, at the time an undertaking is given conditions of detention in the particular country may give rise to no particular concern, however when the person is due to be returned there may have been a regime change or other event that would cause real concern. None of these possible problems are dealt with in these proposed amendments. All we have is a clause that provides that nothing requires the return of the person if to do so would breach the ECHR, in the view of the Secretary of State. This is insufficient to fully protect the human rights of the extradited person. It is not enough for legislation to leave this up to the discretion of the Secretary of State (with the only review rights being within the confines of judicial review). Parliament should set out specific safeguards in this Bill and not leave it to the discretion of the Secretary of State. There are also other considerations apart from the ECHR that would have to be taken into consideration before a person could be returned to a country, such as the Refugee Convention and other international instruments. It is not clear what happens to an undertaking that is given under these powers if it subsequently cannot be honoured as a result of human rights concerns. This should be dealt with more specifically in this Bill.

24. In addition Liberty has concerns about the provisions which allow for the detention of persons under these sections pending the determination of a number of matters. In particular clause 53 (proposed new section 59(6)(b)), clause 54 (proposed new section 132(6)(b)) and clause 55 (proposed new section 153B(4)(b)) provide that if a person is returned to the UK and was entitled to be released on licence but had not yet been released while in the UK, he or she is liable to be detained on return by a constable or immigration officer until release on licence. None of these provisions incorporate any maximum time by which a person can be detained under such provisions, not even a requirement of reasonableness. This must be included if such detention can possibly be said to be proportionate as required under article 5 (right to liberty) of the HRA.⁴⁷ Similarly clause 55 (proposed new section 153A(5)(b)) enables a person to be kept in custody in the UK until he or she is returned to a territory pursuant to an undertaking. No time limit is imposed on this which, given there could well be difficulties in arranging the return of the person and involve potentially considerable delays, could potentially breach of article 5. This is especially the case given that section 154 of the Extradition Act 2003 currently provides that in cases where the Secretary of State has given an undertaking bail may only be granted in exceptional circumstances.

25. Finally we note that clause 58 allows for a judge to grant an extension of up to 48 hours for the detention of a person subject to provisional arrest under the *Extradition Act 2003* if it is not reasonable to comply with the requirement that the person be brought before the judge along with certain documents. This appears to be a matter purely of administrative convenience and no explanation has been given as to why this is necessary or proportionate which must be explained given the clear interference with article 5 (right to liberty).

PART 7—MISCELLANEOUS

Criminal Records

26. Clauses 62 to 72 seek to make amendments to the *Safeguarding Vulnerable Groups Act 2006* and the *Police Act 1997* to amend the application process for Criminal Record checks and checks done by the (renamed) Independent Safeguarding Authority (ISA). We are somewhat confused as to why amendments are being made to tidy up the application process in relation to Enhanced Disclosure (ED) checks but no effort has been made to avoid the duplication between ED and checks carried out by the ISA. To understand our concerns it is necessary to set out some of the history behind the creation of the ISA.

27. The ISA's creation was recommended by Sir Michael Bichard in his Inquiry into the murders of Jessica Chapman and Holly Wells by Soham school caretaker Ian Huntley. At the time we agreed that the new body had the potential to square a difficult circle. An effective vetting system could ensure those not suitable for working with children or the vulnerable are barred, while ensuring that potential employers remained unaware of unfair, malicious or spurious allegations. It is undeniable that details of allegations (as well as convictions) might be relevant in determining suitability to work with children and the vulnerable. However, it is also an unfortunate truth that many careers have been blighted by unfounded accusations of impropriety.

28. It was because of this that we believed that the ISA could provide an effective new body. Instead of Enhanced Disclosure records being passed directly to employers they would go to the ISA instead to allow vetting. This independent vetting would allow those who had allegations made against them (usually referred to by the police as "intelligence information") the opportunity to make representations to the ISA if barring was being considered. It would also mean that an employer would not be aware of those allegations if the person was successful in being deemed suitable for work. The Bichard Report clearly

⁴⁷ Article 5 (right to liberty) of the ECHR as incorporated by the HRA.

envisaged the current system of sending Enhanced Disclosure to employers continuing until the ISA come into operation. However, the presumption from Bichard seemed to be that once the ISA began work ED need no longer be sent to employers. The Bichard Report proposed vetting through the ISA model saying:

The central body would take a decision on the basis of the information above and notify the applicant. At that stage, no other employer, individual or institution would be informed. Under this system, employers would still decide whether or not a job required the postholder to be registered with the central body . . . Employers would also retain the ultimate decision about whether or not to employ someone, using references and interviews. (Paragraphs 4.117 & 4.118).

29. It is of course understandable that an employer would still need to interview and take up references. However, it is a reasonable presumption that Sir Michael Bichard did not envisage the need for Enhanced Disclosure to continue once the ISA came into operation. However, it appears that (particularly given the amendments proposed in this Bill) employers will still be able to obtain Enhanced Disclosure directly from the Criminal Record Bureau (CRB). The only justification given for this is that an ISA check does not “*check for malpractice or all criminal convictions, and therefore registration with the ISA does not guarantee that a person has no criminal history.*”⁴⁸ We agree that in some circumstances some extra disclosure might be necessary to determine suitability. However, this other type of information would be available through an application by the employer for Standard Disclosure. Standard Disclosures shows current and spent convictions, cautions, reprimands and warnings held on the Police National Computer. What it will not show is any record of allegations. We cannot think of a situation where information not available through Standard Disclosure might be relevant to the employment of someone who has been cleared by ISA vetting.

30. Liberty is opposed to any attempt to allow employers to have continued direct access to Enhanced Disclosure once the ISA begins its work in October 2009. We believe any attempt to continue would be open to challenge under Article 8 (right to privacy) of the HRA. There are a range of judgements from the European Court of Human Rights that establish that the release of information held on police registers engages Article 8. The continuation of Enhanced Disclosure in such circumstances with the ISA in operation is disproportionate and we cannot see how there can be a pressing social need for enhanced disclosure to continue. We do not wish for or advocate any vetting system that would place children or the vulnerable at risk. We are merely seeking adherence to a system that is fair and which deals with the problems identified by Sir Michael Bichard. This Bill is a perfect opportunity to include amendments to the *Police Act 1997* to ensure that this situation is remedied.

31. We also have some particular concerns with the amendments that are currently proposed in the Bill in relation to this area. Clause 69 seems to us to be unnecessary, costly and potentially discriminatory. It provides that if a person has applied for a Criminal Record Check for the purposes of employment, an immigration control check can also be carried out if an additional fee is paid by the applicant. The stated intention is to “*assist employers in avoiding the employment of illegal workers*”.⁴⁹ This amendment is completely unnecessary. Employers can already find out this information by checking an applicant’s passport and, if necessary, making inquiries of the UK Borders Agency. It is not necessary to include this as part of a criminal records check. To do so will incur a fee, the amount is not yet stated (it is to be prescribed), which will inevitably have to be paid by a job applicant. It is unlikely that a British citizen will be asked to include this information when applying for a criminal records check, meaning non-nationals will have a fee imposed on them unnecessarily. While we appreciate the need for employers to determine if there are any immigration controls on a person before they are employed, this can already be done (as stated above). Indeed, the Explanatory Notes state that this will be an optional service and “*there will remain other ways for employers to satisfy themselves of an individual’s right to work status*”. This is not a measure designed to help people exploited by unscrupulous employers, nor is it a measure that will help to stop employers from employing illegal workers. Those that employ illegal workers generally know that they are doing so and do so in order to gain cheap labour. This measure will not stop this practice in any way: it provides nothing new to employers and simply imposes an additional cost on job applicants which in straightened economic times cannot be considered either fair or useful.

32. Clause 70 seeks to amend the *Police Act 1997* to include a provision that in establishing a person’s identity it must be verified by a third person as determined by the Secretary of State and set out in regulations. This seems to be a wholly unnecessary amendment given the section it seeks to amend (section 118) already provides that the Secretary of State may obtain information from agencies such as the UK Passports Authority, the Driver and Registration Authority, records of national insurance numbers, and “*by such other persons or for such purposes as is prescribed*”. This addition does not seem to add anything and its vagueness and broad nature raise questions as to why it is proposed.

⁴⁸ See Frequently Asked Questions page on the ISA website (www.isa.gov.org.uk). Liberty also contacted the Home Office about this and we were given one example of a possible reason why employers might need access to CRB records. The example given was of the employment of a school bus driver. It would be necessary to show not only that they had ISA clearance but also that they did not have, for example, a conviction for dangerous driving which would make them unsuitable for such employment.

⁴⁹ See Explanatory Notes at paragraph 456.

Football spectators

33. Clauses 78 to 82 basically extend those subject to football banning orders in England and Wales to also ban them from attending regulated football matches in Scotland and Northern Ireland. This is not a substantial change in the law and we would simply refer the Committee to our response to the introduction of football banning orders in 2000.⁵⁰ We would note, however, that clause 80 introduces a defence in Scotland for a person charged with a failure to comply with a requirement imposed by a banning order. Under clause 80(2) it will be a defence for a person charged with such an offence to prove that he or she had a reasonable excuse for failing to comply with the requirement. We welcome this as a small improvement to the broad nature of this offence but query why this has specifically been limited to Scotland only. This defence should apply to all persons charged with such an offence regardless of where in the country they are charged.

January 2009

Memorandum submitted by Dr C N M Pounder⁵¹

This evidence is limited to commentary on New Clause 33 (NC33) which provides for wide ranging powers in relation to the use and retention of personal data, in particular CCTV and Automated Number Plate Readers (ANPR) images, and personal data derived from DNA samples. The Government has explained that the clause is its response following the loss of its ECHR case in *S and Marper v The United Kingdom*.⁵² NC33 was inserted into the Police and Crime Bill at the end of its Commons Committee stage; its function is to insert new section 64B into the Police & Criminal Evidence (PACE) Act 1984. For convenience, it is reproduced in the Appendix.

In outline, the Government is seeking to acquire extensive powers to use and retain personal data in sensitive areas, and this acquisition is likely to significantly reduce the protection afforded by the Data Protection Act. The provisions have been introduced in advance of a promised public consultation on DNA retention; there never has been a public consultation over the use of CCTV or ANPR images. The fact that secondary legislation is used in these areas ensures that there is limited Parliamentary scrutiny over the detail of Government proposals.

The evidence makes five recommendations that help remedy these failings.

1. THE FIVE RECOMMENDATIONS (A–E)

A. There should be no need to remind the Committee of the number of times it has made comments about its inability to scrutinise such wide-ranging statutory powers which impact on Article 8 ECHR, nor to refer to the omission of a human rights memorandum which would explain why the exercise of these new powers is likely to be consistent with human rights legislation.⁵³ Once again, these very issues are presented in a heightened way in relation to the DNA database and in connection with the most widely used surveillance cameras in the UK.

Consequently, without providing the detail, I repeat my recommendations made in my written evidence to the Committee concerning similar extensive powers associated with the content of Information Sharing Orders as described in the Coroners and Justice Bill.⁵⁴

I recommend:

- (i) A linkage between Article 8 ECHR and Data Protection Act via the Sixth Data Protection Principle (dealing with rights of data subjects); this will introduce a privacy right limited to the processing of personal data.
- (ii) A new power for the Information Commissioner to challenge an Order made under any legislation on the grounds that the Order requires the processing of personal data in a way inconsistent with Article 8.
- (iii) The independence of the Information Commissioner who becomes funded by Parliament and reports to a relevant Parliamentary Committee.

⁵⁰ See Liberty's Briefing on the draft Football (Disorder) Bill, July 2000, available at: <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>.

⁵¹ I have been working in data protection for more than 20 years and have given oral or written evidence to several Committees of both Houses of Parliament, including previous written evidence to the JCHR. All the historic evidence I have provided to the House is accessible from www.amberhawk.com.

⁵² *S and Marper v The United Kingdom*—30562/04 [2008] ECHR 1581 (4 December 2008).

⁵³ See the Joint Committee on Human Rights (JCHR), 6th Report, Session 2007–08; Joint Committee on Human Rights (JCHR), 8th Report, Session 2004–05; Joint Committee on Human Rights (JCHR), 12th Report, Session 2004–05; Joint Committee on Human Rights (JCHR), 14th Report, Session 2007–08 and Joint Committee on Human Rights (JCHR), 16th Report, Appendix 20D, Session 2006–07 and Joint Committee on Human Rights (JCHR), 19th Report, Session 2004–05. Recommendations 59 and 60 of the Home Affairs Select Committee's report into ID Cards (session 2004–05); described powers in the ID Card Bill as "unacceptable", yet they exist in the ID Card Act 2006 in the same form.

⁵⁴ The complete analysis of Section 152 of the Coroners and Justice Bill is available on www.amberhawk.com

- (iv) An enhanced right to object to the processing of personal data in circumstances where the processing is not for a purpose identified in Article 8(2). Note that this extended right to object is not designed to apply to that processing necessary for legitimate law enforcement.

B. New section 64B to the Police and Criminal Evidence Act 1984 begins:

“(1) The Secretary of State may by regulations make provision as to the retention, use and destruction of material to which this section applies”.

I recommend that the following subsection is added after subsection (1) in the new section 64B.

“(xx) Regulations made under subsection (1) shall not specify any measure that relates to the processing of personal data that is derived from material falling within subsections (2)(a) and (e) of this section”.

Section 2 of this evidence provides background in support of this change. The argument in summary is as follows: if there are no powers for Ministers to apply in connection with the use or retention of personal data relating to DNA samples or photographs, then the balance of “police need for DNA or photographic personal data” versus the “protection of the individual” becomes subject to the Data Protection Act and its well established, independent regulatory framework.

C. The definition of “photograph to include a moving image” in section 64B(10) could provide a statutory basis for the retention or use of CCTV images as part of ACPO’s National CCTV Strategy.⁵⁵ As recommendation 3.2 of ACPO’s National CCTV Strategy suggested that primary legislation was needed to cover a number of deficiencies covering the legislation relevant to CCTV surveillance, there is a risk that this definition could legitimise that strategy by means of secondary legislation in contradiction to ACPO’s recommendation (and with minimal Parliamentary scrutiny).

The definition is discussed in section 3 of this evidence as it also covers images collected by ANPR systems.⁵⁶ These images too have not been subject to public debate, Parliamentary scrutiny and both the Surveillance Commissioner and Information Commissioner have both expressed concern over ANPR systems.

I have found no evidence that the Government has, in relation to new section 64B, considered any of the recommendations of the two Parliamentary Committees that have considered the Surveillance Society.⁵⁷ In addition, I am not aware of any Privacy Impact Assessments that have been published by Government re ANPR/DNA/CCTV.

As it is difficult to foretell the future of technological developments that relate to DNA and CCTV/ANPR. I recommend that the Committee insert a “sunset clause” into section 64B which is activated in 2015. This sunset clause will ensure that a future Parliament can revisit this subject in a few years time and take an informed view of the implications of giving Ministers wide ranging powers to determine of “use” and “retention” of DNA and CCTV/ANPR images in the light of technological advancements.

D. I repeat the observation I made to Marper’s legal team when I prepared a data protection analysis for them.⁵⁸ Because of the genetic linkages between the generations of family members, the Home Office’s DNA database (if unchecked) possesses the potential to span most of the population of the UK. The analysis in the section 4 to this evidence shows that this possibility arises from the combination of the view of the European Court of Human Rights that the retention of DNA relating to offenders does not breach Article 8,⁵⁹ and the assumption that familial DNA techniques will become more commonplace.

E. I recommend the Committee firmly reject the weak regulatory system established by provisions in Section 64B as lacking independence and credibility.

This weak system of regulation arises because the Home Secretary controls the functions and reporting structure of the regulator, has jurisdiction over what is regulated, and is also politically responsible for the public bodies that are subject to regulation. The Committee should recognise the inherent conflict of interest when, for example, the Home Secretary sets public policy in relation to DNA samples or CCTV/ANPR surveillance and also provides for privacy protection in these areas.

Note that my Recommendation A would ensure that the Information Commissioner could challenge Orders which were in breach of Article 8. Recommendation B would ensure that the processing of personal data would be subject to regulation by the Data Protection Act and allow the Commissioner to establish the degree of independent regulation. Recommendation C would allow a future Parliament to review these matters in 2015.

⁵⁵ <http://www.crimereduction.homeoffice.gov.uk/cctv/cctv048.htm>

⁵⁶ See for example, “Britain will be first country to monitor every car journey” <http://www.independent.co.uk/news/uk/home-news/britain-will-be-first-country-to-monitor-every-car-journey-520398.html>

⁵⁷ “Surveillance: Citizens and the State” (House of Lords Constitution Committee; HL 18, Session 2008–09) and “A Surveillance Society” (House of Commons Home Affairs Committee; HC 58, Session 2007–08).

⁵⁸ This analysis is also available on www.amberhawk.com

⁵⁹ Decision as to the Admissibility of Application 29514/05, Hendrick Jan Van der Velden against the Netherlands.

The Committee should unambiguously state that the Home Secretary's powers over the regulator are unacceptable. The provisions in Section 64B propose a situation that is akin to that which would arise if Count Dracula were given the responsibility for policy at the National Blood Transfusion Service and was seeking powers to appoint his own auditors to make recommendations as to the distribution, quantity and quality of the blood supply.

2. MAIN CONCLUSIONS OF A DATA PROTECTION ANALYSIS

(a) *The position established by Section 64B*

New Section 64B(2) of PACE allows Ministers to enact regulations that to relate to:

- “(a) photographs falling within a description specified in the regulations;
- (b) fingerprints taken from a person in connection with the investigation of an offence;
- (c) impressions of footwear so taken from a person;
- (d) DNA and other samples so taken from a person; and
- (e) information derived from DNA samples so taken from a person”.

It is noteworthy that this subsection has two paragraphs in relation to DNA and only one in relation to fingerprints. One would conclude, therefore, that if fingerprints were destroyed, personal data relating to those fingerprints would also be destroyed. However, this is not the case with DNA. If the DNA sample were destroyed, the power in paragraph (e) could ensure that the related DNA personal data could be retained for longer periods (eg indefinitely) or used for something else (eg for a research purpose or any other purpose).

When the Government's amendment was promoted in Committee,⁶⁰ the Minister made no statement as to why there were two provisions with respect to DNA—nor was there any comment in relation to CCTV/ANPR. Yet these provisions are so flexible that they could allow Ministers to lawfully retain and use DNA personal data in circumstances which, without those regulations to provide the statutory basis, could be in breach of several data protection principles. The same position pertains to CCTV/ANPR images.

(b) *The position if Recommendation B is accepted*

Recommendation B requires the following subsection to be included in Section 64B.

- “(xx) Regulations made under subsection (1) shall not specify any measure that relates to the processing of personal data that is derived from material falling within subsections (2)(a) and (e)”.

The effect of this change is to leave any matter that relates to the processing of personal data to the Data Protection Act. This means that the retention periods are not established by Ministerial *fiat* in regulations; they are established by a mechanism that balances the interests of the police versus the interests of the policed and regulated by the Information Commissioner. This provides a system of independent checks and balances, and appeals to the judicial system in cases of dispute.

For example, the Data Protection Act would not preclude the processing of a DNA personal data derived from a sample taken from somebody arrested and using those data in relation to any inquiry. The Act would not prevent DNA personal data derived from a sample being processed and comparisons been made with samples found at the scene of a crime or other scenes of crime. The Act would not require DNA personal data to be deleted by the police, if such data could be justified in terms of retention with respect to ongoing inquiries or likely inquiries. All processing of DNA personal data that were necessary for the statutory functions of the police, that were relevant for a policing purpose, that were needed to be retained or used for a policing purpose, could all be lawfully processed.

However, a data protection analysis would arrive at a range of different retention periods for the DNA personal data that define the circumstances when they were no longer needed for a policing purpose. This retention time would depend on a number of factors such as the status of the data subject (convicted, arrested), the likelihood of recidivism, the age of the data subject, the length of time which had passed since the data subject last came to police attention, and the seriousness of the crime involved or being investigated. These are the very items that have been identified by the Government in its public pronouncements on the retention of DNA.⁶¹

The need for a variety of retention criteria is manifestly apparent from published criminal statistics. For example,⁶² criminal statistics relating to those born between 1953 and 1978 reveal that “the majority of offenders had been convicted on only one occasion” and that “the peak age of known criminal activity for males was 19”. If this is the case, data protection could require consideration of the deletion of DNA personal data if (a) the offence was minor; (b) the offender had not repeated a crime; (c) the offender was of a certain maturity (eg over 30), and (d) that the police had no interest in the data subject for some years.

⁶⁰ <http://www.publications.parliament.uk/pa/cm200809/cmpublic/policing/090226/pm/90226s06.htm>

⁶¹ The speech of the Home Secretary at the Intellect Technology Association (16 December 2008) <http://press.homeoffice.gov.uk/press-releases/common-sense-standards>.

⁶² <http://www.homeoffice.gov.uk/rds/pdfs/hosb401.pdf>

So, for example, retention periods relating to the DNA personal data and samples would likely to differentiate between groupings such as:

- (a) those identified individuals who are convicted of minor offences;
- (b) those identified individuals who are convicted of serious offences;
- (c) juveniles who are processed by the criminal justice system;
- (d) those identified individuals who are arrested and whose DNA matches that found at another scene of crime;
- (e) those identified individuals who are arrested but are not convicted or proceeded against;
- (f) those identified individuals whose samples need to be eliminated from the DNA found at the scene of crime;
- (g) those unidentified individuals whose DNA is found at the scene of a crime;
- (h) those who help the police and consent to the DNA personal data being processed; and
- (i) those who are involved or suspects in offences of a sexual nature.

It can be seen that DNA personal data in category (b), (g) and (i) are likely to be kept indefinitely whereas (h) would be retained until consent is withdrawn; some special retention rules might apply for category (c) and the retention times for (a) would be longer than (e).

However, this granular approach would be jeopardized if any future Ministers can specify retention periods independently of the Data Protection Act. If, for example, a Minister stipulated in an Order that DNA personal data can be retained for 20 years, that time period would become the lawful retention period—irrespective of any data protection analysis that may point to a shorter retention period as being more appropriate.

It should be added that the same argument is equally pressing in relation to the processing of CCTV/ANPR photographic images by the police. Like the powers in the Coroners and Justice Bill, these powers in NC33 are so wide that the Home Secretary could determine excessive retention periods and uses that were incompatible with a policing purpose (See section 4).

It seems very curious that Home Secretary in December 2008 wanted to “enjoy the confidence and trust of the public” in the DNA database and proposed that changes will be set out in the White Paper that in order to “deliver a more proportionate, fair and common sense approach”.⁶³ Yet, in advance of that public consultation, this Bill provides a framework for the lawful use and retention of DNA and related personal data. If there is to be a meaningful public debate over DNA retention, why is there a need to determine the relevant legal framework in advance? Perhaps clairvoyant civil servants and Ministers already know the conclusions of that debate.

My own view is that specific primary legislation should be enacted when Government has finalised its plans, delivered on its promised public consultation, and reported to the European Court of Human Rights on its course of action. In many privacy matters that require a balancing act to be performed, the devil is in the detail of actual processing procedures. Such detail is not going to be debated or scrutinised via a procedure that provides for wide ranging powers, which gain little scrutiny in Parliament. I hope the Committee will support that view.

3. “PHOTOGRAPHS OF A MOVING IMAGE”

New Section 64B(10) of PACE reads as follows: “(10) For the purposes of this section—(a) ‘photograph’ includes a moving image . . .”.

The most obvious photographic “moving image” relates to those images captured by CCTV and ANPR surveillance. This means that the wide ranging Ministerial powers in the Section 64B are engaged in connection with the use and retention of CCTV/ANPR images. The Minister in moving the the clause in Committee, for some reason, did not make any comment in relation to the surveillance connection.⁶⁴

ACPO’s National CCTV Strategy⁶⁵ sets out plans for co-ordinating an ambitious, integrated expansion of the CCTV in town centres to include “CCTV from buses, tube and train carriages” and from “football stadiums, arenas and other areas of public convenience”. The Strategy foresees other electronic linkages for localised CCTV systems such as in a store or railway station: these include “shop cameras to Electronic Point of Sale systems”, “transport system cameras to travel cards” and “internal building cameras connected to building access control systems”. Such integration, the Strategy states, will “dramatically improve the effectiveness of CCTV systems” as “post event CCTV images can quickly be searched against other events”.

One important reason for these linkages is that, in the post 9/11 world, the Strategy is subtly enhancing the role of CCTV from its accepted role that relates to crowds in city centres (eg public safety, public order or low-level street-crime) to ensure that such CCTV, in future, has the functionality to trace individuals and

⁶³ Part of her speech to Intellect Technology Association (reference 11).

⁶⁴ <http://www.publications.parliament.uk/pa/cm200809/cmpublic/policing/090226/pm/90226s06.htm>

⁶⁵ See reference 5.

vehicles involved in serious crime and for anti-terrorist purposes. The Strategy clearly states that “if we are to deal more effectively with serious, organized crime and terrorism, different operational requirements are needed”.

As is widely known, London’s Congestion Charge ANPR cameras now feed images through to MI5 for national security purposes, and modern digital CCTV in city centres are increasingly augmented by ANPR functionality that permits checks with the Police National Computer (eg to provide intelligence on vehicle movements, to identify uninsured drivers). The Strategy envisages that CCTV will develop facial recognition functionality in future, and one can see such systems being used in relation to ASBOs or surveillance of individuals of interest to the police. In this way, the police’s use of CCTV, linked to ANPR, to support its policy of “Denying Criminals the Use of the Road”⁶⁶ could possibly develop into a policy of “Denying Criminals the Use of the Pavement”.

The Committee should raise serious objection to ANPR/CCTV images being legitimised by the exercise of wide ranging powers and subject to minimal scrutiny and no public debate. This was one main mistake made with DNA sample collection and related database—no public debate, little Parliamentary scrutiny, and lengthy and expensive Court proceedings. That is why the Committee could support Recommendations A, B & C. (CCTV/ANPR should be regulated by the Data Protection Act, there should be an ability to challenged orders that could breach Article 8 and a sunset clause should be included in section 64B).

Finally, in this section, it appears to be a little disingenuous to promote a New Clause with a claim that its objective is to resolve a serious breach of Article 8 re DNA, and slip in, without any announcement, a subtle definitional change that extends surveillance via the use and retention of ANPR and CCTV images. I think this kind of “double dealing” can only undermine public trust in the political process.

4. WHY THE DNA DATABASE MAY SPAN THE POPULATION

DNA testing kits are often marketed with statements such as “confirm with 100% accuracy if a child is related to their Grandparent”. If this claim is true, it means the DNA of child maps through its parents to the “parents of the parents” or Grandparents (or at least five individuals).⁶⁷ The UK has a population of 60,000,000. As there are very high statistically significant links of one DNA profile to say four to six close members of a family (eg between parents, grandparents and siblings), then each entry in the DNA database can be considered as having the potential to span at least five other family members.

The ECHR has already accepted in the case of Van der Velden,⁶⁸ that because of his offences, his Article 8 rights were not infringed by the retention of his DNA and any related personal data; this means that the interference arising from retaining DNA personal data in relation to offenders has a lawful basis.

The current size of the DNA database has 3–4 million entries relating to offenders; the use of familial linkages implies that the database has the potential to span about 15–25 million individuals or between 20%–40% of the population, many of whom will not be offenders. It follows that a database of 10–12 million offenders clearly has the potential span the vast majority of the UK population. In other words, the mathematics of family genetics means that a DNA database of this potential is probably only few technical innovations away.

It is recognised that this prospect is not a realistic one given the state of today’s technology or current DNA practice. However, if following Marper, the police cannot use DNA samples of the “innocent”, then one would expect scientific and statistical techniques to be developed that exploit the genetic links between offenders and their family members. As techniques improve, they become cheaper and it is to be expected that familial line DNA analysis can become more effective, possibly extended to the more remote family members. The reason why the police keep DNA samples beyond the death of the person from whom the sample was taken is, in part, a tacit recognition that the DNA sample can relate to other individuals and that such techniques could improve familial tracing.⁶⁹

Criminal statistics regularly show that, approximately, about one third of males and one-tenth of women have a criminal record other than motoring offences.⁷⁰ Assume these level remain constant, and assume that DNA continues to be taken from those convicted, the maximum DNA database coverage of the population will inevitably approach 20–25% (assuming DNA is taken from those men and women who commit a criminal records).

Such a national DNA database of the future (if unchecked) thus has the potential to span 80%–100% of the population—the only question is when this coverage will occur. That is why I have made recommendations B & C (the use and retention of DNA personal data should be regulated by the Data Protection Act, and a “sunset” clause should be included in Section 64B so that Parliament can re-evaluate this database).

⁶⁶ http://police.homeoffice.gov.uk/publications/operational-policing/ANPR_10,000_Arrests.pdf?view=Standard&pubID=288680

⁶⁷ For example, the grandparent test on <http://www.dna-worldwide.com/relationship-testing/grand-parent-test>.

⁶⁸ See Van Velden, reference 9.

⁶⁹ ACPO DNA Good Practice Manual, Second Edition 2005, Appendix 1.

⁷⁰ See *Hansard*, 18 Apr 2006: Column 287W or <http://www.homeoffice.gov.uk/rds/pdfs/hosb401.pdf>

APPENDIX 1

NEW CLAUSE 33

RETENTION AND DESTRUCTION OF SAMPLES ETC: ENGLAND AND WALES

“(1) After section 64A of the Police and Criminal Evidence Act 1984 (c 60) insert—

“64B Retention and destruction of samples etc

- (1) The Secretary of State may by regulations make provision as to the retention, use and destruction of material to which this section applies.
- (2) This section applies to the following material—
 - (a) photographs falling within a description specified in the regulations;
 - (b) fingerprints taken from a person in connection with the investigation of an offence;
 - (c) impressions of footwear so taken from a person;
 - (d) DNA and other samples so taken from a person; and
 - (e) information derived from DNA samples so taken from a person.
- (3) The regulations may—
 - (a) make different provision for different cases, and
 - (b) make provision subject to such exceptions as the Secretary of State thinks fit.
- (4) The regulations may frame any provision or exception by reference to an approval or consent given in accordance with the regulations.
- (5) The regulations may confer functions on persons specified or described in the regulations.
- (6) The functions which may be conferred by virtue of subsection (5) include those of—
 - (a) providing information about the operation of regulations made under this section;
 - (b) keeping their operation under review;
 - (c) making reports to the Secretary of State about their operation; and
 - (d) making recommendations to the Secretary of State about the retention, use and destruction of material to which this section applies.
- (7) The regulations may make provision for and in connection with establishing a body to discharge the functions mentioned in subsection (6)(b) to (d).
- (8) The regulations may make provision amending, repealing, revoking or otherwise modifying any provision made by or under an Act (including this Act).
- (9) The provision which may be made by virtue of subsection (8) includes amending or otherwise modifying any provision so as to impose a duty or confer a power to make an order, regulations, a code of practice or any other instrument.
- (10) For the purposes of this section—
 - (a) “photograph” includes a moving image; and
 - (b) the reference to a DNA sample is a reference to any material that has come from a human body and consists of or includes human cells.

64C Retention and destruction of samples etc: supplementary

- (1) Regulations under section 64B may make—
 - (a) supplementary, incidental or consequential provision; or
 - (b) transitional, transitory or saving provision.
- (2) Regulations under that section are to be made by statutory instrument.
- (3) An instrument containing regulations under that section may not be made unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament.”

(2) The amendment made by subsection (1) applies in relation to material obtained before or after the commencement of this section.”.—(*Mr Campbell.*)

This amendment, responding to the ECtHR judgement in S and Marper v UK on 4 December 2008, would amend the Police and Criminal Evidence Act 1984, creating a power to make regulations on the retention, use and destruction of photographs, fingerprints, footwear impressions, DNA and other samples and DNA profiles. Brought up, and read the First time.

March 2009

Memorandum submitted by Rights of Women

In Part 2 of the *Policing and Crime Bill 2008* the Government has proposed a number of changes to the law on prostitution to tackle the growing demand to sexually exploit vulnerable women, men and children. Clause 13 of the Bill proposes the insertion of section 53A into the *Sexual Offences Act 2003* so that it reads:

“53A Paying for sexual services of a prostitute controlled for gain

- (1) A person (A) commits an offence if—
 - (a) A makes or promises payment for the sexual services of a prostitute (B), and
 - (b) any of B’s activities relating to the provision of those services are intentionally controlled for gain by a third person (C).
- (2) The following are irrelevant—
 - (a) where in the world the sexual services are to be provided and whether those services are provided,
 - (b) whether A is, or ought to be, aware that any of B’s activities are controlled for gain.
- (3) An activity is “controlled for gain” by C if it is controlled by C for or in the expectation of gain for C or another person (apart from A or B).
- (4) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”

CONTROLLED FOR GAIN

This offence is therefore a strict liability offence; there is no need to prove the state of the offender’s knowledge in order to secure a conviction, only that he (or she) had made or promised a payment for sexual services from a person (B) who is intentionally controlled for gain by a third person (C). The issue in the offence is, therefore, what amounts to being “controlled for gain”.

Subsection (3) of the proposed offence states that an activity is “controlled for gain” if it is controlled by a third person, C, for or in the expectation of gain for C, or another person (who is not A or B), for example, another individual in an organised crime network (D).

The definition of what constitutes “gain” is set out in section 54 of the *Sexual Offences Act 2003* which reads:

“54 Sections 52 and 53: interpretation

- (1) In sections 52 and 53, “gain” means—
 - (a) any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount; or
 - (b) the goodwill of any person which is or appears likely, in time, to bring financial advantage.”

Whether or not a person is controlled for gain will depend on the nature of C’s behaviour towards A. In the case of *R v Massey [2007]*⁷¹ the Court of Appeal considered the types of behaviour that may or may not constitute control in an appeal against conviction for controlling the activities of another person relating to that person’s prostitution for gain.⁷² The evidence at the appellant’s trial was that he had organised her methods of work, set up a website for her, arranged bookings with clients and that the complainant had done this because she was intimidated by the appellant, with whom she was in a relationship. The complainant had been 19 when she met the appellant, who was older than her, and had been in care. The appellant’s case was that he organised her work for her so that it was safer for her. The trial judge ordered the jury that in order to prove that the appellant had “controlled” the complainant the Crown had to prove that: “he exercised control over her activities, in the sense that she was acting under compulsion exercised over her activities by the defendant. The Crown do not have to prove that on every occasion she acted under compulsion; they must prove that over the whole period the defendant was exercising control over her activities”.

The appellant argued that this definition of control was incorrect and that his conviction was therefore unsafe. The Court of Appeal ruled that the conviction was safe and said the following about the meaning of “control”:

“In our judgment, “control” includes but is not limited to one who forces another to carry out the relevant activity. “Control” may be exercised in a variety of ways. It is not necessary or appropriate for us to seek to lay down a comprehensive definition of an ordinary English word. It is certainly enough if a defendant instructs or directs the other person to carry out the relevant activity or do it in a particular way. There may be a variety of reasons why the other person does as instructed. It may be because of physical violence or threats of violence. It may be because of emotional blackmail, for example, being told that “if you really loved me, you would do this for me”. It may be because the defendant has a dominating personality and the woman who acts under his

⁷¹ EWCA Crim 2664.

⁷² Contrary to section 53(1) of the *Sexual Offences Act 2003*.

direction is psychologically damaged and fragile. It may be because the defendant is an older person and the other person is emotionally immature. It may be because the defendant holds out the lure of gain, or the hope of a better life. Or there may be other reasons.

Sex workers are often vulnerable young women with disturbed backgrounds, who have never known a stable relationship or respect from others and are therefore prey to pimps. It is all too easy for such a person to fall under the influence of a dominant male, who exploits that vulnerability for financial gain. Exploitation of prostitution for financial gain is the broad mischief against which section 53 is aimed, whether or not it involves intimidation of the prostitute or prostitutes concerned. At one stage it was submitted by Mr Gerasimidis that some degree of absence of free will on the part of the prostitute is an essential ingredient of control. But on reflection he withdrew that submission and, in our judgment, he was right to do so. If, for example, a group recruits young women from overseas and puts them to work in organised prostitution in the United Kingdom, we do not see any ground for saying that the prosecution would have to prove absence of free will in order to be able to show that the organisers were controlling the activities of the women for gain.

Although, as we have stressed, we do not seek to substitute alternative words for the word “control” which Parliament has used, our approach to the interpretation of the word in its statutory context is also consistent with its ordinary English usage. The *Concise Oxford Dictionary* defines “in control of” as “directing an activity”. It defines the noun “control” as “power of directing, command”. By contrast, it does not include the words “compel, force or coerce”, although they would doubtless be forms of control”.⁷³

Professor David Ormerod has welcomed this judgement’s interpretation of “control” as affording protection to particularly vulnerable people.⁷⁴

When interpreting the proposed new offence the courts will look at previous, relevant case law like that discussed above. It is clear therefore, that women who work with a maid (for security purposes for example) would not be considered to be “controlled for gain” but that those whose work is controlled by another person for their own benefit would.

EVIDENTIAL ISSUES

Concern has been raised about the ability to investigate and prosecute this offence. It is clear that investigating sexual violence poses unique challenges. Investigations and prosecutions that are supported by the person involved in prostitution (as was the case of *R v Massey [2007]*⁷⁵ above) should present fewer difficulties than those where the person involved does not support the prosecution. However, this is the case with all sexual offences and is not a problem specific to the proposed new offence. It is important to note that those giving evidence in relation to the proposed new offence would benefit from special measures under section 17 of the *Youth Justice and Criminal Evidence Act 1999*⁷⁶ and would be given anonymity under *Sexual Offences (Amendment) Act 1992*.

The international legislative context—violence against women and international human rights law

The historical failure of States, including the UK, to deal with the human rights implications of prostitution and trafficking has had profound implications on the ability of those States to prosecute and punish perpetrators of these types of criminal activity. Consequently, we welcome current government plans to develop the legislation on prostitution in a way that is more consistent with a human rights based approach.

⁷³ Paragraphs 20–22 of the judgement which was given by Toulson LJ.

⁷⁴ David Ormerod is Professor of Criminal Justice at Queen Mary, University of London as well as being a barrister. His publications include *Blackstone’s Criminal Practice 2008* of which he is general editor with the Rt Hon Lord Justice Hooper. Professor Ormerod’s views on this case were given in *Crim. L. R.* 2008, 9, 719–721.

⁷⁵ EWCA Crim 2664.

⁷⁶ Special measures are practical steps that are taken to make the process of giving evidence at trial less intimidating for vulnerable and intimidated witnesses; they are available under section 19 of the *Youth Justice and Criminal Evidence Act 1999* (YJCEA 1999). Special measures that may be available in court include:

- Screens which can be placed either around the defendant or the complainant so that the defendant cannot see the complainant.
- A live link enables the complainant to give evidence by a live televised link from another part of the court building (or a different building).
- Exclusion from the court of the public and press (except for one named person to represent the press) will be considered in all cases which involve sexual violence or intimidation.
- Video recorded evidence enables a pre-recorded interview with the complainant to be played to the court as examination-in-chief.
- Giving evidence through an intermediary who is appointed by the court to assist a witness. This is only available to witnesses who are entitled to special measures because of their age or a disability.
- Aids to communication, such as an interpreter or a communication aid (for example, a symbol book or alphabet board) may be used to enable a witness to give evidence. As with the use of an intermediary, these special measures are to assist witnesses with disabilities to communicate their evidence.
- Removal of wigs and gowns in the Crown Court where someone who is under 18 years old is giving evidence (in the magistrates court and Youth Court wigs and gowns are not worn).

Any measures proposed to tackle prostitution must be in line with the UK's obligations under the following international instruments:

- UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).
- Universal Declaration of Human Rights (1948).
- UN Slavery Convention (1926).
- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956).
- European Convention of Human Rights (1950) (the ECHR).
- The International Convention on Civil and Political Rights (1966).
- UN Working Group on Contemporary Forms of Slavery (est 1975).
- UN Declaration on the Elimination of Violence against Women (1994).
- UN Fourth Conference on Women (1995) Platform for Action.
- UN Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (known as the Palermo Protocol) (1998).
- The Convention on the Elimination of All Forms of Discrimination Against Women (1971) and the Optional Protocol to the Convention (1999) (CEDAW).
- The European Union Council Framework Decision on Combating Trafficking in Human Beings (the Framework Decision).
- Convention on Action against Trafficking in Human Beings (the Trafficking Convention).

The UN Declaration on the Elimination of Violence against Women defines violence against women in Article 1 as: “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.

Article 2 of the Declaration further states that violence against women encompasses, but is not limited to:

- (a) physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; and
- (c) physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

The 1995 UN Fourth Conference on Women (1995) Platform for Action went further in recognising sexual violence, trafficking and forced prostitution as forms of violence against women which required positive State action.

“Strategic objective D.3.

Eliminate trafficking in women and assist victims of violence due to prostitution and trafficking.

Actions to be taken

130. By Governments of countries of origin, transit and destination, regional and international organizations, as appropriate:

- (a) consider the ratification and enforcement of international conventions on trafficking in persons and on slavery;
- (b) take appropriate measures to address the root factors, including external factors, that encourage trafficking in women and girls for prostitution and other forms of commercialized sex, forced marriages and forced labour in order to eliminate trafficking in women, including by strengthening existing legislation with a view to providing better protection of the rights of women and girls and to punishing the perpetrators, through both criminal and civil measures;
- (c) step up cooperation and concerted action by all relevant law enforcement authorities and institutions with a view to dismantling national, regional and international networks in trafficking;
- (d) allocate resources to provide comprehensive programmes designed to heal and rehabilitate into society victims of trafficking, including through job training, legal assistance and confidential health care, and take measures to cooperate with non-governmental organizations to provide for the social, medical and psychological care of the victims of trafficking; and

- (e) develop educational and training programmes and policies and consider enacting legislation aimed at preventing sex tourism and trafficking, giving special emphasis to the protection of young women and children”.

The UK also has clear legal obligations under CEDAW, Article 6 of which requires States to take “all appropriate legislative and other measures” to deal with trafficking and the “exploitation of the prostitution of women”. General Recommendation No 19⁷⁷ goes further in describing the positive obligations on States to eliminate gender based violence (including sexual violence, forced prostitution and trafficking) and makes clear that States may be responsible for private acts if they fail to act with due diligence to prevent the violation of rights or to investigate and punish acts of violence. The recommendation also States that trafficking is a violation on the prohibition on sex based discrimination.

In addition to looking at specific measures aimed at dealing with violence against women, it is also important to understand the positive obligations the Government has under the ECHR. Under Article 1 of the ECHR the UK is required to secure the Convention rights and fundamental freedoms of “everyone within their jurisdiction”. A failure to effectively protect a woman from violence may be a breach of:

- Art 2 ECHR (her right to life);
- Art 3 ECHR (her right to be free of inhuman and degrading treatment);
- Art 4 (her right to be free from slavery and servitude);
- Art 12 ECHR (her right to marry and found a family); and
- Art 13 ECHR (her right to an effective remedy).⁷⁸

These obligations are all in addition to those that are imposed by the Council of Europe’s Trafficking Convention.⁷⁹

The above discussion of international human rights law is important because it outlines the myriad of positive obligations on States to tackle prostitution, trafficking and sexual violence. Positive obligations require States to do more than simply exercise due diligence in the investigation of criminal activity. Rather, they require States to analyse and respond to the causes of violence against women which in this case are the causes of prostitution, trafficking and sexual violence. This includes the demand to sexually exploit women.

Fulfilling positive obligations may require legislative action, such as the proposals new offence, but they also involve non-legal measures, such as the development of safe exit strategies for women who wish to leave prostitution. Both legislative and non-legislative measures are necessary if the Government wishes to fulfil its international obligations in this area as paragraph 130 of the Beijing Platform for Action makes clear.

13 January 2009

⁷⁷ General Recommendation No. 19 (11th Session, 1992) on Violence against women.

⁷⁸ See for example *Kontrova v Slovakia* [2007] Application no 7510/04 31 May 2007.

⁷⁹ For further information see the *Explanatory Memorandum on the Council of Europe Convention on Action against Trafficking in Human Beings* available to download at <http://www.crimereduction.homeoffice.gov.uk/humantrafficking004a.pdf>

List of Reports from the Committee during the current Parliament

First Report	The UN Convention on the Rights of Persons with Disabilities	HL Paper 9/HC 93
Second Report	The Work of the Committee in 2007-08	HL Paper 10/HC 92
Third Report	A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007-08	HL Paper 15/ HC 145
Fourth Report	Legislative Scrutiny: Political Parties and Elections Bill	HL Paper 23/ HC 204
Fifth Report	Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2009	HL Paper 37/HC 282
Sixth Report	UN Convention on the Rights of Persons with Disabilities: Government Response to the Committee's First Report of Session 2008-09	HL Paper 46/HC 315
Seventh Report	Demonstrating respect for rights? A human rights approach to policing protest	HL Paper 47/HC 320
Eighth Report	Legislative Scrutiny: Coroners and Justice Bill	HL Paper 57/HC 362
Ninth Report	Legislative Scrutiny: Borders, Citizenship and Immigration	HL Paper 62/HC 375
Tenth Report	Legislative Scrutiny: Policing and Crime Bill	HL Paper 68/HC 395
Eleventh Report	Legislative Scrutiny: 1) Health Bill and 2) Marine and Coastal Access Bill	HL Paper 69/HC 396
Twelfth Report	Disability Rights Convention	HL Paper 70/HC 397
Thirteenth Report	UK Libya Prisoner Transfer Treaty	HL Paper 71/HC 398

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
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I

Legislative Scrutiny: Policing and Crime

Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501
Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527

Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper 172/HC 1077
Thirty-first Report	Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008	HL Paper 173/HC 1078
Thirty-second Report	Scrutiny of Mental Health Legislation: Government Response to the Committee's Sixteenth Report of Session 2007-08	HL Paper/ HC 1079
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 Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
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	HL Paper 157/HC 394

	days, intercept and post-charge questioning	
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