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Rt. Hon. Baroness Smith of Basildon
House of Lords
London
SW1A 0PW

18th December 2013

Dear Angela,

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL: GOVERNMENT AMENDMENTS FOR LORDS REPORT STAGE

I am writing to let you have details of the Government amendments for Report stage that I have tabled today (copy attached). This first tranche of amendments relate to the anti-social behaviour and forced marriage provisions in Parts 1 to 4, 6 and 10 of the Bill. I expect to table amendments to other Parts of the Bill in the New Year.

Injunction to Prevent Nuisance and Annoyance (IPNA) – test for grant of an injunction (amendments to clauses 1(2), 86, 89, 93 and 94)

In Committee, I made it clear that the courts, in deciding whether to grant an injunction, would not only consider whether the twin tests in clause 1 had been met, but also whether it was reasonable to grant an injunction in the circumstances of the case. Nonetheless, I undertook to consider amendments tabled by Baroness Hamwee and Lord Faulks which sought to import a reasonableness threshold onto the face of the Bill (Hansard, 18 November 2013, column 790). We have concluded that it would be appropriate to do so to provide further assurance that the injunction cannot be used to prevent people from exercising their rights to peaceful protest and free speech. The amendment would alter the first limb of the test for the grant of an injunction from –

> "the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in conduct capable of causing nuisance or annoyance to any person"

to –

"the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in conduct ~~capable of causing~~ *that could reasonably be expected to cause* nuisance or annoyance to any person"

The amendments to clauses 86, 89, 93 and 94 are consequential on the clause 1 amendment.

IPNA and Criminal Behaviour Order (CBO) – avoiding conflict with respondent's religious beliefs (amendments to clause 1(5), 21(9) and paragraph 2(4) of Schedule 2)

The Bill requires the court, as far as practicable, to avoid imposing prohibitions and requirements as part of an IPNA or CBO which conflict with, amongst other things, the respondent's religious beliefs. In Committee, Lord Ahmad undertook to consider further the JCHR's concern that under the ECHR there is an absolute right to hold religious beliefs and that accordingly any interference could only be with the manifestation of the respondent's religious beliefs (Hansard, 18 November 2013, column 794). Moreover, the JCHR questioned why the Bill singles out one Convention right when others, such as the right to a private life, could equally have a bearing on the nature of any prohibitions or requirements. In the light of the JCHR's points and the debate in Committee, I propose to remove this provision from the Bill on the grounds that the courts would, in any event, need to consider whether any prohibitions or requirements were compatible with the respondent's Convention rights.

IPNA – linked applications involving multiple respondents some of whom are under 18 whilst others are 18 or over (amendments to clauses 1(8), 7, 8, 9 and 18)

The Law Society has argued that the Bill should be amended to deal with the situation where there are linked applications for IPNAs involving respondents whose ages fall each side of 18 years. One of the improvements to the existing ASBO regime we have made in the Bill is to provide for applications for IPNAs against under 18s to be heard in the youth court. However, one consequence of this is that linked applications involving both adult and minor respondents cannot be heard in the same court. To address this, we propose amend the Bill to enable an applicant for an injunction, at the time of application, to apply to the youth court for permission for the application against the adult(s) to be heard in that court. The youth court may grant the application if it is in the interests of justice. We believe that it is in the best interests of respondents aged under 18 for linked cases involving adults to be transferred to the youth court rather than vice versa.

IPNA – power to exclude under 18 from their own home (amendment to clause 12)

The Bill enables an IPNA to include a requirement excluding the respondent from his or her own home in cases of violence or risk of harm to others. In

Committee, I undertook to undertook to consider concerns raised by Baroness Hamwee about the application of this provision to under-18s (Hansard, 20 November 2013, column 973). Given the wider safeguarding implications of excluding a young person, we are satisfied that it would not be appropriate for this power to apply in such cases and we propose that the Bill be amended to this end.

IPNA – tenancy injunctions (amendment to leave out clause 13)

The provisions in respect of the IPNA are tenancy neutral, save for the provisions in clause 13 which make special provision for tenancy injunctions in respect of respondents who live in social housing. The inclusion of this provision in the Bill was questioned by Lord Rosser in Committee (Hansard, 20 November 201, columns 974-978). In practice, tenancy injunctions are a species of IPNA and the provision was only included in the Bill to preserve an existing power in housing legislation. However, as the IPNA can do everything a tenancy injunction can do, we are satisfied that there is no compelling case for retaining this bespoke provision for those living in social housing; this amendment would therefore remove clause 13 from the Bill.

CBO – standard of proof (amendment to clause 21(3))

In Committee, Baroness Hamwee moved an amendment which sought to write onto the face of the Bill that the criminal standard of proof applied to the court's consideration of whether the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person (Hansard, 20 November 2013, column 1002). As I made clear in the debate, it is the Government's view that, as breach of a CBO is a criminal offence, the criminal standard of proof would apply to proceedings considering the grant of an order. Given that this is apparent from the case law, we do not believe, as a rule, that it is necessary to provide for the criminal standard of proof on the face of the Bill; this approach is in line that taken in other legislation providing for other types of civil preventative order. However, we are satisfied that there are sufficient grounds here for taking a different approach. Part 1 of the Bill expressly provided that the IPNA is subject to the civil standard of proof so, unless express provision was made in Part 2, we acknowledge that there may be some doubt that the criminal standard would apply in proceedings in respect of the CBO. This amendment therefore puts the matter beyond doubt.

Dispersal powers (amendments to clause 32 and 34)

In Committee, concerns were expressed that the new dispersal powers should not be used to restrict peaceful protest and freedom of assembly (Hansard, 20 November 2013, columns 1016-1026). We are satisfied that the test for the exercise of these powers precludes them from being used in this way, but we intend to make it clear on the face of the Bill that before issuing an authorisation permitting the use of the dispersal powers in a specified area the police officer giving such an authorisation must have particular regard to

the rights of freedom of expression and freedom of assembly. A similar duty would be placed on a constable before issuing a dispersal direction.

In addition, the question of whether the new public spaces protection order (PSPO) could be used to prohibit peaceful protest was also raised in debate (Hansard, 25 November 2013, column 1223). Again, we do not believe that peaceful protest would meet the test for the order. However, for the avoidance of doubt, new clause *Convention rights, consultation, publicity and notification* similarly requires a local authority to have particular regard to the rights of freedom of expression and freedom of assembly before making a PSPO.

Community Protection Notice (CPN) – defences (amendments to clause 45)

Under the Bill it is an offence to fail to comply with the terms of a CPN. The defence provided for in clause 45(3) and (4) of the Bill in respect of this offence repeats the grounds on which the making of a CPN can be appealed against. Criminal proceedings on breach of a CPN should not be the forum to repeat earlier proceedings on an appeal against a notice. The amendments to clause 45 therefore remove this element of the defence. It will continue to be the case (as provided for in clause 45(5)), that a person charged with the offence of failing to comply with a CPN, can put forward a defence that he or she took all reasonable steps to comply with the order, or had some other reasonable excuse for the failure to comply with the order. This change will bring this aspect of the Bill into line with the approach taken with the PSPO and the closure powers.

CPN – forfeiture and seizure of items (amendments to clauses 47 and 48)

The Bill confers the power to issue a CPN on the police, local authorities and persons designated by a local authority (provided such persons are of a description specified in an order made by the Home Secretary). Provision is made for items used in the commission of the offence of breaching a CPN to be forfeited or seized on the order of a court. Forfeited items must be handed over to a constable and disposed of by the relevant police force. Similarly the power to seize items is vested in a constable. In Committee, Baroness Hamwee tabled amendments to confer similar powers on local authority personnel. Although she subsequently withdrew the relevant amendments (amendments 22QK-22QS), we are satisfied that this would be a sensible extension of these provisions and propose that the Bill is amended accordingly.

PSPOs – duty to consult (amendments to clauses 55, 56 and 57 and new clause *Convention rights, consultation, publicity and notification*)

Before making a PSPO, the Bill requires the relevant lower tier or unitary local authority to consult the chief officer of police and such community representatives as the authority considers appropriate. We have deliberately sought to limit the consultation requirements to avoid these provisions

imposing unnecessary bureaucratic burdens on local authorities. That said, in response to amendments tabled in Committee by Lord Greaves (Hansard, 25 November 2013, columns 1228-1233), we propose to augment these provisions with a duty to consult, so far as reasonably practicable, the owner or occupier of the land in question and to inform the county council and any parish or community council.

PSPOs – land managed by the City of London Corporation (amendment to clauses 66 and 67 and new clause *Bodies other than local authorities with statutory functions in relation to land*)

In Committee, Lord Ahmad undertook to consider an amendment tabled by Lord Brooke designed to enable the City of London Corporation to make a PSPO in respect of the open spaces, such as Epping Forest, Ashtead Common and Hampstead Heath, which the Corporation manages outside of the Square Mile under the terms of various Private Acts of Parliament. In the interests of the proper management of these public spaces, we are satisfied that there should be a power for the Home Secretary to designate, by order, other bodies who are able to make a PSPO in respect of land in relation to which they have the power to regulate by virtue of any enactment. Any PSPO made by designated body under the provisions of the new clause would take precedence over a PSPO made by the local authority in whose area the land is situated.

PSPOs – challenging the validity of orders (amendment to clause 62)

In Committee, I undertook to reflect on a debate about the provisions in clause 62 which enables interested individuals to challenge the validity of a PSPO (Hansard, 25 November 2013, column 1271-1279). I must apologise for any confusion I caused during this debate about the effect of clause 62(7) which does indeed oust the ability to challenge an order by means of judicial review. We believe that, in the case of an "interested person", this is a legitimate step on the grounds that the appeal mechanism provided for in clause 62 includes – and indeed is wider than – the grounds on which a judicial review may be brought. However, only interested individuals may challenge a PSPO so the unintended effect of the clause, as drafted, is to block other legal persons from challenging a PSPO by means of judicial review. This amendment will ensure that judicial review remains open to persons other that interested individuals.

Closure powers – service of notice (amendments to clause 72)

Where a closure notice is issued by a local authority, the Bill requires the notice to be served by an employee of the authority. During Committee, Baroness Hamwee suggested that some local authorities may wish to contract out this task (Hansard, 2 December 2013, columns 12-16). We agree such a change would confer sensible flexibility on local authorities whilst ensuring that the decision to issue a notice continues to rest with the local authority, where it properly resides.

Anti-social Behaviour Powers: statutory guidance (new clauses after clauses 18, 30, 38, 52, 66 and 83 *Guidance* and amendments to clause 27)

As you know, we have already published draft guidance for front line professionals on the exercise of the new anti-social behaviour powers in Parts 1 to 4 of the Bill. In Committee, Lord Ahmad and I undertook to consider whether provision for such guidance should be included on the face of the Bill. We see the merit in giving statutory underpinning to such guidance and, accordingly, these new clauses confer a power on the Secretary of State to issue guidance to the police, local authorities and others in relation to the exercise by them of their functions under each of Parts 1 to 4 of the Bill.

Community Remedy (amendments to clause 93)

In Committee, I undertook to consider an amendment tabled by Lord Greaves which sought to provide that local authorities should be consulted in the drawing up of a community remedy document (Hansard, 2 December 2013, columns 65-69). While we would have expected (principal) local authorities to be consulted by the Police and Crime Commissioner as part of their public consultation, we see merit in making this explicit on the face of the Bill; these amendments modify clause 93 to this end.

Offence of forced marriage: Scotland (amendment to clause 110)

At the request of the Scottish Government, the Bill was amended in the Commons to extend to Scotland the new offence of forced marriage. The offence broadly mirrors the equivalent offence in the Bill in respect of England and Wales save that the maximum penalty was set at two years rather than seven years to reflect the sentencing regime for analogous offences under Scots law. The Scottish Government has now reconsidered this issue and has asked that the maximum penalty be raised to seven years to bring it into line with England and Wales. This amendment makes the necessary change to clause 110(7).

Recovery of possession of dwelling-house: anti-social behaviour grounds (amendments to clauses 167 and 170)

As housing is a transferred matter in Wales, clause 170 of the Bill already provides for the provisions in Part 5, so far as they extend to Wales, to be brought into force in Wales by the Welsh Ministers. Clause 166 contains a related order-making power to enable the Welsh Ministers to make any necessary consequential amendments in respect of the provisions in Part 5. In each case, the relevant provisions make no mention of Schedule 3 to the Bill (which contains the list of "serious offences" to be inserted into the Housing Act 1985); these amendments make good those omissions.

Commencement (amendments to clause 170)

The drafting amendments to clause 170 make it clear that the power to appoint different commencement dates for different purposes or different areas applies to the commencement powers in subsections (1) and (4) of clause 170 and not just to subsection (1).

I attach a supplementary delegated powers memorandum in respect of these amendments.

I also attach a copy of draft regulations which set out the manner in which a PSPO made, varied, extended or discharged under the provisions of Chapter 2 of Part 4 is to be published. These draft regulations provide, in particular, for PSPOs to be publicised on local authority websites and fulfils another of the undertakings I gave in Committee in response to an amendment tabled by Lord Greaves (Hansard, 25 November 2013, columns 1232-1233).

In Committee, Lord Ahmad and I undertook to consider a number of other amendments to Parts 1 to 4 of the Bill. On further reflection, we have concluded that no amendment to the relevant provisions is required. Annex A provides further details of these. We also undertook in response to yet other amendments to revisit the terms of the draft guidance for frontline professionals. A list of the areas where we will review the draft guidance is set out in Annex B.

I am copying this letter to Lord Rosser, Lord Beecham, Baroness Thornton, Baroness Hamwee, Lord Greaves, Lord Harris of Haringey, the Earl of Listowel, Lord Ramsbotham, Lord Hope of Craighead, Lord Faulks, Lord Dear, Baroness Mallalieu, Lord Lloyd of Berwick, Lord Morris of Aberavon, Lord Ponsonby of Shulbrede, Lord Wigley, Baroness Berridge, Lord Flight, the Earl of Lytton, Lord Swinfen, Lord Redesdale, Lord Brooke of Sutton Mandeville, Lord Deben, Lord Brown of Eaton-under-Heywood, Lord Wasserman, Lord True, Baroness Linklater of Butterstone, Baroness Hussein-Ece, Baroness Scotland of Asthal, Baroness Butler-Sloss, Lord Hussain, Baroness Uddin, Baroness Cox, Baroness Manzoor, Baroness Kennedy of The Shaws, Lord Hylton, Baroness O'Loan, Lord MacKay of Clashfern, Baroness Thomas of Winchester (Chairman, DPPRC), Baroness Jay of Paddington (Chairman, Constitution Committee), Dr Hywel Francis (Chair, JCHR), Keith Vaz (Chair, HASC) and Jack Dromey. I am also placing a copy in the library of the House and on the Bill page of the Government website.

John Taylor of Holbeach

Lord Taylor of Holbeach CBE

Annex A

IPNA/CBO: Prohibitions and requirements not to conflict with respondent's training obligations

When attaching conditions to an injunction, the court must, as far as practicable, avoid 'any interference with the times, if any, at which the respondent normally works or attends school or any other educational establishment'. During Committee Stage, I undertook to consider an amendment tabled by Lord Greaves that would have included 'training' in this consideration (Hansard, 18 November 2013, column 792-795). On reflection, we do not believe an amendment is necessary as any 'bona fide' training would be connected to a work placement or educational establishment, and as such, is already covered.

Post-conviction application for Criminal behaviour Orders (CBOs)

During the debate at Committee, Lord Rosser requested clarification as to the window of opportunity for making an application for a CBO (Hansard, 20 November 2013, columns 1003-1004). The drafting of clause 21 of the Bill reflects the provisions of the Crime and Disorder Act 1998 in relation to ASBOs on conviction. In line with those provisions, we believe that a CBO should be made at the same time as sentencing. To provide otherwise, would lead to the possibility that the police could seek a CBO years after the original conviction; in our view such an approach would be disproportionate. In the event that the offender engaged in a renewed bout of anti-social behaviour post-conviction, it would be open to the police to apply for an IPNA where the tests in clause 1 are satisfied.

CBO: definition of a "local government area"

In Committee, Lord Ahmad undertook to consider whether the definition of a local government area in clause 28(4) of the Bill covered unitary county councils (Hansard, 20 November 2013, column 1009). We are satisfied that it does. The reference in clause 28(2) (as read with clause 28(4)(a)) to "the council for [the district] in which the offender lives..." must mean the appropriate county council in a case where there is no district council for the district.

I would add that the drafting of clause 28(2) and (4)(a) is based upon the existing provisions concerning the review of orders under section 1C of the Crime and Disorder Act 1998. Section 1K(4) of the 1998 Act provides that "the chief officer of police..., in carrying out a review under section 1J [of an order under section 1C], shall act in co-operation with the appropriate local authority...". Section 1K(7) goes on to provide that "the appropriate local authority" means the council for the local government area in which the person subject to the order resides..." and the term "local government area" is defined in section 1(12) in the same way as it is defined in clause 28(4). We are not aware of any difficulties arising in connection with the application of these existing provisions.

Community Protection Notice (CPN): Transfer of land ownership

During the debate in Committee, Lord Greaves expressed concern that the new CPN could fall foul of the same problems faced by section 215 'tidying up' notices under the Town and Country Planning Act 1990 - namely that the owner of the land gets around the enforcement of the notice by simply transferring ownership to another person. Lord Greaves suggested that in certain circumstances, the notice could be served on the land (Hansard, 20 November 2013, column 1045). We have concluded that no change to the legislation is required. The transfer of ownership of land necessarily takes time. The requirements of a CPN would still apply in the meantime (including, for example, to remove rubbish from the land by a certain time) and, if necessary, under the streamlined process for service of the notice a new CPN could be issued quickly to the new owner.

Public Spaces Protection Order (PSPO) – Duty to consult before varying/extending an order

During the debate in Committee on the duration of a PSPO, Lord Ahmad undertook to consider an amendment tabled by Lord Greaves which sought to ensure that those who lived in, worked in, or regularly visited an area would have the ability to challenge an order again if and when it was extended (Hansard, 25 November 2013, column 1240-1250). While we accept the principle behind the amendment, after further consideration, we believe that this could result in local authorities choosing the maximum length for a PSPO rather than a more appropriate shorter period to minimise the risk of challenge. For that reason, I am not persuaded that such an amendment is appropriate.

It was also suggested in the same debate that the duty to consult the police and other community representative every time a PSPO is extended or varied would slow down the process and create unnecessary bureaucracy. Lord Faulks suggested that this could be mitigated by converting the duty into a power. Given the role of the police in enforcing PSPOs we believe they should be consulted. In addition, it may be sensible to consult others too, such as the landowner, local residents' association, etc. We will make clear in guidance that the list of those who should be consulted could be shorter and more targeted on variation or extension, but believe that the requirement, as worded, does not present an unnecessary burden on local authorities.

PSPOs – premises to which alcohol prohibition does not apply

Amongst other things, a PSPO may restrict the consumption of alcohol. Such restrictions cannot be applied to premises licensed under the Licensing Act 2003 or to council-operated licensed premises. In Committee, Lord Greaves questioned why premises owned by parish or town councils were not treated in the same way (Hansard, 25 November 2013, column 1264-1265). We have concluded that no amendment is required to address this point. If a parish (or town) council owned premises for which it held a premises licence, the exception in clause 58(1)(a) would apply. In the more likely scenario, if a

parish council wished to carry on a licensable activity for a short period, such as the period of a summer fete, they would operate under a temporary event notice under Part 5 of the Licensing Act 2003, in which case the exception in clause 58(1)(d) would apply.

PSPO – Definition of a community representative

Before a local authority makes a PSPO, there is a requirement to consult the police and any other 'community representatives' they think appropriate. During the debate at Committee, Lord Greaves asked for clarification as to whether the term 'community representatives' could include national, as well as local bodies (Hansard, 25 November 2013, column 1271). It is our view that it could include a local branch of a national body, such as the Ramblers, British Naturism or the Dogs Trust and we have made this clear in the draft guidance. We do not therefore believe any a change to the Bill is required.

Dealing with young people

We have already articulated in guidance the importance of engaging constructively with young people and ensuring that decisions about them are taken with all available information. However, we have listened to the concerns raised during the debates and will continue to work with groups representing young people and frontline professionals to ensure the guidance is absolutely clear about what is expected when dealing with young people.

Positive requirements

We have included some detail on the kinds of things that could be attached to injunctions and criminal behaviour orders to encourage a change in behaviour. Questions have been asked in both Houses about what kinds of positive requirements would be appropriate. While it is down to professionals to decide what works in any given situation, the workshops we have been running with professionals have been invaluable in enhancing our understanding of what is available. We will continue to work closely with the police, councils and landlords to build on this section of the guidance.

Peaceful protest

We have always made clear our belief that the new powers, specifically the dispersal power and public spaces protection order, could not be used to limit the right to peaceful protest. However, given the strength of feeling on this issue, and the views of the Joint Committee on Human Rights, we have decided to make this explicit in the legislation. In addition, we will look at the way this is currently reflected in the guidance and update it accordingly.

PSPOs: Community representatives

We have acknowledged the strength of feeling amongst Peers that more detail is required in defining who could be a 'community representative' for the purposes of clause 67. It could include groups such as the local residents' association as well as national groups such as the Open Spaces Society or Salvation Army and we will make this even clearer in the guidance.

Open spaces

The guidance already states that the new public spaces protection order is designed to ensure public spaces are welcoming for all. However, clearly there are some concerns that councils will use the new power to restrict access to some public spaces. In addition to the concerns raised by a number of Peers during the debate, Home Office officials have had a number of very constructive meetings with the Open Spaces Society and Ramblers to discuss the guidance. We are keen to ensure the guidance is as clear as possible that restricting access to public land should only be considered when alternatives have been exhausted.

Statutory nuisance

While there is already some detail in the guidance on the relationship between the anti-social behaviour powers and the statutory nuisance regime, Home Office officials will continue to work with the Chartered Institute of Environmental Health, environmental health officers and the Department for Environment, Food and Rural Affairs to ensure that this issue is adequately covered.