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Rt Hon Baroness Smith of Basildon
House of Lords
London
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Dear Angela,

Serious Crime Bill

Following on from the Second Reading debate on the Serious Crime Bill on 16 June, I wanted to take this opportunity to thank you and others for your helpful contributions. A number of points were raised, some of which I was able to cover in my wind up speech. To help inform the debate at Committee stage, I thought it would be useful to write to address some of the other points raised.

Proceeds of crime

Lord Harris and yourself raised a number of important questions regarding the Proceeds of Crime provisions, particularly in relation to asset recovery and restraint orders.

The Serious and Organised Crime Strategy, published last October, sets out the Government's approach to attacking criminal finances. Working with our partners, we will make it harder for criminals to move, hide and use the proceeds of crime. As set out in the Strategy, strengthening the provisions in the Proceeds of Crime Act 2002 is only one of the ways we are seeking to improve the asset recovery system, we also need to ensure that court orders are effectively enforced. The Criminal Finances Board, chaired by the Minister for Modern Slavery and Organised Crime (Karen Bradley), is overseeing the delivery of a multi-agency Criminal Finances Improvement Plan. The plan sets out 11 clear objectives and milestones to improve performance. These are set out in our response to the Public Accounts Committee's report on confiscation orders which was published by the Treasury on 19 June and is available at:

https://www.gov.uk/government/publications/treasury-minutes-june-2014

One of the key objectives of the Criminal Finances Improvement Plan is to ensure Asset Recovery Incentivisation Scheme (ARIS) works effectively. To this end, we intend to review the Scheme by the end of this year to ensure it works effectively for frontline agencies.

Computer misuse

Lord Blencathra asked about penalties for existing Computer Misuse Act offences. It might be helpful if I briefly outline the existing offences in the Act by way of background.

The Computer Misuse Act 1990 creates three offences of interfering with a computer (that is, hacking). The first offence, in section 1, is the basic offence of unauthorised access to computer material, for which the maximum sentence is two years' imprisonment. More serious offences are committed where the purpose of the unauthorised access is to commit or facilitate the commission of other offences (section 2), or to impair the operation of the computer or hinder access to the programmes or data it contains (section 3); the maximum sentences for these offences are five and 10 years' imprisonment respectively. We do not intend to change these penalties.

Clause 37 is designed to address the scenario where unauthorised access to a computer does not just impair its operation, but causes serious damage to human welfare, the economy, the environment or national security. Such cyber attacks could currently be prosecuted as a "section 3" offence above, but a maximum sentence of 10 years would not be sufficiently severe for the significant level of personal or economic harm that could be caused. We are therefore creating a new offence of unauthorised acts in relation to a computer that cause serious damage. The maximum sentence will be life imprisonment, where the damage is loss of life, serious illness or injury or serious damage to national security; or 14 years' imprisonment for attacks causing serious environmental or economic damage or severe social disruption. This will ensure that a suitably serious offence is available to prosecute the most serious cyber attacks.

This new offence, as is the case with all the Computer Misuse Act offences, will be prosecuted by the relevant prosecuting authority across the UK (those being the Crown Prosecution Service, the Crown Office and Procurator Fiscal Service and the Public Prosecutions Service) following an investigation by the police or, particularly for serious and complex attacks such as these, the National Cyber Crime Unit within the National Crime Agency.

With regards to the matter of how decisions will be taken between UK-based prosecutions and extradition, which was raised by yourself, I can confirm that it would be for prosecutors in the affected jurisdictions to negotiate as to where the prosecution should take place. Such decisions will be made according to agreed guidelines and the interests of justice.

Gang injunctions

Baroness Meacher expressed concerns about imposing injunctions on under 18s involved in the illegal drugs trade. Her view is that they would not be effective unless accompanied by support to help the person address their drug dependency.

Of course, not every gang member involved in the illegal drug market will have a drug dependency, but if they do, Baroness Meacher is correct in saying that they should be provided with right support to address this issue alongside the injunction. As such, where there is any evidence to suggest that a young person may be suffering from substance misuse problems, those making the application for an injunction should work with local agencies to ensure that specialist interventions are provided.

Section 5.3.2 of the current statutory guidance in relation to injunctions to prevent gang-related violence outlines the applicant's responsibilities in respect of those with substance misuse needs; the guidance is available at:
https://www.gov.uk/government/publications/statutory-guidance-injunctions-to-prevent-gang-related-violence--2.

This guidance is currently being updated to reflect provisions in section 18 of the Crime and Courts Act 2013 to give youth courts jurisdiction to grant injunctions for 14 – 17 year olds. In due course it will be further updated to reflect the provisions in the Bill.

Drug cutting agents

Turning to Part 4 of the Bill, I want to assure Baroness Meacher that the new powers to seize, detain and forfeit substances used as drug-cutting agents will not impact on genuine businesses using these substances. The chemical industry was amongst those we consulted whilst developing these proposals.

Law enforcement agencies currently have some limited powers with which to seize suspected drug-cutting agents, which are used in a targeted fashion to tackle those criminals supplying these substances to the UK. Use of the new powers will be similarly targeted, enabling law enforcement agencies to disrupt the trade in cutting agents without penalising legitimate businesses. The National Crime Agency's Project Kitley, which has been leading the enforcement response to cutting agents since 2007 has not received any complaints from legitimate businesses.

This demonstrates that law enforcement can effectively distinguish between substances belonging to legitimate businesses and those intended for use as drug-cutting agents. In addition we are introducing judicial oversight of the powers in the Bill. In particular, the grant of search and seizure warrants, the continued detention of seized substances and the forfeiture of seized substances are all subject to approval by a magistrates' court. In the very unlikely event that a legitimate business does have its property seized, we have also included a compensation provision.

I noted Baroness Hamwee's views that we need to consider extending the provisions to address the trade in drug-cutting agent equipment. I am confident that there are already robust powers under the Misuse of Drugs Act 1971 and other legislation that enable law enforcement agencies to seize hydraulic press machines, related glassware and mixing equipment when such equipment is suspected of being used in drug supply.

Lord Hope raised a valid point that in some clauses the application to Scotland and Northern Ireland is spelled out within the body of the clause, while elsewhere it is left to the interpretation clause (clause 61(4) and (5)). To achieve complete consistency on this matter, it would be necessary either to specify the application to Scotland and Northern Ireland in every clause in which differences occur, or to leave everything for the interpretation clause. The first of these options may risk leaving the clauses appearing rather cluttered. The second would involve inserting terms in the interpretation clause which arise only once in Part 4 (namely in clauses 48(6), 56(9), 58(3) and 60(5)). As Lord Hope pointed out, currently the terms referred to in clause 61(4) and (5) are those which arise in several places in Part 4. While there is no ideal solution to this, we believe it is more straightforward to deal with terms that are only used once within the relevant clause, and therefore we are satisfied that it is appropriate to keep the current drafting as it is.

Child cruelty

We had a particularly good debate on the provision relating to the child cruelty offence. Whilst clause 62 was widely welcomed, a number of Peers highlighted the key issues which they wished to pursue in Committee.

Some Peers suggested that the term "wilful" in section 1 of the Children and Young Persons Act 1933 was too narrow and should be replaced. We believe that such a change is unnecessary. There is a well established body of case law that sets out the meaning of the term in this context. It clearly provides, amongst other things, that the term "wilful" already implies an intentional or reckless state of mind. This interpretation was most recently endorsed by the House of Lords in the case of R v G [2004] 1 AC 1034 HL (now the leading case on recklessness), where it was said that "wilful" misconduct means deliberately doing something that is wrong, knowing it to be wrong, or with reckless indifference as to whether it is wrong or not.

The relevant CPS and police guidance also include the correct interpretation of the term "wilful". In addition, we consider that making the suggested clarification here would risk creating uncertainty in respect of the significant number of other existing offences subject to the 'wilful' mental state (for example, the offence of wilfully neglecting a person lacking mental capacity under section 44 of the Mental Capacity Act 2005), and indeed the proposed new offence of 'wilful neglect' in health care settings which is being taken forward in the Criminal Justice and Courts Bill.

Lord Elystan-Morgan in advocating a fresh approach to child cruelty suggested that the term "significant harm" should replace the concept of "unnecessary suffering" in section 1. "Significant harm" is the threshold for the court to make a care or supervision order under section 31(2) of the Children Act 1989. But in our view, the threshold of "significant harm" would appear to envisage harm of a greater degree of seriousness than "unnecessary suffering". If the term were to be interpreted as imposing a higher evidential threshold, prosecutions could be harder to secure, and the effectiveness of the offence undermined.

Baroness Meacher argued that in cases of child neglect the authorities should only resort to the criminal law as a last resort. I share that view. As I said during the debate, the Children and Young Persons Act 1933 is part of a comprehensive legislative framework for protecting children and keeping them safe from harm. Other relevant legislation includes the Children Act 1989, which is the responsibility of the Department for Education. In addition, the revised Government statutory guidance "Working Together to Safeguard Children" which was published in March 2013 is used by a range of professionals working in child protection. The guidance sets out the need to respond quickly to the early signs of abuse and neglect, be it physical or emotional. The guidance also emphasises the importance of assessing children and families in a way that is timely and proportionate to their needs and transparent for children and families.

The "Working Together" guidance makes it clear that local agencies should have in place effective ways to identify emerging problems and potential unmet needs for individual children and families. It specifically provides (at page 12) that professionals should be particularly alert to the potential need for early help for a child who is "in a family circumstance presenting challenges for the child, such as substance abuse, adult mental health, or domestic violence". Further, the guidance outlines what makes for a 'good' assessment and is clear that this should include consideration of Parenting Capacity as a key element of this. Social workers should work together with parents wherever possible to try to improve outcomes for children. Where, however, there is a conflict between the needs of the child and their parents/carers, decisions should be made in the child's best interests. The guidance is available at:

https://www.gov.uk/government/publications/working-together-to-safeguard-children.

Lord Rosser expressed concern about the reduction in the number of convictions under section 1 of the 1933 Act, from 720 in 2009 to 550 in 2013. I believe that the number of convictions for child cruelty should not be looked at in isolation. Prosecutions need to be considered as a part of the wider legislative framework for the protection of children. For example, section 17 of the Children Act 1989 places a duty on local authorities to safeguard and promote the welfare of children who are being neglected. Under section 47 of that Act, local authorities have a duty to make inquiries when there is reasonable cause to suspect that a child in their area is suffering or is likely to suffer significant harm. At 31 March 2013, 40,000 children were the subject of a child protection plan. Neglect was the most common initial category of abuse (41.6%) followed by emotional abuse (31.6%). These are all ways of seeking to prevent neglect and abuse, which is in line with Baroness Meacher's point about prosecution being the last report.

With regard to wider issues relating to parents with dependency issues, families affected by substance misuse are at the heart of the Government's drug strategy, which commits to: support those with the most complex needs; give their children a better start in life; and tackle the intergenerational aspects of substance misuse. We know that partnerships between substance misuse services and children's and family services are improving around the country. This was confirmed by a 2013 Care Quality Commission and Ofsted report, which found that substance misuse treatment services are working closely and effectively with children and family services, to identify and respond to the needs of children affected by adult substance misuse.

There are also parents whose drug or alcohol use may not pose immediate risks to their children, but which may compromise their ability to be good parents. Interventions for this group are picked up through the universal offer for 0-5 years including the health visitor programme.

No doubt we will explore these issues in more detail during Committee stage.

Paedophile manuals

In response to Baroness Hamwee's query on whether Internet Service Providers (ISPs) had been consulted about the provisions in Schedule 3 (Paedophile manuals: providers of information society services) to the Bill, I can confirm that we have not specifically consulted ISPs on these provisions. The provisions in Schedule 3 mirror those already in place for other similar offences , for example the "prohibited images of children" offence at section 62 of the Coroners and Justice Act 2009 (see Schedule 13 to that Act). These standard provisions ensure that the United Kingdom complies with its obligations under the e-Commerce Directive.

Schedule 3 sets out, in accordance with that Directive, the circumstances in which proceedings may be brought under clause 63 against information society service providers established in the United Kingdom and in other European Economic Area states. It also sets out the circumstances in which such providers are excluded from criminal liability for prohibited material which they might possess in the course of providing those services. For example, by virtue of paragraph 6 of Schedule 3, a service provider who provides a service for hosting websites, will not commit an offence under clause 63 if it had no actual knowledge that the information contained prohibited material, or if it promptly removed the information or disabled access to it upon obtaining actual knowledge of its nature. Other specific provisions (see paragraphs 4 and 5 of Schedule 3) apply to service providers which hold the information only as providers of communication network services, or are holding the information only for transmission on such a network.

In addition, you raised a point regarding the decrease in the numbers of arrests made by the Child Exploitation and Online Protection (CEOP) Command of the National Crime Agency. I can confirm that while the data has yet to be validated, arrests of suspects as a result of the NCA-CEOP Command activity in the eight months since it went live have substantially exceeded the 2012-13 yearly total of 192.

As part of the NCA, the CEOP Command can access more resources to deal with complex cases of sexual exploitation and abuse and benefits from other NCA specialist functions such as the National Cyber Crime Unit and the local knowledge of officers stationed in over 40 countries. This has allowed the UK's child protection expertise to be deployed more effectively overseas in areas targeted by paedophiles.

For example, in a recent operation, four individuals were sentenced to a total of 20 years' imprisonment in Bahrain, following an investigation by the NCA in partnership with Surrey Police and Bahraini authorities. The men were found guilty of a range of sexual offences against children involving online extortion. As a result of the operation over 200 children have been safeguarded. Operations such as this one give a clear message regarding the work our law enforcement agencies do in partnership with other countries to tackle online paedophiles. This in turn acts as a deterrent to others.

Preparation or training abroad for terrorism

On clause 65 of the Bill, which enables the prosecution of individuals preparing or training for terrorism more generally overseas, Lord Sherbourne raised the pertinent question as to whether it is realistic to believe that sufficient evidence can be brought to court to secure a prosecution. Whilst we recognise that any evidence gathering which involves other countries is inherently more challenging than if it was confined to the UK, this does not mean that prosecutions are not possible in such cases.

Our law enforcement partners, including the police, are already accustomed to working with the relevant authorities overseas for this purpose and we fully expect that these established arrangements will continue to be employed for future prosecutions.

The UK already takes extra-territorial jurisdiction over a number of terrorism offences which enables prosecution of individuals where they have undertaken prohibited activities abroad. These are set out at section 17 of the Terrorism Act 2006 and include the offences of weapons training and membership of a proscribed organisation.

I have no doubt that there are other issues which will be debated further in Committee. If any Peer would like further clarification of the provisions in the Bill, I hope that they will not hesitate to write to me or contact my office to arrange a meeting. I am copying this to all Peers who spoke at Second Reading. I am also placing a copy in the library of the House and on the Bill page of the Government website.

With my best wishes

Yours ever

John

Lord Taylor of Holbeach CBE