THE GOVERNMENT REPLY TO
THE TENTH & FIFTEENTH REPORTS FROM THE
JOINT COMMITTEE ON HUMAN RIGHTS
SESSION 2008-09 HL PAPER 68, HC 395 &
HL PAPER 81, HC 441

Legislative Scrutiny: Policing and Crime Bill

Presented to Parliament
by the Secretary of State for the Home Department
by Command of Her Majesty

May 2009

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GOVERNMENT RESPONSE TO THE JOINT COMMITTEE ON HUMAN RIGHTS TENTH AND FIFTEENTH REPORTS OF 2008-09 SESSION: LEGISLATIVE SCRUTINY: POLICING AND CRIME BILL

INTRODUCTION

The Joint Committee on Human Rights (JCHR) published two legislative scrutiny reports on the Policing and Crime Bill on 16 April 2009[1] and 5 May 2009[2] detailing the Committee's considerations, conclusions and recommendations in relation to the Policing and Crime Bill.

The report covers a wide range of provisions within the Bill including:

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

This Command paper sets out the Government's response to the recommendations in the Committee's report and highlights a number of changes that are already being proposed to the provisions in the Bill which address a number of concerns raised by the Committee in their report.

The Minister of State for Security, Counter-Terrorism, Crime and Policing provided the Chair of the JCHR with an early response to the Report 'Demonstrating Respect for Rights? A human rights approach to policing protest' on 20 April and gave an undertaking to provide the Committee with a comprehensive response to all of the recommendations and conclusions in that Report by 23 May 2009. We have therefore not commented on the proposed amendments to the Policing and Crime Bill that relate to this issue in this response document.

1 Joint Committee on Human Rights – Legislative Scrutiny: Policing and Crime Bill – Tenth Report of Session 2008-09 drawing special attention to Policing and Crime Bill

2 Joint Committee on Human Rights – Legislative Scrutiny: Policing and Crime Bill – Fifteenth Report of Session 2008-09 – Policing and Crime Bill (gangs injunctions)

Careful consideration has been given to each recommendation raised in the JCHR reports and the Government thanks the Committee for the thoughtful scrutiny it has carried out in relation to this Bill. The Government would like to re-state the value and importance it continues to attach to human rights and the need to maintain these important principles while carrying out the Government's duty to protect the public.

We thank the Committee for the comments on the timeliness and content of the Government Explanatory Notes to the Bill and the Ministerial correspondence with the Committee. Whilst we recognise the concerns raised in relation to the process of introducing the gangs injunctions provisions through amendments at Committee, the Government set out at that time the unavoidable reasons for this, namely that the Home Office had to await a Court of Appeal judgment on the use of injunctions obtained by local government before proceeding with further development of national policy. This judgment was handed down on 30 October 2008, after which we worked rapidly in consultation with key stakeholders to develop our policy

GOVERNMENT'S RESPONSE TO THE COMMITTEE'S RECOMMENDATIONS

We have identified 42 substantive recommendations and conclusions in the two JCHR reports on the Policing and Crime Bill. Some of these recommendations have been grouped together for this response.

Inspection regime and human rights

1. 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 policy authority's performance of its new duties in respect of human rights and equality and diversity (Paragraph 1.11)

The Government agrees that human rights are central to the work of police authorities, and that one of an authority's core functions is to monitor their force's compliance with the Human Rights Act. Therefore human rights must be a fundamental element of any inspection regime and there is a clear expectation that this important aspect will be inspected.

The Government notes, however, that as Her Majesty's Inspectorate of Constabulary currently has a power rather than a duty in relation to the inspection of police authorities, it would be inconsistent with the existing statutory framework to impose an inspection requirement in relation to police authorities' human rights and equality duties. Moreover, the Government feels it would be preferable to adopt a more flexible approach to inspections. Reliance on a list in primary legislation of the matters which must be inspected could risk undue emphasis being placed on some matters which could unbalance the overall focus of inspection, and could lead to some areas being neglected.

A joint inspection framework and methodology currently being developed by HM Inspectorate of Constabulary and the Audit Commission, working with the Association of Police Authorities and the Home Office, will be published by the inspectorates in July. The methodology will set out the key inspection themes, performance criteria and characteristics against which police authorities will be assessed. Proposals recently issued for consultation place a focus on how authorities engage with their communities and ensure that policing services reflect the needs of all local people, including those who are hard to reach and vulnerable. The Government will continue to work closely with both inspectorates, and the APA, to ensure that the emphasis on human rights and equality and diversity is given the necessary force in the inspection regime and that authorities are supported to build their capacity and capability where necessary.

Appointment of senior officers

2. 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)

The Government welcomes the support of the Committee for the new Senior Appointments Panel, including the role it will play in increasing the pool of potential candidates for appointment as a senior officer. However the Government believes that the amendment proposed by the Committee is not necessary for achieving the aims which it and the Government share for the panel, as the Policing and Crime Bill already ensures that the panel is subject to the relevant equality duties. The Policing and Crime Bill amends the Race Relations Act to apply the race equality duty to the Panel, and the existing equality duties for gender and disability will apply to the Panel as it will be carrying out public functions. In future the government fully expects that the panel will be subject to the requirements of the Equality Duty, set out in the Equality Bill. The current legislative framework therefore provides the equalities responsibilities which the amendment seeks to establish, and in any event the amendment is too broad to be a useful guide to the panel in its work.

Sexual offences and sex establishments

3. 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. 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)

As the Committee acknowledges, the aim of the prostitution measures is to protect the vulnerable people involved in prostitution, for example those who have been trafficked. We believe our measures do protect such people without preventing those who choose to work as prostitutes from doing so. To put the issue beyond doubt, the Government is bringing forward amendments to Clause 13 which will limit the scope of the offence to only capture those who are subject to force, threats or deception. We cannot see that this will make those involved in prostitution voluntarily more vulnerable.

Strict Liability

4. 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. 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)

The Government's *Tackling the Demand for Prostitution: A Review* which recommended a strict liability offence was developed as a part of a broader process of policy development which began with the Government's consultation, *Paying the Price* in 2004. This in turn led to the development of the Co-ordinated Prostitution Strategy (which included a summary of the responses received to the review).

The 2004 consultation revealed significant support for a shift of the enforcement focus onto those who create demand. These responses and a considerable amount of existing research, as highlighted in the bibliography, informed the development of the Government's strategy which identified tackling demand as one of its key aims. It is this aspect of the strategy that led to the Tackling Demand Review.

The review itself sought information from a range of individuals and organisations and conducted visits, notably to the Netherlands and to Sweden. It also commissioned additional Research from the University of Huddersfield with the aim of highlighting

existing, published research, which informed the conclusions of the review and provided evidence that criminal justice sanctions can have a deterrent effect on potential sex-buyers. The research reviewed has been published and is fully referenced in the Review, so we have clearly highlighted published research which informs our conclusions, and developed our conclusions following extensive consultation.

It is important to emphasise, though, that the additional research commissioned does not consider the benefits of a strict liability offence, nor was this the aim in commissioning the research. The decision to introduce a criminal offence was taken on the basis of all the evidence considered during the process outlined above, including the responses to the public consultation and consideration of the existing criminal law where it is presently legal to pay for sex. We considered alternatives including the benefits of a public information campaign aimed at changing attitudes but considered that a stronger response, supported by such campaigns was necessary. The decision to make the offence one of strict liability was taken following consultation with the police and Crown Prosecution Service.

5. 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)

As noted during the Public Bill Committee, the Crimestoppers hotline already exists to allow the anonymous reporting of crime. We have considered the proposal of a designated hotline however we do not believe an additional hotline is necessary and may be counter-productive as it could undermine the benefits of having one easily recognisable anonymous line for reporting all crime. This duplication would also put an unnecessary burden on resources in order to ensure both lines worked effectively.

The Government does not believe that this offence will discourage reporting of offences. As noted above the facility exists, through Crimestoppers, to report anonymously and if someone were minded to report after having paid for sex with a trafficked person they could do so. It is up to the police to decide whether to prosecute in an individual case but we do not consider that it is appropriate to say that where a person reports a concern, they should necessarily avoid prosecution if they had sex with the person.

If people suspect that a person is being forced or threatened to provide sexual services, they should desist from having sex with that person and ring Crimestoppers rather than waiting until after the event to do so.

6. We have concerns about the breadth of the new [strict liability] 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)

As noted above, the amendments we are making to the offence created by Clause 13 will mean that those who pay for sex with persons other than those who have been forced, threatened or deceived will not be criminalised. We cannot see that this will make those involved in prostitution voluntarily more vulnerable.

7. 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)

As regards the strict liability aspect of the offence, we have previously explained why we consider that the offence complies with both the ECHR and the principles of common law. A person who pays for sex will know that if it is found that the prostitute has been the subject to force, deception or threats which are likely to have induced or encouraged the prostitute to provide the sexual services he will have committed the offence. We have previously drawn the Committee's attention to the distinction between legal certainty and factual certainty. Whilst it may be difficult to know whether all the factual elements of an offence will occur in a particular case, it is clear what facts need to occur for the offence to be committed.

The Committee appears to be raising this concern in relation to Article 8 of the ECHR. As we have previously made clear, the Government are not convinced that the offence even engages Article 8 as we do not consider that the right to respect for private and family life includes a right to pay for sex.

We are grateful to the Committee for recognising that the European Court of Human Rights has held that strict liability offences are generally compatible with Article 6(2) of the ECHR. Further to this, the House of Lords in R v G [2008] UKHL 37 has held that Article 6 is only concerned with procedural matters and not with the substantive criminal law. In other words, Parliament is responsible for defining the elements of the offence and it is able to decide whether there should be a mental element in the offence or not.

In addition any doubt there may have been around factual certainty arising from the concern that the offence was drafted too widely is now being addressed through the Government amendments that have been tabled to limit the offence to those who pay for sex where a third person has used force, deception or threats of any kind. Where women have been subject to such forms of coercion we find it difficult to see how creating the offence will put women into any more exploitative or unsafe situations.

8. 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)

As noted above, we believe there are strong reasons for maintaining the strict liability aspect of the offence. One of the key aims of the offence is to encourage potential sex-buyers to consider the circumstances of prostitutes before they pay for sex. If they cannot be certain that a prostitute is not being subject to force, threats or deception then they should not pay for sex in those circumstances. It should not be a defence for the sex buyer to say that he did not know that the person he had sex with had been forced or threatened. At the same time, the penalty for this offence is much lower than that for rape reflecting the fact that no mental element is required for this offence

Rehabilitation orders

9. 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)

The court will be the ultimate judge of whether a person has breached an order without reasonable excuse. If the supervisor considers that a person has breached the order without reasonable excuse the offender will be brought back before the court and the court will only be able to revoke the order and re-sentence the offender if it is satisfied that the offender does not have a reasonable excuse for the breach. Therefore, offenders who are brought back before the court but the court considers them to have a good excuse will not receive any sanction.

We intend to publish guidance to assist practitioners on the implementation of these orders. It is important that there is flexibility in the way the orders operate in recognition of the circumstances affecting many of those involved in street prostitution who will be subject to the orders. However, we agree that it would be helpful to be as clear as possible about which circumstances would constitute a "reasonable excuse" and will provide a list of examples of such circumstances in accompanying guidance.

10. 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)

We acknowledge that there are remaining concerns about the wording of clause 16 but we emphasise that this was a response to those concerns raised previously when provisions to introduce the order were contained within the Criminal Justice and Immigration Bill.

As such, we do believe it will operate as an effective safeguard which will limit the time that police are able to detain someone while they await a court hearing for a breach of an order. It will not allow indefinite detention as some have suggested. 'As soon as practicable' means just that. Where there is a court available to deal with the matter, the police will be expected to bring the offender before that court immediately.

The change in wording should also be considered alongside the other amendments which we have made since the provisions appeared Criminal Justice and Immigration Bill. In particular, we have changed the provisions so that should a person fail to attend one or more of the three appointments the court can only issue a summons. Previously, they could issue a summons or a warrant. It is only if the person fails to respond to the summons that a warrant can be issued for their arrest. In addition, if a warrant is issued the police can bring the person back before any court rather than just the court that issued the referral order. This means that the person will only end up in police detention as a last resort and that the period of that detention will be as short as possible.

Premise closure orders

11. 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)

12. 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)

We note that in relation to this recommendation and the other recommendations on closure orders the Committee has suggested amendments, which have subsequently been tabled by Andrew Dismore and Evan Harris for Commons Report stage. The Government will, of course, respond to these amendments during the course of the debate on the Bill. However, we believe that the safeguards proposed are not necessary for the reasons set out below.

The concerns led to the recommendation that the authorising officer and the court should consider all those affected by the order before an order is issued, and consult such parties before the order is made. The Bill already requires the police to take steps to establish the identity of any person who resides on the premises, who has control of or responsibility for the premises or an interest in the premises and therefore it is difficult to see how this will not involve them considering who will be affected by the order.

The police are also under a duty to consult the local authority. This will give the police the opportunity to alert local authorities to any housing issues and discuss such problems with them.

Furthermore, while this recommendation is clearly intended as a safeguard, we believe it is not necessary and could inhibit the effective working of the order. The point of the closure notice procedure is to ensure that premises can be shut down quickly without tipping off those responsible for the prostitution/pornography related offences that the notice is about to be served. Closure notices may well be used following covert surveillance on particular premises and therefore it would be inappropriate to go in beforehand and try and consult interested parties, albeit that some of those people may be the victims rather than the perpetrators of the offences. Aside from disrupting the covert operations and potential to obtain evidence to convict those committing the offences, it could also allow those involved time to organise themselves and take action to make it more difficult for the police to enforce the closure notice.

We consider that appropriate safeguards are provided by the fact that within 48 hours of a closure notice being served, a magistrates' court must hold a hearing to decide whether a closure order should be made. Any person who resides at the property, or who has control of or responsibility for the premises, or any other person with interest in the property may make representations to the court at this hearing. The court may also adjourn the hearing to allow such 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. In addition, the schedule allows for compensation to be paid to those who have incurred financial loss as a result of a closure notice or order in appropriate circumstances.

In this respect the provisions mirror those for crack house closure orders and anti-social behaviour orders.

13. 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)

Although we have no current intention to extend these powers beyond the police, it will be necessary to review the situation on the basis of operational experience once the orders have been implemented. Local authorities already have powers to issue notices for closure orders under the Anti-social Behaviour Act 2004. We believe that similar provisions with regards to these orders might be appropriate but we are content to wait and see how the current process works in practice before extending the powers further.

If the Secretary of State does decide to exercise the power provided by section 136Q Parliament will, of course, have an opportunity to scrutinise the order exercising these powers. Any such order will be subject to the affirmative resolution procedure and will therefore have to be approved by resolution of each House.

14. 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. (Paragraph 1.54)

The fact that the order needs to be 'necessary' should be a sufficient safeguard to ensure that they are not used where there are other reasonably practicable steps that could be taken by the police to prevent the use of the premises for activities related to the specified prostitution or child pornography offences. There may be other measures that could be taken to prevent the use of the premises for activities relating to prostitution or pornography offences but these may be within the power of the owner or occupier rather than the police. Equally, measures that the police could take may not be reasonably practicable. For example, putting police officers on the door of the premises 24 hours a day may deter criminal activity but would clearly be very costly and could prevent the police from dealing with other policing priorities in the area. However, we will make it clear in guidance that the police should consider what other steps could be taken to prevent the premises being used for these purposes before issuing a closure notice.

Whilst we realise that the Committee is keen to see safeguards on the face of the Bill, it is not clear how requiring the court to consider the human rights of those likely to be affected by the order will provide a more structured approach to human rights than the duty already imposed on the police and the courts as a public authority under section 6 of the Human Rights Act 1998 to act in a way which is compatible with Convention rights. We have already explained above how we consider the current provisions will require the police to give consideration to who will be affected by the order as well as explaining that such people will have an opportunity to make representations to the court.

Extensions to preventative orders under the Sexual Offences Act

15. 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. (Paragraph 1.57)

We appreciate the Committee's recognition of the Government's commitment to protect the public from individuals who pose a risk of sexual harm. However, we respectfully disagree with the Committee's conclusions on the preventative orders in the Bill.

Above all, it should be noted that the Government is not changing the law and current regime. It is merely clarifying the current law by setting out in the Sexual Offences

Act 2003 that the time limit under section 127 of the Magistrates Courts Act 1980 does not apply.

The Government believes that the effect of expressly disapplying section 127 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. This disapplication of the time limit cannot truly be considered "open ended" given that there still must be evidence to show that the risk the offender presents makes it necessary and proportionate to impose the order to prevent crime. Specifically the Sexual Offences Act 2003 requires a court, when assessing the application for either a sexual offences prevention order or foreign travel order, to be satisfied that the offender poses a current risk of either causing sexual harm to members of the public or, in the case of foreign travel orders, to children and that therefore the making of such an order is necessary.

We also consider that it is appropriate that if a person has been convicted abroad of a sexual offence and spent the last 20 years in prison there, if he returns to the UK it should be possible to make a notification order ensuring that he is made subject to the notification requirements (i.e. placed on the sex offender's register) at any time, given that if the offence had been committed in the UK the offender would automatically be subject to the notification requirements.

At paragraph 1.56 the Committee state that potentially the provision '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'. We should point out that this is already the case with foreign travel orders and sexual offences prevention orders. What this provision is concerned with is how long ago the evidence of behaviour since the conviction or caution which shows the offender still represents a risk can date back.

16. 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. 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. 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)

We are disappointed that the Committee do not believe that sufficient evidence has been provided of the reasons why the existing regime causes or has the potential to cause problems in practice. Whilst the Government is constrained in the level of detail it can reveal in individual cases, attached at Annex A of this report are a number of practical examples of the problems that have occurred as a result of the police applying the 6 month time limit. As the examples show, clarifying the law in this way will be particularly useful in ensuring that the police feel able to apply for sexual offences prevention order and foreign travel orders where individuals have been convicted and imprisoned abroad for a sexual offences but later return to the UK, It is not always possible to obtain reports from professionals in these transferring states particularly from within the last 6 months as once in prison there may not be any continuing assessment of the offender. This does not mean that there will not be some evidence of the offender's behaviour from before that time which gives rise to significant cause for concern e.g. a report at the time of sentencing or a cellmate may report that the offender told him that when he gets out he intends to return to the UK and continue offending.

We do not think there should be an artificial cut off point preventing the court from considering particular evidence given the serious nature of the behaviour these preventative orders are trying to prevent. A person knows that once he has been convicted of a qualifying offence, any concerning behaviour after that date could be used to found an application for a foreign travel order or a sexual offences prevention order

17. In view of the lack of published evidence to date, we recommend that the Government reconsider whether a period of five years is necessary [for foreign travel orders]. 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)

We note that the Committee agrees with the Government that section 6 of the Human Rights Act requires a court to act compatibly with human rights when deciding whether or not to grant a foreign travel order. However, the Committee should note that this and the proportionality test is not the only safeguard that the Government relies on. We have already built safeguards directly into the Sexual Offences Act and its provisions on foreign travel orders: the courts must 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 UK. Therefore, it is only where the proposed interference with the individual's right to private life can be justified as being necessary on these specific grounds that the court would be able to impose a foreign travel order.

Furthermore, it should be remembered that the Government's proposal is to extend the maximum duration of foreign travel order to five years. Five years is not a minimum period and the actual duration of a foreign travel order will have to be assessed by the court, depending on the risk each particular individual poses. The court will not be imposing a longer foreign travel order on the grounds it is administratively convenient but on the basis that the offender poses such a risk of travelling abroad to sexually abuse children that it is necessary to restrict his travel abroad for the period concerned.

For example, if a child that the offender has already abused is going abroad to a particular country for a year and the foreign travel order is necessary to protect the child from the offender, it is difficult to see why the court should not be able to make the order for the whole one year period if it is satisfied that the threat from the offender will continue during this time. The following real life scenario which has been provided by the police once again highlights the practical difficulties in not being able to have a foreign travel order of more than six months' duration. An offender had been convicted in the UK of possessing indecent photographs of an 11 year girl he had befriended through a foreign children's charity. He had looked after the girl in the UK and visited her in Belarus. A foreign travel order banning him from travelling to Belarus and Russia for 6 months was successfully obtained. Just under a month before the foreign travel order was due to end, the offender notified the police that he was intending to move to Europe, which he subsequently did. Although the force, managed to renew the foreign travel order for a further six months, it has been difficult to serve this on the offender as he had been working on boats in the Mediterranean. The police force will not be seeking to renew this order as the offender is no longer resident in the police force area.

It should also be remembered that an individual subject to the foreign travel order will still be able to apply to the court and make representations for a foreign travel order to be discharged or varied if they consider that the order is no longer necessary. Consequently, we believe that the five year maximum duration of a foreign travel order is appropriate and is supported by

the police. As we are already working closely with ACPO to monitor FTOs and their progress and we will continue to do so once these new provisions are enacted, we do not consider it necessary to have an additional review in the way the Committee has suggested.

Children involved in prostitution

18. We recommend that the Government reconsider its opposition to decriminalising children involved in prostitution and suggest an amendment to the Bill. (Paragraph 1.66)

We note that this issue does not relate to a change that the Government is making through the Policing and Crime Bill but relates to policy on prostitution more generally. Nonetheless we note its importance and the fact that it has been raised recently in the context of a report by the UN's Committee on the Rights of the Child.

We note the conclusions of the UN and the views of other organisations cited by the Committee. We have taken account of their views. However, we believe there are good reasons in support of maintaining the current law.

First, by decriminalising under 18s we would risk sending out a message that we do not think it is acceptable for adults to be involved in street prostitution but that we consider that it is acceptable for a child or young person to loiter or solicit for the purposes of prostitution. By retaining the offence we may deter some young people or children from engaging in street prostitution in the first place.

Secondly, there is a risk that abolishing the offence could encourage pimps to target children as they would know that child prostitutes could not be arrested by the police if they were found loitering or soliciting.

Thirdly, we are concerned at the risk that such a move could encourage the trafficking of women into street prostitution having been briefed to lie about their age. This may be a particular risk as it may be difficult to establish the age of women trafficked form abroad.

Finally, there may be exceptional cases where support from other agencies has been made available but has not been accessed or not been effective in helping a child exit street prostitution. In such exceptional cases the ability of criminal justice agencies to intervene may be necessary to remove a child or young person from a situation of danger and to trigger engagement with support services. It may be that intervention in such circumstances is what finally leads to engagement with appropriate support agencies.

The very low number of convictions of children for this offence make it clear that, in practice, children are treated as victims in all but exceptional cases, and this approach has followed the publication of the Government's Safeguarding Children in Prostitution Guidance.

However, for the reasons, outlined above we believe that it is necessary, on balance, to retain the ability to prosecute.

Directions to leave a locality

19. 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. 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)

The Government shares the Committee's concerns that young persons should be protected. Clause 30 is however necessary to remove or minimise alcohol related crime and disorder in our communities. Unfortunately, the current age restrictions on Directions to Leave prevent the police from using this power effectively. This is particularly so in situations where a group of children of mixed ages (i.e. when some children are under 16 and others 16 and over) are responsible for the alcohol related crime and disorder. We know that unsupervised public drinking by children, including those aged between 10 to 15, is a key factor associated with young people committing offences. Our intention for amending this power is therefore to increase its effectiveness in tackling alcohol-related crime and disorder amongst young people.

The Government also understands the Committee's concern in regards to the welfare and safety of the child who has been issued with Directions to Leave. However, the police currently consider the safety and welfare of all potentially vulnerable persons, including young people, at all times when carrying out their duties. Indeed existing Home Office guidance on Directions to Leave cautions police officers against issuing Directions to Leave if it would place an individual in a more vulnerable situation (for example, if it could lead to them being assaulted or robbed) and provides specific guidance on issuing Directions to Leave to vulnerable people, particularly those aged 16 and 17. The existing guidance will of course be revised to extend these considerations to persons aged 10-15 should this clause become law and make it clear that the police should consider the specific welfare and safety requirements of persons under the age of 16 if exercising these powers. For these reasons we do not believe it is necessary to place a legal requirement for officers to regard the welfare and safety of persons under 16 on the face of the Bill.

20. 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 174)

The Government understands the intention behind these recommendations. However, we believe that current safeguards within this power, which require the presence of an individual to be likely to contribute to alcohol related crime and disorder, and a direction for their removal to be necessary to ensure the reduction of the likelihood of crime and disorder, are sufficient to ensure that officers appropriately and fairly tackle this problem in our local communities. We understand the intentions behind the recommendation that officers should enact this power only after the individual has engaged in criminal activity. However, we believe such a measure would be undesirable as this power is intended to prevent as well as tackle occurring alcohol related crime and disorder. We believe that officers should be able to take appropriate preventative action to protect our communities.

The Government also shares the Committee's concerns behind the recommendation to prevent the immediate renewal of a Direction to Leave. This is why section 27(1) of the Violent Crime Reduction Act 2006 expressly prohibits officers from issuing a Direction to Leave for a period of more than 48 hours. Further to this, section 27(3) prevents it from being extended for longer than this period. However, we believe that preventing a second successive order being made will limit this power's effectiveness in the exceptional cases where a renewed direction is necessary and is considered the appropriate course of action to reduce a re-occurring problem.

We have also given careful consideration to the recommendation for a constable to obtain authorisation from a more senior officer before issuing a Direction to Leave. Section 27 reflects the reality that it is often the constable on the ground who encounters individuals causing or contributing to alcohol related crime and disorder. A senior officer is unlikely to be present at the relevant time. We therefore believe it to be inappropriate and unwise for this senior officer to assess and decide what action is required to resolve the ongoing problem. The power to issue Directions to Leave enables constables to respond immediately and effectively to alcohol related crime and disorder.

Proceeds of crime

21. We recommend that the Government publish the evidence which has led it to conclude that the new powers [to search for and seize property before proceedings] 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)

Evidence from the confiscation enforcement agencies suggests that, of the current confiscation orders that remain unpaid, much of the value of the assets involved are either hidden or are overseas.

The Home Office submitted further evidence to the House of Lords Select Committee on the European Union (Sub-Committee F) Inquiry into money laundering and terrorist financing following the evidence session of 18 March on un-enforced confiscation orders. Broadly these can be split by agency and by where the assets are held. This is set out in the table below based on data collected mainly in October 2008.

Agency	**Outstanding orders (£m)**	**Assets hidden (£m)**	**Assets held overseas (£m)**	**Identifiable and UK based assets (£m)**
Crown Prosecution Service (Organised Crime Division)	131	51	34	46
CPS (Areas)	42	7*	2*	33*
Serious Fraud Office	58	16	41	1
Revenue and Customs Prosecution Service	240	157	50	33
Her Majesty's Courts Service	64	23	2	39
Total	**535**	**254**	**129**	**152**

*Estimates

Powers to seize and retain moveable property would partially address this significant loophole.

These provisions are responding to a request from practitioners who have identified these powers as being important in the continued effective use of the proceeds of crime legislation.

22. 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. (Paragraph 1.86)

The use of the magistrates' courts in proceeds of crime legislation is not new. The ability to seize, detain and forfeit cash under Chapter 3 of Part 5 of the Proceeds of Crime Act 2002 is overseen by a magistrate. Similar issues that occur in those proceedings will also be likely to be raised under these new powers; the new powers are modelled on the cash provisions. The area of law and issues arising will not be new to the magistrates' court.

Also, the magistrates' court is the enforcement authority for the purposes of confiscation orders (section 35 of the Proceeds of Crime Act 2002). Issues relating to property and other matters that arise from confiscation orders have been before the magistrates' court since the enforcement powers under section 35 were commenced in 2003.

Government amendments to be brought forward at Report stage in the Commons will remove the power of a justice of the peace (or a lay magistrate in Northern Ireland) to conduct detention (and related) hearings – so this power will only be exercisable by the magistrates' court.

The Crown Court will still make and oversee restraint orders and therefore deal with matters relating to the seizure and detention of property covered by such an order. We believe that restraint orders will be sought in more complex cases; and the magistrates' court will deal with the lower value, simpler cases. Magistrates' courts are fully equipped to deal with these types of cases.

23. 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)

Provisions in the Code of Practice will supplement the provisions on the face of the Bill in the usual way and will set out the detail of how the powers are to be exercised in practice. It is entirely standard to have codes of practice setting out the detail of such matters. The Code for the search power for cash under section 292 of the Proceeds of Crime Act is an example; it is a thorough document running to sixteen pages. There are of course provisions in the Bill to safeguard proportionality in addition to the general requirement that public authorities act in accordance with people's Convention rights. There are for example provisions concerning prior approval for the exercise of the search and seizure powers and provisions for reporting to an appointed person. In addition we will be introducing at Report stage in the Commons an amendment making it clear that an appropriate officer must release property detained under or by virtue of one of the new powers where the conditions for detention are no longer met.

New Section 47M only allows the magistrates' court to authorise further detention where there are reasonable grounds to suspect that property may otherwise be made unavailable or its value diminished.

A draft skeleton of the Code for England and Wales is attached at Annex B and will be made available for future debates on the Bill. This is still under discussion. We repeat that there will be full scrutiny of the draft Code of Practice (in accordance with new section 47R) before it comes into force. This includes a public consultation and also the order that brings the Code into force is subject to Parliamentary approval by a resolution of each House.

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

24. 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)

25. 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 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)

The Government has given careful consideration to the amendment of section 153D in light of discussions that took place at the House of Commons' Committee stage. In light of this we have proposed that the Refugee Convention be added to the face of the Bill. The Home Office maintains the view that any return which is compatible with the Human Rights Act would in our view be consistent with any other international agreements dealing with fundamental rights. However, we have, for the sake of completeness, inserted reference to the Refugee Convention to the face of the Bill to make it absolutely clear that Section 153D provides a comprehensive framework with sufficient safeguards to ensure that the return of an individual pursuant to an undertaking is compatible with that person's fundamental rights. The Government takes the view that adding other treaties to the face of the Bill is not only unnecessary given the scope of the Human Rights Act 1998, but also inconsistent with the scheme of the Extradition Act 2003.

26. 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)

The Government does not consider that clause 71 requires any further amendment. As the clause is currently drafted, the Home Secretary must refuse to return someone pursuant to an undertaking if their surrender would be incompatible with both their rights under the Human Rights Act 1998 and/or the Refugee Convention. Section 153D (as inserted by Clause 71) makes it clear that that the decision as to whether return would breach a person's rights under the Human Rights Act 1998 or the Refugee Convention is not a matter for the Minister's discretion. Whether or not return would breach either of these is a question of law and could be reviewed by the courts on that basis. We are satisfied therefore that the clause already provides an adequate legal basis for the courts to consider whether the return of a person is compatible with a person's rights under the Human Rights Act and/or the Refugee Convention and that further amendment is not required.

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

27. 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)

Provisional arrest is an important tool in the fight against serious and organised crime. There are cases, although rare, in which the urgency of the situation and the complexity of the case lead Member States to ask one another to arrest someone before the full European Arrest Warrant has been issued. Where someone is arrested under the provisional arrest powers found in Section 5 of the Extradition Act 2003, section 6 requires that the person be brought before the court and the documents justifying extradition provided to the judge within 48 hours of arrest.

There are cases however where the strict time limits in place in the UK force law enforcement agencies in the UK to refuse provisional arrest requests. As the full European Arrest Warrant must be produced within 48 hours, this has led to numerous cases where law enforcement agencies do not consider it practical or appropriate to execute a provisional arrest warrant.

This has two important consequences. Firstly, although law enforcement agencies would execute a provisional arrest request if there was a serious perceived risk to public safety, there remains a risk that criminals could, for example, flee the jurisdiction and therefore evade arrest.

Furthermore the UK also issues provisional arrest requests to other EU Member States. The quid pro quo of Member State co-operation is executing requests that are issued to the UK. The amendment is therefore important in safeguarding the close co-operation of our international partners in continuing to undertake provisional arrest requests issued by the UK.

It is also important to note the time limits in other EU member states – all of which have incorporated the requirements of the ECHR in to their domestic law. For instance, Italian domestic law allows for a person to be held for up to 10 days in a provisional arrest warrant cases. In France, a Member State has 6 days, from the date of provisional arrest, to produce the European Arrest Warrant during which time the person can be detained in custody.

At the Committee stage, the Government responded to concerns raised by the opposition regarding the drafting of this clause. One of the Government amendments for example, made it clear that where a Member State are unable to provide the relevant information within the 48 hour period, an application for an additional 48 hours must be made to the appropriate judge and must only be granted where the judge is satisfied that the documents required by section 6 could not reasonably have been provided within the original 48 hour period.

In light of the above the government is satisfied that Clause 74 strikes the correct balance between protecting the public from serious criminals and safeguarding the fundamental rights of those who are subject to European Arrest Warrants.

Use of live links in extradition hearings

28. 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)

Live link hearings will provide significant benefits both to the Criminal Justice System and persons subject to extradition and European Arrest Warrant requests. The primary purpose of the clause is not one of administrative convenience. Although we have made it clear that it will assist in part in dealing with a rising number of hearings related to European Arrest Warrant requests, the clause will provide significant benefits both to the subject of the request who will often be required to travel great distance for a short hearing, whilst also reducing the financial and environmental costs of transporting people between police stations and prisons and the City of Westminster Magistrates' Court.

The Government continues to be satisfied that these provisions are compatible with Articles 5 and 6 of ECHR.

Firstly, it is important to note that Clause 75 is limited in its scope in that it only applies to initial and remand hearings and not the substantive hearing where more detailed arguments are made in connection with the request. Clause 75 also makes it clear that the judge can rescind a live link direction at any time before or during the initial or remand hearing if it is in the interest of justice for the hearing to take place 'in person'.

Live link hearings have already taken place in other jurisdictions between prisons and the courts. There have been no significant problems with defence lawyers being able to consult with their clients directly before and after the hearing.

Listing of care workers under the Safeguarding Vulnerable Groups Act

29. 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)

There may be a misunderstanding about the circumstances in which an individual may be barred without the right to make representations under the Safeguarding Vulnerable Groups Act. To clarify: wherever the ISA exercises its discretion over barring, the individual has a right to make representations. Barring with no right to make representations can only occur where the individual has been convicted or accepted a caution for one or more of a set of very serious offences, and is therefore barred under paragraph 1 or paragraph 7 of Schedule 3 to the Safeguarding Vulnerable Groups Act. The offences prescribed for the purposes of these two paragraphs are set out in regulations approved by Parliament in December 2008 (SI 2009/37). In these circumstances, either the individual's guilt has already been proved beyond reasonable doubt (in the case of a conviction), or the individual has admitted guilt (by accepting the caution). This is quite different from the situation under section 84(2)(b) of the Care Standards Act, criticised in *Wright*, in which a person could be barred provisionally provided the Secretary of State felt that they met the low threshold that it might be appropriate for them to be subject to a full bar (this decision being taken simply on the basis of a referral from an employer, rather than any criminal proceedings). Provisional listing does not form any part of the new scheme.

Retention, use and destruction of biometric data

30. 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)

We acknowledge that this important topic arouses strongly held views and there is a case for saying that the detail of the retention periods should be set out in primary legislation. But, against that, we have to weigh the importance of responding to the Court's judgment within a reasonable timeframe.

We should bear in mind the current position under the Police and Criminal Evidence Act 1984. PACE currently provides that retention of biometric data of people whether or not they have been convicted is at the discretion of the chief officer of each force area. There is no statutory provision setting out any retention framework. We are proposing through the regulations a statutory retention framework.

In the meantime our domestic legislation still stands, we would be uneasy about it remaining in force, in breach of the ECHR, until such time as we could address this in the normal timescale for primary legislation. Individuals, and police forces that hold DNA and other data relating to individuals, need clarity about what will happen to such data. This approach provides a sensible opportunity for us to demonstrate we are committed to implementing the judgment, to consult swiftly but thoroughly on the detail of the policy, and for us to give Parliament an opportunity to approve this through the affirmative resolution procedure.

Although the proposed enabling powers in the Policing and Crime Bill are broad, this is necessary to allow sufficient flexibility in making regulations that reflect the outcome of the ongoing consultation. The Government also accepts our obligation to implement the Strasbourg court's decision, which effectively provides a limit on the exercise of these powers. On 7 May 2009 the Government published for public consultation its proposals for a new retention framework, including proposals which differentiate between the position of people aged under 18 and adults.

Whilst the Government is confident that the new proposals effectively comply with the Court's judgment in this case, it should also be recognised that our proposed approach has the additional advantage that the higher courts will effectively be able to require the regulations to be amended if they adjudge that they fail to comply fully with the Convention. If the retention periods for DNA were set out in primary legislation, it would require a comparatively lengthy process to respond to any future court decisions on compliance with the Convention rights, as any amendment would require a Parliamentary Bill or a remedial order under the Human Rights Act.

The Committee of Ministers would expect Member States to make significant progress towards implementation of an ECtHR judgment within 12 months from the date of the judgment on 4 December 2008. Delaying a change in legislation would build uncertainty with the public and with police forces as well as raising the potential for legal challenge in our domestic courts and potentially in Strasbourg. Potentially, relevant legislative

provisions may not be on the statute book before mid to late 2010 if we are to follow the primary legislation route. We consider that the regulations approach provides the optimum solution to ensure an effective and prompt statutory response to the judgment

Gangs Injunctions

31. We are concerned at [the gang's injunctions] potentially wide application in the future beyond the category of people currently envisaged to be covered and the broad discretion which it gives to those seeking applications and the courts as to how the term is interpreted. We consider that, in the interests of legal certainty, the term [gang] should be defined in the Bill. (Paragraph 1.10 Gangs report)

Recognising the concerns that were raised during committee debates on this issue, the Government has now tabled an amendment for Commons Report stage to provide a refined definition of 'gang-related violence'. This will be as follows:

Injunctions under part IV can only be granted if two conditions are met. The first requires the court to be satisfied that the respondent has engaged in, encouraged or assisted gang-related violence.

The second is that it is necessary to grant the injunction for either or both of the following purposes:

i. to prevent the respondent from engaging in, encouraging or assisting gang-related violence.

ii. to protect the respondent from gang-related violence.

The amendment will make it explicit that for the purposes of part IV, 'gang-related violence' means violence or a threat of violence which occurs in the course of, or is otherwise related to, the activities of a group that

a) consists of at least three people

b) has an identifying characteristic and

c) is associated with a particular area.

In addition to this, the Home Office will issue guidance to clarify by way of narrative examples the types of gangs this injunction is aimed at to provide further clarity on this issue.

32. Given the significant issues which the guidance is intended to cover, it is vital for effective scrutiny for Parliament to have an opportunity to consider both the Act and the draft guidance in order to ascertain how the two will operate in practice and whether, taken together, they are compatible with human rights standards. We propose an amendment to the Bill. (Paragraphs 1.10 and 1.11 Gangs report)

The Government has tabled an amendment to clause 45 to require that any guidance issued or revised must be laid before Parliament. Given our intention to amend the definition of 'gang-related violence' in the Bill, scrutiny on this issue will be given by Parliament in the remaining stages of the Commons and the Lords. Therefore, we do not believe that it is necessary to insert a subsection requiring consultation on the Guidance. The Home Office intends to consult extensively on the issue of guidance before it is laid before Parliament

33. In order to ensure legal certainty and protection for individual rights, we recommend that the Bill be amended to set out an exhaustive list of prohibitions and requirements which may be imposed. In the event of changes in the future, amendments could be proposed to Parliament in subsequent legislation. (Paragraph 1.13 Gangs report)

Given the complex and changing nature of gang-related violence, the Government maintains that it is imperative that a degree of flexibility is afforded to the courts in the prohibitions or requirements that can be imposed. 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 2008/9, it would not have been envisaged to fall within the injunction and gang injunctions would have risked not being able to tackle this behaviour.

34. In our view, the Government has failed to provide a satisfactory explanation of the need for these provisions, including the unusual Clause 32(3)(b) (protecting the respondent from himself). As the Court of Appeal in *Shafi* concluded, a range of powers already exists to deal with gangs, including the criminal law, anti-social behaviour orders and injunctions in exceptional circumstances. In our view, the Government has not made the case for Part 4 of the Bill. (Paragraph 1.18 Gangs Report)

As stated previously, the Government accepts that there are a number of civil and criminal law tools which can be, 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 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. These injunctions were supported by local communities, including mothers of gang members, as a means to protect communities and individuals without involving the criminal justice system. Evidence from the use of these injunctions in Birmingham showed that incidents of serious gang-related crime fell (Col 590, PBC, 26.02.09) 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.

35. Whilst we are pleased to note the Government's commitment to the use of the criminal law as "the preferred option", we are concerned that the Bill does not make this explicit and that there are no safeguards on the face of the Bill to ensure that this occurs. We recommend that the Bill be amended to impose an express duty on the applicant for a gangs injunction, throughout the period during which the injunction has effect, to ensure that the question of whether there is a reasonable prospect of successfully prosecuting the subject of the injunction for a gang-related violence offence is kept under review at least every 3 months. (Paragraph 1.20 Gangs report)

The Government's has made clear that these injunctions would not 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 police and CPS explain why it is impossible to charge the individual in question before an injunction is sought. This is because of the time this would take in cases where immediate action is needed and the 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 guidance will make it clear that, where appropriate, the criminal justice system should be used.

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.

This is not a linear process and it is entirely possible that a criminal investigation can be underway in the breathing space created by the injunction.

36. We welcome the Government's commitment not to amend the current Bill so as to cover children and young people explicitly. However, we do not agree with the Government's contention that Part 4 will not be applied to children or young people. If the Government does not wish these provisions to be applied to children, we recommend that the Bill be amended to say so directly, and to set a minimum age limit for respondents. (Paragraph 1.24 Gangs report)

Injunctions must be enforceable and it is unlikely in practice that these injunctions would be enforceable for under 18s because the court cannot fine someone without a source of income.

When a court deals with a gang member over the age of 18 for a civil contempt of court, the court can impose a fine and/or a sentence of imprisonment for up to 2 years. However a court cannot sentence an individual under the age of 18 to detention in a young offender's institute for a civil contempt of court. Therefore where a gang member is under 18, and is without an independent and legitimate source of income, the court would be unable to sanction any breach and so would not grant an injunction.

However, there may be occasions where it would be both appropriate and enforceable to obtain an injunction against an under-18 and whilst these instances are likely to be rare we do not want to prevent applicant authorities from doing so if the circumstances provide for it. Therefore we will not seek to amend the Bill to explicitly exclude under-18s.

37. In addition, we are concerned by the Government's ongoing discussions as to whether civil injunctions can be amended to apply to children and young people. We therefore do not understand why the Government considers additional provisions to be necessary to deal with the particular position of children and young people. In addition, given the comments of the Court of Appeal, we are doubtful whether further legislation in this area would be compatible with the Court's judgment. (Paragraph 1.25 Gangs report)

The Government remains committed to considering whether a new tool is necessary in order to prevent gang-related violence resulting from children's involvement in gangs. All

proposals will be carefully scrutinised to ensure that they are necessary and proportionate in their effect, whilst ensuring that the safeguarding of children remains a priority

38. We recommend that Clause 32(2) be amended to require the court to be satisfied beyond reasonable doubt that the respondent has engaged in, or encouraged or assisted, gang-related violence. This would be consistent with the House of Lords' decision in *McCann* and the Court of Appeal in *Shafi*. (Paragraph 1.33 Gangs report)

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.

Civil courts are well versed in using injunctions to deal with allegations involving criminal or quasi-criminal behaviour e.g. 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.

The Government has also made express provision in clause 33(5) to ensure the court has regard to the respondent's religious beliefs, work life or education in applying prohibitions or requirements.

39. We recommend that the Bill be amended to make clear that an interim injunction should only be granted without notice being given to the respondent where it is both urgent and necessary to do so. (Paragraph 1.34 Gangs Report)

The Government understands the Committee's concerns that interim injunctions should only be sought when both urgent and necessary to so do. However, we believe that the addition of the term 'urgent' is unnecessary as it is implicit that the court would only deem it necessary to grant such an injunction in urgent cases.

40. We do not believe that it is sufficient to rely on the courts to ensure that the operation of an individual gangs injunction is not indefinite or so intrusive that it breaches human rights obligations. We recommend that Parliament should debate the principle of whether there should be a maximum limit on the duration of a gangs injunction, and if so what that limit should be. (Paragraph 1.41 Gangs Report)

41. In relation to interim injunctions however, given the lower threshold before they may be granted and the possibility that they may be made without notice being given to the respondent, we recommend that an individual interim injunction should be subject to a maximum period of four weeks or less and should be non-renewable. (Paragraph 1.43 Gangs report)

The Government does not at this time consider it necessary to time limit injunctions granted under part IV. The courts are best placed to determine whether an injunction (interim or otherwise) should be granted and for how long it should last. 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. The court must be able to tailor the injunctions to the individual respondent. Therefore the Government considers

that the duration of interim injunctions is a matter that should be left to the courts. This is in line with the current procedure in relation to other civil injunctions.

42. In addition, we recommend that the Bill be amended to require courts to specify the length of each term of a gangs injunction, whether interim or full. We also recommend that the Bill be amended to require a court to review any injunction at least annually for the entire duration of the injunction and that both the applicant and the respondent be permitted to attend a review hearing and make submissions. (Paragraph 1.42 Gangs report)

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. 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 intention 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.

Annex A

EXAMPLES RELATING TO SEX OFFENDER PREVENTION AND FOREIGN TRAVEL ORDERS

The Committee has questioned whether there is any real evidence that applying the 6 month time limit in section 127 of the Magistrates Court Act 1980 had prevented the police from obtaining a Foreign Travel Order (FTO) or a Sexual Offences Prevention Order (SOPO). We do not consider that that the 6 month time limit currently applies to such applications but we accept that there is confusion regarding this issue and that clause 21 is needed to clarify the matter. Policy officials have provided the following case studies from Operation Jigsaw and a Force Solicitor to illustrate examples of where applying the 6 month time limit could have inhibited applications being made:

Suspect on bail

Several instances have occurred where a suspect is on police bail or court bail having been charged with an offence. An interim order is not appropriate (be it Sex Offender Prevention Order or Risk of Sexual Harm Order) as any risk is adequately dealt with by way of bail conditions. After several months the CPS decide not to charge or they discontinue the matter or the suspect is acquitted, then a preventative order is required but the police consider that they are out of time to use the behaviour that was the subject of the initial charge/investigation.

Persons deported to UK

Similarly, there have been difficulties obtaining civil orders against sex offenders deported to the UK following their conviction/release from prison. The police may not be able to obtain information on the offender's behaviour during the previous 6 months from the country deporting the offender. In one such instance this meant that the police only felt able to apply for a notification order when they would otherwise have applied for a SOPO. In another, the offender's convictions were too old for him to qualify for a notification order and the lack of evidence in the previous 6 months meant that no other civil orders under the Sexual Offences Act 2003 were obtained. Although he was managed under Multi Agency Public Protection Arrangements he was charged with a further offence within 3 months of his return to the UK.

Information obtained post 6 months

A further category of cases is where evidence of an offender's behaviour only becomes known to the police over 6 months after it occurred. For example, in one case the police became aware of intelligence indicating that an offender intended to re-offend on his imminent release. However, the intelligence was over 6 months old and therefore they did not proceed with their application. It may also be difficult to obtain evidence of an offender's concerning behaviour in the previous 6 months where he has been in prison, even though his overall behaviour since conviction may give rise to serious concerns.

Return to prison following breach

The police have also highlighted difficulties where an offender is returned to prison following breach of a licence condition aimed at preventing re-offending. The offender may not be released from prison for several years as a result of the breach but the offender's

behaviour before he was returned to prison may have provided evidence to found an application for a SOPO or FTO. Whilst it would seem sensible to wait until closer to the offender's release date before applying for such an order, when there could be a further assessment of the offender's risk, one Force has cited a specific example of such a case where they have made the application now to avoid the behaviour being considered out of time if delayed until the offender's imminent release. This is detrimental to the offender as if the application could be made towards the end of his term of imprisonment, he may have an opportunity to show that his risk level has changed whilst in prison.

Annex B

DRAFT SKELETON CODE OF PRACTICE – SEARCH AND SEIZURE POWERS

Clause 52 of the Policing and Crime Bill provides for search and seizure powers in England and Wales to prevent the dissipation of personal property that may be used to satisfy a confiscation order. It inserts a number of new sections into the Proceeds of Crime Act 2002 – 47A to 47R. Section 47R requires the Secretary of State to publish a Code of Practice setting out how the powers are to be exercised. A similar code is issued in respect of Northern Ireland.

The Code will be drafted before the powers come into force. It will be subject to a public consultation exercise and it will be laid and debated before Parliament before it comes into force. It is likely to be modelled on the Police and Criminal Evidence Act Code B – Code of Practice for Searches of Property Found by Police Officer and the Seizure of Property Found by Police Officers on Persons or Premises.

The following items will be covered by the Code.

1. Introduction

- Explain powers of search and seizure covered by the Code.
- List persons covered by Code (namely an officer of Revenue and Customs, a constable and an accredited financial investigator).
- Stress the need for full justification before the powers are used, with particular emphasis on the Human Rights Act and compliance with article 8 in relation to the search powers and article 1 of the first protocol in relation to the seizure and detention powers.

2. General

- To make Code widely available for operational and public consultation.
- Explain the applicability of other Codes (under the Police and Criminal Evidence Act 1984 and others) in other circumstances.
- Define terms in the Code.

3. Search and seizure powers – general

- Explain the seven different pre-conditions for the exercise of the powers.
- Provide guidance on "reasonable cause to believe" test that the defendant has benefited from criminal conduct.
- Before seizure, there must be consideration of the likelihood of a confiscation order (or amendment to that order) being made; and an estimate of person's benefit from criminal conduct and recognition that the value of the property to be seized should not exceed that amount.
- Guidelines to assess the risk of dissipation – this must be assessed individually and may include an assessment of the degree and history of criminality and the amount of unexplained wealth. Particular care should be taken with low level offenders. The risk of dissipation must be significant.

- Define the property that may be seized – this is realisable property: free property held by the defendant or recipient of a tainted gift.
- Detail property which cannot be seized, i.e. cash and exempt property. Explain "exempt property" which is broadly items necessary for use in the defendant's business or employment and property which is necessary for satisfying the domestic needs of him and his family.
- Presumption of prior consultation with community liaison officer.
- Guidance on obtaining judicial prior approval with proforma of information to be provided to the magistrate. Guidance on the alternative of obtaining approval of a senior officer.
- Requirement to provide the defendant with a notice of the officer's powers and the defendant's rights.
- Requirements for recording searches and seizures – includes name of officer, the name of person/premises searched, list of property seized etc.
- That searches must be performed at a reasonable hour unless this would frustrate its purpose.
- Guidance on reporting searches to the "Appointed Person" where there was no prior judicial approval and either nothing was seized or was not detained for more than 48 hours.

4. Search with consent

- Require the officer to explain fully the nature of the search and ascertain that consent has been properly given.
- In respect of premises, that if consent is withdrawn the search must stop.

5. Searching premises

- Set out the definition of 'premises'.
- Provide guidelines on the conduct of the search. This will include having consideration for the property and privacy of the person.
- Offer the presence of a witness to the search unless this would frustrate its purpose.
- Ensure that premises are secure on leaving them.

6. Searching people

- Provide detailed guidelines on the conduct of the search. This will include having consideration for the privacy of the person.
- Offer the presence of a witness to the search unless this would frustrate its purpose.
- Reiterate that there is no power to perform a strip search

7. Searching vehicles

- State that there is no power of entry. Define the location of vehicles which can be searched.

- Provide guidance of situations in which a search of a vehicle may be appropriate; most often when a search of the person in control of the vehicle has been performed.
- Provide guidance on requesting entry into the vehicle to perform a search.
- Provide guidance on arrest etc. for obstruction. Reminding officer of arrests being dealt with under other legislation and Code of Practice.

8. Seizure and retention of property

- Provide defendant with list/description of seized property
- Set out the conditions for detention [and provide pro forma forms for applying for a detention order]
- Ongoing consideration of the validity of the detention and duty to release if detention conditions no longer met. A senior officer undertaking a formal review of continued detention every three months.
- Ongoing consideration of the proportionality of retention – including the calculation of the likely costs of storage and insurance as against the value of the property (particularly depreciating assets) in order to assess whether it is reasonable to continue to retain the property rather than seek a consent order for its sale or to release it.
- Provisions relating to allowing supervised access to retained property.
- Ensure that property is properly secured, insured and stored.
- Storage requirements to ensure that the property's value is maintained.

9. Action after search and seizure

- Maintain a publicly accessible search register

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