House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: Government Replies

Twenty–Third Report of Session 2007–08

Report, together with formal minutes, and appendices

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Joint Committee on Human Rights

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

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

Current membership

HOUSE OF LORDS	HOUSE OF COMMONS
Lord Bowness	John Austin MP (Labour, *Erith & Thamesmead*)
Lord Dubs	Mr Douglas Carswell MP (Conservative, *Harwich*)
Lord Lester of Herne Hill	Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Lord Morris of Handsworth OJ	Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
The Earl of Onslow	Mr Virendra Sharma MP (Labour, *Ealing, Southall*)
Baroness Stern	Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)

Powers

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

Publications

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

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Rebecca Neal (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), James Clarke (Committee Assistant), Karen Barrett (Committee Secretary) and John Porter (Chief Office Clerk).

Contacts

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Report

1 Report

As appendices to this Report we are publishing the Government's responses to our Reports on the following Bills:

- Children and Young Persons;[1]
- Criminal Justice and Immigration;[2]
- Education and Skills;[3]
- Human Fertilisation and Embryology;[4] and
- Sale of Student Loans;[5]

We are also publishing two letters we have received from Lord Darzi of Denham, Parliamentary Under Secretary of State, Department of Health, dated 7 May and 5 June, concerning the Health and Social Care Bill.[6] We are grateful to the relevant departments for responding to our work in this way.

[1] Fifteenth Report, Session 2007-08, *Legislative Scrutiny*, HL Paper 81, HC 440, chapter 1.

[2] Fifth Report, Session 2007-08, *Legislative Scrutiny: Criminal Justice and Immigration Bill*, HL Paper 37, HC 269 and Fifteenth Report, Session 2007-08, *Legislative Scrutiny*, HL Paper 81, HC 440, chapter 2.

[3] Nineteenth Report, Session 2007-08, *Legislative Scrutiny: Education and Skills Bill*, HL Paper 107, HC 553.

[4] Fifteenth Report, Session 2007-08, *Legislative Scrutiny*, HL Paper 81, HC 440, chapter 4.

[5] Ibid., chapter 5.

[6] We also publish letter from our Chairman to the Lord Darzi of Denham dated16 May 2008, to which the second of these responses relates.

Formal Minutes

Tuesday 17 June 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Dr Evan Harris MP
Lord Dubs	Mr Richard Shepherd MP
Lord Lester of Herne Hill	
The Earl of Onslow	
Lord Morris of Handsworth	
Baroness Stern	

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Draft Report (*Legislative Scrutiny: Government Responses*), proposed by the Chairman, brought up and read the first and second time, and agreed to.

Several papers were ordered to be appended to the Report.

Resolved, That the Report be the Twenty-third Report of the Committee to each House.

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

[Adjourned till Tuesday 24 June at 1.30pm.

Appendices

Appendix 1: Letter from Kevin Brennan MP, Parliamentary Under Secretary of State for Children, Young People and Families, Department for Children, Schools and Families, dated 4 June 2008

Fifteenth Report of Session 2007-08: Children and Young Persons Bill

I am writing in response to the Committee's conclusions and recommendations relating to the Children and Young Persons Bill in the above report. I am pleased that you 'welcome the Bill as a measure enhancing human rights'. I have sought to provide a full response to the recommendations of the committee.

Social Work Practices

1.23 Pending a more general solution to the "public authority" problem by a clarification or amendment of the Human Rights Act, we recommend that the Bill be amended to make it absolutely clear that it is intended that the provision of social work services to a local authority pursuant to arrangements made by a local authority under this part of the Bill is a function of a public nature for the purposes of the HRA 1998

I refer to my letter of the 7 January of this year where I set out our position fully; it is not necessary to make provision on the face of the Bill. The Government considers that the status of providers of social work practices is clear, and that they will fall automatically within the definition of public authority in section 6(3)(b) of the Human Rights Act. I am aware that the Human Rights Minister, Michael Wills MP, has corresponded with the Committee on the wider issue of the definition of "public authority" in the context of the forthcoming consultation on the British Bill of Rights and Responsibilities.

Placement with siblings

1.27 …We[…]) recommend that Clause 9 of the Bill be amended to make clear that the presumption should be that siblings be accommodated together unless it is not conducive to their welfare, or where the interference with their right to respect for their family life is both necessary and proportionate in order to achieve a legitimate aim.

Clause 9 is clear that a local authority, when providing accommodation for a child, where it also provides accommodation for a sibling of that child, should ensure that the placement allows the siblings to live together. Of course, this has the primary qualification that in determining the most appropriate placement the local authority has to consider what best safeguards and promotes the welfare of the child. This follows from the local authorities general duties to safeguard and promote the welfare which impact on all local authorities' decision making and ensure they are child focused. Secondly, it is qualified by what is reasonably practicable in all the circumstances of the child's case for the reasons I have set out in previous correspondence (such as, for example, a large sibling group coming into care at the same time). We will in statutory guidance (as part of the review and update of the whole suite of Children Act guidance) the subtleties of the interplay of various factors in relation to placement decisions will be explored in more detail.

I believe the Committee's concern here is that local authorities will interpret this as though mere administrative convenience is a justifiable rationale for not placing siblings together. It is the Government's firm view that this would not be a reasonable interpretation of the clause as drafted, in the context of the other provisions of the Children Act 1989: local authorities will need to be able to demonstrate that their placement decision is the most appropriate one available for the child; that it is reasonable decision, given all the circumstances of the case (in particularly their assessment of the child's needs); and, most importantly, that the placement will safeguard and promote the child's welfare.

There are dangers inherent in considering only one element of a placement decision in isolation, and by doing so elevating it above other important factors. Indeed, this was illustrated in the drafting difficulties that became apparent following detailed consideration of the original clauses 7-10 of the Bill as it was originally introduced. In any particular child's case, many considerations, some of which may conflict, will inform the decisions that local authorities (and their practitioners) take with regard to placement. Great care was taken with the drafting of the provision to enable a reasonable exercise of discretion and ensure the provision would be workable in practice. The approach taken by this Government amendment was endorsed in the House of Lords.

Independent Reviewing Officers

1.35 ...our fears are that an IRO may, for reasons of conflict and a lack of independent, be unable to defend robustly the position of a looked-after child and to ensure that his or her views are heard. These fears are exacerbated by the Government's implied acceptance in its creation of a backstop power (Clause 12) that IROs may not be sufficiently independent to discharge their function. We therefore recommend that the Government amend Clause 11 to set out, on the face of the Bill, that IROs are required to be entirely independent of the local authority so as to ensure that children are heard in material decisions affecting them.

We have acknowledged that the existing system in relation to IROs is not working as effectively as it should: there is more to be done to ensure challenge, rigorous reviews of care planning and full and meaningful engagement of children, in their care planning, and other decisions that affect them. However, we believe that the current system can be made to work, and that the root cause of current dissatisfaction with existing provision is not necessarily related to the structure or independence of IROs, as I have taken the opportunity to set out at some length below. We will however keep the effect of the reforms introduced by clause 11 under close review. If the necessary improvements are not seen, clause 12 ensures that Government has the power to take further appropriate and proportionate action, in response to firm evidence as to the nature of the problems.

There is no consensus on the reasons why IROs have, in some areas, failed to have the degree of impact on improving professional practice that was hoped for. Government believes there is insufficient evidence at present to determine whether the perceived shortcomings in case review processes are attributable for example to weaknesses in the training and support networks for IROs; the significant variation in caseloads; or whether there are more fundamental, structural problems with the way that some local services are set up.

The statutory framework under which IROs operate only came into force in September 2004. Before undertaking any major structural reform, with the inevitable disruption that would cause to services to children, we want to see whether the strengthening measures contained in clause 11 will have a real impact in improving outcomes for looked after children, and the effectiveness of the IRO in contributing to those outcomes.

This is the view shared by many stakeholders, take for example the response from the Family Justice Council (FJC) to the *Care Matters* Green Paper on this very issue:

'The drastic step of relocating responsibility for IROs outside local authorities, for example within CAFCASS or some other independent organisation, demands serious consideration. However the level of disruption and expense and the unlikelihood of any, or any sufficient increase in CAFCASS resources for the purpose, which such a course would involve is a strong argument against. Moreover the issue of independence from the local authority, perceived or actual is not in the view of the Council, the central issue. Steps should be taken to see whether the current position can be improved, radically, before such a drastic course is adopted' [Emphasis added]

We share the view of the FJC, as do many IROs. My Department commissioned a recent survey of IROs themselves and this included a section on the issue of conflict of interest. Of the 70 local authorities that responded to the questionnaire, only 3 IROs cited concerns about potential conflicts of interest in their role. Some of those questioned who did not feel that such an issue existed, suggested this was due to the fact that that they were placed within the Strategy & Performance Division of the authority and not the Social Care Division, giving them a degree of separation from front line social work and an unconnected line management structure.

In such structures, IROs can play a key role within the local authority by contributing towards the local authority's arrangements for internal audit, quality assurance and performance management of its children's social care workforce, a role that is greatly valued by many authorities. In many local authorities, IRO services provide formal reports on the performance of the authority as corporate parent directly to both their Director of Children's Services and, to the authority's lead member for children's services or to the Council committee responsible for its corporate parenting strategy. If IROs could not be local authority employees, we would have concerns that a good deal of the knowledge base and wider power to influence and develop social work practice for the better within authorities would be lost, with potentially negative consequences for the quality of care provided to looked after children.

I can reassure the Committee that the Government will monitor progress closely. If the evidence shows that the desired change in the effectiveness of IROs can be achieved through the new framework introduced by clause 11 and combined with other provisions in the Bill these changes deliver real improvements in the outcomes for looked after children, it may not be necessary to go any further. If not we have the option of exercising the enabling powers in clause 12 to establish a new national IRO service entirely independent of local authorities.

The Committee included in their report on this issue reference to the UNCRC and Article 12, and I thought it would helpful to provide the Committee with a view in relation to this,

although this does necessarily involve some repetition of the detail I provided in my letter of the 7 January. Government is clear that both the spirit and the obligation of article 12 are already fully reflected in legislation and practice in relation to looked after children. There are existing statutory duties in primary legislation (reiterated in Regulations and statutory guidance) for local authorities to seek and give due weight to children's wishes and feelings[7]. This is reinforced in the Children and Young Persons Bill with a new statutory duty for the IRO to ensure that the local authority gives due consideration to the wishes and feelings of children.

There are other administrative safeguards, such as the requirement in the Integrated Children's System for a child's wishes and feeling to be recorded[8], and where the local authority makes a decision against the wishes of a child, to include the reasons why it has done so. There is a statutory right for all looked after children (and a much broader range of people) to assistance in making representations about the services they receive[9] ,which includes access to independent advocacy[10] and requirements in relation to local authority complaints processes[11]. IROs also have a statutory power[12] to refer a case to CAFCASS, if they consider it appropriate to do so. Our guidance[13] makes it clear that the IRO should consider exercising the power of referral in circumstances where there is a danger that the child's human rights are being breached. This power is restated in the Children and Young Persons Bill[14]. The referral power is not limited, however, to cases involving a potential breach of the child's human rights; it could be used in other circumstances in which the child might be entitled to legal redress for breach of any of the local authority's other statutory duties.

Clause 11 will enable us to issue guidance to which IROs themselves must have regard, advising them of how they should fulfil their functions, including emphasising that case referrals to the Children and Family Court Advisory and Support Service (CAFCASS) and ensure it is no longer seen as a last resort[15], but considered as a real option where the individual IRO believes that it is appropriate to escalate their well founded professional concerns. The IRO has, in addition, a duty set out in Regulations to assist a looked after child obtain legal advice when they wish to assert their rights in other respects, for example, to apply to the court for contact or for discharge of a care order[16].

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[7] In particular Section 22(4) and (5) of the Children Act 1989

[8] As described by Lord Adonis, Grand Committee, Children and Young Persons Bill, Day 3, January 16 2008, see Official record, columns GC 535 and GC536 and references to section 20 and 21 of the exemplar.

[9] Section 26A of the Children Act 1989

[10] As described more fully in the statutory guidance, Get it Sorted: Guidance to Providing Effective Advocacy Services for Children and Young People Making a Complaint under the Children Act 1989.

[11] The Children Act 1989 Representations Procedure (England) Regulations 2006

[12] The Review of Children's Cases (Amendment) (England) Regulations 2004, introduced regulation 2A (1) (c)

[13] Independent Reviewing Officers Guidance, published in 2004 by DFES

[14] Section 25B (3) of the children Act 1989 to be introduced by clause 11 of the Children and Young Persons Bill

[15] Current guidance suggests the power should be used "...[i]f all other methods of resolving an identified problem [in relation to the child's case] have proved or are proving unsuccessful and there is a danger of the child's human rights being breached ... so that legal proceedings can be brought to achieve a remedy". Independent Reviewing Officers Guidance, published in 2004 by DFES, paragraph 5.4.

[16] The Review of the Children's Cases (Amendment) (England) Regulations 2004, introduced regulation 2A (7)

We would also expect IROs to be alert to other circumstances in which the child (or his parents or carers) might benefit from a referral to others for legal advice or representation, for example in relation to appeals to the SEN and Disability Tribunal.

Religious persuasion

1.38 On the face of it, the Clause [Schedule 1] appears to raise issues as to the right to freedom of thought, conscience and religion. However, because the provision was inserted by Government amendment at the end of the Committee stage, we have not yet corresponded with the Minister about this issue. We will be writing to the Minister shortly and may return to the issue in a future report.

Thank you for your letter on this matter. I have responded separately and I hope that my letter has addressed your questions on this issue.

Further measures

1.47 In our view, the Bill presents an opportunity to protect further the rights of separated children who are subject to immigration control (including those seeking asylum). We welcome the decision of the Government to review its continued reservation to Article 22 of the UN Convention on the Rights of the Child and look forward to being kept informed of the progress of that review, as well as its outcome. However, we would urge the Government to reconsider its opposition to a scheme of statutory guardianship which would further safeguard the rights of separated children subject to immigration control and would ensure the UK's compliance with Article 19 of the EU Reception Directive.

I understand and have noted the committees long held views on this point. The Government has made it clear publicly, and to Parliament[17], that it believes that it fully complies with Article 19 of the EU Reception Directive.

Article 19.1 states that Members States shall…"take measures to ensure the necessary representation of unaccompanied minors by legal guardianship, or where necessary representation by an organisation which is responsible for the care and well-being of minors or by any other appropriate representation."

There are a range of existing requirements designed to ensure that unaccompanied children are provided with the support they need. The committee is no doubt aware the majority of unaccompanied children are "looked after", as set out in statutory guidance, and as such, they must be provided with the same protections and support as every other looked after child, including support and assistance to take or defend legal proceedings that affect their rights.

The distinct experiences of unaccompanied asylum seeking children may require some more specialised services to other looked after children. There are, for example, very difficult challenges in identifying child victims of trafficking. The good practice guidance, *Safeguarding children who may have been trafficked* outlines the reasons for child trafficking, the methods used by traffickers, the roles and functions of relevant agencies and how practitioners should follow procedures to ensure the safety and well-being of

[17] For Example, Lord Adonis, day 2 in Grand Committee of the Children and Young Persons Bill.

children who it is suspected have been trafficked as well as helping practitioners identify children who may have been trafficked.

In revising the statutory Children Act guidance for local authorities, we will, of course, be reflecting the significant increase in the proportion of looked after children who are unaccompanied asylum seekers. The original guidance was issued in 1991 to support the commencement of the Children Act 1989. At that time meeting the care needs for unaccompanied asylum seeking children would not have been a significant issue for local authorities. In line with the *Code of Practice to Keep Children Safe from Harm* and the work to develop specialist local authorities we will ensure that the statutory guidance specifically covers the particular needs that such children may have, and outlines the expectations that local authorities should ensure that unaccompanied looked after children and care leavers are properly supported.

These initiatives represent very significant progress. It is not clear what benefits a system of formal guardianship would add. The reality for most unaccompanied asylum seeking children is that they already encounter a long list of individuals, each performing different functions, who can have a profound influence on what happens to them. As a corporate parent for lone children the role of the local authority is to ensure that services are provided in a co-ordinated way and the child is provided with appropriate support and assistance to access those services.

Introducing another professional into the lives of unaccompanied children could indeed hinder and not help: their role would potentially overlap with the local authority's responsibility to safeguard and promote their welfare, and perhaps, by confusing responsibilities, allow the authority to resile from its obligations to the child. I am anxious to ensure this doesn't happen and believe it would be better to make the existing arrangements work well so that they are provided with the right kind of support for as long as the local authority remains responsible for their care.

1.50 This Bill presents an opportunity to strengthen the rights of children in custody. Whilst we agree that this does not require the state to assume parental responsibility for all children in custody, we note that the state has positive obligations towards all those it detains, including children, who are a particularly vulnerable group of people. We recommend that the Bill be amended to ensure that the full range of child protection measures contained within it be extended to children in custody, whether or not they have looked-after status during the period of their detention.

The Government does of course accept it has positive obligations towards children in custody. In my letter of 7 January I recognised the importance of safeguarding the welfare of all young people in custody and of effective joint working between the various agencies involved in the criminal justice system to ensure that they fulfil their respective responsibilities to contribute to keeping children in custody safe. In our view the "full range of child protection measures" that apply to all children also extend to all children in custody. Youth Offending Institutes and Secure Training Centres, as well as local probation boards and youth offending teams are subject to the duty to make arrangements to ensure that in the discharge of their functions they have regard to the need to safeguard and promote the welfare of children under section 11 of the Children Act 2004. They are also statutory members of Local Safeguarding Children Boards. Furthermore, in 2007 the

Youth Justice Board carried out a safeguarding review across the entire secure estate for young people. These are just some of the measures already in place to safeguard and promote the welfare of young people in custody.

The Bill is, however, mostly concerned with implementing proposals set out in the White Paper *Care Matters* and therefore focuses on the role of the local authority as corporate parents towards children they look after. I agree that a local authority's obligations should not cease when a looked after child is taken into custody, but their role will of course be subject to the conditions of custody. As I explained in my earlier letter, we intend to use powers taken in the Bill to extend the practical obligations of local authorities towards those children who were provided with accommodation under section 20 of the Children Act 1989 immediately before going into custody but who are no longer looked after. This is because of the authority's involvement in the child's life prior to detention and should ensure that all these children receive the services (including accommodation, if appropriate) that they need when they are released.

I trust that this response addresses the points in your report. I hope you and the Committee will join me in working to ensure the passage of a Bill that will improve the lives of children and young people.

Appendix 2: Letter from the Rt Hon David Hanson MP, Minister of State, Ministry of Justice, dated 29 April 2008

Criminal Justice And Immigration Bill

I attach the Government's response to the Committee's Fifth Report of Session 2007-2008 and those parts of the Committee's Fifteenth Report which deal with the Criminal Justice and Immigration Bill.

I am most grateful for the Committee's careful consideration of this Bill. As the attached response sets out, many of the amendments tabled by the Government during the passage of the Bill respond to the concerns expressed by the Committee.

Criminal Justice And Immigration Bill: Government Response to the Fifth and Fifteenth Reports from the Joint Committee On Human Rights: Session 2007-08

Reference to clause or Schedule numbers in the Bill are to the Bill as amended at Lords Report (unless otherwise stated) and ordered to be printed on 23 April 2008.

1. We add our voice to the many Members who complained at Report stage that the House of Commons has been deprived of the opportunity to conduct, in the case of many clauses, any scrutiny at all of provisions which have serious implications for the rights and liberties of the citizen. (Paragraph 1.3: 5th Report)

2. The Bill had 47 hours in Committee in the Commons and a further 8 hours for remaining stages. While extra time was made available for Report, the Leader of the House of Commons acknowledged that this did not turn out to be enough and undertook to see whether extra time can be found to consider the amendments passed by the House of Lords. The Leader of the House of Commons has announced that there will be a full day for Commons Consideration of Lords Amendments on 6 May 2008.

3. We urge the Government to exercise caution in this contentious area of policy [rebalancing the criminal justice system] and to proceed only on the basis of objective evidence. We ask the Government again to clarify their position on this issue. (Paragraph 1.7: 5th Report)

4. The purpose of the Bill is to protect the public, reduce re-offending, promote and improve access to justice and increase public confidence in the justice system. It remains the case that the Government is not asserting that there is an actual imbalance in the criminal justice system.

Youth Justice

5. We welcome, in principle, the introduction of a generic community sentence for children and young offenders, because it has the potential to enhance the legal protection for the human rights of children and young people in the criminal justice system. Indeed, Article 40(4) of the UN Convention on the Rights of the Child ("the CRC") requires that a variety of dispositions shall be available "to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." In particular, seeking to ensure that the requirements imposed in a community sentence are more closely tailored to the individual circumstances of the juvenile offender, which is said to be one of the main aims of this Part of the Bill, should help to make the requirements imposed on juvenile offenders more proportionate. (Paragraph 1.9: 5th Report)

6. The Government welcomes the Committee's support for the principle of the Youth Rehabilitation Order.

7. We note the Government's statement that it strongly believes that custody for young people should only be used as a last resort. However, we note that in the Government's response to our predecessor Committee's recommendation, it said that "intensive supervision and surveillance would be the first option for courts, and custody would be available as a second option only where the offences were so serious that only a physical restriction of liberty could be justified." (Paragraph 1.16) As presently drafted, however, there is nothing in the Bill to require that a YRO with ISS be the first resort, before custody, other than in exceptionally serious cases.(Paragraph 1.16) In our view, such a requirement would be an important additional safeguard to ensure that custody of children is only used as a last resort. Moreover, such a safeguard is arguably necessary to counter the risk that a single community sentence may lead to a quicker escalation to custody if the order is breached. We recommend that the Bill be amended to require that a YRO with ISS should always be tried before custody, unless the offence is so exceptionally serious that a custodial sentence is necessary to protect the public. (Paragraph 1.17: 5th Report)

8. The Government considers that clause 1(4) of the Bill makes it clear that a youth rehabilitation order with intensive supervision and surveillance ("YRO with ISS") or intensive fostering should be used as a direct alternative to custody. Therefore, a custodial sentence should only be imposed on a child or young person where it is necessary to deal with serious offence(s) or persistent offending.

9. However, in the light of the debates in Parliament and of the recommendation of the Committee, the Government considered that additional clarification would be helpful.

10. There are already a number of legal constraints on the courts on the imposition of a custodial sentence on a person under 18. The most important is that contained in section 152(2) of the Criminal Justice Act 2003 which states that:

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

11. As the Committee pointed out in its 5th Report, however, this custody threshold applies to all offenders - to adults as well as juveniles. At Report stage, the Lords agreed Government amendments which supplemented this duty (see now paragraph 80 of Schedule 4 to the Bill).

12. At present, under section 174 of the Criminal Justice Act 2003, the courts are under a duty to make a statement giving its reasons for, and explaining the effect of, a sentence. In particular, where custody is imposed, it must say it is of the opinion that section 152(2) of the Criminal Justice Act 2003 applies and why it is of that opinion. The amendment made to the Bill imposes an additional requirement on the court, where the offender is under 18 years of age and the court imposes a custodial sentence, to make a statement that it is of the opinion that a sentence of a YRO with ISS or intensive fostering cannot be justified and why it is of that opinion.

13. The Government's response to our inquiry has confirmed our concern that the Bill lacks adequate safeguards to ensure that the use of custody is proportionate, not only to the offence, but to the child's age and intellectual and emotional maturity, as required by the CRC. The Government's emphasis on robust enforcement for wilful and persistent breaches of a YRO, coupled with its assertion that it "needs to maintain confidence in community sentences" appears to us to give rise to a considerable risk that young people will be accelerated into custody not because of the seriousness of their offence but because of their persistent failure to comply with the terms of their community sentences. We recommend that the Bill be amended to include an explicit reference to the requirement of the CRC that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence. (Paragraph 1.21: 5th Report)

14. Issues of proportionality in respect of sentencing a young person are already taken into account by the courts. Proportionality is embedded in the criminal justice system and does not need to be set out for a specific sentence. The courts are required to ensure that each sentence, including sentences for breach, they make is a proportionate response to the needs of the offender and the seriousness of the crime. In particular, the courts are required before reaching a decision on the appropriate penalty to consider the offender's personal mitigation. This should always include consideration of the offender's age and maturity. Not only will the courts take such factors into account but the Court of Appeal in *R v Howells* [1999] 1 AER 50 stated that youth and immaturity, while offering no defence, will often justify a less rigorous penalty than would be appropriate for an adult.

15. In respect of a community sentence, section 148(2) of the Criminal Justice Act 2003 (as it would be amended by Schedule 4 to the Bill) provides that where a court passes a community sentence which consists of or includes one or more youth community orders—

> "the particular requirement or requirements forming part of the ….youth rehabilitation order, comprised in the sentence must be such as, in the opinion of the court, is, or taken together are, the most suitable for the offender".

16. The Youth Offending Team will also take into consideration the age and maturity of the young person when undertaking assessment of their needs and making recommendations to the court on appropriate interventions – for instance, where a pre-sentence report is provided. The type and number of requirements and their length will be tailored to meet the individual's needs and to a large extent these will reflect their age and maturity. The court will, of course, have regard to Youth Offending Team reports and recommendations as part of the sentencing process.

17. Finally, clause 9 of the Bill sets out the purposes of sentencing and other factors which the courts must take into account when sentencing. There is a requirement for the court to have regard to the welfare of the young person, this applies to both sentencing for the original offence and when re-sentencing following breach of a YRO. The court will always consider all of the circumstances of a young person when passing sentence, including any aggravating and mitigating circumstances. The Government is therefore in no doubt that the need to ensure proportionality in sentencing, taking into account the age and maturity of the offender, is already a key part of the sentencing process.

18. We are surprised to learn that there is not a presumption that children are entitled to publicly funded legal representation in criminal proceedings, given the seriousness of the consequences for them and the complex and intimidating nature of those proceedings for the child. We recommend that the Government amend the Bill to provide for a general right of legal representation for children in criminal proceedings. (Paragraph 1.24: 5th Report)

19. Under the Access to Justice Act 1999, legal representation is available to anyone facing criminal proceedings before any court where it is in the Interests of Justice that public funding be granted. The 'Interests of Justice' test is set out in Schedule 3 to the Access to Justice Act 1999. The court must consider the following factors:

a. whether the individual would, if any matter arising in the proceedings is decided against him, be likely to lose his liberty or livelihood or suffer serious damage to his reputation;

b. whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law;

c. whether the individual may be unable to understand the proceedings or to state his own case;

d. whether the proceedings may involve the tracing, interviewing or expert cross examination of witnesses on behalf of the individual; and,

e. whether it is in the interests of another person that the individual be represented.

20. For those defendants under 18 years of age, it may be the case that such young people will be considered unable to follow proceedings and so will be held to satisfy the 'Interests of Justice' test on this element of the test alone. This point is reinforced by guidance on the Legal Services Commission's website which makes clear that the young age of the defendant can be considered by the court in determining whether the defendant is able to understand proceedings or able to state their own case.

21. Whilst a likely custodial sentence would be sufficient to meet the 'Interests of Justice' test on the grounds of a loss of liberty, there is nothing to prevent the court from taking into account the serious nature of a non-custodial sentence, such as a Youth Rehabilitation Order, when considering whether it is in the 'Interests of Justice' to grant a representation order. As with all legal aid applications, the 'Interests of Justice' test will be assessed on the basis of the individual circumstances in each case.

22. Since 2 October 2006, defendants appearing before the magistrates' court and youth court have also been required to pass a financial eligibility test to qualify for publicly funded representation. Defendants under the age of 16 and those under the age of 18 and in full time education were exempt from this test. From 1 November 2007, this exemption was extended to all defendants under the age of 18 .

23. It would be extremely rare for a youth not to pass the "Interests of Justice" test, not least because court staff could take the view that the youth may well not understand proceedings and would be unable to state their own case. Therefore in the overwhelming majority of cases, under 18s will qualify for legal representation at court especially where any defendant appears at the Crown Court. Where an older youth is charged with a relatively minor/low level crime and they are familiar with the court process, they might be held not to satisfy the 'Interests of Justice' test. But this is likely to be very rare.

24. In cases where a young person under 18 does not apply for legal aid before their appearance in court, the court duty solicitor can in many cases provide advice and representation to the youth concerned, so providing an additional safeguard.

25. The Government believes that the current arrangements provide young people, particularly the most vulnerable, with appropriate and proper access to legal representation. However, the Government remains of the view that it is right that we ask, in each individual case, whether it is in the "Interests of Justice" that a representation order be granted.

Sentencing

26. We recognise that the obligation in the CRC is to ensure that the best interests of the child are a primary consideration in all decisions affecting children, not the sole primary consideration. In our view, however, the effect of clause 9 of the Bill is to subordinate the best interests of the child to the status of a secondary consideration below the primary consideration of crime prevention. To treat the welfare of the child as a mere "supporting factor" is not, in our view, to treat it as a primary consideration. We recommend that the Bill be amended to delete the provision which subjects the duty to have regard to the welfare of the child to the primary duty to have regard to the

principal aim of the youth justice system. We also recommend that the Bill be amended to make explicit that the sentencing court is required to have regard to the welfare of the child "as a primary consideration," as required by the CRC. (Paragraph 1.28: 5th Report)

27. The Government welcomes the Committee's recognition that the best interests of the child are not the sole primary consideration. Indeed, as was made clear at Lords Report, the UN Working Group which drew up the CRC specifically considered whether the best interests of the child should be "the" primary consideration but rejected that because:

> "It was generally noted that there were situations in which the competing interests, *inter alia*, of justice and of the society at large should be of at least equal, if not greater, importance than the interests of the child".

28. That is why the Working Group adopted the phrase "a primary consideration" which is incorporate in Article 3 of the CRC.[18]

29. However, the Government recognised that that there had been concerns that the version clause 9 as it appeared in the Bill on Introduction subordinated, or appeared to subordinate, the welfare of the child to the status of a secondary consideration. The use of the words "a supporting factor" may have led to this.

30. The Government therefore acknowledged that the provision needed further clarification. That is why the Government tabled an amendment, which was agreed at Lords Report which removed the perceived hierarchy within the purpose of sentencing for under 18s. The amendments ensure that the court gives equal weight to all of these considerations. This shows that welfare is a primary consideration for the court to have regard to when sentencing.

31. The clause now states that when sentencing an offender under 18 the court must have regard to –

a. the principal aim of the youth justice system;

b. the welfare of the young person in accordance with section 44 of the Children and Young Persons Act 1933; and,

c. the purposes of sentencing.

32. The Government therefore considers that it is clear that the welfare of the child is now plainly a primary consideration.

Criminal Appeals

33. We welcome the Government's willingness to amend the Bill, since its introduction, to acknowledge the important function of the appellate courts in upholding the rule of law by quashing convictions where there has been serious

[18] Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, Volume 1, Article 3 (Best interests of the Child), E. Second Reading (1988-1989), United Nations, New York and Geneva, 2007

misconduct on the part of the State authorities. However, we still have two concerns about the new test for allowing criminal appeals. (Paragraph 1.31: 5th Report)

34. The first concern in relation to criminal appeals is whether the necessity for restricting the powers of the Court of Appeal in this way has really been made out by the Government. There is no clear evidence that the mischief the provision is aimed at is a problem in practice: the Court of Appeal has not interpreted its powers to mean that any procedural irregularity or technical defect renders a conviction unsafe. On the contrary, the Court of Appeal has generally taken a fairly robust, common sense attitude to its "safety" jurisdiction. (Paragraph 1.32: 5th Report) Our second concern is that the clause appears to invite the Court of Appeal to set itself up as the arbiter of factual questions going to the guilt or innocence of the appellant, which is not the function of the Court of Appeal in criminal appeals. The role of the Court of Appeal is to review the safety of the conviction, and if it thinks that a conviction is unsafe it should quash a conviction and order a retrial. The new clause appears to restrict the ability of the Court of Appeal to do this. (Paragraph 1.33: 5th Report)

35. We therefore recommend that the Bill be amended to allow expressly for the reopening of criminal proceedings in appropriate cases following a finding by the European Court of Human Rights that there has been a breach of the right to a fair trial. We repeat our earlier observation that what is required is not an automatic right to have proceedings reopened following a finding of a violation of a Convention right by the Strasbourg Court, but a procedural mechanism for deciding whether proceedings should be reopened to review the safety of the conviction in the light of that judgment. We hope to propose an amendment to give effect to this recommendation in time for the Bill's Committee stage. (Paragraph 1.35: 5th Report)

36. On 27 February 2008, Lord Hunt of Kings Heath announced (Official Report, col. 658-660) that the Government was withdrawing the provisions relating to criminal appeals in clauses 42 and 43 (Lords Introduction print) in order to facilitate the speedy passage of the Bill so that the provision restoring the statutory prohibition on inducing prison officers to take industrial action can be in force by 8 May when the current voluntary industrial relations agreement between the Prison Service and the POA expires.

37. The Government will consult further on the provision on quashing convictions and come back to them in a future Bill if appropriate.

Commissioner for Offender Management and Prisons

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

the Commissioner truly independent of the Secretary of State and accountable directly to Parliament not the Secretary of State. (Paragraph 1.40: 5th Report)

39. In placing what have previously been purely administrative arrangements on a firm statutory basis, it is the Government's view that the provisions in what were Parts 4 and 5 of the Bill (Lords Introduction print) would have substantially enhanced the standing and independence of the new Commissioners. However, it was evident from public statements made by the current ombudsmen, Stephen Shaw and Brian Coulter, and by the Parliamentary Ombudsman, Ann Abraham, that there was significant disquiet about the provisions in the Bill. All three Ombudsmen have argued for a quite different model which provides for direct accountability to Parliament.

40. In the absence of such a consensus, the Government announced at Lords Second Reading its intention withdraw these two parts (they were duly excised from the Bill at Lords Committee Stage on 5 February).

41. The Government remains committed to placing these two important offices on a firm statutory basis. We will now enter into a period of further consultation with interested parties. We will need to be satisfied that any alternative statutory model will provide value for money and an enhanced level of service.

Compensation for miscarriages of justice

42. We do not accept that there is any rational connection between limits on compensation for miscarriages of justice and limits on compensation for victims of crime. In our view, where the State is responsible for a miscarriage of justice, there arises an obligation to restore the individual as closely as possible to the position he or she would have been in but for the miscarriage of justice. It is not difficult to imagine extreme cases in which a limit of £500,000 would fall far short of such an amount, for example where an innocent person has served a very long sentence for a very serious crime and so foregone a lifetime's opportunities. We recommend that the cap on the amount of compensation be deleted from the Bill. (Paragraph 1.44: 5th Report)

43. The Government set out in its letter to the Committee of 6 December 2007 (see Appendix 3 to the Committee's 5th Report) why it considered the proposed cap on the maximum compensation payable following a miscarriage of justice was compatible with our international and ECHR obligations. The Committee appear to accept our reasoning but recommend that the £500,000 cap should be removed from the Bill on the grounds that there is no 'rational connection between the limits on compensation for miscarriages of justice and limits on compensation paid to victims of crime'.

44. While it is accepted that the causes of miscarriages of justice are entirely different from those who are victims of violent crime, the consequences in both cases can be similar in that lives can be blighted. The average award for a victim of violent crime is around £5,500 while the average following a miscarriage of justice is over £250,000 – about fifty times more. Currently, there is no limit of the level of compensation paid following a miscarriage of justice whereas there is an absolute cap of £500,000, no matter what the consequences, payable to victims of crime. The Government does not consider that these huge disparities are justified.

45. It is not the case that the State is always to blame for a miscarriage of justice. For example developments in medical science since the time of the trial can show that evidence given at trial was flawed, or incomplete, or on occasions there may be mistakes by the defence team.

46. As David Hanson pointed out in his letter of 6 December, the proposed cap on miscarriage of justice compensation was set at a high level, £500,000. However, we have listened carefully to the points made during the passage of the Bill in both Houses and by the Committee. In response a Government amendment was agreed at Lords Report stage so that where the victim of a miscarriage of justice meets the eligibility requirements for compensation in section 133 of the Criminal Justice Act 1988 and has spent 10 or more years in relevant detention the maximum compensation payable will be £1,000,000. Where the person has spent no time at all in detention, or spent a period in detention of less than 10 years, the maximum payable will remain at £500,000.

47. The Government believes that the proposed new arrangements will continue to enable significant compensation to be paid to those who are victims of miscarriages of justice, while at the same time ensuring that there is a better balance between the compensation paid to victims of crime and that paid following a miscarriage of justice.

Extreme pornography

48. Our concerns about the vagueness of the definition of the offence of possession of extreme pornographic images, which we expressed in correspondence with the Minister, remain. It is in our view questionable whether the definition of the new offence in clause 113 is sufficiently precise and foreseeable to meet the Convention test of "prescribed by law". The offence requires the pornographic image in the individual's possession to be "extreme". An assessment of whether an image is or is not "extreme" is inherently subjective and may not, in every case, be, as the Government suggests, "recognisable" or "easily recognisable". This means that individuals seeking to regulate their conduct in accordance with the criminal law cannot be certain that they will not be committing a criminal offence by having certain images in their possession. We look forward to the Government bringing forward an amendment to make the scope of the new offence more precise. (Paragraph 1.50: 5th Report)

49. The Committee has suggested that it is questionable whether the definition of the offence is sufficiently precise to be "in accordance with the law". They have contended that whether or not an image is 'extreme' is inherently subjective and that as a consequence individuals will not be able to be certain whether they are committing a criminal offence.

50. During the debate in Commons Committee, concerns were raised about the ambit of the offence and the clarity of the definitions. It was argued that, as drafted, the offence could potentially catch a scene taken from a popular mainstream movie "Casino Royale" which purports to depict (albeit not explicitly) torture inflicted on the victim's genital area. Ministers consequently undertook to consider whether the definitions within the offence could be further clarified.

51. The Lords agreed a series of Government amendments at Committee stage which we believe clarify the main elements of the offence and put it beyond doubt that popular mainstream films do not come within its scope.

52. Firstly, we have clarified the definition of pornography (the first element of the offence). It was always our intention that the question whether or not material is pornographic should be a matter which the jury (and by implication the pornography user) could take a view on simply by reference to the nature of the material before them, without having regard to the intent of those who produced it. Our amendment clarified this by providing that "An image is pornographic if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal".

53. The second main change our amendments made related to that part of the offence which lists the "extreme images". The various occurrences of the words "appears to" have been omitted and we have provided instead that the acts depicted must be "explicit and realistic". This should serve to clarify that the offence targets only graphic convincing material.

54. We have also slightly restructured this part of the offence so that the persons and animals depicted must be such that a reasonable person looking at the image would think that they were real. The same requirement does not apply in respect of acts, but as explained above, depicted acts would have to be "explicit and realistic". This position as regards acts does not denote a change in policy but flows from our restructuring of the offence in order to provide greater clarity.

55. The third (and most significant) change our amendments provided for is the creation of a new and additional element of the offence.

56. That new element requires that the material caught "is grossly offensive, disgusting or otherwise of an obscene character". The intention is to align the offence more closely with the Obscene Publications Act 1959 to give greater certainty in respect of our policy intention to catch only material which it would already be illegal to publish here.

57. Those then are the changes we have made to the offence. We consider that they have addressed the concerns raised in Parliament about the scope of the offence. We are hopeful that they will also address the related concern the Committee has raised about whether the offence is precise enough to be "in accordance with the law". Insofar as the Committee is not persuaded by our amendments we make the following points.

58. There is a limit to the extent to which language can encapsulate images. When delineating and thereby criminalising images of a particular nature we will never be able to reach a position in which every single person will know with certainty in respect of every single image which side of the line it falls. But, that is not a position the courts or the Convention expect us to reach. For example, in the case of *R v O'Carroll* [2003] EWCA Crim 2338 in relation to an argument that the term 'indecent' (in the context of images of children) was too imprecise to enable the applicant to know in advance whether his conduct was criminal, the Court of Appeal held that "it is not necessary for an individual to be able to be sure in advance whether his conduct will be characterised by a jury as a crime." A similar argument was made in the case of *R v Stephane Laurent Perrin* [2002] EWCA Crim 747 in respect of the term 'obscene' as it appears in the Obscene Publications Act 1959. In relation to that argument the Court of Appeal concluded "not only does the statute speak for itself, but there is also a body of European authority to support the proposition that for the purposes of Article 10:2 the offence of which the applicant was

convicted was for a legitimate purpose prescribed by law." At the heart of the European authority to which the Court of Appeal is there referring is the case of *Muller v Switzerland* [1991] 13 EHRR 212 in which the European Court rejected the submission that the word "obscene" in the Swiss Criminal Code was too vague to enable the individual to regulate his conduct, saying at paragraph 29 of the judgment that, "The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague ... criminal law provisions on obscenity fall within this category".

59. We are not citing those judgments in order to suggest either that we intend or that it would be acceptable for our possession offence to be fluid or vague in terms of what it catches, rather what we are saying is that we consider that we have provided as much clarity as is possible and in doing so have discharged our burden of ensuring that the offence is "in accordance with the law". Our offence in fact provides greater clarity than the 'indecency' and 'obscenity' offences with which the above cited cases are concerned, because in addition to providing that material must be 1) pornographic and 2) grossly offensive, disgusting or otherwise of an obscene character, we have also set out a list of the extreme, explicit and realistic images which are caught.

60. We do not share the Committee's view that whether or not an image is an extreme image is inherently subjective. On the contrary we consider, for example, that whether a pornographic image depicts, in an explicit and realistic way, an act which is likely to result in serious injury to a person's genitals is a largely objective question. We necessarily accept that there will be grey areas at the periphery, but do not consider that they are such as to render the offence not "in accordance with the law." This point is addressed further, below.

61. We remain concerned that "serious injury" (Clause 63(7)(b)) may be subject to a broadly subjective assessment. This term must be interpreted in a way which does not lead to unjustified interferences in an individual's private life and discrimination on the basis of his or her sexual orientation or gender. We recommend that the threshold for serious injury must include permanent physical harm. (Paragraph 2.16: 15th Report)

62. There is some evidence, provided by the Government's rapid evidence assessment, of a causal link between viewing such material and an increased risk of committing sexual offences for a small number of people. However, the evidence does not extend to demonstrating that those who participate in the making of images are harmed by their involvement. We therefore recommend that the definition of the offence be further refined to exclude images created by consenting adults, where there is no serious physical harm to any participant and no intention to distribute the material beyond the participants involved. We recommend that guidance spell out factors which should be taken into account in order to ascertain that participants have consented. Such factors should include, for example, whether or not participants received payment. (Paragraph 2.17: 15th Report)

63. In its report the Committee addressed the issue of proportionality and made two consequential recommendations. The first was that 'serious injury' be defined to mean permanent physical harm, and the second was that the Government exclude from the scope of the offence material which is created by consenting adults, in relation to which no

serious physical harm was caused to any participant, and in respect of which there is no intention to distribute the material beyond the participants.

64. Before addressing the specific points which the Committee has made, the Government would like to make two general points.

65. Firstly, the offence does not regulate any action on the part of any person, other than the action of possessing certain material. In particular, the offence does not deal with what consenting adults may or may not do to each other. Secondly although the offence regulates the material a person may possess, we believe the way it is formulated should ensure it relates only to material which, by virtue of the Obscene Publications Act, it is illegal to publish in the United Kingdom. Thus when approaching the proportionality question, it should be kept in mind that the freedom which this offence limits is the freedom to possess material which cannot be legally published or distributed in this country. Moreover that freedom, such that it is, is one which only has a significant practical (as opposed to theoretical) existence because of the advent of the internet.

66. Turning to the Committee's specific points: the words 'serious injury' are not defined in the Bill and would thus take their ordinary dictionary meanings. The Committee expressed concern that they "may be subject to a broadly subjective assessment". We appreciate that the term is not defined, but if by that the Committee means that the words are indeterminate, the Government does not agree. We believe that, as a matter of normal meaning, most injuries will be clearly either serious or not. We accept that, as with all language, there is some grey in the middle of the spectrum, but not such as to render the phrase "broadly subjective".

67. The Committee has suggested that the phrase be defined as including (and therefore meaning) permanent physical harm. We consider that carries as much room for debate as the existing phrase. Does, for example, a scar amount to permanent physical harm or must the injury have some form of debilitating or disabling effect? Moreover, the suggestion would have the effect of removing from the scope of the clause much of the extreme pornography which could be and is prosecuted under the Obscene Publications Act. For example, material which involves cuts to and electrodes on a person's genitalia could well give rise to serious harm, but (the scarring point aside) is unlikely to amount to permanent physical harm. The effect, therefore, of the Committee's suggestion would be to raise the threshold for this possession offence higher than it is for the publication offence. As noted at the outset, the proportionality question in issue here is the freedom to possess material which cannot be legally published. The Government does not consider that the Convention dictates that that issue be resolved by setting the higher threshold which the Committee has proposed.

68. The Committee's second suggestion was a refinement of the offence in respect of consenting participants.

69. The Committee acknowledged that there is some evidence, supported by the Government's rapid evidence assessment, of a causal link between viewing extreme pornographic material and an increased risk of committing sexual offences for a small number of people. They noted, however, that the evidence does not extend to demonstrating that those who participate in the making of images are harmed by their

involvement. The Committee therefore recommended that the offence be refined to exclude images created by consenting adults, where there is no serious physical harm to any participant and no intention to distribute the material beyond the participants involved They further recommend that any guidance spell out factors taken into account in order to ascertain that participants have consented including for example whether or not participants received payment.

70. The Government has now tabled an amendment for Third Reading in the Lords which addresses the concern to which the Committee's suggestion relates, a concern which was also raised during debates in both Houses, namely the anomaly that one effect of the offence is that there would be certain acts which it would be lawful to do, but which it would not be lawful to possess a photographic record of oneself doing.

71. The relevant Government amendment introduces a new defence which will apply where the possessor of an extreme pornographic image proves firstly that he was a participant in the act depicted, or was present when the event took place, and secondly that no harm – other than harm that can be and was lawfully consented to – occurred to any of the participants. This defence will not apply in respect of bestiality images or necrophilia images which involve a real corpse.

72. Where actual harm occurs in the creation of the image, the defence will only apply where the defendant shows that the harm was lawfully consented to. The Government notes that in footnote 92 of its report the Committee states that it agrees with the minority position in *R v Brown* [1993] 2 All ER 75. However, this offence concerns possession of extreme pornographic material, it does not address the law on consent to injury in a sexual context. The new defence is therefore tied simply to the law on consent at any given point in time. If the position changes in respect of consent to injury in a sexual context, this will automatically be reflected in the proposed defence.

73. In their proposal - to which the new defence is fairly similar - the Committee suggested an element relating to consent, and therefore guidance on factors which may be taken into account in determining whether consent is present. Given that the new defence is structured by reference to the absence of harm or unlawful harm, the Government does not see a need to also place on defendants a requirement to show consent.

74. With regard to the Committee's comments on the REA and the evidence of the risk of harm for those who participate in the making of extreme pornographic images, the Government notes that the REA found that there had simply been no formal research studies of the effects on those who participate in making extreme pornography. That is not to say such that such evidence does not exist. The REA mentions, for example, the evidence given by female victims of pornography to Public Hearings held in the U.S.A. in 1983. There is anecdotal evidence to show that individuals who participate in extreme sexual practices can harm themselves and in some cases, this has resulted in death – however we acknowledge that these incidents have not been directly linked to the production of images.

Prostitution

75. We welcome the motivation behind the Bill's provisions on prostitution, in particular the emphasis on rehabilitation and its attempt to facilitate assistance for those vulnerable women who are forced to resort to prostitution. Such measures have

the potential to enhance the human rights of such women. However, we are concerned that these measures may in fact lead to the detention of women for up to 72 hours for failing to attend a meeting, and in fact may eventually lead to their imprisonment for failure to comply with the terms of court orders. (Paragraph 1.55: 5th Report)

76. On 27 February 2008, Lord Hunt of Kings Heath announced (Official Report, col. 658-660) that the Government was withdrawing the provisions relating to prostitution in clauses 123 and 125 (Lords Introduction print) in order to facilitate the speedy passage of the Bill so that the provision restoring the statutory prohibition on inducing prison officers to take industrial action can be in force by 8 May when the current voluntary industrial relations agreement between the Prison Service and the POA expires. The Lords subsequently agreed Government amendments to withdraw the clauses on 3 March.

77. The Government remains firmly committed to the prostitution provisions and will bring forward fresh legislation at the earliest opportunity.

Blasphemy

78. In our view, the continued existence of the offences of blasphemy and blasphemous libel can no longer be justified, and we are confident that this would also, in today's conditions, be the view of the English courts under the Human Rights Act and the Strasbourg Court under the ECHR. We therefore look forward to the Government amendment to the Bill in the Lords abolishing the offences of blasphemy and blasphemous libel. The amendment proposed in the Commons had the virtue of simplicity, by just abolishing the two offences. We recommend that the Bill be amended to similar effect. (Paragraph 1.60: 5th Report)

79. The Government brought forward amendments at Committee Stage in the Lords. The Lords agreed to these amendments on 5 March (see now clause 78 of the Bill).

80. We welcome the abolition of the offences of blasphemy and blasphemous libel as a human rights enhancing measure. (Paragraph 2.40:15th Report)

81. The Government welcomes the Committee's conclusion that the abolition of these offences is a human rights enhancing measure.

Incitement to hatred on grounds of sexual orientation

82. We welcome the creation of the new offence of incitement to hatred on grounds of sexual orientation as a human rights enhancing measure. As Stonewall has demonstrated, there is now considerable evidence that gay people in particular are often the subject of material inciting people to violence against them. Where such clear evidence of harm exists, there is a positive obligation on the State under Articles 2, 3 and 8 ECHR (right to life, prohibition of inhuman and degrading treatment, and right to respect for private and family life) to ensure that the criminal law is adequate to protect people from such harm. We are gratified to see that there was a clear crossparty consensus in the Commons that there is an obligation on the State to act to protect against such harm. (Paragraph 1.62: 5th Report)

83. We welcome the fact that the new offences concerning incitement to hatred on grounds of sexual orientation are narrowly defined so as to apply only to threatening

words or behaviour intended to incite hatred against people on the basis of their sexuality. In our view this provides an appropriate degree of protection for freedom of speech. (Paragraph 1.64: 5th Report)

84. We will be writing to the Minister to ask about the evidence the Government has about the extent of the problem of incitement to hatred on transgender grounds and may return to the issue in a future report. (Paragraph 1.65: 5th Report)

85. The Government endorses the Committee's concern that legislation should be firmly based on evidence.

86. The Government has been in contact with a number of groups and individuals representing transgender people, including Press for Change, Gender Trust, FTM network, Gender Identity Research and Education Society, GALOP and the Beaumont Trust. The Government has heard some eloquent and specific examples of the difficulties which some transgender people may face.

87. Like the Committee, the Government has considerable sympathy for the views expressed by transgender organisations. We in no way want to minimise the difficulties faced by many transgender people. But the evidence we have suggests that most of the incidents described are already criminal, and should be dealt with by existing criminal law. Incitement to commit a crime (as opposed to stirring up hatred) is already a criminal offence. In the case of for example one case of disparaging song lyrics that was cited as evidence, the Government believes that although distasteful they would be unlikely to be considered threatening to transgender people as a group.

88. In summary, the Government has not seen any compelling evidence of words, behaviour or material, which are threatening and intended to stir up hatred against transgender people as a group. At present, therefore, the Government is unpersuaded that there is a significant gap in the law. The problem seems to be a different one, and may require different solutions. A cross–Government Working Group exists to tackle hate crime, and its priorities include increasing reporting of hate crime and increasing the number of hate crimes brought to justice.

89. The state has positive duties to protect the human rights of all people within its borders (including, amongst other methods, through effective and enforceable criminal laws). We have not been provided with any of the material on which the Government relies, but have simply been informed of its interpretation of that evidence, which leads it to conclude that there is no need to extend the offence to cover transgendered people. We find it very hard to accept the Government's assertion, in the absence of evidence, that transgendered people are not subject to hate crime, being part of a similarly vulnerable group. We recommend that the Government conduct urgent research into the extent of hate crime experienced by transgendered people in order to ensure that it complies with its positive obligations to protect equally the rights of all members of society. (Paragraph 2.20: 15th Report)

90. The Committee have recommended that further research should be undertaken into the extent of offences against transgendered people, and whether the offence of inciting hatred should apply to them. They are disappointed that they have not seen the evidence which we have received, and from which the Government has concluded that

there is at present no compelling reason to justify extending the offence to transgendered people given the incursion into free speech this would involve.

91. The Government sympathises with the Committee's position on this and are aware of the need and the positive obligation to protect the human rights of individuals and groups. The Government also fully accepts that transgendered people are the victims of crimes which may be motivated by hatred and that this needs to be tackled.

92. Serious though it is, evidence of hate crime does not in itself provide evidence of the need for an offence of incitement to hatred. The law as it stands protects everybody from violence such as assault, criminal damage or harassment. It also protects people from incitement to any offence, including violence, harassment and criminal damage.

93. In looking at an offence of incitement to hatred the Government is therefore looking for evidence of words or actions which go beyond the offensive, but which are not already subject to the criminal law. We believe that there is a gap in the law dealing with the use of words or behaviour which is threatening and which is intended to stir up hatred against a group because of their sexual orientation. We have had examples such as rap and reggae song lyrics, leaflets and websites of extreme religious and political organisations, which are threatening to the group as a whole and which are intended to stir up hatred. We do not believe the current law would catch these lyrics, pamphlets and websites.

94. From the evidence which the Government has seen about transgender crime, the problem is slightly different. It is about acts of harassment, assault, criminal damage and other acts which are currently criminal. We have not seen significant evidence that transgendered people are the subject of words or behaviour which are threatening and intended to stir up hatred, and which would not otherwise be criminal.

95. To assist the Committee on the information which has been received by the Government, a list is attached, together with the detailed evidence. To protect the vulnerable, we have removed names in some instances. As we have explained, the evidence points towards criminal offences such as harassment and offences against the person. But there is little evidence of stirring up hatred. There is one example of rap lyrics. But although these are distasteful and denigrating, we believe they are unlikely to pass the threshold of the offence – words or behaviour which are threatening and intended to stir up hatred.

96. The Government believes therefore that the problem will not be solved by creating a new criminal offence of stirring up hatred. We should rather be concentrating on making sure offences against transgendered people are properly reported and recorded, treated seriously, investigated and wherever possible brought to justice. Creation of a new offence of stirring up hatred would not necessarily help in any of those areas.

97. There is a cross-Government working group on hate crime. Their work includes tackling crime against transgendered people. A lot of good work is going on in conjunction with police forces, Crime and Disorder Reduction Partnerships and criminal justice boards. The main aims of the work are to increase reporting, increase the number of offences brought to justice, and prevent re-victimisation.

98. The Government has placed £300,000 into the Victims Fund to tackle hate crime and to provide support for victims of hate crime. We expect the fund to support projects including a specific trans project to help teachers to tackle transphobia in schools. The Association of Chief Police Officers recently agreed a definition which they will use for monitoring hate crime. This includes transgendered as a specific category. This information will help us put effective measures in place to deal with such crimes.

99. Clearly from the evidence submitted about crimes against transgendered people we have much still to do to achieve our aims. The Home Office leads on this area of work.

100. The Government does not want to minimise the difficulties which many transgendered people face, and which you have illustrated to us. The Government certainly would not rule out an extension of the offence of stirring up hatred in the future, and it is something we will continue to monitor and consider carefully.

Self defence and the use of force to prevent crime

101. We are satisfied that the new clause clarifies rather than amends the existing law, by articulating clearly in statutory form some of the most important elements of the case-law interpreting the scope of the defences in the use of force to prevent crime. As such, in our view the clause is to be welcomed as a clarification of the existing law. To this extent we consider the clause to be a human rights enhancing measure because it brings greater precision to the scope of a defence to a criminal charge and therefore improves legal certainty in the criminal law. (Paragraph 1.68: 5th Report)

102. The human rights issue which this matter raises is whether the right to life is adequately protected by the defence as it currently stands in the Bill, or whether the inclusion of "honest belief" as part of the defence risks putting the UK in breach of the positive obligation under Article 2 ECHR to ensure that its criminal law provides adequate protection for the right to life. This is an obligation which applies even to protect life against the unjustified use of force by other individuals, but it applies with particular strength where the use of force is by state agents. (Paragraph 1.72) Because the provision was inserted by Government amendment at Report stage, we have not yet corresponded with the Minister about this issue. We will write to him shortly and report further in due course. (Paragraph 1.73: 5th Report)

103. If the criminal law were amended to permit the use of disproportionate force in self defence or to prevent crime, the UK would be in breach of its obligation to ensure that its criminal law provides adequate protection for the right to life in Article 2 ECHR and the right to physical integrity in Article 8 ECHR. (Paragraph 2.24: 15th Report)

104. In our view, the failure to require reasonable grounds for an "honest belief" as part of the defence risks putting the UK in breach of the positive obligation under Article 2 ECHR to ensure that its criminal law provides adequate protection for the right to life. We recommend that the Bill be amended to require that there are reasonable grounds for an honest but mistaken belief about the circumstances. The question whether the degree of force used was reasonable in the circumstances should be decided by reference to the circumstances as the person using force reasonably believed them to be. Honest mistaken beliefs should provide a defence but only if the

mistake was reasonable. We propose an amendment (see Annex). (Paragraph 2.26: 15th Report)

105. Amending the Bill as we propose would not, in our view, impose a disproportionate burden on the person who has used force to defend themselves against attack. The reasonableness of their belief about the circumstances would still have to be decided taking into account the considerations spelt out explicitly in the Bill, which recognise that determinations of reasonableness after the event must factor in a certain amount of leeway for beliefs and judgements made in the heat of an intensely stressful moment. (Paragraph 2.27: 15th Report)

106. In our view the position in the Strasbourg case-law is clear: an honest but mistaken belief that the use of force was necessary may be enough for that use of force to be compatible with Article 2 ECHR, but only if the honest mistake was reasonable. (Paragraph 2.32: 15th Report)

107. In our view the very minimum required by human rights law is an amendment to the Bill to make clear that honest but mistaken beliefs must be based on good reasons when force is used by state agents. In the event that the Bill is not amended to give effect to our principal recommendation above, requiring that honest but mistaken beliefs must always be reasonable, we recommend that the Bill be amended to ensure that this requirement that mistakes be reasonable always applies in the context of the use of force by state agents. We propose an amendment (see Annex). (Paragraph 2.35:15th Report)

108. The Committee reported on the self-defence provisions in the Bill in both its Fifth and Fifteenth Reports. The Government does not propose to add anything specifically in response to the Fifth Report, as this was covered in the letter of 12 March 2008 to the Committee from David Hanson (reproduced at Appendix 7 of the 15th Report).

109. In its Fifteenth Report, the Committee reported that the Strasbourg law is "clear" that allowing a defendant to rely on a mistaken belief that the use of force was necessary is compatible with Article 2 ECHR only if the belief was reasonable. They also suggest that this conclusion is particularly inescapable in the case of state agents.

110. The Government is aware of various indications in ECHR case law that can be read as supporting this view, and the letter from the Minister of State mentioned a number of these, including the reference to "good reasons" in *McCann v UK* (1996) 21 EHRR 97), the case that the Committee emphasises in paragraph 2.31 of its report.

111. However, the Government maintains that the position in human rights law is not in fact clear. We believe that the case law on this point is inconclusive and falls well short of a requirement to change our law. The passage in *McCann* which the Committee cites at paragraph 2.31 says that a defendant can rely on a mistaken belief which he holds "for good reasons", but it does not say in terms that this is an exhaustive account of the situations in which a defendant can rely on a mistaken belief. We further note that even in an academic article[19] which seems to be at the forefront of the academic debate over the ECHR compatibility of the law on self-defence, it is conceded that *McCann* is inconclusive on this

[19] F Leverick, "Is English Self-Defence Law Compatible with Article 2 of the ECHR?", [2002] Crim LR 347.

point and that from an assessment of this case "it is difficult to reach any firm conclusions on whether or not English self-defence law might be incompatible with Article 2". What is clear is that the Strasbourg court has never taken the opportunities (in *McCann* and elsewhere) it has had to rule that our domestic law is ECHR incompatible, as might perhaps have been expected if in fact there was an obvious incompatibility.

112. As far as the legal arguments are concerned, we would continue to maintain that case law suggests that the current position in common law is compatible with the requirements of ECHR Article 2 and that states are in any case permitted a certain flexibility in determining how their national law deals with these requirements. As previously indicated, we rely on a number of points in coming to this view. In particular, a person who professes an unreasonable mistaken belief as the basis of his use of force in self-defence is not automatically given the benefit of being judged on that basis. Rather, he is to be judged on the facts as he claims to have seen them only if the court believes that his view was genuinely held. And as previously noted, if a defendant's professed belief is unreasonable, that can of course be a powerful reason for disbelieving him. Moreover, in those cases where a person's use of force is to be judged on the circumstances as he mistakenly saw them, the degree of force use must have been objectively reasonable in those circumstances.

113. On the underlying merits of the matter, the Government notes that to tighten up the law so that a defendant was judged on the facts as he saw them only if his belief was "reasonable" would be a significant shift away from the current position arrived at by the courts in common law. It would run counter to the concern that householders and others should be judged sympathetically on the basis of their mistaken beliefs. Even if a defendant has used excessive force because he has made an unreasonable mistake in his assessment of the danger he faced, it seems harsh to penalise him if in fact he had no aggressive intent and was simply reacting to the circumstances as he honestly saw them, or at most he had an intent that was justifiable in the light of his mistaken perceptions.

114. The Government also notes the Committee's view in paragraph 2.34 that it is right in principle that state agents should be permitted to rely on their mistaken beliefs only when they are based on good reasons, because the state can be expected to train such agents to have a well-grounded belief. We see the force of this point, but we note that it would put a tremendous burden on service personnel on duty in dangerous parts of the world who have to make snap decisions. We would also observe that the beauty of the current position under common law, as reflected by the Bill, is that it sets a single, simply-understood, test of "reasonable force" across the board. In deciding if reasonable force has been used a court will be able to look at all the circumstances of the case, which could include the fact that a trained state agent can be expected to make a more accurate assessment of what force is needed than, for example, a civilian householder who is surprised by a burglar. Similarly, when a court comes to consider whether a defendant's professed mistaken and unreasonable belief was genuinely held, it is likely to show more scepticism in the case of a trained state agent than a householder. The Government therefore considers that the current law already caters adequately for the differences between state agents and others, and it would be reluctant to introduce dual tests the face of the legislation unless there is a clear requirement in case law to do so.

115. So the Government acknowledges that the position is arguable, and indeed has been argued in legal academic journals. But there is no consensus in respect of the answer. The courts, in Strasbourg and domestically, have not developed the law in the way that the Committee contends. And, as the Minister mentioned in his letter of 12 March, the leading text book Smith & Hogan's *Criminal Law* takes the view that to invalidate a defendant's right to rely on a mistaken belief unless that belief was reasonable would "be an undesirable and unnecessary conclusion and the English courts should not arrive at it unless compelled to do so". The Government finds this reasoning persuasive.

Violent Offender Orders

116. We are concerned that the power to interfere with various Convention rights by imposing a VOO is insufficiently defined in law to satisfy the requirement of legal certainty which is also a fundamental feature of human rights law, including the ECHR. (Paragraph 1.79: 5th Report)

117. In our view, in order to provide the requisite degree of legal certainty, the Bill should be amended to provide, at the very least, an indicative list of the types of prohibitions, conditions or restrictions which may be imposed, although we consider that it would be more appropriate, and offer greater protection for individual rights, if an exhaustive list were set out. (Paragraph 1.80: 5th Report)

118. Following the Committee's recommendation, the Government tabled amendments at Report Stage in the Lords to provide an indicative list of the types of prohibitions, conditions or restrictions that could be imposed as part of a VOO. The Government's intention was that this list would not be an exhaustive one and will therefore not limit the conditions which can be made as part of an Order. This is because risk is a highly dynamic concept and will present itself in various guises depending on the individual and the context in which they are operating. In the Government's view, the provision of an exhaustive list of possible conditions would not give the court sufficient flexibility. Nonetheless, at Report Stage, the Lords agreed an opposition amendment which provides for an exhaustive list of possible conditions (see clause 101 of the Bill). The Government will reflect carefully on the debate before deciding how best to proceed.

119. The Bill has always required that a condition cannot be imposed as part of a VOO unless the court considers it necessary for the purpose of protecting the public from the risk of serious violent harm caused by the individual. Therefore, any condition must be directly linked to the specific risk posed by that individual. This provides an overriding safeguard for the individual. In imposing conditions as part of a VOO, the court would itself have to be acting compatibly with the Human Rights Act 1998. Conditions would also need to be proportionate to justify interference with Convention rights.

120. We consider VOOs to be more akin to control orders and serious crime prevention orders, both in terms of the seriousness of the conduct in which the individual must have been involved before the order can be made and in the severity of the possible restrictions which can be imposed. (Paragraph 1.89: 5th Report)

121. The Government considers that VOOs most closely mirror Sexual Offences Prevention Orders (SOPOs) as provided for in the Sexual Offences Act 2003. SOPOs are an effective and valued tool and are used regularly by the police and other public

protection agencies. They are designed to protect the public from serious physical or psychological harm caused by an individual committing a specified sexual offence. The Government wishes to apply the same successful approach to the protection of the public from serious violence.

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

123. The Government's view is that VOOs are civil in nature; they do not involve the determination of a criminal charge. This is because VOOs are preventative rather than punitive in character.

124. Although a person must have been convicted of a serious offence in the past, this is only an initial qualifying condition. For a VOO to be imposed, the individual must have, in addition, acted in such a way as to make it necessary to impose a VOO for the purpose of protecting the public from the risk of future serious violent harm. There must be clear evidence of a risk that the individual is going to commit a serious offence in the future, and it is this future offence that the VOO is designed to help prevent.

125. A VOO can only contain such prohibitions, restrictions or conditions as the court considers necessary for the purpose of protecting the public from the risk of serious violent harm. This also makes clear that the nature of a VOO is to protect the public from the risk of future harm. The individual is not punished for any of his past behaviour, and in particular, he is not being further punished for his initial qualifying offence. A VOO will restrict to some degree the freedom of the individual, but these restrictions are imposed for preventative reasons, not for punitive reasons.

126. Breach of a VOO is itself a criminal offence, which suggests that the VOO cannot also be a criminal measure. In addition, a VOO is made by a Magistrates Court on complaint, which is within the court's civil jurisdiction.

127. As stated above, VOOs are most similar to SOPOs. Parliament has already approved the use of these orders in the Sexual Offences Act 2003. For an individual to receive a SOPO, he must have been convicted of a specified offence and have subsequently acted in such a way as to make it necessary to make a SOPO for the purpose of protecting the public from serious sexual harm. The type of restrictions that can be imposed under a VOO are similar to those that can apply under a SOPO.

128. Following the Committee's recommendation, the Lords accepted a Government amendment at Report Stage so that VOOs have a maximum length of 5 years (see clause 97). They can only be renewed following a further court application, at which the court will need to be satisfied that continuation of the order is necessary and that the conditions in the VOO are also still necessary.

129. As the Government does not consider VOOs to be a criminal measure there is no requirement to comply with the criminal fairness guarantees of Article 6. However, the Bill contains a number of procedural safeguards for individuals in respect of whom an application for a VOO is made.

130. In our recent work on counter-terrorism policy and human rights we have drawn attention to the unsustainability in the long term of resort to methods of control which are outside of the criminal process and which avoid the application of criminal standards of due process. We are concerned that the introduction of VOOs represents yet another step in this direction. (Paragraph 1.91: 5th Report)

131. VOOs form part of a package of measures which already exists to tackle the issue of serious violence and are designed as an addition, rather than as an alternative, to powers already available within the criminal justice system.

132. Violent Offender Orders provide an additional and important risk management tool by imposing certain conditions on an individual where they are considered necessary for the purposes of protecting the public from serious physical or psychological harm. The Orders are therefore intended to prevent an individual from committing a serious violent offence. If such a violent offence does occur, an individual will come under the jurisdiction of the criminal justice process in the normal manner which we agree is entirely appropriate.

133. We welcome the Government's acceptance in debate that the criminal standard of proof applies. However, this acceptance should be spelt out on the face of the Bill to provide that before making a VOO, the court must be satisfied beyond reasonable doubt that the person has "acted in such a way as to make it necessary to make a violent offender order" (clause 151(2)(b)). As we have stated on previous occasions, we do not consider that issues of such importance, and with such serious consequences for the individual, should be left to guidance, but instead should be made explicit on the face of the Bill. (Paragraph 1.95: 5th Report)

134. We recommend that the Bill be amended in the manner proposed in Committee to make explicit that the appropriate standard of proof for an application for a VOO be the criminal standard, in accordance with the decision of the House of Lords in *McCann*. (Paragraph 1.96: 5th Report)

135. As set out above, it is the Government's view that VOOs are civil in nature. As such the civil standard of proof should apply in proceedings for a VOO. In *McCann* the House of Lords were content that the civil standard is not a static one; it is flexible depending on the seriousness of the allegations made against an individual. Where serious allegations are involved, the heightened civil standard should apply. This heightened standard is virtually indistinguishable from the criminal standard of beyond reasonable doubt.

136. The Government expects the courts to apply the heightened civil standard to VOOs. This would mean in practice that a court would apply the heightened civil standard in relation to the individual's behaviour since the date of his conviction for the qualifying offence. Consideration of whether a VOO is necessary would be a court judgment. The Government does not consider that it is appropriate to set out the criminal standard of proof on the face of the Bill; this would introduce a criminal concept into a civil order. The

criminal standard has not been set out on the face of any legislation dealing with civil orders. The Government is content to leave the question of standard of proof to the courts and are confident that they will be able to apply the appropriate standard to VOOs.

137. We are concerned that VOOs may be made without oral evidence or the opportunity for the individual to cross examine witnesses. We recommend that there needs to be a full adversarial hearing in order to ensure that the fairness guarantees in Article 6 ECHR are met. (Paragraph 1.97: 5th Report)

138. Given the significant consequences for an individual if an Order is made, we repeat our recommendation, for the sake of clarity and to protect the fair trial rights of those against whom applications for VOOs are made. (Paragraph 2.42:15th Report)

139. The Government's view is that a VOO is not a criminal measure. Accordingly, it is not necessary to comply with the criminal fairness guarantees of Article 6 ECHR.

140. However, the Government has considered the Committee's views and the Lords accepted a Government amendment at Report Stage so that the person subject to the VOO has the right to be heard at the application hearing and not just at the point of variation, renewal or appeal (see clause 100). As such, the individual's case against the making of a VOO will be before the court. The individual would also be able to put questions to anyone giving evidence in person at the hearing

141. The Government needs to ensure that hearsay evidence is available for use in an application for a VOO. This is important so that witnesses who feel intimidated from giving evidence directly can still have their evidence considered indirectly by the court. In recognition of the seriousness of Violent Offender Orders, the Government intends to make clear in guidance that hearsay evidence should only be used where necessary and that in practice we would want witnesses to attend the court hearing in person and therefore be cross-examined. To support this, the Government has invested a considerable amount of resource into supporting witnesses including witness protection measures such as screens and voice distortion technology. The Government has also committed to strengthen arrangements for victims further as part of its new Action Plan to tackle violence which was published on 18 February 2008.

142. We recommend that clause 153(3) (relating to interim violent offender orders) be amended to include, as a third requirement, that prima facie evidence be provided to the court that the individual has engaged in the behaviour set out in clause 151(2)(b). Further, we suggest that the period for which an individual IVOO may be granted be reduced from four weeks to a more limited period, and that IVOOs be nonrenewable. (Paragraph 1.99: 5th Report)

143. At Report Stage, the Lords agreed Government amendments which make such significant changes to the interim Orders to reflect the Committee's suggestions.

144. Firstly, the Bill has been amended to ensure that an interim Violent Offender Order will only be made when three conditions have been met (see clause 103). The conditions are: that an individual is a qualifying offender; that the court would be likely to make a Violent Offender Order in respect of that person; and that it is desirable to act before the

application for the full Order is determined with a view to securing the immediate protection of the public from the risk of serious violent harm caused by that person.

145. Secondly, the Lords amended the duration for which an interim Order can be applied by requiring that interim Orders are non-renewable and can only be imposed for a certain period of time as specified within each individual Order. The Committee Rights has suggested that the time period for which an interim Order can be applied should be restricted to two weeks. However, having considered this recommendation, the Government does not believe that this would always be in the best interests of the public whom we seek to protect nor the individual in respect of whom an application is being made.

146. Her Majesty's Courts Service (HMCS) has strongly recommended that the time period for which an interim Order might be applied should not specified or limited. This is to ensure that there is not a gap in supervision in the case of an interim Order expiring before a decision on the main Order is taken. HMCS has also stated that restrictions on time periods are unnecessary because the court will always know exactly when a decision on the main Order is expected.

147. We remain to be convinced that the imposition of a VOO or IVOO, particularly one with especially onerous terms, would always comply with Article 7 ECHR. We are disappointed that the Government has chosen not to put in place safeguards to ensure that an individual is not retrospectively punished and we recommend that the Government reconsiders its opposition to introducing safeguards in this regard. (Paragraph 1.102: 5th Report)

148. The Government remains of the view that the provisions on VOOs do not engage article 7. The VOO is not imposed as an additional punishment for one or more of the specified offences. VOOs are instead a civil preventative order with the specific purpose of preventing the risk of future serious violent harm. The Lords agreed Government amendments at Report stage which state even more clearly that VOOs can only be made on the basis of current risk and therefore before a VOO can be made, an up to date assessment of risk would be needed. Breach of the terms of a VOO will be a criminal offence, in line with arrangements already in place for other civil orders. This is in line with article 7 as breach of a VOO will be a criminal offence at the time that the breach is committed.

149. We welcome the Government's reconsideration of the provisions on VOOs, on which we expressed a number of serious concerns in our previous Report. As we have not seen the proposed Amendments, we are unable, at present, to comment on their substance or on the extent to which they meet the concerns that we raised. (Paragraph 2.41:15th Report)

150. The Government has noted the Committee's concerns and paragraphs 118-148 above refer to the amendments brought forward by the Government which respond to those concerns

Premises closure orders

151. We are pleased to note that the Government intends to produce guidance dealing more fully with the operation of premises closure orders in practice. However, in our view, this guidance will set out requirements which, for reasons of legal certainty and to ensure the proportionality of the measures with Convention rights, should be contained in the Bill itself. In particular, we are disappointed that the Government does not propose to include, on the face of the Bill, the requirement that a premises closure order only be imposed as a last resort, and that the needs of children and vulnerable adults be taken into account. We encourage the Government to reconsider its position in order to ensure that premises closure orders are proportionate to the interference with the rights to respect for family and home life (Article 8 ECHR) and the peaceful enjoyment of property (Article 1 of Protocol 1). (Paragraph 1.110: 5th Report)

152. The Government acknowledges the importance of closure notices and orders being made as a last resort after all other interventions and measures have failed or have been reasonably considered and that the consequences for children and vulnerable adults must be considered. However, we maintain that the best place for these important considerations is in the robust guidance that will be issued to practitioners instead of on the face of the Bill as proposed here. This is because placing too many obligations on practitioners will result in the orders not being applied for rendering the legislation without teeth and therefore useless. The Lords agreed a Government amendment at Report Stage to make the proposed guidance statutory and provide a duty on those using the power to have regard to the guidance (see new section 11JA of the Anti-Social Behaviour Act 2003 inserted by Schedule 20 to the Bill).

153. Ultimately, if children and vulnerable adults are affected by the closure of certain premises where significant and persistent anti-social behaviour occurs, orders would only be pursued as a matter of last resort after other interventions have been tried or considered. A multi-agency approach would have to have been taken first to tackle the nuisance behaviour by using the full range of support and enforcement measures available. The Government would therefore expect to see the use of, for example, acceptable behaviour contracts, parenting contracts, injunctions or ASBOs, alongside offers of support before a closure is pursued. Agencies are already under duties to safeguard and protect the welfare of children under the Children's Act 2004.

154. Before issuing a closure notice, the police and local authorities are bound to act in compliance with the ECHR and would consider the needs of any vulnerable people and children, the rights to respect for family and home life and the peaceful enjoyment of property as well as the interests of the wider public when gauging the proportionality of the notice. The court process is a further safeguard and magistrates would also weigh up such interests in their capacity as public authorities under the Human Rights Act. In addition to these wider duties and the robust guidance to be published, proportionality is already safeguarded on the face of the Bill, insofar as magistrates must satisfy themselves of the statutory test that the making of an order is necessary to prevent such disorder or nuisance.

Nuisance or disturbance on NHS premises

155. We consider that the Government has made its case for the necessity of a new power to deal with individuals who cause a nuisance or disturbance on NHS premises. The proposed new offence appears to attempt to strike a balance between the desire for

staff and patients not to suffer nuisance and disturbance and the needs of those requiring medical attention to be treated. We welcome the safeguards which the Government has proposed and its commitment to ensuring that the rights of individuals to access medical treatment or advice are protected. The question is whether the proposed measures put into effect the Government's commitment. We are concerned to see that the manner in which the power to remove may be exercised is to be contained in guidance, rather than on the face of the Bill and encourage the Government to reconsider this omission. In particular, we suggest that the Bill should be amended to include express provisions on the matters currently covered by Clause 172(2)(d) to (g), as the exercise of the powers in relation to these issues has the capacity to seriously interfere with an individual's Convention rights. We recommend that the Bill set out an indicative list of the factors which would constitute a reasonable excuse for the purposes of Clause 170(1). Whilst the Government has told us that nuisance or disturbance caused by an individual suffering a mental or physical condition will prevent the commission of an offence or removal, it is unclear whether this would include behaviour due to an addiction (e.g. to drugs or alcohol). We propose to write to the Minister to seek clarification on this matter. (Paragraph 1.122: 5th Report)

156. Key safeguards limiting the use of the power of removal are set out on the face of the Bill, namely that the authorised officer cannot remove a person if he has reason to believe that the person to be removed requires medical advice, treatment or care or that removal would endanger the person's physical or mental health.

157. The nature of the further provision we wish to make about the way the powers may be exercised will be comprehensive and will set out detailed examples, case studies and sample scenarios in which the powers can be used. Such further provision is thus not appropriate for inclusion on the face of the Bill and will be better dealt with in guidance. NHS bodies and authorised officers will be under a duty to have regard to the Guidance and we consider that this duty would ensure that important provisions, such as those relating to training and to the suitability of authorised officers, are adhered to.

158. It is important that further provision of this nature is made in guidance so as to allow NHS bodies to exercise the powers in a way suitable to their premises. It is not the case that the power will be exercised in exactly the same manner across all NHS premises as the size and character of the premises will impact in some way upon how the power is exercised. Therefore making further provision in guidance about the exercise of the power will provide the flexibility to help NHS staff comprehend the aims and objectives of the offence and power, whilst understanding how they will exercise the power safely and with a full regard to the rights of the person being removed in a manner which suits both their own needs and available resources.

159. Including express provisions of this nature in the Bill would restrict the flexibility for authorised officers to use their own expert judgement to determine if a person is committing or has committed an offence and can be removed from the premises. The situations in which a person can be suspected of committing an offence can be unique; therefore, there is a need to encourage authorised officers to be as objective as possible in their approach.

160. By issuing guidance, there is the flexibility to allow NHS hospitals to consider a variety of grades and role of authorised officer taking the nature and size of their premises into account. There is also the ability to ensure the authorised officer has regard to the guidance but can make their own objective decision on whether to remove an offender based on the unique nature of the situation and consider, in such a situation, whether to use force to remove the person. Guidance allows detailed examples and scenarios in which the power in clause 118 can be used, whilst not restricting use of the power to a particular situation and having NHS staff believe they can only be used in a very limited set of scenarios.

161. The guidance will comprehensively consider a wide range of rights the person who may be subject to the power of removal will have and would expect to be taken into account before the power of removal is exercised. NHS bodies and authorised officers will be under a duty to have regard to the guidance and would have to justify and decision to depart from it.

162. Issuing comprehensive guidance which NHS bodies and authorised officers are under a duty to have regard to provides flexibility in the way the powers are exercised. This will meet the needs of each NHS premises, enable NHS bodies to tackle nuisance or disturbance behaviour objectively and ensure correct safeguards are in place.

163. Paragraph 825 of the Bill's Explanatory Notes provides some examples of what may constitute a reasonable excuse for a person's nuisance or disturbance behaviour. Listing these or other examples on the face of the Bill would, however, again remove a degree of the flexibility and objectivity which the provisions require and may lead to the view amongst NHS bodies and authorised officers that only those matters appearing on the face of the Bill could constitute a reasonable excuse. For example, if an authorised officer believes that a person's nuisance or disturbance behaviour may be a result of a mental health problem and so constitute a reasonable excuse, then they should bring this to the attention of an appropriate mental health practitioner who will be able to make a more comprehensive assessment of the person. This process may differ slightly depending on the person's exact behaviour at the time or even if the authorised officer is already a mental health professional themselves, so including such an example on the face of the Bill would be unhelpful, as what would very much depend on the unique nature of the situation and would have to be documented in guidance.

164. To clarify, a person will not be able to commit an offence under clause 117 nor be removed under clause 118 if the person has a reasonable excuse for their behaviour. This includes the suspicion that the person may be suffering from a mental health problem which is a causal factor in their behaviour. A person's 'physical condition' does not automatically prevent them from being able to commit an offence, unless the person is on the premises for the purpose of seeking medical advice, treatment or care for this physical condition or for any other reason. Simply possessing a physical condition, such as a disability, does not prevent a person from committing an offence if they cause a nuisance or disturbance without reasonable excuse, refuse to leave the premises without reasonable excuse and are not seeking medical advice, treatment or care for themselves.

165. Behaviour consequential to an addiction to drugs and alcohol does not automatically qualify as a reasonable excuse for a person's nuisance or disturbance

behaviour, although it could constitute a reasonable excuse depending on the circumstances of the case at hand. If a person causes a nuisance or disturbance as a consequence of an alcohol or drug addiction and is seeking medical advice, treatment or care at the time they are causing the nuisance or disturbance, then they will be unable to commit the offence and cannot be removed. This measure acts as a safeguard for such persons to enable them to access help and support for their addiction.

166. It must be noted, however, that a key driver in developing these provisions was the high number of nuisance or disturbance cases resultant from a person suspected of being under the influence of alcohol or drugs. Respondents to the 2006 Department of Health consultation, 'Tackling nuisance or disturbance behaviour on NHS healthcare premises', spoke of such cases and under current law felt powerless to do anything about this themselves. This lack of action sometimes escalated to more serious offences such as assault against NHS staff.

167. The Government believes the safeguard in clause 117(1)(c) helps to protect those who are addicted to drugs or alcohol whilst leaving those who are not seeking medical advice, treatment or care open to be able to commit the offence and possibly be removed if their nuisance or disturbance behaviour results from drinking alcohol or taking drugs.

168. Whilst Clause 118(1)(c) seeks to ensure that those on NHS premises for the purposes of seeking medical attention receive that medical attention regardless of their behaviour, we consider that, for the sake of absolute clarity, it should be made explicit in guidance that even where the person's behaviour is due to drink or drugs, s/he must still be treated, if medical attention is required, and s/he cannot commit the offence, or be removed from the premises until such treatment has taken place. (Paragraph 2.47: 15th Report)

169. Whilst clause 117(1)(c) seeks to ensure that those on NHS premises for the purposes of seeking medical attention receive that medical attention regardless of their behaviour, we consider that, for the sake of absolute clarity, it should be made explicit in guidance that even where the person's behaviour is due to drink or drugs, he or she must still be treated, if medical attention is required, and he or she cannot commit the offence, or be removed from the premises until such treatment has taken place

170. Clause 117(1)(c) will prevent anyone from committing an offence if, at the time of committing a nuisance or disturbance against an NHS staff member, they are seeking medical advice, treatment or care.

171. Clause 118(4) will prevent an authorised officer from exercising the power to remove a person reasonably suspected of committing or having committed the offence where the officer has reason to believe that the person requires medical advice, treatment or care or removal would endanger the person's physical or mental health.

172. The provisions in clauses 117(1)(c) and 118(4) are designed to ensure that, where anyone needs treatment advice or care, there are safeguards in place to ensure such treatment, care or advice will be provided. Addiction to drugs or alcohol will not exclude anyone from the operation of these safeguards.

173. The Government acknowledges the need to ensure that NHS staff understand the legislation and the safeguards within it. Guidance issued under clause 119 will explain the operation of the legislation in detail. Potential scenarios covering various eventualities will be covered in guidance, including issues relating to drugs and alcohol.

Special Immigration Status

174. We welcome the Government's clarification that the Secretary of State's designation of a person under clause 181 of the Bill would be unlawful if, in the opinion of a court, the effect of designation would breach the UK's obligations under the Refugee Convention. (Paragraph 1.125) We are concerned that this Part of the Bill gives rise to a further risk of breaches of the Refugee Convention by the UK and we recommend that the statutory construction of Article 1F of that Convention be repealed. (Paragraph 1.126: 5th Report)

175. The Government is pleased that our earlier clarification went some way towards reassuring the Committee. However, we do not believe that the statutory construction of Article 1F(c) contained in section 54 of the Immigration Asylum and Nationality Act 2006 either has, or is likely to have, the effect described by the Committee.

176. As was made clear at the time, section 54 of the 2006 Act was declaratory in nature, and did not represent any change to the interpretation of Article 1F(c) of the Convention.

177. The Government remains of the view that, where there are serious reasons for considering that a person has been guilty of committing, preparing or instigating terrorism, or of encouraging or inducing others to act in that way, he is rightly excluded from the protection which would otherwise be afforded him by the Refugee Convention.

178. This view was endorsed by Parliament when passing the legislation less than 2 years ago, and we do not propose to repeal the section concerned.

Prohibition on industrial action by prison officers

179. We consider that the duty on the State to ensure the safety and well-being of prisoners is a fairly compelling consideration capable in principle of justifying some restriction on the right of prison officers to take some forms of collective action to protect their interests. The question is whether the restrictions contained in the Bill are proportionate to the pursuit of that aim. (Paragraph 1.130) First, why is it necessary, in order to protect the welfare of prisoners, to prohibit all forms of industrial action by prison officers rather than just strike action? Second, has the point of last resort been reached, or is there still a possibility that a voluntary agreement with the Prison Officers Association could be reached? We will write to the Minister in relation to these points and may return to the matter in a future report. (Paragraph 1.131: 5th Report)

180. The provisions engage Articles 10 and 11 of the ECHR as they restrict the ability of prison officers to take industrial action. However, those rights do not guarantee the right to take such action and it is well established that the rights of essential workers (such as prison officers) can be restricted provided that this is done in a measured and proportionate manner. The rights of prison officers to take industrial action must be weighed against the need to ensure the safety of prisoners, other staff and the public.

181. The key factor in this consideration must be the risk of harm should different types of industrial action by prison officers be permitted, including instances of work to rule and the withdrawal of goodwill. The Government's position is that any type of industrial action that disrupts a prison regime introduces an element of instability which increases the risk of harm, whether to prisoners, other staff, or members of the public. Action short of strike action would:

- limit the ability to provide the most fundamental amenities for the prisoners in our care, such as food and medication;
- undermine the wider operation of the criminal justice system in which the timely and efficient transfer of prisoners to and from courts is essential; and,
- compromise the work of third party providers including the NHS, who we rely on to deliver key elements of our offender management programmes.

182. Collectively, this would rapidly destabilise the prison estate and the wider Criminal Justice System and has the potential to incite prisoner unrest – creating a volatile environment and putting the safety of prisoners, staff and the wider public at risk.

183. On the possibility of reaching a voluntary agreement, the POA special delegates' conference on 19 February 2008 voted overwhelmingly in favour of a motion not to accept any agreement containing a no-strike provision. In these circumstances, it is extremely unlikely that any such agreement will be reached in the foreseeable future. It is not the Secretary of State's intention to suspend the statutory restrictions on industrial action until such an agreement is in place.

184. Although a prohibition on industrial action short of strike action is capable of being a justified restriction on the right to freedom of association of prison officers, the extent of the prohibition currently proposed in the Bill, which includes any action likely to affect the normal working of a prison, is disproportionate. We recommend that the Bill be amended by deleting the reference to action likely to affect the normal working of a prison and replacing it with "action likely to put the safety of prisoners, staff or the public at risk." (Paragraph 2.57:15th Report)

185. The Government welcomes the Committee's finding that it is justifiable to restrict action short of strike action provided the restriction can be shown to be both necessary and proportionate. The "affect the normal working of a prison" wording reflects the legally binding agreement in force since 2005, and has satisfactorily addressed safety issues without any unjustified infringement of prison officers' rights. In the Government's view, any type of industrial action that disrupts a prison regime introduces an element of instability which increases the risk of harm, whether to prisoners, other staff, or members of the public.

186. However, the Government recognises the Committee's concerns that any definition enshrined in statute should refer explicitly to the overriding issue of safety, rather than the proxy of the "normal working of a prison". Accordingly, the Government accepts the Committee's recommendation in principle, notes the amendment tabled for Lords Report by the Earl of Onslow to implement that recommendation and has tabled

amendments for Lords Third Reading to incorporate it into the Bill, subject to minor drafting changes (relating principally to clarification of the terms "staff" and "the public").

Disclosure of convictions of sex offenders

187. We share the concerns about the potentially negative consequences of disclosing convictions of sex offenders, which appear to us to have the potential to undermine the overall intention of the new Clause, namely child protection. We recommend that guidance make clear that authorities must consider whether disclosure would indirectly identify the victim(s) of a sex offender. (Paragraph 2.63:15th Report)

188. Current practice in relation to disclosure is expected to take account of all relevant factors and involves all relevant agencies, including social services. Therefore, in practice, the risk of identifying a victim through disclosing an offender's details and any steps that may be necessary to mitigate this risk are issues that should be thoroughly considered.

189. However, the Government recognises the particular importance of ensuring that the process of disclosure does not have an adverse impact on victims and accepts the Committee's recommendation to amend the guidance so that MAPPA responsible authorities will explicitly be required to consider the risk of identifying a victim when making a disclosure.

190. Whilst we accept that civil or criminal remedies could provide limited redress against impermissible disclosure, including for breach of Article 8 ECHR, at that point the damage to an individual's privacy, and to his or her family and home life, would have been done. We recommend that there be a presumption in favour of notifying an individual in advance that the authorities intend to make a disclosure and provide an opportunity for an individual to make representations as to whether or not the disclosure should take place, and the manner in which it would be made. (Paragraph 2.64:15th Report)

191. The involvement of the offender in the process of disclosure is identified in guidance as an important element of good practice that should be considered wherever possible. In most cases an offender is informed in advance of disclosure and the disclosure is made in co-operation with the offender, sometimes by the offender himself in the presence of their offender manager or a police officer. We expect this practice to continue, where appropriate. In these cases, offenders are able to raise arguments with the MAPPA authorities or indeed to seek an injunction preventing disclosure before any interference with the offender's right to family life occurs.

192. We do not believe that it would be advantageous to introduce a statutory presumption in favour of informing the offender prior to disclosure. The current system under which the guidance encourages MAPPA authorities to inform the offender works effectively and we do not consider that there is a need to limit the MAPPA authorities' discretion in this way, on the face of the legislation, given that they will in any event be bound to follow the statutory guidance and act in accordance with Article 8.

193. There may be cases where it is not appropriate to inform an offender in advance that a disclosure will take place or where the need to act urgently to protect a child or children could be hindered by a statutory presumption such as you suggest, thereby

endangering the particular child or children in that case. We believe MAPPA are best placed to judge on a case by case basis the degree of involvement of the offender in the disclosure process.

Appendix 3: Letter from Jim Knight MP, Minister of State for Schools and Learners, Department for Children, Schools and Families, dated 5 June 2008

Nineteenth Report of Session 2007-08: Education and Skills Bill

On 13 May 2008 the Joint Committee on Human Rights (JCHR) published its 19th Report of the 2007-08 Session concerning the human rights implications of the Education and Skills Bill currently before Parliament. As the lead Minister for the Bill I am responding to conclusions and recommendations of the Committee and, in doing so, I use the numbering adopted on pages and 18 and 19 of the report:

1) We welcome the Government's recognition of the "increasing autonomy" of young people approaching adulthood and the positive duties incumbent on the state to respect and facilitate the enjoyment of their rights, independent of their parents or carers. However, we suggest that it is, at the very least, confusing why, given this recognition, the Government has chosen to coerce young people into education and training through the use of criminal sanctions, in a way which it could not possibly do in relation to those over the age of 18. We also regret the Government's failure to give any real consideration to the human rights implications of the proposed duty in the Explanatory Notes. This hinders effective parliamentary scrutiny of the clause's compatibility with human rights. (Paragraph 1.9)

Article 12, UNCRC states that *"State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."*

The UNCR suggests that the state must give a child the right to express his or her own views according to age and maturity.

It is between the ages of 16 and 18 that a young person moves from becoming a child to becoming an adult. It is in recognition of this that the law gives 17 and 18 year olds specific rights — the right to drive at 17, the right to purchase alcohol and cigarettes at 18.

The Bill recognises this transition in young people's maturity and recognises their right to express choice. Unlike those of compulsory school age, the Bill places the responsibility to participate in education on young people, rather than on their parents. Young people are also able to choose how they participate from a wide range of options — from full time education at school or college, to employment with part time training. The flip-side of this increased right to autonomy and decision-making power is the responsibility to participate.

The only choices that would not be available to young people are doing nothing or going into a job without training, as we know that these lead to worse outcomes for young people.

I would like to draw to the Joint Committee's attention that particular effort went into making the consultation on the Green Paper proposals more accessible to young people. This included the publication of *Reach*, a consultation magazine, aimed at young people which was in high demand and through which we gathered the views of 1,708 young people. We also consulted young people through focus groups; we contacted children in year 5 through a number of schools and consulted young people who have barriers to participation, or who are not in education, employment or training through the third sector organisations Fairbridge and Foyer.

2) The duty to participate in education or training raises issues under Article 8 ECHR (the right to respect for private life, which can include aspects of an individual's working life and employment). Such rights may only be interfered with when it is necessary and proportionate to do so, in pursuit of a legitimate aim. Whilst we do not deny the potential benefits to some young people and the economy of their continuing in education and training, in our view, relying on criminal coercion for its enforcement is potentially disproportionate. (Paragraph 1.15)

We think it is unclear whether compelling a young person to participate does in fact engage Article 8.

Article 8 does not confer a generalised right to self determination or personal autonomy — it is concerned with the notion of 'respect' and it is therefore not the case that <u>any</u> interference with or intrusion into an individual's personal life constitutes a lack of respect by the state for that personal life. The Strasbourg court has recognised that certain protected interests, fall within the concept of private life in Article 8, and the duty to participate does not fall within any of these.

In addition, the duty does not contain an indefinite obligation — it is time-limited and does not compel the young person to participate in a particular form of learning and there is therefore a significant element of personal choice. Furthermore, the duty to participate does not intrude upon family life and there will be no sanction if the young person has a reasonable excuse for not participating.

However, even in the event Article 8 is engaged, our view is that the interference is clearly, in pursuit of a legitimate aim as the provisions in the Bill are in the economic interests of the country. As set out in the Leitch Review of Skills, the opportunities for a young person who has few or no skills are likely to reduce significantly in the next 20 years. Their prospects are already poor with nearly 40% of 16 year olds who leave school with no qualifications becoming NEET, compared with just 2% of those with 5 good GCSEs. It is true that the majority of the young people who drop out will be from disadvantaged families, and a significant number will have specific needs. And the benefits of staying on are clear in terms of improved life chances, as the Joint Committee acknowledges.

We think that that the interference is also <u>proportionate and justified</u>. The primary enforcement system is one of administrative penalties — criminal sanctions can only apply at the very end of the process. We have considered very carefully whether there is a viable alternative to criminal sanctions at this final point and concluded that there is not.

A young person cannot even enter the enforcement system, let alone reach the end of it, while they have a reasonable excuse for not participating or have unmet needs. Individual

personal circumstances will be taken into account at every stage of the enforcement process. Furthermore, there are safeguards built into the system, such as an independent panel to hear appeals and consider the local authority's judgements, to ensure that young people do not face enforcement action inappropriately.

The Bill does not, as the Committee claims, *"coerce young people into education and training through the use of criminal sanctions"*. The focus of the policy is on engaging young people in learning through the provision of worthwhile routes and the right support. An enforcement system is required to make the requirement meaningful, but its use would be an absolute last resort. It is only at the very end of this process, which it would be difficult and rare for a young person to reach, that there is any question of criminal sanctions.

3) We question whether simply "enabling" or "assisting" the performance of statutory functions is sufficient, in every circumstance, to meet the necessity test. We recommend that these particular provisions of the Bill be amended to provide more precise purposes for which information may be disclosed. (Paragraph 1.24)

We do think that "enabling" or "assisting" the performance of statutory functions is sufficient in these circumstances to ensure the fulfilment of what the Joint Committee refers to as "the necessity test". There are a number of statutory functions that are set out in Part 1 of the Bill including the duty to promote fulfilment of the clause 2 duty (clause 10) and the duty to identify those not fulfilling the duty imposed by clause 2 (clause 12). The information that may lawfully be disclosed under clauses 14, 15 and 16 would need to be reasonably required or necessary for the fulfilment of those and other statutory functions in Part 1.

I would like to remind the Joint Committee that, in considering whether a disclosure would be lawful under clauses 14, 15 and 16, account must be taken of the operation of principles of public law, the Human Rights Act 1998, the common law of confidence and the Data Protection Act 1998. We do not think that it is possible, or desirable, to devise a form of statutory language that encapsulates the operation of all of these statutory provisions and legal principles and imports such provisions and principles into these particular clauses. The existing legal framework for data sharing (which is contained in more than one source) operates satisfactorily and these clauses must be seen in that context. The Joint Committee may wish to refer to our letter to the Public Bill Committee of 8 May 2008 which sets out the Government's view on how exactly the existing legal framework applies to the information sharing provisions in Part 1 and Part 2 of the Bill.

We do not think that in this context detailing in a more precise way the purposes for which information may be disclosed in primary legislation is the best way to convey to those that need to know how exactly information can be lawfully shared and used. We intend to issue guidance to local authorities under clause 18 of the Bill, on how we expect local authorities to carry out their duties and powers and we think that that is a better approach.

4) Whilst we are pleased to note that the Government has chosen to deal with the categories of information which may be disclosed in primary rather than secondary legislation, we draw attention to the vagueness of many of those categories. We recommend that the Bill be amended to ensure that the information which may be

disclosed is defined with greater specificity, preferably in an exhaustive list. This is vital to ensuring that both the authorities making the disclosures and the individual subjects of disclosures understand the information which may or may not be disclosed and the circumstances in which that disclosure may take place. (Paragraph 1.26)

The Government's view is that there are adequate legal safeguards (contained in principles of public law, in the Data Protection Act 1998, the Human Rights Act 1998 and the common law of confidence) which ensure that information is only disclosed in so far as it may be reasonably required and such disclosure is proportionate. Data sharing is carried out under these provisions for purposes that are in the public interest in that they promote the well-being of individuals and the economic well-being of society as a whole. That is why it would be undesirable to unnecessarily restrict the disclosure of relevant information. Compiling exhaustive lists or attempting to be more specific might have this effect. In addition it would remove the subtlety of judging what information might be needed in one case, but would not be in another.

In some individual cases, it may be necessary:

- To receive information from a Strategic Health Authority that a young person had died, so that the deceased's family would not be contacted which they could find distressing

- To receive information from a Youth Offending Team that an Order had been issued against a young person (though normally the information would not include details of the offence) — which would accompany a referral of the young person to Connexions by the YOT

- To receive information from the police about a young person being the victim of domestic violence

- For a Primary Care Trust to contact Connexions with information about a teenage mother who was not engaged with Connexions.

Again, the Joint Committee may wish to refer to our letter to the Public Bill Committee of 8 May 2008 on this matter. We intend to issue guidance under clause 18 to local authorities, on how we would expect them to carry out their new duties and powers under Part 1.

In addition the Joint Committee will wish to note that the Government has tabled amendments to clauses 15 and 61 which limit the information that may be supplied to "social security information", and these were passed by the House during the Bill's Commons Report Stage on 13 May.

5) We repeat this conclusion [that the existence of the Data Protection Act does not exhaust the obligation on the State to provide adequate safeguards] in relation to this Bill. (Paragraphs 1.29-1.30)

We agree that it may be necessary for legislation to limit the scope of powers to disclose personal information, over and above the safeguards contained in the Data Protection Act and the other sources of law as mentioned previously.

That is why each of the information clauses specifies the purposes for the disclosures and restricts them to those purposes only. Disclosing information other than for the specified purposes would therefore be unlawful.

In addition clauses 14 and 57 (information provided by learning providers) provide an additional safeguard by enabling young people to instruct the provider not to pass on information beyond their basic identification information. This was included in s117 of the Learning and Skills Act 2000, which clause 57 replaces for England.

Clauses 15 and 61 (information provided by the Secretary of State) contain a specific criminal offence for unlawful disclosures of personal data, which is necessary so that it is commensurate with offences in other social security legislation. That is why no such offences appear in the other clauses, as there is already an offence provided in the Data Protection Act for unlawful disclosures not relating to social security legislation.

The purpose of the Data Protection Act is to regulate the collection, use, storage and distribution of personal data and therefore the Bill must be read alongside the Act and other data protection law, which apply to all disclosures of personal data. They are of general application, and the Government's view is that they do not require explicit references to them or their principles on the face of other legislation for this to be the case. Indeed, to make such references in one piece of legislation whenever that legislation contains data sharing provisions would be unnecessary as a matter of law and would increase the burden on Parliament when it scrutinised such legislation. It would also be confusing to have so much repetition.

We are clear that, although the Bill proposes to create statutory duties and powers for public bodies to provide information, this does not remove the responsibility of these public bodies to act in accordance with the relevant data protection legislation and legal principles, as we have set out at length in the recent letter to the Public Bill Committee on this matter.

6) We are concerned by the confusion surrounding the operation of the purported safeguard in clauses 14(4) and 57(4), which is exacerbated by the need for public bodies to have regard to a number of pieces of legislation to interpret their statutory duties in relation to both clauses. We are therefore dubious as to whether the position will be sufficiently clear to enable staff to be sure when they may disclose information without consent, and when consent will be required. Such confusion is likely to be detrimental to the privacy rights of individuals. We recommend that the issue be clarified in guidance under clause 18. (Paragraph 1.34)

We are happy to clarify this in guidance issued under clause 18 (and in non statutory guidance in relation to clause 57(4))

Clauses 14 and 57 treat basic identification information and additional information differently. Young people (or, if younger than 16, their parents) can instruct the learning provider not to disclose the additional information, which has been referred to as the 'opt-out'.

So consent for disclosure is not required by these clauses. However consent could be required in law in exceptional cases if the educational institution holds extremely sensitive

information, for example if it holds information obtained under an obligation of confidence, such as in the case of sensitive medical records and there isn't a sufficiently strong public interest justification in disclosing the information.

These arrangements have been in place since 2000 for disclosures to Connexions (under s117 of the Learning and Skills Act 2000) and have a good track record.

7) We recommend that, in relation to any of the information sharing provisions dealing with personal information, the Bill be amended to require that an individual and his or her parents be notified, at a minimum, annually of the personal information (beyond an individual's name and address) which may be disclosed, and be required to decide whether to opt-in to permit such disclosures being made. However, before the disclosure of sensitive information may take place, written consent should be sought and received. (Paragraph 1.35)

We completely agree that young people and their parents should be notified annually. Learning providers should already do this and the existing arrangements for disclosures to Connexions (under section 117 of the Learning and Skills Act 2000) are established and work well.

In addition, the principle of fairness contained in the Data Protection Act already means that it is necessary to inform a person if personal data relating to him or her is being, or will be, shared, if such notification is practicable.

Currently, schools write to the parents of all pupils approaching the age of 13, and then annually, letting them know that information about their children will be shared with the Connexions service unless they request that it should not be. Parents are provided with a form to sign and return to the school if they do not want information about their child to be passed to Connexions which goes beyond name, address, date of birth and a parents name and address. These arrangements are sufficient and respect the will of Parliament through the requirements of the Data Protection Act.

It is right that consent is sometimes required for disclosures of highly sensitive personal information. That is why, under the law relating to the obligation of confidence, for example in relation to sensitive medical records, that a data controller is already restricted from using information for a purpose other than that for which it was provided, unless it obtains the individual's consent and unless there is a sufficiently strong public interest justification in favour of disclosure. This is the case under common law.

We will clarify the operation of clauses 14(4) and 57(4) through guidance and this guidance will clarify when consent is required before the disclosure of sensitive information.

8) The lack of safeguards on the face of the Bill is in our view unacceptable. Specific core safeguards in relation to the powers to enter, inspect and take copies of records should appear on the face of the Bill, not least to provide protection for documents subject to legal professional privilege. Requiring the surrender of documents subject to privilege would create a significant risk of incompatibility with Articles 6(1) and 8 ECHR (Paragraph 1.39)

We are giving careful consideration to bringing forward a government amendment during the passage of the Bill through the House of Lords in response to the recommendation. We are exploring an amendment which would introduce safeguards onto the face of the Bill in relation to the powers to enter, inspect and take copies of records contained in clauses 82 and 96 in order to provide protection for documents which are subject to legal professional privilege. We remain of the view that the Chief Inspector, being a public authority for the purposes of the Human Rights Act 1998, is obliged to act compatibly with Convention rights when conducting inspections. The duty to act compatibly would apply in cases involving legally professionally privileged materials. Therefore, we disagree there is a "significant risk of incompatibility with article 6(1) and 8 ECHR". Nevertheless, we are considering an amendment to put the matter beyond doubt.

9) We are pleased to note that the Bill proposes to permit sixth-form pupils to opt-out of religious worship in non-maintained special schools. However, we question whether the Bill gives sufficient weight to the rights of a child to freedom of thought, conscience and belief under Article 9 ECHR and to Article 12 of the UNCRC. (Paragraph 1.42)

10) We recommend that the Government reconsiders its objection to permitting a child of sufficient maturity, intelligence and understanding to withdraw from religious education and takes into account our previously expressed views on this issue. As for religious worship, we recommend that children who are not in the sixth-form but who have sufficient maturity, intelligence and understanding be permitted to withdraw. This could be simply remedied in the Bill by replacing "sixth-form pupil" (in new section 342(5A)(b)(i) of the Education Act 1996 - see clause 127) with "child of sufficient maturity, intelligence and understanding." (Paragraph 1.45)

The purpose of clause 127 is to align the position of maintained and non-maintained special schools. During the passage of the Education and Inspections Bill 2006 a government amendment was made to allow pupils above compulsory school age in maintained the right to withdraw from collective (religious) worship. There are a number of reasons why this amendment did not go further by allowing pupils the right to withdraw from Religious Education or by allowing younger pupils to withdraw from collective worship.

Article 12, UNCRC states that *"State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child"*

The UNCRC suggests that the state must give a child the right to express his or her own views according to age and maturity.

It is between the ages of 16 and 18 that a young person moves from becoming a child to becoming an adult. It is in recognition of this that the law gives 17 and 18 year olds specific rights — the right to drive at 17, the right to purchase alcohol and cigarettes at 18.

The Bill recognises this transition in young people's maturity and recognises their right to express choice. This clause provides for those pupils over compulsory school age attending non-maintained special schools to make choices for themselves relating to attendance at

the daily act of collective worship. In relation to younger children, there remains a parental right of withdrawal.

There is a proper distinction to be drawn between participation in collective (religious) worship and attendance at religious education lessons on the grounds of the nature of those activities. We do not believe that teaching children about religion in an objective, critical and pluralistic manner in religious education lessons (especially where, as here, there is a parental right of withdrawal from RE) is a breach of their human rights.

The Government continues to believe that it is not practicable to require schools to conduct the individual assessments which a right to withdraw based on sufficient maturity would require. Such one-to-one assessments may well require professional advice in considering whether children have sufficient maturity, understanding and intelligence to make an informed decision. Parents have the right to withdraw their child from all or any part of religious education and / or collective worship and sixth form pupils can withdraw themselves from collective worship. We believe this strikes the right balance.

Appendix 4: Letter from the Rt Hon Dawn Primarolo MP, Minister of State, Department of Health, dated 1 May 2008

Human Fertilisation and Embryology Bill

1. Following the publication of your report on the Human Fertilisation and Embryology Bill on 18 March 2008, this letter sets out the Government's response to your conclusions and recommendations. We continue to believe that the proposals in the Bill are compatible with the Convention.

Background

In so far as these provisions [the extension of legal parenthood to same sex couples and the availability of parental orders to unmarried and same sex couples] reduce the risk of discrimination in relation to fertility treatment, we agree with the Government that the provisions in the Bill which extend parental rights in relation to same sex couples and unmarried couples are human rights enhancing measures. (Paragraph 4.5)

2. The Government welcomes this comment by the Committee. Parliament has passed legislation allowing the legal recognition of civil partnerships and to prevent discrimination on the grounds of sex and sexual orientation. In line with this wider policy, the Bill provides for civil partners and same sex female couples to be the legal parents of children born through assisted conception, including being recorded on the birth register as a parent. We are of the view that enabling same sex couples to both have the status of legal parents will also safeguard the welfare of any child born to them by ensuring they have a recognised legal relationship with both parents, rather than only one.

Access to donor information

In light of the weight being placed by the Government on the effect that a lower threshold for access to identifying information may have on potential donors, we call on the Minister to provide further information about the evidence base for its view that providing identifying information to 16 year olds or to Gillick-competent children

would deter potential donors and undermine fertility services. We recommend that the advice of the National Gamete Donation Trust on this issue is published to allow parliamentarians and others to scrutinise effectively the Government's view. (Paragraph 4.14)

3. With regard to the age at which donor-conceived people can access identifying information about their donors, the Committee is seeking further information about the Government's view that providing such information to 16 year old donor-conceived people, or to those under 16 who are Gillick competent, would deter donors. In considering our policy on this issue, we sought the views of the National Gamete Donation Trust (NGDT), and we understand they have written to you directly with their views so that you may be aware of their concerns.

4. There is, in our view, a general perception that the two years between 16 and 18 years of age are important ones in the process of becoming more mature. Following the removal of anonymity, donors have to consider how they would feel if a donor-conceived person decided to approach them. It is our view, which is drawn from discussions with the NGDT, that many donors would have concerns about the prospect of contact from a 16 year old, to the extent that those concerns would outweigh their willingness to donate.

The "need for a father"

Without justification, such distinctions may be in breach of the right to respect for private life without discrimination (as protected by Article 8 and Article 14 ECHR). Similarly, the Convention prohibits unjustified discrimination between married and unmarried parents for the purposes of recognition of parental responsibility, or wider family law decisions on access and custody. (Paragraph 4.16)

Since it may reduce the risk that there could be unjustified discrimination against single mothers, or those in a same-sex relationship, in the provision of fertility treatment, we consider that the removal of the gender specific reference to the "need for a father" is a human rights enhancing measure. (Paragraph 4.17)

We welcome the requirement in the Bill that the HFEA Code of Practice provides guidance on the meaning of "supportive parenting".

Appropriate guidance must be issued by the HFEA to help providers of fertility services understand the extent of their obligation to consider the welfare of any child and to ensure that the need to consider 'supportive parenting' is not applied by providers of fertility services in a way which still carries a risk of unjustified discrimination against same sex couples and single women. (Paragraph 4.19)

5. The Government welcomes the Committee's view that the removal of the phrase the "need for a father" is a human rights enhancing measure. Following much detailed debate during the passage of the Bill through the House of Lords, the Government brought forward an amendment to replace the reference to a child's "need for a father" with a reference to their "need for supportive parenting". We believe that the term "supportive parenting" does not discriminate against either same sex couples, unmarried heterosexual couples or single women and instead values the role of all parents.

6. We will draw the Committee's recommendation to the HFEA's attention to take into account when drawing up their guidance. The Government indicated during debates on the Bill that we envisage supportive parenting would involve demonstrating a person would be willing and able to make a long-term commitment to safeguard and promote the child's health, development and welfare in a manner appropriate to the age and development of the child, to provide direction and guidance.

Safeguards for personal information

The Bill should be amended to make clear on its face that where the information to be disclosed engages Article 8 the test of necessity must be met. We recommend that all references to the power to disclose personal information, or enable the disclosure of personal information, as and when it is "expedient" are removed. (Paragraph 4.25)

7. We recognise the Committee's concerns about the safeguards for disclosure of personal information. However, I believe that there are real safeguards in place, and accepting this recommendation could unnecessarily fetter the HFEA's ability to disclose information where Article 8 of the Convention is not in play.

8. As was outlined during debate in the House of Lords, the authorisation process allowed for in new section 33C is intended to provide a method of last resort. It cannot be used by researchers to circumvent the need to seek patients' consent, where it is reasonably practicable to consult them. New section 33C(5) requires that the regulations may not enable or require identifying information to be disclosed or processed for any purpose, if it would be reasonably practicable to achieve the purpose by other means. Further to this, the issue of necessity will need to be approached rigorously on a case-by-case basis.

9. In relation to new section 8D(2), the provision is intended only to lift any duty of confidence. It does not provide for information to be disclosed once the duty of confidence is lifted. It is still necessary to comply with other legal obligations such as the Data Protection Act or Article 8 of the Convention where that Act or Article is relevant. It would therefore be unclear to refer to Article 8 and personal information in section 8D(2).

Contracting out by the HFEA

We do not share the Government's confidence that the Bill will ensure that the individual will retain a remedy against the HFEA for any breaches of Convention rights which are a result of the action or inaction of a contractor. In any event, we disagree with the Government's assertion that contracting out in these circumstances will not undermine the protection offered to third parties by the Human Rights Act. As we have consistently pointed out in our reports on this subject, a remedy against a commissioning public authority offers significantly less protection to a service user than the direct application of the HRA to a service provider. Without the direct application of the HRA, there will be no incentive to service providers exercising contracted out functions to take a positive approach to the rights of their service users. (Paragraph 4.28)

10. The Government has considered this matter and remains of the view, as set out in the letter to the Committee dated 14 December 2007, that there are appropriate safeguards in place in the Bill to ensure that individuals retain a remedy against any breaches of the

Convention rights. Section 8C(5) of the Bill ensures that the HFEA retains responsibility for contracted-out functions. The HFEA, as a public body, has a legal duty to comply with section 6 of the Human Rights Act 1998. They will meet this duty for example by ensuring that contracts include the necessary safeguards in respect of confidentiality, with appropriate sanctions for any breach. Whatever terms are included in the contract, they will not remove the liability for any breach of confidentiality, which will, under the legislation, continue to rest with the HFEA itself. We are satisfied that these arrangements provide the proper protection of Convention rights in respect of personal information.

11. As regards the confidentiality of any information held by contractors, there are of course safeguards in place other than human rights legislation. There are further provisions in the Bill itself that ensure the protection of confidential information, as well as protection under the terms of the Data Protection Act.

Donor conception and birth certificates

We share the Government's concern that proposals to amend the process of birth registration raise serious concerns about the privacy of donor-conceived people. Conflicting views have been raised over the value of the proposals, including whether a change would lead to more people becoming aware of their status and whether or not a change would be welcomed by donor-conceived people. We note that the Government have made a commitment to keep this issue under review. The Government plans to consult with relevant stakeholders on whether a full public consultation should go ahead in 2008-09. We consider that the registration process should only be changed if there is objective evidence that it is necessary and that the change will not have a disproportionate impact on the ability of donor-conceived people to keep their birth status private if they wish to do so. (Paragraph 4.33)

12. During debates in the House of Lords, the Government committed to carrying out a review, within 4 years of commencement of the Bill, into whether birth certificates should be annotated in some way, or to find the best way to ensure that donor-conceived children are told about their origins.

13. We share the Committee's view that the registration system should only be changed if there is objective evidence that it is deemed necessary. We welcome that the Committee also highlighted that no change should have a disproportionate effect on donor-conceived people keeping their birth status private if they wish to do so.

Other issues raised by the Bill

We accept that in principle, the requirement for consent to the use of genetic material for these purposes is not absolute and that in some limited circumstances proceeding without consent may be justified. (Paragraph 4.38)

Any amendments proposed by the Government and containing safeguards for the protection of human rights should be published at an early stage to allow for effective scrutiny. (Paragraph 4.39)

Where the Government provides a further explanation of its views on the human rights compatibility of provisions in a Bill, it would assist effective scrutiny if this explanation

were included in the Explanatory Notes which accompany the Bill when it passes from the first to second House. (Paragraph 4.40)

14. The Government undertook to give further consideration to a number of important issues raised in the House of Lords, including issues around consent, and is in the process of doing so. We will write separately to the Committee on any Government amendments that significantly alter the policy of the Bill, or the Bill's human rights compatibility.

Appendix 5: Letter from Baroness Delyth Morgan of Drefelin, Parliamentary Under Secretary of State for Intellectual Property and Quality, Department for Innovation, Universities & Skills, dated 1 May 2008

Sale of Student Loans Bill

I am writing to you as Chair of the Joint Committee on Human Rights, in response to the Committee's fifteenth report of the current session, which includes coverage of the Sale of Student Loans Bill. I acknowledge the Committee's comments about the extent to which we have made it explicit that purchasers will not have the right to alter terms and conditions of sold loans, and note its conclusion not to recommend any amendment to the Bill on that issue, given the statements the Government put on the record during passage through House of Commons stages of the Bill.

Given the Committee's particular interest in the issue of future changes to terms and conditions, I am writing to draw your attention to amendments to the Bill we are tabling today that touch upon this issue. Lords Committee is on Thursday 8 May.

The amendments spring from discussion we have had with our recently-appointed sales arranger (a team from Deutsche Bank), which is helping us prepare for student loan sales in 2008-09. We want to take advantage of their expert advice to ensure that we have provisions in the Bill that are clearly understood by potential investors and will thus facilitate a sale that can yield good value for money for the taxpayer.

The issue of greatest substance concerns the Government's ability to amend Regulations affecting the terms and conditions of all loans. Purchasers will have no ability to alter terms and conditions of sold loans, and the Government will retain this power to vary them. In asset sales of this kind it is unusual for potential purchasers to face the prospect of such change, so we have had to consider how to handle the concerns that they might have that a future Government could, for example, raise the repayment threshold in a way that would reduce the repayment flows to which the purchaser would be entitled.

At present, we have a provision in the Bill for compensating purchasers if we were to change terms and conditions of loans after the sale in a way that adversely affected the repayment cash flows from the purchasers' perspective. Because we are legislating for a long-term programme of sales and want to ensure sales achieve good value for money, we think we ought to have at our disposal more than one way in which investors can be given confidence that a change in the terms and conditions of repaying the loans will not affect the value of the assets they have bought. So we are bringing forward an amendment to Clause 2 that would enable the Government to make undertakings at the point of sale

about how specific loan terms and conditions for sold loans would or would not be altered by future changes to regulations.

Such undertakings might be needed to provide sufficient certainty to enable purchasers to value the loan assets with confidence - and that confidence would be a pre-requisite for Government to achieve a price that was not discounted on the grounds of an unquantifiable risk about future policy decisions. For example, we might give an undertaking about the repayment threshold, making into an enforceable commitment the current publicly-stated policy intention to keep the threshold at £15,000 a year until 2010, and then increase it in line with RPI; or undertake not to alter the 9% repayment rate.

To be clear, we would not be abandoning the idea of a compensation mechanism for policy change, but giving Ministers the ability to make undertakings would provide flexibility to adopt different approaches to ensure good value for money.

We recognise, as does the Committee, the importance of our commitment that no-one should be treated differently if their loan has been sold. So we would need to be quite clear that if Government gave an undertaking not to alter one or more terms and conditions for loans that were sold, or to alter them only in pre-arranged ways, it would also apply to comparable unsold loans. In view of this, and bearing in mind the emphasis given in earlier debate and by the Committee that we should make our reassurances as concrete as possible, we are tabling a specific amendment to Clause 4 to put a commitment on the face of the Bill that such parity of treatment will be the aim of how the Government approaches any future change to regulations.

There are also three minor points of clarification on which we are considering amendments, with a view in particular to ensuring that potential purchasers are in no doubt about what we intend. These do not relate to the Committee's main area of interest, but for completeness, I describe them below.

First, as the Explanatory Notes on Clause 5 set out, there is a presumption in the Bill that all monies relating to sold loans should be paid to the loan purchaser. The presumption is qualified by the cross-reference in Clause 5(4) to Clause 2(2), so that the transfer arrangements (sales contracts) may provide for exceptions, but we now consider that this provision is not the clearest way of saying that the transfer arrangements could provide for some payments (for example penalties in the tax regime about inaccurate returns) still returning to Government after a sale. So we have proposed a minor drafting change to the cross-reference to expand its scope to the whole of Clause 2. The amendment does no more than fulfil what we originally intended.

Second, our intention in dealing with onward sales - or "further transfer arrangements" - has been to ensure that borrowers remain protected if the legal title to their loans is sold on. But our advisors tell us we need to distinguish between the transfer of title (where we need to protect borrowers) and the technical onward transfer of equitable rights - rights to the repayments - to the various parties that occurs in setting up the Special Purpose Vehicle and the securitisation. These arrangements are ones we don't need to regulate or participate in so as to protect borrowers and it would make the securitisation process unworkable if we did. It Is only the legal owner who has the relationship with the borrower and with the student finance system as servicer. We are tabling an amendment to Clause 3

to clarify what we intend and to ensure that we do not restrict the sale of the assets more than is necessary.

Third, and a consequence of this second clarifying amendment, we have tabled an amendment to Clause 6 about HMRC data to make sure that we do not exclude from its scope those parties we are excluding from Clause 3. We need this to enable potential purchasers and those who would have equitable interests in the SPV to be able to examine the anonymised data used in the modelling of our Sales Arranger to decide whether to invest.

If you would like any further clarification, please get in touch with me, or contact the Bill Manager.

Appendix 6: Letter from the Lord Darzi of Denham KBE, Parliamentary Under Secretary of State (Lords), Department of Health, dated 7 May 2008

I am writing to inform you of an amendment that I have today tabled to the Health and Social Care Bill, of which I enclose a copy[20]. This amendment ensures that care and accommodation which is publicly arranged under the National Assistance Act 1948 (or similar provision in Scottish and Northern Irish legislation) will in future be subject to the Human Rights Act 1998 as if it were a function of a public nature within the meaning of section 6(3)(b) of that Act. It therefore reverses the effect on care homes of the judgment of the Appellate Committee of the House of Lords in *YL v Birmingham City Council*[21].

As our new clause would appear before Clause 138 of the Bill, I have been able to take note of the debate yesterday on the amendments tabled on behalf of your Committee by Baroness Stern, and still table this amendment in good time for consideration in Committee. This creates the maximum possible opportunity for the consideration of this important subject during the remaining stages of this Bill.

My colleagues in the Department of Health and the Ministry of Justice who were working on this issue agreed at the outset four principles that any amendment in this Bill must meet:

(a) it should restore the Government's original intention as to the meaning of "public authority" in this context by including only the provision of care and accommodation that has been publicly arranged;

(b) it should not create fresh uncertainty in the law on this subject, nor should it affect the status under the Human Rights Act of any function to which it does not expressly refer;

(c) its effect should be certain, and not incur the risk of further litigation; and

(d) it should apply equivalently to England, Wales, Scotland and Northern Ireland.

I believe that the amendment as drafted meets these four criteria.

[20] Not published here.

[21] [2007] UKHL27

I should emphasise that this amendment is not intended to be a comprehensive solution to the question of the scope of the Human Rights Act; it would restore the Government's original intention in relation to the specific statutory provisions considered in *YL*. This Bill is not the appropriate context in which to reopen the wider debate about that original intention, nor is it the context (or the timescale) in which to attempt any comprehensive solution to the wider problem of the meaning of "public authority". As you know, my colleagues in the Ministry of Justice intend to consult on the wider issue of the scope of the Human Rights Act in the context of their work towards a British Bill of Rights and Responsibilities.

The amendment therefore follows the second of the two approaches set out by your Committee in your Fifteenth Report of this Session by referring only to sections 21(1)(a) and 26 of the National Assistance Act 1948. We have also identified, in close consultation with our colleagues in the devolved administrations, the equivalent provisions in Scotland and Northern Ireland to which the amendment also refers. The provision will not have retrospective effect.

By virtue of the wording of subsection (1) of the new clause, specifically the phrase "is to be taken for the purposes of", the clause is what may be termed a "deeming provision". The effect of this is that it will not have a wider impact on the interpretation of the words "function of a public nature" either in the Human Rights Act or in other statutory provisions in respect of which a similar formulation has been adopted. This will mean that, with the exception of the specific functions to which the amendment refers, the principles derived from the speeches of the majority in *YL* remain binding case law for all other purposes.

However, having considered carefully those speeches, we do not believe that the judgment in *YL* has determined the position of any function other than those specifically considered by their Lordships. It is notable, for example, that Lord Mance expressly notes in the conclusion of his judgment that he "would leave entirely open the provision of those operating in the different areas of health and education services"[22].

Given that the amendment is a deeming provision, its application to any given function implies that the function in question is not already caught by the existing statutory test. We must therefore take particular care to ensure that we do not by means of this amendment cause any further functions to be excluded from the scope of "functions of a public nature", either expressly or by analogy on the basis of the drafting and nature of the function in question.

It remains the Government's view that the provision of publicly-arranged health and social care should generally be considered a function of a pubic nature, and we will continue to treat those exercising such functions as subject to the Human Rights Act. In particular, as I am aware that this has been a matter of some concern, I would emphasise the Government's firm view that independent providers of NHS care under the National Health Service Act 2006 are exercising a function of a public nature.

[22] Ibid. at para. 123

I therefore look forward to debating this amendment, which demonstrates the Government's commitment to taking effective action in relation to this issue.

I am writing in similar terms to Peers and MPs who have spoken on this subject during the passage of the Bill, and I am placing a copy of this letter in the Library of the House. I understand that Michael Wills will also be writing to you to address the wider context of this amendment and the various recommendations on this subject that your Committee has made.

Appendix 7: Letter to the Lord Darzi of Denham KBE, Parliamentary Under Secretary of State (Lords), Department of Health, dated 16 May 2008

Health and Social Care Bill

Thank you for your letter dated 7 May 2008 enclosing the Government's amendment to the Health and Social Care Bill intended to reverse the effect on care homes of the House of Lords judgment in *YL v Birmingham City Council.*

Your letter has been circulated to the members of the Joint Committee on Human Rights in advance of the final stages of Grand Committee in the House of Lords and we have published it on our website to inform wider public debate. I congratulate the Government for its decision to introduce this amendment in good time for a full debate before the Bill returns to the House of Commons. I warmly welcome the Government's decision to ensure that the Human Rights Act will apply directly to all publicly arranged residential care in the United Kingdom. The amendment proposed adopts the approach of the second, narrower amendment proposed by my Committee and would effectively reverse the consequences of the House of Lords judgment for those receiving publicly arranged care in private care homes.[23]

Although we welcome the Government's amendment, we have a number of continuing concerns. We therefore seek further information about the Government's position and the effect of the amendment in advance of the debate, with a view both to informing the debate and ensuring that the amendment does not create any further uncertainty for public service users. I outline our principal concerns below.

(1) The need for a general solution to the scope of the Human Rights Act

We remain disappointed by the Government's decision to approach the issue of the application of the Human Rights Act to contracted out public services on a sectoral basis.[24] As we have made clear in earlier reports, the effect of the reasoning of the majority in the *YL* case is much wider and has the potential to affect the provision of public services by private sector and voluntary organisations across the whole range of Government activity. We do not agree with your analysis that the judgment in *YL* has not determined the position of any function other than those specifically considered by their Lordships in that case. In our view, this is far too narrow a reading of the case. The reasoning is of much

[23] Fifteenth Report of Session 2007-08, *Legislative Scrutiny*, HL Paper 81, HC 440, paras 3.8 – 3.18.

[24] Eight Report of Session 2007-08, *Legislative Scrutiny: Health and Social Care Bill*, HL Paper 46, HC 303, paras 1.11 – 1.12.

wider import. We believe that there therefore continues to be an urgent need for a more general solution to the wider question of the scope of the Human Rights Act.

We also remain concerned that the Government intends to delay any further consideration of the meaning of public authority for the purposes of the Human Rights Act until the publication of its Green Paper on a Bill of Rights for Britain. We are concerned that the judgment in *YL v Birmingham City Council* and the interpretative principles established in earlier cases, such as *Leonard Cheshire*, have undermined the original intention of Parliament that the Human Rights Act would apply to all public services whether provided by public bodies or privately. Rather than apply a functional test, as intended, the courts have developed their own institutional test based principally on the nature of the bodies performing a task and their relationship with the State. In the past, the Government has accepted that this approach is wrong, including intervening in *YL* to argue this point. We welcome the acknowledgement in your letter that this is not the end of the wider issue of the scope of the Human Rights Act. However, you also accept that after the introduction of this amendment, the principles derived from the speeches of the majority in *YL* will remain binding case law for all other purposes.

I would be grateful if you could tell us whether the Government considers that the general legal principles derived from *YL v Birmingham City Council* on the meaning of public function reflect the intentions of the Government and of Parliament during the passage of the Human Rights Act.

If not, do you accept that the continued application of these principles has the potential to further narrow the intended protection of the HRA, leading to similarly unintended consequences in other sectors?

(2) Private providers and health care

In our Reports and our first proposed amendment, we argued that the Bill should clarify that the provision of any publicly arranged and partially or wholly publicly funded health and social care would be a public function for the purposes of the Human Rights Act.

We welcome your strong indication that it is the Government's firm view that privately provided health care arranged under the National Health Service Act 2006 is a public function for the purposes of the Human Rights Act. However firmly that view is held, it remains the Government's view. In our view there remains a real risk that in a case dealing with privately provided health services on the principles established in the *YL* judgment the courts would conclude that the provider was not a public authority for the purposes of the Human Rights Act.

In the light of the principles established in *Leonard Cheshire* and confirmed in *YL v Birmingham City Council*, I would be grateful if you could provide a further explanation of the Government's view that the courts would consider the provision of publicly arranged or publicly funded health care by a private provider a public function for the purposes of the Human Rights Act.

(3) Social care not provided in a care home

Your amendment, like our own second amendment, would clarify that the Human Rights Act applies to publicly arranged residential care. It would not clarify whether publicly arranged social care provided outside a residential setting would be a public function if it were contracted out. While care provided directly by a local authority service at home would be subject to the protection of the Human Rights Act, the effect of *YL*, in the Committee's view, is that it would not apply if that service were contracted out, or purchased privately using a publicly provided independent budget.

Although your letter indicates that it is the Government's view that the effects of the judgment in *YL v Birmingham City Council* may not impact on other sectors, it does not confirm whether or not the Government considers that the provision of publicly funded or publicly arranged social care at home or in the community is a public function for the purposes of the HRA. In light of the Prime Minister's renewed commitment, in the context of the review of funding for social care, to helping more people stay at home or in the community and out of residential care, we consider that clarity in this area is essential.

I would be grateful if you could confirm whether the Government considers that the provision of publicly arranged and publicly funded social care outside a residential setting is a public function for the purposes of the HRA, including where it is provided by a private provider.

If this is the case, I would be grateful if you could further explain the Government's view that there does not need to be an express statutory statement to this effect in the Health and Social Care Bill.

(4) Effect on existing arrangements

The amendment is intended to have prospective effect. I understand that it is the Government's intention that it should not "apply to acts (within the meaning of section 6 of the Human Rights Act 1998 (c.42)) taking place before the coming into force of this section". However, in your letter, you carefully explain that subsection (1) of the amendment is a deeming provision which provides for acts which would not otherwise fall within section 6 of the Human Rights Act 1998 to be treated as public functions for the purposes of that section. Subsection (1) applies to the provision of accommodation under arrangements made with P under the relevant statutory provisions. It is far from clear whether the Government intends the amendment to apply only to arrangements entered into after the commencement of the Act. We are concerned that, if this is the case, there will be a significant number of elderly and vulnerable people in residential care who will continue to be deprived of the protection intended by the Human Rights Act.

I would be grateful if the Minister would confirm during debate in the House of Lords that this amendment will extend the protection of the Human Rights Act to those in private care homes under arrangements entered into before this Act comes into force, albeit that it will not apply to acts committed or omitted by care homes before that date.

My Committee would be grateful if answers to these questions were forthcoming during the final stages of the consideration of the Health and Social Care Bill by the House of Lords Grand Committee, and certainly before the Bill returns to the Commons.

Appendix 8: Letter from the Lord Darzi KBE, Parliamentary Under Secretary of State (Lords), Department of Health, dated 5 June 2008

Health and Social Care Bill

Thank you for your letter of 16 May about the Government amendment to the Health and Social Care Bill relating to section 6 of the Human Rights Act 1998. I am pleased that the Committee welcomes the Government's amendment.

As you requested, Baroness Thornton responded to the specific points raised by the Committee in her speech moving the amendment in Grand Committee. I am writing to set out those responses for the record.

In response to a particular concern expressed in your letter, I must stress that this amendment does not represent part of any wider intention to address the issue of the scope of the Human Rights Act on a sector-by-sector basis. It remains the Government's intention to consult on the wider issue in the context of the work towards a British Bill of Rights and Responsibilities, and to address the issue as a whole.

I would be grateful if you could tell us whether the Government consider that the general legal principles derived from *YL v Birmingham City Council* on the meaning of public function reflect the intentions of the Government and of Parliament during the passage of the Human Rights Act.

In general, neither the reasoning nor the conclusion of the majority of their Lordships on the Appellate Committee in the *YL* case reflects the intentions of the Government when it introduced the Human Rights Bill, nor the intentions of Parliament as evidenced in the debates on the Bill.

If not, do you accept that the continued application of these principles has the potential to further narrow the intended protection of the HRA, leading to similarly unintended consequences in other sectors?

Although the most conspicuous issue caused by the narrowed interpretation of the meaning of "public authority" in section 6 of the Human Rights Act has been in relation to the provision of publicly-arranged residential social care, it is quite possible that outcomes different from that which the Government would have intended may occur in relation to other functions. It is for this reason that the Government remains committed to consulting on the wider issue of the scope of the Human Rights Act.

In your letter, you note that the Committee does not agree with the Government's view that the judgment in *YL* has not determined the position of any function other than that specifically at issue in the case. I am surprised at this view. While the various principles set out by the majority of their Lordships on the Appellate Committee will strongly influence the consideration of the nature of other functions in other cases, at least one of their Lordships expressly noted that his reasoning left open the interpretation of the Human Rights Act in relation to functions other than that specifically at issue in the *YL* case. I would suggest therefore that a distinction must be drawn between whether *YL* has determined the position of other functions – which we would say it has not – and whether

YL could affect the position of other functions – which we would of course agree it could through the ordinary operation of the doctrine of precedent.

In the light of the principles established in *Leonard Cheshire* and confirmed in *YL v Birmingham City Council*, I would be grateful if you could provide a further explanation of the Government's view that the courts would consider the provision of publicly arranged or publicly funded health care by a private provider a public function for the purposes of the Human Rights Act.

It is of course difficult to extract from the diverse opinions expressed even by the majority of their Lordships in *YL* a single set of principles. Nevertheless, the Government believes that, on the basis of the views expressed, there are fundamental differences between the provision of publicly-arranged residential social care under the National Assistance Act (i.e. the function at issue in *YL*) and the provision of publicly-arranged health care. In particular, services provided by the National Health Service are provided to all, regardless of means and capacity, and are free at the point of delivery. This contrasts with the provision of publicly-arranged social care under the National Assistance Act, which is provided to those who need it through a lack of means and/or capacity to arrange it for themselves, and which is publicly funded only insofar as the recipient is not able to fund it for themselves. For this reason, the Government believes that independent providers of NHS care under the National Health Service Act are, as the law currently stands, exercising a function of a public nature.

I would be grateful if you could confirm whether the Government consider that the provision of publicly arranged and publicly funded social care outside a residential setting is a public function for the purposes of the HRA, including where it is provided by a private provider.

While the Government considers that, in general, the provision of publicly-arranged non-residential social care services should be subject to the Human Rights Act, the wide diversity of forms that such services may take means that the status of such services in relation to section 6 of the Human Rights Act falls to be determined in light of all the circumstances. It is therefore for the courts – for better or worse – to determine the position of each function. This has of course always been the case since the Human Rights Act came into force: this is not a result of *YL*.

If this is the case, I would be grateful if you could further explain the Government's view that there does not need to be an express statutory statement to this effect in the Health and Social Care Bill.

Given my previous response, it is appropriate to leave the framework of the Human Rights Act as it currently operates in this respect, although this may be an issue for consideration when we come to consult on the wider issue of the scope of the Act.

I would be grateful if the Minister could confirm during debate in the House of Lords that this amendment will extend the protection of the Human Rights Act to those in private care homes under arrangements entered into before this Act comes into force, albeit that it will not apply to acts committed or omitted by care homes before that date.

As Baroness Thornton said during the debate, this is a correct understanding of the amendment.

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty–First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501

Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC755

Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
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