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**REPORT BY**  
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**COMMISSIONER FOR HUMAN RIGHTS,**  
  
**ON HIS VISIT TO THE UNITED KINGDOM**

**4<sup>th</sup> – 12<sup>th</sup> November 2004**

**for the attention of the Committee of Ministers  
and the Parliamentary Assembly**

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## INTRODUCTION

*In accordance with Article 3 (e) of the Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, I visited the United Kingdom of Great Britain and Northern Ireland from 4<sup>th</sup> to 12<sup>th</sup> November 2004 for the purposes of preparing this report on the effective respect for human rights in the country.*

*During my visit I travelled to Edinburgh, Belfast and London and am very much indebted to the Scottish Executive, the Northern Ireland Office and, especially, the Foreign and Commonwealth Office for their complete cooperation in the organisation of my visit. I was able to meet with all those I requested and visit all the sights I asked to see; I thank all those who opened the doors of their offices or institutions to me for their patience and the frankness with which they answered my questions.*

*In London I met with The Rt. Hon. David Blunkett, Secretary of State for the Home Department, The Rt. Hon. Lord Falconer of Thoroton QC, Secretary of State for Constitutional Affairs and Lord Chancellor, The Rt. Hon. Lord Goldsmith, Attorney General, and The Rt. Hon. Bill Rammell, Parliamentary Under Secretary of State for Foreign & Commonwealth Affairs and enjoyed an audience with the Parliamentary Joint Committee on Human Rights. I also had meetings with The Rt. Hon. Lord Woolfe, Lord Chief Justice for England and Wales, Mr. Ken MacDonal QC, Director of Public Prosecutions, Mr. Trevor Phillips, Chairman of the Commission for Racial Equality and Ms Anne Owers, Her Majesty's Inspector of Prisons for England and Wales. Whilst in London I visited the detainees held under Section IV of the Anti-Terrorism, Crime and Security Act 2001 at Belmarsh Prison and the Asylum Clearing Centre at Heathrow.*

*In Scotland I met with The Rt Hon Cathy Jamieson, MSP, Minister for Justice, The Rt. Hon. George Reid, MSP, Presiding Officer of the Scottish Parliament, the Scottish Parliament's Cross Party Group on Human Rights, Ms. Kathleen Marshall, Commissioner for Children and Young People in Scotland, Dr. Andrew McLellan, HM Chief Inspector of Prisons in Scotland and Mr. Mike Duffy, Director of the Scottish Prison Service. Whilst in Scotland I visited Dungavel Removal Centre and Edinburgh Prison.*

*In Belfast I met with The Rt. Hon. Paul Murphy Secretary of State for Northern Ireland, The Rt. Hon. John Spellar, Minister of State for Human Rights in Northern Ireland, Mr. Ray Bassett, Head of the Irish Joint Secretariat, Ms. Gillian Preece, Deputy Head of the British Joint Secretariat, Sir Brian Kerr, Lord Chief Justice of Northern Ireland, Sir Alasdair Fraser, Director of Public Prosecutions for Northern Ireland, Mr. Hugh Orde, Chief Constable, Police Service of Northern Ireland, Mrs. Nuala O'Loan, Police Ombudsman for Northern Ireland and Mr. Brice Dixon, Chief Commissioner of the Northern Ireland Human Rights Commission. Whilst in Belfast I visited Castlereagh Police Station and Hydebank Wood, Young Offenders Centre.*

*I was, lastly, able to meet with a broad range of NGOs in all the cities I visited and, though too numerous to mention individually, I would like to express my admiration for their work and thank them all for the information they provided me with.*

## I. GENERAL REMARKS

1. One of the ten founding members of the Council of Europe, the United Kingdom was the first country to ratify the European Convention on Human Rights<sup>1</sup> (ECHR) and has, consistently with the strong sense of individual liberty that characterises British society, shown a generally impressive commitment to the respect for human rights over the past decades. The adoption of the Human Rights Act in 1999, rendering the rights guaranteed by the Convention directly applicable in domestic law, has been an extremely positive development and has significantly marked the human rights landscape in the United Kingdom.
2. Convention rights are frequently and thoroughly raised in domestic courts. In Parliament, the Joint Committee on Human Rights has added an effective layer of legislative scrutiny, whilst the obligatory declaration of the compatibility of proposed legislation with the ECHR has served to raise the sensitivity of Government to its obligations in this area. This is reflected in turn in the detailed references to human rights in executive regulations and guidelines. Indeed, the formal anchoring of human rights in the machinery of government and the level of protection offered by the judiciary are impressive.
3. The United Kingdom has not been immune, however, to a tendency increasingly discernable across Europe to consider human rights as excessively restricting the effective administration of justice and the protection of the public interest. The Government itself has every right to be proud of its achievement in introducing the Human Rights Act and has proven itself to be acutely conscious of the contours of the obligations entailed. I was struck, however, by the frequency with which I heard calls for the need to rebalance rights protection, which, it was argued, had shifted too far in favour of the individual to the detriment of the community. Criminal justice, asylum and the prevention of terrorism have been particular targets of such rhetoric, and a series of measures have been introduced in respect of them which, often on the very limit of what the respect for human rights allows, occasionally overstep this mark.
4. Against a background, by no means limited to the United Kingdom, in which human rights are frequently construed as, at best, formal commitments and, at worst, cumbersome obstructions, it is perhaps worth emphasising that human rights are not a pick and mix assortment of luxury entitlements, but the very foundation of democratic societies. As such, their violation affects not just the individual concerned, but society as a whole; we exclude one person from their enjoyment at the risk of excluding all of us.

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<sup>1</sup> On the 8<sup>th</sup> March 1953

## II. THE PREVENTION OF TERRORISM

5. The terrorist attacks of September 11<sup>th</sup> 2001 opened the eyes of Europe to a new threat. The Madrid bombing of 11<sup>th</sup> March last year confirmed this horrific new reality. In the face of such threats, there is clearly a strong obligation on Governments to protect their populations and there has been much reflection, across Europe, on the international and domestic responses that should be made. Such measures must, perforce, be robust. It is essential, however, that as such measures are adopted they should respect the fundamental rights and principles that are at the very core of our democracies. Indeed, it is precisely the belief in such values that distinguishes democratic states from those who wish to cripple them. Confidence in these values and in the respect for human rights - themselves so gravely violated by terrorist activity - must, therefore, be central to response given to it by a democratic state. To limit their application, to deny these rights, is to effect ourselves of what terrorists wish to achieve.
6. Terrorist activity not only must but can be combated within the existing framework of human rights guarantees, which provide precisely for a balancing, in questions concerning national security, of individual rights and the public interest and allow for the use of proportionate special powers. What is required is well-resourced policing, international cooperation and the forceful application of the law. It is to be noted, in this context, that in the Terrorist Act 2000, the United Kingdom already has amongst the toughest and most comprehensive anti-terror legislation in Europe.
7. In an immediate response to the September 11<sup>th</sup> attacks, the United Kingdom adopted the Anti-terrorism, Crime and Security Act 2001. There is no need to dwell on this legislation. In a ruling of December last year, the House of Lords declared the indefinite detention without charge of foreigners suspected of involvement in international terrorism under powers requiring a derogation from the ECHR to be discriminatory and disproportionate in nature and incompatible with the rights guaranteed by the Convention. The Secretary of State for Home Affairs did not seek to renew the relevant provisions of Act on their expiry in March this year.
8. Having presented an Opinion on the Anti-terrorism, Crime and Security Act 2001 voicing similar concerns, I cannot but welcome the decision of the House of Lords. The decision of the Secretary of State for Home Affairs to release the detainees on the expiry of the Act is also welcome. During my visit to the United Kingdom, I met with the detainees under Act held in Belmarsh Prison, and can testify to the extremely agitated psychological state of many of them. One I met with was due to be transferred to a psychiatric institution, to which, I understand, a number had already been transferred before him. The ten remaining suspects held in custody were released on conditions imposed under new legislation, the Prevention of Terrorism Act 2005, in respect of which a number of fresh concerns arise.

### **The Prevention of Terrorism Act 2005**

9. Adopted in response to the House of Lords ruling on the derogating powers of the Anti-terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act (the Act) seeks to address the objections raised by reducing the restrictions on the liberty of terror suspects and extending the scope of the measures to include all persons on British territory, whether foreigners or UK nationals. Essentially, the Act allows the Secretary of State for Home Affairs to make control orders against individuals whenever he has reasonable grounds for suspecting them of being involved in terrorist-related activities, if necessary for the protection of public security.
10. The control orders allow for a wide variety of restrictions to the rights and liberty of their subjects, ranging from the prohibition of the use of specified articles or substances, restrictions on work and activities, through a gradation of restrictions to association, communication, movement and residence, up to the obligation to remain at a certain area or place, including house arrest. The Act acknowledges that some, or the combination of some, of these restrictions may be incompatible with Article 5 ECHR on the right to liberty, in which case the possibility of derogating from the UK's obligations under this article is foreseen, though no precise dividing line is drawn up in the Act. The Act consequently foresees two different types of order – derogating and non-derogating control orders- in respect of which different procedures apply.
11. Low level, or non-derogating, control orders are issued directly by the Secretary of State. It is foreseen that the Secretary of State will make the control order having applied to the court for permission, with the court able, in this initial proceeding, to withhold permission if it considers the Secretary of State's decision to be obviously flawed. The Secretary of State may also make a control order before receiving permission, but must refer his decision to the court immediately, in which case the court must commence permission proceedings no later than 7 days after the control order was made. In both cases the court must give directions for a full hearing on the legality of the control order as soon as reasonably practicable. In these full hearings the court is to apply the principles applicable to judicial review, which is to say that the court is not empowered to make its own findings and arrive at its own determination.
12. The role of the court is, indeed, restricted to examining whether the decisions of the Secretary of State concerning the suspicion of involvement in terrorism-related activity, and of the necessity of the control order's provision, might reasonably have been arrived at. The court might itself disagree with the Secretary of State's assessment, but still be obliged to approve the control order. The procedures for such hearings foresee the use of secret evidence and closed hearings, to which a special advocate, appointed by the Attorney General to represent the interests of the suspected may have access, but following which he may no longer converse with control order's subject. Neither the suspect, nor his own appointed counsel have access to such *in camera* proceedings or to any secret material used in the course of the hearing. Non-derogating control orders are made for a twelve-month period and may be renewed indefinitely for further periods of twelve-months subject to the same conditions each time.

13. In respect of derogating control orders, the Secretary of State must first obtain the approval of Parliament for a derogation from the United Kingdom's obligations under the ECHR. The Secretary of State may subsequently apply to the court for the making of a control order against an individual. In an initial hearing the court may make a control order if there is material which, if not immediately disproved, might subsequently be relied upon to establish the individual's involvement in terrorism-related activity and if there are reasonable grounds for believing the restrictions imposed by the control order to be necessary. In the subsequent full hearing the court may confirm the control order if it is satisfied, on the balance of probabilities only, that the individual is or has been involved in terrorism-related activity and that the control order is, indeed, necessary. Derogating control orders are made for renewable periods of 6 months.
14. Whilst indeed avoiding the difficulties inherent in the Anti-terrorism, Crime and Security Act 2001, this new system does not appear to me to be without problems of its own. I would hope that derogating control orders will not be considered necessary. It is, in any case, difficult to analyse them, at this stage, in the absence of any specific cases where derogation orders have been made. I will not attempt to do it here. I will focus instead on the procedures and restrictions imposed in the case of non-derogating control orders.
15. Non-derogating control orders are intended to enable the imposition of restrictions on the liberty of persons, who are suspected of constituting a threat to public security but who fall outside the scope of criminal prosecution. The orders are imposed by executive decision with limited judicial control and significantly reduced procedural guarantees. There cannot but be some concern over the introduction of orders obviating the need to prosecute and circumventing the essential guarantees that criminal proceedings provide.
16. Control orders raise not only general points of constitutional principle concerning the rule of law and the separation of powers, but also a number of specific concerns regarding their compatibility with the rights guaranteed by the ECHR. In so far as the control orders break new legal ground, it is difficult to assess their compatibility with the ECHR with certainty. A number of concerns can, however, be raised.
17. The first question to arise is whether the restrictions applied in respect of non-derogating control orders are capable of amounting to a deprivation of liberty for the purposes of Article 5(1) ECHR. On the face of it, they cannot, as the Act states that control order obligations within the scope of Article 5(1) ECHR would require a derogation and be subject to derogation order proceedings. The Act does not, however, as noted, provide for any clear cut off point. This is understandable as it would be difficult to provide a clear limit, in particular where there might be many combinations of a variety of different restrictions which are impossible. House arrest would, for instance, clearly, fall within the scope of Article 5(1) ECHR. However, there might be, a strict combination of other restrictions on movement, contacts and residence, falling just short of this<sup>2</sup>. The question of whether the restrictions imposed by the non-derogating control order amount to a deprivation of liberty falling within the scope of Article 5(1) CEDH must inevitably be determined on a case-by-case basis. It is of the utmost importance, therefore, that this appreciation should not lie exclusively with the Secretary of State and that the court be able to determine for itself whether this threshold has been breached.

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<sup>2</sup> See judgment of 6.11.1980 of the European Court of Human Rights in the Guzzardi case.



18. Leaving aside the question of Article 5 ECHR, there must also be some doubt as to whether the fair trial requirements, guaranteed by Article 6 ECHR, should apply in respect of proceedings leading to the adoption of non-derogating control orders imposing restrictions of liberty or other fundamental rights and freedoms. This is uncertain territory. In order for Article 6 CEDH to apply, paragraph 1 of this provision requires that the proceedings should be aimed at the determination of the “civil rights” of the suspect or of “any criminal charge” against him. In other words, that control orders imposed on the suspected person are qualified as either a limitation of his or her civil rights or tantamount to a criminal sanction against him or her. The European Court of Human Rights has been, to date, reluctant to interpret the words -‘civil rights’ as covering restrictions to the exercise of any of the rights guaranteed by other Articles of the Convention. Thus, despite a number of dissenting opinions, proceedings dealing with restrictions to, for instance, freedom of expression and association, do not involve the determination of a “civil right”, within the meaning of Article 6 CEDH.
19. This being so, Article 6 CEDH would still be applicable if the proceedings in question were to involve, in practice, the determination of a “criminal charge”. In other words, if derogating control orders impose restrictions upon the exercise of fundamental rights which can be qualified as a form of criminal sanction. It is clear that control orders would not be qualified, under domestic legislation, as criminal. As a matter of fact, the preventive system set up under the Act is meant to deal precisely with terror suspects who, for one reason or another, cannot be subject to a criminal prosecution. However, the domestic qualification of the measures as “non-criminal” does not exclude the possibility of considering them as “criminal” for the purposes of the ECHR. According to a well established case-law<sup>3</sup> the domestic qualification is only the starting point for the determination of what constitutes a “criminal” charge under the Convention, which is an autonomous concept. There can be legitimate doubts, when examining the Act under consideration here, as to whether the nature of the activity justifying the adoption of the non-derogating control orders – by definition acts relating to terrorism - , and the extent of the sanctions imposed, would suffice to equate the making of at least some control orders with the pressing of criminal charges. This question seems to me to go to the heart of control orders. It is precisely because control orders are considered by the Act to be preventive executive decisions of a non-criminal nature, that the fundamental guarantees provided by Article 6 are excluded, allowing in turn for the otherwise difficult imposition of ‘obligations’ restricting fundamental rights on the basis of mere suspicion.
20. Formally, as it has been already indicated (see parag. 15 above), control orders are not made in respect of criminal charges. There seems to me, however, to be some strength in the argument that non-derogating orders are brought in respect of an essentially criminal deed, namely involvement in a terrorism-related activity. Coupled to this, the nature of the restrictions imposed on the suspect seems to be capable of attaining a degree of severity equivalent to a criminal penalty in accordance with the autonomous concept of a criminal offence. It is, again, difficult to say at what point, on a sliding scale of restrictions, such a degree of severity might be reached. The possibility of reaching such degree of severity is, I believe, evident in the fact that, at some point, the restrictions are acknowledged by the Act itself to amount to a restriction of liberty for the purposes of

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<sup>3</sup> See, for instance, judgement of 8 June 1976 in the Engel case.

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Article 5 ECHR. It would be curious if at least immediately below this most extreme sanction, there were not other limitations or restrictions of sufficient severity to warrant the classification of the obligations as tantamount to a criminal penalty. It seems to me therefore that if not necessarily in all, then, at least in some cases of non-derogating control orders, Article 6 CEDH guarantees would be required.

21. The rights guaranteed by Article 6 ECHR include, *inter alia*, the right to a fair and public hearing by an independent and impartial tribunal and the entitlement to the presumption of innocence. Leaving aside the fact that non-derogating control orders are initially made by the executive rather than, as Article 6 ECHR would properly require, the judiciary, it does not seem to me that the weak control offered by judicial review proceedings satisfies the requirement of the judicial determination of what could be considered, in effect, as criminal charges. Added to this, the proceedings fall some way short of guaranteeing the equality of arms, in so far as they include in camera hearings, the use of secret evidence and special advocates unable subsequently to discuss proceedings with the suspect of the order. The proceedings, indeed, are inherently one-sided, with the judge obliged to consider the reasonableness of suspicions based, at least in part, on secret evidence, the veracity or relevance of which he has no possibility of confirming in the light of the suspect's response to them. Quite apart from the obvious flouting of the presumption of innocence, the review proceedings described can only be considered to be fair, independent, and impartial with some difficulty.
22. Substituting 'obligation' for 'penalty' and 'controlled person' for 'suspect' only thinly disguises the fact that control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive. Under normal circumstances such a step would not even be contemplated. But these are not, the argument runs, normal times. Both the risk, and the likely damage, of terrorist attacks are great; sufficiently great to justify exceptional measures.
23. I would not want to exclude the possibility, under such conditions, of certain preventive measures being justified for the duration of, and in proportion to, the threat. It is essential, however, that the necessary judicial guarantees apply to proceedings resulting in their application and that the legislation providing for such exceptional measures be subject to regular parliamentary review.
24. The application of these two guarantees to control orders would, I believe, render them compatible the UK's obligations under the ECHR. The application of the necessary judicial guarantees would, perhaps, partly defeat the purpose of Act. They would, however, still leave much intact; if I am correct that some of the restrictions allowed by control orders would be of a severity sufficient to trigger the application Article 6 CEDH others still would not. It is be vital, however, for the determination of the possible application of both Article 5 and Article 6 ECHR, that there be effective judicial scrutiny, indeed an autonomous decision on the part of the court in each case. Should the court consider Article 6 ECHR to be applicable it will, in turn, be, essential to ensure that the substance, i.e. the essential content, of the rights it guarantees are enjoyed in respect of all subsequent proceedings.

25. If a limited range of preventive measures may be justified in the event of a clearly identified danger, it is important that their exceptional nature is made clear. Ordinary criminal prosecution must be the preferred means of tackling terrorist activity and limiting important rights. The Prevention of Terrorism Act recognises this in the obligation it places on the police to continue investigations leading to possible charges. The indefinitely renewable nature of control orders, however, risks elevating the exceptional to the permanent by obviating the need ever to prove suspicions the restrictions are supposed to counter. Failure to find sufficient evidence to bring charges within the generous 12-month period allowed for control orders ought in my view to constitute grounds for lifting the restrictions imposed.

### **The use of torture as evidence**

26. A subsidiary issue to arise in relation control order proceedings concerns the possible reliance on evidence obtained through torture in the determination of the suspicion of involvement in terrorism-related activity. Such evidence is clearly inadmissible in criminal proceedings, which may, indeed, render an effective prosecution more difficult. There is good reason for this inadmissibility, however. To use evidence obtained under torture to secure criminal convictions is to condone an entirely indefensible practise. The same consideration should apply to any proceedings affecting the liberty of an individual, as is evidently the case with control orders. The Government has variously announced its refusal to rule out taking evidence suspected of being obtained under torture into account in its assessment of the threat presented by individuals, so long as the evidence was not extracted by, or with the connivance of, UK agents.
27. A Court of Appeal ruling<sup>4</sup> examining the admissibility of such evidence in the context of proceedings under the derogating provisions of the 2001 Act accepted that such evidence might be used in support of the Home Secretary's suspicion. Consideration would, however, have to be attached to the weight to be given to the evidence in the light of its possible provenance. This view is difficult to reconcile with the absolute nature of the prohibition of torture in Article 3 of the ECHR; torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose – the former can never be admissible in the latter.

### **Diplomatic Assurances**

28. The inability to return foreigners suspected of involved in international terrorism to their countries of origin owing to the risk of torture they faced there was one of the reasons behind the introduction of the Anti-terrorism Crime and Security Act in 2001. Since then the Government has variously declared its intention to facilitate the removal of the former detainees under the Act through diplomatic assurances obtained from their home countries that they would not be subject to torture, and would enjoy every right to fair trial in the event of judicial proceedings, on their return. To date, no such assurances have been obtained nor any expulsions effected.

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<sup>4</sup> A & Others v. Secretary of State for State for the Home Department, 11<sup>th</sup> August 2004

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29. In the light of the Government's declarations, however, a number of comments are perhaps worth making. There is clearly a certain inherent weakness in the practice of requesting diplomatic assurances from countries in which there is a widely acknowledged risk of torture. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot be sufficient to permit expulsions where a risk is nonetheless considered to remain. There are sufficient examples already of breached assurances for the utmost caution to be required.
30. Such assurances must, certainly, as the UN Special Rapporteur on Torture has noted, be unequivocal and an effective monitoring mechanism be established. It is equally important that the State in question does not condone or practise torture and is able to exercise an effective control over the actions of state and non-state actors. Given the extremely serious consequences at stake it would be vital that the deportation of foreigners on the basis of diplomatic assurances are subject to judicial scrutiny capable of taking all these elements, the content of the assurances, and the likelihood of their being respected into account.

### **The prevention of terrorism and race relations**

31. My discussions with representatives of the Muslim community, revealed concerns over a growing Islamophobia arising from the manner in which terrorist threats were frequently presented in the media. Recent legislative changes relating to the prevention of terrorism had, they claimed, not only resulted in the discriminatory treatment of individual Muslims but had also contributed to raising anti-Islamic sentiments. It is clear that the portrayal of the international and domestic terrorist threats, both in the media and by politicians requires the exercise of considerable responsibility. From what I have been able to observe, the Government has itself been careful and constructive in its rhetoric, frequently stressing the important contribution of the Muslim community to UK society and the enormous difference between the peaceful Islam of the vast majority and corrupt version of the fanatical few.
32. It is clear, however, that the limitation of the derogating provisions of the 2001 Act to foreigners and their exclusive application in high profile cases Muslims has had a negative affect on both the perception of Muslims by the rest of the population and the confidence of many Muslims in the fairness of the executive. The damage to both is not easily repaired. The non-renewal of the Act following the House of Lords ruling in December is certainly welcome, therefore. The consequences of the application of the new legislation, itself not entirely free from controversy, remains to be seen. What is clear, however, is that human rights abuses in the context of anti-terrorism measures have a repercussion extending beyond their impact on individual persons to entire communities. This in, itself, argues for considerable caution in the adoption of measures in this area.
33. Whilst strong measures may prove necessary to counter serious terrorist threats, their impact on certain communities should be an important consideration when deciding to adopt such measures and every effort must be made to avoid the victimisation of the vast

majority of innocent individuals. What is essential is that the measures themselves are proportionate to the threat, objective in their criteria, respectful of all applicable rights and, on each individual application, justified on relevant, objective, and not purely racial or religious, grounds.

34. The use of extended stop and search powers under anti-terror legislation raises all of these issues. I was informed by the Commission for Racial Equality that there was a 36% percent increase in the number of Asians stopped over the course of 2002/3 under section 44 of the Terrorism Act 2000 compared to a 17% increase for Whites. Between the adoption of the Act and 2002/3, there was a 300% increase in the number of Asians stopped. The maintenance of good community relations is clearly difficult under such circumstances. The Government has, however, shown considerable sensitivity to these concerns and the need to maintain a constant dialogue with the leaders of Muslim communities. A Stop and Search Action Team has been created to monitor the application of these powers and the Home Office has recently published guidelines on their use, which emphasise the need for forces to consider as wide a range of factors as possible.
35. Arrests under Terrorist Act powers affect far fewer people but have a greater repercussion in the community. It would appear that very few of the several hundred Muslims arrested have had charges brought against them and far fewer yet been convicted<sup>5</sup>. This fact does not, in itself, confirm that powers under the Act are being abused, for which an analysis of each individual case would be required. It does, however, create tensions and feeling of victimisation. The use of these powers must, therefore, be kept under very close review. There is an onus on the executive to demonstrate the fairness of, and justification for, its interventions. Attention should also be paid to the fact that, whilst arrests are news, releases are not. The press inevitably focuses on the former rather than the latter, inflating the popular impression of an Islamic terrorist threat. It is essential, therefore, that efforts are made to present an accurate picture of the extent and nature of terrorist threats.

### III. IMMIGRATION AND ASYLUM

36. Immigration and asylum have become much-debated issues across Europe over the last decade and the United Kingdom is certainly no exception. Indeed, it has faced much the same challenges as elsewhere – increased migratory pressure on the one hand and, on the other, rising social tensions owing to the failure to effectively integrate existing immigrant communities. This report is not the place to analyse the causes of either of these phenomena, nor, harder still, to propose realistic solutions. What is clear, however, is that their coincidence has resulted in a public opinion that has, in the United Kingdom as elsewhere, become increasingly concerned by the prospect of an uncontrolled influx of foreigners. There are, certainly, legitimate concerns about the ability of the state to effectively regulate the flow of foreigners into the country, which no responsible government can afford to ignore. At the same time, however, attitudes openly to hostile

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<sup>5</sup> Police records show that from 11th September 2001 until March 31 2005, 732 people were arrested under the Terrorism Act 2000. 121 of these were charged under Act and 21 individuals have been convicted for offences within the Act. 138 were charged under other legislation. The religion of those arrested is not collated centrally. I am not aware of statistics providing a breakdown in terms of race.

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towards foreigners and foreign cultures are being expressed with increasing insistence and have even slipped, throughout Europe, into mainstream political discourse. It seems to me that these views can only be pandered to with the greatest dangers for Europe's long-term social stability.

37. The distinction between legitimate concern and alarmism is especially important in respect of asylum. The visible tip of the migratory iceberg, asylum has inevitably attracted particular attention. Here again, the United Kingdom has followed a similar pattern to elsewhere in Europe with a sharp rise in asylum applications from the late 1990s onwards provoking a raft of restrictive measures. Asylum applications in the United Kingdom rose over the last decade from a low of 29,640 in 1996 to a high of 84,130 in 2002, in which year the United Kingdom received the largest number of applications of any EU country. Whilst difficulties in accessing the UK regularly have unquestionably resulted in a greater burden being placed on the asylum system, it is important to note that much of this rise is attributable to deteriorating political circumstances elsewhere in the world, initially in the former Yugoslavia and Sri Lanka and more recently in Afghanistan, Iraq and Zimbabwe. The 'bogus asylum seeker' certainly exists, but is by no means the ubiquitous bogeyman he is frequently made out to be by large sections of the national press. The 41% decline in asylum applications in 2003 on the previous year in turn owes much to improved circumstances elsewhere in the world.
38. Leaving aside the difficult, but ultimately central, question of coherent immigration management, it remains the case that measures designed to maintain the integrity of the asylum system in the United Kingdom have been necessary. Measures designed to eliminate abuse and speed up asylum procedures are welcome, indeed, in the interest of applicants with good grounds to seek asylum. Nor can there be any objection to the expulsion, under appropriate conditions, of applicants whose requests have been refused following an adequate hearing and review. It is important, however, that such measures do not reduce the necessary procedural guarantees, nor directly or indirectly, prejudice the rights guaranteed by the Geneva Conventions. It is difficult to avoid the conclusion that many of the restrictions recently introduced across Europe have been intended to render domestic asylum regimes increasingly unattractive to potential applicants and divert the flow elsewhere. This competition has inevitably impacted on the enjoyment of fundamental rights by asylum seekers.
39. In February 2003, the UK Government announced a target of a 30-40% reduction in asylum applications on the previous year. As noted above, this target has been achieved. One cannot help but wonder, however, at the appropriateness of such an absolute objective prior even to the consideration of claims and regardless of the situation elsewhere in the world. The Government has, for the most part however, been careful in its utterances and, I believe, sincere in its desire to address real challenges whilst respecting its human rights obligations. Still, such targets inevitably place the immigration service under considerable pressure and a number of recent legislative changes, notably in the Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants) Act 2004, raise a number of concerns for the full respect of human rights in practice. These relate primarily to the increased use of detention, weakened procedural guarantees and reduced social assistance.

## The Detention of asylum seekers

40. The increased use of detention constitutes a central plank of the Government's reforms of the asylum system. The addition of a further 1,000 spaces to the detention estate by the end of 2005 was announced towards the end of last year, which will bring the total number of spaces to around 2,750. There are, at present, 9 Removal Centres in the United Kingdom, primarily holding individuals whose removal is pending. Two of these centres, Harmondsworth and Oakington, also hold asylum seekers whose applications are considered in fast-track proceedings.
41. Aware of the debate surrounding the criteria and conditions of detention, I requested to visit the Dungavel Removal Centre in Scotland. This request was accepted and I was able to visit the centre and meet with detainees and staff alike. I am grateful for the welcome I received and the frankness with which my questions were answered by the immigration officials I met with. The same might be said, indeed, of the staff I met at Heathrow, with whom I discussed procedures for arriving foreigners.
42. A number of issues have given rise to particular concern with respect to detention. The first concerns the sheer extent of its use. Official statistics indicate only the number of persons detained at any time – the most recently available, dating from 25<sup>th</sup> December 2004, reveal that some 1,515 persons were being detained on that day<sup>6</sup>. It is difficult under these conditions to form an accurate overall picture of the use of detention for asylum seekers and this is in itself problematic. UNHCR<sup>7</sup> guidelines stress that detention of asylum seekers ought to remain the exception and this fact is clearly recognised by the Home Office's own guidelines on the use of detention, which state that "all reasonable alternatives to detention must be considered before detention is authorised"<sup>8</sup>. It is important, therefore, that a comprehensive picture of its use be made available, if an informed debate is to take place.
43. For my own part, therefore, I will restrict myself to observing, with some surprise, the imprecision with which my questions on the criteria for authorising detention were answered, both at Dungavel and at Heathrow. My conversations with detainees at Dungavel revealed that whilst most were, indeed, awaiting expulsion, plenty were still awaiting the result of their applications, albeit on appeal. Whilst some were aware of the reasons for their detention and the possibilities for contesting it, plenty appeared to have no idea at all.
44. An examination of existing legislation relating to the detention of asylum applicants reveals that there are no statutory criteria. Whilst detention is foreseen primarily for individuals who are denied leave to enter the country, whose applications are considered suitable for consideration in a fast-track procedure or who are pending removal, it may be applied at any stage of asylum proceedings. There are, however, fairly detailed administrative guidelines laid down in the Immigration Service's Operation Enforcement Manual, which lists a variety of grounds on which an immigration officer can authorise the detention of an asylum seeker. The list provided is not in itself objectionable. The manual insists,

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<sup>6</sup> The Home Office. This figure excludes those detained at Oakington Reception Centre

<sup>7</sup> UNHCR's Guidelines on the Detention of Asylum Seekers (Revised - 26 February 1999)

<sup>8</sup> The Immigration Service Operational Manual, Internal Home Office Publication, London, UK.

moreover, on the exceptional nature of detention and abounds with references to human rights requirements. The manual requires that the asylum seeker be informed of the reasons for their detention (in a language they understand) and that they be provided with a form indicating the reasons for their detention (a matter of ticking the applicable box) and explaining the detainee's rights to apply for bail. These are, certainly, important guarantees, but it remains the case that the authorisation of severe restrictions on the liberty of individuals is left to the discretion of chief immigration officers.

45. I was not able to obtain information relating to the frequency with which bail is applied for, nor how often appeals are successful, so I am in no position to comment on the appropriateness of the initial decisions to detain taken by the immigration authorities. Certainly, there is pressure on the immigration service to fill the increasing immigration detention estate, but it is worth noting that the last available statistics indicate that some 1,500 were detained, which, presuming the day in question is representative, is not large in proportion to the approximately 2,300 capacity at the time. Whilst I have misgivings, therefore, over plans to increase the use of detention still further, I can only note that, for the time-being at least, these powers would appear to have been exercised with restraint.
46. There are, however, procedural questions that give rise to concern. I have noted that the decision to detain is taken administratively. The detainee may, however, apply to an immigration appellate Adjudicator to be released on bail. Though continued detention is subject to internal administrative review, there is no automatic judicial review, either at the time of the decision, nor at any stage thereafter, though detainees may themselves contest the lawfulness of their detention through judicial review. It seems to me to be infinitely preferable, in respect of a matter which concerns so fundamental right as the right to individual liberty, that detention be authorised by a judge from the very outset. I accept, however, that the current system, providing the possibility of applying for bail, or judicial review, meets the criteria laid down by article 5 of the Convention. It is essential, however, that this possibility be a real and not a virtual one and here I have a number of doubts.
47. The reasons provided to detainees by the immigration officer at the time of the decision are at best cursory and the explanation of bail rights technical and perfunctory. From my own experience in Dungavel, it was clear that those who did not have decent legal representation, of which there appeared to be plenty, had very little idea, if any at all, as to how they might begin to apply for bail. Many, no doubt, would in any case fail to satisfy the necessary bail criteria, without, for all that, their continued detention being justified. As regards the possibility of applying for judicial review, it is unlikely, given the need for fairly complex legal argument referring to different Immigration Acts, Convention rights, Home Office guidelines and relevant case-law, that any detainee could successfully challenge his detention without legal assistance. Access to quality legal representation in asylum cases would appear, however, to be somewhat problematic. New rules restricting free legal aid to five hours per case with a further merits test for continuation beyond this time, or for the purposes of appeal, inevitably limit the access to legal representation. This is, indeed, a problem for all stages of asylum proceedings, but it is of particular concern in respect of the deprivation of liberty.



48. To this general difficulty one must add the fact that detainees are sent to centres very shortly after, if not immediately upon, being informed of the decision affecting them. Once there, in centres far removed from anywhere (and, in the case of Dungavel, frankly in the middle of nowhere, however beautiful the scenery may be) contacts with lawyers are inevitably even more difficult. Indeed, it would take a particularly dedicated lawyer to venture from London, where the majority of proceedings initiate, to the Scottish lowlands to interview his client.
49. The possibility of effectively contesting one's detention is all the more important, as it is indefinite and subject only to internal administrative review. It is not entirely clear what form this review takes – the Home Office guidelines refer only to the need to keep detention “under close review to ensure that it continues to be justified”. The ability of asylum seekers to contest their detention is not a hypothetical question. Of the 1,514 asylum seekers detained on 27<sup>th</sup> December 2004, 55 had been detained for between 4 and 6 months, 90 for between 6 months and a year and a further 55 for over one year. These are not negligible figures. I understand that difficulties may arise in the deportation of failed asylum seekers, but detention for anything over 4 months is long and over 12 months very long indeed. It is, of course, conceivable that detention may continue to be justified for such long periods. It is not acceptable, however, that such lengthy detention should remain at all times at the discretion of the immigration service, however senior the authority may be. It seems to me that there ought, at the very least, to be an automatic judicial review of all detentions of asylum seekers, whether failed or awaiting final decisions, that exceed 3 months and that the necessary legal assistance should be guaranteed for such proceedings.

### **Conditions of detention**

50. To concerns over the length of detention, one must add those, voiced by many organisations I met with, over the conditions of detention. Detention centres for foreigners are, inevitably, difficult places to manage. Detainees pending deportation are subject to significant levels of stress and have, it must be admitted, little incentive to abide by regulations. A high turnover merely adds to these inherent difficulties. A number of reports by HM Inspector of Prisons have, however, adverted to eminently avoidable failings. Riots in Yarl's Wood and Harmondsworth Removal Centres in February 2002 and July 2004, have graphically demonstrated their consequences.
51. I understand that efforts have since been made to address many of these shortcomings. I am bound to state that the conditions I observed in Dungavel were good and the relations between detainees and staff apparently excellent. As an aside, however, the proximity of the perimeter fencing to the main building, itself a not unattractive 19<sup>th</sup> century country house, seemed to me to be somewhat excessive – surrounding space is hardly at a premium and the effect is unnecessarily oppressive. There was, however, a limited range of activities on offer to detainees and reasonably free circulation for the large majority. None whom I spoke to complained of how they were treated.
52. I was struck, however, by the fact that many of those I spoke to appeared to be poorly informed of what was going to happen to them. A degree of uncertainty surrounding the fate of detainees is inevitable, but this only makes it all the more important to

communicate regularly with them. Greater communication on the part of immigration officials treating each case and more attention to the psychological needs of detainees in the form of counselling and support services should be offered. This would appear from my conversations with several organisations to apply to other removal centres also. The detention of some asylum seekers is, perhaps, unavoidable. Due regard for the well-being of failed asylum seekers is the very least that is owed to individuals that have committed no crime and whose only fault has been to aspire to a better life than they enjoyed at home.

### **The detention of children**

53. Prior to my visit, I received numerous reports and complaints regarding the asylum related detention of children in the United Kingdom. UNHCR guidelines<sup>9</sup> are clear on the inherent undesirability of detaining children in relation to asylum proceedings and it is obvious that their detention, for reasons largely beyond their comprehension, will inevitably be traumatic. Beyond this self-evident fact, a number of provisions of international law are relevant. Article 3 of UN Convention on the Rights of the Child states that judicial and administrative decisions should take the best interest of the child into account<sup>10</sup>. The Convention also states, in article 37, that children should be deprived of their liberty only as a last resort and for the shortest appropriate period of time. Whilst the detention of children for a matter of days prior to a certain expulsion might exceptionally fall within the permissible scope of these provisions, anything much longer would be of serious concern.
54. It is worrying, in this context, to note both the frequency and the duration of the detention of children in the United Kingdom. The overwhelming majority of child detainees are held together with their parents – special provisions apply to unaccompanied minors, who might very exceptionally be detained overnight, pending their transfer to more appropriate facilities. On 26<sup>th</sup> June 2004, 60 children were being detained in Removal Centres under Immigration Act powers, though the number had fallen to 25 by December 25<sup>th</sup> 2004. Already in 2002, however, the UN Committee on the Rights of the Child expressed its concern that the detention of an increasing number of children claiming asylum in the United Kingdom is incompatible with the provisions of the Convention<sup>11</sup>.
55. The 26<sup>th</sup> June 2004 figures reveal that 50 of children were detained for less than 14 days, 5 for between 15 and 29 days and the remaining five for between one and two months. I was, however, informed of a number of cases of children being detained for in excess of two months and am bound to comment, once again, on the lack of comprehensive statistics in this area. There is a clear duty to ensure the utmost transparency on an issue of such importance – snap-shot statistics on any one day cannot be said to give a detailed picture of the true extent of the detention of children. If the detention of children really is as exceptional as the Government claims, and subject, moreover, to special scrutiny, then it cannot be either time-consuming or costly to make detailed statistics publicly available.

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<sup>9</sup> UNHCR's Guidelines on the Detention of Asylum Seekers: Revised, 26 February 1999

<sup>10</sup> It is to be noted that the United Kingdom has made a reservation to the UN Convention on the Rights of the Child in respect of immigration matters.

<sup>11</sup> Concluding Observations to the United Kingdom's 2<sup>nd</sup> Report, para. 49, October 2002.

56. Particular concern over the detention of children was one of the reasons I requested to visit to Dungavel. The detention of children in this Removal Centre has attracted more criticism than elsewhere, owing in part to the length of time children have been held there and in part to the inadequate attention to their needs. At the time of my visit, however, there were no families with children in Dungavel at all – an outbreak of chicken pox apparently rendering the facility unsuitable for further transfers. I was, however, able to observe the arrangements in place for their accommodation. It would be unfair to state that they were anything other than acceptable for a period of residence not exceeding a week or two at most. Separate family accommodation was provided, children could be shielded from other detainees, there was a perfectly attractive nursery and basic materials for their occupation were provided. I am grateful to the Home Secretary for having provided me after my visit with statistics regarding the detention of children in Dungavel. I note that a total of 65 families were detained (comprising 106 children) between 1 November 2003 and 31 October 2004. The average stay was just under 12 days. Only three families (5 children) were detained for 30 days or more, for 41, 51 and 125 days respectively.
57. I am aware that there has been much debate over the education children at Dungavel have, or rather have not, been able to receive. I am loath, however, to recommend greater attention to this issue, or the possibility of children attending the local school (though I understand that the Local Authorities have generously made this offer), as it seems to me that no child should be detained for a length of time sufficient to make access to education an issue at all.
58. The numbers of children detained with their families suggests that insufficient attention has been paid to the examination of alternative forms of supervision. There has, it appears, been very little study of the likelihood of families with children to abscond that might support the Immigration Service's increasing resort to detention. Prima facie, indeed, families with children, particularly those who are settled with their children attending school, are less likely to abscond than any other category.
59. Discussing this issue with the Scottish Commissioner for Children and Young people, she informed me of the trauma she had encountered in children whose removal to Dungavel had been conducted in a particularly abrupt manner. She informed me that she had discussed this with the Home Office who had replied that families will typically receive a 'pastoral visit' from immigration officers giving notice of their impending transfer to a removal centre. This procedure was not followed, however, if there was believed to be a high risk of absconding. Without wishing to dwell on the conditions under which such transfers are effected, this exchange seems to me to reveal a certain anomaly. If some families are considered too liable to abscond to be informed of an impending transfer to a removal centre, others, clearly are not. It seems to me, however, that if a family can be relied on not to abscond prior to such a transfer, the sole purpose of which is to guarantee a certain expulsion, then there is equally little likelihood of their absconding if informed, simply, of their planned removal from the country. At the very least, this small example suggests that the criteria for detaining families with children are not as strict as they might be.

60. Greater use of alternative measures is therefore to be encouraged. The length of detention is also a major concern. In response to criticisms raised by HM Chief Inspector of Prisons in a report on Dungavel, the Government has recently introduced a requirement that the detention of any child beyond 28 days be subject to the express authority of the Immigration Minister, based on an assessment of the welfare needs of the child made after 21 days. Whilst this response certainly shows a sensitivity to concerns over the detention of children, it does not appear to me to be entirely adequate. Quite apart from the fact that, to my knowledge, no procedure for conducting the welfare assessment is yet in place, this review remains an administrative decision, without any form of hearing. Whilst it seems to me that, under a normal reading of the Convention on the Rights of the Child, no detention of a child in excess of a month can be justified at all, I concede that this point can be debated. It is imperative, however, that any decision to detain children be taken by a judicial authority, capable of independently weighing up all the relevant considerations. I do not believe that the possibility of applying for review satisfies this condition – certainly not in practice, as I have noted, but not in principle either. It is perverse that the burden should lie on the child or his family to take arduous steps to challenge their detention, rather than on the Immigration Service to prove its continuing necessity to an independent authority. A system minimally in conformity with the rights of the children would, in my view, require the Immigration service to seek the authorisation of a judge, with a periodic, judicial review of the continuing justification for detention.
61. There is one final issue concerning detention that merits mention. I was surprised to find, during my visit to Hydebank Wood prison in Belfast, a female asylum seeker detained with ordinary convicts. The lady appeared, certainly, to be as well looked after as one might hope, and enjoyed, if that is the right word, as loose a regime as prison conditions afford. It is clear, however, that prison is no place for asylum seekers, a point which the prison staff insisted on themselves. The situation in Northern Ireland is rather particular, as there is no Removal Centre there. Asylum seekers, who the Immigration Service wishes to detain, are consequently held in prisons. I raised this issue with the Home Secretary, who assured me that he was sensitive to this issue. It is not easy to know what the solution is; numbers are, for the time being, small – but not that small, I was informed by an NGO that had been monitoring this issue that during the course of 2003, 30 men, 15 women and 3 children had variously been held in prison under immigration powers. It was suggested, however, that they would not justify the construction of a special removal centre in Northern Ireland. The Secretary of State assured me that the possibility of being transferred to a Removal Centre on the mainland would be offered to all those who would otherwise be detained in prisons in Northern Ireland. If alternative arrangements in Northern Ireland really cannot be found, then this offer must be made good.
62. Detention in prisons elsewhere in the United Kingdom is also a problem. 120 asylum seekers were being detained in ordinary prisons solely under immigration act powers on 27<sup>th</sup> December 2003<sup>12</sup>. I understand that this is a very exceptional measure, and that such detention is meant to be of very short duration, but this number is not negligible. It is important to stress that asylum seekers have committed no offence and should under no circumstances be held together with common criminals. There would appear to be no shortage of space in the regular immigration detention estate and little excuse for

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<sup>12</sup> Home Office Statistical Bulletin. Control of Immigration: Statistics United Kingdom, 2003. 24 August 2004

transferring asylum seekers, even for short periods to an ordinary prison in or around London, where the majority are held, when there are a plenty of removal centres close by. I can only urge that the practise of detaining asylum seekers in ordinary prisons be stopped immediately.

### **Fast-track asylum procedures**

63. Two accelerated asylum application systems currently are currently in place. There is, firstly, one for those whose applications which are considered on initial inspection by the immigration service to be manifestly unfounded. Under Section 94 of the Nationality, Immigration & Asylum Act 2002, the Home Secretary has the power to draw up a list of safe countries (currently containing 14 countries), from which applications will automatically be considered manifestly unfounded if refused. Individuals from these countries, as well as others whose claims are also considered manifestly unfounded, will, if suitable for detention, be transferred to Oakington Reception Centre for the duration of proceedings and are unable to lodge an appeal against the negative decision (though they may contest their removal through judicial review) from inside the country. I was informed that not all asylum seekers processed in non-supensive appeal proceedings are detained. Statistics indicating the precise proportion would not, however, appear to be available. My impression from my discussions with immigration officials certainly suggested that the majority were.
64. Apart from those subject to non-supensive appeal proceedings, other asylum seekers may also be subject to fast-track proceedings. These include those applicants whose claims appear after screening to be capable of being decided quickly. Again, a list of countries is provided by the Home Office (currently numbering 55) from which applicants will be presumed to be suitable for fast-track proceedings. Not all applicants subject to such fast-track proceedings will be detained. Those that are will be held either in Harmondsworth or Oakington. These proceedings, which do not include the qualification of the application as manifestly unfounded, provide for the possibility of in-country appeal.
65. I would like to raise a number of points regarding these proceedings. The first concerns the frequent resort to detention for asylum seekers at the very outset of proceedings. Whilst detention is not automatic in such proceedings, there would appear to be a strong presumption in its favour; mooted plans to increase the asylum detention estate in precisely this area suggest that this is the direction in which the United Kingdom is headed. The United Kingdom authorities have indicated to me that the UK courts have approved detention for the sole purpose of processing asylum applications. I do not exclude the possibility of detention being appropriate in certain circumstances, but I do not believe that this would be an appropriate rule. Open processing centres providing on-site accommodation and proceedings are, I believe, a more appropriate solution for the vast majority of applicants whose requests are capable of being determined rapidly.
66. There may, indeed, be countries from which the vast majority of applications for asylum will turn out to be unfounded, but this in no way removes the obligation to examine each attentively on its merits. There may be numerous reasons why a country that is generally safe may not be so for a particular person. I was glad to hear from the Immigration

Service that they took this obligation seriously. It seems clear to me that the asylum applications can be heard reasonably quickly and yet thoroughly if the appropriate infrastructure is in place and the necessary arrangements are made for effective legal representation. Whilst the quality of the Immigration Service's initial decisions has been called into question, I note that the success rate of applications for individuals from countries on the fast-track list has not noticeably declined since the adoption of this procedure and conclude that, generally speaking, the quality of the examination has not been gravely prejudiced by its being accelerated.

67. I have, lastly, grave concerns over the fact that appeals in cases considered manifestly unfounded can only be lodged from abroad. This requirement is difficult to reconcile with the Geneva Convention, as it puts potentially successfully applicants at serious risk of persecution upon their return to their countries of origin. It is clearly harder to lodge an appeal from abroad and difficult for applicants to maintain contact with their lawyers. I am informed that rejected asylum seekers can challenge their removal through judicial review. This is certainly better than nothing, but I am not sure it permits the same kind of analysis as a full asylum appeal. Be this as it may, I was informed that of the more than 200 out-of-country appeals that have been lodged since the adoption of the 2002 Act, 4 have been successful. This may, indeed, be a very small proportion (though it obscures the fact that other potentially successful applicants may not have been able to appeal at all) and I was told that in each of these cases the applicant has either been brought back or that the UK authorities were in the process of organising their return. It is, however, four persons, acknowledged to be at risk, who are sent back to the very source of that threat. This is scarcely compatible with article 3 of the ECHR prohibiting torture, inhumane and degrading treatment. I do not see how the small proportion can justify this worrying fact. Rapid proceedings, including appeals, can, as the ordinary fast-track process demonstrates, be perfectly effective. Removing the essential guarantee that an in-country appeal provides cannot be considered appropriate.

### **The quality of initial asylum decisions**

68. An increase in the use of detention has been accompanied by a number of significant changes to asylum procedures, which taken together have greatly reduced the level of judicial scrutiny of asylum cases. Foremost amongst these has been the replacement, in the 2004 Act, of the previous two-tier appeal system with a single appellate authority, the Asylum and Immigration Tribunal (AIT). Appeals can be made from this special body, which is of a judicial nature, to the ordinary courts on points of law only and solely on the basis of written submissions. Plans to exclude judicial review altogether were dropped in the face of considerable criticism. Whilst this reform certainly provides fewer guarantees than before (and it should be noted that a fair proportion of appeals succeeded before the Immigration Appeal Tribunal<sup>13</sup>) the new system does not differ greatly from those in place elsewhere in Europe. There are, however, a number of practical considerations that significantly undermine this already reduced right of appeal to the High Court.

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<sup>13</sup> In 2003, 535 appeals by applicants were upheld out of a total of 3,345

Applications must, firstly, be made within 5 days of the AIT's decision. Such a short period of time cannot possibly be sufficient to prepare all cases effectively. Secondly, a tough 'merits' test for free legal aid, is likely to leave several potential worthy appellants with no possibility of representation and hence no effective right of appeal. Both of these measures need to be relaxed.

69. With the elimination of one level of appeal, the quality of initial decisions by the immigration service is clearly of particular importance. Many were the NGOs and asylum law practitioners, though, that complained to me of the poor quality of initial asylum decisions. They are not alone. The National Audit Office<sup>14</sup> has found cause to prepare a report on the quality of asylum decisions and the House of Commons Home Affairs Committee<sup>15</sup> has also expressed its concern on this issue. Successful appeals against negative initial decisions have been hovering around 20% for the last few years - over the 15% expected by the Immigration Service itself. The Immigration service has, however, pronounced itself satisfied with the results of its own quality testing, estimating at 80% the level of decisions that are fully effective or better. A closer inspection of the success rate of appeals against its decisions suggests that this satisfaction is misplaced. Though the average success rate is 20%, this jumps considerably for applicants from certain countries – those, in effect, from which the majority of well-founded asylum seekers come. Thus the success rates for appeals to Asylum Adjudicators only (the first tier under the old system) in 2003 for applicants from Somalia and Sudan was 38%. For Eritrea and Iran they were 33 and 30% respectively. These are high rates and clearly indicate a failure to appropriately measure the merits of cases from asylum hot-spots. It is easy to point to the pressure the immigration service is under to reduce asylum applications as a factor in this failure. A more compelling reason, however, can be found in the extremely limited training received by the front-line immigration officials taking these decisions.
70. The Immigration service more than doubled the number of case-workers from 355 in August 2000 to 769 in February 2001, in order to tackle the large increase in asylum applications over the previous few years. This increase in staff is certainly welcome. However, these new case-workers received only 11 days of training, followed by 11 days of supervised activity, before taking on cases individually. Including interview training, new caseworkers receive a total of 30 days training. This level of training is manifestly inadequate to handle complex cases, which require a detailed knowledge of country situations and considerable experience of the psychological behaviour of those fleeing persecution. It is, moreover, far below the levels of training generally provided across Europe. To this lack of training, one might add an apparent failure to react to new situations elsewhere in the world quickly enough and to reassess the decision-making criteria in the light of high numbers of successful appeals of applicants from certain countries. The quality of initial decisions is not only important because of the reduced rights of appeal. There are also good utilitarian grounds for addressing this failure. Improved first instance decisions will reduce the burden on the asylum system all the way down the line and, as a result, all the associated costs.

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<sup>14</sup> NAO report "Improving the Speed and Quality of Asylum Decisions" 23 June 2004

<sup>15</sup> <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/130/13002.htm>

**The withdrawal of basic support for asylum seekers**

71. Recent moves to reduce the attractiveness of applying for asylum in the United Kingdom have also included measures to limit access to social assistance. Section 55 of the 2002 Nationality, Immigration and Asylum Act was introduced to withhold assistance, in the form of housing and benefits, under the National Asylum Support Service to those asylum seekers who were deemed not to have made their applications as soon as reasonably practicable upon their entry into the country. I was informed of several cases of persons being denied support despite making applications only a few days after their entry. Many were those who spoke to me of the forced destitution of asylum seekers, who, unable to work, had no means of supporting themselves.
72. A Court of Appeal<sup>16</sup> ruling of May 2004 held that the denial of such support could breach Article 3 of the European Convention on Human Rights. Whilst asylum seekers might access basic social assistance once destitute, it was considered inhumane and unreasonable to first force asylum seekers into destitution before minimally bailing them out. I cannot but concur with this assessment. I understand that the Home Office has sought leave to appeal this judgment before the House of Lords, but that it has, in the interim, relaxed the application of Section 55. I welcome this temporary respite and urge the Government to ensure its permanence.
73. Section 9 of the Asylum And Immigration (Treatment of Claimants, etc.) Act 2004 introduces a further category of asylum seekers from whom basic assistance can be withheld. These are failed asylum seekers whom the Home Secretary has certified (having offered the opportunity of an interview) that they have failed, without reasonable excuse, to leave the United Kingdom voluntarily or to place themselves in a position in which they are able to leave the United Kingdom voluntarily. It is not unreasonable for the Government to take all necessary steps to ensure the removal of failed asylum seekers who have, after all, no right to remain in the country and their voluntary departure is certainly to be encouraged. Menacing failed asylum seekers with destitution may well be an effective way of doing this but it cannot be considered particularly humane. Organising one's departure will not necessarily be that easy; difficulties may well be encountered that beyond the individual's will. I trust, therefore, that this provision will be applied with due regard to the conclusions of the Court of Appeal regarding the similar provisions in Section 55 of the 2002 Act.

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<sup>16</sup> Court of Appeal, SSHD v. Limbeuala, 21<sup>st</sup> May 2004



### **Entering the United Kingdom without a passport**

74. The Asylum and Immigration (Treatment of Claimants etc.) Act 2004 introduces a new criminal offence of failing to provide, without a reasonable excuse, a valid document showing his or her identity and nationality when first interviewed by an immigration officer<sup>17</sup>. This provision is somewhat problematic. It is evident that many individuals fleeing persecution will arrive without personal documents. At the same time, difficulties in accessing the United Kingdom legally have led many, genuine asylum seekers amongst them, to seek the assistance of traffickers, who frequently confiscate the documents of their 'clients'. It is true, however, that a number of foreigners deliberately destroy their travel documents in the hope of rendering their deportation harder.
75. Whilst the introduction of legislation penalising the lack of valid documents seems to me to be generally undesirable for the reasons given above, my real concern is more specific. The new offence does contain a number defences. These include both the deliberate destruction of documents beyond the control of the individual charged with the offence and having travelled, from the very outset, without valid documents. However, the burden of proof in these cases is on the accused. These defences ought, rather to constitute central elements of the offence and it should be for the prosecution to prove their absence. Anything else would be a unwarranted inversion of the principle that individuals are innocent until proven guilty. How, for instance, is a victim of trafficking to show that he, or more likely, she, was forced to destroy their documents by untraceable agents. A properly formulated offence would rather require the proof, on the part of the prosecution, of the deliberate and autonomous destruction of documents for the purposes of facilitating entry or frustrating removal.

### **Access to legal representation in asylum cases**

76. The access of asylum seekers to legal assistance has surfaced in connection to a number of issues already discussed but deserves individual mention. The Government has been understandably keen to reduce the cost of legal assistance, which rose from £81.3 million in 2000-1 to £204 million in 2003-4. It is also understandable that the Government should wish to reduce the financing of unmeritorious appeals. Practitioners have, however, been unanimous in their criticism of recent reforms that limit free legal aid to 5 hours work and places strict merits based tests on any continued work on appeals and detention challenges. 5 hours does, indeed, seem remarkably little. Moreover, money spent on legal assistance is not ill spent, if the aim is to ensure the fair, but rapid resolution of asylum applications. It will greatly facilitate both the work of the immigration service and the appellate authorities if arguments are presented properly and in a timely manner. Decent legal representation is essential for this. With reduced guarantees at all stages of the asylum procedure, the last thing that is needed is for the fairness and accuracy of the decision-making procedure to be compromised by inadequate legal representation.

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<sup>17</sup> Section 2

**Conclusion**

77. If I have had cause to analyse many of the more recent reforms, it is because many of them give rise to concern. I understand that certain measures designed to preserve the integrity of the asylum system may have been necessary, given the increasing pressure over last decade. How we treat asylum seekers is, however, a measure of how we treat foreigners in general, and, in particular, how seriously we take our obligations to defend victims from persecution wherever it may take place. A society that loses its sensitivity to the suffering of foreigners, simply because they are foreigners, has lost something very precious indeed. An analysis of recent changes to the United Kingdom asylum system does not always yield pleasant conclusions in these respects. The need to respond to real challenges and legitimate social concerns, should not give way to a desire to reduce asylum applications at all costs. It cannot but be concluded, however, that a number of recent reforms have placed the effective enjoyment of human rights and the entitlement to refugee protection in some peril.

**IV. THE CRIMINAL JUSTICE SYSTEM**

78. It is cheering not to have to include a section in a report on country that I have visited on the malfunctioning of the judiciary. The wide-spread malaise of over-burdened courts and excessively slow justice does not extend to the United Kingdom, whose courts might serve in many respects as a model of efficiency to other countries in Europe. I understand that the judiciary is in the process of undergoing significant reform with a view, primarily, to increasing its independence. The judiciary of the United Kingdom never seemed to me particularly to lack this vital quality, but the ironing out of certain well-known anomalies is perhaps not unwelcome. Further comment on my part would, however, be inappropriate. I trust, in any case, that these reforms will in no way affect the quality of judgments for which the UK's courts have long been admired.

79. I have commented already on the frequency and thoroughness with which Convention rights have been analysed in UK court rulings since the adoption of the Human Rights Act. Suffice it to repeat that it is exemplary. There can be no doubt either that the United Kingdom's judiciaries largely and consistently satisfy the procedural requirements laid down by the European Convention on Human Rights. In sum, they serve as extremely effective guarantors of human rights.

80. My attention was, however, drawn to a number of more general concerns regarding the criminal justice system. These were the high rates, and conditions, of detention, and the treatment of juvenile and young offenders. The introduction of a wide range of civil orders to combat low-level crime and anti-social behaviour also raises a number of human rights concerns.

## Juvenile Justice

81. In response to widespread popular concern, the United Kingdom Government has made a priority of combating youth crime and disorder. It has invested considerable effort in reforming the youth justice system and introduced a wide-range of preventive and repressive measures. Many of these measures have been extremely positive. It is, however, difficult to avoid the impression that juvenile trouble-makers are too rapidly drawn into the criminal justice system and young offenders too readily placed in detention, when greater attention to alternative forms of supervision and targeted early intervention would more effectively straighten the errant, rehabilitate the convicted and consequently reduce youth crime.
82. It is important to note that many of the Government's more welcome reforms have been introduced with precisely this aim in mind. Indeed, with the adoption of the Crime and Disorder Act and the establishment of the supervisory Youth Justice Board in 1998, fresh emphasis was placed on holistically addressing all aspects of juvenile disorder and offending. The creation of Youth Offending Teams, composed of representatives from the police, Probation Service and a wide range of social services, has enabled intervention to be targeted towards young offenders more effectively. Nor has prevention in the form of increased welfare assistance been ignored. I was impressed by the wide range of programmes aimed at deprived children - 'Sure Start', 'Connections', the 'Children's Fund', 'Youth Inclusion Programmes', 'Positive Action for Young People', and I could go on – which, if in their infancy, appear to be addressing the differing needs of children of different ages quite effectively. Recent reforms have also recognised the need to reduce the numbers of juveniles and young offenders in detention, which, I understood, was also a priority for the Youth Justice Board. Thus, a range of alternative community sentences have been introduced including new Supervision Orders, Community Rehabilitation and Punishment Orders. A further Intensive Supervision and Surveillance order would appear to be in the pipeline. Somehow, however, these policies would appear to have made little dent on the numbers of juveniles and young offenders detained.
83. At the same time, these welcome initiatives have been significantly undermined by the introduction of a series of civil orders aimed at reducing urban nuisance, but whose primary effect has been to bring a whole range of persons, predominantly the young, within the scope of the criminal justice system and, often enough, behind bars without necessarily having committed a recognisable criminal offence. The most publicised of these orders, and the one to give rise to the most human rights concerns, is the Anti-Social Behaviour Order – the ASBO.
84. Such a curious contradiction in policy reflects a broader disparity between the reality of juvenile crime and the perception of it. Whilst the British Crime Survey suggests that youth crime has marginally decreased over the last few years<sup>18</sup> this is not the general public perception – in a recent survey, 75% of interviewees believed it rather to have worsened<sup>19</sup>. I was struck, moreover, by the insistence with which MPs, of all parties,

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<sup>18</sup> The number of known young offenders peaked in 1992 before falling 14 per cent between 1995 and 2001.

<sup>19</sup> M Hough and J Roberts, *Youth Crime and Youth Justice: Public Opinion in England and Wales*, ICPR research paper no. 1, ICPR, London, 2003.

informed me of the concerns in their constituencies over crime and anti-social behaviour. The frequency with which such complaints were raised during constituency meetings led almost all I spoke to stress the need to strike an appropriate balance between individual and collective rights in order to protect the quality of life of the community – the implication being, of course, that the former had for too long been privileged at the expense of the latter.

85. Certainly, rights come with responsibilities. Criminal activity must, indeed, be strictly prosecuted and criminal tendencies redirected. Anti-social behaviour is unquestionably an urban blight that seriously erodes the quality of life of ordinary citizens. It is essential, however, that measures to combat such behaviour be both fair and effective. It is doubtful whether the excesses of the anti-social behaviour order and the high-levels of juvenile detention achieve either of these aims. As a general impression, it seems to me that more effort might be expended on explaining the successes of positive reforms and presenting an accurate picture of juvenile crime rather than concocting new measures, which may well inspire confidence through empowering local communities to act themselves, but which would appear neither necessary nor appropriate.

*The detention of juveniles and young offenders*

86. The United Kingdom has amongst the highest rates of juvenile detention in Western Europe. Comfortably in line with the European average during the early nineties, the numbers of juvenile and young offenders increased significantly between 1995 and 1997, since when they have remained largely stable. Thus, the number of 15 to 17 years olds detained (in prisons) on 30<sup>th</sup> June 1995 was 1,675, rising to 2,479 on the same date in 1997<sup>20</sup>. On 31 December 2004 the corresponding figure stood at 2,169. An equivalent pattern obtains for young offenders (between the ages of 18 and 20); on 30 June 1995, 5,872 were detained, rising to 7,684 on the same date in 1997 and standing at 8,073 on the last day of last year.
87. Such a large number of young and juvenile detainees is in itself of concern. The detention of young offenders, and particularly of juveniles, ought to be a last resort and applied for the shortest appropriate period of time<sup>21</sup>. This is not an appeal for leniency. Punishment must necessarily attend on crime and detention may well be the most appropriate sentence. It is, however, vital to recognise the need to assist and effectively correct offending youths. Punishment can perfectly well be combined with the social imperative to, for want of a better expression, give mostly extremely troubled children a chance. Detention, if sometimes necessary, is, at the same time, very bad at this. It should be noted that around 80% of young people sentenced to custody are reconvicted within two years of their release.
88. The high levels of youth detention would appear to suggest a lack of suitable alternatives. As noted above, however, this is not entirely the case. A wide range of alternatives already exists. It would appear, rather, that magistrates and judges do not yet have sufficient confidence in them. At the same time, magistrates and judges face considerable pressure from a public opinion generally in favour of strict custodial sentences. I was

<sup>20</sup> The figures provided are for England and Wales.

<sup>21</sup> Article 37 UN Convention on the Rights of the Child

even informed by a member of the judiciary of the publication in the press of the names and photos of judges considered by editorial staff to have been too lenient in their sentencing. Here again, a plea might be made to raise the overall awareness of the public firstly of the realities of youth crime and, secondly, of the effectiveness of non-custodial sentences. This cannot, however, be all there is to the matter. Whilst the introduction of new non-custodial sentences is certainly to be welcomed, they must, if they are to enjoy the confidence of sentencers be accompanied by the necessary means to apply them effectively. The high rates of detention of young people suggest that this is not yet the case. Greater investment in alternative sentences would appear to be required if ambitions are to be translated into reality.

89. The high rates of incarceration of children and young offenders have inevitably impacted on the conditions of detention, in respect of which a number of concerns were brought to my attention. During my visit I was able to visit only one prison for young offenders and juveniles – Hydebank Wood in Northern Ireland. A scheduled visit to Feltham Young Offenders Institution had to be cancelled as my programme overran on the final day. I was, however, able to speak to many involved in the supervision of prison conditions in the United Kingdom, including Her Majesty’s Inspectors of Prisons for England & Wales and for Scotland, as well as numerous extremely well informed NGOs.
90. Juvenile and young offenders will often have endured troubled and disrupted childhoods. Special attention to their educational and psychological needs is consequently required if their detention, at such a critical time in their development, is to contribute to their rehabilitation and reinsertion into society. All those I spoke to within the prison system were naturally sensitive to these imperatives, but it is difficult to conclude that they are entirely being satisfied. Indeed the overall impression I obtained was of a detention system that placed too much emphasis on punishment and control and not enough on rehabilitation.
91. The needs and treatment of juveniles (under 18) and young offenders (18 – 20) differ and I will consequently examine them separately. As far as children are concerned, I was informed that the conditions of their detention has improved somewhat in recent years, with greater investment in Local Authority Secure Children’s Homes (LASCH’s) and Secure Training Centres (STCs) and in the services provided to children detained in Young Offender Institutions (YOI)<sup>22</sup>. Whilst these improvements are certainly to be welcomed, two serious shortcomings remain.
92. I was struck, on my visit to Hydebank Wood, by the apparent lack of appropriate psychological care and the inadequate educational assistance provided. My discussions with other actors suggest that these problems arise, to a greater or lesser extent, throughout the juvenile and young offender detention estate. With regard to the former it is to be noted that the average time spent in education in Young Offenders Institutions in 2003 was a mere 7.1 hours a week<sup>23</sup>. There would appear, moreover, to be a shortage of properly qualified teachers working within the prison system. The result is not surprising

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<sup>22</sup> LASCH’s are generally used to accommodate juveniles between the ages of 12 and 14, but will also hold children up to 16 who have been assessed as vulnerable. STCs are purpose built centres for young offenders up to the age of 17. YOIs hold young offenders between the ages of 15 and 21.

<sup>23</sup> Hansard, Written Answers to Questions, 25<sup>th</sup> March 2004.

- between April 2000 and December 2002 only 279 children achieved a single GCSE in prison and a mere three an A-level. I understand that short periods of detention and high transfer rates make it difficult to pursue properly structured courses, but these statistics clearly indicate a worrying failure to address the educational needs of juvenile detainees who risk re-entering society even more poorly equipped to meet its demands than before their conviction. It is to be recalled, moreover, that all children have the right to receive an appropriate education and that the obligation on the state to satisfy this right is accentuated when children are within its care. I can only urge that greater investment be made in this area.

93. The lack of appropriate psychiatric care is of particular concern. As noted above, juvenile detainees are often amongst the most vulnerable and disturbed amongst their age-group. Often psychologically damaged prior to their conviction, detention inevitably places unstable children under additional strains. It was the opinion of many that I spoke to that far too many vulnerable children were detained in YOI's, who ought really to be detained in LASCH's, which provided specialised care to children (up to the age of 16) assessed as requiring special attention – but that there was simply not enough space for them. If Hydebank Wood is at all representative, it is clear that YOI's are poorly equipped to deal with psychologically fragile children. The prison management there certainly did what it could, and did so with consideration, but conceded that its means were entirely inadequate. Beyond a visiting NHS psychiatrist, there was very little specialised care. Ordinary prison wardens, who had received little to no specialised training, were all too often left with no more sophisticated methods of supervision than sitting outside a stripped cell ready to intervene, more or less forcefully at the first sign of impending self-harm. Preventive *treatment* was minimal. It is hardly surprising, under such conditions, though extremely worrying, that 19 children should have hung themselves in YOI's over the last decade. One can only conclude that the prison service is failing in its duty of care towards juvenile inmates. Whether the solution lies in increasing the number of places in LASCH's, in improving psychiatric care in YOI's or in keeping such unstable children out of prison altogether is not for me to say. It is obvious, however, that this structural shortcoming must be urgently addressed.
94. Whilst considerable investment has been made in the juvenile detention facilities, comparatively little new funding has been set aside for youths between the ages of 18 and 20, despite the 49% increase in the number of young adults detained since 1992. There would appear, moreover, to be no comprehensive strategy for dealing with this important part of the prison population. Whilst the number of young adults detained at any one time hovers around 8,600, the annual intake upon conviction is around 14,500 – almost a third of all those entering prison under an immediate custodial sentence in any given year. The importance of this age group is not merely quantitative. The peak age of offending is around 18. Reconviction rates for 18-20 year olds stand at 71%<sup>24</sup>. Effectively addressing the needs of this age group whilst in detention is consequently central to reducing crime. It is vital, in short, that young adults should leave prison with something other than advanced degrees in criminality.

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<sup>24</sup> Home Office, 2003

95. Serious problems of overcrowding have made it very difficult to achieve this. In July 2004, 28 of the 47 prisons holding 5 or more young people were overcrowded and 30 had prisoners doubling up in single cells. Such overcrowding has inevitably impacted on the conditions of detention and the availability of education and purposeful activity. The situation is exacerbated, moreover, by the high turnover that such large numbers entail, as detainees are frequently shuffled around the prison estate to make way for new arrivals. Frequent transfers make it difficult for detainees to adjust to life in prison and seriously disrupt programmes and activities for their rehabilitation.
96. The shortage of purposeful activity so central to the rehabilitation of young offenders is striking. The Youth Justice Board has set the admirable target of 30 hours of purposeful activity per week for detainees between the ages of 18 and 20. Only 6, however, of the 47 prison establishments holding young persons achieved this target in 2003-2004, with 15 failing to provide an average greater than 20 hours a week<sup>25</sup>. The result is that detainees spend large amounts of time in their cells – young offenders in 26 of the 47 prisons spent on average more than 15 hours a day locked up<sup>26</sup>.
97. The conclusion would appear to be that there are too many young offenders in custody doing too little in overcrowded and stressful conditions. The purpose of detention is not merely punitive. Rehabilitation, particularly at this pivotal age, must be a central objective. The respect shown for juvenile detainees by the prison staff at Hydebank Wood, and which I can only presume is typical of the prison administration, cannot on its own be sufficient to achieve this aim. Far greater resources than are currently available need to be invested in the young offender prison estate.

#### *The Juvenile Justice System in Scotland*

98. The Scottish juvenile justice system differs considerably from the one in place in the rest of the United Kingdom and it seemed to me to be important to examine its functioning separately. I am grateful, therefore, to all those who found the time to explain it to me during my visit to Scotland and, in particular, to the Minister of Justice for the lengthy meeting we held on a Saturday afternoon.
99. Scottish criminal law considers as children only those who are under 16 years old and has no specialised youth courts. Instead, it operates a two-track system comprising on the one hand a predominantly welfare based system and, on the other the ordinary criminal justice system, with nothing, as it were, in the middle. Thus children under the age of 16 suspected of committing an offence will typically be referred to the Children's Hearings system. Particularly serious crimes may, however, be heard in the ordinary courts. Children over the age of 16 will automatically be prosecuted in ordinary adult courts unless already under the supervision of the Children's Hearing System.

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<sup>25</sup> Solomon, 2004; Prison Service Planning Group

<sup>26</sup> The Prisons Inspectorate recommends that young prisoners should spend at least 10 hours a day out of cells.

100. The Children's Hearings system is essentially a welfare based-system. The majority of cases heard in the Children's Hearings system (60% in 2002-03) do not concern criminal offences at all but relate rather to the care and protection of children. When addressing criminal behaviour the Children's Hearing system consequently focuses on the causes of the delinquency and imposes measures based on the children's needs. Though the supervision orders at its disposal naturally extend to varying degrees of restrictions of liberty in specialised centres, its aims are essentially recuperative rather than punitive. I understand that there is currently some debate over the effectiveness of the Children's Hearings System in addressing juvenile crime and that a consultation process has been launched. I am, of course, no expert, and various aspects of a system over 30 years old may well require reform. I heard much, however, to suggest that the originality of its welfare-based approach is rewarded with success and that, in its essentials it deserves to be preserved.
101. My concern lies rather with prosecution of children in ordinary adult courts. It would appear that children under 16 will only be prosecuted in the ordinary courts in the event of serious offences, and even then not always, as such cases are referred jointly to the Children's Hearing System and Procurator Fiscal, who may decide that a Children's Hearing would be most appropriate. I was informed that between 100 and 150 are tried each year and that proceedings are modified to accommodate the needs of the child. If found guilty, the judge may yet decide to refer the child to the care of the Children's Hearings system to determine the appropriate response. Such flexibility is certainly welcome and I have no doubt that good sense generally prevails when deciding whether to prosecute.
102. The fact remains, however, that ordinary adult courts, even where procedures are adapted, are no place to try children. This applies particularly to the few who are under 16, but equally to all those who are under 18 for whom a Children's Hearing is no longer an option. The low age of criminal responsibility in Scotland – a mere 8 – is a further concern in this context, which is examined in greater detail below. I was interested to learn, therefore, of the recent introduction in Hamilton and Airdrie of pilot Youth Courts for offenders aged 16 to 17 with the possibility of dealing with 15 year olds in certain circumstances.
103. Specialised youth courts allow for rapid hearings, appropriate proceedings, greater experience of young offending amongst sheriffs and, most importantly, closer ties between the judiciary and the broad range of service-providers dealing with offending youths post-conviction. I would be extremely surprised if the experiment does not prove to be a success. Without wishing to encourage the diversion of more cases concerning offenders under 16 from the Children's Hearings system to the criminal justice system, the trial of suspects below this age in Youth Courts might also be considered as an alternative to trial in ordinary courts.
104. The emphasis placed on the rehabilitation of juvenile and young offenders in Scotland is reflected in the lower proportion serving custodial sentences. Unlike England and Wales, the total numbers of detainees in Young Offender Institutions has remained relatively stable over the last decade. Since last year Scotland has only one Young



Offender Institution, Polmont, which has a capacity of 655 – near enough the average daily number of young detainees in Scotland. Overcrowding is not, therefore, a pressing problem (at least in young offender detention estate). I was, however, surprised to discover that a number of detainees, often in shared cells, in Polmont were obliged to slop out. I was informed by the Minister of Justice that plans had been drawn up to put an end to this degrading situation and I can only encourage their immediate execution. Whilst on this subject, I might note that these welcome plans extend to adult establishments where slopping out is also necessary. I was, however, informed that there were for the moment no such plans to end this practise in one remaining wing in Peterhead Prison holding sex offenders. I am sure that this omission is only temporary, but would nonetheless call for its rapid correction.

*The Age of Criminal Responsibility in England & Wales and Scotland*

105. The privileging of the criminal justice system over other forms of intervention in respect of errant juveniles is reflected somewhat in the age of criminal responsibility in the United Kingdom. I was surprised to learn that the age of criminal responsibility in England and Wales was 10 and that in Scotland it is as low as 8 years old. I understood from my discussions with prosecutors and judges that it was extremely rare, in both jurisdictions, for children under the age of 14 to be prosecuted. They would be so only in the event of the commission of a particularly serious crime (for homicide, for instance, and even then not always), and that the decision to prosecute was surrounded by a series of safeguards and could be taken only at the very highest levels of the prosecution services. There is, most likely, a cultural difference at the heart of my surprise and yet I have extreme difficulty in accepting that a child of 12 or 13 can be criminally culpable for his actions, in the same sense as an adult. I do not mean to deny that extreme measures may need to be taken, both to punish the act and to attempt to correct whatever it is that has clearly gone so drastically wrong. From this, however, to considering that a child of 12 can measure with the full consciousness of an adult the nature and consequences of their actions is, in my view, an excessive leap.
106. It should be noted, however, that the European Convention on Human Rights does not, however, require any age-limit on the presumed capacity of children to form sufficient *mens rea* to be criminally responsible for their actions. The European Court for Human Rights has, in particular, held that attribution of criminal responsibility to a child as young as ten would not of itself give rise to concerns under Article 3 of the ECHR (on inhumane and degrading treatment)<sup>27</sup>. The nature of any resulting criminal proceedings must, however, be an important factor when considering whether the Article 3 threshold has been breached. Offences of juveniles in England and Wales will usually be heard in the Youth Courts, but may, if particularly serious, be tried in the ordinary Crown Court. Providing that the trial was sufficiently adapted to the psychological needs and intellectual capacity of the child, Crown Court hearings would not necessarily breach either Article 3 or Article 6 (on fair trial) of the ECHR.

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<sup>27</sup> *T v UK and V v UK*

107. Even if the ECHR would not appear to require a modification of the ages of criminal responsibility in the United Kingdom, I would nonetheless, for the reasons given above, recommend that consideration be given to raising the age of criminal responsibility in line with norms prevailing across Europe.

### **Anti-Social Behaviour Orders**

108. Over the last few years the Government has introduced a broad range of civil orders designed to combat low-level crime and general nuisance by obliging or banning specified behaviour by a given individual. These include Dispersal Orders, Parenting Orders and most, notably, the Anti-Social Behaviour Order (ASBO). Whilst a number of concerns have been raised in respect of all of these orders, I will focus on the ASBO, which seems to me to be particularly problematic.
109. An application for an ASBO can be made to a magistrate by the police, local authorities, housing action trusts and registered social landlords on their own initiative or on the request of members of the local community. Where the magistrate is satisfied, on the balance of probabilities, that an individual has been engaged in *"behaviour which causes or is likely to cause harassment, alarm or distress to one or more people who are not in the same household as the perpetrator"*<sup>28</sup>, he may prohibit the behaviour in question or the individual from entering a specified geographical area. The ease of obtaining such orders, the broad range of prohibited behaviour, the publicity surrounding their imposition and the serious consequences of breach all give rise to concerns.
110. Civil orders designed to protect an identifiable person or group of persons from clearly specifiable behaviour on the part of another have existed for some time. Restraining orders, for example, preventing a given individual from approaching another, exist to protect victims of domestic violence from further abuse. Less dramatically, and more akin, I take it, to what ASBOs are designed to address, civil injunctions may also be sought in most countries against such nuisances as excessive noise or harassment by neighbours. What is so striking, however, about the multiplication of civil orders in the United Kingdom, is the fact that the orders are intended to protect not just specific individuals, but entire communities. This inevitably results in a very broad, and occasionally, excessive range of behaviour falling within their scope as the determination of what constitutes anti-social behaviour becomes conditional on the subjective views of any given collective. It also makes it difficult to define the terms of orders in a way that does not invite inevitable breach. This is particularly important as the breach of an order is a criminal offence with potentially serious consequences. At first sight, indeed, such orders look rather like personalised penal codes, where non-criminal behaviour becomes criminal for individuals who have incurred the wrath of the community.
111. I was surprised by the enthusiasm I encountered amongst the executive and the legislature for this novel extension of civil orders to such a wide range of offensive, if not necessarily offending, behaviour. I do not question the fact that low-level crime and

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<sup>28</sup> Home Office Guidelines on the use of ASBOs

- anti-social behaviour constitutes a serious nuisance to ordinary members of the community, which is typically aggravated by a feeling of impotence. Certainly, the state has an obligation to protect society from the rogue behaviour of hoodlums and vandals. I do, however, question the appropriateness of empowering local residents to take such matters into their own hands. This feature would, however, appear to be the main selling point of ASBOs in the eyes of the executive. One cannot but wonder, indeed, whether their purpose is not more to reassure the public that something is being done – and, better still, by local residents themselves – than the actual prevention of the anti-social behaviour itself. Be this as it may, I do not wish to suggest that ASBOs are necessarily objectionable. Well-drafted orders, prohibiting clearly proven and seriously vexatious behaviour, accompanied by appropriate assistance and supervision may well usefully protect citizens from activity that gravely prejudices their welfare, but which falls outside the scope of effective criminal prosecution. Many ASBO's would appear, however, to fail to satisfy these requirements.
112. ASBO excesses have been well-publicised – two notable examples include the serving of ASBOs on an 87 year old for being repeatedly sarcastic and a 17 year old deaf girl for spitting. This kind of behaviour, or boozing in public, or loudly hanging around street corners, is no doubt unpleasant. It is not clear, however, whether it ought to be elevated to a two-stop criminal offence. That they regularly fall within the scope of the anti-social behaviour order is attributable in part to the ease of obtaining them and in part to the excessive political encouragement being given to Local Authorities by Westminster, particularly over last 18 months.
  113. With regard to the latter, it is difficult to avoid the impression that the ASBO is being touted as a miracle cure for urban nuisance. The police, Local Authorities and other empowered actors are thus placed under considerable pressure to apply for ASBOs, both from central government and from inconvenienced members of the local community. This pressure applies equally to magistrates to grant them. It is notable that only 200 ASBOs were awarded in 1999-2000. In 2004, 2,600 ASBOs were made in the first 9 months alone. It is to be hoped that this burst of ASBO-mania will quieten down, and that its use will in time be limited to appropriate and serious cases, where no other means of intervention might succeed. Responsible guidelines and realistic rhetoric is required, however, for this to happen.
  114. Part of the drive to promote ASBOs has involved making them as easy as possible to obtain and open to as many actors as possible to request. I understand that consideration is currently be given to allowing individuals, or groups of individuals, to apply for ASBOs directly. This development should be strongly discouraged – the pressure on magistrates to award ASBOs is already considerable. Some form of responsible screening of ASBO applications by a responsible authority seems to me to be at least a minimum guarantee against excessive use.
  115. The ease of obtaining Ambos can be seen in the fact that of the 3,069 ASBO applications to made between 1 April 1999 and 30 June 2004, only 42 were turned down by the courts<sup>29</sup>. Despite being a civil order, the House of Lords has confirmed that the standard of proof applicable in for the determination of anti-social behaviour is

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<sup>29</sup> In England and Wales. Home Office

- the criminal standard proof – which is to say beyond reasonable doubt. However, the same judgment goes on to say that as the proceedings are civil for the purposes of domestic law, hearsay evidence is admissible. For my part, I find the combination of a criminal burden of proof with civil rules of evidence rather hard to square; hearsay evidence and the testimony of police officers or ‘professional witnesses’ do not seem to me to be capable of proving alleged behaviour beyond reasonable doubt. The rationale behind the admissibility of such evidence is stated to be that witnesses may be afraid to testify in respect of anti-social behaviour they have themselves been victims of for fear of future reprisals – suggesting that activity causing serious and actual harassment is what is meant to be targeted. It is unfortunate, therefore, that ASBO proceedings are drawn up in such a way as to permit a range of behaviour that is merely disapproved of (even by only very few people) to be brought within their scope. My attention has been drawn to Home Office Guidelines outlining both the kind of evidence required and the kind of behaviour that is meant to be targeted. It seems to me that they both unduly encourage the use of professional witnesses and hearsay evidence and fail to emphasise the seriousness of the nuisance targeted.
116. Proper evidential requirements and a sensible control of what actually constitutes anti-social behaviour are essential as ASBOs can bring their subjects, literally, a mis-placed step away from the criminal justice system. Indeed, the ASBO blurs the boundaries between the civil and criminal justice systems and great care must consequently be taken to ensure that the rights to fair trial and liberty are respected. ASBO breaches are punishable by up to 5 years in prison – an extremely heavy punishment for behaviour that is not recognisably criminal. It should be noted, moreover, that 42% of all ASBOs up to December 2003 were breached and that 55% of these breaches were punished with a custodial sentence. It seems to me that detention following the breach of an ASBO drawn up in such a way as to make its breach almost inevitable (such as not entering a demarcated zone near one’s residence), and which was applied on the basis of hearsay evidence in respect of non-criminal behaviour, would almost certainly constitute a violation of article 5 of the ECHR. Such cases would appear to occur and, in so far as they do, the functioning of ASBOs needs to be addressed.
117. Particular concerns arise in respect of the application of ASBOs to children. ASBOs can be served on children as young as 10 in England and Wales and 12 in Scotland. It is one thing to intervene in respect of seriously and repetitively troublesome youths, in respect of whom ASBOs may, on occasion, be appropriate. It is another to slap them on youths that are generally up to no good. There is a world of difference between hassle and harassment. It is not because a child is causing inconvenience that he should be brought to the portal of the criminal justice system. Here again, however, I heard numerous complaints of excessive, victimising ASBOs being awarded.
118. The concern is that the excessive use of ASBOs is more likely to exacerbate anti-social behaviour and crime amongst youths than effectively prevent it and this is for two reasons. Firstly, ASBO breaches have resulted in large numbers of children being detained – 46% of young people received immediate custody upon conviction for breach, though only 17% were sentenced to custody for breach where no other offence was considered. The chair of the Youth Justice Board has conceded that the rise in the young offender population in custody in 2004 resulted mainly from breaches of anti-

social behaviour orders. Given the high reconviction rates for detained juvenile offenders, one wonders, whether the detention of juveniles for non-criminal behaviour will not lead to more serious offending on release. It is to be recalled, in any case, that the detention of children should be a last resort – detaining children for activity that is not itself criminal can scarcely be consistent with this principle. I was pleased to note that children under 16 cannot be detained for breaching ASBOs in Scotland and would strongly encourage the extension of this rule to the rest of the United Kingdom.

119. Secondly, ASBOs risk alienating and stigmatising children, thereby entrenching them in their errant behaviour. Whilst the first of these consequences is perhaps involuntary, if inevitable, the second effect seems rather to be expressly encouraged. I was particularly struck by the degree of publicity surrounding the awarding of ASBOs that is encouraged by Home Office guidelines<sup>30</sup>. These guidelines encourage a wide-range of measures to notify local residents of the serving of ASBOs on members of the community, which include the distribution of leaflets containing photos of the ASBOs subject. Whilst recognising that “*the impact of publicity on a youth should be considered when deciding how to inform people about the order*”, the guidelines go on to state that “*generally the approach to publicity [for children] should be the same as for adults*”. A recent court ruling concerning the publicity of ASBOs requested by Brent County Council has recognised that the broad notification of local residents is essential to the ASBO system and would not, as a general rule, violate the right to respect for private and family life guaranteed by Article 8 of the ECHR. I cannot help but be somewhat uneasy over such a transfer of policing duties to local residents.
120. This is not my main concern, however. I am happy to concede that the serving of ASBOs should be made public, this indeed is part of the point of them, and that consequently the reporting restrictions that apply to the criminal convictions of juveniles need not be respected quite so strictly in respect of them. It seems to me, however, to be entirely disproportionate to aggressively inform members of the community who have no knowledge of the offending behaviour, and who are not affected by it, of the application of ASBOs. It seems to me that they have no business and no need to know. They might, if interested, wish to inform themselves of local residents subject to ASBOs, and this might even be made easy for them. The aggressive publication of ASBOs, through, for instance the door step distribution of leaflets containing photos and addresses of children subject to ASBOs risks transforming the pesky into pariahs. The impact on the family as a whole must also be considered. Such indiscriminate naming and shaming would, in my view, not only be counter-productive, but also a violation of Article 8 of the ECHR. The point is not that publicity will necessarily violate the rights guaranteed by the Convention, but that it may in certain circumstances. Stricter guidelines and greater restraint would reduce this risk in practise and are urgently necessary.

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<sup>30</sup> In the Home Office’s “Together” campaign - “Anti-Social Behaviour Orders – the use of leaflets”.

## **Prison Conditions**

121. Whilst in the United Kingdom, I visited three prisons – Hydebank Wood, which holds young offenders and has a new women’s section, Edinburgh Prison and Belmarsh. In all three prisons I was impressed by the professionalism of the staff I encountered and seemingly good relations that prevailed between them and the inmates. With the exception of a few remaining wings in Scotland in which detainees are obliged to slop out and the inevitable stresses of ubiquitous overcrowding, the material conditions in the United Kingdom’s prisons would appear to be fairly good. My visits and discussions with prison managements, prison inspectors and NGOs did, however, reveal a number of remaining challenges. I recall the words of Her Majesty’s Inspector of Prisons for England and Wales who summed up the problems of Britain’s prison population as “too many, too vulnerable”.

### *Overcrowding*

122. Overcrowding would appear to be the single greatest difficulty. Over the last ten years there has been a sharp rise in the numbers detained, that has not been matched by a commensurate increase in the detention capacity. The average prison population (in England & Wales) in 1994 was 48,631. On 28<sup>th</sup> January 2005 it was 74,103. Over the same period, despite the construction of ten new prisons (at a cost of £2bn), only 17,000 new places have been added. As a consequence, the populations of 73 out of 144 prisons exceeded their Certified Normal Accommodation, on 28<sup>th</sup> January 2005, with 35 of them doing so by over 20%. Adult prisons in Scotland do not suffer less from overcrowding.
123. One might pause to note that the 50% increase in the prison population over the last decade has resulted in the United Kingdom having the highest rates of detention in Western Europe (around 140 per 100,000, in comparison, for instance, to 93 in France and 98 in Germany). This sharp rise would appear to result from a combination of longer and more frequent custodial sentences<sup>31</sup>. UK courts have not over this period been dealing with more offenders nor an increase in serious offences that might otherwise explain this development<sup>32</sup>.
124. Quite apart from the cramped conditions inevitably entailed<sup>33</sup>, such high levels of overcrowding impact on all aspects of prison regimes. Access to purposeful activity, visits, showers and telephone calls and other facilities are all reduced. Average time spent in cells increases. The management of prisons under such conditions is difficult for staff, and the maintenance of security becomes harder as the stress levels of detainees rise. In short, the conditions of detention in some of the United Kingdom’s more crowded prisons cannot be considered to meet international standards.

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<sup>31</sup> The number of detainees serving sentences of four years or more has increased from 14,622 in 1994 to 28,360 on 19<sup>th</sup> November last year, a rise of 92%. Offenders convicted in magistrates courts are three times more likely to be sentenced to custody than ten years ago, and twice to be so as likely if convicted in Crown Courts.

<sup>32</sup> 1.2 million convictions were made in 1991, 1.1 million in 2001. The number of convictions for violence against the person, sexual offences and burglary all decreased, though drug related convictions rose substantially over the same period. Source : Criminal Statistics for England and Wales 1991 and 2001.

<sup>33</sup> In May 2004 17,000 prisoners were doubling up in cells designed for one. Prison Reform Trust.

125. There are only two possible solutions – a reduction in the number of detainees or an increase of the detention estate and the resources available for its administration. The first of these two possibilities seems to me to be preferable – non-custodial sentences are both cheaper and no less effective in preventing re-offending. The second, would, however, also answer the human rights concerns resulting from the overcrowding of Britain’s prisons. Either way, the problem of overcrowding urgently needs to be addressed.

#### *Self-harm and Psychiatric Care*

126. I have already examined the inadequacy of psychiatric care and the high level of suicide amongst the juvenile detention population. Similar problems exist for adult detainees and, in particular, for women. I was able to observe this problem close up during my visit to the female offenders unit of Hydebank Wood prison in Belfast. Much to the Governor’s chagrin, the women’s section held a number of highly damaged women in a special wing, one or two of which, he conceded attempted suicide on a weekly basis and were never likely to return to the normal prison regime. The wing in question contained a number of stripped cells, in which psychologically unstable detainees are held in special non-rip clothing – a kind of unbreakable sack-cloth – without any underwear or other material that might be used to hang oneself, and a recreation room, to which they were admitted when the risk of self-harm was considered to be low. The unit had a full-time nurse and an NHS psychiatrist regularly visited the prison. For the rest, ordinary prison wardens, whose dedication under extremely trying circumstances was admirable, had to make do as best they could. There was, quite clearly, no possibility for the women to receive appropriate treatment, indeed, the conditions could only be considered likely to aggravate their fragile condition still further. This situation raises two problems. The first is the obvious lack of appropriate psychological care for detainees identified as being at risk of self-harm. The second is the fact that some of these detainees, whose psychological instability is permanent and who repeatedly attempt suicide, really should not be detained in ordinary prisons at all.
127. The conditions I observed in Hydebank Wood would appear to be typical of those prevailing throughout the female detention estate. The statistics speak for themselves - in the 6 years between 1992 and 1998 10 women committed suicide in prisons in England and Wales. Between 1999 and 2004 the figure rose to 53.
128. The female prison population has increased from an average of 1,800 ten years ago to around 4,500 today. It is clear that this population includes a considerable number of women for whom detention in ordinary prisons is entirely inappropriate; according to a recent Office for National Statistics survey 40% of females have received help or treatment for emotional or psychological problems in the 12 months prior to their entry to prison and 15% have been admitted to a mental hospital. The same survey revealed that 37% of sentenced female prisoners had previously attempted suicide.
129. The continuing detention of seriously disturbed women in ordinary prisons without adequate psychiatric care clearly breaches Article 3 of the ECHR prohibiting inhumane and degrading treatment. One of the problems would appear to be a lack of space in secure accommodation managed by the National Health Service, which is where many

of these women should be held. Greater investment in this area is urgently required. Improvements are also urgently needed in the treatment and supervision of vulnerable detainees, male as well as female, in the ordinary prison estate.

#### *Family and private visits*

130. Family visits are vital to the well-being of prisoners and an important part of any prison regime. Their positive influence on detainees make prisons easier places to manage, whilst the preservation of meaningful ties with the outside world greatly facilitates resettlement on release. The spouses and children of detainees also have their own right to maintain family ties. For all these reasons every effort should be made to ensure that prisoners are able to receive visits both regularly and under the best possible conditions.
131. In the light of this, I was struck by the fact that no provision is made in British prisons for private visits. All contact takes place in rooms typically full of other prisoners also receiving visits and under the supervision of prison staff. Whenever I raised this issue, however, I had the distinct impression of having touched upon a taboo, as though the possibility of a detainee spending a private hour with their partner, with all its likely consequences, was simply not to be contemplated. It seems to me that the benefits of such intimacy should outweigh any residual embarrassment. Relationships already under considerable strain might, as a result, be more easily maintained with the attendant benefits on resettlement, and the tensions of prisoners eased, making prison populations easier to manage. Such visits would, moreover, be equally beneficial to the maintenance of ties with children, for whom crowded rooms and the impossibility of quiet intimacy with their parent is particularly distressing.
132. This kind of visiting arrangement already exists elsewhere in Europe. In my own country, for instance, prisoners who are denied home leave may receive one intimate visit of up to three hours per month in a private room out of the sight and hearing of staff. Certain Scandinavian countries and the Russian Federation offer similar arrangements. I am not sure whether a demonstrable human right is at issue here, but I do believe that good sense, and common humanity, plead very much in favour of intimate visits and I would strongly encourage their adoption in the UK.

## **V. DISCRIMINATION AND RACE RELATIONS**

133. As with the majority of Western European countries the United Kingdom has seen a significant increase in its ethnic minority population as a result of immigration, primarily from former colonies, over the last 40 years. This population currently stands at around 4.5 million, or 7.6 percent of the total population. Indians represent the largest minority group, followed in turn by Pakistanis, black Caribbeans and black Africans.
134. Whilst such numbers inevitably bring new challenges, I think it would be true to say that the United Kingdom has generally provided a welcoming environment for its new arrivals. Overt racism and racially motivated violence certainly exist, but not on the



scale of other countries I have had occasion to visit. As elsewhere, however, the United Kingdom has faced some difficulty in effectively integrating immigrant communities and still has some way to go before achieving genuine equality of opportunity and treatment. I was impressed, however, by the commitment shown by the Government to realising these goals. This is particularly evident in the seriousness of the efforts to eliminate both direct and indirect racial discrimination in the provision of public services, with the Race Relations (Amendment) Act adopted in 2000 imposing a positive duty on all public authorities to this end.

135. This generally positive impression is offset somewhat by the increasing expression in the media, but also on the part of politicians, of anti-immigrant (as opposed to anti-immigration) views. The events of September 11<sup>th</sup> have further muddied the waters of acceptable comment, and the many Muslim representatives I spoke to all voiced their concerns over a rising Islamaphobia. Much to its credit, the Government has typically been cautious in its rhetoric, open in its attitude towards immigrants and active in its attempts to respond to the concerns of the Islamic community. A number of recent measures, particularly those introduced in the context of the fight against terrorism and in respect of asylum, have, however, had a tendency to undermine this positive approach by placing individual members of ethnic minorities in increasingly vulnerable positions and eroding thereby the confidence of entire communities in a society of equal worth and equal rights.
136. I have examined concerns arising from recent changes to asylum and anti-terrorism laws elsewhere in this report, and will focus here on a few issues relating to combating discrimination that seem to me to merit particular attention.

### **Discrimination in the criminal justice system**

137. In my discussions with NGOs, ethnic minority representatives and the Commissioner for Racial Equality, my attention was repeatedly drawn to a latent discrimination in the criminal justice system. The main concern is that discretionary powers would appear to be applied discriminately. Members of ethnic minorities are disproportionately stopped and searched by the police, more frequently prosecuted than warned, more frequently remanded in custody and more frequently given custodial as opposed to community sentences.
138. So far as the police are concerned, it would appear that concerted efforts have been made to address institutional racism following the conclusions of a comprehensive inquiry into the inadequate police response to the murder of a black youth in 1993<sup>34</sup>. Even if there is still some way to go, the gradual implementation of reforms were widely acknowledged to have resulted in improvements. With respect to use of stop and search powers, recommendations resulting from the inquiry concerning the recording of all public encounters on the part of the police were implemented in July last year in a new Code under the Police and Criminal Evidence Act. A Stop and Search Action Team, charged with monitoring the use of these powers has also been established.

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<sup>34</sup> The Stephen Lawrence Inquiry, February 1999.

139. It took considerable publicity surrounding a particularly graphic case to provide the necessary external impetus for changes to the functioning of the United Kingdom's police forces. Similar publicity has been lacking in respect of potential bias within the judiciary, though seriousness of the issue merits an equal attention. In 2002/2003, for instance, 10% of remand decisions concerning black citizens and residents between the ages of 18 and 20 lead to custody compared to 6% for Whites. With respect to sentencing, the proportion of decisions resulting in custody was 4% and 8% respectively for the same age group<sup>35</sup>. I understand that various branches of the judiciary are well aware of these discrepancies and have themselves begun a process of introspection. I was informed that the Home Office has also established a special unit to examine potential discrimination across the criminal justice system. These developments are certainly welcome. I am not aware, however, of any substantial conclusions to date, nor any measures that might address the underlying concerns. It seems that greater priority needs to be given to addressing potential discrimination within the judiciary.

### **Anti-discrimination Legislation**

140. I spoke to many who complained of the complexity of anti-discrimination legislation and the differing standards of protection applicable in respect of discrimination on the grounds of age, race, religious belief, gender, disability and sexuality. There are currently 30 Acts, 38 Statutory Instruments, 11 Codes of Practice and 12 EU Directives and Recommendations that apply in the field of discrimination, which clearly makes it difficult for employees and service providers to keep track of their responsibilities.
141. This legal jumble reflects the inevitable fact that standards have evolved at different rates for different categories of discrimination. As each new area of discrimination has been addressed improved levels of protection have been applied, but often only in respect of that category, leaving others behind to await their turn. This kind of legal leap-frogging results in key terms being defined in different ways, different remedies being offered in respect of types of discrimination and differing duties on public authorities. There is certainly much to be said for the introduction of unifying single equality legislation, which would be simpler to apply, iron out anomalies and offer the same protection across the board. I understand that serious consideration is being given to this idea and encourage this development.
142. Whilst it would certainly be preferable to address outstanding gaps in a single comprehensive legislative framework, a number seem to me to merit particular and immediate attention. I was informed that whilst it is illegal to discriminate in respect of the provision of goods and services on the grounds of race, gender and disability, this is not the case in respect of age, sexuality or religious belief. Whilst Jews and Sikhs may therefore enjoy protection in the provision of goods or services, in virtue of belonging to an identifiable ethnic minority, Muslims do not, qua Muslim, enjoy any protection at all. I was informed that the Government intends to address this last inconsistency and this is certainly welcome. I would, however, encourage the extension of this prohibition to discrimination on the grounds of age and sexuality.

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<sup>35</sup> Audit Commission analysis of YJB data.

143. My discussions with Muslim representatives also revealed concerns about the absence of legislation criminalising incitement to religious hatred. Such incitement is by no means confined to attacks on Islam and all religious communities deserve such protection; the prohibition of incitement to religious hatred is not only in the interest of public security, but is also essential to the effective enjoyment of the freedom of religion. The Government has demonstrated its sensitivity to these concerns by promising the introduction of new legislation as soon as possible. This has, in turn, provoked concerns for the protection of freedom of speech. Incitement to religious hatred laws exist elsewhere in Europe, however, and are applied sensibly – there is no reason to presume that UK courts and prosecution services will not do so likewise. There is a considerable difference between the intention to incite to mirth, for instance, and the intention to incite hatred, with the latter requiring a particular degree of severity to satisfy any court. The current proposals are well-considered and well-defined and I would hope for their rapid adoption.

### **Roma/Gypsies and Travellers**

144. Though a small part of the overall population of the United Kingdom<sup>36</sup>, the difficulties faced by Gypsies and Travellers have attracted considerable, and largely negative, attention in recent years. Indeed, to judge by the levels of invective that can regularly be read in the national press, Gypsies would appear to be the last ethnic minority in respect of which openly racist views can still be acceptably expressed. I was truly amazed by some of the headlines, articles and editorials that were shown to me. Such reporting would appear to be symptomatic of a widespread and seemingly growing distrust of Gypsies resulting in their discrimination in a broad range of areas. If it is true that the traditional way of life of Gypsies is increasingly difficult to square with modern society, and that individual Gypsies and Travellers must themselves bear an equal responsibility for the maintenance of good relations with their neighbours, it is clear that much more serious efforts are required to accommodate their needs and promote greater tolerance towards them than are currently in evidence.
145. Access to accommodation would appear to present the greatest difficulty and give rise to the most contention. Whilst some Gypsies live in ordinary housing, the majority live in caravans, remaining in one place for most of the year and travelling around in the summer months in search of seasonal employment. This life-style evidently requires sites for Gypsies to settle on, both permanently and temporarily. Recent legislative changes have made this increasingly difficult, resulting in an increasing number of illegal settlements and an inevitable rise in social friction.
146. In effect, the 1994 Criminal Justice and Public Order Act removed the statutory obligation on local authorities to provide sites to Travellers and Gypsies contained in the Caravan Sites Act 1968. The alternative chosen was to encourage the private purchase of land by Gypsies and Travellers on which they might settle. Non-binding guidelines, contained in circular 1/94, were introduced encouraging Local Authorities to favourably consider applications for permission to establish caravans on purchased land.

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<sup>36</sup> The Roma/Gypsy population has been estimated at between 90-120,000 people and the total number of Gypsies and Travellers at around 300,000. This number has risen over the last 20 years as a result of the arrival of many Irish Travellers.

Local authorities are expected, but not obliged, to conduct an assessment of the accommodation needs of Gypsies and Travellers in the area and to identify land suitable for settlement. This switch in policy has, however, singularly failed to meet their needs. Few local authorities have conducted needs assessments, or identified appropriate land. Permission for the placement of caravans has proven extremely difficult to obtain, with refusal rates apparently hovering around 90%. No doubt many of these refusals are for sound objective reasons, but in the absence of purchasable land in more suitable areas, and owing to lack of space in the remaining local authority sites, Gypsies are all too often faced with little choice but to purchase where they can and settle there - illegally if need be<sup>37</sup>.

147. The evident failure of the current system, and the tensions that have resulted plead strongly in favour of a return to the earlier statutory obligation on local authorities to provide caravan sites. This will enable the local council to identify areas that satisfy the needs of Gypsies and Travellers and the reasonable concerns of local residents, thus reducing the potential for conflict and satisfying the right of Gypsies and Travellers to housing. The Office of the Deputy Prime Minister Select Committee for Housing, Planning, Local Government and the regions also reached this conclusion in a recent report. The Office of the Deputy Prime Minister itself already released £17 million in 2001 for the refurbishment of existing local authority sites over a three year period. A further £16 million has been awarded for 2004-2006. This outlay is certainly welcome. I would, however, encourage its extension to the provision of new sites.
148. I was also informed of the incorporation, in certain counties, of members of the police in the management structures of local authority caravan sites<sup>38</sup>. This provision strikes me as both odd and discriminatory. The police have no business being auxiliary landlords. Nor would one think of including them in the management of ordinary local authority accommodation even in the most crime ridden housing estates. Regular policing as and when necessary ought to suffice, to give them in the provision of local authority services serves merely to reinforce a presumption of criminality and subject the majority of law-abiding citizens to unwarranted control as a result of the actions of a few.

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<sup>37</sup> In January 2002, approximately 20% of all caravans (2,774) were on unauthorised sites, 45%, or 4660, on authorised council sites and 34%, or 4,660, on authorised private sites. Source: ODPM.

<sup>38</sup> Oxfordshire was the first county, I believe, to introduce "Traveller Management Units" including the services of a police officer, and the system has since spread.

## **VI. THE CREATION OF A COMMISSION FOR EQUALITY AND HUMAN RIGHTS**

149. In an extremely welcome development the Government has committed itself to the creation of a Commission for Equality and Human Rights, following extensive consultation with a wide range of stake-holders. It is intended that the Commission will unite the existing Commissions for Racial Equality, Disability Rights and Equal Opportunities and enjoy broad additional powers in relation to the respect for human rights. It is to be hoped that this institution will be able to make a real impact in the promotion of a culture of human rights, both within the population at large, itself a pressing need, and across the public sector. The proposed merger of the three equality Commissions into a single structure with an additional human rights mandate seems to me to be sensible. Generally speaking, one strong institution is preferable to several smaller ones – the qualifying adjective is essential, however, in respect of which I have only a few comments to make.
150. It is proposed that the new Commission combine a broadly promotional role in all the mandated areas with a number of judicial, quasi-judicial and mediatory powers already enjoyed by the existing equality commissions. I was pleased to note that the final proposals do not reduce any of these existing powers, even if very few of them are extended to exclusively human rights cases, in respect of which the Commission will have the right to request to intervene in cases before the courts and the power to conduct named investigations and compel the disclosure of evidence. Even if the Commission will not have the power to bring cases in its own name or provide legal assistance to individuals before the courts in respect of human rights cases, the human rights powers foreseen are already considerable and in my view sufficient for the Commission to play an effective role in the protection of human rights in practise. I have, for my own part, always been a little uncomfortable with a combination of powers that might allow a commission to advise on draft legislation and immediately contest the final act in the courts, or investigate a case with disclosure powers and subsequently assist an individual in bringing a case. A human rights commission must enjoy the confidence not only of the public, but also of Government and the executive if it is to be effective. This will, inevitably, always be difficult to balance, and it is not wise, in my view, to complicate such relations through a combination of powers too easily inviting conflict.
151. The powers of the Commission are, therefore, broadly satisfactory and exceed, indeed, those enjoyed by many European equivalents. It is very important, however, to ensure that these powers can be exercised effectively. This is a matter of both means and independence. It is clear that the Commission will have an extremely large work-load – assuming the powers of three existing commissions and acquiring new roles in relation to human rights. It would be extremely disappointing if the Commission were not able to satisfy the hopes invested in it for lack of funding. There must inevitably be concerns that the new Commission will not be able to provide the same level of attention to the three areas of equality previously covered by separate institutions, and that the Commission will be obliged to prioritise between them in the use of its resources. There is a clear onus here on the Government to ensure that this will not be the case – the success of the institution and the confidence the public will have in it depends on this.

152. With respect to the independence of the institution, I note that it is foreseen that the institution will be a standard Non Departmental Public Body (NDPB). I confess to not fully understanding the subtleties of the United Kingdom's administrative arrangements, but I note that many NGOs, the existing Commissions and the Joint Committee on Human Rights have all expressed dissatisfaction on this point. Whatever status is finally adopted, it is essential that the institution should enjoy a total independence in the implementation of its mandate and the use of its resources.
153. Whilst on this subject, I note that the process of establishing a separate Human Rights Commission in Scotland has been stalled for some time now. It is understandable that the Scottish Executive should have wished to wait and see what structure might be established for the United Kingdom as a whole before deciding the contours of its own institution. It is to be hoped that progress will rapidly be made in the creation of an effective Human Rights Commission in Scotland now that this matter has been decided. A Human Rights Commission has already been established in Northern Ireland and is discussed below.

## **VII. IDENTITY CARDS**

154. Many were those in the course of my visit who raised concerns over plans to introduce identity cards in the UK. Without wishing to examine the content of proposals at an early stage of their Parliamentary passage, a number of general points are perhaps worth making. The issuing of some form of identifying document to all residents does not seem to me to be objectionable in principle, nor does the right to private life guaranteed by the Article 8 of the Convention preclude it. I carry an identity card myself and find it more useful than annoying.
155. What is important is the range of information stored, the range of persons with access to this information and the purposes for which the information might be used. Put simply, an identity card should be no more than its name suggests – a document containing sufficient information, and no more, than is necessary for establishing an individual's identity for relevant administrative purposes. Such information might consequently include a person's name, sex, date and place of birth, current address and, conceivably, residential status. Certain biometric data might also, on this reckoning, be included. Not needing to extend much further than this, however, there is no reason why it should do. Individuals must, moreover, have access to all the information stored and be able to contest its veracity. The information should be used solely to establish identity for legitimate administrative purposes clearly specified by law and solely to the extent that those purposes require. Access to such information should, therefore, be conditioned by the same criteria.

## VIII. THE RESPECT FOR HUMAN RIGHTS IN NORTHERN IRELAND

156. It does not take a Commissioner for Human Rights to point out the considerable advances made in Northern Ireland over the last decade, both politically and in terms of the respect for human rights. It is worth pausing to acknowledge them, however, as the remaining difficulties must be set against this background. The 1998 Good Friday Agreement paved the way for new structures, wide-ranging reforms and, just as importantly, fresh hope. Many of today's challenges are a matter of making these structures work, implementing these reforms and realising these hopes.
157. It is certainly not my place to pronounce on the political situation in Northern Ireland. Such a complex question must, in any case, remain beyond the comprehension of a visitor of only a few days. I will restrict myself to noting, and saluting, the prominent role that has been given to the respect for human rights in the ongoing political process. Indeed, the recognition of the importance of human rights for the creation of a climate of confidence and inclusion might serve as an excellent example to other parts of Europe where division and violence continue to hold sway.
158. The Good Friday Agreement foresaw an important role for human rights in three areas – in addressing the legacy of the past, through inquiries into suspected abuses of power, in addressing shortcomings in the maintenance of law and order, through reforms of the police and the criminal justice system, and lastly, looking to the future, in the promotion of a culture of rights, through the establishment of a Human Rights Commission and the adoption of a Bill of Rights for Northern Ireland. Difficulties and challenges have arisen in all three of these areas and I examine some of these below. It is necessary, however, to acknowledge the positive course that has been set and the progress that has already been made.
159. Many of the difficulties to have arisen in respect of the human rights commitments flowing from the Good Friday Agreement relate to the inevitable challenges of implementation. One might always wish for profound changes to be made more quickly. Such reforms, often requiring considerable shifts in attitude, have their own logic, however, and their own rates. It is the will to see them through that counts, and I was, for the most part, impressed by the commitment shown to the implementation of these reforms by those I met with in Government, in the police and in the judiciary.
160. Other difficulties, impacting in particular on efforts to entrench a culture of human rights in Northern Ireland, result from the scepticism with which they are still occasionally viewed. The human rights movement in Northern Ireland would appear to be widely associated with the Catholic community, as though human rights were *for* them and consequently, in inevitable logic of partisan perceptions, enjoyed by them, or granted to them, at the expense of the loyalist, protestant community. Whilst such views would appear to enjoy greater currency in political than popular circles, there is, nonetheless, still much to be done to promote human rights as norms and values in the interest of all communities, or, perhaps more appropriately, in the interest of all individuals. It is the parity of protection that makes the enjoyment of human rights so particularly relevant to the situation in Northern Ireland.

161. One final general consideration seems to me to be worth raising. I refer to the social and economic conditions of Northern Ireland's poorest communities. Whilst for many the quality of life in Northern Ireland would appear to have improved considerably over the last decade, others, across the religious divide, have less demonstrably benefited from economic advances. If I raise this issue, it is, in part, because one cannot but suppose that tensions and distrust will linger longer in disadvantaged, socially isolated communities. It is also because exclusion and poverty facilitate the continuing control of such communities by criminal and paramilitary structures. All individuals have a right to be free of such oppressive influence. Crime, violence and parallel 'community justice' would appear, however, to remain low-level cancers at the heart of Northern Ireland's poorest communities, which are none the more acceptable for their spilling over less frequently into richer streets. I understand that tackling this phenomenon, through both social and economic investment and effective policing, will necessarily be a long a difficult process. It must, however, remain a priority.

### **Implementing reforms**

#### *The Police*

162. The promise of wide-ranging reforms of the Northern Ireland police force constituted a central element of the Good Friday Agreement. An independent report (the Patten Report) was subsequently commissioned which recommended significant changes to the police's composition, working conditions and accountability, in order to ensure the trust and confidence of all communities. I was naturally interested in examining the implementation of these reforms and was able to speak at some length with the Chief Constable and the Police Ombudsperson and visit Castlereagh Police Station. Overall, it is difficult not to be impressed both by the sense of direction and the success that has already been achieved. Even if the Chief Constable was himself candid about the distance still to go, I recall his description of his task as one of overseeing the transformation from a police force to a police service, and believe this attitude, reflected in its new name, to be indicative of the seriousness with which the Police Service of Northern Ireland has approached its reforms.
163. A key element of the reforms has been a commitment to raising the number of police officers from Catholic communities. To this end a quota has been introduced requiring 50% of all new recruits to be from Catholic communities. Since its introduction their numbers have increased from 8 to 17.67% of the force; the target is 30% six years from now. It is a measure of the success of this policy, and the wider reforms promoting a neutral working environment, that there has been no shortage of Catholic applicants, nor any difficulty in retaining them; of the approximately 10,000 applications (for 540 places) each year 35% are from Catholic communities, whilst the retention rate is around 97%.
164. The Patten Report also contained a number of recommendations designed to improve the confidence of different communities in the police through increased accountability to local civilian structures. Foremost amongst the new oversight mechanisms to have been introduced is a Policing Board, composed of representatives from the four main



- political parties as well as other prominent local citizens, to which the chief constable is obliged to report once a month. The refusal of Sinn Fein to sit on the Board was regretted by all I spoke to both within the police force and beyond. No doubt no issues in Northern Ireland can be sealed off from the broader political context, but progress clearly requires the constructive engagement of all parties. Though not foreseen by the Patten Report, a Police Ombudsperson has also been established. Well staffed and well resourced, its good relations with both citizens and the police testify to its success, even if, in its infancy, and on the admission of Police Ombudsperson herself, its intervention in non-urgent cases is not always as rapid as one might wish for.
165. Despite all these reforms and the considerable emphasis placed on improving community relations, the police still face difficulties in intervening effectively in the most troublesome areas. This is particularly evident, and particularly worrying, in respect of crimes committed within the poorest closest-knit communities. The combination of a residual lack of trust in the police, the fear of reprisal and a deeply ingrained community loyalty still make it difficult for victims to approach the police over crimes committed within their own communities. In respect of paramilitary crime, many prefer silence, in respect of other crimes, many turn first to local, invariably paramilitary, hard men for retribution.
166. I could not but be struck on my visit to the Young Offenders section of Hydebank Wood, by the high proportion of detainees who had suffered punishment beatings prior to their convictions. I was informed by the Governor of the prison that a fair few had received “six packs” – local slang for the breaking of ankles, knees and wrists. A recent survey conducted in Hydebank Wood showed that 51% of the detainees had been assaulted and 23% had been assaulted and threatened in the year prior to their conviction<sup>39</sup>. Such statistics, the swollen wrists of hands I shook, are only a small part of the terror still inflicted on ordinary citizens by paramilitary and organised criminal structures on both sides of the sectarian divide.
167. The legacy of terror, the stranglehold of paramilitary organisations and years of distrust will inevitably take time to overcome. It will take time too for a police service for years focused almost exclusively on sectarian violence to adapt its methods to combating ordinary crime in communities in which paramilitary structures continue to exploit their pernicious dominance. I do not wish to underestimate the difficulties faced, nor ignore the broader social and political context. There is, however, a clear duty on the state to bring ordinary justice to ordinary citizens and a right, on their part, to be free from such violence and fear. All those I spoke to within the police service were perfectly sensitive to this imperative; the eradication of such terror requires an equal commitment on the part of politicians of all colours.
168. One final issue to be brought to my attention in this context was the rise in recent years of attacks against members of ethnic minorities. Mostly of Phillipino, Indian, Chinese and Portuguese origin, recent immigrants make up only 1% of the population of

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<sup>39</sup> Conducted by the Institute of Criminology and Criminal Justice, Queens University Belfast, from 8<sup>th</sup> – 11<sup>th</sup> March 2004. 187 of the 191 inmates were interviewed.

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Northern Ireland. This diversification of violence would appear to owe as much to the protection of criminal interests as it does to lingering racism. It testifies to the need to eliminate both.

*The Criminal Justice System*

169. As for the police, the Good Friday Agreement provided for a comprehensive review of the criminal justice system. The 294 recommendations resulting from the review covered a broad range of areas, including reforms to appointment procedures and criteria for judicial posts, the creation of complaint mechanisms and the creation of a single prosecuting authority. The majority of these recommendations have, however, taken far longer to implement than those suggested by the Patten Report.
170. Following the publication of the review in 2000, the Government issued its response in the form of an implementation plan, which resulted in the adoption of new legislation, the Justice (Northern Ireland) Act in 2002. This Act omitted or diluted a number of key recommendations and provided for no definite time-scale for the implementation of many of the reforms. A second Implementation plan was subsequently published and a further Justice Act adopted in 2004, which filled many of the gaps left by the original Act and set specific deadlines for the implementation of reforms by the relevant criminal justice agencies. In a further welcome development, an independent Oversight Commissioner, equivalent to the existing Commissioner for the police, has been appointed to oversee the reform process. Many of the reforms, however, remain conditional on the devolution of competence for justice to Northern Ireland, itself obviously conditional on the functioning of the temporarily suspended Assembly. Whilst it is regrettable that the implementation of important reforms should consequently depend on uncertain political developments, I am in no position to comment on the appropriate forum for such decisions. I will restrict myself to observing that every effort must be made to implement reforms that are already sometime overdue.
171. Two matters concerning the functioning of the judiciary that were not addressed by the Review were brought to my attention, which deserve mention. The first concerns the continued use of ‘Diplock’ Courts – courts composed of a single judge, deciding on both the sentence and the facts – for criminal cases whose relation to the sectarian conflict might risk perverting verdicts were juries called on to pronounce them. The essence of this system, as modified by the 2000 Terrorism Act, has not been found by the European Court of Human Rights to violate the rights to a fair trial guaranteed by Article 6 of the Convention. Nonetheless, its variance to the norm inevitably attracts disquiet and many were those who presented the case for its abolition to me. Accepting, however, that such courts might once have been necessary, I am not well-placed to assess whether they might be so still. The day they disappear will, certainly, be a welcome one and I can only hope that day will be short in coming.
172. The second point, brought to my attention by both lawyers and members of the judiciary relates more specifically to a procedural difficulty inherent in the ‘Diplock’ court system and concerns the access of defendants to material in the possession of the prosecution but not relied on in court. In normal proceedings the presiding judge has

access to the prosecution's files and may decide, at any stage in the proceedings, that material that the prosecution has requested that he withhold from the defence be revealed in the light of its relevance to the charges made. In the absence of a jury, it is natural that the presiding judge should not have access to the entirety of the prosecution's files, as information not strictly relevant to the determination of guilt, may yet influence the judge's attitude towards the defendant. In such cases a 'disclosure judge' is appointed to determine such unused material in the possession of the prosecution as may be of relevance to the defence. The difficulty arises in so far as the disclosure judge is called upon to take this decision at the outset of proceedings and is consequently unable to determine whether material that was not, in his view, relevant on first sight, might not subsequently become so during the course of the proceedings. The question is whether it might not be necessary, therefore, to appoint special counsel to continually monitor such cases.

173. A recent ruling by the Court of Appeal in Belfast acknowledged that measures might have to be tailored to suit cases where the likely later relevance of material was not clear-cut. In such cases, the Disclosure judge might be provided with daily transcripts of the evidence presented in court. The difference in such cases in the guarantees provided by a disclosure judge and a special advocate seems to me to be minimal, or only a matter of the amount time they might each be able to devote to reviewing material on a daily basis. The relevant point does not seem to me to be who reviews the proceedings but who decides, and at what stage, if such a procedure is necessary at all. This decision can hardly be left in the hands of the prosecution. The disclosure judge might, conceivably, decide at the initial hearing to request daily transcripts where he believes there is some doubt as to possible future relevance – but this possibility cannot always be foreseen. The simplest way of overcoming this difficulty, and obviating the need for a special advocate, would be to place an obligation on the disclosure judge to continually monitor all cases. I realise that this would be rather inconvenient and, most likely, time consuming. The context ought, however, to be taken into account. Diplock courts are exceptional and not entirely free from controversy. Bearing in mind the need to ensure an equality of arms and the fact that justice must not only be done, but be seen to be done, there is, I believe, good reason to provide this additional guarantee.

### **Creating a culture of rights in Northern Ireland**

#### *A Bill of Rights for Northern Ireland*

174. Amongst the most interesting human rights related initiatives to be included in the Good Friday Agreement was the proposal for a Bill of Rights for Northern Ireland. Of them all, however, this has proved the most difficult to make progress on. The Northern Ireland Human Rights Commission was originally charged with preparing a first draft of a Bill that would, in the wording of the Agreement "take the particular circumstances of Northern Ireland into account". This proposal would then be examined in the Assembly and adopted in Westminster.
175. There would appear to be three main problems. The first concerns the content of the Bill, with considerable disagreement having arisen over the inclusion or not of social and economic rights and the desirability of referring to collective and, in particular

community, rights. The second concerns the low priority attached to the Bill by the main political parties in Northern Ireland, extending, indeed, to a certain scepticism on the part of unionist ones. The last is the lack of impetus being provided by Westminster. This is all rather unfortunate because it seems to me that there is a real opportunity here. An opportunity not just to firmly anchor a culture of rights in machinery of government, but also for the people of Northern Ireland to express the values on which they wish their society to be based, and perhaps, in seeking that expression, to find a greater unity.

176. Without wishing, or being remotely able, to provide solutions, I would like to make a number of comments. It seems to me, firstly, that there is little to be gained by NGOs, civil society and the Human Rights Commission arguing passionately over the Bill's content at some distance from broader political and social debate. Discussion can only effectively progress on the content once there is a broad consensus over the desirability of such a Bill in the first place. This clearly requires the engagement of the leading political parties, though civil society might play a large role here in pressing the Bill's importance on them. The necessary political engagement and wide social participation might, moreover, more easily be encouraged by concentrating the debate, initially, on broad principles rather than detailed technicalities.
177. My discussions with civil society representations revealed a growing realisation of the need, as it were, to go back to basics. I heard much of the hopes invested in the possible organisation of a roundtable, which would unite a broad range of actors from the main political parties, churches and civic associations, including, one would suppose, human rights organisations. This initiative seems to me to represent the right approach and offer the best chance of progress. It deserves the active backing of both Westminster and Dublin.

#### *The Human Rights Commission*

178. Another product of the Good Friday Agreement, the Northern Ireland Human Rights Commission has had a somewhat rocky infancy. The task of any Human Rights Commission is difficult; it cannot but be harder still in the context of Northern Ireland. It is particularly unfortunate, therefore, that its first few years should have been dogged by unresolved questions over powers and competences that were poorly defined in the original Act. Indeed, I had occasion myself to present an Opinion on a number of these issues on the request of the Commission itself in the context of a review of its powers. The confidence so vital to the functioning of a Human Rights Commission cannot be won where there is little invested in it at the outset. I am pleased, therefore, to note that some of the most important questions have recently been addressed, with the Government announcing that Human Rights Commission should be granted the right of access to places of detention and the power to compel evidence and witnesses, subject to appropriate safeguards, in conducting its investigations.
179. The first cycle of Commissioners came to an end last year, though not before the disappointed resignation of many of them. I understand that interviews for new Commissioners have already been held and that their appointment is imminent. For all its difficulties, the Northern Ireland Human Rights Commission has already

demonstrated the useful contribution it can make to the respect for human rights. It is to be hoped that the new Commission, with better-defined powers, will be able to build on this beginning and come to fully assume the important role originally intended for it.

### **Addressing the past**

#### *The Cory Report Inquiries*

180. The need to address the legacy of the Northern Ireland's fractious past has for some time been recognised as central to securing its peaceful future. As part of this process, the United Kingdom Government committed itself<sup>40</sup> to conducting public inquiries into four murders involving the alleged collusion of state actors if this was recommended by an independent report commissioned in the context of the Good Friday Agreement. The resulting report by Judge Peter Cory, a retired Canadian Supreme Court Judge, recommended inquiries into all four cases – the murders of the Billy Wright, and Robert Hamill, Rosemary Nelson and Patrick Finucane. Beyond the obvious significance of these inquiries to the political process in Northern Ireland, they are of particular importance to families whose right, under Article 2 of the ECHR, to know the truth of the circumstances surrounding the deaths of their relations has for too long been denied.
181. At the time of my visit the Government was finalising the arrangements for the inquiries into the deaths of Billy Wright, Robert Hamill and Rosemary Nelson. The chairs and panel members have since been appointed and, in a positive development, the concerns expressed to me by family members over the scope of the inquiries and their possible involvement in them would appear to have been positively answered.
182. Greater complications have arisen in respect of the Finucane Inquiry. Whilst the three other inquiries will be conducted under existing legislation (the Police and Prisons Acts), the inquiry into the death of Patrick Finucane has been delayed pending the adoption of the new Inquiries Act, which is intended to govern not only the Finucane Inquiry but all future public inquiries. This Act was adopted finally adopted in April 2005, some months after I visit. Many prominent voices, not least Judge Cory himself, have already expressed their disappointment with the Act. Prior to its adoption the Joint Committee on Human Rights also the Joint Committee on Human Rights expressed concern over the likely failure of inquiries held under the Act to meet the criteria imposed by Article 2 of the ECHR., which grants the Government the power to limit funding, to terminate the inquiry and to withhold, under certain conditions, public access to proceedings and parts of the resulting publication. I am not well placed to assess the relative merits of the Inquiries Act and earlier legislation. My concern is rather with practice and I can only stress the need for a full, independent, public inquiry capable of arriving at the truth. Anything short of this would, indeed, lead to a violation of Article 2 of the ECHR, a sorry breach of longstanding commitments and, most importantly, the continuing disappointment of relatives who desire only the truth to put their personal tragedy behind them.

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<sup>40</sup> At multi-party talks held at Weston Park in August 2001.

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*Coroner's Inquests*

183. A number of problems concerning determination of the circumstances of suspicious deaths through coroners' inquests were brought to my attention in Belfast. The inquest system in Northern Ireland has been under discussion in the Committee of Ministers for some time in the context of the execution of the judgment by the European Court of Human Rights in *Jordan et al v UK* in May 2001 concerning the need for effective investigations into suspicious deaths for the purposes of satisfying Article 2 of the Convention on the right to life. The United Kingdom has recently presented a package of measures to the Committee of Ministers. A fundamental review of the inquest system in Northern Ireland was published in 2003 and put out to consultation, though there has not been a Government response as yet.
184. The failure to complete the reform of the inquest system has resulted in continuing difficulties for some inquests. In 2004 the House of Lords<sup>41</sup> ruled in respect of inquests that the Human Rights Act merely gives effect to Convention Rights in domestic law and could not have retroactive effect for cases prior to its adoption. Inquests into deaths in Northern Ireland prior to this date, conducted under the Coroners Act (Northern Ireland) 1959, are consequently limited in their scope to the identification of the deceased and the time, place and cause of the death. This narrow scope will not always be sufficient to discharge the State's obligations under Article 2 of the Convention, which requires that investigations aim at establishing the broader circumstances of suspicious deaths. It is unfortunate, and somewhat arbitrary, that the families in such cases will be obliged to take the arduous steps of seeking a remedy before the Strasbourg Court.
185. One issue that is not directly being examined in the context of the execution of the European Court of Human Rights' ruling in the Jordan case is the access of coroners in Northern Ireland to information held by the police. A number of NGOs referred to difficulties apparently faced by Coroners in accessing such material in a number of deaths caused by security forces in Northern Ireland. Whatever difficulties may arise in practice, the legal position appeared to be resolved in a Northern Ireland Court ruling<sup>42</sup> stating that police were under an obligation to disclose information to the Coroner in advance of an inquest. This judgment was, however, recently overruled on appeal to the Northern Ireland Court of Appeal, which stated that Article 8 of the Coroner's Act (Northern Ireland) 1959 could not be read in such a way as to impose such a duty on the police. Whatever the correct interpretation of this article may be for the purposes of domestic law, it is clear that the coroner needs to have access to all relevant information in the possession of the police if the inquest is to satisfy the requirements of Article 2 of the Convention in the absence of a criminal prosecution capable of elucidating the circumstances, as well as the immediate cause, of the death. Public interest immunity may be requested for material that the police do not believe that the Coroner should subsequently make public; this immunity cannot extend to withholding relevant information from the Coroner himself where an inquest is the only means left of determining the circumstances of death. This principle might usefully be made clear in domestic law.

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<sup>41</sup> In re McKerr [2004] UKHL 12

<sup>42</sup> *Re McCaughey and Grew's application*

## **RECOMMENDATIONS**

The Commissioner, in accordance with Article 3, paragraphs b, c and e and with Article 8 of Resolution (99) 50 of the Committee of Ministers, recommends that the British authorities:

### **The Prevention of Terrorism**

1. Provide for the judicial authorisation of all control orders; ensure that the essential content of the right to a fair trial under Article 6 of the ECHR is guaranteed where necessary.
2. Ensure that evidence suspected of having been extracted through torture is in no case admissible and in particular is not relied on in control order proceedings.
3. Ensure the judicial supervision of expulsions carried out on the basis of diplomatic assurances.
4. Continue to carefully monitor the impact of the application of anti-terror powers on disproportionately affected communities.

### **Asylum**

5. Provide for the automatic judicial review of the continuing administrative detention of foreigners under Immigration Act powers beyond three months; ensure that adequate legal representation is provided in such cases.
6. Ensure the public availability of comprehensive statistics relating to the detention of minors under Immigration Act powers.
7. Increase the use of alternative forms of supervision of families with children pending deportation.
8. Ensure that the detention of minors for any period be authorised by a judicial authority, and subject to periodic judicial review.
9. Take all possible measures to ensure that foreigners detained under Immigration Act powers are not held in ordinary prisons.
10. Extend the five day time-limit for the filing of appeals against negative Asylum and Immigration Tribunal decisions before the High Court, so as to permit their effective presentation.
11. Improve the quality of first instance asylum decisions by immigration officers, through increased training for front-line immigration officers and improved internal review of the reasons for high success rates of appeals by applicants from certain countries.
12. Provide for the possibility of open regimes in asylum processing centres for applicants in fast-track proceedings.

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13. Reinstate the suspensive effect of appeals against negative asylum decisions on the deportation of applicants in fast-track proceedings.
14. Ensure that assistance from the National Asylum Support Service is not withheld from applicants who would otherwise be rendered destitute.
15. Place the burden of proof on the prosecution to show that the accused has deliberately destroyed his or her identity documents for the purpose of entering the country or frustrating deportation.

### **Juvenile Justice**

16. Bring the age of criminal responsibility in the different jurisdictions of the United Kingdom in line with European norms.
17. Provide greater investment in alternative sentences for juvenile and young offenders.
18. In Scotland, provide for the prosecution of juvenile offenders under the age of 16 in specialised Youth Courts, in the event of their country-wide introduction.

### **Anti-Social Behaviour Orders**

19. Ensure that Anti-social behaviour order guidelines adequately delimit the nature of the behaviour targeted.
20. Exclude the possibility of authoritising ASBOs on the basis of hearsay evidence alone.
21. Restrict the ability to apply to the courts for Anti-Social Behaviour Orders to the authorities currently invested with this right.
22. Raise to 16 the age at which children in breach of terms of Anti-Social Behaviour Orders may be sentenced to custody.
23. Reformulate Anti-Social Behaviour Order guidelines so that they neither encourage nor permit the excessive publicity of the making of orders against juveniles. In order to guarantee the right of children to privacy, the reproduction and public dissemination of posters reproducing the pictures of children submitted to ASBOs should be prohibited.

### **Prison Conditions**

24. Address the problem of over-crowding in prisons through the construction of new detention facilities and greater investment in alternative sentences and non-custodial pre-trial supervision.
25. Improve the psychiatric support services in the adult prison estate; increase the capacity of National Health Service secure accommodation facilities so as to enable the transfer of all detainees in need of full time psychiatric treatment.



26. Improve the educational and psychiatric support services in juvenile and young offender detention facilities ; ensure that purposeful activity targets in Young Offender Institutions are met.
27. In Scotland, eradicate slopping out in all detention facilities.
28. Provide for the possibility of private family visits.

#### **Measures to combat discrimination**

29. Give greater priority to the elimination of potential discrimination in the criminal justice system.
30. Include the prohibition of discrimination on the grounds of age and sexual orientation in the provision of goods and service in future legislation in this area.
31. Consider the introduction of single equality legislation standardising protection across all areas.
32. Reintroduce the obligation on local authorities to provide caravan sites for Roma/Gypsies and Travellers ; provide financial assistance for their construction to local authorities.

#### **The Commission for Equality and Human Rights**

33. Ensure that the Commission for Equality and Human Rights enjoys the necessary resources and independence to carry out its functions effectively.

#### **The respect for Human Rights in Northern Ireland**

34. Increase efforts to dismantle paramilitary structures and combat organised crime in Northern Ireland's poorest communities.
35. Accelerate the implementation of the reforms of the criminal justice system.
36. Provide for an obligation on disclosure judges to regularly review court proceedings in juryless trials.
37. Encourage and facilitate the organisation of an inclusive round-table on a Bill of Rights for Northern Ireland and the participation of all political parties.
38. Ensure that the public inquiries recommended by the Cory report are capable of establishing the full circumstances surrounding the deaths of the four individuals concerned and meeting the legitimate interests of their families.
39. Ensure the access of Coroners to all relevant material held by the police; ensure that inquests conducted into suspicious deaths in Northern Ireland prior to the adoption of the Human Rights Act are capable of satisfying the requirements of Article 2 of the ECHR.



**APPENDIX TO THE REPORT****COMMENTS BY THE GOVERNMENT OF THE UNITED KINGDOM**

The following comments were submitted by the government of the United Kingdom when the report was presented to the Committee of Ministers of the Council of Europe on 8 June 2005.

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The United Kingdom Government is grateful for the opportunity to comment on the draft report by Commissioner for Human Rights following his visit to the United Kingdom from 4 - 12 November 2004.

The United Kingdom Government welcomes the Commissioner's draft report, and will give careful consideration to the issues and recommendations that the Commissioner makes in his report.

The United Kingdom Government would like the Commissioner to take account of the following points:

Of a more general nature, as with virtually all reports of this nature, the issue for the UK is that arrangements, conditions, and circumstances that apply in Great Britain are presented as if they applied throughout the UK.

For example:

Paragraph 133 makes reference to the Race Relations (Amendment) Act 2000 "imposing a positive duty on all public authorities". Of course, in the case of Northern Ireland public authorities, the legislation applicable is the Race Relations (Northern Ireland) Order 1997 (as amended) and section 75 of the Northern Ireland Act 2000.

It may be worthwhile to note that different circumstances prevail in Northern Ireland, with their different laws and institutions.

More specific comments relating to the recommendations are as follows:

## **Paragraphs 5-25**

### **General**

The Prevention of Terrorism Act 2005 has been introduced by the UK government to address:

- the threat the UK faces from terrorism;
- the House of Lords judgement that section 23 of the ATCS Act was incompatible with Articles 5 and 14 of the Convention on the grounds that the measures unjustifiably discriminated against foreign nationals and were not “strictly required” since they provided for the detention of some but not all of those who presented the same risk.

The Act provides for the imposition of “control orders” upon individuals who are involved in terrorist-related activity. These “control orders” are preventative orders which impose one or more obligations upon an individual which are designed to prevent, restrict or disrupt his or her involvement in terrorism-related activity. The legislation is applicable to all individuals regardless of nationality or perceived terrorist cause.

The orders themselves are based on a menu of options that can be employed to tackle particular terrorist activity on a case by case basis. This could for example include measures ranging from a ban on the use of communications equipment to a restriction on an individual’s movement. The Act therefore allows for a flexible range of preventative orders to be employed in order to disrupt an individual’s activities. This allows for orders to be tailor made and therefore proportionate to the threat that the individual actually poses.

A breach of any of the obligations of the control order without reasonable excuse is a criminal offence punishable on indictment with a prison sentence of up to 5 years or a fine or both and on summary conviction (in England and Wales) with a prison sentence of up to 12 months or a fine or both. It is also an offence intentionally to obstruct a person exercising a power of search or entry for the purpose of serving the control order upon the individual, punishable (in England and Wales) by imprisonment for up to 51 weeks.

The Report raises a number of issues in relation to the Act which are addressed in turn.

### **The judicial process for non-derogation control orders**

#### **Paragraph 15**

The Secretary of State must seek permission from the court to make a non-derogating control order. However, in certain cases (including cases of urgency), the Secretary of State can make an order without first seeking the permission of the court but he must refer it immediately to the court for confirmation.

There will subsequently be a full hearing before the High Court or Court of Session, at which the individual will be represented by an advocate of his choice; in so far as it is necessary for the court to consider “closed material”, the individual’s interests will be represented by a special advocate.

At the hearing, the court will apply the principles applicable on an application for judicial review, which is the most common procedure for challenging actions of the executive on human rights grounds.

## **EU Comparison**

### **Paragraph 16**

The government is aware that other ECHR signatory countries are interested in the UK's control order provisions and have under consideration proposals which would restrict the movement of individuals (who have not been prosecuted through the courts) into or out of specified areas and attach reporting requirements.

## **ECHR Compliance**

### **Article 5 – Deprivation of Liberty**

#### **Paragraph 17-18**

The Act permits a control order to impose obligations amounting to a deprivation of liberty within the meaning of Article 5 of the ECHR (‘derogating obligations’), but only where the pre-conditions set out in the Act have been met. First, there must exist a ‘designated derogation’, in other words, a derogation from Article 5 that has been designated by an order approved by both Houses of Parliament (‘designation order’). Second, the derogating obligations in the control order must be of a description set out in the designation order. A control order containing derogating obligations (‘derogating control order’) is made by a court, on application by the Secretary of State. If a control order is made amounting to a deprivation of liberty within the meaning of Article 5, but in circumstances where the pre-conditions explained above have not been met, the courts may quash that order.

As was made clear at the time the Act was passed through Parliament, the government does not intend for the present time to seek a derogation to Article 5 of the ECHR. This is because although the government believes that there is a threat to the life of the nation from Al-Qaeda and associated groups we also believe that the measures we have put in place meet the exigencies of the situation the UK currently faces.

## **Article 6 – Right to a Fair Trial**

### **Paragraph 19**

Article 6(1) provides that “in the determination of civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The report notes that the European Court of Human Rights has been, to date, reluctant to interpret the words “civil rights” as covering restrictions to the exercise of any of the rights guaranteed by other Articles of the Convention. It remains to be seen, therefore, whether a court would regard proceedings challenging non-derogating control orders as involving the determination of civil rights and obligations. However, in so far as necessary, we consider that the requirements of Article 6 ECHR in relation to the determination of civil rights and obligations are satisfied by the procedures in place for making and challenging control orders.

We do not accept that the criminal limb of Article 6 is engaged by proceedings in relation to control orders. The purpose of the Act is to enable preventative orders to be made against individuals suspected of being involved in terrorism-related activity. The exercise carried out by the Secretary of State in making a control order is concerned with the evaluation of risk, and the imposition of measures necessary to address that risk; it is not concerned with the determination of guilt, nor with the imposition of a punishment, in relation to a criminal charge. Control orders are protective and preventative rather than punitive in nature and are designed to restrict or prevent the further involvement by individuals in terrorism-related activity.

In the circumstances, we consider that these provisions are compatible with the Convention rights

### **Non-derogating control orders**

The report heavily criticises the fact that non-derogating control orders are tested by the courts to a “judicial review” standard. The report states that the “judicial review” test is not sufficient to test the imposition of the order and is therefore an infringement upon the rights of the individual.

The government does not accept the view that JR is not a sufficient test of the Secretary of State’s right to impose a control order.

Judicial review is concerned with reviewing whether the decision maker could properly make the decision he did. But it is entirely wrong to characterise it as a procedure which is only concerned with law and procedure. Even before the Human Rights Act courts in judicial review proceedings would where appropriate look at the facts to see whether they could support the decision reached. Since the Human Rights Act came into force the courts have applied a more intensive level of scrutiny where convention rights are at stake – which will be even more intensive depending on the degree of interference with such rights. This will involve considering in detail (with cross examination of witnesses where appropriate) whether the factual material does justify the decision reached by the Secretary of State and whether the decision is proportionate.

Moreover, in making a control order there is a wide range of potential restrictions which could be applied. A judicial review type approach is entirely appropriate for scrutinising the exercise of discretionary powers of this kind. Every day, ministers and public authorities are taking decisions which potentially affect the human rights of individuals. Judicial review is the remedy available to those who consider that their rights have been breached and it is an effective remedy.

Therefore the government considers that the test contained within the legislation provides a robust test of the Secretary of State's decision to impose a control order and the conditions that he intends to impose.

### **Cut off point for derogating and non-derogating control orders**

The report notes that there is no clear cut-off point between obligations amounting to a deprivation of liberty within the meaning of Article 5, and obligations which do not amount to such a deprivation of liberty. The report expresses concern that the Secretary of State is the sole authority responsible for determining that cut-off point. The government considers that, in fact, there is effective political and judicial control over this issue. First, as explained above, for a control order to impose measures amounting to a deprivation of liberty there must be a designation order in place. That designation order, which must be approved by both Houses of Parliament, will contain a description of the obligations which may be imposed in a derogating control order.

It should therefore be clear from the restrictions imposed by a control order whether it was intended to be a derogating control order and subject to the specific regime and safeguards set out in the Act. However, it should be emphasised that the courts will make the final decision on this issue. Even if the Secretary of State purported to make a non-derogating control order, a court would nevertheless be free to consider for itself whether, notwithstanding the view of the Secretary of State, the restrictions in that order in fact constituted a deprivation of liberty. If the court were to decide that the order did constitute a deprivation of liberty, the court would have powers to quash the control order.

More generally, the Secretary of State is required by law (section 6 of the Human Rights Act) to act compatibly with the convention rights of the individual and his family. It is unlawful for the Secretary of State to impose restrictions which breach convention rights, and the courts have powers to quash orders that are unlawfully made. Interferences with private and family life, association, and communication must be proportionate, and in accordance with a legitimate aim (normally national security). The Secretary of State will therefore consider very carefully whether any interferences with Convention rights are appropriately justified.

### **Review safeguards of the Act**

The report recommends that these "exceptional measures" should be subject to regular parliamentary review. The Prevention of Terrorism Act contains 3 main forms of review which all involve the parliamentary process and are as follows:

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- Sections 1-9 of the Act (which contain the powers to make control orders) expire after 12 months, unless renewed by order. The renewal order must be approved by both Houses of Parliament.
- Section 14(1) of the Act requires the Secretary of State to prepare and lay every three months a report before Parliament on the operation of the control order powers.
- Section 14(2) of the Act further requires the Secretary of State to appoint a person to review the operation of the Act. The person so appointed will send the Secretary of State a report on the outcome of the review as soon as reasonably practicable 9 months from the Act gaining Royal Assent and then annually.

The report must contain recommendations upon:

- The implication for the operation of the Act of further proposals made by the Secretary of State for the amendment of the law relating to terrorism.
- The extent to which the Secretary of State has made use of the emergency procedure to make non-derogation control orders the permission of the court.

Upon receipt, the Secretary of State must lay the report before Parliament.

### **Paragraphs 26 & 27 - The use of torture as evidence**

UK law contains extensive safeguards in relation to evidence obtained by torture. Those safeguards are found in the common law; they flow from the Human Rights Act; and they are contained in statute.

The Courts will have regard to the UK's international obligations, including under the UN Convention Against Torture, in exercising these powers.

Evidence obtained as a result of any acts of torture by British officials, or with which British authorities were complicit, would not be admissible in criminal or civil proceedings in the UK. It does not matter whether the evidence was obtained here or abroad.

The issue of whether or not material from a third country, that may have been obtained as the result of torture, could be taken into account arose during the individual appeals against certification under the part 4 powers in the Anti-terrorism Crime and Security Act 2001. These appeals were heard before the Special Immigration Appeals Commission SIAC (a superior court of record) who concluded that whilst the Government could take account of such material they emphatically rejected any suggestion that any evidence relied upon by the Home Secretary was or even may have been obtained by torture – or indeed by any inhuman or degrading treatment. The Court of Appeal confirmed the view of the SIAC. This issue will now be heard before the House of Lords, sitting in their judicial capacity, in October.



It is important to be clear that it is not the Home Secretary's intention to rely on, or present to Special Immigration Appeals Commission or to the Administrative Court in relation to control orders, evidence which he knows or believes to have been obtained by a third country by torture.

### **Paragraphs 28-30 – Diplomatic assurances**

The Commissioner rightly draws attention to the need for "diplomatic assurances" (obtained in connection with the deportation of foreign nationals) to be subjected to the most rigorous judicial scrutiny. The issues raised are ones with which the immigration appellate bodies are already familiar, and which they are fully competent to assess.

### **Paragraph 31 – Presentation of terrorist threat**

We welcome the Commissioner's observation that the Government has been "careful and constructive" in its statements on international terrorism and by stressing the important contribution of the Muslim community to UK society.

The Government is very aware of the damage that can be caused by the use of inappropriate and insensitive language when referring to terrorism. We have always made a clear distinction between extremist individuals and the faith they claim to be associated with or represent. The tiny number of people who advocate and practice violence have nothing to do with mainstream Islam and do not represent the majority of the Muslim community or their views. The Prime Minister and the Home Secretary have taken a firm stand on this and have made it clear that we find terms such as "Islamic terrorist" unacceptable.

### **Paragraph 34 (and 136-138) – stop and search powers**

The stop and search figures quoted by the CRE originate from the Section 95 Report published under the Criminal Justice Act. The 36% and 17% increase in searches for Asians and White people respectively was in 2002/03 not 2004. These searches were carried out under PACE and other legislation, not under the Terrorism Act 2000.

The 300% increase in searches of Asian people under section 44 relates to the figures for 2002/03. More recent figures, for 2003/04, show that searches under the Terrorism Act 2000 increased by 43% for White people, 55% for Black people, and 23% for Asians. The number of stops and searches has risen across all ethnic groups but the number of Asians stopped and searched, as a proportion of the total, has fallen slightly.

The Government believes the stop and search powers in section 44 of the Terrorism Act are an essential tool in the fight against terrorism. As part of a structured counter-terrorist strategy, they are an invaluable aid to disrupting terrorist activity by making it more difficult for terrorists to operate here. The Government is aware that the Muslim community is concerned about the use of section 44 powers and it takes these concerns very seriously. As well as launching the Stop & Search Action Team to look at all forms of stop and search, the Home Office has published specific guidance for police forces on the authorisation of section 44 powers, which emphasises the need for forces to consider as wide a range of factors as possible when authorising the powers.

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The report, at paras.136-138, recognises some of these steps already taken. The government is also currently investing £172K in research to improve the targeting of Stop and Search by the police. There are also additional sums of money being invested in other Home Office business areas such as the IND-RDS research for Mary Coussey, the Home Office independent race monitor.

### **Paragraph 35 – Arrests under the Terrorism Act 2000**

Some individuals arrested have not subsequently been charged under the Terrorism Act, but as the report recognises, this does not suggest that the powers are being used inappropriately. Many offences relating to terrorist activity such as explosives, firearms, or fraud offences are dealt with under general criminal legislation. Therefore not all individuals arrested under the Terrorism Act will necessarily be charged with offences under terrorism legislation.

Police records show that from 11 September 2001 until March 31 2005, 732 people were arrested under the Terrorism Act 2000. 121 of these were charged under the Act and 21 individuals have been convicted for offences within the Act. 138 were charged under other legislation. The religion of those arrested is not collated centrally and it is not appropriate therefore to refer to the number of “Muslims” arrested under the Act as stated in the report. Full details of arrest statistics under the Terrorism Act can be found at [http://www.homeoffice.gov.uk/docs3/tatc\\_arrest\\_stats.html](http://www.homeoffice.gov.uk/docs3/tatc_arrest_stats.html)

## **IMMIGRATION AND ASYLUM**

### **Paragraph 37**

The numbers quoted for asylum applications in the United Kingdom should be 29,640 in 1996 to a high of 84,130 in 2002. This rise was not unique to UK, but an EU-wide phenomenon, reflecting events in source countries. The reference to a 10 year low in 1996 is unclear. 1996 was lowest in years 1995-2004 (i.e. lowest in the last decade). 1996 was not a ten year low in the sense of, at the time, being the lowest for 10 years eg 1993 was lower at 22,370

There is no evidence to support the assertion that there has been increasing difficulties in accessing the UK or that this would lead to an increase in asylum applications.

It is an unsupported assumption that the 41% decline in asylum applications in 2003 on the previous year in turn owes as much to improved circumstances elsewhere in the world as it does to recent reforms of the asylum system. The fact that the UK had a much greater fall than rest of EU15 in 2003 and 2004 suggests that the assumption is incorrect.

It is misleading to describe asylum as the visible tip of the migratory iceberg. This implies vast hidden numbers of migrants and in any case the UK produces immigration statistics clearly showing other types of migration.

### **The detention of asylum seekers**

#### **Paragraph 42**

Latest statistics show that at 26 March 2005 there were 1,625 people detained who were recorded as having sought asylum at some stage.

#### **Paragraph 44**

It is incorrect to say in the last sentence that it remains the case that the authorisation of severe restrictions on the liberty of individuals is left to the discretion of immigration officers. Authorisation of detention must be given at Chief Immigration Officer level which is a senior grade to an Immigration Officer.

#### **Paragraph 46**

The report notes that the decision to detain is taken administratively but that this decision can be appealed to a special immigration appellate authority. We believe that this is a reference to the right to apply to an immigration appellate Adjudicator for release on bail. If so, it does not constitute an appeal against the original decision to detain but rather provides for an Adjudicator to decide whether the detained person may safely be released on bail.

It should be noted that continued detention is subject to internal administrative review at increasingly senior levels within the Immigration Service.

The report accepts that the current system, providing the possibility of applying for release on bail meets the criteria laid down by article 5 of the Convention. It should also be noted that the lawfulness of detention can be challenged through judicial review or an application made for a writ of habeas corpus.

#### **Paragraph 47**

In line with paragraph 46, paragraph 47 misunderstands the purpose of a bail application and presents it as far more complex than it is in practice. The bail applicant merely has to satisfy an Adjudicator that he will answer to his bail if granted, have an address to which he may be bailed and, if required, provide sureties. The difficulties described by the Commissioner are those that might be expected to be encountered in a judicial review or habeas corpus application made to the Courts.

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### **Paragraph 49**

The Commissioner is unsure as to whether detainees are informed of the outcome of detention reviews. We can confirm that the outcome of the monthly review of detention is communicated in writing to the detainee.

### **Conditions of detention**

#### **Paragraph 52**

The report states that failed asylum seekers have committed no crime and that their only fault has been to aspire to a better life. However, they will in fact have been refused leave to enter the UK and may have also breached immigration rules.

### **The Detention of Children and Families**

#### **Paragraph 53**

Families are detained under the same criteria as individuals, ie whilst identity and basis of claim is established, because of the risk of absconding, as part of a fast-track process or to effect removal.

Not all families in detention will be held pending removal although the vast majority are.

Each case is considered on its merits and the presumption will still be in favour of granting temporary admission or release wherever possible

Detention is used only where necessary and that this is especially true for families with children.

Detention of families kept to the minimum period, subject to frequent and rigorous review, and very few families are detained for more than just a few days.

Families are accommodated in dedicated family rooms within a removal centre so as to ensure that family members are not separated and, so far as practicable within the constraints of detention, are able to maintain family life.

Family accommodation is available at Yarl's Wood, Dungavel and Tinsley House Immigration Removal Centres and at Oakington Reception Centre.

Unaccompanied children are only ever detained in the most exceptional circumstances and then only overnight whilst alternative arrangements are made for their care.

**Paragraph 54**

The report outlines that in 2002, the UN Committee on the Rights of the Child had expressed its concern that the detention of an increasing number of children claiming asylum in the United Kingdom is incompatible with the provisions of the Convention. It should be noted that statistics include asylum and non-asylum detainees.

**Paragraph 55**

In paragraph 55 the report claims that the Commissioner was informed of numerous cases of children being detained for in excess of two months. However, no indication is given as to the source of this information or its accuracy. It also conflicts with the only statistics cited.

The report is not correct in saying that: “There is a clear duty to ensure the utmost transparency on an issue of such importance – snap-shot statistics on a day of the Government’s choosing.” The day is not chosen by the Government but is in effect set automatically in advance as part of the overall schedule for the publication of national statistics. It is produced by independent statisticians as part of the National Statistics framework, which includes commitments to professional standards and integrity.

Data over a period cannot yet be used to produce publishable statistics on flows of detainees, as there is no reliable way of independently verifying the figures, and there are still data quality and methodological issues. There is potentially significant double counting when producing flows data relating to the detention estate, for example due to flows of individuals between different locations. Work is ongoing to improve the quality of the data, with an aim to producing these statistics as soon as they are of a high enough standard to comply with National Statistics.

**Paragraph 56**

In line 3 we would wish to emphasise that only a few children had been held at Dungavel and that the accusation of inadequate attention to their needs is an allegation only.

**Paragraph 59**

The purpose of the pastoral visit is not described correctly and, consequently, the reasoning and conclusions that follow are flawed. The pastoral visit is intended to allow the Immigration Service to gather information necessary to plan for the safe and orderly detention of the family in the event that removal needs to be enforced. At the same time, it provides an opportunity to ensure that the family understand they have reached the end of the asylum process, should now leave the UK and, if they fail to do so, will be liable to be detained in order to enforce their departure.

**Paragraph 61**

The paragraph states that during 2003, 30 men, 15 women and 3 children had been held in prison (in Northern Ireland) under immigration powers. However, these are not official statistics and we are unclear as to the source of such numbers.

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We acknowledge that holding asylum seekers at Hydebank Wood Young Offenders Centre is not ideal but we have put in place arrangements to try and make conditions more agreeable for those in our care.

All Immigration detainees held at of Hydebank Wood Young Offenders Centre are afforded the opportunity to transfer to Tinsley House Immigration Detention Centre in Liverpool. Detainees will normally be transferred within 24/48 hours of a transfer request being submitted. Representatives from the Law Centre and Refugee Action sit on the Ethnicity and Diversity Committee of Hydebank Wood Young Offenders Centre. Members of the traveling community have also been invited to sit on the Committee.

### **Paragraph 62**

It should also be noted that the practice of routinely holding immigration detainees in prisons ended in January 2002. Individual detainees may, however, be held in prison for reasons of security or control. This would include individuals who were violent, disorderly or represented a risk to other detainees, and could include criminals awaiting deportation on completion of a prison sentence.

### **Fast-track asylum procedures**

We are particularly concerned with the analysis of fast track procedures and the conclusions subsequently made. It appears that the report has confused the Harmondsworth Fast Track process with the Non Suspensive Appeals (NSA) system.

### **Paragraph 63**

The report claims that significant procedural changes have also been introduced in respect of applications that are considered to be clearly unfounded. However, the change (in the Nationality, Immigration & Asylum Act 2002) applies to applications which, if refused, are certified clearly unfounded. It is only in such cases that NSA is relevant.

*Paragraph 63 should therefore be read as follows, in relation to the Fast-track asylum procedure (amendments in italics):*

Two accelerated asylum application systems currently are currently in place. There is, firstly, one for those whose applications which are considered on initial inspection by the immigration service to be **clearly** unfounded. Under Section 94 of the Nationality, Immigration & Asylum Act 2002, the Home Secretary has the power to draw up a list of **generally** safe countries (currently containing 14 countries). The **Secretary of State will assess whether applications made by people who are entitled to reside in these countries are clearly unfounded, and if he considers that they are then he is obliged to certify them as clearly unfounded. But each application is still attentively considered on its individual merits.** Individuals from these countries, as well as others whose claims are also considered **capable of being decided quickly**, will, if suitable for detention, be transferred to Oakington Reception Centre for **consideration of their asylum claim** and, **if there claim is certified**, are unable to lodge an appeal against the negative decision **from inside the UK** (though they may

contest *the certificate* through judicial review *before they leave the country and acquire an in country appeal right against the negative decision if they succeed in overturning the certificate*). *They may, however, instruct their legal representatives and sign appeal papers prior to departure / removal*. I was informed that not all asylum seekers processed in non-suspensive appeal proceedings are detained. Statistics indicating the precise proportion would not, however, appear to be available. My impression from my discussions with immigration officials certainly suggested that the majority were.

#### **Paragraph 64**

In line 2 the second sentence should make it clear that other asylum seekers subject to fast-track proceedings are applicants from any country whose claims appear after screening to be capable of being decided quickly, eg: *A list of countries is provided by the Home Office (currently numbering 56 and including the 14 countries / states referred to in paragraph 63 above) as a guide as to which claims are considered likely to be suitable for fast-track proceedings*.

In line 7 Yarls Wood should be added to the list of places where applicants will be held.

In line 8 it should read *clearly* unfounded.

#### **Paragraph 65**

In line 6/7 it should be made clear that UK courts *up to the highest level (the House of Lords)* have approved detention for the sole purpose of *quickly* processing asylum applications.

#### **Paragraph 66**

There has been no departure from considering each application attentively upon its merits. All claims in any of the fast track processes have a substantive interview prior to decision; and if the claimant is detained they have access to free on-site legal representation from the outset. In the API and in the NSA training we repeatedly emphasize that all cases are determined on their individual merits. This approach is a key part of the NSA process.

#### **Paragraph 67**

The Commissioner should note that appeal papers may be prepared and signed before the appellant leaves / is removed and the relevant NGOs are fully aware of this. The appeal is not, however, valid if lodged whilst the appellant is still in the UK.

#### **Response to accusation that the NSA process is not in accordance with Article 3:**

Firstly our courts have not ruled that NSA proceedings are contrary to Article 3 ECHR. The reason the NSA process is compatible with Article 3 is the availability of Judicial Review before removal. We must stress that at Judicial Review the person only has to make an arguable case that they qualify for asylum to quash the certificate and hence get an in country appeal right – this addresses with the concern that Judicial Review is not necessarily the best route to get into the substance of the claim.

## **The quality of initial asylum decisions**

### **Paragraph 68**

On 4 April 2004 a new single tier Asylum and Immigration Tribunal (AIT) was created in place of the existing two-tier appeal structure, which comprised of the adjudicator tier and the Immigration Appeal Tribunal (IAT). In addition to the creation of the AIT a new system of higher court oversight was introduced. Under the new system, following receipt of the AIT's appeal decision, a party to the appeal can apply to the High Court to have the AIT's decision reviewed on the grounds that it made an error of law. On consideration of the application the High Court can order the appeal decision to be reconsidered if it thinks that the AIT may have made an error of law and there is a real possibility that the AIT would decide the appeal differently on reconsideration. For a transitional period the review application will be considered in the first instance by a member of the AIT.

The new appeals structure has been introduced to combat abuse of the system and reduce opportunities for delay. The previous system could take up to 65 weeks from receipt of an asylum application through to promulgation of the IAT's decision. Corresponding time scales under the new process will be at least half this. Increasing speed and efficiency within the system and delivering early finality will ensure that public money and resources are targeted on those genuinely in need.

The time limits for applying for a High Court review of an AIT decision and the new legal aid arrangements for the review and reconsideration stages support the Government's aims for the new system.

The intention behind the introduction of the shortened time limits is to deliver speed and efficiency without compromising the provision of effective access to justice and the Government is confident that the time limits have been set at the right level. In the majority of cases there will be sufficient time for a representative to prepare and lodge a review application. The importance of having flexibility in the process is recognised, however, and provision has been made for these limits to be extended.

The new legal aid arrangements, which only apply to the later review and reconsideration stages of the appeals process, have been designed to encourage suppliers to focus more carefully on the merits of a case before agreeing to provide representation. Funding will be awarded retrospectively, usually by the Tribunal following reconsideration. This introduces an element of risk to the scheme, which is that if a supplier agrees to provide representation in a weak case they may not be paid for their work. The Government is aware of concern that the arrangements will create financial uncertainty and drive legal aid suppliers out of the market. However, the purpose of the scheme is not to create uncertainty and suppliers that act conscientiously and pursue cases with merit can expect to be paid. Taking on a case will only involve risk if its prospects of success are poor.

The Government is committed to ensuring access to justice and is confident that the new appeals system strikes the right balance between securing access for those genuinely in need whilst also discouraging exploitation of the system.



**Paragraphs 69 - 70**

It must be emphasised that we do not accept that there is a simple correlation between the outcome of an appeal and the quality of an initial decision. A good number of other factors influence the outcome of asylum appeals, e.g. new evidence presented by the appellant at appeal, changes in country circumstances or emerging caselaw.

As previously outlined we consider that the picture of training given in the report to be unduly negative. Including interview training, new caseworkers receive 30 days training (6 weeks) and on-going training (e.g. on human rights and assessment of credibility in 2004) and seminars with outside bodies such as the Medical Foundation for the Care of Victims of Torture are also provided during the year. All caseworkers also have access to senior Caseworkers who will offer advice and guidance on more complex cases or cases requiring very specific country information. Caseworkers also have access to a detailed Knowledge base containing policy and process instructions and country information guidance.

We would also counter the accusation that there is an apparent failure to react quickly to new situations in the world.

**The withdrawal of basic support for asylum seekers****Paragraphs 71 and 72**

We are concerned with the accusation that section 55 led to “the forced destitution of asylum seekers, who, unable to work, had no means of supporting themselves” We would argue that there was little firm evidence of an increase in rough sleeping as a result of Section 55 and that support was available from other sources such as friends, family and charities.

There is a specific provision built into section 55 to ensure that support will be provided if this is necessary to prevent a breach of a person’s rights under the ECHR even if that person did not claim asylum as soon as reasonably practicable after their arrival in the UK.

**Paragraph 73**

Support will not be withdrawn where the family is co-operating. Therefore, even if there are delays in obtaining appropriate travel documentation to enable removal, support will continue provided the family is co-operating by, for example, attending relevant interviews or taking reasonable steps to secure a voluntary return. The legislation contains a specific safeguard in that support is not to be withdrawn where to do so would breach a person’s rights under ECHR (see paragraph 3(b) of schedule 3 to the Nationality, Immigration and Asylum Act 2002). The Government would not accept therefore that this provision constitutes ‘menacing’ failed asylum seeker families or that it is inhumane. Furthermore, assistance with air tickets and travel documents is given where necessary, and this is made clear to all families who fall within the section 9 process.

## **Entering the United Kingdom without a passport**

### **Paragraph 74**

The report does not provide evidence to support the accusation that it is increasingly difficult to enter the UK legally leading many people, including asylum seekers, to seek the assistance of traffickers.

### **Paragraph 75**

We would like the Report to include the point that the Parliamentary Joint Committee on Human Rights accepted that the requirement of the defendant to prove the defence rather than have the prosecution do so was acceptable in all the circumstances.

## **Access to legal representation in asylum cases**

### **Paragraph 76**

There has been a huge increase in legal aid expenditure on asylum. Between 2000-01 and 2003-04 it rose from £81.3m to £204m. There are numerous reasons which account for this increase. However, the fact that the majority of asylum claims have historically been unsuccessful has understandably given rise to concerns that the system is being exploited.

It is against this background that the Government introduced a number of important measures in April 2004. The measures focus public money on deserving cases, save taxpayers' money and reduce the opportunities for the system to be abused. At the same time they also ensure that only accredited lawyers and caseworkers can carry out publicly funded asylum work. The Commissioner's report makes specific reference to two of the measures introduced.

A five-hour financial threshold for the initial decision-making process was introduced. This is intended to target resources on genuine cases and prevent duplication of work. The Government is confident that this limit has been set at the right level. In the majority of cases it will be sufficient for the representative to carry out the work required at the initial decision making stage. The five hours will cover the initial advice in an asylum case and the preparation and submission of the applicant's statement of case. We recognise however, that it is important to have flexibility so once the threshold is reached the representative can apply to the Legal Services Commission (LSC) for an extension. Extensions are only likely to be granted in genuine and complex cases where there is a real prospect of success.

The application of the merits test for appeals against initial decisions has been brought in house and is now applied by the LSC. This initiative is similarly intended to target resources on genuine cases and was introduced following concerns that some representatives were not applying the merits test properly and were providing representation in unmeritorious cases. The merits test has not been changed but by bringing it in house the LSC can ensure that it is correctly interpreted and applied.

## **Juvenile Justice**

### **Paragraphs 81 and 82**

In his opening paragraphs the Commissioner reports that the United Kingdom Government has made a priority of combating youth crime and disorder; that it has invested considerable effort in reforming the youth justice system and has introduced a wide-range of preventative and repressive measures, many of which have been extremely positive. He recognises that many of the reforms, following the adoption of the Crime and Disorder Act including the creation of the Youth Justice Board for England and Wales and the multi-agency Youth Offending Teams, have provided greater alternatives to custodial sentences with earlier interventions and a wide range of welfare-based programmes. He also comments however that these policies would appear to have made little dent on the numbers of juveniles and young offenders detained. We acknowledge and welcomes the credit given by the Commissioner.

### **Paragraphs 83 – 85, 108 – 119 (Anti-Social Behaviour Orders (ASBOs))**

#### **Accusation**

The report acknowledges the range of new powers that the Government has introduced to tackle ASB but wishes to focus on ASBOs because the Commissioner sees them as ‘particularly problematic’.

The report’s main concerns relate to:

1. The use of hearsay evidence
2. The inappropriate use of ASBOs
3. Push by Government for agencies to use ASBOs
4. Agencies that can apply for ASBOs
5. Breach of ASBO leading to an increase in youth custody
6. Publicity of ASBOs

The report makes 5 recommendations:

- Ensure that ASBOs adequately delimit the nature of behaviour targeted.
- Exclude the possibility of authorising ASBOs on the basis of hearsay evidence alone.
- Restrict the ability to apply to the courts for Anti-Social Behaviour Orders to the authorities currently invested with this right.
- Raise to 16 the age at which children in breach of terms of Anti-Social Behaviour Orders may be sentenced to custody.

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- Reformulate Anti-Social Behaviour Order guidelines so that they neither encourage nor permit the excessive publicity of the making of orders against juveniles. In order to guarantee the right of children to privacy, the reproduction and public dissemination of posters reproducing the pictures of children submitted to ASBOs should be prohibited.

**Ensure that ASBOs adequately delimit the nature of behaviour targeted.**

The Commissioner acknowledges that well drafted ASBOs prohibiting clearly proven and serious behaviour have their place, but cites two cases where their use might not have been appropriate; the case of an 87 year old who received an order for ‘being sarcastic’ and a ‘17 year old deaf girl for spitting’.

It is difficult to comment on individual cases, especially when the details of the cases provided are so scant.

The legal definition of anti-social behaviour in relation to ASBOs is behaviour that ‘caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household’. The order must be necessary for the protection of persons from further anti-social behaviour by the defendant.

We know that ASBOs are being used to deal with a range of behaviours, but they are generally used to address loutish and unruly conduct such as verbal abuse, harassment, assault, graffiti and excessive noise

From April 1999 to September 2004 (date up to which data is currently available), there have been 3826 orders, 45% of which have been made on juveniles.

It is for the court to decide if the application for the ASBO has merit and meets the required tests.

In relation to young people, Home Office guidance on ASBOs (2002) states ‘when applying for an order against a young person aged between 10-17, an assessment should be made of their circumstances and needs.’

Similar guidance is offered in relation to adults who may be in need of community care services.

In addition to ASBOs, the Government has introduced a full range of powers to tackle anti-social behaviour, for example, strengthening existing injunction powers, allowing the police to close down premises being used for misuse of Class A drugs, allowing the police to disperse intimidating groups, allowing the demotion of a social housing tenant’s tenancy so that it is less secure and fixed penalty notices for disorder.

ASBOs are just one tool in the tool box and Home Office advice via published material and training events has consistently been that local agencies must use the most appropriate tool for the particular situation.

In addition, Home Office published material and training events stress the need for a staged and incremental approach to tackling anti-social behaviour which includes the use of Acceptable Behaviour Contracts/Agreements that are used to nip issues in the bud.

**Exclude the possibility of authorising ASBOs on the basis of hearsay evidence alone.**

The Commissioner finds the combination of a criminal burden of proof with civil rules of evidence difficult to justify. He is concerned that hearsay evidence and the use of professional witnesses are not capable of proving alleged anti-social behaviour beyond reasonable doubt. He is also concerned that Home Office guidance unduly encourages the use of professional witnesses and hearsay evidence and fails to emphasise the seriousness of the nuisance targeted.

The principal purpose of ASBOs is to protect those people who directly experience anti-social behaviour. Therefore, the welfare and safety of victims and witnesses must be the first consideration at every stage in the process. Most victims of anti-social behaviour live in the same community as the perpetrators of anti-social behaviour and many therefore feel unable to come forward for fear of reprisals. Hearsay and professional witness evidence allows for the identities of those too fearful to give evidence to be protected. It is for this reason that the House of Lords judgement in the McCann case confirmed that the use of hearsay and professional witness evidence was permissible. It is a matter for the judge or magistrate to decide what weight they attach to hearsay evidence.

Although the civil rules of evidence apply to ASBO proceedings, this does not mean ASBOs can be made on the basis of very little or poor evidence. The evidence presented in each anti-social behaviour case must enable the court to arrive at a clear understanding of the details of the case.

We acknowledge that witnesses who are willing to testify in court provide the best form of evidence and, where possible, witnesses are encouraged to come forward. However, where a witness is unable to testify, hearsay or professional witness evidence must be sufficiently robust to convince a court that anti-social behaviour has occurred and that an order is necessary to protect persons from further anti-social acts. Examples of types of evidence that may be used include video or CCTV footage, breach of an acceptable behaviour contract, evidence of complaints recorded by police, housing providers or other agencies and previous relevant civil proceedings or convictions. We believe these types of evidence are capable of proving anti-social behaviour beyond reasonable doubt. Current Home Office guidance reflects this position.

In addition, we have recently introduced measures to make it easier for victims of anti-social behaviour to attend court and give evidence in person. The Serious Organised Crime and Police Act 2005 contains provisions to allow the "special measures", formerly reserved for criminal hearings, to be used in anti-social behaviour cases. These new provisions will allow the use of "special measures" such as enabling witnesses to give evidence in private or by video link and the use of screens to protect witnesses from the accused.

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**Restrict the ability to apply to the courts for Anti-Social Behaviour Orders to the authorities currently invested with this right.**

The Commissioner is concerned that as part of a drive to promote ASBOs, they are being made more accessible and open to 'as many actors as possible'. He understands that consideration is being given to allowing individuals, or groups of individuals, to apply for ASBOs directly. He recommends that the ability to apply for an ASBO is restricted to those authorities that are currently able to apply for them.

Provisions in the Serious Organised Crime and Police Act 2005 allow the Secretary of State to add, by way of an order, to the list of 'relevant authorities' that can apply for ASBOs. Additionally there is a power enabling local authorities, currently one of the relevant authorities' that can apply for ASBOs, to be able to 'contract out' their ASBO power to other organisations.

These provisions were sought to enable the Government to respond quickly to the way in which communities are served.

However, there are currently no plans to add to the list of 'relevant authorities' that can apply for ASBOs nor is there any firm or conclusive thinking as to which agencies local authorities might be able to delegate their ASBO power to.

**Raise to 16 the age at which children in breach of terms of Anti-Social Behaviour Orders may be sentenced to custody.**

The Commissioner comments that breach of ASBOs has led to a large number of children being detained. He advises on recent breach and custody statistics; 46% of young people who breach their ASBOs and who are found guilty, receive immediate custody. The Commissioner goes on to say that the Chair of the Youth Justice Board has conceded that the rise in the youth offender population in custody in 2004 resulted mainly from breaches of ASBOs.

The Commissioner is probably not aware of the recent study conducted by the Youth Justice Board which concludes that use of ASBOs is not bringing a whole new group of young people into the offending environment. In the study, 43 young people who had ASBOs had a total of 1,779 offences between them.

Home Office data on breach and custody rates for the period between June 2000 and December 2003 indicates that only 17% of young people were given custodial sentences for breach of an ASBO where the ASBO was dealt with on its own and no other offence was considered.

The Commissioner makes reference to the use of ASBOs in Scotland and that breach by a young person under the age of 16 will never result in custody. He recommends that this approach is adopted in England and Wales.

The statistics above confirm that only a small number of young people receive custody for breach of ASBO alone. In addition statute only allows a maximum detention of 12 months (the average is in fact 3-6 months).

Recently published (31 March 2005) Joint Youth Justice Board and Home Office guidance on how local Youth Offending Teams should deal with anti-social behaviour advises that custody should be a last resort for juveniles who breach their ASBOs.

In relation to Scotland, the youth justice system is different to that which operates in England and Wales. ASBOs were introduced for individuals 12 years old and upwards in October 2004 and as yet there is no data on their take up.

The Commissioner is right in his comment that breach by a young person under the age of 16 would not result in custody. However the full range of disposals is available including tagging, supervision orders, community reparation orders and in the case of serious anti-social behaviour and breach, those under 16 can be detained in secure local authority accommodation for which there is no maximum stay specified.

**Reformulate Anti-Social Behaviour Order guidelines so that they neither encourage nor permit the excessive publicity of the making of orders against juveniles. In order to guarantee the right of children to privacy, the reproduction and public dissemination of posters reproducing the pictures of children submitted to ASBOs should be prohibited.**

The Commissioner was particularly struck by the degree of publicity surrounding the making of ASBOs and that this was indeed encouraged by Home Office publicity. The Commissioner acknowledged the need for the community to know of action taken and was aware of the recent judgment, commonly referred to as *Stanley v Brent*<sup>43</sup> which stated that ASBOs need publicity in order to operate.

However, he felt it to be entirely disproportionate to aggressively inform members of the public who have no knowledge of the offending behaviour and who are not affected by it, of the ASBO.

The Commissioner recommends a reformulating of the Anti-Social Behaviour Order guidelines so that they neither encourage nor permit the excessive publicity of the making of orders against juveniles. In order to guarantee the right of children to privacy, the reproduction and public dissemination of posters reproducing the pictures of children submitted to ASBOs should be prohibited.

The Commissioner makes reference to the Home Office guidance published in June 2004. The Commissioner might not be aware of more recent Home Office guidance published on 1<sup>st</sup> March 2005 in relation to publicity and ASBOs. That guidance advises on a case by case approach to publicity and on the need to balance the human rights of the individual subject to the ASBO with the human rights of the wider community.

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<sup>43</sup> R (Stanley, Marshall and Kelly) v Metropolitan Police Commissioner and London Borough of Brent, Secretary of State for the Home Department (intervening), October 2004.

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It advises that any publicity should be appropriate and proportionate in all aspects, including distribution and consideration of the vulnerability of the perpetrator.

“Distribution should be primarily with the area (s) which suffered from the anti-social behaviour and which are covered by the terms of the order, including exclusion zones. People who have suffered from the anti-social behaviour, for example residents, local businesses, shop staff, staff of the local public services, particular groups or households should be the target of publicity.” Home Office Guidance on ASBOs and Publicity (March 2005).

This guidance is available from the Home Office website.

### **Paragraphs 86 – 97 (The detention of juveniles and young offenders)**

#### **Accusation**

The report’s main concerns relate to:

1. “The high levels of youth detention suggest either a lack of suitable alternatives or that magistrates and judges do not have sufficient confidence in them.”
2. “The levels of juvenile and young offender detention.”
3. “The high conviction rate for those released from custody.”
4. “Whether the Youth Justice Board’s expenditure on secure facilities represents the most judicious use of its funds.”
5. “Conditions in custody.”
6. “Too much emphasis on punishment at the expense of rehabilitation in custody.”
7. “Levels of education in custody.”
8. “The importance of appropriate psychiatric care in custody.”
9. “The risk of self-harm to vulnerable and disturbed young people in custody.”
10. “The report mixes references to juveniles and young adult offenders.”

**1. “The high levels of youth detention suggest either a lack of suitable alternatives or that magistrates and judges do not have sufficient confidence in them.”**

#### **Community Sentences for Juveniles**

Reforms of the youth justice system have had 4 main aims:

- To develop a clear strategy to prevent offending and re-offending,;
- To intervene earlier and more effectively,
- To get things done more quickly; and
- To bring together all the people who have an interest in and are responsible for doing something about youth crime.

The Government strongly believes that juveniles should only be sent to custody as a last resort and in recent years has greatly strengthened and expanded the range of non-custodial sentencing options available to the courts.



Punishment forms an integral element of these sentences as well as the opportunity for intervention to address the offending behaviour and any underlying problems. The youth justice reforms have expanded the range of orders available to the courts to provide varying degrees of punishment and intervention to ensure that the response by the criminal justice system is proportionate to the seriousness of the offence.

If they are to provide a genuine alternative to custody, community sentences must be strong, effective, and command public confidence.

The orders challenge young offenders and confront them with the consequences of their offending, for themselves and their family and their victims and local community. It is important for them to develop personal responsibility for their behaviour and to face up to the consequences of their actions and change their attitudes and behaviour. They must tackle offending behaviour, address educational and social problems, encourage the young offender to take responsibility for their behaviour and make reparation to the victim or community where appropriate.

The Referral Order is now the main intervention for young offenders who plead guilty on their first court appearance. They are referred to a community led panel also attended by parents and others. The panel negotiates a contract with them including reparation to victims and steps to tackle their offending behaviour. If they agree a contract and carry it out the conviction is not recorded. If they do not they are referred back to the court for re-sentencing.

The reparation order requires the young person to make specific amends for the wrong they have done, makes them face up to their crimes and understand the impact of their actions on their victims and the wider community.

The Youth Justice Board has developed the Intensive Supervision & Surveillance Programme (ISSP) to cater for serious and persistent young offenders who might otherwise be at risk of a custodial sentence.

Since 2001 the Youth Justice Board has invested approximately £80million on ISSP, specifically designed to improve the confidence of the courts in community sentences for more serious and persistent offenders. The total number of starts to date and since programme inception is 13,522.

The programmes have two key elements;

- Intensive supervision consisting of highly structured, individual programmes to tackle the causes of offending behaviour – including education and training; reparation to victims, inter-personal skills and family support.
- Intensive surveillance consisting of either tracking, electronic tagging voice verification, or intelligence led policing.

Looking to the future we are aiming to create a simpler and more flexible sentencing structure. The reparation order and referral order will be maintained and we want to legislate to introduce a new generic juvenile community sentence with a wide menu of interventions.

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This new Juvenile Rehabilitation Order will replace eight current community sentences. We anticipate that this will give courts the flexibility and choice which they need to determine the most appropriate sentence for a convicted young offender.

We also intend to legislate to introduce an Intensive Supervision and Surveillance Order which will replace ISSP as a robust alternative to custody for the more serious or persistent offenders.

## **2. “The levels of juvenile and young offender detention.”**

The Report comments on the levels of juvenile detention. It is true that numbers increased markedly in the early- to mid-1990s. Since 2002, however, there has been a substantial fall. The Report quotes figures for 15 to 17 year olds detained in Prison Service accommodation. In fact, the figure for 31 December, 2004 was 2,169 (not 2,203, as stated). This is 12 per cent lower than the June 1997 figure, which is correctly given as 2,479. The Report also says that ‘compared with 2003 ... the number of juveniles detained [in 2004] has increased’. No dates or figures are given, so it is not possible to comment on them - but it should perhaps be pointed out that the number of juvenile offenders in all types of custody was lower in eight of the twelve months of 2004 than it had been in 2003.

As the Report rightly comments, the detention of juveniles ought to be a last resort and applied for the shortest appropriate period of time. That precisely summarises the Government’s policy. We are pleased that the Report recognises the steps that have been and are being taken to give it effect. In particular, we have made available to the courts a wide range of community sentences.

## **3. “The high conviction rate for those released from custody.”**

The Report comments on the high reconviction rate for those released from custody. The Government is determined to try to reduce this. But it should be understood that a high proportion of those sentenced to custody are serial offenders who have already been ‘given a chance’ – or indeed several chances. Custody has to be the last resort because it guarantees that penalties ordered by the courts will be put into effect. Without such a sanction, non-custodial sentences would be less effective and this could lead to a lack of confidence in the system. Something similar occurred in the late 1980s and early 1990s, with the policy of encouraging repeated use of police cautions for young people who continued to offend.

## **4. “Whether the Youth Justice Board’s expenditure on secure facilities represents the most judicious use of its funds.”**

The Report questions whether the Youth Justice Board’s expenditure on secure facilities represents the most judicious use of its funds. Ultimately, it is the courts who decide whether an offender is sentenced to custody or receives some other penalty. In the short-to-medium term, therefore, the Board’s expenditure on custodial provision is purely demand-led. Over a longer timescale, it can seek to influence sentencers’ views on when custody is appropriate, and that is what it is doing. It has a target of reducing numbers in custody by 10 per cent by March 2006. Some of the Report’s recommendations would add to the cost of custody. Rehabilitative regimes are expensive. The Report welcomes recent investment in LASCHs

and STCs, but these places cost more than three times as much as a place in a Young Offender Institution. The call (at [paragraph 92](#)) for even greater investment in education in custody – it has trebled in the last three years - would add further to the Youth Justice Board’s spending on custodial provision.

#### **5. “Conditions in custody.”**

It is unfortunate that time did not allow a visit to any custodial establishments in England or Wales, as first hand observation would have added to the relevance of the Report’s conclusions. The youth justice system in Northern Ireland is rather different from that in England and Wales, and it is not possible to make reliable inferences, as the Report seeks to do at [paragraphs 92, 93 & 97](#), about conditions in English and Welsh establishments.

#### **6. “Too much emphasis on punishment at the expense of rehabilitation in custody.”**

The comment at [paragraph 90](#) that there is too much emphasis on punishment, at the expense of rehabilitation, overlooks the strong rehabilitative thrust of the Detention and Training Order (DTO), which is the standard sentence for juveniles in England and Wales when the court decides that custody is unavoidable. The DTO is designed to prepare the young person for return to the community and has a strong emphasis, which the Youth Justice Board is continuing to develop, on education, training and employment.

#### **7. “Levels of education in custody.”**

The statement at [paragraph 92](#) that the average time spent in education in Young Offender Institutions in 2003 was 7.1 hours a week could give a seriously misleading impression. Young Offender Institutions accommodate offenders up to the age of 20 – well past the school leaving age. Juvenile offenders receive a much greater amount of education than young adults. YJB figures suggest that in 2002-03, all except one of the Young Offender Institutions that accommodate juveniles was meeting or exceeding the 15 hours a week specified in the service level agreement between the Prison Service and the Youth Justice Board. And in 2003-04, an average of 24 hours education a week was provided – though it is recognised that some young people were receiving significantly less. During the year ending March 2004, young people in juvenile Young Offender Institutions gained 4582 Basic Skills qualifications – exceeding the target by 17 per cent. Of these, 577 were at level 2, which is recognised as equivalent to a GCSE of reasonable standard. In addition, young people in juvenile Young Offender Institutions sitting GCSE examinations gained 119 passes.

#### **8. “The importance of appropriate psychiatric care in custody.”**

The Report rightly stresses the importance of appropriate psychiatric care. The Youth Justice Board has put in place arrangements to ensure young people are screened for mental health problems and substance misuse, and where appropriate are assessed by specialist services within set time periods. The Board is working in partnership with the Department of Health and other Government agencies to improve access to, and provision of, services. National Health Service Primary Care Trusts are assuming responsibility for commissioning health services in all Prison Service establishments by 2007, with the aim of bringing community standards of health care provision to these establishments. The Board is also working with the Department of Health to improve access to new secure mental health beds, which are being provided in several parts of the country.

### **9. “The risk of self-harm to vulnerable and disturbed young people in custody.”**

The Report comments on the risk of self-harm to vulnerable and disturbed young people in custody. The Prison Service and the Youth Justice Board attach the greatest importance to preventing this. A comprehensive review of each establishment was conducted between November and December 2003, under a Steering Group of the Youth Justice Board, Prison Service and Social Services and Prison Inspectorates. It covered measures to address self-harm and suicide, bullying and peer abuse, harm from adults and historic child abuse; monitoring and reporting, management and warning arrangements; and arrangements with local Area Child Protection Committees and local authority services. A new staff training package with an enhanced child protection module has been developed and independent advocacy services now operate in all establishments. The Board has made available funding for 25 local authority staff (in addition to existing Prison Service child protection co-ordinator posts) to undertake duties under the Children Act 1989 in Young Offender Institutions. These are just some of the measures that have been taken to protect vulnerable young people.

The juvenile secure estate has made significant progress over the last five years. No 15 or 16 year old girls are now held in Prison Service accommodation and we are setting up five new special units to accommodate 17 year old girls. But we recognise that there is scope to do more. The Youth Justice Board has published a consultation document outlining its draft Strategy for the Secure Estate for Juveniles. Its proposals include, for example, enhanced provision for vulnerable older boys. The Board is currently considering the comments it has received and will take account of them in finalising its strategy.

### **10. “The report mixes references to juveniles and young adult offenders.”**

In England and Wales, the Criminal Justice System regards those aged 18 and over as adults: their cases are dealt with by the adult courts, with different disposals to those available in the Youth Court.

However, we welcome any report which encourages discussion of how we treat young adult offenders. The Government has invested heavily in improved regimes for all prisoners, concentrating on activities such as education and vocational training which are particularly valuable for young adults. The Criminal Justice Act 2003 is giving courts a wider range of community penalties, which allow a sentence to be tailored to the needs of young adults and other offenders.

This group will also benefit from the creation of a National Offender Management Service, and better case management will help in targeting the delivery of programmes and services to offenders. A Young Adult Offender project has been established to develop a strategy for managing the needs of this group, including any special regime requirements and resettlement needs.

The Prison Service has taken steps to improve both conditions and regimes. Five of the larger Young Offender Institutions (Glen Parva, Onley, Portland, Brinsford and Feltham) and five local prisons have received an additional £20 million investment over the last four years. This has improved standards of decency and provided enhanced regimes, with a focus on resettlement for over one third of the young adult offenders held in custody at any one time.

Two other young offender establishments, Thorn Cross and Deerbolt, have had extra investment to run the successful High Intensity Training programme addressing offending behaviour and education, and providing mentoring and throughcare to reduce the risk of re-offending.

Young adult offenders have also benefited from the wider investment programme to improve regimes and reduce re-offending, including provision of drug treatment, offender behaviour programmes, basic skills and key work skills.

The Government has also been seeking to improve the effectiveness of community penalties for this group. The Intensive Control and Change Programme is a community- based sentence for 18 to 20 year olds at risk of imprisonment. It aims to cut the number of custodial sentences handed down to this group by the magistrates' courts by half, and to reduce reconviction rates by ten per cent. These intensive programmes include attending behaviour programmes, mentoring, education, training and advice on finding work, as well as a community punishment or curfew requirement with electronic monitoring. The Government will be aiming to develop the potential benefits of this approach with the implementation of new community penalties under the Criminal Justice Act 2003.

### **Paragraph 102**

With regard to the prosecution of children under the age of 16 in Scotland it is important to note that a child will only be prosecuted upon the instruction of the Lord Advocate. In internal staff guidance they are advised that for children under 16 there is a presumption that they will be dealt with by the Children's Reporter and that criminal proceedings will only be taken where there are compelling reasons in the public interest to do so. Should authority be granted by the Lord Advocate to prosecute a child under 16, Procurators Fiscal are responsible for asking the Court to agree measures to ensure the child can participate effectively. When a case is being dealt with under summary procedure section 142(1) of the Criminal Procedure (Scotland) Act 1995 provides that the Sheriff shall sit in a different building or room from normal criminal proceedings and that only certain people can be present. When a case is being dealt with under solemn procedure the defence will be asked whether the accused will agree to be assessed by a psychologist who can report and recommend steps to ensure the child can participate in the proceedings. Such measures may include shortening of the court day and regular breaks throughout the day, dispensing with court dress and clearing the court, In addition it should be noted that a number of provisions of the Vulnerable Witness (Scotland) Act 2004 apply to the child accused. Measures that apply to child accused who decide to give evidence include provisions allowing for court familiarisation visits prior to trial, having a "supporter" in court along with the accused and the giving of evidence by CCTV.

Secondly, the Commissioner examines the operation of the Youth Court Pilots and suggests that children under the age of 16 may be dealt with there, as well as those aged 16 and 17 who are currently dealt with under the pilots. It is true that certain 15 year olds can be dealt with in the Youth Court, however this is specific to road traffic offences where the court could impose disqualification as a likely disposal. It is also true that prosecution of children under 16 may be considered if it is shown that there are special reasons for doing so. However it should be noted that the Youth Courts are intended to deal with those 16 and 17 year olds who

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would ordinarily have been dealt with in the adult court system. It is not, nor is it intended to be, and alternative to a Children's Hearing. Those involved in the children's hearings system develop a high degree of expertise in dealing with children who offend. They are able to consider and address any welfare issues that may be contributing to the offending behaviour in a way that the adult court system does not.

### **Paragraph 103**

It should be emphasised that the Youth Courts are not intended to be an alternative to Children's Hearings, the ethos is to speed up processes and focus on persistent offenders.

### **The Age of Criminal Responsibility in England & Wales and Scotland**

#### **Paragraphs 105 – 107**

#### **Accusation**

The Commissioner expresses surprise to learn that the age of criminal responsibility in England and Wales is 10 and that in Scotland it is as low as 8. He notes that the European Convention on Human Rights does not require any age-limit on the presumed capacity of children to form sufficient mens rea to be criminally responsible for their actions. He notes that the European Court for Human Rights has held that attribution of criminal responsibility to a child as young as 10 would not of itself give rise to concerns under Article 3 of the ECHR (on inhumane and degrading treatment). However he asserts that the nature of any resulting criminal proceedings must be an important factor when considering whether the Article 3 threshold has been breached. He recommends that, even if the ECHR would not appear to require a modification of the ages of criminal responsibility in the United Kingdom, consideration be given to raising the age of criminal responsibility in line with norms prevailing across Europe.

The age of criminal responsibility is set at 10 to allow for interventions to address offending behaviour at an early stage and to help young people develop a sense of personal responsibility for their misbehaviour. The 2003 self-reporting Youth Lifestyles Survey showed that one in eight offenders committed their first offence at the age of 7 or younger. The report also highlighted that the key watershed for starting to offend was between the ages of 11 and 13. Most young people are mature enough at the age of 10 to know the difference between right and wrong. They also have the moral reasoning and emotional capacity to cope with the process of criminal law.

This is balanced by the holistic approach taken by the UK Government through the youth justice system in tackling offending behaviour and 10 and 11 year olds are not prosecuted when an alternative can be found. Reprimands and Final Warnings are the most likely response to offending by this age group, both of which include interventions to tackle offending behaviour and underlying problems.

Where a young person is placed before a Court, if it is their first time in court and they plead guilty, they will be given a Referral Order (RO). This involves referral to a Youth Offender Panel for a period of 3-12 months. The panel consists of a YOT worker and volunteers from

the local community. They, working with the young offender and his/her parents/guardians and, if appropriate, the victim, produce a contract which the young person agrees to keep. The aim of the contract is to repair the harm caused by the offence and address the causes of the offending behaviour.

The only exceptions are if the offence is so serious that the court decides a custodial sentence is absolutely necessary, or the offence is relatively minor (i.e. a 'non-imprisonable' offence such as a traffic offence or fare evasion), in which case an alternative such as a fine or an absolute discharge may be given.

The conviction is 'spent' once the contract has been successfully completed. This means that in most circumstances the offence will not have to be disclosed by the young person when applying for work.

The effect is that whilst the offence has resulted in the young person appearing before a Court, the RO enables them to access help and interventions designed to help them keep out of further trouble. It also involves the local community in a positive way, enabling them to work with the young person and resolving their problems."

In the light of the recent case of SCvUK in which the European Court criticised the way in which young people are dealt with in Court, we are actively looking at provisions to better protect the interests of those young defendants. We are also examining what needs to be done to ensure that they have as full an understanding as is possible about what is happening and what it means for them.

Local multi-agency Youth Offending Teams include social services and health professionals who identify needs that cannot be met by the criminal justice system alone. They can refer a young person to child welfare departments and services. If the age of criminal responsibility were to be raised, some of the most vulnerable children would be excluded from a system that supports an effective response to youth crime.

### **Paragraph 108**

The curfew order is cited in paragraph 108 as being a civil order, although it is in fact a criminal community penalty (now replaced by the new community order for offences committed on or after 4 April 2005, but that is probably not relevant to the report, which is historical).

### **Prison Conditions**

#### **Paragraph 121-132**

Recommendation 23: Address the problems of overcrowding in prisons through the construction of new detention facilities and greater investment in alternative sentences and non-custodial pre-trial supervision.

**England and Wales**

The prison population for England and Wales was 74,975 on the 1 April 2005. The usable operational capacity (which is the total number of prisoners that establishments can hold taking into account control, security and the proper operation of plan regimes) for the prison estate was 76,892. The UK Government has increased the number of prison places by 17,000 since 1997.

Funding was provided in 2002 for 3000 additional prison places, as part of an ongoing programme, to be built at existing prisons by 2006. In addition, two new private sector prisons have provided 1,290 places; HMP Bronzefield opened in June 2004, and HMP Peterborough opened in March 2005. This will increase the number of prison places in England and Wales to around 79,500 by 2006. Funding has since been provided for a new building programme and it is proposed to create an additional 1,300 places.

The Government believes that serious, dangerous and seriously persistent offenders should be sent to prison; there will always be some prisoners for whom prison is the only response. However, prison needs to be effectively targeted and many offenders can safely be dealt with in the community. This is why the Government intends to ensure that the courts have available to them a full range of alternative custody, which are not only effective, but which are strictly enforced and in which the courts and the public have confidence. The new community order introduced by the Criminal Justice Act 2003 for offences committed on or after 4 April 2005, allow sentencers a greater degree of flexibility in putting together tougher community sentences that will be tailored to the needs of offenders whose offending is serious enough to warrant a community penalty. Robust community sentences are a more effective way of dealing with offenders than short periods in custody.

The National Offender Management Service (NOMS) was established in 2004 and brings together the work of the prison and probation services to ensure a greater focus on the end to end management of offenders and a reduction in re-offending. NOMS is committed to implementing proposals in the Carter Report "Managing Offenders, Reducing Crime" to rebalance sentencing. It aims to ensure that correctional resources are targeted on more serious offenders, with an increasing use of diversions from court and a reinvigorated fine for less serious offenders. This will allow probation to concentrate on more serious offenders, including those who might otherwise receive a custodial sentence.

Recommendation 24: Improve the psychiatric support services in the adult prison estate, increase the capacity of NHS secure accommodation facilities so as to enable the transfer of all detainees in the need of full time psychiatric treatment.

**England and Wales**

Mental health services within prison are being significantly improved through the development of NHS mental health in reach services backed by new investment. The NHS plan (2000) commits that by 2004, the 5,000 prisoners with a severe mental illness should be receiving more comprehensive mental health services in prison. No prisoner with a serious mental health problem will leave prison without a care plan and 300 additional staff will be



employed. 100 in reach teams are currently in operation. NHS mental health in reach investment will reach 20 million a year by 2005/6 so that in reach type services are available to every prison in England and Wales.

Mentally disordered offenders who need specialist treatment should receive it in hospital wherever possible. Tighter regular monitoring has been introduced to identify any prisoners who have been waiting unacceptably long periods for transfer to hospital and a protocol issue setting out what must be done when a prisoner has been waiting for a hospital place for more than 3 months following acceptance by the NHS. This has brought about an improvement since the number of prisoners transferred to hospital in 2003, represents an increase of 12% on the 2002 figure. We do however accept that there remains some lack of clarity around the transfer arrangements. The Prison Service, the Joint Prison Health Team, the National Institute of Mental Health in England and the Commissioners and providers of NHS hospital services are therefore working together to establish a national waiting time limit for transfers between custody settings and hospitals. The Government is already doing a great deal to ensure that offenders with mental health problems are not sent to prison inappropriately through the operation of court diversion schemes and the development of wider sentencing option for the courts, coupled with the further development of other mental health services to close gaps in community care and so to reduce the number of such offenders who reach court.

**Recommendation 27: Provide for the possibility of private family visits.**

**England and Wales**

The Prison Service of England and Wales actively encourages prisoners to maintain meaningful family ties as an integral part of a business successful rehabilitation. Prison Rules require that special attention should be paid to the maintaining of such relationships between a prisoner and his family as it is desirable in the best interests of both. They also state the prisoner shall be encouraged and assisted to maintain and establish such relations with persons and agencies outside of prison as made, in the opinion of the Governor, best promote the interests of his/her family and his/her own social rehabilitation. We are also conscious of the responsibility placed upon the Prison Service under the UN Convention on the rights of the child.

With the benefit of such contact in mind there is an increase in emphasis on the delivery initiatives to fully maximise the potential of allowing prisoners to establish and maintain contact with family and friends in many establishments, prisoners are eligible for extended contacts with the families through longer or enhanced visits; visits and other schemes that are particularly sensitive to the needs of children and the visits of the family from long distances may be partially facilitated through the provision of financial support for travel and assistance with accommodation. Pay phones for prisoner's use have been installed in all establishments.

Prisons in England and Wales do not permit private or conjugal visits and there are currently no plans to change the policy on this. There are two main reasons for this, the risk posed by such visits to security in good order and the need for the Prison Service to restrict prisoners activities and freedoms of associations which maintain the effect of imprisonment and the criminal justice and public confidence.

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The introduction of conjugal visits would require major cultural and practical changes at a time when resources are being directed to providing for an increased prison population and activity programme which impacts more tangibly on Prison Service objectives this policy on conjugal visits is consistent with judgements by the European Courts of Human Rights.

## **Scotland**

### **Paragraph 121**

Incidences of slopping out, overcrowding and poor regime across the prison estate in Scotland have been substantially reduced in recent years. In May 2004 the Scottish Minister for Justice announced a package of measures to accelerate improvement in prison conditions, reduce overcrowding and make effective use of custody. The Executive is spending £1.5m per week on a programme to improve the existing prison estate, and we are building 2 new prisons. Development of the prison estate is on target. Slopping out at HMP Barlinnie ended in July 2004. It will end this summer at Edinburgh and at Perth by the end of 2005. It will end at Polmont by the end of 2006. Cells in HMP Peterhead have no integral sanitation: prisoners use chemical toilets. Ministers have instructed SPS to update its strategy for modernising the prison estate in the light of progress so far and the need to resolve priority issues in the continuing development of the estate.

### **Paragraph 125**

The Government believes that serious, dangerous and seriously persistent offenders should be sent to prison; there will always be some offenders for whom prison is the only response. However, prison needs to be effectively targeted and many offenders can safely be dealt with in the community. This is why the Government intends to ensure that the courts have available to them a full range of alternatives to custody, which are not only effective, but which are strictly enforced and in which the courts and the public can have confidence.

The new community order, introduced by the Criminal Justice Act 2003 for offences committed on or after 4 April 2005, allows sentencers a greater degree of flexibility in putting together tough community sentences that will be tailored to the needs of offenders whose offending is serious enough to warrant a community penalty.

### **Paragraphs 137 - 139 and Recommendation No. 28**

The UK does see the elimination of discrimination in the Criminal Justice System as a priority, and the following sets out some of the steps being taken in this area.

The Criminal Justice System Race Unit (CJS - RU) is part of the Office for Criminal Justice Reform (OCJR) which itself is the cross-departmental team that supports all criminal justice agencies in working together to provide an improved service to the public.

Criminal Justice *System* (CJS) work on race is largely, though not exclusively, sited within the 'Confidence Strand' work;

The SR2004 PSA target '*to reassure the public, reducing the fear of crime and anti-social behaviour, and building confidence in the criminal justice system without compromising fairness*'. The target is in two halves:

- **Reassurance** (covering sub targets on reducing fear of crime, perceptions of anti-social behaviour (ASB) and increasing confidence in local police. This is owned by the Home Office
- **Confidence** (covering sub targets relating to improving general public confidence in the CJS, the proportion of people from Black and Minority Ethnic communities who feel that they would be treated fairly by the criminal justice system and the satisfaction of victims and witnesses. This is shared by the Home Office, DCA and CPS.

The overall strategy for delivering the PSA target is based around a series of specific programmes tackling each of the target elements and a series of cross-cutting themes where we are working to deliver enhanced coherence and synergy across the Home Office, OCJR, CPS and DCA. The cross cutting themes include:

- **Community engagement** - ensuring that CJS agencies work effectively with local communities to and addressing their real concerns about crime and the CJS
- **External Communications** - improving public understanding and appreciation - tackling some of the myths and misunderstandings about the CJS
- **Research/Analysis** - improving our understanding of the drivers of reassurance and confidence, and what works in tackling it
- **User experience**- improving the quality of the service the system provides to the public, particularly victims and witnesses
- **Local Delivery** - ensuring good arrangements for planning and performance management at local agency levels so as to better support the delivery of the PSA

One of the 'specific programmes' mentioned above is the substantial CJS - RU planned work programme. In addition to the Unit's contribution to the Stop and Search Action Team (mentioned at paragraph 137), another of its core workstreams is to undertake an enhanced piece of research replicating the early 1990s comprehensive study of selected Crown Courts. Police, Prisons, Courts, Crown Prosecution Service, Youth Justice Board and Probation have each contributed to the CJS - RU delivery plan the 3 initiatives which in their opinion will have the biggest positive impact upon BME perceptions of equitable treatment - these form part of the overall CJS - RU delivery strategy and will be rigorously monitored. Driving improved race performance of LCJBs is a key aspect of the CJS - RU's work programme.

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### **Paragraph 142**

Protection in the provision of goods or services is being addressed in relation to religion and belief in Part 2 of the Equality Bill which was introduced into Parliament in March although was not completed before the election was called. It is to be reintroduced. This will address the inconsistency mentioned. There are currently no plans to extend this protection on the grounds of age and sexuality.

### **Paragraph 143**

The labour Party manifesto included a commitment to reintroduce legislation on incitement to religious hatred.

### **Paragraphs 144 - 148 and Recommendation No. 31**

A comprehensive review of Gypsy and Traveller accommodation policy has been undertaken by the Office of the Deputy Prime Minister (ODPM), as a result of which numerous changes have been put in place. These ensure that an informed and strategic approach is taken to accommodation needs, and that the planning system identifies land to meet these needs. Government funding for socially rented sites is now available, and the security of tenure of those resident on such sites has been strengthened.

In detail:

- Under new measures in the Housing Act 2004, local authorities will be required to review the accommodation needs of 'gypsies and travellers' residing in, or resorting to, their district when carrying out reviews of housing needs under section 8 of the Housing Act 1985. Guidance on how to carry out housing needs assessment, including for Gypsies and Travellers, will be issued later this year.
- The Housing Act 2004 also provides for local housing authorities to be required to prepare and supply a strategy in respect of the meeting of the accommodation needs of Gypsies and Travellers in their district.
- The permissible purposes of the Housing Corporation will be extended to allow Registered Social Landlords (private sector providers of publicly funded social housing) to provide as well as manage Gypsy and Traveller sites, and to receive public subsidy to do so.
- From 2006/07, mainstream funding for local authority and Registered Social Landlord sites will be available from the £2.5bn housing capital budget, which is distributed on the advice of the nine Regional Housing Boards.
- The Gypsy Sites Refurbishment Grant (GSRG) continues to support the improvement and expansion of the local authority network of sites. GSRG will be providing £8m funding for this purpose in 2005/06. The scope of the grant has been widened for 2005/06 to cover the provision of new residential sites.

- The new planning system, introduced in the Planning and Compulsory Purchase Act 2004, will ensure a systematic and comprehensive approach is taken to the assessment of housing needs and site provision. Where a need for sites is identified, it will require that land for such sites is identified in local development plan documents.
- Planning Circular 1/94, which deals with Gypsy and Traveller sites, has been revised and consulted on, in order to overcome some of the barriers to site provision which have become apparent since the Circular was issued in 1994. Responses are currently being considered by the Department.
- The Housing Act 2004 allows judges to suspend eviction orders against residents of local authority sites. This brings the situation for residents of local authority sites in line with those on private Gypsy and Travellers sites and those with secure tenancies in bricks and mortar housing in this respect.
- The Housing Act 2004 brings security of tenure on County Council sites in line that on other local authority sites.
- The Social Exclusion Unit based within ODPM is undertaking a study into 'Better Service Delivery for Disadvantaged People who Move Frequently', which will include an examination of the particular issues faced by Gypsies and Travellers.
- ODPM will be issuing a range of guidance related to the establishment, design and management of sites, and the production of Gypsy and Traveller accommodation strategies.
- In addition, a Gypsy and Traveller Unit has been set up within the Department. This will implement legislation, work with Local Authorities to promote site and service provision, promote the effective use of enforcement powers, and promote greater community cohesion.

Any involvement of the police in management of Gypsy and Traveller sites is extremely rare.

### **Paragraphs 149-150**

The Government is pleased to receive the Commissioner's endorsement of the proposals for the Commission for Equality and Human Rights (CEHR). The United Kingdom assisted in the drafting of the European Convention on Human Rights, and was the first country to ratify the Convention in 1951 and successive Governments have been bound by the Convention since it came into force. The Human Rights Act 1998 was the next step in the development of a culture of respect for human rights, and the CEHR follows on from this. Its powers have been designed to complement the procedures under the Act by which breaches of the Convention rights may already be challenged in court.

**Paragraph 151 and Recommendation No. 32**

The Equality Bill provides for the Secretary of State to ensure that the CEHR receives the funding which he/she considers appropriate for it to perform its functions. The CEHR will have responsibility for six areas of equality (race, gender and gender reassignment, disability, age, sexual orientation, and religion and belief) as well as human rights. It will therefore need to plan its activities carefully, and the Bill provides that it should consult widely in preparing a strategic plan, which it should revise at least every three years.

**Paragraph 152**

The Government believes strongly that the CEHR should be authoritative and independent. As an Executive Non-Departmental Public Body (NDPB) it will be accountable to Government. However, the powers conferred on the CEHR by the Equality Bill have been framed to ensure that it can undertake its activities with complete independence - for example, it will be able independently to launch and compel evidence in relation to inquiries and investigations.

**Paragraph 153**

It is incorrect to suggest that the creation of a Scottish Human Rights Commission has stalled. The Scottish Executive has continued developing the proposals for a Scottish Human Rights Commission since the responses to the consultation were published in 2004. The Scottish Executive has publicly stated that the Commission will be established within the lifetime of the current parliament, and this commitment has not changed. The Executive has been closely consulted by UK departments regarding the proposal for a UK Commission on Equality and Human Rights, but this has had no significant bearing on the proposed structure of the Scottish Commission beyond ensuring that the two bodies will be capable of working together on issues of mutual interest.

**Paragraph 164**

The Chief Constable and his senior management team regularly meet both in public and in private. In accordance with the Police (NI) Act 2000 (as amended by the Police (NI) Act 2003) the Policing Board is required to hold 8 meetings in public per year. The principal function of the Policing Board is to secure the maintenance, efficiency and effectiveness of the police in Northern Ireland.

**Paragraph 182 (Inquiries Act and Finucane Inquiry)****Article 2**

The Commissioner might wish to bear in mind that as with all UK legislation, Ministers have made a statement to Parliament that the provisions of the Inquiries Act are, in their view, compatible with the European Convention on Human Rights. Both the Government and the inquiry panel will be public authorities for the purposes of the Human Rights Act 1998 and will therefore be under a duty to exercise their powers under the Act in a way that is compatible with that Act.