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Dr Hywel Francis  
Chair  
Joint Committee on Human Rights  
House of Commons  
7 Millbank  
London  
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15<sup>th</sup>

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Dear Hywel

**CRIMINAL JUSTICE AND COURTS BILL: GOVERNMENT AMENDMENTS  
ENGAGING CONVENTION RIGHTS BEING TABLED AT HOUSE OF LORDS  
REPORT STAGE**

Further to my letter of 14 October, the Government has today tabled further amendments to the Criminal Justice and Courts Bill. I am writing to you to highlight these provisions which, in the view of the Ministry of Justice, engage the Convention Rights and to provide the Department's analysis of the issues raised. Only amendments which raise substantive issues under the European Convention on Human Rights are discussed.

**Lifetime reporting restrictions for witnesses and victims under 18**

1. Section 39 of the Children and Young Persons Act 1933 ("the CYPA") contains a power for any court to impose a discretionary reporting restriction in relation to a person under 18 concerned in court proceedings. Section 49 of the CYPA provides for automatic reporting restrictions for a person under 18 involved in criminal proceedings in the Youth Court. Case law has established that reporting restrictions under both sections of the CYPA automatically expire when the individual turns 18. This new clause provides for a statutory discretion to make lifetime reporting restriction orders for child/young person victims and witnesses involved in criminal trials. The discretion will not extend to defendants.

## Article 6

2. Article 6 guarantees the right to a fair and public hearing, to which the reporting of criminal proceedings contributes. However, the requirements of Article 6(1) are not absolute and restrictions can be justified where they are necessary and proportionate in a democratic society. The provision made by this clause pursues the legitimate aim of facilitating co-operation in criminal proceedings of victims and witnesses who are under 18 – a group that has particular needs in the context of criminal proceedings. By providing the possibility of lifetime reporting restrictions for child and young person witnesses and victims – which is already possible for adult victims – the provision furthers that legitimate aim. In the same way as with the current arrangements, in the Government's view, the provision is proportionate – it only permits an order to be made on consideration by a court and it can be varied or revoked, including upon application by media organisations. In addition in determining whether to make lifetime reporting restrictions the court must consider the interests of justice and the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of criminal proceedings.
3. Subsection (3) of the clause provides that the offences in section 49 of the Youth Justice and Criminal Evidence Act 1999 ("the YJCE") apply in relation to the new reporting restrictions regime. Section 50(1) of that Act (which is not amended by the Bill) has effect such that a defendant who can establish on the balance of probabilities that, at the time of the alleged offence, he was not aware, and neither suspected nor had reason to suspect, that the publication included the matter or report in question is not guilty of the offence. A transfer of the burden of proof to the accused in this way engages article 6(2) ECHR (presumption of innocence). The legal principles concerning the compatibility of such a reverse burden are set out in paragraphs 7 and 8 above (in the context of revenge pornography).
4. There is a clear public interest in successfully prosecuting breaches of court-imposed reporting restrictions – the impact a breach would have on both the administration of justice and on the victim or a witness themselves is potentially great. Furthermore, the matters that a defendant would have to establish on the balance of probabilities are within their knowledge. In these circumstances, and bearing in mind the proportionate nature of the penalty that can be imposed, the Government considers that the reverse burden is justified.

#### Article 10

5. Article 10 guarantees freedom of expression, including the freedom to impart information without interference by a public authority. An order restricting the reporting of criminal proceedings therefore interferes with freedom of expression. Article 10, however, also permits such interference where it is “prescribed by law” and is necessary, among other reasons ... for the protection of the rights of others...”.
6. An important purpose of this provision is to ensure that child victims and witnesses receive the same potential protection as adult witnesses in cases in which the reporting of an individual’s involvement in criminal proceedings is likely to affect the quality of evidence or co-operation given because of fear or distress.
7. In the case of *R (JC and RT) v Central Criminal Court* [2014] EWHC 1041 (Admin), the President of the Queen’s Bench Division stated that there is no incompatibility between the existing statutory reporting restriction regimes concerning children and young persons and human rights (paragraph 34). Furthermore the court, as a public authority for the purposes of the Human Rights Act 1998, will be required to exercise its discretion under the new power in a way that is compatible with ECHR rights, balancing the competing demands of Articles 8 and 10. The Government therefore considers that these provisions are compatible with those convention rights.

#### Article 14

8. The provision provides for the possibility of a lifetime reporting restriction for witnesses and victims who are under 18 at the commencement of criminal proceedings but not for defendants of that age. While it may be argued that Article 14 (prohibition of discrimination) is engaged on the basis that this provision falls within the ambit of Article 8, the Government does not accept that being a defendant, or a witness or victim, amounts to “any other status” for the purposes of Article 14. To the extent it were found to do so, victims and witnesses on the one hand and defendants on the other are not in a comparable situation (see *R. (Carson and Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, paragraph 61).
9. If this needed to be justified, a number of statutory protections within the criminal justice system are applicable only to victims and witnesses (see, for example, section 46 Youth Justice and Criminal Evidence Act 1999 (lifetime reporting restrictions for adult witnesses) and the Sexual Offences (Amendment) Act 2002

(reporting restrictions for alleged victims of sexual offences)). This reflects the different position of defendants on the one hand and witnesses and victims on the other. Moreover, in *R (JC and RT)* (above) the court emphasised the existing anomaly between child and adult witnesses and noted that: “victims and witnesses need individual and tailor-made protection within the criminal justice system ... the problem requires to be addressed as a matter of real urgency”. The court also retains its inherent powers to order reporting restrictions in the case of defendants where that is necessary to ensure that the administration of justice would not be seriously affected (see *R (on the application of Harper) v Aldershot Magistrates’ Court* [2010] EWHC 1319 (Admin)).

United Nations Convention on the Rights of the Child: Article 34

10. As the intention of these provisions is to provide protection for child victims and witnesses in criminal proceedings they support the United Kingdom’s commitments under Article 34 of the United Nations Convention on the Rights of the Child.

I hope that your Committee has found this to be a useful explanation of the issues engaged by these new provisions. I am placing a copy of this letter in the Library of both Houses and copying this letter to Lord Beecham and Lord Marks of Henley-on-Thames.

As ever  
Yours  
Edward

**EDWARD FAULKS**