RESPONSE TO QUESTIONS OF THE PORTFOLIO COMMITTEE ON THE PROPOSED FIREARM PROHIBITION ORDER AMENDMENTS

* No corrections required to the transcript of my evidence

* In relation to Questions on Notice, from page 34 of the transcript (highlighted), and this is essentially the same issue on pages 36 and 37, "Can you just confirm that section 75 will not provide a mechanism to challenge the review after 10 years?"

I can confirm that the proposed amendment reads, "requires the Commissioner of Police to review a firearms prohibition order after the order has been in force for 10 years and provides that the review is to be completed within 6 months." It does not specify whether the person the subject to the review is to be notified, and it does not provide a mechanism to challenge the refusal to lift a firearm prohibition order if the review is unsuccessful.

The second part of this argument was in relation to the timing of the review. The proposed amendment refers to 10 years, and in my submissions I proposed a review after 5 years. This was based on 2 aspects, the ease in being able to impose an FPO (completely subjective criteria of s73(1) of the Firearm Act - "The Commissioner may make a firearms prohibition order against a person if, in the opinion of the Commissioner, the person is not fit, in the public interest, to have possession of a firearm"), and secondly, the burden such an order carries (searches on vehicles and property without warrant at anytime, and now all persons present, even though there is no order imposed on them).

The 1942 case of Liversidge v Anderson (a commentary is attached), from the House of Lords, deals with the question of subjective criteria when imposing a penalty/punishment. In this case the imposition of an FPO, and therefore, the High Court of Australia ruled in *George v Rockett* (1990) 170 CLR 104, from the second last paragraph of the above-mentioned commentary; *"High Court confirmed that a statutory reference to 'reasonable grounds' for a relevant suspicion, belief or other state of mind, 'require[d] the existence of facts ... sufficient to induce that state of mind in a reasonable person'. The words created an objective test. The focus is on what a reasonable person would think in the circumstances, not the decision-maker's subjective state of mind."*

So, the Police should not be able to "have their cake and to eat it to", the time for review should be every 5 years from imposition (unless changes are made to section 73 of the Firearm Act imposing an objective criteria on its imposition), with the subject being notified, and a pathway/mechanism to an independent review if the mandatory review is unsuccessful.

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Liversidge v Anderson [1942] AC 206

Lord Atkin's dissent in Liversidge v Anderson [1942] AC 206 was a defining point in his judicial career. It was delivered on 3 November 1941, a few weeks before his 74th birthday.

In September 1939, the United Kingdom entered into the Second World War. Former Lord Chief Justice, Lord Bingham, described the grave situation that Britain faced at the time of *Liversidge v Anderson:*

France had fallen. The British army in France had been destroyed or captured except for the remnant which escaped by the skin of its teeth through Dunkirk. German invasion was expected daily. It was the gravest national crisis in the life of anyone alive in the UK then or since. There was high anxiety about the risk of German collaborators in the United Kingdom.

Emergency Powers (Defence) Act 1939 (UK)

Responding to growing national security concerns, the United Kingdom Parliament enacted the *Emergency Powers (Defence) Act 1939*. It empowered the Parliament to issue any controls or regulations that the government felt were necessary to secure public safety, defend the realm, maintain public order and enable the efficient prosecution of the war.

Members of the public and Parliament debated these new laws that surrendered citizens' liberties and rights.

31 October 1939, 7.14pm
House of Commons Debate
Frank Kingsley Griffith, Member of United Kingdom Parliament for Middlesbrough West

On the one hand, there will be a full realisation that none of us can expect in time of war to preserve unimpaired in detail all the liberties that we enjoyed in peace, and on the other hand, there will be a corresponding eagerness, not confined to any one part of the House, that those liberties shall not be unnecessarily sacrificed.

Regulation 18B

Regulation 18B of the *Defence (General) Regulations 1939* (UK) was at the heart of *Liversidge v Anderson.*

The initial draft empowered the Secretary of State to direct that a person be detained 'if satisfied with respect to any particular person' that their detention was necessary 'with a view to prevent [that person] from acting in any manner prejudicial to the public safety or the defence of the Realm'.

The draft was attacked in the House of Commons, leading to its amendment on 31 October 1939. The amended version stated that the Secretary of State could direct detention of any person if the Secretary 'has **reasonable cause to believe** any person to be of hostile origin or association, or to have been recently concerned in acts prejudicial to the public safety or the defence of the Realm'.

The Blitz

In 1940 and 1941 during the early days of the Second World War, England endured a ceaseless rain of bombs and suffered catastrophic destruction. Many civilians and members of the armed forces lost their lives. This was the Blitz, and the German Air Force, the *Luftwaffe*, targeted most British cities, including London. Its sustained aerial bombing campaign directly affected the delivery of *Liversidge v Anderson*.

On Monday 3 November 1941, the Law Lords delivered their judgments in the King's Robing Room. The Commons Chamber had been destroyed by bombs and the Commons was meeting in the Lords Chamber.

The case

On 29 May 1940, Robert Liversidge (born Jacob Perlzweig), a pilot officer in the Royal Air Force Volunteer Reserve, was arrested by a warrant issued by Sir John Anderson, Secretary of State. Liversidge was detained in Brixton Prison pursuant to Regulation 18B. He was not charged or accused of criminal conduct and he was given no reasons for his detention. The warrant merely recited that the Home Secretary had 'reasonable cause to believe' that Liversidge was 'a person of hostile associations'. At the time of *Liversidge v Anderson*, there was understandable public concern about the threat of persons who might support or collaborate with the enemy. Security Service MI5 was interested in Liversidge as he had a chequered past and access to classified information through his position.

On 14 March 1941, Liversidge issued a writ, suing the Secretary of State for unlawful detention and claiming damages for false imprisonment. The matter was first heard by Master Mosley who refused Liversidge's suit. An appeal to the Kings Bench was dismissed. At this point Liversidge appealed again to the English Court of Appeal, then to the Appellate Committee of the House of Lords.

Majority judgment

Liversidge v Anderson was decided by the usual number of five Law Lords, who each delivered a judgment. The case concerned the meaning of the phrase 'reasonable cause'. The central issue was whether the Secretary of State's belief was subject to an objective or a subjective test.

- **Lord Maugham** held that the Secretary of State's executive discretion did not need to be triggered by legally admissible evidence but could be triggered by hearsay that was extremely confidential or prejudicial to disclose. Also, there were safeguards, including that the Secretary of State was answerable to Parliament and was to report to an Advisory Committee.
- **Lord Macmillan** considered that the wartime context of Regulation 18B was relevant to ascertaining its meaning. Moreover, the Secretary of State was, by reason of his position, entitled to public confidence and integrity.
- **Lord Wright** advised that the use of 'reasonable' only connoted that the Secretary of State did not 'lightly or arbitrarily' invade the liberty of the subject. The Advisory Committee was intended to substitute for recourse to the judiciary – if a detainee objected to a decision, the Committee could inform that detainee of the reasons.
- **Lord Romer** remarked that the Secretary of State should not be caught in the dilemma of making public information that could imperil security, or withholding information that could risk a dangerous person's release.

By majority, Liversidge lost his claim on 3 November 1941. Because he failed to prove that he was wrongly detained, he received no damages for false imprisonment. Liversidge was only released on 31 December 1941, having been detained for one year and seven months.

Lord Atkin's dissent

Lord Atkin strongly dissented. He held that the words 'reasonable cause to believe' imposed a standard of reasonableness on the Secretary of State's belief. A subjective belief was not enough, since it would confer 'an unconditional power of imprisonment'.

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.

Lord Atkin, Liversidge v Anderson [1942] AC 206 at 244

Lord Atkin's 'clash of arms' comment derived from the ancient Roman senator, Cicero. For Lord Atkin, the law is not to be interpreted or understood differently in times of war, unless Parliament changes the law.

[Arguments of counsel] … might have been addressed acceptably to the Court of King's Bench in the time of Charles I.

Lord Atkin, Liversidge v Anderson [1942] AC 206 at 244

This comment about the Court of Charles I targeted the arguments from government counsel in court and spurred Lord Maugham's unprecedented letter to the Editor of *The Times.*

The Times, Thursday 6 November, 1941
War and Habeas Corpus
The arguments in Court
Lord Maugham's comment to the Editor of *The Times*

Sir, –

… Lord Atkin, in his dissentient speech, stated that he had listened 'to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I'. Counsel, according to the traditions of the Bar, cannot reply even to so grave an animadversion as this. I think it only fair to the Attorney-General and Mr. Valentine Holmes, who appeared for the respondents, to say that I presided at the hearing and listened to every word of their arguments, and that I did not hear from them, or anyone else, anything which could justify such a remark.

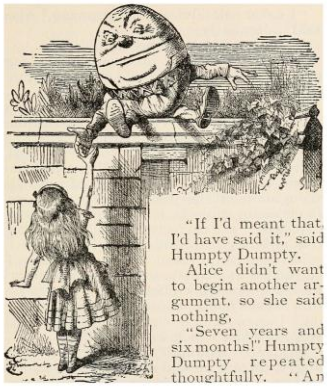
Yours truly,
MAUGHAM

In a later statement to the House of Lords, Lord Maugham noted that his letter was written to 'protect' counsel from any negative imputations from Lord Atkin's comment. While Lord Atkin maintained a dignified public silence, Lord Maugham was criticised in Parliament for commenting on another judge to a newspaper.

I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive minded than the executive.

Lord Atkin, Liversidge v Anderson [1942] AC 206 at 244

Lord Atkin criticised other judges for adopting an interpretation restricting liberty more than the executive government had intended. Lord Chief Justice Caldecote was particularly upset by this reference to the 'attitude of judges', causing him to write to Lord Atkin. Lord Atkin responded that he was not criticising 'judges generally', but only judges who 'adopted this unnatural construction'. He 'dismiss[ed] as sophistry' the majority's interpretation of Regulation 18B, and their advice that the Secretary of State need only have a subjective belief, leaving the judiciary unable to consider the reasonableness of that belief.



The words have only one meaning ... I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'

Lord Atkin, Liversidge v Anderson [1942] AC 206 at 244-245

The Lord Chancellor, Viscount Simon, who read the draft judgment, wrote to Lord Atkin in an attempt at persuading him to remove the Humpty Dumpty reference from *Through the Looking Glass* (the sequel to *Alice's Adventures in Wonderland*). Lord Atkin responded by commenting on the majority opinion:

I consider that I have destroyed it on every legal ground: and it seems to me fair to conclude with a dose of ridicule.

Contemporary application

Over time, Lord Atkin's dissent has been vindicated. Former Chief Justice of the High Court of Australia, the Hon Anthony Mason AC KBE QC observes that *Liversidge v Anderson* reveals how 'exclusion of effective judicial review exposes the individual to abuse of executive power'.

Lord Atkin's dissent has been adopted around the world, cited in South Africa, America and Australia. In 1990 it was adopted by the High Court of Australia in *George v Rockett* (1990) 170 CLR 104:

In this case, the High Court unanimously declared Lord Atkin's dissent to be the 'famous, and now orthodox' approach. The case was an appeal from the Supreme Court of Queensland's review of the grant of a search warrant. The search warrant enabled documents to be seized from the office of solicitors for the former Police Commissioner, Sir Terence Lewis. Applying Lord Atkin's dissent, the High Court confirmed that a statutory reference to 'reasonable grounds' for a relevant suspicion, belief or other state of mind, 'require[d] the existence of facts ... sufficient to induce that state of mind in a reasonable person'. The words created an objective test. The focus is on what a reasonable person would think in the circumstances, not the decision-maker's subjective state of mind.

Lord Atkin's decision in *Liversidge v Anderson* is described as the one of the most important constitutional decisions in recent legal history. In *A v Secretary of State for the Home Department* [2005] 2 AC 68, the United Kingdom's House of Lords adopted a similar approach to Lord Atkin's dissent in balancing national security and individual liberty against executive detention. *Liversidge v Anderson* was cited in counsel's arguments. The House of Lords – in an eight to one majority – held that the indefinite detention of foreign prisoners suspected of being involved in terrorism under the *Anti-terrorism, Crime and Security Act 2001* (UK), was incompatible with the European Convention on Human Rights. The detention without trial scheme was ruled to be disproportionate and discriminatory (read *BBC News* report: Terror detainees win Lords appeal).

Images

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- 'Hitler will send no warning – so always carry your gas mask.' UK Ministry of Home Security poster, Imperial War Museums © IWM
- Children of an eastern suburb of London who have been made homeless by the random bombs of the Nazi night raiders, waiting outside the wreckage of what was their home. September 1940, New Times Paris Bureau Collection. (USIA)
- Illustration of Alice and Humpty Dumpty by John Tenniel, from Through the Looking-Glass and What Alice Found There by Lewis Carroll, 1872, Wikimedia Commons