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PROTECTING CIVIL LIBERTIES
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Liberty's Second Reading Briefing on the Criminal Justice and Immigration Bill in the House of Commons

October 2007

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml

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Overview

1. The Government's zeal for reform of the criminal justice system has been a prominent feature of its administration. Liberty has agreed with many of these reforms – the greater consideration given to victims and witnesses; the creation of new preparatory criminal offences making it possible to act before serious crimes are perpetrated and the creation of the Serious Organised Crime Agency. This latest Criminal Justice and Immigration Bill, published just the day before Gordon Brown became Prime Minister, also contains some welcome proposals. Clause 54 would, for example, allow cautions to become spent at some point so that they do not haunt an offender for the rest of their lives.[1] Liberty also welcomes the proposal in Clause 108 to review Anti-Social Behaviour Orders on an annual basis, as there is currently far too little information on how ASBOs are being used and to what effect.[2]

2. Sadly, however, positive developments like these were too often drowned out in the rhetoric of *Simple, Speedy, Summary Justice*" and "*Rebalancing the Criminal Justice System in Favour of the Law Abiding Majority"*. Basic values underlying our criminal justice system were too often undermined in pursuit of these platitudes: the presumption of innocence and the right to a fair trial before an independent court. These are the values that we exported around the world and should be proud of. They are not, as Tony Blair suggested, concerns which were fine "in the time of Dickens" but which are an unacceptable obstacle to tackling modern-day crime.[3] We did not accept this analysis. The rule of law is just as important today as it was 100 years ago to make sure that the innocent aren't swept up with the guilty. It is just as important to ensure that real justice is done and seen to be done – with trial by jury in open court. These are the foundations upon which public faith in Britain's criminal justice system are based. We hope that the approach of new administration reflects an acceptance that effective crime reduction and public safety policy does not necessity bypassing due process.

3. The Bill contains a number of proposals of concern:

- In the last ten years, we have seen an endless stream of legal shortcuts – punitive measures dressed-up as "preventative" to escape the fair trial

[1] Particularly important given the significant extensions for when and how cautions are used

[2] Other welcome proposals include the creation of Her Majesty's Commissioner for Offender Management and Prisons, which effectively places the Prisons and Probation Ombudsman on a statutory footing.

[3] Tony Blair, Labour Party Conference, September 2005

safeguards that civilised societies normally abide by before punishing their citizens. This Bill proposes the latest member of this mutant family – it would add the Violent Offender Order or VOO to the ASBO, the Parenting Order (ASBO for parents), the Control Order (ASBO for terror suspects) and the proposed Serious Crime Prevention Order (ASBO for gangsters).

- The fashion for over-broad powers is also continued in this Bill. We would draw MPs' attention to Clause 103 which proposes a new power to close premises (including a person's own home) where those premises have been associated with anti-social behaviour. This measure could make children homeless because of the bad behaviour of an out-of-control sibling. The insulting promise of homeless advice for those turfed-out onto the street would do nothing to soften the blow.
- The proposal to remove the Court of Appeal's power to quash convictions when there has been a serious abuse of process demonstrates a continuing distrust of the judiciary and disrespect for the rule of law and, in particular, for the need effectively to sanction serious, illegal actions by agents of the state. These proposals are not about preventing the courts overturning convictions on the basic of "minor technicalities". They aim to remove a rarely-used but constitutionally important fall-back power for the courts.

We discuss these issues in some detail in this briefing. In addition we consider the proposed proposal for a new "Special Immigration Status" in Part 11 and the new criminal offences proposed in Part 6 of the Bill.

Sentencing (Part 2)

4. Liberty does not normally comment on sentencing proposals.[4] However, we recognise that public confidence and support of the criminal justice process as a whole is crucial. Concerns over sentencing policy and its lack of clarity have impacted upon the entire system. These concerns came to a head in 2006 over the case of Craig Sweeney, who received a life sentence for extremely serious sex offences against minors. Under the current system for determining the point at which Sweeney could be considered for parole he became eligible after just over 5 years, once time spent on remand had been taken into account. Of particular concern was

[4] Our comments and recommendations relating to the criminal justice process have most often focused on the process leading up to conviction. In particular, we have commented on fair trial and due process issues surrounding investigation, questioning, charge and trial.

the requirement that Sweeney's sentence be reduced by one third due to his guilty plea. Liberty agreed with the Government's suggestions that courts should have greater discretion about sentence-reduction for guilty pleas[5]. For example, we consider there to be a clear difference between someone pleading guilty when they have been caught 'red handed' and someone pleading guilty as an acknowledgment of their wrong-doing even though the evidence against them is weak. It is very disappointing that this proposal for greater judicial discretion is absent from the Bill.

5. While some of the provisions in Part 2 of the Bill are welcome,[6] we do have profound concerns about some others. Liberty is particularly concerned about the implications of Clauses 16 and 18. Clause 16 proposes to remove the requirements both that a recalled prisoner's case be referred by the Secretary of State to the Parole Board, and that the Parole Board have the power to recommend the re-release of a prisoner following his recall. Clause 18 removes the requirement for a Parole Board recommendation before the Secretary of State may decide whether to recall a prisoner serving a life sentence or an indeterminate sentence for public protection. At present, the Home Secretary only has the power to act without the recommendation of the Parole Board in urgent cases: i.e. where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable.[7]

6. Parliament should not agree to give Government Ministers these broader powers to deal with the sentences of individual offenders in individual cases. This would be constitutionally inappropriate – such matters should be dealt with by independent bodies rather than an elected official. If there is a lack of faith in the ability of the Parole Board to deal with these matters effectively either the role of the Board should be strengthened or another independent mechanism considered. To discard or usurp the expertise and independence of the Parole Board for reasons of political expediency would be a serious mistake.

7. We also urge parliamentarians to consider the practical implications of Clause 12. This Clause relates to the minimum period to be served in custody by an offender

[5] See the Home Office White Paper 'Making Sentencing Clearer'. http://noms.justice.gov.uk/news-publications-events/publications/consultations/Making_sentencing_clearer_consul?view=Binary

[6] We welcome Clause 15, designed to address the declaration of incompatibility made in *R (Hindawi and Headley) v Secretary of State for the Home Department* [2006] UKHL 54. This would allow foreign national prisoners, liable to removal from the United Kingdom and sentenced under the provisions of the Criminal Justice Act 1991 to sentences of 4 years and over, to be eligible to have their cases considered by the Parole Board for early release, so reducing overcrowding in prisons and allowing those persons to return to their own countries.

[7] Section 32(2) of the Crime (Sentences) Act 1997

who is given a discretionary life sentence or an indeterminate sentence for public protection. The minimum punishment element of the sentence or "tariff" is set by the judge by reference to the period the offender would have served in detention had they been given a determinate sentence for the same offence (the Notional Determinate Sentence). At present the Notional Determinate Sentence takes account of the fact that only half of a determinate sentence is served in prison, the remainder being served in the community. Clause 12 proposes to change the law[8] so that, in some cases, the Notional Determinate Sentence would not have to take account of the duty to release determinate sentence prisoners at the half way point of their sentence. This change would apply to discretionary life sentences imposed where the circumstances of the offence are "exceptionally serious".[9]

8. This very technical sounding change could lead to very different levels of punishment where the offender receives an indeterminate rather than a determinate sentence. Creation of a separate system would also lead to much harsher sentences for those who meet the higher criteria of "exceptionally serious". Conversely those offences which do not quite meet the new criteria of "exceptionally serious" would still retain the automatic half reduction when calculating the Notional Determinate Sentence. They are still likely to be very serious offences[10] and the sudden disparity in sentence lengths between these cases and those meeting the new criteria would be difficult to explain. This is likely to give rise to allegations of unfairness and inconsistency from victims, relatives and the public in cases which do not meet the criteria.[11]

Appeals (Part 3)

9. The Government proposes to change the law so that the Court of Appeal (Criminal Division) cannot quash a criminal conviction where it is satisfied that the appellant committed the offence, unless not to do so would be contrary to the appellant's Convention rights.[12]

[8] Section 82 of the Powers of Criminal Courts Sentencing Act 2000

[9] It would also apply for some exceptional discretionary life sentences and indeterminate sentences for public protection where the offender would otherwise serve no extra time in custody

[10] Because they warrant a discretionary life sentence or indeterminate sentence for public protection in the first place

[11] This is particularly the case given that these offences presumably already attract the longest period of custody for punishment. As a consequence they are already likely to result in the longest period of extra custody for public protection.

[12] This proposal was announced in its consultation paper, "Quashing Convictions" (December 2006).

10. The Government has stated that this change is needed to prevent judicial outcomes which "are damaging to public confidence in the criminal justice system".[13] In reality no evidence has been provided to support the suggestion that the current legal position has, in fact, given rise to a loss of public faith. Indeed, the current state of the law on quashing convictions does not seem to have prevented a recently reported rise in public confidence in the criminal justice system.[14] One suspects that if there were a loss of faith in the criminal justice system, connected to the law on quashing convictions, the real cause of this would be the political spin surrounding this latest policy, rather than pre-existing public perceptions. The current power for the courts to quash decisions where there has been a very serious abuse of process during or prior to trial is, in the long term, vital to maintaining confidence in the integrity of the criminal justice system.

11. On reading previous Government statements on this issue, one could easily get the impression that this is an issue which affects many cases each year; that hundreds of people are escaping justice on the basis of minor technicalities. In reality this is far from true. While Part 3 of the Bill no doubt raises important constitutional issues (discussed below), it would not affect more than a handful of cases.[15] The majority of convictions that are quashed on appeal do not involve cases in which the Court of Appeal is satisfied as to the appellant's guilt. This law change, while risking serious damage to the integrity of the criminal justice system and important constitutional principles would, in reality, be merely tinkering at the edges in terms of the Government's aims of rebalancing the criminal justice system "in favour of the victim and the law-abiding majority".

12. Even in the small number of cases which are in question here, the Court of Appeal will frequently order a retrial.[16] The Court already does this where the interests of justice require.[17] Where a retrial is ordered, the Government's primary arguments in favour of prohibiting the Court quashing the conviction in the first place fall away. If found guilty at the retrial, the person concerned would not evade punishment and justice would not be denied to the victim and the public. The Government's current proposals would prevent a conviction being quashed where

[13] Foreword

[14] DCA publication, *Delivering Simple, Speedy, Summary* Justice, July 2006, para 1.11.

[15] The Partial Regulatory Impact Assessment to the "Quashing Convictions" consultation paper itself stated that the potential number of individual convictions affected "will be very small, probably fewer than 20 each year" (para 44).

[16] The "Quashing Convictions" consultation paper stated that this happens in a third of cases.

[17] Section 7 of the Criminal Appeal Act 1968.

there has been serious abuse of process even where, once quashed, the Court of Appeal would currently order a retrial. We accept that, in some cases, a retrial might not be possible or could be stressful or burdensome for witnesses. We do not, however, consider that these factors outweigh the public interest in quashing a conviction and ordering a retrial where this is necessary to maintain the integrity of the criminal justice system and to punish serious abuse of process or illegality on the part of the prosecution or police.

13. The Government has previously suggested that convictions are being quashed, where the court is satisfied as to the defendant's guilt, on the basis of minor procedural errors. In reality, those cases in which this power to quash convictions is used involve very serious failings either before or at trial, or serious illegality on the part of the prosecution or police. Furthermore, we understand that the trend of the Court of Appeal has in fact been to move away from allowing appeals based on irregularities of the trial process in cases where there has been extremely strong evidence of guilt.[18] As the facts of *Mullen* (below) demonstrate, the kinds of cases in which this power is used are a far cry from minor technicalities:

***R v. Mullen*:[19]**

Mullen was tried in 1990 and convicted of conspiracy to cause explosions. In order to face trial in the UK he had to be returned from Zimbabwe, where he had moved with his family. The UK authorities chose not to seek his lawful extradition from Zimbabwe to the UK as this would give Mullen the chance to seek legal advice and to challenge his deportation in the Zimbabwean courts or to seek to be transferred to Ireland instead of the UK. Rather than running the risk and delays that would be associated with a legal challenge, the S.I.S encouraged the Zimbabwean authorities unlawfully to render Mullen to the UK, with no legal process. The UK colluded in the deportation being effected in such a way as to deny him access to a lawyer and had, thereby, acted in breach of both Zimbabwean and public international law. As the Court stated, the State's actions were "so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed." Had the trial judge been aware of the circumstances of the appellant's return to the UK he would have stayed the proceedings as an abuse of process. This was not possible as the truth of the means by which Mullen was transferred to the UK was not disclosed to the defence until after conviction.

[18] Response by the CCRC to the Government's previous consultation on this issue.
[19] [2000] Q.B. 520

14. Leaving aside the rhetoric, the Government's policy position boils down to the following argument:

> "to quash a conviction where there is strong evidence of guilt, without ordering a retrial, will bring the criminal justice system into disrepute, rather than protect its integrity. According to that argument it is wrong to punish the public and deny justice to the victim in this way; if the system or those who operate it are at fault it is they and not the public which should be punished or required to learn lessons."[20]

It is for this reason that the Government believes that the Court of Appeal should not have the power to quash convictions where it is satisfied that the appellant committed the offence. The issue at stake is not, however, as black and white as the Government would like to suggest.

15. There are compelling reasons of principle why, in some exceptional cases, it would be appropriate for the Court of Appeal to quash a conviction even when there is clear evidence of guilt. A statutory prohibition on quashing convictions in such cases would only be acceptable if justice were no more than a question of determining the guilt of the appellant. We do not agree with this over-simplistic assertion. In a case such as *Mullen*, for example, we believe that justice required the conviction to be quashed, even though the Court did not doubt Mullen's guilt.

16. Liberty does not, however, take the opposite extreme position that the guilt of the appellant is irrelevant to justice and that justice is purely a question of procedural propriety and ensuring that those in power comply with the law. As the Court of Appeal has stated in *Randall* "[i]t would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice."[21] For this reason we would not support a statutory formulation which meant that any procedural error or illegality by the State led to the conviction being quashed.

17. Rather than legislation which takes an absolutist position on either side, we believe this to be an area where the only sensible way to proceed is to trust the Court of Appeal to make sensible decisions on a case by case basis. Such decisions will no

[20] Para 26, "Quashing Convictions" consultation paper.
[21] *R v. Randall*, [2002] 1 W.L.R. 2237

doubt be difficult, often requiring the Court to balance conflicting and important interests: protection of the rule of law, justice for the appellant and also, importantly, justice for victims and society as a whole. No doubt there will be cases where the Government and/or Liberty would have reached a different decision to the Court of Appeal. It is, however, only the courts that have the independence and impartiality, and which are in the position to perform, the necessary balancing act on a case by case basis.

18. In those rare cases where the Court of Appeal has quashed a conviction, notwithstanding clear evidence of guilt, it has cited a range of compelling reasons why it could not allow the conviction to stand. A consideration of the reasons cited in individual cases demonstrates the responsible and thoughtful manner in which the Court has approached the difficult balance required. The factors cited explain why, even where there is clear evidence of guilt, it will sometimes be appropriate to quash a conviction. It is clear that in *Mullen*, for instance, many factors stacked up against the public interest in rejecting the appeal and in favour of not allowing the conviction to stand (maintaining the rule of law, discouraging seriously unlawful activity by agents of the state and encouraging full disclosure by the prosecution). The Court explained that the abuse which enabled the trial to take place meant that it was "offensive to justice and propriety to try the defendant at all".[22] Accordingly, and in our view rightly, the Court considered that "in the highly unusual circumstances of that case, the conviction was unsafe as it was unlawful, resulting as it did from a trial which should never have taken place.[23]

19. In reality, the proposals in Part 3 of the Bill misunderstand and downplay the wider constitutional role of the Court of Appeal in appeals against criminal convictions. The proposals would restrict the Court's power to ensure the integrity of the criminal process and, in some cases, to ensure that the defendant has received a fair trial (in the wider, abuse of process sense). We also fear that it would undermine the moral standing of the Court of Appeal if it allowed a conviction to stand which resulted from serious illegality or a serious breach of procedural safeguards by another limb of the State. Rose LJ explained that the decision to quash the conviction in *Mullen* "arises from the court's need to exercise control over executive involvement

[22] Ibid, 537
[23] Ibid, 540

in the whole prosecution process".[24] The courts play an important constitutional role in checking abuses of power and illegality by the Executive.

20. Dicey identified equality before the law as a key element of the rule of law and described this as meaning that: "With us, every official, from the Prime Minister down to a Constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen".[25] Those who enforce the law should also obey the law and should not benefit from breaches of it. It would be contradictory for the state to take advantage of a breach of the law which it itself has committed. The proposed change would disturb the existing separation of powers by restricting the power for the Court to check serious illegality and abuse of process by the Executive in cases such as *Mullen*. While it is clear why the Executive would prefer the courts not to have this power, Liberty hope that Parliament would resist any attempts to remove this important constitutional check on the Executive.

21. The Government's response to such arguments is that the Court should not punish victims of crime and the public in general by quashing the conviction of a person who the Court itself believes to be guilty. We consider that it is wrong to blame the Court of Appeal, and the current state of the law, when a guilty person goes free in a case such as *Mullen*. The blame for this outcome would, more fairly, be ascribed to the state body responsible for the serious illegality or procedural impropriety that resulted in the Court quashing the conviction. Using legal deportation means to bring Mullen before the courts may have caused delays for the S.I.S. It would, however, have shown respect for the rule of law and public international law. Furthermore, there is no reason to suspect that, had the police and S.I.S complied with the law, Mullen would not have been justly convicted of the offences he committed. The reason the State colluded in the unlawful rendition of Mullen was to prosecute him for the offence. If the resulting conviction were allowed to stand this would implicitly vindicate the methods used to bring Mullen before the courts.

22. In many of the cases that are targeted by these proposals the issue in question was whether the prosecution was an abuse of process. In *Mullen,* for example, the trial judge would have stayed the proceedings as an abuse of process had he been aware of the circumstances of Mullen's unlawful rendition. As Rose LJ explained in the Court of Appeal, this was clearly a case where a stay of proceedings would have

[24] Ibid, 537

[25] Dicey, *Law of the Constitution*, 10th edition 1959, 189

been called for because the state's actions were "so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed."[26] If, as the majority of the Royal Commission considered, it is illogical for the Court of Appeal to exercise powers in respect of deficiencies in a prosecution that are not available to the trial judge, it is equally illogical to deny the Court powers to address an abuse of process that are available to the judge at first instance. We are concerned that, once the Court of Appeal's power to quash a conviction outright where there has been serious malpractice on the part of state authorities is removed, the next step would be to take that power away from the courts of first instance. The power to stay proceedings as an abuse of process is an important constitutional safeguard which should not be restricted or removed.

23. Nor, it should be noted, is it satisfactory to argue that the introduction of the new subsection (1B) would assuage these concerns, for although an unfair trial (contrary to Article 6 of the ECHR) will generally result in an unsafe conviction, an unsafe conviction may not necessarily be unfair, using the ECHR meaning of that term. For instance, the circumstances in *R v Mullen*, while certainly an abuse of process (a domestic law concept), may not have been in breach of Article 6 of the ECHR as they did not concern the trial, but rather how Mullen was brought to trial.

24. Another issue is that, in our legal system the determination of guilt or innocence is not a question for judges sitting in the Court of Appeal (Criminal Division) but for the first instance court and the jury.[27] This is still the case, notwithstanding attempts to remove juries from some categories of case, most recently serious fraud trials. If the power of the Court of Appeal to quash convictions is expressly restricted by reference to the Court's determination of guilt or innocence, the Court would be required to make such determinations in many more cases than at present. This is indeed what is proposed, the Explanatory Notes to the Bill stating that "It would be for the Court to form their own view as to guilt on the evidence available to them".[28] This would represent a fundamental change of the Court of Appeal's role and the usurpation of the role of the jury in determining guilt. It could also have an unfortunate practical result. If the Court of Appeal more frequently determined that a finding of guilt at first instance was incorrect, public faith in first instance trials and the

[26] Lord Steyn in *R v Latif* [1996] 1 W.L.R. 104
[27] Cf *R v Hickey* 1997
[28] Paragraph 228

ability of the jury to decide guilt would inevitably be undermined. The result would be more appeals against convictions and lower public confidence in the CJS.

Other Criminal Justice Provisions (Part 5)

25. Liberty has profound concerns about the system of reprimand and final warning system for people aged 16 and 17 introduced in the Crime and Disorder Act 1998. This two-step system leads automatically to court if the young person offends again within two years.[29] This system is inflexible and unjust. It ties the hands of police officers, preventing them from making reasoned judgments on a case-by-case basis about how best to deal with young people with whom they come into contact. It acts as a funnel, channelling young people into the criminal justice system and removing the option of informal intervention as a way of tackling low-level offending. The result is growing numbers of young people embroiled in a criminal justice system which, once entered, it is notoriously difficult to escape.

26. In Clause 53 Government proposes to gives the police and prosecutors an alternative to reprimand and final warning. The Clause extends the adult conditional caution scheme under Part 3 of the Criminal Justice Act 2003 (the CJA) to young people aged 16 and 17. As we have noted above, we consider greater flexibility to be needed. We are not, however, convinced that this will be delivered by these proposals. We fear that, in practice, youth conditional cautions could operate as a short cut to punishment for 16 and 17 year olds.

27. Cautions are supposed to be an alternative to entering the criminal justice process, a non-punitive means of encouraging a person not to re-offend. We consider such a second chance to be particularly important in the context of young offenders. There is, however, a real danger that conditional cautions will be used as a short-cut to punishment, intended for use in large numbers of cases. While we greatly welcome Clause 54 which would allow warnings, reprimands, and simple and conditional cautions to become spent,[30] this is not enough to allay our concerns about greater use of conditional cautions.

[29] Section 65(8) of the Crime and Disorder Act 1998 prohibited the giving of any caution to a child other than a reprimand or warning.

[30] The previous position, allowing serious convictions (for instance those following prosecution and a jail term) to become spent, whilst not allowing cautions to become spent, was illogical.

28. When conditional cautions were initially introduced in the Criminal Justice Act 2003 they were only able to impose conditions described as relating to rehabilitation and reparation. Notwithstanding this limitation, Liberty would point out that conditions described as restorative can in reality operate as a punishment. The Police and Justice Act 2006 changed the 2003 Act so that conditions can be imposed on cautions which are expressly designed to be punitive. This is also suggested for youth conditional cautions under Schedule 11 of this Bill. When punitive conditional cautions were proposed in the context of adult offenders in the 2006 Act, the Magistrates' Association argued, that it was:

> "contrary to the principles of justice for prosecutors and police to be able to impose punishment without the involvement of the judiciary. A democratic legal system ensures that an independent tribunal—the judiciary—should sentence and impose punishment, thus preventing bias from prosecutorial authorities". [31]

Liberty agreed.

29. Using cautions as a fast-track to punishment is an even greater concern when used for young offenders. Many young offenders could benefit significantly from constructive measures and engagement designed to make them understand the consequences of their behaviour in the hope that they will change their ways and become responsible adults. A simple fine or compulsory work will not achieve this. The UN Guidelines on the Prevention of Child Delinquency recognise the need for special measures designed to "avoid criminalizing and penalizing a child" which take notice of the fact that "in the predominant opinion of experts, labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons."[32]

30. While, in theory, a person does have a choice about whether to accept a caution we would suggest that the reality, particularly for youths, is rather different. The "offender" may not have a free choice about whether to accept the caution. The freedom to refuse a caution is likely to be limited by the youth's fear of prosecution, limited understanding of the options available and limited access to legal advice. The Bill fails to address the practical reality that those suspected of crimes may have

[31] Cited by Nick Herbert MP in Committee, Standing Committee D, 23 March 2006 (morning), col 161.

[32] United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990.

limited effective choice about whether or not to accept a caution. Because the process is not truly voluntary, the proposals in the Bill could be seen as allowing the police and CPS to act as investigators, prosecutors and judges.[33] Moreover, since the conditions that may be imposed include a financial penalty, there is also a serious concern that the proposals could lead to two tiers of punishment. A youth would be unable to accept the caution if s/he cannot afford to pay the fine attached to it or who does not have parents who could give or lend them the money. S/he would, therefore, be forced to go to court and, if found guilty, end up with a criminal conviction.

31. Clause 62 is also of concern. In the words of the Ministry of Justice press release, which accompanied the introduction of the Bill, it is designed to "[bring] compensation for the wrongly convicted into line with that for victims of crime." Of course Liberty agrees that victims of crime should receive compensation for their loss and suffering. The perpetrator of the crime should rightly bear the primary responsibility to provide compensation given that their wrong-doing is to blame. It is for this reason that a victim of crime can take a civil action against the criminal. It is also entirely right that the state should provide compensation to victims under the Criminal Injuries Compensation Scheme (the CICS). Although the state is not directly responsible for the victim's suffering, this compensation acknowledges the fact that perpetrators of crime often have limited financial means as well as the fact that the state owes a moral obligation to provide the basic help its citizens need in difficult times.[34]

32. We do not, however, accept that there is any rational connection between the levels of compensation paid out under the CICS and the amount of compensation received by victims of miscarriages of justice. The way this is expressed in the press notice suggests that this is part of the "rebalancing the criminal justice system" agenda - as though either victims of miscarriages of justice were, in fact, perpetrators of crime getting a better deal than their victims; or as though victims of crime would get more from CICS if victims of miscarriages of justice got less. Of course, neither assertion has any basis in reality.

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[33] Sections 22 and 23 of the CJA allow an "authorised person" (including a constable) to give a conditional caution provided that a "relevant prosecutor" (i.e. the CPS in most cases) considers that that there is sufficient evidence to charge the offender with the offence and that a conditional caution should be given to the offender in respect of the offence. The CPS Code of Practice states that "it is for the prosecutor to decide that a Conditional Caution is the right disposal and what condition(s) would be suitable".

[34] Liberty has recently argued that the CICS should be extended to cover British victims of terrorism overseas. See our Briefing on the Victims of Overseas Terrorism Bill, introduced in the House of Lords by Lord Brennan QC.

33. The position of the state, and its proper responsibility to pay compensation, is entirely different in relation to a victim of a miscarriage of justice than it is in relation to a victim of crime. The State has, at best, limited control over the criminal actions of individuals on the street. For this reason it is right that the criminal should themselves bear the main burden for, as far as possible, restoring the victim to the position they were in before the wrong-doing. By contrast, in the case of a miscarriage of justice the wrongdoing is committed by the state – no one else can be held to account for this.[35] Where the state makes a mistake and wrongly convicts someone of a crime, there is no justification for the state escaping its responsibility for compensating the victim of the mistake so that as far as possible the victim is put in the same position as if the mistake had never happened. As cases like those of Angela Cannings and Sally Clarke demonstrate so clearly, full financial compensation is not in itself enough to enable people to rebuild their lives after being wrongfully convicted. It is, however, the very least that could reasonably be expected of the state when it makes a mistake which has such terrible consequences.

34. Because of this we think that comparison to the CICS is misplaced. A more appropriate comparison might be the civil court process for damages claims. We accept that it is appropriate for there to be a limitation period so that people cannot make claims man years after conviction is reversed. However, it would be appropriate for this to mirror the six year period permitted for brining civil action. Similarly, as the cases of Angela Cannings, Sally Clarke and others demonstrate, a miscarriage of justice can have severe implications and can ruin lives. For this reason we do not believe it appropriate to impose an upper limit as introduced by the amendment to s.133A of the Criminal Justice Act 1988 contained in Clause 62 (7). Compensation should be able to reflect the entirety of damage caused.

New Criminal Offences (Part 6)

35. Clauses 64 to 67 of the Bill create a new offence of possession of extreme pornographic images. An image will be 'pornographic' (Clause 64) if it appears to have been produced solely or principally for sexual arousal. It is 'extreme' if it falls into one of specified categories: 1) threatening or appearing to threaten life; 2) resulting or appearing to result in serious injury; 3) involving or appearing to involve

[35] We do not oppose in principle the idea of a reduction of the compensation payable where the loss is attributable to the conduct of the victim of the miscarriage of justice.

sexual interference with a human corpse; or 4) performing or appearing to perform sex with an animal. In all cases the act must be real or appear to be real. It is a defence (Clause 66) for a person to establish that they have a legitimate reason for possession, that they hadn't seen the image or if it was unsolicited. The offence does not apply to images from films that have been given a classification certificate unless the image has been extracted for sexual purposes. No prosecution can take place without the consent of the Director of Public Prosecutions.

36. The regulation of pornographic images is an extremely emotive issue for many people. Views range from those who believe possession of pornography involving non consensual coercion should not be an offence to those who consider that all pornography should be forbidden. Liberty subscribes to neither of these extreme viewpoints.

37. We agree that legitimate and proportionate legal restrictions on pornography, including criminal offences of possession, can be justified in a democratic society. The criminal law can play an important role in protecting the vulnerable from harm and possession of certain forms of pornography should be a criminal offence. In particular any pornography in which the participants have not consented is a legitimate subject of the criminal law. It follows that the possession of child pornography, for example, is rightly criminalised as children are unable to give consent to sexual activity. However, as we discuss below, we fear that the proposed overbroad offence would criminalise those who do no harm to others and detract attention from those who cause genuine hurt. It would, for example, be tragic if the creation of this offence reduced the police resources available to tackle child pornography or other circumstances where participants are clearly forced to act against their will.

38. There are, of course, people who argue that all pornography is coercive and all those who participate exploited. Such debates have their place but are not appropriate to a consideration of the appropriate boundaries of the criminal law. The fact that many people find pornography morally offensive, damaging or worthless is not a good reason in itself to outlaw possession. Extreme caution should be exercised when new criminal laws are imposed with the intention of imposing a subjective opinion of what is morally acceptable. Liberty believes that the state should be required to provide justifications for legal restrictions on pornography and to demonstrate that a proposed measure does not go further than is necessary. In

particular, we consider it vital to ensure that legitimate and undamaging behaviour is not unintentionally criminalised by carelessly drafted, over-broad criminal offences. We are concerned about the breadth of the proposed new offence might criminalise people who cause no harm to others and who possess pornographic material involving consensual participants.

39. Before commenting on the offence it is worth noting the criminal law currently in operation regarding the possession of pornography. Possession of child pornography is an offence under the Protection of Children Act 1978 which has been extended to cover generated or 'pseudo-images' under Section 84 of the Criminal Justice and Public Order Act 1994 and further extended to cover images of young people up to 18 years of age by virtue of Section 45 Sex Offences Act 2003 (SOA). Possession of extreme pornography has not, however, previously been a criminal offence, unless it satisfies the definition in the Obscene Publication Act1959 (OPA) and is accompanied by an intention to distribute for gain. The definition of an obscene publication in S1(1) of the OPA is one which will "tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."

40. We consider the first question for parliamentarians to be whether a case has made to create a criminal offence of possessing extreme pornography (as defined) with no intention to distribute for gain. The case for the new offence would be greatly strengthened if a connection had been established between the possession of the forms of pornography listed in Clause 64 and other forms of criminal activity. However, the original consultation accepted that there was no evidence that this was the case saying;

> 'Given the many different approaches to conducting the research and framing the questions, as well as differences in the nature of the material examined, we are unable, at present, to draw any definite conclusions based on research as to the likely long term impact of this kind of material on individuals generally, or on those who may already be predisposed to violent or aberrant sexual behaviour.'[36]

This is a surprising admission for any Government seeking to extend the criminal law. It is usual for White Papers to justify policy drivers with evidential backing. This

[36] Consultation on the possession of extreme pornographic material at Paragraph 31 http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/30_08_05_porn_doc.pdf

evidence might be disputed or challenged but normally Government departments will go to great lengths to provide a statistical basis for what is being proposed. It is unusual to see an acceptance that there is no basis to suggest that a proposal might help prevent harm. We would ask parliamentarians to bear this in mind when considering the offence.

41. Given the absence of evidence that possessing this kind of pornography can itself make a person more likely to engage in criminal activity, the real justification must be protection of those involved in the pornography. Only possession of material where they have not acted of free will, have not consented or have otherwise been coerced should, therefore, be included. Media coverage of this subject has indeed tended to imply that the offence targets exploitative pornography causing harm to those involved against their will. The reality, however, is that at present the offence goes much further. If parliamentarians feel that a new offence should be created to protect participants, we would emphasise the need for limitation.

42. As stated earlier an 'extreme pornographic image' is one which has been produced principally for the purpose of sexual arousal and which covers certain acts (threat to life, serious injury and so on). We absolutely agree that possession of pornography involving anyone whose life is genuinely threatened, who suffers serious injury against their will or who unwillingly performs sex acts with corpses or animals should be criminalised. The difficult arises from determining whether involvement is willing or unwilling. The bill attempts to address this by also requiring that 'any such act, person or animal depicted is real or appears to be real'. However, this still creates problems.

43. In relation to images being 'real' it is understandable that this should be criminalised when, for example, life is threatened. However some pornography involves willing participants suffering 'real' injury through BDSM acts.[37] While there is a requirement that the injury be 'serious', this is not defined. If 'serious' is equated with the level of injury covered by the offence of Grievous Bodily Harm (Section 20 of the offences Against the Person Act 1861) it would cover non permanent cuts and other relatively minor injuries. The fact that the offence would also cover images that 'appear to be real' makes it even more problematic. It is presumably the role of a consenting performer in pornography to 'appear real'. Therefore, the offence would

[37] BDSM is 'Bondage, domination and sadomasochism'

appear to catch footage which is no more 'real' than the depiction of a violent sexual assault or murder in a classified film.

44. The Bill attempts to address this problem by exempting any film that has been given a classification (Clause 65). It does, however, exempt from this exclusion any part of a classified film that has been extracted for sexual purposes (Clause 65(3)). This exemption encapsulates the problem caused by the general broad definition of the offence. Possession of material that has been considered suitable for classification can become a criminal offence solely on the basis that it results in the sexual arousal of the person in possession. The torture scene in the recent James Bond film 'Casino Royale' might be an example of footage covered by this provision. This was a film otherwise certified as suitable to be seen by 12 year old children if accompanied by an adult. In the absence of any evidence to suggest that possession of such material might cause wider public harm this is a worrying development in the criminal law.

45. The defences available are limited in that they only protect those who had a legitimate reason to have the material[38] or who were not aware they possessed it. The requirement of consent of the Director of Public Prosecutions before any prosecution can occur does provide a bulwark against inappropriate prosecution and we are pleased to see this provision included (Clause 64 (9)). However, the broad definition means that many people will be committing the offences regardless of whether they are actually prosecuted. Liberty maintains that legislation should provide sufficient clarity so that people are aware of the parameters of criminal activity. Liberty considers that an additional defence should also be available where a person believes that those involved in the material they possess consented to their participation. While this might be difficult to prove in the case of mass produced pornographic images, it could provide a useful defence in the case of images made by consenting couples, or groups, for their own use. If this defence were to mirror the approach to consent in the SOA[39] it would also require that such a belief were 'reasonable'. The introduction of a need for reasonable belief in consent in the SOA arose from problems arising under the previous law which resulted in defendants being acquitted if they successfully argued that they genuinely believed that a person consented to a sexual assault even if that belief was itself unreasonable. It is

[38] This is not defined but we imagine covers those who involved with law enforcement or who are using the material for research purposes.

[39] S.1 Sexual Offences Act 2003 and elsewhere in the Act

arguable that such an approach would be difficult to adopt as there would be no evidential basis (such as interaction between the person in possession of the material and those involved in it) for a jury to determine whether or not the belief in consent was reasonably held. However, we accept the rationale that an unreasonably held belief in consent should not allow acquittal when material clearly involves coercion.

46. It might be suggested that a defence of consent would be problematic as a consequence of the issue of consent to participation in a criminal act - many of the acts covered will result in offences being committed by the those who take part[40]. We do not however see this as a significant issue. People do consent to sexual acts they know are criminal. Indeed the argument of Laskey, Jaggard and Brown (see footnote 40) in the European Court of Human Rights was that assault occurring during consensual BDSM practices should not be criminalised. It is also worth noting that the definition of extreme pornography also goes much further than criminal activity. There is not, for example, any offence of pretending to cause serious harm to a person who consents to the pretence. The material might also be produced in different jurisdictions where the acts performed are not criminal.

Violent Offender Orders (Part 8)

47. The proposed Violent Offender Order or "VOO" continues the trend of creating civil orders, breach of which is a criminal offence. Liberty fears that VOOs would be overbroad; that they could be in breach of Article 6 (Fair Trial) and Article 7 (Retrospective Punishment) of the European Convention on Human Rights (and so in breach of the Human Rights Act); and that they raise significant issues over the way in which evidence is assessed.

48. VOOs are "intended to fill a gap, providing a tool for the management of risk posed by those violent offenders who have not been awarded a public protection sentence". The Bill envisages (Clause 83(1)(a)) a wide range of restrictions and obligations that might be imposed by an order. These could include address notification, residence restrictions, bars on contact with specified persons or entry to particular locations. They might also impose positive obligations such as compulsory

[40] Sexual acts with a corpse and with an animal being offences under S. 69 and S.70 Sex Offences Act 2003. Consent to sado-masochism is not a defence to assault *Laskey, Jaggard and Brown v U.K 24 E.H.R.R. 39*

mental heath or drug treatment or a requirement to inform the police of any developing personal relationships. To "qualify" for an order:

- the person would have to have received a custodial sentence exceeding 12 months (Clause 84(2));
- their period of licence must have expired and they could not be subject to any other equivalent measures (Clause 86(4)); and
- the person must have been assessed as presenting a high risk of serious harm to the public after release (Clause 86(2)).

49. The VOO is described as a preventative civil measure designed to protect the public from the risk of serious violent harm caused by a qualifying offender. Breach of a VOO would be a criminal offence. This theme of civil/criminal law crossover was initially introduced with the Anti Social Behaviour Order (ASBO) as part of the Crime and Disorder Act 1998. It has continued in various manifestations including the criminalisation of non-molestation orders[41], the use of control orders[42] and the new Serious Crime Prevention Orders (SCPOs) contained in the Serious Crime Bill currently before Parliament. Liberty has general concerns about breach of civil orders being a criminal offence. In limited circumstances we do, however, accept that there may be legitimate uses of these types of order, depending on their rationale and exercise. For example, while our concerns over the use, scope and effectiveness of ASBOs are well documented, we accept that, if properly targeted, they could serve a useful alternative to the traditional civil law method of an injunction. It may not always be possible or practical for those who have been affected by anti social behaviour to use civil law remedies to protect themselves. In such cases the state might legitimately be expected to offer protection by effectively helping the victim of low-level criminality or anti-social behaviour to obtain the targeted protection of a civil order.

50. We do not, however, accept the same rationale to be true of control orders or Gangster ASBOs. The rationale behind these orders is to place what amount to potentially severe restrictions on individuals by reference to their suspected involvement in serious criminal behaviour. In reality, the public perception and political rhetoric surrounding these orders is that they are designed to tackle and to punish crime: Vernon Coaker MP described Gangster ASBOs as a way to "get at

[41] Section 1 Domestic Violence, Crime and Victims Act 2004.
[42] Prevention of Terrorism Act 2005.

those people who currently feel ... almost that they are beyond the law"[43] – language more akin to punishment for something that someone has done wrong than for a non-punitive measure which is designed to prevent future illegal activity. The Home Office website describes SCPOs more directly as aimed at "Making criminals' lives miserable".[44] We believe that these orders seek to punish individuals while sidestepping the criminal due process protections that apply under Article 6 of the European Convention on Human Rights. This punitive impact forms part of the challenge to the control order regime currently before the domestic courts.[45] In a recent report the Joint Committee on Human Rights expressed its concern about these kinds of civil orders, saying:

> In our recent work on counter-terrorism policy and human rights we have drawn attention to the unsustainability in the long term of resort to methods of control which are outside of the criminal process and which avoid the application of criminal standards of due process. We are concerned that the introduction of SCPOs represents a similar step in relation to serious crime generally. In our view, the human rights compatible way to combat serious crime in the long run is not to sidestep criminal due process, but rather to work to remove the various unnecessary obstacles to prosecution.[46]

51. We appreciate that VOOs can only be imposed following conviction (Clause 84 (4)[47]. However, Liberty has a number of concerns about the way VOOs will operate in practice. At the heart of these is the extraordinary scope available for the imposition of restrictions on individual freedom. It is worth noting that orders should be unnecessary for anyone who has been convicted of a serious offence of violence. This is because the CJA provides that anyone convicted of a specified offence, punishable by more than 10 years imprisonment, will be given an indefinite period of imprisonment for public protection. Once released from prison they will be on licence for a minimum of a further 10 years. After this they can apply to the Parole Board for termination of the licence. Presumably anyone who might be considered such a risk as to justify an application for a VOO would not have their licence terminated by the

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[43] http://uk.news.yahoo.com/17012007/325/civil-liberty-group-turns-pm-crime-push.html

[44] http://police.homeoffice.gov.uk/news-and-publications/news/new-serious-crime-powers

[45] The case of *Engel v Netherlands* (1976) E.H.R.R 647 established three criteria for determining whether proceedings are criminal which are a) the classification in domestic law b) the nature of the offence and c) the severity of the potential penalty. Of these the severity of penalty is more relevant in determining whether a civil law order should properly be considered criminal.

[46] Joint Committee on Human Rights, Twelfth Report of 2006-2007 at paragraph 1.15 http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/91/91.pdf

[47] Or they are not convicted for technical reasons such as a finding of insanity

Parole Board.[48] If still on licence they could, of course, be subject to conditions and be subject to recall. As an example, the offence of wounding with intent to do grievous bodily harm[49] carries a discretionary life sentence. Anyone convicted of this offence would be subject to licence for a very long period. If they continued to present a risk, this might be for the remainder of their life.

52. Liberty believes that the principal purpose for VOOs (at least initially) will be to cover situations where the new sentence regime under the CJA was introduced after the person's conviction but where that regime would otherwise have been appropriate. There are likely to be a number of offenders, perceived to pose a risk of violence, who are due to be released over the next few years who would fall into this category. The concerns expressed by the JCHR are of particular significance here. If the use and scope of orders is excessively broad it is likely they will amount to being in breach of Article 7 of the European Convention on Human Rights, which prevents punishment without law. Article 7 provides (amongst other things) that 'A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed'.[50] If VOOs are excessively restrictive (which is quite possible given the potential scope of orders outlined in the Bill) they will be retrospective punishment and therefore violate Article 7.

53. While the Government's previous consultation on VOOs suggested that 'in most cases' an order would be most appropriately made towards the end of a person's licence period, to take effect when it expires, it does not preclude the possibility of an order being made long after the licence period has ended. This raises the possibility that an order could be applied for by the police at any time, including years after the end of licence. Notwithstanding our reservations about VOOs generally, if they are to be introduced there should be a specific window towards the end of the licence period when an application to impose one can be made.

54. The range of restrictions envisaged by the Bill indicates that VOOs might raise similar concerns to ASBOs. Experience with these has shown that overuse and a lack of specificity have resulted in extremely broad ASBOs being issued. These often contain restrictions which set people up for failure because people are unable to

[48] As the Bill makes clear, a person could not be given a VOO if they are on licence (Clause 86 4 (b)

[49] Section 18 of the Offences Against the Person Act 1861.

[50] This is known as the bar on retrospective penalties. If a measure is imposed following conviction the court will assess its substance and severity in determining whether it amounts to a penalty. The criteria by which this is judged are analogous to those applied in order to determine whether or not a sanction is punitive under Article 6.

avoid breaching them. The danger with VOOs lies in a risk assessment taking place that identifies someone as being a 'risk of serious harm' (Clause 83 (2)) but without needing to identify a particular person or persons they are a risk to[51]. Because they are identified as a general risk, they are likely to be made subject to a broadly drafted order. When similar situations have arisen with ASBOs there has been a tendency to make them wide in scope. Experiences with ASBOs have shown that the broader the order, the greater the likelihood of breach.

55. Liberty agrees that there may be cases where identified individuals are reasonably considered to be at risk of serious harm from an individual where it would be entirely reasonable to provide additional legal protection. At present the most likely available order would be the non-molestation order, breach of which is a criminal offence punishable by five years imprisonment.[52] Such orders are, however, limited in scope in that they are reliant upon the person who wishes to be protected making an application to the court for the order. Rather than creating the VOO, Liberty would propose that reasonable extension of the existing non-molestation regime be considered. It may, for example, be possible for state agencies to apply for the order rather than the person at risk, enabling non-molestation orders to be used to provide protection for those specifically at risk and their families without the need for them to undergo the difficult, stressful and traumatic process of obtaining an order themselves. The use of non-molestation orders could also be extended to cover those in danger of violence who are not in a relationship with the person against whom the order is made. A key difference between this suggestion and the VOO is that the non-molestation order would be targeted specifically at named persons who are identified as being in danger of violence and so the conditions imposed would be limited to those necessary to protect those identified individuals.

Home Closure Powers (Part 9)

56. Part 9 of the Bill is the latest in a long-line of initiatives designed to deliver the Government's "respect" agenda. We welcome the recognition in the Bill that there needs to be greater review mechanisms for previous initiatives designed to tackle anti-social behaviour (Clause 108). The operational use and impact of ASBOs has

[51] Clause 83 (2) (b) allows for the making of an order to protect 'the public in the United Kingdom'

[52] Breach of non-molestation orders is an offence under Section 1 Domestic Violence, Crime and Victims Act 2004.

proved problematic with high breach rates, concerns over effectiveness and inappropriate use. The proposed annual review mechanism should help to provide the information and analysis required to assess how they have been used and to what effect. It is a great shame that the Government has not paused to learn from its past mistakes, before ploughing on with further similar measures.

57. The Bill proposes to extend the existing powers to close down properties used for the sale drugs, to cover properties where there is a problem with anti-social behaviour (Clause 103 and Schedule 17). In the Government's previous consultation on this issue, behaviour that could result in the closure of a property was stated to include frequent drunken parties; high numbers of people leaving and entering, intimidating residents and criminals running businesses from properties. It also proposed, as the current Bill appears to, that closure would apply just as much to owner occupiers and private tenants as to those in social housing.

58. Initially a Police Superintendent would need to have grounds for believing there to be a problem with anti-social behaviour. If so he could authorise a closure notice. Once issued, a person who does not own or live in the premises would be committing an offence if s/he remains on or enters the premises contrary to the notice, and pending an application for a full closure order (Paragraph 11(d)(1) to Schedule 17). Within 48 hours of the notice being issued, a court would be required to hear the application for the closure order. If granted, an order would allow closure of the property for 3 months (including prohibiting access to owners or residents) which could be extended to six months in exceptional circumstances. Return during closure would also be a criminal offence.

59. Existing closure powers have been described as 'working well and … welcomed by local communities for bringing immediate relief to their neighbourhoods'.[53] This may be true. When closure orders were originally proposed Liberty agreed that they were a proportionate and potentially effective way of addressing a significant problem. However, we are concerned to see that drug-related closures appear to be having unfortunate consequences. In November 2006 *The Guardian* newspaper ran a story saying that closures were resulting in displaced drug dealers taking over properties of the vulnerable, a practice called 'cuckooing':

[53] Page 14 of the Home Office's consultation, "Strengthening Powers to tackle anti-social behaviour".

'*They [drug dealers] are now targeting older people, vulnerable young people or people with mental health problems on housing estates, befriending them, giving them drugs and then taking over their homes.*[54]

We hope that the police and local authority community safety teams in areas where closures are taking place are aware of any problem with cuckooing and are ensuring that the vulnerable are protected.

60. Cuckooing demonstrates that closure does not necessarily end a problem but can merely displace it. The same will apply to closures on the basis of anti-social behaviour. Simply closing a property will not address the cause of anti-social behaviour. The Government's previous consultation stated that 'the closure should not be used in isolation but rather as a more strategic and holistic response aimed at tackling the underlying causes of anti-social behaviour.'[55] We recall that the need for post-closure planning was similarly emphasised when drug closures were proposed.

61. The Government's consultation emphasised that closure would only be considered as a last resort and would require multi-agency involvement. It also stated that the safety of the young and vulnerable would not be compromised, the implication being that a court would not have the power to make an order unless satisfied that proper arrangements were in place to protect their interests. This safeguard appears to be absent from the Bill. If such a drastic step as a closure order, allowing an entire family to be displaced from their home, is to be permitted a need for proper support arrangements also needs to be specified

62. Closure for anti-social behaviour will usually differ from drug related property closures. Drug closures are more likely to be properties used primarily for the sale of drugs without settled residents. Anti-social behaviour closures are more likely to affect properties used as a main family residence. According to the original consultation, closure notices are also envisaged for activities which, in themselves, are not unlawful - such as having people frequently entering and leaving property. We do not accept that removal and displacement of a family could be a proportionate response to any annoyance caused by late night visitors. As a consequence we would also like to see further safeguards included in the Bill. The grounds for refusing

[54] http://society.guardian.co.uk/drugsandalcohol/story/0,,1947501,00.html
[55] Page 15

a closure order should be extended so that no order can be made unless the court is satisfied that appropriate steps have already been taken to address the behaviour.

63. Inherent to the making of an order is the need for compliance with the Human Rights Act 1998. Any court making an order must be satisfied that in doing so none of the rights of those being removed is breached. The Right to Respect for Private and Family Life under Article 8 HRA is most likely to be engaged. Any attempt to interfere with this must be for a legitimate purpose,[56] in accordance with the law and proportionate. The removal of children and vulnerable adults will increase the prospect of a decision to issue an order being disproportionate. However, closure orders are a drastic step. As a result, further safeguards, above and beyond the HRA, are needed. Article 8, for example, will provide less protection to tenants without children even if their behaviour has not been particularly 'anti social' (such as the late night coming and going referred to as a possible justification for an order). Because of this there needs to be specific safeguards against excessive use and oppressive impact. There should also be a requirement that an order can only be made if the court is satisfied that the impact of the order is not disproportionate to the nuisance caused and that the making of an order will not be in breach of the HRA.

64. Sweeping powers already exist to address the anti-social behaviour of social tenants.[57] The substantive differences between existing repossession powers and the proposed closure orders contained in the Bill are that closure orders will take place much more quickly and will be only for a limited time. The Government's consultation stated that an order "is not an eviction tool nor a fast track to eviction. It is about providing immediate respite to communities suffering from the misery caused by anti-social neighbours'.[58] As a consequence it could be argued that an order is in fact a step that could be sought instead of full possession proceedings, so avoiding the need for formal repossession. A similar argument might be used in respect of private tenancies where an order might avoid the need for a landlord to seek formal eviction though the courts. We fear that the reality is likely to be that

[56] The legitimate purposes permissible under Article 8 being the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

[57] Section 13 of the Anti Social Behaviour Act 2003 ("**ASBA**"), for example, contains provisions allowing social landlords to apply for injunctions to prohibit anti-social behaviour. Sections 14 and 15 ASBA allow local authorities, Housing Actions Trusts and registered social landlords to apply to the county court to bring a tenure to an end and then have it replaced with a less secure tenancy by way of a 'demotion order'. Actual repossession of property takes place by way of action under the Housing Act 1996. Section 16 ASBA expanded the grounds for the making of a possession order on nuisance grounds to specifically include the impact that anti-social behaviour has had or might have on the local area. Part 6 of the Housing Act 2004 further extended the powers available in relation to social tenants. It also contained a range of powers restricting anti-social tenants' "right to buy".

[58] Page 17

closure powers would provide a more straightforward mechanism for allowing anti-social tenants and owner-occupiers to be removed from their homes. As with ASBOs and many of the others powers created to deal with anti-social behaviour, excessive use is likely to become counterproductive as local authorities attempt to deal with ever increasing numbers of displaced and possibly divided families living in temporary accommodation. This type of temporary and uncertain existence is unlikely to address anti-social behaviour. It is more likely to exacerbate the problems.

65. The Bill allows for application of these powers to owner-occupiers as well as tenants.[59] While this possibly has a rationale, in that owner-occupiers could be just as anti-social as tenants, this is a major policy decision for Government to take. Unless under arrest, the forced removal of people from a property they own is permitted by law only in exceptional circumstances, such as when necessary for their own protection or when civil contingency powers permit mandatory evacuation. This proposal would fly in the face of the long-standing protection of protection for a person's home and property under the Common Law. Removal of owner-occupiers is also likely to raise issues under the Right to Peaceful Enjoyment of Possessions under Article 1 of the First Protocol to the HRA. This is not an absolute right and can be limited in the public interest.[60] However, whether the public interest would extend to the use of closure orders is debatable and we urge Parliament to subject this proposed power to intense scrutiny.

Special Immigration Status (Part 11)

66. Liberty has a number of concerns about the proposed new special immigration status in Clauses 115 to 122 of the Bill. In outline, these provisions will enable the Home Secretary to designate a non-British citizen as subject to special immigration status if:

- the person has been convicted of an offence (in the UK or overseas) and has been sentenced to at least two years' imprisonment (Clause 116 (2));
- the person has been convicted of an offence specified by the Home Secretary, or an equivalent non-UK offence, even if not sentenced to two years' imprisonment (Clause 116(3)); or

[59] See for example Paragraphs 11A and 11B of Schedule 17 of the Bill, which talk generically of "premises".
[60] This public interest limitation be used to justify compulsory purchase for example

- Article 1F of the Refugee Convention applies, i.e. there are serious reasons to consider that the person has committed (i) a crime against peace, a war crime or a crime against humanity in the UK or overseas, (ii) a serious non-political crime outside of the UK or (iii) been guilty of acts contrary to the purposes and principles of the United Nations (Clause 116 (4)).

Designation can occur if the person cannot be deported because to do so would be unlawful under the Human Rights Act 1998 (Clause 115 2(b)). The effect of a designation is that a person is not given leave to enter or remain in the UK (Clause 117) and that conditions can be imposed on them (Clause 118).

67. Special immigration status is primarily being introduced to allow for restrictions to be imposed on foreigners (or their family members) who have been convicted of offences and who would otherwise face deportation but for the fact that, for example, if this occurred it is likely that they would face torture or death. As well as applying to those who have been imprisoned for over 2 years, this will apply to people who have received even a very short custodial sentence for a specified offence. These offences are those listed in an order made under Section 74(4)(a) of the Nationality Immigration and Asylum Act 2002. The Order made under this section is SI 2004 No. 1910[61] which lists a range of statutory and common law offences. The offences listed in the order include relatively minor crimes such as criminal damage, theft and threatening unlawful violence. There is, in fact, no need for a person to have been convicted of any offence to become subject to special immigration status. Clause 116(4) allows special immigration status to be applied to anyone to who Article 1F of the Refugee Convention. As mentioned above Article 1F applies to anyone who '*there are serious reasons for considering* has committed a crime…etc'. This means that special immigration status can be applied to people who have no conviction at all.

68. As special immigration status can be applied to anyone who is convicted of relatively minor offences, or even someone who has never been convicted it is important that any conditions imposed be appropriate and not excessive. This is particularly relevant as special immigration status can be imposed on family members including children[62]. We have significant concerns about the imposition of

[61] http://www.opsi.gov.uk/si/si2004/uksi_20041910_en.pdf

[62] For the purposes of the Bill family is given the meaning in Section 5(4) of the Immigration Act which covers spouse and children under 18.

conditions on the innocent and on children in any circumstances. The UN Convention on the Rights of the Child makes specific provision to ensure that children are not disadvantaged as a consequence of the actions of their parents. Article 2.2 of the Convention states that '*States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members'*.

69. When imposed without any mention of necessity, proportionality or purpose these concerns are compounded. Clause 118 simply states that the Secretary of State can impose conditions relating to residence, employment or reporting to the police or immigration officers. We see two significant problems with the breadth of these provisions and the lack of clarity about how the powers to impose conditions must be exercised.

70. Firstly, as indicated above, the lack of any restrictions on the types of conditions that could be imposed, their duration and the purpose that they must be designed to serve means there is immense potential for abuse. Indeed, special immigration status could arguably be used in addition to (or even in place of) the control order regime introduced by the Prevention of Terrorism Act 2005. There is nothing to suggest that people subject to special immigration status and their families could not be restricted to such an extent that the restrictions become punitive in themselves. This will raise issues not only over compliance with human rights obligations, but could also result in the sort of allegations of unfairness, discrimination and counter productivity commonly (and in Liberty's view rightly) applied to control orders. If special immigration status is to be used in a way that is not likely to result in excessive and unjustifiable restrictions on freedom and movement then much tighter controls on their use need to be written onto the face of the bill. These should ensure that any restriction is necessary and not excessive. This is of particular relevance to the imposition of restrictions on innocent family members.

71. The second problem that might arise from the use of special immigration status restrictions is their purpose. Special immigration status would primarily be imposed upon those who have been convicted of criminal offences. As a consequence restrictions are arguably intended to serve a preventative purpose, i.e. they are intended to stop a person who would otherwise be deported from being able to commit any further crimes. The problem with this is that it means the restrictions are

nothing to do with immigration but are related instead to crime prevention. As a consequence, the fact that they can only be imposed upon those who do not have residential status means they could be discriminatory. This was the problem experienced with the detention of foreign nationals under Part 4 of the Anti Terrorism Crime and Security Act 2001, found to be discriminatory by the House of Lords Appellate Committee in 2004. Unless these problems are addressed we anticipate significant problems with the compliance of the special immigration status with the UK's human rights obligations.

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