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PROTECTING CIVIL LIBERTIES
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Liberty's Report Stage Briefing on the Anti-social Behaviour, Crime and Policing Bill in the House of Commons

October 2013

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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.

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Introduction

The Anti-social Behaviour, Crime and Policing Bill was introduced to the House of Commons on 9 May 2013 and read for a second time on 10 June 2013. It completed its Committee stage in the Commons on 16 July 2013. This substantial Bill makes important changes to a variety of policy areas. The first six parts of the Bill are lifted almost unchanged from the Draft Anti-social Behaviour Bill, which was published for pre-legislative scrutiny in December 2012. Parts 1 to 4 of the Bill would significantly restructure and expand the current regime for dealing with anti-social behaviour (ASB), replacing the existing 18 remedies for ASB with six new broader remedies. Part 5 creates a new mandatory power for judges to order possession of the house of a resident in social housing, which they *must* exercise where a resident has engaged in certain behaviour, including breach of an ASB order. Part 6 of the Bill provides for the use of new "community remedies" to deal with ASB, and creates a trigger mechanism whereby, if a certain number of complaints are made about ASB in an area, there must be a review of the response to it.

The second half of the Bill makes a number of significant changes to miscellaneous aspects of the law on crime, policing and criminal justice. Part 7 extends the offence of failing to keep a dog under proper control so that it applies to private property as well as public spaces, but carves out an exception so there is no liability where the person attacked by the out-of-control dog is (or is merely believed to be) a trespasser. Part 9 of the Bill criminalises forced marriage, and criminalises breach of a forced marriage protection order. Part 10 makes changes to the powers of the Independent Police Complaints Commission and gives the new elected Police and Crime Commissioners power to arrange local policing services, such as victim and witness services. Schedule 6 (introduced by clause 124) makes a number of changes to the stop and search powers at borders and ports under Schedule 7 to the *Terrorism Act 2000*. Part 11 makes regressive changes to extradition law, including the removal of the automatic right of appeal against an extradition order. Part 12 introduces a much stricter test for individuals to obtain compensation for miscarriages of justice, and narrows the availability of protection for persons involved in criminal investigations and proceedings, such as witnesses. It also grants the Lord Chancellor a power to make provision for tribunal fees by order.

We were heartened to hear the Minister for Crime Prevention state in Committee that "*I do not think that we in Parliament should feel ashamed…about protecting the basic*

freedoms of our fellow citizens."[1] We therefore urge the Government, and individual Members, to consider the analysis below of the Bill's potential impact on civil liberties and human rights in the UK, including proposed amendments to:

- require anti-social behaviour by an individual to be proved beyond reasonable doubt before an injunction or order can be imposed (amendments **1** and **9**);
- tighten the definition of anti-social behaviour, including the addition of a mental element (amendments **2** and **3**);
- introduce a "necessary and proportionate" test for requirements imposed by an injunction (amendment **4**);
- remove the proposed power for IPNAs and CBOs to impose positive obligations (amendment **6**);
- introduce a maximum duration for injunctions imposed on adults (amendment **7**);
- prevent children being detained for breach of an injunction (amendment **8**);
- tighten the threshold for the authorisation of dispersal powers and add greater safeguards on their use (amendments **11** to **14**);
- remove provision for new Public Spaces Protection Orders (amendment **17**);
- remove entirely the proposed new mandatory eviction power in Part 5 (amendment **18**);
- remove the loophole which allows the owner of a dangerous out-of-control dog to escape any liability if the person attacked is a trespasser on private property, or if the owner merely *believes* they are a trespasser (amendment **20**);
- test the Government's case for creating a new criminal offence of forced marriage (amendment **21**);
- remove provision to give elected Police and Crime Commissioners power to arrange victim and witness services in their local areas (amendment **22**);
- retain the explicit inclusion of genocide, crimes against humanity and war crimes as extradition offences (amendment **23**);
- retain the automatic right of appeal in extradition cases, a key safeguard in our much-criticised extradition system (amendment **24**); and
- clarify the current test for eligibility for compensation for miscarriages of justice, and remove provision which would unfairly narrow eligibility for compensation (amendment **26**).

[1] Committee debate; 4th sitting; 20 June 2013, at column 119.

In addition to these amendments, Liberty is also proposing an amendment to this Bill, which would amend the Regulation of Investigatory Powers Act 2000 to require judicial pre-authorisation for the use by police of covert human intelligence sources.[2] This is addressed in a separate briefing.

Anti-social behaviour (Parts 1-5)

The anti-social behaviour provisions of the Anti-social Behaviour, Crime and Policing Bill are almost unchanged from the Draft Anti-social Behaviour Bill, which was published in December 2012 for pre-legislative scrutiny by the Home Affairs Select Committee, as well as proposals to extend eviction powers contained in a Department of Communities and Local Government consultation in 2011.[3] The draft Bill followed a Home Office consultation[4] and White Paper[5] on reforming the framework for dealing with anti-social behaviour.

Liberty had hoped, following the Home Secretary's announcement of a review in July 2010, that the Government would undertake a comprehensive evaluation of the ASBO and other civil orders; reviewing the practical experience to date, the underlying principles of the legislation and producing reasoned conclusions about what has and hasn't been effective. Sadly, while the Home Office consultation document presented some alarming statistics about the failures of the current regime; its assumptions, conclusions and stated objectives lacked any kind of genuine new thinking in this area. The greatest preoccupations of the document were the perceived bureaucracy of the current system; the complications inherent in the sheer number of civil orders now available to public bodies; the desire to create a less centralised system; and the belief that the current penalties for breach are not tough enough.

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[2] See http://www.liberty-human-rights.org.uk/news/2013/Lawrence-amendment-email-your-mp.php

[3] A New Mandatory Power of Possession for Anti-Social Behaviour, Department for Communities & Local Government, August 2011, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/8460/1959275.pdf.

[4] *More effective responses to Anti-Social Behaviour*, Home Office, February 2011 available at: http://www.homeoffice.gov.uk/publications/consultations/cons-2010-antisocial-behaviour/asb-consultation-document?view=Binary.

[5] *Putting Victims First – More Effective Responses to Anti-Social Behaviour*, White Paper, Home Office, May 2012, available at: http://www.official-documents.gov.uk/document/cm83/8367/8367.pdf.

As a result this Bill is based on flawed assumptions. The proposed remedy is a simplified system containing fewer specific orders which will be framed to cover even wider categories of behaviour and activity. The new framework will contain fewer "bureaucratic" safeguards that have previously protected against the most unfair, arbitrary and perverse aspects of the policy; will impose more onerous positive activity requirements on those affected and will attract tougher sanctions for breach.

These points were forcefully made by the Home Affairs Committee in its February 2013 report on the Draft Anti-social Behaviour (ASB) Bill:

"Each time successive Governments have amended the ASB regime, the definition of anti-social behaviour has grown wider, the standard of proof has fallen lower and the punishment for breach has toughened. This arms race must end. We are not convinced that widening the net to open up more kinds of behaviour to formal intervention will actually help to deal with the problem at hand."[6]

Liberty's concerns over the use of ASBOs and other similar orders are well-documented. We believe that many of them dangerously blur the distinction between serious criminal activity and nuisance; create personalised penal codes that set the young, vulnerable or mentally ill up to fail; are open to inappropriate use; and in practice – contrary to their original policy intention - have the effect of fast-tracking individuals into the criminal justice system rather than diverting them away. Indeed, the experience of the past 13 years and the statistics presented in the consultation document and gathered since support our concerns, which we elaborate on further below. While reform of the current regime is badly needed, Liberty urges the Government not to press ahead with the ill-thought through reforms outlined in the Bill. The proposed system contains most of the faults and weaknesses of the current regime and, by removing certain safeguards, will likely lead to even greater unfairness.

When the ASBO was introduced by the *Crime and Disorder Act 1998*, it was intended to be the targeted response to a specific problem. It would be used to address difficulties faced by individuals in using traditional civil law remedies to deal with social problems, such as an injunction to prevent anti-social behaviour. Instead of

[6] House of Commons Home Affairs Committee, Twelfth Report of Session 2012-13, The draft Anti-social Behaviour Bill: pre-legislative scrutiny, para 35.

individuals having to navigate the process for obtaining civil injunctions, the State would do so on their behalf, backed by the sanction of criminal penalty. Since then, the creation of new types of civil order seems to have been the Home Office's answer to nearly every social disorder problem. There has been a persistent blurring of what constitutes criminal activity and a move away from the criminal justice system as the mechanism for imposing punitive sanctions.

As the Home Office consultation fleetingly recognised, the breach rate for ASBOs is incredibly high and particularly high in relation to children. Of the 21,645 ASBOs issued between 1 June 2000 and 31 December 2011, 57.3% were breached at least once with 42.9% breached more than once. [7] By the end of 2011, children accounted for 37.7% of all ASBOs issued and for 44.9% of all ASBOs breached.[8] Of the ASBOs breached, 52.7% of individuals were given an immediate custodial sentence with an average custodial length of 5.1 months.[9] The disturbingly high and consistent breach rates for ASBOs, and the custodial repercussions for children, amount to an on-going failure of public policy. Confusingly, while the Government has acknowledged the stunningly high breach rates for ASBOs, it has provided no explanation as to why or how the replacement injunction will fare any differently.

The breadth of restrictions that can be imposed has meant that onerous and inappropriate requirements have been placed on individuals who would arguably be better suited to a different type of intervention. For instance, in 2009 a 16-year old was given an ASBO which banned him from every street in the area in which he lives, except his own. This meant that he was unable to leave his road on foot and could only travel by bus or car.[10] The overly broad conditions are often impossible to comply with, resulting in individuals - and frequently young people - being alienated from their community and funnelled into the criminal justice system. A new power to impose positive obligations would only exacerbate this problem by making breach more likely.

[7] Statistical Notice: Anti-Social Behaviour Orders Statistics England and Wales 2011, Ministry of Justice, October 2012, available at http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/asbo-stats-england-wales-2011/asbo11snr?view=Binary.
[8] Ibid.
[9] Ibid.
[10] See http://www.statewatch.org/asbo/ASBOwatch.html

Part 1 – Injunctions to prevent nuisance and annoyance ('IPNAs')

Injunctions to prevent nuisance and annoyance ('IPNAs') will replace a number of civil orders and injunctions, namely the ASBO, the Anti-Social Behaviour Injunction, the Individual Support Order and the Intervention Order. Put simply, the mechanism will operate in a way similar to ASBOs save for the fact that breach of an injunction will not be criminal offence but rather a breach of a civil injunction dealt with by way of contempt of court for adults and by a new scheme of punitive criminal-type sanctions for children. However, IPNAs will be much easier to obtain than ASBOs, with broader definitions of culpable behaviour, and a lower burden of proof.

Test for imposition

Amendment 1 – amend clause 1

Part **1**, clause **1**, page **1**, line **7**, **remove** "on the balance of probabilities" and **insert** "beyond reasonable doubt."

Effect

This amendment would change the burden of proof for establishing that the conditions for making an IPNA have been met from the lower civil burden of proof ('balance of probabilities') to the higher criminal burden of proof ('beyond reasonable doubt') which is currently used for ASBOs.

Amendment 2 – amend clause 1

Part **1**, clause **1**, line **8**, **remove** "capable of causing annoyance to any person" and **insert** "that had caused, or was likely to cause, harassment, alarm or distress."

Effect

This amendment would change the definition of anti-social behaviour from the new, broader test, to the narrower test currently used for imposition of an ASBO.

Briefing

One of the key problems with the current ASBO regime is the frighteningly low trigger for an ASBO to be imposed. However, the new test proposed in the Bill for the imposition of an IPNA would be much weaker than the present test for imposing an ASBO. A chief constable, local authority, provider of social housing, the Environment Agency, the Special Health Authority and other bodies[11] (including, following

[11] Clause 4.

amendments at Committee stage, headteachers and the principals of FE institutions) will be able to apply for an injunction. A court may grant an injunction against anyone aged 10 and over if (a) "*the court is satisfied … that the respondent has engaged or threatens to engage in conduct capable of causing nuisance or annoyance to any person*"[12] and (b) the court considers it "*just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour*".[13] The Bill sets out that the required standard of proof will be the civil standard, the "balance of probabilities."

The lower burden of proof means that an applicant authority will have to provide much less evidence that an individual had engaged or threatened to engage in anti-social behaviour than is currently the case for an application for an ASBO. The ASBO was originally intended to be able to be imposed when anti-social behaviour was evidenced to the civil burden of proof, but the criminal standard ("beyond reasonable doubt") is currently required. In the case of *McCann*[14] the House of Lords determined that although ASBOs are made in civil courts where the burden of proof is the "balance of probability" the court must be satisfied to the criminal standard of 'beyond reasonable doubt' that anti-social behaviour took place due to the "seriousness of the matters involved."[15] The Law Lords inserted this modest safeguard into the regime in recognition of impact of an ASBO on fundamental rights and freedoms. Clearly unhappy with this test, the Government is now seeking to lower the burden of proof to allow an injunction to be imposed where there is relatively little evidence of past or threatened anti-social behaviour. The inclusion of hearsay evidence raises the possibility that the test could be met merely by the reported testimony of an absent individual.

Not happy with just relaxing the level of proof that anti-social behaviour has, or is likely to, take place, the new injunction also significantly broadens the (already broad) definition of targeted behaviour and further weakens the test. The current test for imposition of an ASBO is that that the individual's behaviour *"had caused, or was likely to cause, harassment, alarm or distress*" and that the imposition of an order

[12] Clause 1(2).
[13] Clause 1(3).
[14] House of Lords – *Clingham (formerly C (a minor)) v Royal Borough of Kensington and Chelsea* (on Appeal from a Divisional Court of the Queen's Bench Division); *Regina v Crown Court at Manchester Ex p McCann (FC) and Others (FC)*.
[15] Per Lord Steyn in *McCann* [2002] UKHL 39 at para 37.

was *"necessary to prevent relevant persons from further anti-social acts".* [16] The new definition embraces any "*conduct capable of causing nuisance or annoyance to any person*" and switches the requirement that an order is deemed "*necessary*" to "*just and convenient*". This new power is breathtakingly wide. As was pointed out in the Second Reading debate, when concerns were raised about the breadth of this definition, "nuisance and annoyance" are highly subjective concepts, and this must be borne in mind when considering the appropriate threshold for IPNAs.[17] How many times a day do we cause nuisance and annoyance to others? Irritatingly noisy passersby? The excessively opinionated dinner party guest?

These criticisms have previously been made by the Home Affairs Select Committee in its report on identical provisions in the Draft Anti-social Behaviour Bill[18] and, more recently, by Ron Ball, the Police and Crime Commissioner for Warwickshire who, in oral evidence before the Anti-social Behaviour, Crime and Policing Bill Committee, stated:

> *"One area of concern, for me as well, is the definition of 'conduct capable of causing a nuisance or annoyance to any person'. Well, any sort of behaviour will cause annoyance to somebody. Should there not be some definition of a reasonable person? The most curmudgeonly, miserable individual should not be able to determine standards of behaviour in their neighbourhood. There must surely be some test of reasonableness."*[19]

The test as it currently stands has allowed for a frighteningly broad range of behaviour to be brought within the scope of the ASBO regime. Indeed, the already wide definition of '*behaviour likely to cause, harassment, alarm or distress*' is arguably one of the reasons that the orders have to date been so inappropriately and over used. Widening the definition yet further is only going to make grossly inappropriate use even more likely.

Liberty is particularly concerned about the breadth of the new IPNA powers in the light of worrying changes made to the Bill at Committee stage. Committee members

[16] Ibid at footnote 15.
[17] See the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Keith Vaz at column 84 and Dr Julian Huppert at Column 90.
[18] House of Commons Home Affairs Committee, Twelfth Report of Session 2012-13, The draft Anti-social Behaviour Bill: pre-legislative scrutiny.
[19] Committee debate; 3rd sitting; 20 June 2013, at column 66.

secured an undertaking from the Government that bullying would be included in the definition of ASB given in the accompanying guidance,[20] and adopted amendment 8, which extends the power to apply for IPNAs to headteachers and the principals of FE institutions.[21]

We urge the government not to expand ASB powers to make them even broader and easier to obtain than under the current regime, but to remember their original intended role as a targeted, surgical intervention to address the worst incidences of anti-social behaviour.

Amendment 3 – amend clause 1

Part **1**, clause **1**, page **1**, line **10**, **remove** "just and convenient" and **insert** "necessary and proportionate."

Part **1**, clause **1**, page **1**, line **11**, **remove** "preventing the respondent from engaging in anti-social behaviour" and **insert** "protecting relevant persons from further anti-social behaviour by the respondent."

Effect

This amendment would impose a higher test for when an IPNA could be imposed. Imposition of an order would have to be both necessary and proportionate, rather than merely "just and convenient." The order would also have to be targeted at protecting particular persons (such as previous victims or neighbours) from the respondent's anti-social acts, rather than a broad power to regulate the respondent's behaviour generally, as recommended by the Home Affairs Select Committee.

Amendment 4 – amend clause 1

Part **1**, clause **1**, page **2**, line **1**, after "injunction" **insert** new clause (4A):

(4A) Any prohibition or requirement imposed under subsection 1(4) must be necessary and proportionate with regard to the purpose specified in subsection 1(3).

Effect

This amendment implements the recommendation of the Home Affairs Committee in its report on the draft Anti-Social Behaviour Bill, that there should be a specific

[20] Committee debate; 5th sitting; 25 June 2013, from column 130 on.
[21] Committee debate; 5th sitting; 25 June 2013.

requirement for any individual prohibition or requirement to be necessary and proportionate for the purposes of preventing further ASB by the respondent.[22]

Amendment 5 – amend clause 1

Part **1**, clause **1**, page **1**, line **8**, after "has" **insert** "intentionally or recklessly", and after "engage" **insert** "intentionally or recklessly."

Effect

As currently drafted, an individual could be made subject to an IPNA even for behaviour that they did not intend to or foresee would cause nuisance or annoyance to another person. This amendment imposes an additional safeguard to ensure that IPNAs are only imposed on persons who engage in ASB deliberately, or without caring about the likely effect of their behaviour on others.

Briefing

The Home Affairs Select Committee, in its pre-legislative scrutiny of the identical provisions in the Draft Anti-social Behaviour Bill expressed concern about how much easier it would be to obtain an IPNA than an ASBO, given the lower burden of proof and wider definition, and in its report called for additional safeguards before such severe restrictions could be imposed. In particular, the Committee recommended that a proportionality test and a requirement of either intention or recklessness should be added to the IPNA, as well as a requirement that the injunction is "necessary" – not merely "just and convenient" to protect from further anti-social acts by the defendant.[23] The Committee also recommended that there be a specific requirement for any prohibition or requirement imposed by an IPNA to be "necessary and proportionate," and that an order can only be imposed to protect victims against further anti-social acts of the respondent. None of these recommended amendments have been made by the Government in drafting the new Bill and members of the Home Affairs Committee repeated their calls for such provision during the Second Reading debate, stressing that these new powers should not be used to deal with trivial behaviour.[24] Nor have any of these recommended changes been made to the Bill in Committee. We urge the Government to ensure that the new regime contains

[22] House of Commons Home Affairs Committee, Twelfth Report of Session 2012-13, The draft Anti-social Behaviour Bill: pre-legislative scrutiny, para 29.
[23] House of Commons Home Affairs Committee, Twelfth Report of Session 2012-13, The draft Anti-social Behaviour Bill: pre-legislative scrutiny, para 28.
[24] See the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Dr. Julian Huppert MP at column 90.

these important safeguards to ensure that the human rights of those subject to IPNAs will be guaranteed.

Positive requirements

Amendment 6 – amend clause 1

Part **1**, clause **1**, page **2**, line **1**, **remove** sub clause 1(4)(a)
Part **2**, clause **21**, page **11**, line **27**, remove sub clause 21(5)(b)

Effect

This amendment would remove the proposed new powers to allow IPNAs and CBOs to impose *positive* obligations on respondents, as well as prohibitions.

Briefing

It is proposed that an injunction can impose *requirements* as well as prohibitions. Under the ASBO regime, individuals can be required to desist from certain actions or activities i.e. from engaging in particular behaviour, or being present in particular areas. However, the new proposed injunctions and orders may, for the purpose of preventing the respondent from engaging in ASB "*require the respondent to do anything described in the injunction*".[25] This represents a significant shift from the original model where the stated emphasis was on injuncting or restricting someone from doing 'anti-social' things, not prescribing positive sanction and punishment.

Positive obligations will necessarily engage a number of rights protected by the European Convention on Human Rights (ECHR) as incorporated into domestic law by the *Human Rights Act 1998* (HRA), in particular the right to liberty, the right to private and family life, the right to free expression and assembly. While ASBO-type restrictions already engage (and sometimes infringe) those rights, positive obligations will necessarily have the potential for greater engagement and possible infringement. Without any guidance in statute about the type of restrictions and obligations that may be imposed, the courts will have to judge on a case by case basis whether or not the terms of an injunction unjustifiably infringe a person's rights, and as with control orders[26] and re-branded Terrorism Prevention and Investigation Measures (TPIMs)[27] the extended powers and discretion proposed will undoubtedly lead to

[25] Clause 1(4).
[26] *Prevention of Terrorism Act 2005.*
[27] *Terrorism Prevention & Investigation Measure Act 2011*.

human rights infringements. In addition to the damaging impact on individuals whose rights may be breached there will likely be a significant cost to the public purse as restrictions and obligations are challenged in the courts.

Under the current regime, the restrictions imposed through the ASBO system can be intrusive, in some instances making breach almost inevitable. Reform which would require (as yet unspecified) positive obligations to be placed on individuals will inevitably create greater burdens making compliance even less likely. We urge the Government not to proceed with this misguided proposal which will only exacerbate the already remarkably high breach rates for ASBOs and which would seriously restrict the human rights of those subject to IPNAs and CBOs.

Duration

Amendment 7 – amend clause 1

Part **1**, clause **1**, page **2**, line **11, delete** words from "or" to "order," and after "effect," **insert** "which may not exceed 12 months."

Effect

As currently drafted, an IPNA may be imposed on an adult for an indefinite duration. This amendment would require each IPNA to be for a specified duration, which may not exceed one year.

Briefing

Clause 1(6) allows an injunction to have a specified duration or to be indefinite in nature. Long-running injunctions will make breach even more likely, increasing the likelihood of fines, imprisonment etc. for failing to comply with what may be onerous and unjustified obligations. Liberty welcomes the Government's decision to make the change recommended by the Home Affairs Select Committee in its report and provide that IPNAs for under 18s cannot be of indefinite duration, and that the maximum period is 12 months.[28] We urge the Government to make this simple amendment to the Bill, which will reduce the risk of IPNAs being used disproportionately and breached unnecessarily.

[28] House of Commons Home Affairs Committee, Twelfth Report of Session 2012-13, The draft Anti-social Behaviour Bill: pre-legislative scrutiny, para 44.

Breach – children

16. As the power of a court is to commit a person to *prison* for contempt, and as legislation provides that children cannot be committed to prison for any reason,[29] breach of an injunction by a child cannot lead to imprisonment. Rather than recognising that this highlights just one of the many problems with using the civil law to impose punishment by the backdoor, the Government is seeking to create a menu of draconian new sanctions for breach of a civil injunction that can be imposed only on children.

Powers of a youth court in dealing with breach of an IPNA by a child are provided for in clause 11 and Schedule 2. Part 2 of Schedule 2 governs supervision orders. A youth court may make a supervision order or a detention order if satisfied beyond reasonable doubt that the child is in breach.[30] A supervision order imposes one or more of the following requirements – a supervision requirement, an activity requirement and/or a curfew requirement. These requirements range from specified activities over a number of days; attending appointments; and curfews for a maximum of 8 hours a day. Supervision orders can last for up to 6 months but if satisfied that a child has failed to comply with a requirement of the supervision order, the court may revoke it and make a new one. Paragraph 1(6) provides that a youth court may also make a detention order if satisfied by the severity or extent of the breach that no other power is appropriate. This means that a child may be detained at a secure training centre, youth offender institution or secure accommodation under a detention order for a period of 3 months.

Amendment 8 – delete paragraph 1(1)(b) and Part 3 of Schedule 2

Schedule **2**, Part **1**, paragraph **1**, page **111**, line **34**, remove subparagraph 1(1)(b) Schedule **2**, Part **3**, paragraph **14**, line **10**, **remove** Part 3

Effect

As currently drafted, if a child breaches an IPNA they can be made subject to a supervision order or detained under a detention order. This amendment removes the

[29] See section 89 of the *Powers of Criminal Courts (Sentencing) Act 2000* as amended by the *Criminal Justice and Court Services Act 2000*.

[30] Although Paragraph 1(5) prevents a detention order being made against a person under 14.

power for youth courts to make detention orders, so that children cannot be detained for breach of an IPNA.

Briefing

Liberty does not believe it is appropriate to grant ever more coercive powers to courts in relation to children – powers that do not exist with respect to adults. If an adult breaches an injunction he or she can be asked by the court to apologise, be fined, or imprisoned. Yet, under these proposals, a child will be subject to additional sanctions such as being required to undertake unspecified activities, subjected to lengthy curfew and electronic tagging, and still potentially be liable to imprisonment in a young offenders institution. While "civil detention" may not give children a criminal record, it will do little to divert them away from the criminal justice system; separating them from their parents and interring them with offenders who have committed crimes.

Article 37(b) of the *United Nations Convention on the Rights of the Child*, which the UK is a signatory to, provides:
The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

However, as the UN Committee on the Rights of the Child said in its last report on the UK, the number of children deprived of liberty in the UK is high, indicating that detention is not always applied as a measure of last resort.[31] The UN Committee also considered the use of ASBOs against children, noting that they did not appear to be in the best interests of children and recommended that there be "*an independent review of ASBOs, with a view to abolishing their application to children*".[32] It is disappointing that instead of considering this recommendation, the Government has instead chosen to internally review the ASBO regime and has concluded to expand the range of coercive powers available and give civil courts new powers to imprison children.

[31] Committee on the Rights of the Child, Concluding Observations on the United Kingdom and Northern Ireland (2008) available at: http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf at Paragraph 77.
[32] Ibid at Paragraphs 79-80.

ASBOs and other non-prosecution alternatives are more effective if targeted such as being used as a 'last chance saloon'. The problem with ill-defined powers of this sort is that they invariably lead to over use and over reliance so that rather than providing an alternative to prosecution, they become a fast track to criminal style sanction and all the repercussions that flow. This point was powerfully made in Committee by Paul Maynard MP:

"We have constructed a conveyor belt for the most vulnerable in our society, whereby they end up in jail. I am not comfortable, as an MP in this legislature, with a system in which we set up our young people to fail. Jail is not the right place to solve all society's ills."[33]

In the Second Reading debate it was stressed that young people who engage in ASB should not be stigmatised.[34] The IPNA is effectively going to be a super-punitive ASBO which will be easier to obtain for even more broadly defined behaviour. It is likely therefore that it will be used even more than the current ASBO and the damaging ramifications of this policy even more widely felt. We urge the Government to consider the likely negative impact that detention could have on young people, as well as its international obligations towards children, and remove this provision.

Criminal Behaviour Orders (CBOs)

Clause 21 creates a new Criminal Behaviour Order (CBO) intended to replace the current ASBO-on-conviction (CRASBO).

Amendment 9 – amend clause 21

Part **2**, clause **21**, page **11**, line **19**, after "satisfied" **insert** "beyond reasonable doubt"

Effect

As currently drafted, no particular burden of proof is specified for the requirement to show that an individual engaged in ASB, and it would therefore suffice to show this only on the balance of probabilities (the civil standard). This amendment provides that the fact that the offender engaged in ASB must be proved beyond criminal doubt (the higher, criminal standard).

[33] Committee debate; 5th Sitting; 25 June 2013, at column 156.
[34] See the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Keith Vaz at column 84.

Amendment 10 – delete sub clause 22(2)

Part **2**, clause **22**, page **12**, line **13**, **remove** sub clause 22(2)

Effect

This amendment would prevent CBOs being imposed on the basis of evidence that is completely unrelated to the criminal offence of which the offender has been convicted, and which would not have been admissible in the criminal proceedings in which they were convicted.

Briefing

Clause 21 creates a new Criminal Behaviour Order (CBO) intended to replace the current ASBO-on-conviction (CRASBO). A CBO can be made against someone convicted of a criminal offence if two - again very loose - conditions are met. First, that the court is "*satisfied that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as the offender*" and second, "*that the court considers that making the order will help in preventing the offender from engaging in such behaviour*."[35] While the initial criminal offence must be proved beyond reasonable doubt, it need only be proved on the balance of probabilities that the offender engaged in ASB for the order to be imposed, and the evidence of ASB may be completely unrelated to the original offence.[36] Again, CBOs will allow the imposition of onerous positive requirements, not just prohibitions. For children, the duration of a CBO must be between 1-3 years and for adults an order must last for at least two years but, as with IPNAs, could be indefinite, greatly increasing the probability of breach.[37] Breach of a CBO is a criminal offence attracting a period of 6 months imprisonment (on summary conviction) and 5 years imprisonment (on conviction on indictment).[38]

There has been no explanation as to why CBOs are required in addition to a court's current sentencing powers. Options such as drug treatment and anger management courses are already available as sentences through community orders or by way of conditions imposed when a prisoner is released 'on licence' or 'on probation'. If the offender has been engaging in unrelated ASB, then an IPNA should be pursued

[35] Clause 21(3) and (4)
[36] Clause 22(2).
[37] Clause 24.
[38] Clause 28.

independently through the civil courts. Bringing such requirements under the umbrella of the CBO appears to us to be unnecessary duplication and in practice will easily lead to double punishment for the same activity. CBO restrictions and the sanctions available for breach could result in gravely disproportionate outcomes for a one-off, minor criminal conviction. If the current range of positive requirements available through the community sentencing or licence regime are not being utilised to address the underlying causes of criminal behaviour, then the reasons for that should be investigated and addressed. Duplicating such powers under a different banner will not, of itself, result in their increased effectiveness.

Dispersal powers

Clause 33 creates a general dispersal power. It is intended to replace a number of dispersal powers that are already on the statute book, combining elements of the current general dispersal power under section 30 of the *Anti-Social Behaviour Act 2003* (ASBA) with elements of the alcohol-related dispersal powers available under section 27 of the *Violent Crime Reduction Act 2006* (VCRA) and the DPPO. Current dispersal powers are already defined incredibly broadly and the Bill proposes extending them and replicating their flaws. Liberty is unconvinced that it will be possible to give such discretionary powers to frontline officers in way that will preserve an individual's rights under Article 11 of the HRA (the right to free assembly).

Under clause 32 a police officer of rank superintendent or above may authorise police and police community support officers ('PCSOs') to exercise a general power to direct a person away from a specified area for a 48 hour period where the officer or PCSO suspects that the behaviour of the person has contributed to, or is likely to contribute to, members of the public being harassed, alarmed or distressed or to the occurrence of crime or disorder.[39] The constable or PCSO must also consider the direction necessary for the purpose of removing or reducing the likelihood of harassment, alarm or distress, crime or disorder. The direction must be given in writing unless this is not reasonably practicable in the circumstances.[40] The constable or PCSO must specify the area from which the person is excluded and may specify when and by which route they must leave the area.[41] If a person appears under the age of 16 the constable or PCSO can take them home or to a place of

[39] Clause 33.
[40] Clause 31(5).
[41] Clause 31(5).

safety.[42] Clause 35 contains a secondary power which permits the constable or PCSO to require the person being given the direction to surrender any items being used in the anti-social behaviour. Under clause 37 a person who fails to comply with a direction to leave commits an offence and is liable on summary conviction to imprisonment for up to 3 months and/or a fine not exceeding level four on the standard scale.

Amendment 11 – amend clause 32 and clause 33

Part **3**, clause **32**, page **18**, line **19**, **delete** "removing or reducing the likelihood of" and **insert** "preventing"
Part **3**, clause **32**, page **18**, line **19**, **delete** "may be" and **insert** "is".
Part **3**, clause **33**, page **18**, line **35**, **delete** "has contributed to or is likely to contribute to" and **insert** "has resulted in or will result in"
Part **3**, clause **33**, page **18**, line **41**, **delete** "removing or reducing the likelihood of" and **insert** "preventing."

Effect

This amendment will tighten the tests for authorisation of dispersal powers and the making of directions. Behaviour which is only "likely" to cause harassment, alarm or distress will no longer suffice, and it will be necessary to show a causal link between the behaviour covered by the direction and the harassment, alarm or distress. It will also need to be shown that the powers are actually necessary to prevent the ASB, rather than just that they "may be" necessary.

Amendment 12 – amend clause 32 and clause 33

Part **3**, clause **32**, page **18**, line **13**, **remove** "48" and **insert** "24"
Part **3**, clause **33**, page **19**, line **1**, **remove** "48" and **insert** "24"
Part **3**, clause **33**, page **19**, line **17**, **remove** "48" and **insert** "24"

Effect

This amendment reduces the maximum duration of an authorisation to use dispersal powers from 48 hours to 24 hours.

[42] Clause 31(7).

Amendment 13 – delete clause 38

Part **3**, clause **38**, page **21**, line **16**, **delete** clause 38

Effect

This amendment would mean that dispersal powers could only be exercised by police constables, not PCSOs.

Amendment 14 – insert new sub clause 34(3A)

Part **3**, clause **34**, page **19**, line **42**, **insert**: (3A) A constable may not give a direction under section 33 to a person who has a genuine need to pass through the locality.

This amendment would create an exception to dispersal powers where an individual has a genuine need to pass through the locality for which the powers have been authorised.

Briefing

The various direction powers currently on the statute book have often proven disastrous in practice. Liberty has found that 'locality,' which is not defined in the statute, has been interpreted by police to include a very wide area, so that people have been excluded from areas as large as 'Greater Manchester' (an area of 493 square miles) or from whole counties like 'South Yorkshire' or 'West Yorkshire'. It appears that this will continue to be the case under the Bill.

In seeking to harmonise the various regimes it appears that the upper limit of 48 hours as permitted under section 27 VCRA has been chosen, rather than the 24 hours under the *Anti-Social Behaviour Act 2003*. Liberty believes that an order not to return to the area within 48 hours is particularly excessive. If the purpose of the power is to disperse a group of individuals with immediate effect, it is difficult to justify why an individual should be prevented from returning to the area for the whole of the following day.

It is also proposed that community support officers may also be authorised to exercise the dispersal power. If such powers are to be re-legislated and extended, we believe that they should only be exercised by fully trained police officers. Draconian, summary powers of dispersal and confiscation will inevitably lead to resistance from those against whom they are applied and will conceivably result in

potentially volatile situations. Liberty does not believe that community support officers have the training or expertise to deal satisfactorily with such situations.

Liberty welcomes the decision not to continue with the proposal, included in the Draft Anti-social Behaviour Bill, to remove the requirement that a police officer of rank superintendent or above authorise use of the power in a specific locality for a specific period before the dispersal power may be exercised by a constable or PCSO. This requirement is preserved in clause 32 and retains at least one important safeguard on the use of this broad and intrusive power. We also welcome the decision to follow the recommendation of the Home Affairs Committee[43] and add a provision explicitly excluding public processions, as well as lawful picketing, from the scope of dispersal powers. [44] However, we regret that this was not extended to the case of individuals with a genuine need to travel through the area, as recommended by the Home Affairs Committee, as without this exemption there is a risk that dispersal powers will have a disruptive and disproportionate effect on the lives of people living in affected areas.

We urge the Government to reconsider this significant extension of powers that have already proven disastrous in practice, and to introduce these minimum safeguards to help ensure that dispersal powers are not used inappropriately.

Community protection

Part 4 of the Bill creates Community Protection Notices (CPNs), Public Space Protection Orders (PSPOs) and creates powers for Closure of Premises Associated with Nuisance or Disorder.

Clause 40 creates the power for an authorised person (constable, local authority, designated person)[45] to issue a CPN if satisfied on reasonable grounds that (a) the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality and (b) the conduct is unreasonable. A CPN can impose a requirement to stop doing specified things; to do specified things or to take reasonable steps to achieve specified results.[46] An appeal against the CPN is granted to the Magistrates Court.[47] It is an offence not to comply

[43] House of Commons Home Affairs Committee, Twelfth Report of Session 2012-13, The draft Anti-social Behaviour Bill: pre-legislative scrutiny, para 32.
[44] Clause 34(4)(b)
[45] Clause 50.
[46] Clause 40(3).
[47] Clause 43.

with a CPN liable to a fine not exceeding level 4 in the case of an individual. Upon conviction of an offence under clause 45, a court may make "*whatever order the court thinks appropriate for ensuring that what the notice requires to be done is done*"[48] which can include requirements to carry out specific work or allow work to be carried out by the local authority (LA). A further appeal is granted to the Magistrates Court.[49] Forfeiture powers also flow from a CPN: upon conviction under clause 45 a court may order the forfeiture of any item that was used in the commission of the offence and may require destruction. Search and seizure may be ordered by a justice of the peace to recover such an item[50] and a Fixed Penalty Notice may be issued by the police or LA to allow the convicted person to discharge liability.[51]

Clause 55 grants a power for a LA to make a PSPO where: activities carried on in a public place have had or are likely to have a detrimental effect on the quality of life of those in the locality; and the effect of the activities is persistent, makes the activities unreasonable, and justifies the restrictions imposed. The order can prohibit certain activities in that area or require people carrying out a particular activity to do certain things. The order can affect everyone or specified categories. The order can have effect for up to 3 years and may be extended by a further 3 years.[52] Failure to comply with the order is a criminal offence liable to a level three fine on the standard scale.[53]

Amendment 15 – amend clause 40

Part **4**, clause **40**, page **22**, line **28**, **delete** "reasonable" and **insert** "necessary and proportionate"

Effect

This amendment tightens the test for imposition of requirements in CPNs, which must each be necessary and proportionate, not merely reasonable.

Amendment 16 – amend clause 40

Part **4**, clause **40**, page **22**, line **14**, **remove** "an authorised person may" and **insert** "On the application of an authorised person, a court may authorise an authorised person to"

[48] Clause 46(1).
[49] Clause 46(7).
[50] Clause 48.
[51] Clause 49.
[52] Clause 56.
[53] Clause 63.

Effect

This amendment introduces a requirement for judicial pre-authorisation before a CPN may be issued by an authorised person.

Briefing

As is the case elsewhere in the Bill, highly intrusive powers are granted under these clauses on the basis of extremely vaguely defined behaviours. Instead of defining the behaviours that the powers are targeting, the powers instead flow from being deemed to lower the "quality of life" of the community. The fact that there is no requirement for pre-judicial authorisation before a CPN or PSPO is ordered only exacerbates the potential for unfairness and abuse. CPNs and PSPOs significantly broaden the powers available to police and LAs to impose notices and orders on residents and individuals in the locality. Given the severe consequences and financial liabilities that flow from breach of these orders and notices, we would expect, at the very least, tighter definitions of the type of activities that are to be prohibited and pre-judicial authorisation. Again, we urge the Government to amend the Bill to provide for at least these minimum safeguards of necessity, proportionality and judicial oversight, to ensure that these expansive new powers are not applied disproportionately.

Amendment 17 – delete Chapter 2 (clauses 55 – 68)

Part **4**, clause **55**, page **32**, line **1**, **delete** clauses **55-68**

Effect

This amendment would remove provision creating new public spaces protection orders.

Briefing

CPNs and PSPOs are intended to replace six existing orders, which deal with a variety of ways that ASB can manifest itself in public spaces, such as littering, dog fouling and graffiti. CPNs may be issued to an individual or body whose conduct is unreasonable and "is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality." PSPOs go even further and, if a similar but even looser test is fulfilled, may impose similar requirements on *all persons* in the locality.

Liberty considers that both of these powers are too widely drawn, with vague definitions of the relevant behaviour and disproportionately punitive sanctions. In particular, it is not clear how the creation of the remarkably broad PSPO power can be justified. ASB interventions should be targeted, not used to impose localised criminal codes on particular communities, with incredibly broad-brush powers that will severely restrict the ability of individuals *in general* to move freely in and enjoy public spaces in their communities. If an individual or organisation is engaging in ASB in a locality, they should be targeted; limiting access to and enjoyment of public spaces for the whole community is a totally disproportionate response to such problems. For this reason, we consider that the proposals to create PSPOs should be removed, and that such problems should be dealt with via the (not unproblematic) CPN powers. We urge the Government to reconsider this remarkably broad power to exclude the general public from public spaces, and to consider whether these objectives could be achieved by better use of targeted individual CPNs.

Mandatory power of eviction

Clause 86 introduces a new mandatory ground for possession of a dwelling that is subject to a secure tenancy. This proposal - to give courts a mandatory power to evict tenants from social housing - was consulted on by the Department of Communities and Local Government in August 2011.[54]

There are already a number of grounds on which a social landlord can apply for a possession order and/or the police or the local authority can apply for premises to be entirely shut down. The difference from the new proposals is that, currently, courts have discretion to grant eviction if it is satisfied that anti-social behaviour has occurred and that it would be reasonable to grant possession and/or suitable alternative accommodation is available.

Clause 86(1) inserts a new section 84A into the *Housing Act 1985* which makes it mandatory for a court to grant possession if any of the conditions in new section 84A are made out; the notice requirements have been met and the new review procedures followed. The conditions will be met if the tenant, a member of the tenant's household or a person visiting the property has been –

[54] *A new mandatory power of possession for anti-social behaviour*, Department of Communities & Local Government Consultation Paper, August 2011, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/8460/1959275.pdf.

a) convicted for a serious offence;
b) found by a court to have breached an injunction to prevent nuisance and annoyance (IPNA) obtained under clause 1 of the Bill;
c) convicted for a breach of a criminal behaviour order (CBO) obtained under clause 21 of the Bill;
d) convicted for on offence under sections 80(4) or 82(8) *Environmental Protection Act 1990* (breach of abatement notice/court order in relation to statutory nuisance), where the nuisance concerned was noise, or
e) the dwelling-house is subject to a closure order under clause 73 of the Bill or access to it has been prohibited by a closure notice under clause 69.

The offence or anti-social behaviour must have been committed in the dwelling house or in the locality of the dwelling house.

Amendment 18 – delete Part 5 (clauses 86-92)

Part **5**, clause **86**, page **52**, line **12**, **delete** clauses **86-92**

Effect

This amendment would remove provision for a new mandatory power of eviction.

Briefing

The preceding DCLG consultation had described the proposed new route to possession as limited to cases of proven "serious, housing related anti-social behaviour." Yet of the five triggers for mandatory possession, only one relates to conviction for serious violence. The other triggers attach to the breach of an injunction or CBO provided for elsewhere in the Bill. This could mean that eviction (including of an entire family) could be triggered merely by breach of an injunction restriction (such as being present in a prohibited place, not attending a required course etc.). As previously discussed, breach rates for ASBOs are notoriously high and breaches of IPNAs and CBOs are likely to continue this trend. These clauses therefore risk creating chaos, as the mandatory eviction power becomes automatically applicable to the many thousands who will breach their conditions, leading to homelessness for them and their families and serious disruption in communities around the country. During the Second Reading debate, concern was raised about this proposal; that "no flexibility is given for the judge to decide" and about the effects on family members and particularly children, who could be made

homeless.[55] Similarly, at Committee stage, concerns were voiced that this provision could lead to the eviction of whole families based on the wrongdoing of one individual, and Members questioned why only social housing residents would be subject to this extra sanction.[56]

Any application for possession must of course be proportionate, as the courts have confirmed that tenants have a right to challenge eviction proceedings under the *Human Rights Act 1998*.[57] Liberty welcomes the decision to add a new second sentence to the new clause 84A(1) in the 1985 Act,[58] which states explicitly that the court's mandatory power to order possession is subject to the tenant's Convention rights under the HRA. The particular rights engaged by these cases will most often be the Article 8 (private and family life) rights of tenants, and we had recommended that such a provision be added on the face of the Bill to ensure that these rights will always be considered by the judge, and to prevent disproportionate cases falling through the cracks where relevant arguments are not put forward by the defendant.

However, this provision ultimately does nothing more than ensure that the protections to which people in the UK are already entitled under the HRA will not be overlooked. **Even if mandatory eviction will not amount to a breach of Convention rights in a particular case, this is still a deeply misguided public policy proposal, which doubly punishes the most vulnerable families in our society. It is very difficult to see how anti-social behaviour will be reduced by making increased numbers of people homeless.**

Continuing the trend of automatic sanction and double punishment for the poor, clause 91 adds a new ground for possession under Schedule 2 of the *Housing Act 1985* and Part 2, Schedule 2 of the *Housing Act 1988* so that a landlord can apply for possession where someone living in the tenant's property is convicted of an offence committed at the scene of a riot which took place anywhere in the UK.

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[55] See the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Dr. Julian Huppert MP at column 90.
[56] See the remarks of Gloria de Piero MP; Committee debate; 10th sitting; 4 July 2013, at columns 310 and 312.
[57] The Supreme Court in *Manchester City v Pinnock* [2010] UKSC 45 held that tenants have a right to challenge eviction proceedings under Article 8 (right to respect for a private and family life). The Court held that public (though not private) landlords should consider the proportionality of applying for possession orders.
[58] Clause 86(1) in the Bill.

Liberty has first-hand experience of the unfairness and suffering that is caused when eviction powers are applied in a blunt and knee-jerk way. In 2011 Wandsworth Council threatened to evict Liberty client, Maite de la Calva, and her young daughter if her son was convicted of a crime committed during the riots in August 2011. Ms de la Calva's son was arrested and charged following the disorder. He had moved out of his mother's property earlier in the year but she was still served with a Notice of Seeking Possession by Wandsworth Council shortly after, stating she was likely to have breached her tenancy agreement as a result. The authority vowed to apply for an order of possession, evicting the innocent Ms de la Calva and her daughter, if her son was convicted. The threat came despite Ms de la Calva's contribution to her local area over the last five years. She has been described as a credit to her housing estate by neighbours and spends her limited spare time volunteering with a youth charity and working with domestic violence victims. Ms de la Calva has committed no crime herself and would not have faced such a threat had she lived in a mortgaged house. Liberty agreed to represent her and fight Wandsworth Council's attempt to punish her and her daughter for her son's conviction. While we ultimately succeeded in persuading Wandsworth Council to back down, this was not before considerable anxiety and suffering had been inflicted. If the eviction powers set out in the Bill are enacted, there will be many more cases such as this, and it is unlikely that the outcomes will be as positive.

It is difficult to see how removing a person and their family from social housing will lead to less rather than more crime and anti-social behaviour. Dispossession will rather shift the problem elsewhere while creating new and greater problems (for the individuals concerned and their families). Private housing may be unavailable or unaffordable for many families leading to homelessness and destitution. Criminal conduct may well proliferate with the disruption that ensues. We urge the Government to pause and seriously reconsider these new and highly punitive powers.

Amendment 19 – amend clause 86

Part **5**, clause **86**, page **54**, line **47**, within new clause 84A of the Housing Act 1985, after "provision" **insert** new sub clause 84A(13):

(13) A person who becomes homeless as a result of an order for possession made under this section shall not by virtue of that fact alone be considered intentionally homeless for the purposes of sections 191 or 196 of the Housing Act 1996.

Effect

This amendment is proposed in the alternative. This amendment would ensure that if an individual or family are evicted under the mandatory power, they will not automatically be deemed to be intentionally homeless, and so the local authority will still have a duty to house them.

Briefing

It has been suggested by Home Office officials that individuals who lose their homes as a result of the new power in clause 86 could be considered intentionally homeless for the purpose of the 1996 Act. If correct, this would be a truly disastrous and ill-considered piece of public policy. If an individual is deemed to have become intentionally homeless, under section 190 of the *Housing Act 1996* the local authority has no duty to secure accommodation for them, but merely to provide advice.

As described above, a mandatory power for the judge to order possession removes all but the bare minimum of judicial discretion in deciding whether or not an individual or family is to be evicted.[59] A judge could not decide not to order possession because, for example, the tenant has a large number of children and it would be difficult for them to find alternative accommodation or because one of the tenant's household is elderly and disabled and would have difficulty moving to accommodation which was not on the ground floor. If Part 5 is enacted judges will not be able to consider the likelihood that the tenant and their family will be able to find alternative accommodation following eviction. It is therefore crucial to ensure that the local authority's core duty to house residents is preserved.

Given the remarkably high breach rate for ASBOs it is very likely that this proposed new power would lead to a high number of evictions. If this were combined with a finding that such individuals are intentionally homeless, this would lead to a crisis of homelessness, which would affect not just individuals who have broken a condition of their ASB injunction, but their innocent household members. If the Government decides to go ahead with the ill-advised and unfair proposals in Part 5 of the Bill, then at the very least this safeguard should be introduced.

[59] See the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Dr. Julian Huppert at column 90.

Part 7 – Dangerous dogs, or 'Bite a Burglar'

It is currently an offence to own or be in charge of a dog (of any breed) which is dangerously out of control in a public place. The Bill proposes to amend the *Dangerous Dogs Act 1991* to extend this offence to any place, including private property. However, Liberty is concerned about the exception in sub clause 98(2)(b) of the Bill, which will effectively encourage dangerous and out-of-control dogs to be kept in domestic residences in order to be used as a weapon against suspected trespassers.

Amendment 20 – delete sub clause 98(2)(b)

Part **7**, Clause **98**, page **70**, line **4**, **delete** sub clause **(2)(b)**

Effect

This amendment, while preserving the welcome extension of liability for dangerous dogs to cover attacks on private property, removes the exception which excludes such liability in "householder cases."

Briefing

Sub clause 98(2)(b) of the Bill would insert two new subsections (1A) and (1B) into the Dangerous Dogs Act 1991, which would provide that a person who owns or is in charge of a dog which is dangerously out of control is not guilty of an offence in a "householder case." A householder case exists where the dog is dangerously out of control in a building which is a dwelling, and the person "in relation to whom the dog is dangerously out of control" (i.e. that it attacks) either is a trespasser, or the person merely believes that they are a trespasser. This proposal jars with the Bill's other provisions, which strengthen current protections against dangerous dogs by making defendants liable for dangerously out of control dogs on private property. During the Second Reading debate a number of MPs criticised the Bill's provisions on dangerous dogs as being too weak.[60] Luciana Berger MP spoke eloquently of the recent tragic case of her constituent, Jade Anderson,[61] who was killed by four

[60] See, for example, the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Gordon Marsden at column 94.
[61] 'Dog attack' girl found dead in Atherton house, BBC News, 26 March 2013 http://www.bbc.co.uk/news/uk-england-21321953

aggressive and out of control dogs when visiting a friend's house, highlighting the risk posed by dangerous dogs, even when confined to private property.[62]

The explanatory notes to the Bill explicitly refer to the changes to the *Criminal Justice and Immigration Act 2008*, which were effected by the *Crime and Courts Act 2013* (CCA), and allow a defendant (D) to rely on self-defence against a trespasser (or someone they believe to be a trespasser) even where they have used force which was *disproportionate* to the circumstances *as D believed them to be* at the time. We strongly criticised these changes when the 2013 Act was being considered by Parliament; these provisions are unnecessary and set a dangerously low threshold for what will be considered acceptable violence used in the home. Even before the CCA, a person could use force which was disproportionate *to what the circumstances actually required* without breaking the law so long as it would have been reasonable in the circumstances *as they believed them to be*, as the law has always reasonably taken account of the effect that fear may have on a person's judgment in such a situation. Going beyond this, to allow homeowners to use force which is *disproportionate* even in the circumstances *as they believe them to be* is unnecessary, and risks encouraging vigilante action.

As one MP said in the Second Reading debate, tackling dangerous dogs should be an issue that "transcends party politics."[63] Instead the Government has used it as an opportunity to chase headlines, by continuing the approach taken by the amendments in the 2013 Act to allow a disproportionate level of force to be used in the home. It suffices for D to *believe* that the person attacked by the dog is a trespasser; they need not actually be a trespasser and may be entering the property entirely lawfully. They may merely be attempting to deliver a packet, an example which was raised in the Second Reading debate.[64] There is no liability of the dog-owner for dog attacks in such circumstances, which creates a perverse incentive for people to keep dangerous dogs on their property "for protection." This exception continues the unprincipled lowering of the threshold for self-defence in the home; undermines the Government's policy of reducing the threat from dangerous dogs; encourages the use of dangerous dogs as a potentially lethal weapon and

[62] See the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Luciana Berger at column 99-102.
[63] See the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Luciana Berger at column 99.
[64] See the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Tessa Munt at column 91 and per Huw Irranca-Davies at column 115.

compounds the ability of defendants to use subjectively disproportionate force in self-defence. Liberty urges the Government to consider the likely tragic repercussions of continuing to encourage violence and vigilantism in this way.

Part 10 – Victims' services

Amendment 22 – delete sub clause 124(1)(b)

Part **10**, clause **124**, page **96**, line **43**, **delete** sub clause **124(1)(b)**.

Effect

This amendment removes the provision which would give Police and Crime Commissioners the power to arrange victims' and witnesses' services in their local area.

Briefing

Clause 124 of the Bill provides that local policing bodies – that is, Police and Crime Commissioners - will have the power to arrange certain services in their area, including victim and witness services. Liberty is extremely concerned about these reforms to the commissioning of victims' services which are built upon a controversial new statutory regime that places political figures at the heart of British policing. Liberty vigorously opposed the passage of the *Police Reform and Social Responsibility Act 2011* which replaced Police Authorities with a Police and Crime Commissioner (PCC), an elected politician with significant power over the delivery of policing at a local level.[65] At present, services for victims of crime are commissioned at a national level by the Ministry of Justice. While a large number of charities provide these services, the bulk of Government funding is currently channelled to Victim Support, a national charity and the largest provider of emotional and practical support for victims of crime, with over 35 years of experience in the field.[66]

The current concentration of services has allowed a bank of experienced service providers to grow up and facilitated a strong and joined-up infrastructure for the provision of vital support to victims of crime. During the Second Reading debate

[65] Read more about Liberty's opposition to the proposals in our Second Reading briefing for the House of Lords available at: http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-second-reading-briefing-on-part-1-of-the-police-reform-bill-april-.pdf.

[66] Victim Support currently run the Witness Service in every court in England and Wales and run a national helpline for victims of crime called the Victim Supportline. They work with locally based volunteers to deliver a consistent standard of service in response to local needs.

concern was raised that local commissioning risks the fragmentation of services, creating inconsistent provision across the country.[67] More worrying still is the fact that responsibility for commissioning services will be entrusted to a locally elected politician. Victims should receive services in an even-handed way in accordance with their current and long-term needs.

Liberty believes that political heads of police forces will be inclined to channel funding towards highly visible victims from communities which are likely to make up a significant proportionate of the local vote – we are seriously concerned that victims from marginalised minority communities will lose out. PCCs will have a wide margin of discretion about the way in which services are made available to meet local need. On this basis it appears each PCC will be free to channel funding to whichever provider it considers appropriate, potentially undermining the bank of experience and resources currently available to victims and creating a post-code lottery. There is no reason to believe that these decisions will be informed by understanding or experience of the delivery of victims' services as opposed to cost considerations or vote-winning strategies. Concerns were also raised about this provision of the Bill at Committee stage, in particular, whether Police and Crime Commissioners may simply exercise their discretion by choosing not to commission any victim services in their area, and about the lack of enforceable quality standards for victim services following decentralisation.[68] We urge the Government to consider the negative consequences that could flow from this proposal.

Part 11 – Extradition

Part 11 of the Bill proposes a number of changes to the *Extradition Act 2003*. Extradition can have a profound and often irreversible effect on an individual's life. Forcible removal to a foreign country to face investigation and possible prosecution can detrimentally affect a person's mental and physical health, their family life, career and relationships. Extradition engages a number of fundamental human rights, such as the right to a fair trial, the right to a family life, and the right not to be subjected to cruel and inhuman treatment, which must be considered in constructing and amending the UK's extradition framework. Liberty has long had concerns about the

[67] See the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Rt Hon David Hanson MP at column 122.
[68] See the remarks of Rt Hon David Hanson MP; Committee debate; 13th sitting; 9 July 201, at column 449-451.

current system of extradition, in particular the erosion of safeguards by the European Arrest Warrant (EAW) and bilateral arrangements with other States given effect by the *Extradition Act 2003*.[69] Public concern about current arrangements has grown in recent years, and ahead of the last General Election both Coalition parties pledged that they would reform the present system to provide for greater protections for individuals. In the Second Reading debate on this Bill, the Home Secretary herself stated that "*we have long needed to make changes to the Extradition Act 2003 in order to make it operate in a fairer and more efficient fashion*."[70]

Extradition amendments adopted in Committee

The House of Commons has now voted for the UK to exercise its right under Article 10(4) of Protocol 36 to the EU Treaties, to opt out, by 31 May 2014, of approximately 130 police and criminal justice measures which were adopted before the Treaty of Lisbon entered into force. The Government has since announced a list of 35 measures that it intends to seek to re-join under Article 10(5) of the Protocol which includes the EAW. The Government has also tabled a number of amendments to this Bill relating to extradition within Europe in advance of the Committee's final debate on 16 July. While Liberty has concerns about the late stage at which these amendments were tabled, which allowed relatively little time for Committee members to digest and scrutinise the new clauses, a number of the new clauses are welcome, and make positive changes to our extradition system by adding new safeguards for people at risk of transfer out of the UK. In particular, Liberty welcomes the proposals in clauses 130, 131 and 137.

Clause 130 aims to prevent persons who are due to be extradited within Europe being subject to prolonged periods of pre-trial detention,[71] by barring extradition in cases where the authorities of the requesting State have not yet made a decision to prosecute. Clause 131 adds a test of proportionality to the current requirement that a judge consider whether the extradition would violate the individual's human rights for extraditions within Europe. While this change is welcome, the proportionality test is

[69] See for example Liberty's evidence to the Home Office Review of Extradition Legislation, December 2010, available at - http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-submission-to-home-office-extradition-review-december-2010.pdf.
[70] See the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Theresa May at column 74.
[71] See, for example, the oral evidence of Andrew Symeou and Gary Mann (both extradited under the EU Arrest Warrant), to the Home Affairs Select Committee as part of its inquiry into the EU Justice & Home Affairs Opt Out, 12th September 2013, available at - http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/uc615-ii/uc61501.htm.

so tightly circumscribed (the judge may only consider the specified matters listed in subsection 3 when making a decision on proportionality) that the judge is left with very little discretion to prevent the type of unfairness and injustice that has resulted under the EAW. Clause 137 removes the provisions of the Extradition Act 2003 whereby a person who consents to their extradition is automatically deemed to have waived their right to claim that they should not be tried for the offence in the requesting territory.

However, while welcome, these changes still fall a long way short of the necessary reform which Liberty and others have long called for and which should be a precursor to the UK re-joining EU extradition arrangements. Namely that those resident in the UK should not be extradited to another country without a basic case to answer being made out in a UK court with additional appropriate discretion for judges to bar extradition on the grounds of forum where the alleged activity took place in whole or in part in the UK.[72] **In addition, these changes do not diminish the highly problematic nature of clause 127, which would remove the automatic right of appeal in extradition cases. The automatic right of appeal is a key safeguard against wrongful extradition – particularly given the acknowledged lack of other protections in our extradition system – and we therefore continue to urge the Government to reconsider this ill-advised proposal, and encourage Members to consider tabling the amendments below.**

Genocide, crimes against humanity and war crimes

Amendment 23 – delete clause 138

Part **11**, clause **138**, page **106**, line **15**, **delete** clause **138**.

Effect

This probing amendment would remove clause 138 from the Bill, keeping sections 64 and 65 of the Extradition Act 2003 as they currently stand, with genocide, crimes against humanity and war crimes explicitly included as extradition offences.

Briefing

[72] A "forum bar" to extradition was introduced earlier this year in the Crime and Courts Act 2013. However, the judges discretion is heavily fettered by an exhaustive list of factors that must be considered when reaching her determination. The possible bar cannot be invoked where the DPP has declined to prosecute in the UK.

Among the last minute amendments tabled by the Government, Liberty has some concerns about new clause 138 of the Bill, which appears to remove the explicit inclusion of genocide, crimes against humanity and war crimes (and ancillary offences) from the list of extradition offences in section 64 and 65 of the 2003 Act. While it is likely that any such offences would fall within the generic definition of an extradition offence given in sections 64 and 65 of the 2003 Act, even as amended by clause 138, it is unclear why the Government would want to risk encouraging the perception that persons suspected of these most heinous and serious of offences are no longer capable of being extradited to face trial. The UK has obligations under international law – both under international conventions such as the Geneva Conventions[73] and under customary international law – to ensure that such international crimes are investigated, prosecuted and punished. While the UK would be able, and perhaps even obliged, to exercise universal jurisdiction to prosecute such offences in the British courts, it is arguably preferable that such behaviour - where possible - is dealt with by the communities in which it occurred. Liberty therefore proposes this probing amendment, to test the Government's case for this puzzling legislative change.

Automatic right of appeal

Amendment 24 – delete clause 134

Part **11**, clause **134**, page **102**, lines **36**, **delete** clause **134**.

Effect

This amendment would preserve the automatic right to appeal against an extradition order, by deleting provision which would make the ability to appeal against an order subject to obtaining the permission of the High Court.

Briefing

Given the widespread concern about the inadequacy of our extradition system under the 2003 Act, Liberty is baffled that, instead of taking the opportunity to provide long overdue extradition safeguards, the Government is now proposing – by way of clause 134 - to *remove* a key safeguard for individuals at risk of extradition, by repealing the automatic right of appeal against an extradition order. Under current law, section 26 of the *Extradition Act 2003* provides that, if a judge orders an individual's extradition from the UK, they have the right to appeal that decision to the High Court, which will

[73] See, for example, Articles 49 and 50 of the First Geneva Convention (1949), and Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

then be able to consider if that decision was correct on the facts and in law. This is a crucial safeguard against the wrongful extradition of individuals, which allows them to raise new evidence which was not available at the time of the extradition hearing or to challenge the decision of the original judge. It was this automatic right of appeal which allowed Gary MacKinnon and his family to challenge the initial decision to extradite him to the US, leading ultimately to the decision not to extradite him. Without this right to appeal, he may have been extradited without any further consideration of the evidence – old or new – that showed that extradition would pose a serious risk to his right to life.[74]

Clause 134 of the Bill would amend section 26 of the 2003 Act to provide that such an appeal will only lie with permission of the High Court. This means that an individual will no longer automatically have the right to challenge a judge's decision to extradite them. No indication is given in the Bill of what criteria would be used to decide whether or not permission should be granted. For example, would the individual need to show that their appeal had a reasonable chance of success, or adduce new evidence, or show that their human rights are in jeopardy before an appeal would be granted? Potentially, a very strict test for granting permission could be developed, which could have the effect of depriving the majority of individuals of the chance to challenge the initial decision to extradite them. Once an individual has been extradited there is virtually nothing that can be done, should new evidence arise to show that it is contrary to the interests of justice or their human rights for them to be extradited. It is therefore essential that the arguments for extradition are thoroughly tested. If an individual risks facing investigation and prosecution far away from their home and loved ones, they should always have the opportunity to challenge any such decision to ensure that it is lawful and, in particular, that their human rights will not be put in jeopardy.

We strongly urge the Government not to remove one of the few safeguards in our woefully inadequate extradition system, but instead to carry out a wide-ranging review and reform of the Extradition Act 2003, with a view to creating much stronger safeguards for those at risk of extradition from the UK.

[74] See http://www.liberty-human-rights.org.uk/media/press/2012/liberty-welcomes-home-secretary-s-decision-not-to-extrad.php

Amendment 25 – delete clause 141

Part **11**, clause **141**, page **114**, line **16**, **delete** clause **141**.

This amendment removes the provision which would allow the Secretary of State to designate all the States which are party to a particular international convention for fast-track treatment as category 2 territories, and preserves the current system, where States party to the same treaties as the UK must be individually designated for category 2 treatment.

Briefing

Clause 141 of the Bill would change how countries may be designated for the purposes of deciding what procedure should apply to their extradition requests. As the law currently stands, under the *Extradition Act 2003*, each of the territories with which the United Kingdom has extradition arrangements is placed in one of two categories, countries being designated category 1 or category 2 by order of the Secretary of State according to the extradition procedures that the United Kingdom has negotiated with each country.[75] A separate set of procedures is provided for each category. Category 1 territories are States which are members of the European Arrest Warrant (EAW) system, and their extradition requests are effectively fast-tracked.[76] Liberty's opposition to the lack of safeguards in the EAW regime, and the ease with which it causes individuals to be extradited from the UK, is well known.

Category 2 States are other States with which the UK has extradition arrangements. If they make an extradition request, the Secretary of State must certify whether or not the offence in question falls within those extradition arrangements and then, following an extradition hearing, the Secretary of State may decide whether or not to extradite that individual.[77] While not as easy as under the EAW, designation as a category 2 territory therefore still means that it is easier to extradite an individual from the UK to that territory than if it were neither category 1 nor category 2.

However, where a territory is not within either category of extradition partners (that is, it has no extradition arrangements with the UK) but is a party to an international convention to which the United Kingdom is a party, that particular territory may be so designated by the Secretary of State and in relation to any specified conduct its

[75] Under ss1 and 69 *Extradition Act 2003*.
[76] Procedure for requests from category 1 territories is contained in Part 1 of the 2003 Act.
[77] Procedure for requests from category 2 territories is contained in Part 2 of the 2003 Act.

requests will be treated as if it were a category 2 territory.[78] Clause 141 of the Bill would change this system by amending section 193 of the 2003 Act, so that instead of designating a particular territory which is party to a convention for category 2 treatment, the whole convention would be designated for category 2 treatment in relation to certain specified conduct. For example, the Secretary of State could designate the *UN Convention on Transnational Organised Crime*, for which the specified conduct would be certain criminal offences. Then, if a State which is in neither category 1 nor category 2 made an extradition request, the Secretary of State could certify that that State was a party to the designated convention, that the offence in question fell within the specified conduct for that convention, and the request would then be treated as though the State were a category 2 State.

Liberty is concerned that this proposal would allow extradition requests from whole groups of countries to be fast-tracked simply because that country happened to be party to a designated convention. The changes made by clause 141 of this Bill would replace designation decisions taken on a territory-specific approach, which can take account of the factual situation in a particular State, with the block designation of groups of States, based on the formalistic criterion of whether they are party to a particular Convention. Such an approach would cut out the sensitive case-by-case analysis of the practice and political situation in a State, which must be carried out before any decision is taken to make it easier to extradite persons to face trial in their courts.

For example, the *UN Convention on Transnational Organised Crime* contains provisions that provide a basis for extradition between States Parties for crimes coming within the Convention and is expressly mentioned in the explanatory notes to the Bill as a Convention which could be designated under the new system. While the UK may be content to make it easier to extradite individuals to certain of its States Parties, it would clearly not be desirable to make it easier to extradite individuals to, for example, China, which is also a party to the Convention. Therefore, the new process forces the UK either to designate all parties to the convention as category 2, including those where the human rights of extradited individuals may not be guaranteed, or not to designate the convention at all, entirely depriving the UK of the potential reciprocal benefits it could bring for law enforcement. Liberty therefore opposes this proposal on the basis that a broad-brush, formalistic approach to the

[78] s193.

designation of territories is not the appropriate process for determining what procedure should apply in extradition cases, and that it risks lowering standards of human rights protection by allowing category 2 status to be granted to territories which do not show respect for human rights in practice. We urge the Government to pause and consider the workability of this proposal, as well as the risks involved for the human rights of those facing extradition from the UK.

Part 12 – Miscarriages of justice

Clause 143 of the Bill inserts a new subsection (1ZA) in section 133 of the *Criminal Justice Act 1988* which provides that, where a person has been convicted of a criminal offence, a miscarriage of justice has occurred "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent of the offence." This significantly increases the burden of proof on an individual who believes they have been the victim of a miscarriage of justice and wants to claim compensation. Concerns about this provision were raised at Committee stage, and we urge Members to table the following amendment at report.[79]

Amendment 26 – amend clause 143

Part **12**, clause **143**, page **115**, line **26**, **leave out** "the person was innocent of the offence" and **insert** "no reasonable court properly directed as to the law, could convict on the evidence now to be considered."

Effect

This amendment removes the proposed new test, which would significantly restrict the availability of compensation for miscarriages of justice, and instead codifies in statute the current, broader test which has been developed and applied by the courts.

Briefing

In the Second Reading debate the Home Secretary made the following statement:

> *…we have also clarified the test for determining eligibility for compensation when someone has been the victim of a miscarriage of justice. The absence*

[79] See the remarks by Rt Hon David Hanson MP; Committee debate; 14th sitting; 11 July 2013, at column 462.

of a clear statutory definition of what amounts to a miscarriage of justice for these purposes has led to repeated legal challenges and shifting case law.[80]

However, clause 143 as currently drafted would not simply 'clarify' the test, but goes far beyond this to limit significantly eligibility for compensation for miscarriages of justice. The proposed test is flawed in practical and principled terms, as described below. This amendment instead codifies the test which is currently used by the courts to assess eligibility for compensation, thus providing the clarification and clear statutory definition the Home Secretary called for, without unfairly denying compensation to those who have suffered miscarriages of justice.

Under existing law, to obtain compensation an individual needs to prove that "a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice." There has been disagreement in the case law on what is meant by a "miscarriage of justice." One view – that held by Lord Steyn in *R (Mullen) v Home Secretary*[81] - held that the concept of "miscarriage of justice" only included the cases of persons who were demonstrably innocent; that is, where the person concerned has shown that he is clearly innocent. On the other hand, in the same case Lord Bingham was of the opinion (based on Article 14(6) of the International Covenant on Civil and Political Rights, which enshrines the right to compensation for miscarriages of justice and to which the UK is a party) that the concept had a wider meaning. This wider meaning also encompassed cases where, although it is not possible to say for sure that a person is innocent, it is possible to say he has been wrongly convicted because of a "failure of the trial process". The Supreme Court adopted the latter, broader view in *R (Adams) v Secretary of State for Justice*.[82] This was reformulated by the Divisional Court in *R (Ali) v Secretary of State for Justice*[83] as a requirement that the individual prove "beyond reasonable doubt, that no reasonable jury (or magistrates) properly directed as to the law, could convict on the evidence now to be considered."[84]

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[80] See the Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, *Hansard*, 10 June 2013 per Theresa May at column 75.
[81] [2004] UKHL 18
[82] [2011] UKSC 18
[83] [2013] EWHC 72 (Admin)
[84] The amendment as now drafted alters the language slightly from that used by the judge (and from the proposed amendment in our Committee stage briefing), changing "jury (or magistrates)" to "court." This is to ensure that miscarriages of justice through conviction by an unconventional trial (such as the juryless Diplock courts employed in Northern Ireland) are not excluded by the formulation of the new test.

The proposed addition to the 1988 Act contained in the Bill would return the law to the narrower pre-*Adams* position and impose a significantly heavier burden on those who have been wrongly convicted. The current test asks them to show that a jury could not rightly find beyond reasonable doubt that they were *guilty*; the new test would ask the individual to go further and prove positively, beyond reasonable doubt, that they were *innocent*.

There are practical problems with this proposal. First, the individual is in effect being asked to perform the onerous task of proving a negative: that they did *not* commit the requisite acts with the requisite state of mind that would make them guilty of the offence. In addition, the individual may be claiming compensation in relation to a prosecution that took place decades ago, and obtaining evidence sufficient to prove *innocence* beyond reasonable doubt where the events took place in the relatively distant past imposes a significant practical burden. The end result will be that those who should be entitled to compensation will be unable to obtain it, due to the virtual impossibility of proving their innocence.

The particular class of individuals who would be detrimentally affected by this change in the law would be those for whom the evidence is sufficient to show that a reasonable jury could not on the evidence have found beyond reasonable doubt that they were guilty of the offence, but for whom that evidence is insufficient to prove their innocence beyond reasonable doubt. This is highly unsatisfactory as a matter of criminal law principle. The presumption of innocence operates as a key safeguard in our criminal justice system: if state prosecutorial authorities cannot evince evidence capable of showing beyond reasonable doubt that a defendant is guilty they should not secure conviction, and if an individual was found guilty in those circumstances they have been wrongly convicted and are entitled to compensation for the wrong they have suffered. If the proposed change becomes law, these individuals will not be able to obtain compensation unless they can fulfil the extra, extremely difficult step of proving their innocence beyond reasonable doubt, a demand that would never be made of them in the original criminal trial.

New Strasbourg jurisprudence indicating potential breach of Article 6(2)

In addition, there is a real possibility that clause 143 as currently drafted would violate the UK's obligations under the *Human Rights Act 1998* and the ECHR. Since the Bill was read for a second time, the Grand Chamber of the European Court of

Human Rights published its decision in *Allen v UK*,[85] which concerned the case of a woman whose conviction for killing her infant son was quashed, but who was refused compensation on application to the Secretary of State. While emphasising that Article 6 ECHR does not "*guarantee a person acquitted of a criminal offence a right to compensation for miscarriage of justice*,"[86] the Court made clear that the protection of Article 6(2) (the presumption of innocence) extended beyond the criminal trial itself:

"*the presumption of innocence means that where there has been a criminal charge and criminal proceedings have ended in acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected*."[87]

Therefore, where the individual can demonstrate the necessary link between the previous criminal proceedings and the later compensation proceedings, they are entitled to that protection of Article 6(2). The Court then referred explicitly to the competing judicial interpretations in *Mullen* and *Adams*, discussed above, and stated that the key question was "*whether, having regard to the nature of the task that the domestic courts were required to carry out, and in the context of the judgment quashing the applicant's conviction, the language they employed was compatible with the presumption of innocence guaranteed by Article 6(2).*"[88]

While no violation was found in the case in question, the Courts judgment strongly suggests that, were the "clearly innocent" test – that contained in clause 143 of the Bill - to be employed, it would fall foul of Article 6(2). The Court noted that while the "clearly innocent" test originated in Article 14(6) of the ICCPR, it had since been "*overtaken by the [Strasbourg] Court's intervening case-law on Article 6(2).*"[89] Crucially, the Court goes on to state that "*what is important above all is that the judgments of the High Court and the Court of Appeal did not require the applicant to satisfy Lord Steyn's test of demonstrating her innocence.*"[90] The clear implication is

[85] Allen v UK, App. No. 25424/09, 12 July 2013.
[86] Allen v UK, App. No. 25424/09, 12 July 2013, para 82.
[87] Allen v UK, App. No. 25424/09, 12 July 2013, para 103.
[88] Allen v UK, App. No. 25424/09, 12 July 2013, para 129.
[89] Allen v UK, App. No. 25424/09, 12 July 2013, para 133.
[90] Allen v UK, App. No. 25424/09, 12 July 2013, para 133.

that, if an applicant were required to satisfy that test to obtain compensation, as they would be should clause 143 be enacted, then the UK would be in violation of Article 6(2) ECHR.

The criminal law, through the presumption of innocence, accepts that sometimes individuals will not be convicted even though it is not 100% certain that they were innocent: it is guilt that must be proven. This proposed provision is inconsistent with this key principle of criminal law and as a result risks denying redress to individuals who may have endured years of unjustified imprisonment and censure. We urge the Government to heed the clear warning given by the European Court of Human Rights and uphold a long-standing principle of British criminal law, and reconsider this ill-advised proposal.

Part 12 – Protection arrangements; Court and tribunal fees

Clause 134 amends the *Serious Organised Crime and Police Act 2005* to make changes to the eligibility for protection arrangements of witnesses and other persons involved in police investigations. At present, a protection provider (such as the police) may make protection arrangements for a person if they fall within one of the categories of person described in Schedule 5 to the 2005 Act, and they believe that person's safety may be at risk by virtue of their being one of the persons described in Schedule 5. The persons listed in Schedule 5 include witnesses, jury members, members of the judiciary, and current and former prison officers. The Bill would repeal Schedule 5 and instead provide that a protection provider may make provision for "any person if he reasonably believes that the person's safety is at risk in view of the criminal conduct or possible criminal conduct of another person."

Amendment 27 – delete clause 145

Part **12**, clause **145**, pages **117**, line **20**, **delete** clause **145**.

Effect

This amendment would remove provision to narrow the test to one where a protection provider may make provision for "any person if he reasonably believes that the person's safety is at risk in view of the criminal conduct or possible criminal conduct of another person" and instead maintain the current test, that protection providers can make arrangements to protect a person specified in Schedule 5 to the Serious Organised Crime and Police Act 2005 if "the protection provider considers

that the person's safety is at risk by virtue of his being a person of a description" specified in Schedule 5.

Briefing

Liberty has long been involved in campaigning and lobbying to protect and promote the rights of those affected by crime. Liberty is concerned that, while appearing to make eligibility for protection broader, the Bill would actually limit access to protection for persons, such as victims and witnesses, involved in police investigations and court proceedings. Schedule 5, although an exhaustive list, is already very comprehensive. It lists 27 categories of person, including, for example, police officers and covert human intelligence sources, plus their family members, members of their household, or those who are or have been in a close personal relationship with them. Therefore it is unlikely that the new formulation is needed to allow extension of protection to a group which has so far been denied necessary protection. If this is the case, a general discretion to make protection available to others could be added to the exhaustive list.

Crucially, while no longer requiring a connection to criminal investigations or proceedings, the new formulation in fact narrows eligibility for protection. Rather than being eligible if it is considered that there is a risk to a person's safety due to their role in criminal investigation or proceedings, individuals would only be afforded protection if there is a risk to their safety "in view of the *criminal conduct or possible criminal conduct of another person*." This appears to require a specific criminal act or threat before protection will be provided rather than pre-emptive protection in circumstances where it is considered necessary.

In addition to the consequences for individuals that may now face safety risks unprotected, the proposed restriction of protection for witnesses, jurors, and others risks undermining the integrity of the criminal justice system and its ability to conduct effective and impartial criminal investigations and prosecutions. The evidence of witnesses and the impartiality of jurors, judges and law enforcement officers is crucial to the effective functioning of our justice system. If witnesses are not confident that they and their relatives and partners will receive whatever protection they need, they will be less willing to testify, which will make the prosecution's job of securing convictions correspondingly more difficult. Similarly, if judges and jurors are not adequately protected from harm, there is a clear risk that their decisions may come to be influenced by corresponding fear and insecurity. We urge the Government not to

continue with this proposal, which risks jeopardising the integrity of the criminal justice system in the UK.

Amendment 28 – delete clause 147

Part **12**, clause **147**, page **118**, line **32**, delete clause **147**

Effect

This amendment would remove the new power for the Lord Chancellor to make regulations making provision for court and tribunal fees.

Briefing

Sub clause 136(1) provides that "The Lord Chancellor may by regulations make provision in connection with court and tribunal fees." Broadly drafted powers for the executive to make secondary legislation always call for justification, as Ministers can effect significant legal changes with considerably less scrutiny by elected representatives in Parliament. However, Liberty is particularly concerned about the potential for this power to further restrict access to justice by imposing prohibitive fees for applications to courts or tribunals.

We are deeply disappointed by the Ministry of Justice's proposals to increase fees in the context of judicial review and wider Government attacks on access to justice and the Rule of Law.[91] The ability to challenge government action by judicial review is a key part of our constitution and essential to the rule of law in this country. This new power is broad enough to allow the Lord Chancellor to impose fees in all areas of the civil and criminal court systems. In reality those on extremely low incomes will qualify for legal aid, whilst the fee will provide no obstacle for wealthy people. The individuals starkly affected by these proposals will be individuals on modest incomes, who will likely already be struggling to meet the costs of litigation, and who risk being unable to vindicate their rights in court.

Katie Johnston

Isabella Sankey

[91] See Liberty's response to the MoJ's consultation 'Judicial review: proposals for reform,' January 2013, available at: http://www.liberty-human-rights.org.uk/pdfs/policy13/liberty-s-submission-to-the-moj-s-consultation-on-judicial-review-jan-2013-.pdf