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

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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.

Liberty Policy

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

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

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Overview

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

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

After second reading of the bill the Government published a further paper covering new clauses intended for publication at a later stage. As these have not yet been

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

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

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

introduced as amendments in Committee we will follow up with a further briefing if necessary.

Part 3 Appeals

Amendment 1

Part 3 Stand Part

Effect

This would remove clauses 26 to 28 from the Bill

Briefing

Part 3 will change the law so that the Court of Appeal (Criminal Division) cannot quash a criminal conviction where it is satisfied that the appellant committed the offence, unless not to do so would be contrary to the appellant's Convention rights.[4] The Government has stated that this change is needed to prevent judicial outcomes which "are damaging to public confidence in the criminal justice system".[5] In reality no evidence has been provided to support the suggestion that the current legal position has, in fact, given rise to a loss of public faith. Indeed, the current state of the law on quashing convictions does not seem to have prevented a recently reported rise in public confidence in the criminal justice system.[6] One suspects that if there were a loss of faith in the criminal justice system, connected to the law on quashing convictions, the real cause of this would be the political spin surrounding this latest policy, rather than pre-existing public perceptions. The current power for the courts to quash decisions where there has been a very serious abuse of process during or prior to trial is, in the long term, vital to maintaining confidence in the integrity of the criminal justice system.

On reading previous Government statements on this issue, one could easily get the impression that this is an issue which affects many cases each year; that hundreds of people are escaping justice on the basis of minor technicalities. In reality this is far from true. While Part 3 of the Bill no doubt raises important constitutional issues (discussed below), it would not affect more than a handful of cases.[7] The majority of

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

[5] Foreword

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

[7] The Partial Regulatory Impact Assessment to the "Quashing Convictions" consultation paper itself stated that the

convictions that are quashed on appeal do not involve cases in which the Court of Appeal is satisfied as to the appellant's guilt. This law change, while risking serious damage to the integrity of the criminal justice system and important constitutional principles would, in reality, be merely tinkering at the edges in terms of the Government's aims of rebalancing the criminal justice system "in favour of the victim and the law-abiding majority".

Even in the small number of cases which are in question here, the Court of Appeal will frequently order a retrial.[8] The Court already does this where the interests of justice require.[9] Where a retrial is ordered, the Government's primary arguments in favour of prohibiting the Court quashing the conviction in the first place fall away. If found guilty at the retrial, the person concerned would not evade punishment and justice would not be denied to the victim and the public. The Government's current proposals would prevent a conviction being quashed where there has been serious abuse of process even where, once quashed, the Court of Appeal would currently order a retrial. We accept that, in some cases, a retrial might not be possible or could be stressful or burdensome for witnesses. We do not, however, consider that these factors outweigh the public interest in quashing a conviction and ordering a retrial where this is necessary to maintain the integrity of the criminal justice system and to punish serious abuse of process or illegality on the part of the prosecution or police.

The Government has previously suggested that convictions are being quashed, where the court is satisfied as to the defendant's guilt, on the basis of minor procedural errors. In reality, those cases in which this power to quash convictions is used involve very serious failings either before or at trial, or serious illegality on the part of the prosecution or police. Furthermore, we understand that the trend of the Court of Appeal has in fact been to move away from allowing appeals based on irregularities of the trial process in cases where there has been extremely strong evidence of guilt.[10] As the facts of *Mullen* (below) demonstrate, the kinds of cases in which this power is used are a far cry from minor technicalities:

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potential number of individual convictions affected "will be very small, probably fewer than 20 each year" (para 44).

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

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

[10] Response by the CCRC to the Government's previous consultation on this issue.

***R v. Mullen*:**[11]

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

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

> "to quash a conviction where there is strong evidence of guilt, without ordering a retrial, will bring the criminal justice system into disrepute, rather than protect its integrity. According to that argument it is wrong to punish the public and deny justice to the victim in this way; if the system or those who operate it are at fault it is they and not the public which should be punished or required to learn lessons."[12]

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

There are compelling reasons of principle why, in some exceptional cases, it would be appropriate for the Court of Appeal to quash a conviction even when there is clear

[11] [2000] Q.B. 520

[12] Para 26, "Quashing Convictions" consultation paper.

evidence of guilt. A statutory prohibition on quashing convictions in such cases would only be acceptable if justice were no more than a question of determining the guilt of the appellant. We do not agree with this over-simplistic assertion. In a case such as *Mullen*, for example, we believe that justice required the conviction to be quashed, even though the Court did not doubt his guilt.

Liberty does not, however, take the opposite extreme position that the guilt of the appellant is irrelevant to justice and that justice is purely a question of procedural propriety and ensuring that those in power comply with the law. As the Court of Appeal has stated in *Randall* "[i]t would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice."[13] For this reason we would not support a statutory formulation which meant that any procedural error or illegality by the State led to the conviction being quashed.

Rather than legislation which takes an absolutist position on either side, we believe this to be an area where the only sensible way to proceed is to trust the Court of Appeal to make sensible decisions on a case by case basis. Such decisions will no doubt be difficult, often requiring the Court to balance conflicting and important interests: protection of the rule of law, justice for the appellant and also, importantly, justice for victims and society as a whole. No doubt there will be cases where the Government and/or Liberty would have reached a different decision to the Court of Appeal. It is, however, only the courts that have the independence and impartiality, and which are in the position to perform, the necessary balancing act on a case by case basis.

In those rare cases where the Court of Appeal has quashed a conviction, notwithstanding clear evidence of guilt, it has cited a range of compelling reasons why it could not allow the conviction to stand. A consideration of the reasons cited in individual cases demonstrates the responsible and thoughtful manner in which the Court has approached the difficult balance required. The factors cited explain why, even where there is clear evidence of guilt, it will sometimes be appropriate to quash a conviction. It is clear that in *Mullen*, for instance, many factors stacked up against the public interest in rejecting the appeal and in favour of not allowing the conviction to stand (maintaining the rule of law, discouraging seriously unlawful activity by

[13] *R v. Randall*, [2002] 1 W.L.R. 2237

agents of the state and encouraging full disclosure by the prosecution). The Court explained that the abuse which enabled the trial to take place meant that it was "offensive to justice and propriety to try the defendant at all".[14] Accordingly, and in our view rightly, the Court considered that "in the highly unusual circumstances of that case, the conviction was unsafe as it was unlawful, resulting as it did from a trial which should never have taken place.[15]

In reality, the proposals in Part 3 of the Bill misunderstand and downplay the wider constitutional role of the Court of Appeal in appeals against criminal convictions. The proposals would restrict the Court's power to ensure the integrity of the criminal process and, in some cases, to ensure that the defendant has received a fair trial (in the wider, abuse of process sense). We also fear that it would undermine the moral standing of the Court of Appeal if it allowed a conviction to stand which resulted from serious illegality or a serious breach of procedural safeguards by another limb of the State. Rose LJ explained that the decision to quash the conviction in *Mullen* "arises from the court's need to exercise control over executive involvement in the whole prosecution process".[16] The courts play an important constitutional role in checking abuses of power and illegality by the Executive.

Dicey identified equality before the law as a key element of the rule of law and described this as meaning that: "With us, every official, from the Prime Minister down to a Constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen".[17] Those who enforce the law should also obey the law and should not benefit from breaches of it. It would be contradictory for the state to take advantage of a breach of the law which it itself has committed. The proposed change would disturb the existing separation of powers by restricting the power for the Court to check serious illegality and abuse of process by the Executive in cases such as *Mullen*. While it is clear why the Executive would prefer the courts not to have this power, Liberty hope that Parliament would resist any attempts to remove this important constitutional check on the Executive.

The Government's response to such arguments is that the Court should not punish victims of crime and the public in general by quashing the conviction of a person who

[14] Ibid, 537
[15] Ibid, 540
[16] Ibid, 537
[17] Dicey, *Law of the Constitution*, 10th edition 1959, 189

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

In many of the cases that are targeted by these proposals the issue in question was whether the prosecution was an abuse of process. In *Mullen,* for example, the trial judge would have stayed the proceedings as an abuse of process had he been aware of the circumstances of Mullen's unlawful rendition. As Rose LJ explained in the Court of Appeal, this was clearly a case where a stay of proceedings would have been called for because the state's actions were "so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed."[18] If, as the majority of the Royal Commission considered, it is illogical for the Court of Appeal to exercise powers in respect of deficiencies in a prosecution that are not available to the trial judge, it is equally illogical to deny the Court powers to address an abuse of process that are available to the judge at first instance. We are concerned that, once the Court of Appeal's power to quash a conviction outright where there has been serious malpractice on the part of state authorities is removed, the next step would be to take that power away from the courts of first instance. The power to stay proceedings as an abuse of process is an important constitutional safeguard which should not be restricted or removed.

Nor, it should be noted, is it satisfactory to argue that the introduction of the new subsection (1B) would assuage these concerns, for although an unfair trial (contrary to Article 6 of the ECHR) will generally result in an unsafe conviction, an unsafe conviction may not necessarily be unfair, using the ECHR meaning of that term. For instance, the circumstances in *R v Mullen*, while certainly an abuse of process (a

[18] Lord Steyn in *R v Latif* [1996] 1 W.L.R. 104

domestic law concept), may not have been in breach of Article 6 of the ECHR as they did not concern the trial, but rather how Mullen was brought to trial.

Another issue is that, in our legal system the determination of guilt or innocence is not a question for judges sitting in the Court of Appeal (Criminal Division) but for the first instance court and the jury.[19] This is still the case, notwithstanding attempts to remove juries from some categories of case, most recently serious fraud trials. If the power of the Court of Appeal to quash convictions is expressly restricted by reference to the Court's determination of guilt or innocence, the Court would be required to make such determinations in many more cases than at present. This is indeed what is proposed, the Explanatory Notes to the Bill stating that "It would be for the Court to form their own view as to guilt on the evidence available to them".[20] This would represent a fundamental change of the Court of Appeal's role and the usurpation of the role of the jury in determining guilt. It could also have an unfortunate practical result. If the Court of Appeal more frequently determined that a finding of guilt at first instance was incorrect, public faith in first instance trials and the ability of the jury to decide guilt would inevitably be undermined. The result would be more appeals against convictions and lower public confidence in the CJS.

Amendment – alternative to amendment 1

Clause 26, page 19, line 25, after 'conviction' insert 'either'
Clause 26, page 19, line 27, after 'appeal' insert 'or where they are satisfied that there had been a substantial abuse of process prior to conviction'

Effect

This extends the scope for the Court of Appeal to allow an appeal against conviction to include situations where they think that there had been a substantial abuse of process.

Briefing

As clause 26 stands it allows the Court of Appeal to allow an appeal against conviction if they think it would be incompatible with the appellant's convention rights. As we have stated above this would not be of benefit in the case of *Mullen* where the

[19] Cf *R v Hickey* 1997
[20] Paragraph 228

impropriety occurred prior to the commencement of any proceedings. As a consequence Article 6 (the Right to a Fair Trial) would not have been engaged.

While we are still concerned about the impact of Part 3, if it is to be introduced, a more general provision covering situations where there had been abuse of process would allow the Court of Appeal to allow conviction in a *Mullen* type scenario.

Other Criminal Justice Provisions (Part 5)

Amendment 2

Schedule 11 paragraph 3, page 161, line 40 delete '(c) punishing the offender'

Effect

This will remove the ability to impose cautions on youth offenders with the object of imposing punishment

Briefing

Liberty has profound concerns about the system of reprimand and final warning system for people aged 16 and 17 introduced in the Crime and Disorder Act 1998. This two-step system leads automatically to court if the young person offends again within two years.[21] This system is inflexible and unjust. It ties the hands of police officers, preventing them from making reasoned judgments on a case-by-case basis about how best to deal with young people with whom they come into contact. It acts as a funnel, channelling young people into the criminal justice system and removing the option of informal intervention as a way of tackling low-level offending. The result is growing numbers of young people embroiled in a criminal justice system which, once entered, it is notoriously difficult to escape.

In Clause 53 Government proposes to gives the police and prosecutors an alternative to reprimand and final warning. It proposes to extend the adult conditional caution scheme under Part 3 of the Criminal Justice Act 2003 (the CJA) to young people aged 16 and 17. As we have noted above, we consider greater flexibility to be needed. We are not, however, convinced that this will be delivered by these

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

proposals. We fear that, in practice, youth conditional cautions could operate as a short cut to punishment for 16 and 17 year olds.

Cautions are supposed to be an alternative to entering the criminal justice process, a non-punitive means of encouraging a person not to re-offend. We consider such a second chance to be particularly important in the context of young offenders. There is, however, a real danger that conditional cautions will be used as a short-cut to punishment, intended for use in large numbers of cases. While we greatly welcome Clause 54 which would allow warnings, reprimands, and simple and conditional cautions to become spent,[22] this is not enough to allay our concerns about greater use of conditional cautions.

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

> "contrary to the principles of justice for prosecutors and police to be able to impose punishment without the involvement of the judiciary. A democratic legal system ensures that an independent tribunal—the judiciary—should sentence and impose punishment, thus preventing bias from prosecutorial authorities". [23]

Liberty agreed.

Using cautions as a fast-track to punishment is an even greater concern when used for young offenders. Many young offenders could benefit significantly from constructive measures and engagement designed to make them understand the consequences of their behaviour in the hope that they will change their ways and become responsible adults. A simple fine or compulsory work will not achieve this.

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

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

The UN Guidelines on the Prevention of Child Delinquency recognise the need for special measures designed to “avoid criminalizing and penalizing a child” which take notice of the fact that “in the predominant opinion of experts, labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons.”[24]

While, in theory, a person does have a choice about whether to accept a caution we would suggest that the reality, particularly for youths, is rather different. The “offender” may not have a free choice about whether to accept the caution. The freedom to refuse a caution is likely to be limited by the youth’s fear of prosecution, limited understanding of the options available and limited access to legal advice. The Bill fails to address the practical reality that those suspected of crimes may have limited effective choice about whether or not to accept a caution. Because the process is not truly voluntary, the proposals in the Bill could be seen as allowing the police and CPS to act as investigators, prosecutors and judges.[25] Moreover, since the conditions that may be imposed include a financial penalty, there is also a serious concern that the proposals could lead to two tiers of punishment. A youth would be unable to accept the caution if s/he cannot afford to pay the fine attached to it or who does not have parents who could give or lend them the money. S/he would, therefore, be forced to go to court and, if found guilty, end up with a criminal conviction.

Amendment 3

Clause 62, page 42, line 38 - delete ‘2’ insert ‘6’
Clause 62, page 44, line 1 - delete subclause 133A (5)

Effect

This will extend the limitation period on compensation for miscarriages of justice from 2 to 6 years and will remove the upper cost limit

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

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

Briefing

In the words of the Ministry of Justice press release, which accompanied the introduction of the Bill, clause 62 is designed to "[bring] compensation for the wrongly convicted into line with that for victims of crime." Of course Liberty agrees that victims of crime should receive compensation for their loss and suffering. The perpetrator of the crime should rightly bear the primary responsibility to provide compensation given that their wrong-doing is to blame. It is for this reason that a victim of crime can take a civil action against the criminal. It is also entirely right that the state should provide compensation to victims under the Criminal Injuries Compensation Scheme (the CICS). Although the state is not directly responsible for the victim's suffering, this compensation acknowledges the fact that perpetrators of crime often have limited financial means as well as the fact that the state owes a moral obligation to provide the basic help its citizens need in difficult times.[26]

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

The position of the state, and its proper responsibility to pay compensation, is entirely different in relation to a victim of a miscarriage of justice than it is in relation to a victim of crime. The State has, at best, limited control over the criminal actions of individuals on the street. For this reason it is right that the criminal should themselves bear the main burden for, as far as possible, restoring the victim to the position they were in before the wrong-doing. By contrast, in the case of a miscarriage of justice the wrongdoing is committed by the state – no one else can be held to account for this.[27] Where the state makes a mistake and wrongly convicts someone of a crime, there is no justification for the state escaping its responsibility for compensating the victim of the mistake so that as far as possible the victim is put in the same position as if the mistake had never happened. As cases like those of Angela Cannings and

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

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

Sally Clarke demonstrate so clearly, full financial compensation is not in itself enough to enable people to rebuild their lives after being wrongfully convicted. It is, however, the very least that could reasonably be expected of the state when it makes a mistake which has such terrible consequences.

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

New Criminal Offences (Part 6)

Amendment 4

Clause 66(2), page 46, line 44 at end of line insert new subclause () '(i) that they reasonably believe that no person portrayed in the image was made to act against their will (ii) for the purposes of this section whether a belief is reasonable is to be determined having regard to all the circumstances.

Effect

This will create an extra defence to the offence of 'possession of extreme pornographic images'. It will allow a person to rely on a defence of a belief that is reasonable in the circumstances that no-one portrayed in the image was coerced.

Briefing

Clauses 64 to 67 of the Bill create a new offence of possession of extreme pornographic images. An image will be 'pornographic' (Clause 64) if it appears to have been produced solely or principally for sexual arousal. It is 'extreme' if it falls into one of specified categories: 1) threatening or appearing to threaten life; 2) resulting or appearing to result in serious injury; 3) involving or appearing to involve sexual interference with a human corpse; or 4) performing or appearing to perform

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

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

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

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

criminalised by carelessly drafted, over-broad criminal offences. We are concerned about the breadth of the proposed new offence might criminalise people who cause no harm to others and who possess pornographic material involving consensual participants.

It is worth noting the criminal law currently in operation regarding the possession of pornography. Possession of child pornography is an offence under the Protection of Children Act 1978 which has been extended to cover generated or 'pseudo-images' under Section 84 of the Criminal Justice and Public Order Act 1994 and further extended to cover images of young people up to 18 years of age by virtue of Section 45 Sex Offences Act 2003 (SOA). Possession of extreme pornography has not, however, previously been a criminal offence, unless it satisfies the definition in the Obscene Publication Act 1959 (OPA) and is accompanied by an intention to distribute for gain. The definition of an obscene publication in S1(1) of the OPA is one which will "tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."

The justification behind the offence should be appropriate protection of those involved in making the pornography. Only possession of material where they have not acted of free will, have not consented or have otherwise been coerced should, therefore, be included. Media coverage of this subject has indeed tended to imply that the offence targets exploitative pornography causing harm to those involved against their will. The reality, however, is that at present the offence goes much further. If parliamentarians feel that a new offence should be created to protect participants, we would emphasise the need for limitation.

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

In relation to images being 'real' it is understandable that this should be criminalised when, for example, life is threatened. However some pornography involves willing participants suffering 'real' injury through BDSM acts.[28] While there is a requirement that the injury be 'serious', this is not defined. If 'serious' is equated with the level of injury covered by the offence of Grievous Bodily Harm (Section 20 of the offences Against the Person Act 1861) it would cover non permanent cuts and other relatively minor injuries. The fact that the offence would also cover images that 'appear to be real' makes it even more problematic. It is presumably the role of a consenting performer in pornography to 'appear real'. Therefore, the offence would appear to catch footage which is no more 'real' than the depiction of a violent sexual assault or murder in a classified film.

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

The defences available are limited in that they only protect those who had a legitimate reason to have the material[29] or who were not aware they possessed it. The requirement of consent of the Director of Public Prosecutions before any prosecution can occur does provide a bulwark against inappropriate prosecution and we are pleased to see this provision included (Clause 64 (9)). However, the broad definition means that many people will be committing the offences regardless of whether they are actually prosecuted. Liberty maintains that legislation should provide sufficient clarity so that people are aware of the parameters of criminal activity.

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

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

The purpose of the amendment is to create an additional defence available where a person believes that those involved in the material they possess consented to their participation. While this might be difficult to prove in the case of mass produced pornographic images, it could provide a useful defence in the case of images made by consenting couples, or groups, for their own use. In order for this defence were to mirror the approach to consent in the SOA[30] it would also require that such a belief were 'reasonable'. The introduction of a need for reasonable belief in consent in the SOA arose from problems arising under the previous law which resulted in defendants being acquitted if they successfully argued that they genuinely believed that a person consented to a sexual assault even if that belief was itself unreasonable. It is arguable that such an approach would be difficult to adopt as there would be no evidential basis (such as interaction between the person in possession of the material and those involved in it) for a jury to determine whether or not the belief in consent was reasonably held. However, we accept the rationale that an unreasonably held belief in consent should not allow acquittal when material clearly involves coercion.

This amendment is also intended to address the uncertainty mentioned above arising from the question of what appears to be real. The current drafting is unclear as to whether 'real' means i) that it is something acted but the intention is that it should appear to be a real act or ii) It is 'real' in that there is no acting i.e. there is coercion. The amendment means that something whether or not something is 'real' can be determined by evidential assessment as to the defendant's belief as to whether a person was forced to participate or not.

Amendment 5

Clause 66, Page 46, line 35 – delete 'prove' insert 'show'

Briefing

All the defences available for the offence of possession of extreme pornographic images place the onus of proof on the defendant. This means that if the person wishes to rely on any of these defences they must satisfy the court on a balance of probability that they apply. If the usual criminal law evidential burden were applied the onus would change in that the prosecution would be required to prove every element of the prosecution case beyond doubt i.e. that there was no legitimate

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

reason for possessing the image, that the person had seen the image, and that it had not been solicited.

Reverse burdens of proof can be compatible with the right to a fair trial under Article 6 of the Human Rights Act (the Right to a Fair Trial). One of the key questions that needs to be established is whether the reverse burden relates to something that is difficult to prove. Proving a legitimate reason (such as academic research) might be a reasonable burden as there is likely to be other evidence that can be adduced to support this reason. However, proving that the defendant *didn't* see material or that they *didn't* request it would be extremely difficult to establish. The reverse burden would therefore be extremely onerous if thee defences were relied on.

It should be remembered that the offence is one where possession of the material presumes guilt. As a consequence, we believe that the application of the defences would be fairer if the traditional onus of the criminal law remains on the prosecution.

Violent Offender Orders (Part 8)

Amendment 6

1) Part 8 Stand Part

2) In Section 42 of the Family Law Act 1996 (c.27)

i) insert new subsection '42 (2) (c) a chief officer of police applies for an order to be made for the benefit of a person associated with the respondent if the respondent–

(a) resides in the chief police officer's police area, or

(b) the chief officer believes is in, or is intending to come to that area

ii) insert new subsection '42 (9) for the purposes of this section a person who is associated with the respondent can include a person who the court is satisfied is at risk of molestation from the respondent'

Effect

This will remove the Violent Offender Order provisions from the bill and instead extend the scope of non molestation order application under the Family Law Act 1996 to cover chief police officers making applications for non molestation orders on behalf of a person who might be at risk of violence. It will also extend the scope of application so that 'association' under the Family Law Act 1996 can cover those who are at risk from molestation from a specific person.

Briefing

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

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

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

The VOO is described as a preventative civil measure designed to protect the public from the risk of serious violent harm caused by a qualifying offender. Breach of a VOO would be a criminal offence. We appreciate that VOOs can only be imposed following conviction (Clause 84 (4)[31]. However, Liberty has a number of concerns about the way VOOs will operate in practice. At the heart of these is the extraordinary scope available for the imposition of restrictions on individual freedom. It is worth noting that orders should be unnecessary for anyone who has been convicted of a serious offence of violence. This is because the CJA provides that anyone convicted of a specified offence, punishable by more than 10 years imprisonment, will be given

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

an indefinite period of imprisonment for public protection. Once released from prison they will be on licence for a minimum of a further 10 years. After this they can apply to the Parole Board for termination of the licence. Presumably anyone who might be considered such a risk as to justify an application for a VOO would not have their licence terminated by the Parole Board.[32] If still on licence they could, of course, be subject to conditions and be subject to recall. As an example, the offence of wounding with intent to do grievous bodily harm[33] carries a discretionary life sentence. Anyone convicted of this offence would be subject to licence for a very long period. If they continued to present a risk, this might be for the remainder of their life.

Liberty believes that the principal purpose for VOOs (at least initially) will be to cover situations where the new sentence regime under the CJA was introduced after the person's conviction but where that regime would otherwise have been appropriate. There are likely to be a number of offenders, perceived to pose a risk of violence, who are due to be released over the next few years who would fall into this category. The concerns expressed by the JCHR are of particular significance here. If the use and scope of orders is excessively broad it is likely they will amount to being in breach of Article 7 of the European Convention on Human Rights, which prevents punishment without law. Article 7 provides (amongst other things) that 'A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed'.[34] If VOOs are excessively restrictive (which is quite possible given the potential scope of orders outlined in the Bill) they will be retrospective punishment and therefore violate Article 7.

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

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

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

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

The range of restrictions envisaged by the Bill indicates that VOOs might raise similar concerns to ASBOs. Experience with these has shown that overuse and a lack of specificity have resulted in extremely broad ASBOs being issued. These often contain restrictions which set people up for failure because people are unable to avoid breaching them. The danger with VOOs lies in a risk assessment taking place that identifies someone as being a 'risk of serious harm' (Clause 83 (2)) but without needing to identify a particular person or persons they are a risk to[35]. Because they are identified as a general risk, they are likely to be made subject to a broadly drafted order. When similar situations have arisen with ASBOs there has been a tendency to make them wide in scope. Experiences with ASBOs have shown that the broader the order, the greater the likelihood of breach.

Liberty agrees that there may be cases where identified individuals are reasonably considered to be at risk of serious harm from an individual where it would be entirely reasonable to provide additional legal protection. At present the most likely available order would be the non-molestation order, breach of which is a criminal offence punishable by five years imprisonment.[36] Such orders are, however, limited in scope in that they are reliant upon the person who wishes to be protected making an application to the court for the order.

Rather than creating the VOO, Liberty proposes the extension of the existing non-molestation regime instead. This amendment allows a chief officer of police to apply for the order. This enables non-molestation orders to be used to provide protection for those specifically at risk and their families without the need for them to undergo the difficult, stressful and traumatic process of obtaining an order themselves. The amendment also extends the application of non-molestation orders to cover those in danger of molestation who are not in a relationship with the person against whom the order is made.

The crucial difference between the amendment suggested here and the VOO is that the non-molestation order would be targeted specifically to protect named persons who are identified as being in danger of violence and so the conditions imposed would be limited to those necessary to protect those identified individuals.

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[35] Clause 83 (2) (b) allows for the making of an order to protect 'the public in the United Kingdom'
[36] Breach of non-molestation orders is an offence under Section 1 Domestic Violence, Crime and Victims Act 2004.

Amendment 7 – Alternative to Amendment 6

i) Clause 83, Page 56, line 30 - delete 'the public' insert 'a person or specified persons'

ii) Clause 83, Page 56, line 36 – delete line 36 to end line 37 insert 'any specified members of the public in the United Kingdom'.

iii) Clause 86, Page 58, line 44 delete 'the public' insert 'a person or specified persons'

Effect

This will restrict Violent Offender Orders so that they must be used in order to protect specified persons rather than the public at large.

Briefing

As discussed above, our principal concern over the use of VOOs is that they will be so broadly drafted so as to make breach likely. If adoption of the non molestation order model proposed above does not occur, this amendment will retain the VOO regime while ensuring that the order applies for the protection of those who are specifically at risk rather than the public as a whole.

Anti-social Behaviour (Part 9)

Amendment 8

i) Schedule 17, Paragraph 11 (B) (4), page 189, line 11

At end insert new subsections

'(d) the making of the order is not a disproportionate response to the disorder or nuisance caused;

(e) the making of the order will not cause unnecessary hardship or suffering to the families of those against who the order is made;

(f) appropriate steps have previously been taken to address the address the disorder or nuisance without success'

ii) Schedule 17, Paragraph 11, page 189, line 30

At end insert new subsection

() No closure order shall be made unless the magistrates' court is satisfied that appropriate arrangements have been made by the local authority for alternative accommodation and support for those affected by it

Effect

This amendment will restrict the making of premises closure order. A magistrate's court will not be able to make an order unless satisfied that the making of the order is not disproportionate to the nuisance caused, that it will not cause undue hardship or suffering and that unsuccessful attempts have been made to address the behaviour. It also requires that the local authority make appropriate alternative arrangements before an order can be made.

Briefing

Part 9 of the Bill is the latest in a long-line of initiatives designed to deliver the Government's "respect" agenda. The Bill proposes to extend the existing powers to close down properties used for the sale drugs, to cover properties where there is a problem with anti-social behaviour (Clause 103 and Schedule 17). In the Government's previous consultation on this issue, behaviour that could result in the closure of a property was stated to include frequent drunken parties; high numbers of people leaving and entering, intimidating residents and criminals running businesses from properties. It also proposed, as the current Bill appears to, that closure would apply just as much to owner occupiers and private tenants as to those in social housing.

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

Existing closure powers have been described as 'working well and … welcomed by local communities for bringing immediate relief to their neighbourhoods'.[37] This may be true. When closure orders were originally proposed Liberty agreed that they were

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

a proportionate and potentially effective way of addressing a significant problem. However, we are concerned to see that drug-related closures appear to be having unfortunate consequences. In November 2006 *The Guardian* newspaper ran a story saying that closures were resulting in displaced drug dealers taking over properties of the vulnerable, a practice called 'cuckooing':

> '*They [drug dealers] are now targeting older people, vulnerable young people or people with mental health problems on housing estates, befriending them, giving them drugs and then taking over their homes.*[38]

Cuckooing demonstrates that closure does not necessarily end a problem but can merely displace it. The same will apply to closures on the basis of anti-social behaviour. Simply closing a property will not address the cause of anti-social behaviour.

Closure for anti-social behaviour will usually differ from drug related property closures. Drug closures are more likely to be properties used primarily for the sale of drugs without settled residents. Anti-social behaviour closures are more likely to affect properties used as a main family residence. According to the original consultation, closure notices are also envisaged for activities which, in themselves, are not unlawful - such as having people frequently entering and leaving property.

The original consultation emphasised the need for appropriate caution and safeguards when considering orders stating,

'Where it is necessary to utilise a Closure Order, we will build robust guidelines for the consideration and operation of the closure process. The police and other agencies will be expected to show that consideration has been given to whether a closure is the most appropriate course of action. The needs of any vulnerable people in the household, including children and young people, will need to be considered. Their safety must not be compromised and a clear plan needs to be put in place to safeguard them and promote their welfare if the closure goes ahead. And a longer-term plan must also be put in place to deal with the underlying nuisance behaviour. Effective consultation between multi-agency partners will be essential to the success of a Premises Closure Order, should one prove to be necessary. Agencies will need to work together, so the police will need to consult the local authority and other local agencies.

[38] http://society.guardian.co.uk/drugsandalcohol/story/0,,1947501,00.html

Clear and sensitive distinctions will need to be made for those who are ultimately targeted as part of the order. On the one hand, there will be a small, hardcore criminal element which needs to have their safe haven removed from use. But, we appreciate that on the other hand, there may be extremely vulnerable cases and the decision to pursue the closure must have careful and considered regard to the welfare of those caught up in the enforcement activity'[39].

Unfortunately the bill does not reflect this emphasis on safeguard and limitation. Because of this we believe it appropriate to write appropriate protections onto the face of the Bill. The grounds for refusing a closure order should be extended so that no order can be made unless the court is satisfied i) that appropriate steps have already been taken to address the behaviour ii) that the measure is not disproportionate to the nuisance caused and iii) that it will not result undue suffering or hardship. As indicated in the consultation, it should also be a requirement that appropriate measures are in place to provide support for those subject to an order

Special Immigration Status (Part 11)

Amendment 9

Clause 115, page 77, line 17 - delete 'is a member of the family of' insert 'is a spouse of'

Effect

This will restrict the designation of special immigration status so that it can only apply to a 'foreign criminal' and their spouses but not to their children.

Amendment 10

Clause 116, Page 77, line 36, delete subclause (4)

Effect

This will limit the definition of 'foreign criminal' to exclude those to who Article 1F of the Refugee Convention applies

[39] Page 15

Amendment 11

i) Clause 118, page 78, line 28 at end insert new subclause

() Any condition imposed under subsection 2 condition must not

(a) be excessively restrictive in all the circumstances;

(b) have a punitive impact upon the designated person;

(c) be intended to prevent the commission of further offences

Effect

This will limit the extent of condition that can be imposed upon someone designated with special immigration status.

Briefing for Amendments 9, 10 & 11

Liberty has a number of concerns about the proposed new immigration status (SIS) in Clauses 115 to 122 of the Bill. In outline, these provisions will enable the Home Secretary to designate a non-British citizen as subject to SIS if; the person has been convicted of an offence (in the UK or overseas) and has been sentenced to at least two years' imprisonment Clause 116 (2); The person has been convicted of an offence specified by the Home Secretary, or an equivalent non-UK offence, even if not sentenced to two years' imprisonment (Clause 116(3)); or; there are serious reasons to consider that the person has: committed a crime against peace, a war crime or a crime against humanity in the UK or overseas, committed a serious non-political crime outside of the UK or been guilty of acts contrary to the purposes and principles of the United Nations (Clause 116 (4)). Designation can occur if the person cannot be deported because to do so would be unlawful under the Human Rights Act 1998 (Clause 115 2(b)). The effect of a designation is that a person does not have leave to enter or remain in the UK (Clause 117) and conditions can be imposed on them (Clause 118).

Special immigration status is primarily being introduced to allow for restrictions to be imposed on foreigners (or their family members) who have been convicted of offences and who would otherwise face deportation but for the fact that, for example, if this occurred it is likely that they would face torture or death. As well as applying to those who have been imprisoned for over 2 years, this will apply to people who have received even a very short custodial sentence for a specified offence. These offences are those listed in an order made under Section 74(4)(a) of the Nationality Immigration and Asylum Act 2002. The Order made under this section is SI 2004 No. 1910[40] which lists a range of statutory and common law offences. The offences listed in the order include relatively minor crimes such as criminal damage, theft and threatening unlawful violence. There is, in fact, no need for a person to have been convicted of any offence to become subject to special immigration status. Clause 116(4) allows SIS to be applied to anyone to who Article 1F of the Refugee Convention. As mentioned above Article 1F applies to anyone who '*there are serious reasons for considering* has committed a crime…etc'. This means that SIS can be applied to people who have no conviction at all.

As SIS can be applied to anyone who is convicted of relatively minor offences, or even someone who has never been convicted it is important that any conditions imposed be appropriate and not excessive. This is particularly relevant as SIS can be imposed on family members including children[41]. We have significant concerns about the imposition of conditions on the innocent and on children in any circumstances. The UN Convention on the Rights of the Child makes specific provision to ensure that children are not disadvantaged as a consequence of the actions of their parents. Article 2.2 of the Convention states that '*States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members'*.

When imposed without any mention of necessity, proportionality or purpose these concerns are compounded. Clause 118 simply states that the Secretary of State can impose conditions relating to residence, employment or reporting to the police or

[40] http://www.opsi.gov.uk/si/si2004/uksi_20041910_en.pdf
[41] For the purposes of the Bill family is given the meaning in Section 5(4) of the Immigration Act which covers spouse and children under 18.

immigration officers. We see two significant problems with the breadth and brevity of the Bill.

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

The second problem that might arise from the use of SIS restrictions is their purpose. SIS is primarily imposed upon those who have been imprisoned for offences. As a consequence restrictions are arguably intended to serve a preventative purpose. They are intended to stop a person who would otherwise be deported from being able to commit any further crimes. The problem with this is that this means the restrictions are nothing to do with immigration but are related to crime prevention. As a consequence, the fact that they can only be imposed upon those who do not have residential status means they will be discriminatory. This was the problem experienced with the detention of foreign nationals under Part 4 of the Anti Terrorism Crime and Security Act 2001, found to be discriminatory by the House of Lords Appellate Committee in 2004.

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