Liberty's Committee Stage Briefing and Amendments on the Policing and Crime Bill in the House of Lords

June 2009

About Liberty

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

1. This briefing sets out Liberty's suggested amendments to the Policing and Crime Bill. This Bill has increased substantially (as has our briefing) since its introduction in the House of Commons, with a large number of concerning provisions introduced as the Bill made its passage through the Commons. Among our concerns are the powers contained in Part 4 which would allow courts to issue injunctions 'to prevent gang-related violence'. This proposal continues the worrying trend of blurring the divide between the criminal and civil law and, as described in detail below at pages 18-31, may well be both counter-productive and discriminatory. The Bill now also contains the contentious power to make regulations to deal with the issue of DNA retention and destruction. If this provision passes unamended Parliament will not be given the opportunity to fully debate the substantive procedures regarding DNA retention and destruction which would be left to secondary legislation (this issue is covered at pages 47-57). The Bill now also contains amendments which would undermine the system of independent vetting of persons wishing to work with children or vulnerable adults. As well as suggesting amendments to what is proposed here, we have taken the opportunity presented by this Bill to propose additional amendments to the *Safeguarding Vulnerable Groups Act 2006* to ensure that system established under that Act to ensure independent vetting (under the Independent Safeguarding Authority) is not undermined by the parallel retention of enhanced criminal records certificates (see briefing at pages 38-47). Finally, the Bill also contains some worrying amendments to the *Extradition Act 2003*. Liberty has had long-standing concerns over the current system of extradition and its potential for unfairness and we have produced a separate briefing on the extradition aspect of this Bill and to propose amendments to seek to rectify current practice.[1]

Part 1 – Police Reform

Amendment 1 – clause 1

Clause 1, page 1 – stand part.

[1] Liberty has recently launched a new campaign, *Extradition Watch*, which seeks to end unfair extradition practices and amend the *Extradition Act 2003*. Find out more at: www.extraditionwatch.co.uk

Effect

2. This will remove clause 1 from the Bill.

Briefing

3. Clause 1 introduces a wholly unnecessary and unworkable duty on police authorities. While this Bill does not include the proposal[2] to have directly elected representatives on Police Authorities (PA), the compromise position in clause 1 is unnecessary and motivated by a desire to be seen to be doing something rather than addressing a particular problem with the current arrangement. Clause 1 seeks to amend the *Police Act 1996* to provide that every police authority in discharging its function must have regard to the views of 'the people' in the authority's area about policing in that area, and inspectors of constabulary can report to the Secretary of State as to whether this requirement is being complied with. However, the *Police Act 1996* already gives local communities the ability to significantly impact upon local policing issues. PAs already have to make arrangements for obtaining the views of local people on matters concerning the policing of their area and obtaining co-operation in preventing crime (section 96). The *Police and Justice Act 2006* also places local councillors under a duty to respond to a 'community call for action' from anybody living or working in the area which they represent, on a matter concerning crime and disorder (including anti-social behaviour and behaviour adversely affecting the environment) or substance abuse in that area (section 19). The ward councillor's response must indicate what (if any) action he or she proposes to take to resolve the matter.

4. As we said when these measures were introduced in 2006,[3] these overstep the boundary of legitimate community engagement in policing by giving local people wider powers to interfere in policing matters. While we believe that communities should be engaged in police matters, this increases the risk of a few people influencing policing strategy to the detriment of others. The local community is already represented on PAs and it is through this route that the community should be engaged in policing. The proposal to make it a *duty* for PAs to have regard to the views of people in the area on policing matters is inappropriate as it further expands

[2] Put forward in the Green Paper 'From the Neighbourhood to the National: Policing Communities Together', July 2008.
[3] See Liberty's briefing on the Policing and Justice Bill, Lords, May 2006, available at: http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml

the potential for a small group of unrepresentative community members to interfere in policing matters. In addition, if it becomes a duty, how is a PA able to properly fulfil this duty: who represents 'the people'? If just one or two people in the area express their opinion must the PA take that into account in discharging its function? The 'community' may in reality consist of a number of communities and these in turn may be subdivided and cross cut by age, ethnicity, gender and socio-economic status. These divisions are represented in differential rates of participation and therefore there is a risk of a few unrepresentative people having a disproportionate impact over policing strategy. As this is cast as a duty on a PA it must be clear, workable and necessary, none of which appear to be the case in relation to clause 1.

Amendment 2 – Clause 2, new clause 53B(3)(c) and (6)(b)

Clause 2, page 2, line 14, leave out from 'Authorities' to the end of line 16 and insert 'Authorities.'. Clause 2, page 2, line 25, leave out 'Authorities,' to the end of line 26 and insert 'Authorities.'.

Effect

5. These amendments will remove new section 53B(3)(c) and (6)(b) and will mean that the Association of Chief Police Officers (ACPO) is not represented on the Police Senior Appointments Panel (which already exists but is now being placed on a statutory footing). As currently drafted, the Panel is to consist of members appointed and nominated by the Secretary of State, by the Association of Police Authorities and by ACPO.

Briefing

6. This is intended as a probing amendment in order to ascertain the role of ACPO in legislation. ACPO is not governed by any statute, rather it is a company limited by guarantee. It is not a staff association but consists of members who are senior police officers in England, Wales and Northern Ireland, with around 280 members. The *Freedom of Information Act 2000* does not apply to it. The company's objectives include 'leading and coordinating' the direction and development of the police service and developing the ACPO brand. ACPO publishes advice and guidance on a wide

range of policing issues and contributes 'decisions' and 'comments' to a wide range of contemporary debates. What is the constitutional role that ACPO has to play? Is it an external reference group for Home Office Ministers? Is it a professional association protecting the interests of senior officers? Is it a public authority which issues guidance and good practice to local forces? Is it a national policing agency? Is it a campaigning pressure group arguing for greater police powers? These are the questions that must be asked before ACPO should be given a statutory role. However, ACPO has also already been included as a body that the Secretary of State must consult with before making particular orders or regulations.[4] It is time to reflect on the nature of ACPO and consider the appropriateness of involving it in decision-making processes. The Government has missed an opportunity to properly define the role of ACPO in this Bill and we believe that the constitutional role and makeup of ACPO has not been adequately debated and defined. Until this is done it is impossible to know if it is appropriate for a representative of ACPO to be consulted before any senior police appointments are made.

Amendment 3 – Clauses 11 and 12

Clause 11, page 15 – stand part. Clause 12, page 15 – stand part.

Effect

7. This will remove clauses 11 and 12 from the Bill.

Briefing

8. Clauses 11 and 12 raise some serious concerns about the ability of the Secretary of State to interfere in operational policing matters with regard to specific forces. Currently the *Police Act 1996* allows the Secretary of State to make regulations requiring *all* police forces to adopt particular practices and procedures. These regulations can only be made if the chief inspector of constabulary states that he or she is satisfied that it is necessary to do so to ensure cooperation between police forces, to ensure the proper procedure is carried out and that it is in the national interest. The proposal in clause 11 is to allow the Secretary to make regulations to

[4] See for example, sections 6ZA, 6ZB, 6ZC, 8A, 37A, 39B, 40B, 42A, 53, 53A, 57 and 96 of the *Police Act 1996* as amended by the *Police and Justice Act 2006*.

this effect that only apply to one or more police forces, and would also allow regulations to be made if the chief inspector thinks it is necessary to do so to promote the efficiency and effectiveness of a police force (rather than just to ensure cooperation). Similarly clause 12 seeks to amend the current position enabling the Secretary of State to make regulations requiring *all* police forces to use specified facilities and services if she thinks it to be in the interests of efficiency or effectiveness, to require just one or more specified police force to do so. Enabling the Home Secretary to direct the type of policies that apply to specific police forces to promote efficiency in that force, raises the specter of political interference in particular police forces. The current power does not allow the Secretary of State to pick and choose between police forces, which provides some limit on the power of central government to control how a particular force operates. Liberty has consistently warned against political interference in policing. The police must remain able to investigate crime independently and to apply the laws made by Parliament free from political pressure. Liberty's position is that PAs should be responsible for setting the strategic direction of the police force and hold the chief constable of the force to account, without additional interference by central government. Liberty has frequently stated that police independence and the rule of law are best served by denying the Executive excessive control of operational policing matters. Similarly we also maintain that communities are best served when the police are able to act with an appropriate degree of independence.

Part 2 – Sexual offences and Sex Establishments

Amendment 4– Clauses 13 and 14

Page 15, line 25, clause 13 – stand part. Page 16, line 12, clause 14 – stand part.

Effect

9. This will remove clauses 13 and 14 from the Bill.

Briefing

10. Clause 13[5] seeks to amend the *Sexual Offences Act 2003* (SOA) to introduce an offence of paying for the sexual services of a prostitute where a third person has, in the expectation of gain, used force, deception or threats to induce or encourage the prostitute to provide the sexual services. The offence will apply whether or not the accused knew that any of the prostitute's activities were induced or encouraged in this way. Force is defined as including coercion by threats or by psychological means. A person guilty of the proposed new offence is liable to a fine of up to £1000.

11. The government indicated in the Public Bill Committee in the House of Commons that this offence is intended as part of measures to tackle the exploitation and trafficking of women and children. Tackling trafficking is extremely important and we welcome the government's efforts to tackle actual trafficking. In particular we welcome the recent announcement that extra funding will be provided to this end, as well as the UK's ratification of the Council of Europe Convention Against Trafficking in Human Beings.[6] We are however very concerned that this offence will not help to tackle the problem of trafficking, and that it may in fact diminish the responsibility of those who knowingly have sex with a trafficked woman.

12. One of the main priorities in tackling human trafficking is, of course, targeting those people who orchestrate, control and coerce and in doing so profit from this sinister form of modern day slavery. It is, therefore, already an offence under the SOA, to control a prostitute for gain.[7] Similarly, knowingly having sex with a woman who has been trafficked and who is acting under coercion and not truly consenting constitutes rape, and should be prosecuted as such.[8] We understand that currently very few, if any, prosecutions for rape are brought against those who have sex with trafficked non-consenting women. While this is extremely disappointing, this new

[5] And clause 14, which is an equivalent provision to apply to Northern Ireland.
[6] See Home Office Press Release dated 1 April 2009, available at: http://press.homeoffice.gov.uk/press-releases/New-measures-human-trafficking
[7] See sections 53 and 57-59 of the SOA.
[8] We agree with the comments in respect of this by Harriet Harman, 25 May 2005. 'Human Trafficking: a European Problem Requiring Urgent Attention', speech to the Institute of European Affairs, available at: http://209.85.229.132/search?q=cache:8gnL01anIbYJ:www.iiea.com/images/managed/events_attachments/HT%2520Speech%2520Dublin%252025-05-2005%2520As%2520delivered.doc+harriet+harman+solicitor+general+rape+trafficked&cd=7&hl=en&ct=clnk&gl=uk

offence will not properly address this issue, and may in fact result in prosecutions under this relatively minor offence rather than a more appropriate serious charge.

13. Liberty has several principled concerns about the creation of this offence. Strict liability offences, which entirely disregard intention or knowledge, have traditionally been enacted in the regulatory sphere for fairly minor offences where it is obvious that an offence has been committed. The strict liability standard is inappropriate where a person is unable to ascertain whether what they are doing is unlawful. In effect this proposed new offence criminalises something that is not otherwise criminal (i.e. sex in exchange for payment). We are not aware of any other criminal offence of this nature where the strict liability standard applies allowing no prospect of a defence. It is worrying that such a move is being made here and it would be extremely concerning if this approach were to be extended.

14. We are also very concerned that this offence, commission of which could lead only to a £1000 fine, could be used to prosecute someone who should instead be prosecuted for rape. It is extremely important not to treat trafficked women as a 'no-go zone' for rape prosecutions simply because of the challenges of investigating the offence. As this offence can also apply when a person knows that a prostitute has been induced to provide sexual services because of a threat of force by a third person, this could mean that a person who, on the facts, knows that the prostitute is not freely consenting is charged with this minor offence rather than with rape.

15. Given the evidence that very few rapes in relation to trafficked women and children are being prosecuted there may be a need for a new offence that deals with a situation where a person knowingly has sex with a trafficked woman. Such an offence might then be subject to a much higher penalty then the possibility of a £1000 fine. This is an important and complex issue that needs to be explored in detail. As such Liberty believes that there should be a full consultation on the creation of any new offence. A 2004 Home Office consultation on prostitution[9] focused on a wide range of issues associated with prostitution and only briefly referred to the possibility of tackling demand by way of an offence. It did not go into specifics as to the type of offence that could be created or whether it would be a strict liability offence. The government's summary of responses and strategy published in

[9] *Paying the Price: a consultation paper on prostitution*, Home Office, July 2004, available at: http://www.homeoffice.gov.uk/documents/cons-paying-the-price/paying_the_price.pdf?view=Binary

2006[10] referred vaguely to some responses that supported shifting the enforcement focus onto those who create a demand for prostitution.[11] Yet, the government's strategy response to 'tackling demand' referred to policing kerb crawling; reducing opportunity through environmental measures; reducing supply by accelerating routes out of prostitution; and considering the use of ASBOs. It did not provide detail for the creation of any new offence, let alone one of strict liability.

16. Given the many problems associated with this proposed new offence, as demonstrated by its difficult passage through the Commons and the last minute amendments introduced there, and given the very real importance of dealing appropriately and effectively with the issue of trafficking and rape, Liberty believes clauses 13 and 14 should be removed from this Bill and the government should instead begin a consultation process on the creation of any new offence and properly consider a more effective and proportionate response.

Amendment 5– Clause 20 and Schedule 2 (new section 136B(8) and 136D(10))

Schedule 2, page 142, leave out lines 24 to 27. Schedule 2, page 144, leave out lines 18 to 21.

Effect

17. This would remove proposed new sections 136B(8) and 136D(10) to take out the qualification in relation to the second condition that must be met before a closure order can be made. The second condition is that an officer, or the court, has reasonable grounds to believe making a closure order is necessary to prevent premises being used for activities related to a specified offence. The qualification, being omitted here, provides that it does not matter whether the officer or court believes that the offence has been or will be committed.

[10] *A Coordinated Prostitution Strategy and a Summary of Responses to Paying the Price*, Home Office, January 2006, available at: http://www.homeoffice.gov.uk/documents/cons-paying-the-price/ProstitutionStrategy.pdf?view=Binary
[11] Ibid, page 7.

Briefing

18. This is intended as a probing amendment to find out what this clause is intended to achieve. Clause 20 and Schedule 2 amend the *Sexual Offences Act 2003* to give police the power to issue a temporary closure notice in respect of any premises if the officer reasonably believes that, within the previous 3 months, the premises had been used for activities related to particular offences and the closure is believed to be necessary to prevent the premises being used for activities related to those offences (although confusingly it does not matter whether the officer believes that the offences have or will be committed). These offences are: paying for the sexual services of a child; controlling or inciting a child to be involved in prostitution or pornography; arranging or facilitating child prostitution or pornography; causing or inciting prostitution more generally; or controlling a prostitute for gain. Apart from the first offence, all of these offences apply to activities undertaken anywhere in the world.

19. These provisions are very similar to those relating to closure orders for anti-social behaviour and drug offences. When closure orders were originally proposed Liberty agreed that they could be a proportionate and potentially effective way of addressing a significant problem. However, as we said in our response to the proposal to introduce closure orders for anti-social behaviour,[12] drug related closure orders seem to have had unfortunate consequences with the offending behaviour being displaced and the offenders taking over properties of the vulnerable, a practice called 'cuckooing'. This demonstrates that closure does not necessarily end a problem but can merely displace it. In relation to the adult prostitution offences a closure order, for example, of a brothel, may in fact increase the vulnerability of some women as they may then be forced onto the streets.[13] Some women band together to work in the relative safety of a private address and it may be that a closure order of this kind would increase street-based prostitution and the problems associated with kerb-crawling, loitering or soliciting. Indeed, as we noted in our response to the proposal to introduce anti-social behaviour orders, inherent to the making of an order is the need for compliance with the *Human Rights Act 1998* (HRA). Any court making an order must be satisfied that in doing so none of the rights of those being removed is

[12] See Liberty's briefing in October 2007 on the Criminal Justice and Immigration Bill, available at http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml.
[13] For example, sadly in 2006 we saw the particular vulnerability of women engaged in street-based prostitution with the tragic murders of five women working as prostitutes in Ipswich.

breached. The right to respect for private and family life under Article 8 of the HRA[14] is most likely to be engaged. Any attempt to interfere with this must be for a legitimate purpose, in accordance with the law and proportionate. This is particularly the case where, as in this proposal, a person need not have been convicted of any offence. Sections 136B(8) and 136D(10) in Schedule 2 are particularly confusing as it appears to provide that although an officer, and later the court, must have reasonable grounds to believe that the closure order is necessary to prevent the premises being used for activities related to a specified offence, it does not matter whether the officer or court believe that the offence has or will be committed. This type of provision is not found in the drug related or anti-social behaviour closure order powers. In the Public Bill Committee in the House of Commons the government said that this sub-clause was necessary in order to ensure that the police could respond rapidly to circumstances in which they believe there is cause to do so, without needing to first have reasonable grounds to believe that all the elements of the offence have been committed. [15] Closing down premises, often private homes, is a very serious decision and one that should not be made lightly. Article 8 of the HRA[16] provides that everyone has the right to respect for his private and family life, his home and his correspondence. Any interference with this right must be necessary and proportionate. The government needs to provide further justification as to why this clause is necessary. It should also be noted that this provision applies not only to the police but also to the courts..

Amendment 6– Clause 20 and Schedule 2 (new section 136Q)

Schedule 2, page 151, leave out lines 13-20.

Effect

20. This amendment will omit proposed new section 136Q of the *Sexual Offences Act 2003*.

[14] Article 8 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.
[15] See Public Bill Committee, 10th sitting, Tuesday 10th February 2009, column 349.
[16] Article 8 of the *European Convention of Human Rights* as incorporated by the *Human Rights Act 1998*.

Briefing

21. Proposed new section 136Q would allow the Secretary of State to amend, by order, the power to authorise a closure notice to persons other than members of the police force. The power to order the closure of premises, which could include a family home, has serious implications for the right to respect for private and family life and the home. Its use should be carried out by trained professionals. More and more of traditional police functions are being delegated to non-police officers, and indeed, closure of premises is traditionally a judicial function. Extending this beyond police officers is unacceptable and this provision should be omitted.

Part 3 – Alcohol misuse

Amendment 7– clause 29

Clause 29, page 26, leave out lines 9 to 12.

Effect

22. The effect of this amendment is to leave out the amendment to the *Confiscation of Alcohol (Young Persons) Act 1997* (new subsection (1AB)) which would give police the power to remove children from an area to their place of residence or a place of safety if they are in possession of alcohol.

Briefing

23. This amendment would remove the proposed amendment to the 1997 Act which would allow a police officer who has confiscated alcohol from a person who is in a public place and appears to be under 16 to forcibly remove that person, regardless of whether any offence has been committed or if it is necessary to do so for the person's safety or well-being or for public order. This new power is unnecessary and disproportionate. The police already have the power under the *Anti-Social Behaviour Act 2003* to remove persons under 16 to their place of residence between 9pm and 6am if they are in a specified area (see section 30) and the power to remove children for their own safety in an emergency (see section 46 of the *Children Act 1989*). Liberty is concerned that these proposed new powers could be open to abuse; that

children will feel further alienated; and that they are unnecessary in light of existing laws to tackle problems of anti-social or criminal behaviour. If a child under 16 in possession of alcohol commits a breach of the peace, such as by threatening, abusive or insulting words or behaviour, this may constitute a breach of sections 4, 4A and 5 of the *Public Order Act 1986*. A power to move children on by the police when they have not committed any offence or disturbance is discriminatory and counter-productive.

Amendment 8 – clause 30

Clause 30, page 26, line 17 – stand part.

Effect

24. This will remove clause 30 from the Bill.

Briefing

25. Clause 30 introduces a new offence for a person under 18 to be in possession of alcohol in a public place on three or more occasions in a 12 month period without reasonable excuse. This proposed offence is unprecedented in that it criminalises something if done a certain number of times that is not in itself criminal. Thus, possessing alcohol in a public place twice in a one year period is not a criminal offence, but it will automatically become an offence if done a third time. This is a fundamentally flawed and undesirable approach to creating offences. Moreover, criminalising teenagers for possessing alcohol will fast-track more children into the criminal justice system and is not the way to tackle the problem of under-age drinking. While it is currently illegal to sell alcohol to those under 18, it is not an offence for those under 18 to buy alcohol or to consume it. Criminalising possession in a public place for those under 18 is therefore a piecemeal and unprincipled way to approach concerns about underage drinking. It also sends confused and mixed messages. If children are inappropriately gaining access to alcohol this could be dealt with by better enforcing restrictions on sale. Where it places them in danger, public consumption of alcohol by under 18s, could also be dealt with under current child protection laws. This is far preferable to the counter-productive criminalisation of those that we are trying to protect.

26. It is also unclear what would constitute a 'reasonable excuse'. In the Public Bill Committee in the House of Commons the government stated that what would constitute a 'reasonable excuse' would be determined on a case by case basis by the police when enforcing the provision.[17] This will mean that each individual police officer will have to use his or her subjective discretion as to what is considered a reasonable excuse, making it unclear not only for teenagers, parents and the community as a whole as to how this offence will apply but also making it difficult for the police. This is an unworkable and undesirable provision that should be removed in its entirety from the Bill.

Amendment 9– clause 31 and additional new clause

Clause 31, page 27, leave out lines 14 to 16 and insert—

'(1) The Violent Crime Reduction Act 2006 (c.38) is amended as follows.

(2) In section 27(1) (power to require person to leave a public place etc)—

(a) in subsection (a) leave out 'of that place' and insert 'immediate';

(b) in subsection (b) leave out 'that locality' and insert 'the immediate locality'

(3) In section 27(2)—

(a) in subsection (a)—

(i) leave out 'likely, in all the circumstances, to cause or to contribute to the occurrence of' and insert 'causing';

(ii) leave out 'that locality, or' and insert 'the immediate locality, or is likely';

(b) in subsection (b) leave out 'likelihood of there being'.

(3) In section 27(3)—

(a) in paragraph (d) before 'that locality' insert 'the immediate';

(b) in paragraph (e) before 'locality' insert 'immediate'.

[17] Public Bill Committee, 11th sitting, Thursday 12th February 2009, columns 395 and 396.

Effect

27. This will remove the current clause 31 from the Bill and will replace it with a different amendment to section 27 of the *Violent Crime Reduction Act 2006* to restrict the test for circumstances in which a constable may give a direction to an individual requiring them to leave a locality and will further define and limit the area from which a person may be excluded.

Briefing

28. The first part of this amendment removes clause 31 which seeks to amend section 27 of the *Violent Crime Reduction Act 2006* to apply it to all people aged over 10 years. Section 27 gives police the power to issue Directions to Leave which require a person to leave an area for 48 hours if there is a risk of an alcohol related disturbance. Currently it only enables police to make such a Direction in relation to people aged 16 or over. No offence needs to have been committed in order for police to make such an order. Extending an already overbroad and discriminatory power is unnecessary, especially as the police already have a wide array of criminal law powers to deal with problem behaviour.[18] This power should not be further expanded by extending it to apply to 10 to 15 year olds. As stated above, there is already a power to move on people for anti-social behaviour and to return children to their homes. A power to disperse children may actually endanger them by forcing them to move on to potentially unsafe areas and is subject to misuse.

29. The amendment also seeks to amend section 27. Liberty has seen section 27 used in a disproportionate and indiscriminate manner by police to remove people without any real assessment of the risk of alcohol related disorder they may pose. On 15th November 2008, relying on section 27 of the *Violent Crime Reduction Act 2006,* the Greater Manchester Police rounded up 80 Stoke City fans who had stopped at a pub on the way to a match at Old Trafford. Although the fans were well-behaved and the pub landlord had no complaints, supporters were detained for about four hours and transported by the police back to Stoke-on-Trent on coaches, missing the game. Deprived of toilet facilities on the coach, the supporters were instructed to

[18] Liberty's concerns regarding this trend are well documented. ASBOs and dispersal powers mix criminal and civil law, set people up to breach them, are increasingly counter-productive and used as panacea for all ills. For more information see http://www.liberty-human-rights.org.uk/issues/7-asbos/index.shtml

urinate into cups, which spilled over the floor of the bus where it remained for the 40 mile journey back. In recent months there have been more and more reports of police using section 27 to prevent fans attending football matches with the Football Supporters Federation (FSF) receiving many first-hand accounts from supporters of clubs across England. The FSF has started a campaign to defend the rights of football fans wrongly served with section 27 orders.

30. This amendment seeks to restrict the power to circumstances where individuals are causing alcohol-related crime or disorder and where it is necessary to do so. As currently drafted section 27 is overbroad: it allows police to make an assessment of possible future problems and to direct people to leave a locality whether or not those people have anything to do with any of the problems envisaged. This is unfair, divisive, and may be counter-productive. It also continues a worrying trend of using the civil law in a coercive way to target the young and the vulnerable.

31. The amendment also amends references to 'locality' to 'immediate locality' where relevant. 'Locality' is not defined in the statute. The Oxford English dictionary defines locality as *"(1) an area or neighbourhood; (2) the position or site of something, place where it is*". The Home Office Guidance on section 27 advises that a locality can be "*the area in or around licensed premises, a geographical area including one or more licensed premises, or any other area defined by the constable....it could constitute the centre of a town or city....In deciding the size of the area, consider practical issues such as ease of enforcement*". There has been previous judicial consideration of the word 'locality' in the context of section 30 of the *Anti-Social Behaviour Act 2003*. In *MB v Director of Public Prosecutions*[19] the 'locality' was a shopping centre. In *R(Singh) v Chief Constable of West Midlands Police*[20] the locality was "*the area around Broad Street*". However, Liberty has found that 'locality' under section 27 has been interpreted by police to include a much wider area. In the Stoke City case referred to above, the locality from which the fans were excluded for 24 hours was the entirety of Greater Manchester – an area of 1,276km^2 (493 sq miles). The obvious difficulty in enforcing a direction relating to 'Greater Manchester' indicates that the 'locality' has been too widely drawn.

[19] [2006] EWHC 1888 (Admin).
[20] [2007] 2 All ER 297.

Part 4 – Injunctions: Gang-Related Violence

Amendment 10– Part 4 and Schedule 5

Page 27, line 17, Part 4 – stand part. Page 158, line 30, Schedule 5 – stand part.

Effect

32. This will remove Part 4 and Schedule 5 from the Bill.

Briefing

33. Part 4 and Schedule 5 were not included in the Bill as it was originally published but were included after an amendment was introduced by the government on 12 February 2009. It is disappointing that such a substantial amendment was not included until after the Second Reading debate. Part 4 introduces a power for a court to grant injunctions to prevent 'gang-related violence'. In effect these are a mix of control orders/ ASBOs for anyone suspected of engaging in, or encouraging or assisting gang-related violence. Liberty has serious concerns about the introduction of these provisions and the continual blurring of the civil and criminal law. We have long expressed our concern about the control order regime and the extensive use of ASBOs and it is very disheartening to see that this type of approach to crime and disorder continues to be dealt with outside normal criminal justice processes.

34. These provisions would allow a chief officer of police, the British Transport Police Force or a local authority to apply to the High Court or a county court for an 'injunction' against a person (which may initially be made without notice). The court can grant the injunction if it is satisfied on the civil standard of proof, that the person "*has engaged in, or has encouraged or assisted, gang-related violence*" and it is necessary to do so to prevent that person from doing so again or to protect the person from gang-related violence. Violence includes violence to property, which would arguably include minor damage and graffiti. What constitutes a 'gang' is not defined. An injunction made by a court could prohibit the person from doing something, which includes (but is not limited to) prohibiting the person from going to

a particular place; associating with particular people in particular places; having an animal in a particular place; wearing certain clothing or using the internet to facilitate or encourage violence. The court could also require the person to do certain things which again are not limited, but could include requirements to notify any change of address; "*be at a particular place between particular times on particular days*" (up to 8 hours a day) and report to a person at that place; and participate in particular activities when required. The injunction can be in force for a specified period or indefinitely. If the person subject to the injunction fails to comply with it they may be subject to arrest, and can be remanded while the matter is dealt with (which could mean up to 8 days in detention). No provision has been introduced making it an offence to breach an injunction, so presumably a breach of an injunction would be dealt with in the same way as a civil contempt of court (the court has extensive powers to remedy breach of its orders, including imprisonment). Note that these powers extend only to England and Wales.

Gang injunctions and stigmatisation: comparisons with America

35. Injunctions to deal with 'gangs' have been used in some parts of America, notably California and Chicago, since the early 1980s. However, there is evidence that suggests that anti-gang injunctions in America have not been effective and worse still, that they are counter-productive. Evidence published in the Stanford Law Review indicates that "*while the targeted zone of an anti-gang injunction may experience an immediate drop in crime and violence, this drop is not necessarily permanent and, more importantly, causes crime rates in adjoining neighborhoods to rise. Injunctions may serve only temporarily to shift crime from one neighborhood to another.*"[21] In light of this a growing number of law enforcement officials in America are now arguing that the same or better results can be achieved if the gang injunctions strategy is dropped and reliance is instead placed on the more targeted use of traditional policing.[22]

36. In addition, American commentators argue that the use of gang injunctions in America has led to discrimination and stigmatisation of many innocent, minority ethnic, young people:

[21] Matthew Mickle Werdegar, 'Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions against Urban Street Gangs' (1999) 51(2) *Stanford Law Review* 409 at 439.
[22] Ibid at 442. The suggestion given is to increase the use of probation and parole restrictions for gang members who have been convicted of a crime.

> *Some of these youth might be labelled "associates" of gangs simply because they belong to racial minorities and share living quarters or public spaces with street gang members. Others might actively affiliate with street gang members but lack the specific intent to further a gang's criminal activities. Either way, anti-gang civil injunctions promise to perpetuate racial stigma and oppression*.[23]

As recently as last year Cathy Wang, writing in the Hastings Constitutional Law Quarterly, argued:

> *Gang injunctions should be rarely issued because of their potential for discrimination. Defendants who risk criminal punishment have not committed illegal acts but have merely been accused of gang association. Prejudice can creep into law enforcement's identification process of gang members. The negative impact of these injunctions can also leave marks on society as a whole*.[24]

'Gangs' in the UK

37. Indeed, we need not go as far as America to discover the discriminatory and alienating effects of stigmatising people as 'gang' members. A group of academics from the University of Manchester[25] have been examining the experiences of young people who live in places labelled as 'gang areas' and who are already subject to surveillance and interventions by the authorities as a result. They have noted that in the absence of much recent research with a direct focus on British gangs, government and local authorities and the public rely on media accounts that suggest that 'gang culture' is endemic in the UK.[26] This has resulted in young people residing in 'gang areas' being subject to labels, with the then Chair of the England and Wales

[23] Gary Stewart, 'Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions' (1998) 107(7) *The Yale Law Journal*, 2249 at 2250-1.
[24] Cathy Wang, 'Gang Injunctions under Heat from Equal Protection: Selective Enforcement as a Way to Defeat Discrimination' (2008) 35(2), *Hastings Constitutional Law Quarterly*, 287 at 288.
[25] Dr Robert Ralphs, Juanjo Medina and Judith Aldridge, School of Law, University of Manchester.
[26] Ralphs, Medina and Aldridge, 'Who Needs Enemies with Friends Like These?: The importance of place for young people living in known gang areas', *Journal of Youth Justice*, forthcoming 2009.

Youth Justice Board, Professor Rod Morgan, warning in 2006 that we risk demonising a whole generation.[27]

38. The University of Manchester study[28] found that the controversial US gang interventions have already slipped unquestioned into mainstream policy and practice in the UK and it is probable that similar gang labelling practices will result here. They found that many of the young people in their study attracted police attention as a result of keeping the wrong company rather than involvement in any criminal activity:

> *What we witnessed in our research was the potential for entire neighbourhoods (especially those living in gang set spaces) of young people to be labelled as 'gang members' or 'gang associates' and to receive high levels of police attention as a consequence of being born and raised in estates and streets with established gang associations.*[29]

Case study[30]

Dwain (not his real name) was a 16 year old black male who aspired to work in the music industry and study law. He had never been arrested or charged with any offence and expressed anti-gang sentiments. However, as he had cousins involved in gangs and lived on the same street as gang members he was considered by the police to be a gang member or an associate, and in his final year of secondary school, a few months before his exams, the police informed his school that he was a gang member (although they were unable to specify the gang based on insufficient evidence). As a result, although never having been arrested or known to have been involved in any gang conflict, he was suspended from school.

39. It is clear that stigmatisation of young people as being 'gang' members is already occurring, and much of it is based on racial and geographical stereotyping. Media and police accounts of British gangs emphasise the ethnic dimensions of gangs, whereas sociologists and those involved in 'gang' research suggest the relationship

[27] See Sophie Goodchild, 'Demonised: We lock them up. We give them Asbos. But is our fear of kids making them worse?' *The Independent*, 23 April 2006, available at: http://www.independent.co.uk/news/uk/crime/demonised-we-lock-them-up-we-give-them-asbos-but-is-our-fear-of-kids-making-them-worse-475273.html
[28] This was a study funded by the UK Economic and Social Research Council, entitled 'Youth Gangs in an English City (RES-000-23-0615), and involved 26 months of participant observation, nine focus groups and 107 formal interviews.
[29] Ralphs, Medina and Aldridge, above footnote 24, page 8.
[30] From Ralphs, Medina and Aldridge, above footnote 24, page 11.

between ethnicity and gang membership to be more complex, with the ethnic composition of gangs generally just reflecting the ethnic composition of the neighbourhoods where they appear.[31] In fact, in 2004 the Home Office, in collaboration with researchers at the University of Manchester, conducted a survey which showed that only a tiny minority of youth gangs in England and Wales were exclusively from minority ethnic groups.[32] The introduction of 'gang' injunctions will only serve to further these divisions and discriminatory practices.

40. This may be particularly the case given no definition of a 'gang' has been provided. The Minister for Security, Counter-Terrorism, Crime and Policing, Mr Vernon Coaker, in the Public Bill Committee in the House of Commons recognised that there was an issue with the lack of definition of a 'gang' in the Bill and that clearly more needed to be in the Bill about the definition of a gang.[33] It is clear that there are major difficulties in defining what constitutes a 'gang'. In the US researchers into gang violence in Chicago have said:

> *The perennial problem of defining what constitutes a "gang" is simultaneously the most necessarily pedantic exercise and the greatest hurdle to effective gang policy… That is, gangs are far too dynamic to conform to a static definition— a gang that fits one typology or definition of a "gang" today may not tomorrow… Inevitably, policies have a broad reach that snares both gang and non-gang people in their net. Just as the consequences of gangs are real, so too are the consequences of legal interventions, and their misassignment has its costs.*[34]

41. It is clear then that defining a gang is problematic, however failing to define it leaves greater scope for an over-broad application that may well capture those who have no gang involvement, or indeed, no proven criminality. While we are relieved that the government has accepted that further work is needed to define what constitutes a 'gang' we maintain that the new injunction model remains dangerously

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[31] Aldridge, Medina and Ralphs, 'Dangers and problems of doing 'gang' research in the UK' in Frank van Gemert, Dana Peterson and Inger-Lise Lien (eds) *Street Gangs, Migration and Ethnicity* (2008), page 35.

[32] Ibid at 36. The Offending Crime and Justice Survey found that among those delinquent youth group members who stated their group was ethnically homogenous, 60% of groups were white only, 3% were black only and 5% were Asian only. 31% said their group included a mix of ethnic backgrounds.

[33] Public Bill Committee, 16th sitting, Thursday 26th February 2009, columns 594 and 596.

[34] Andrew V. Papachristos, 'Interpreting Inkblots: Deciphering and Doing Something about Modern Street Gangs' (2005) 4 (3) *Criminology and Public Policy* 643 at 644-5.

flawed. It is disappointing that no consultation was engaged in by the government before these provisions were hastily introduced into the Bill.

Background to introduction of Part 4

42. It seems clear that these provisions were introduced following the decision of the Court of Appeal in *Birmingham City Council v Shafi and Ellis* [2008] EWCA Civ 1186 ('*Shafi & Ellis*'). In that case the Court held that an injunction to prevent two young people, said to be gang members, from going into certain areas of Birmingham and associating with specified people was not necessary. This decision was, in the main, made on the basis that an Anti-Social Behaviour Order (ASBO) was the more appropriate course of action:

> *The critical factor in the present case is in our opinion that, whether the council seeks an injunction in aid of the criminal law or on the basis of an alleged public nuisance, the essential remedy sought is an ASBO.*[35]

The Court went on to say:[36]

> *In reaching these conclusions we do not wish to minimise in any way the problems identified by the council. However, we are confident that the courts have ample powers to deal with them. The difficulty for the council here was that, as was submitted on behalf of the respondents, the case against these individuals was very thin on the facts. There is no reason why an ASBO should not be made against those against whom the evidence is sufficient, which must be true in many cases. Moreover, there may be exceptional cases where it would be appropriate to grant an injunction. This is not such a case.*

Given the Court's conclusion that the ASBO would have achieved the desired aim, and that recourse to an injunction can already occur in exceptional cases, it is somewhat puzzling as to why the government is seeking to introduce further legislation in this area. The answer seems to lie in the burden of proof that is applicable and in what matters can be dealt with by way of an injunction, making it more akin to a control order.

[35] See paragraph 59.
[36] See paragraph 68.

43. The courts have held in relation to ASBOs, that in determining whether a person has acted in an anti-social manner, the criminal burden of proof (beyond reasonable doubt) applies, whereas in determining if an ASBO is necessary to protect persons from future conduct the civil standard of proof applies (on the balance of probabilities).[37] The court in *Shafi & Ellis* held that the same burden of proof should attach to any injunction.[38] However, the government has explicitly provided in clause 33 that the court in granting an injunction need only be satisfied "*on the balance of probabilities that the respondent has engaged in, or has encouraged or assisted, gang-related violence*". The House of Lords held in relation to ASBOs that the criminal burden of proof should apply "*given the seriousness of matters involved*" and for practical reasons.[39] It is clear the government in Part 4 is seeking to create a new civil order which has a lower applicable standard of proof, despite the fact that the powers given are of the utmost seriousness affecting, as they may do, the liberty of the person; private life; rights of association and expression; and freedom of movement.

44. The other possible reason why the government is introducing further civil orders in this area is that ASBOs only allow the court to "*prohibit the defendant from doing anything described in the order*".[40] Therefore the order can only prohibit a person from doing something, not require them to do something.[41] Whereas, these amendments would allow an injunction to *require* that a person notify of a change of address, be at particular places at certain times, participate in certain activities and impose reporting requirements. In this way this proposed system is more akin to that of the control order regime which is currently applicable to people suspected of involvement in terrorism. The control order regime was originally stated as being only 'temporary'. The extension of its principles into other spheres of the law is extremely worrying and should be rejected by parliamentarians. While the possible

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[37] See *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787.
[38] See *Shafi & Ellis* at paragraph 51.
[39] See Lord Steyn in McCann at paragraph 37: "*Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply. However, I agree that, given the seriousness of matters involved, at least some reference to the heightened civil standard would usually be necessary… Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard.*"
[40] Section 1(4) of the *Crime and Disorder Act 1998*.
[41] See *R (M) v Sheffield Magistrates' Court* [2004] EWHC 1830 (Admin) at paragraph 57: "*Care should be taken not to include by negative prohibitions what in truth amount to mandatory orders to do something specific*".

deprivation of liberty applicable under a 'gang injunction' is not as extensive as that under a control order, it could nonetheless amount to a severe deprivation of liberty. In particular an injunction could require a person to be at a particular place between particular times on particular days. The only limit on this is that it must not require the person "*to be at a particular place for more than 8 hours in any day*". However, this could mean that the order could require the person to remain at home for 8 hours in the day, at a workplace/school for 8 hours and then at another venue for the final 8 hours. In effect, as currently drafted, an order could require the person to remain at three different locations during the day, which would be a severe imposition on a person's private and family life, engaging Article 8 of the HRA.[42]

45. As we said in relation to control orders when they were first introduced: "*those subjected to control orders will suffer the badge of criminality without the benefit of a trial. They will be denied the presumption of innocence, the 'golden thread' that runs back through centuries of criminal process to the Magna Carta*."[43] The type of requirements that can be imposed are very similar to bail conditions, however, those made subject to these types of injunction will not, of course, have been charged with any offence or even arrested. In the Public Bill Committee in the House of Commons the government suggested that the reason why injunctions should be used rather than imposing an ASBO is because the behaviour is not just anti-social but violent.[44] If a person is suspected of involvement in violent crime, criminal proceedings should be instituted against them. The government should not be resorting to civil orders to tackle violent behaviour when we have existing criminal law for this purpose. There is no need, other than to cut corners and erode important safeguards, to introduce further legislation.

46. The proposed injunction applies if the court considers on a civil standard of proof that a person has engaged in or encouraged or assisted gang-related violence ('violence' is defined to include violence against property, which could conceivably include graffiti). A person subject to an injunction may never have been convicted of any offence (because proving a criminal offence requires the court or a jury to be satisfied beyond reasonable doubt). In addition, if any offence has been committed,

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[42] Article 8 of the *European Convention of Human Rights* as incorporated by the *Human Rights Act 1998*. See also article 5 (right to liberty) of the ECHR.
[43] See Liberty's Second Reading Briefing on the Prevention of Terrorism Bill, 2005, paragraph 11, available at: http://www.liberty-human-rights.org.uk/pdfs/policy06/ptb-remaining-stages-commons.pdf
[44] Public Bill Committee, 16th sitting, Thursday 26th February 2009, column 598.

this will necessarily have been in the past and if they have been convicted of such an offence they will already have been punished for it. It is also concerning that one of the bases on which an injunction can be granted is "*to protect the respondent from gang-related violence*". Ostensibly this allows an injunction to be imposed prohibiting a person from doing certain things, or requiring them to do things, for their own protection. When the person to be protected is under the age of 18, child protection laws already exist that could be used to protect such children. When it applies to adults this is an extremely paternalistic approach, imposing an injunction on a person 'for their own good'. This paternalistic approach is highlighted by the comments of the Minister in the Public Bill Committee in the House of Commons when he suggested that by imposing an injunction on an individual "*we are almost trying to protect them from themselves*".[45] This approach fundamentally misunderstands the role of the police, imposing coercive and restrictive sanctions on a person does not keep them safe. If the intention of this is to protect people we are sure a non-legislative approach could be adopted, rather than imposing an injunction on such a person, breach of which could lead to serious consequences (including imprisonment).

47. Liberty believes these amendments are unnecessary and introduce a new worrying quasi-criminal regime into an already over-crowded system of controlling 'anti-social behaviour'. Clearly the various non-criminal schemes put in place over the last 10 years are not working. Adding further new and rushed measures that unjustifiably infringe a person's private life, right to liberty, freedom of association, freedom of expression and freedom of movement is not the answer. We were disheartened by the Government's unhelpful comments in the Public Bill Committee in the House of Commons that although the use of injunctions may infringe the privacy and human rights of the individual subject to the injunction, the human rights of the community are enhanced.[46] While many rights are limited and are required to be balanced against the rights of others this does not give the government carte blanche to impose manifestly unfair proposals with such clumsy justifications. Followed to its logical conclusion, this type of oversimplification would give the power to impose almost any type of policy if the government perceives that there is a benefit to be had. While balance is important, precious rights and liberties (such as, in this case the presumption of innocence, the right to a fair trial, the right to privacy etc)

[45] Public Bill Committee, 16th sitting, Thursday 26th February 2009, Column 597.
[46] Public Bill Committee, 16th sitting, Thursday 26th February 2009, Column 590.

must not be sacrificed under the pretext of a false trade-off between an individual and the community. Part 4 should be rejected in its entirety by parliamentarians.

Alternative amendments 10A – Part 4

Amendment A – standard of proof

Clause 33, page 27, line 22, leave out 'on the balance of probabilities' and insert 'beyond a reasonable doubt'.

Effect

48. This amends clause 33 to ensure that the court must be satisfied on the criminal standard of proof that a person has been engaged in, or has encouraged or assisted, gang-related violence.

Amendment B – protection of respondent

Clause 33, page 27, line 26, leave out 'for either or both of the following purposes'. Clause 33, page 27, leave out line 29.

Effect

49. This amends clause 33(3) to ensure that an injunction cannot be granted simply to protect the respondent from gang-related violence.

Amendment C – definition of gang

Clause 33, page 27, leave out lines 34 to 40 and insert— '( ) In this section 'gang' means a group of people who perceive themselves or are perceived by other to be a discernable group if— (a) the group is formed for the purpose of carrying out criminal activity; or (b) members of the group have engaged in criminal activity together on more than one occasion.'.

Effect

50. This will remove clause 33(5) and insert a new definition of 'gang' in clause 33. This amendment is heavily based on an amendment originally proposed by JUSTICE in their February 2009 briefing on these clauses.

Amendment D – type of injunctions that can be made

Clause 33, page 27, line 30, leave out 'An' and insert 'Subject to section 34, an'. Clause 34, page 28, leave out line 29.

Effect

51. This will amend clause 33(4) to ensure that an injunction may only be made subject to section 34 that sets out a list of prohibitions and requirements. It will also leave out clause 34(6) which makes it clear that these provisions are intended to be a non-exhaustive list of prohibitions and requirements. This would allow the court to require or prohibit anything at all, so long as it fits within the purposes set out in clause 33.

Amendment E – power to require a respondent to do something

Clause 33, page 27, line 30, leave out '(for either or both of those purposes). Clause 33, page 27, leave out line 33. Clause 34, page 27, leave out lines 12 to 20. Clause 34, page 28, leave out lines 21 to 23. Clause 34, page 28, line 24, leave out 'and requirements'. Clause 35, page 28, line 33, leave out 'or requirement'. Clause 35, page 29, leave out lines 3 to 5. Clause 40, page 30, line 21, leave out 'or requirement'. Clause 40, page 30, leave out lines 16 to 17.

Effect

52. This will amend clause 34 (and make consequential amendments to clauses 33, 35 and 40) to remove the ability of the court to *require* a respondent to do something.

Amendment F – application for injunction by local authority

Clause 36, page 27, leave out lines 11 to 16. Clause 46, page 32, leave out line 23. Clause 48, page 32, leave out line 38.

Effect

53. This will amend clause 36 which gives a local authority the power to make an application for an injunction, and makes consequential amendments to clauses 46 and 48.

Amendment G – definition of violence

Clause 48, page 33, line 6, leave out 'includes violence against property' and insert 'means serious violence'.

Effect

54. This will amend the definition of violence so that it does not specifically include violence against property, but instead means serious violence.

Briefing on alternative amendments

55. As discussed above, Liberty strongly opposes the inclusion of Part 4 in this Bill which we believe has dangerous potential for stigmatisation and discrimination. The powers are both unnecessary and excessive and should be removed in their entirety. If, however, this approach is not taken, the amendments proposed above should, at a minimum, be included. Amendment A would require an injunction to be imposed only when the court is satisfied on the criminal standard of proof that a person has

engaged in or encouraged or assisted gang-related violence. Given the imposition of an injunction can involve serious deprivations of liberty and a grave intrusion into a person's private life, the court must be satisfied beyond reasonable doubt, in the same way as it does in a criminal trial or for the imposition of an ASBO.

56. Amendment B would remove the ability for a court to grant an injunction in order to "*protect the respondent from gang-related violence*". A coercive injunction should not be imposed on a person for their own protection. This is, in effect, punishing the victim. This is similar to a case considered by the team of academics from the University of Manchester. At one school a high achieving student and two friends were permanently excluded from school after a group of young men had gathered at the school gates and threatened to kill him. The student was then labelled as a 'gang member', despite having no other links to gangs or involvement in crime. His status as a victim of crime was ignored.[47] Victims, or potential victims, of 'gang-related violence' should not be penalised in this way. In respect of children, child protection laws already exist which are designed for their protection – this is a more appropriate response than one which is designed to, in effect, punish a person.

57. Amendment C would remove the definition of 'gang-related violence' (which essentially provides a definition of a gang and insert a new definition of 'gang' in clause 33. It is extremely difficult to define what a 'gang' is as it is not a static group. The definition of a 'gang' currently included in the Bill is very broad and can lead to generalisations and potential targeting of young people who simply associate together. In this context, membership of a gang should be limited to membership of a group that has been formed for the purposes of undertaking criminal activity or a group that together has undertaken criminal activity more than once.

58. Amendment D ensures that only the types of prohibitions listed in clause 34 may be imposed by a court, rather than an ever expansive range that Parliament has no control over. A non-exhaustive list is not appropriate in circumstances that can lead to such severe imposition on a person's life. Amendment E removes the ability of the court to require a person to do something – i.e. to remain in a particular place at particular times of the day, participate in specified activities; notify of change of address; report at particular times of the day. These type of requirements are very similar to that imposed while on parole or those imposed by a control order. The

[47] Ralphs, Medina and Aldridge, above footnote 24, page 12.

people who are to be subjected to such a requirement may never have been convicted of any criminal offence and the injunction is not being imposed as punishment for any offence committed, rather it is for the ill-defined prospect of some potential future engagement. It is inappropriate to impose such requirements in such circumstances and this provision should be removed.

59. Amendment F would remove the ability of a local authority to apply for an injunction. Given the seriousness of the measures imposed by an injunction it is inappropriate for a local authority to apply for such an injunction – given the link, although vague and imprecise, to criminality the police, if anyone, are the more appropriate applicants. The final amendment (G) amends the definition of violence to restrict it to serious violence and take out reference to violence to property. It will be up to the courts in the circumstances of each case to determine whether the alleged violence is sufficient to cover violence to property. The limitation to serious violence should be included to ensure that very minor allegations of violence (i.e. shoving a friend or graffiti) will not lead to an injunction.

Part 5 – Proceeds of Crime

Amendment 11– clause 53

Clause 53, page 38, leave out lines 4 to 20.
Clause 53, page 38, line 21, leave out 'third' and insert 'first'.
Clause 53, page 38, line 28, leave out 'fourth' and insert 'second'.
Clause 53, page 38, line 32, leave out 'fifth' and insert 'third'.
Clause 53, page 38, line 38, leave out 'sixth' and insert 'fourth'.
Clause 53, page 38, line 46, leave out 'seventh' and insert 'fifth.
Clause 53, page 39, line 8, leave out 'third or fourth' and insert 'first or second'.
Clause 53, page 39, line 11, leave out 'fifth, sixth or seventh' and insert 'third, fourth or fifth'.
Clause 53, page 39, leave out lines 15 to 19.
Clause 53, page 40, lines 10 to 11, leave out 'first, second, third or fourth' and insert 'first or second'.
Clause 53, page 45, leave out lines 9 to12.
Clause 53, page 45, line 13, leave out 'third or fourth' and insert 'first or second'.

Clause 53, page 46, lines16 to 17, leave out 'fifth, sixth or seventh' and insert 'third, fourth or fifth'.

Effect

60. The first amendment removes the power to seize property from a person when they have just been arrested, but not yet charged with an offence. The subsequent amendments are consequential renumbering and removes provisions that would have no effect if the first amendment is made.

Briefing

61. The *Proceeds of Crime Act 2002* allows for a confiscation order to be made in respect of a person's property following conviction for an offence, if he or she has benefited from the criminal conduct. In addition, a restraint order can be made to restrain the use of the property in question pending the determination of the criminal conviction. As it presently stands, the property itself cannot be seized until a confiscation order is made (although it may be seized for other lawful reasons, such as for use as evidence). Clause 53 (and clauses 54-55 in relation to Scotland and Northern Ireland) introduces a new power to enable police, customs authorities and financial regulators to search for and seize property (not necessarily subject to any order) before a person has been convicted, including before proceedings have even been commenced. It is enough simply for the person to have been arrested, criminal investigations to be ongoing and for there to be reasonable cause to believe that the person has benefited from conduct constituting the offence. This proposed amendment clearly raises issues regarding the right to privacy and peaceful enjoyment of possessions under the HRA.[48]

62. There are already ample powers under the criminal and civil law to search for and restrain property pending the outcome of criminal proceedings and seize property that is of evidential value. We do not see the need to have an additional power to seize property before a person has been convicted of any offence. In addition, these proposals necessarily involve direct or indirect findings of guilt on the part of the property holder or persons connected to the property, as there is a requirement to show that the person has benefited from conduct constituting the offence. This

[48] See article 8 of the ECHR regarding the right to privacy and article 1 of Protocol 1 to the ECHR regarding protection of property, as incorporated in the HRA.

undermines the presumption of innocence, and the danger is that individuals will be 'convicted' by the civil courts in the eyes of the public without the protections that would be available in the criminal courts. Such an extreme interference with property and potentially private and family life should be proportionate and necessary. The Explanatory Notes to the Bill recognise this interference but simply provide that a Code of Practice will be drafted "*to cover the exercise of these powers, to ensure that they are exercised proportionately*". This is not adequate: Parliament should oversee the exercise of these powers and such broad powers should not be left to be regulated by secondary instruments. This Bill goes particularly far in applying these measures when a person has not even been charged with any criminal offence. Our proposed amendment is a bare minimum amendment to ensure that the power to search for and seize property does not apply until, at least, after arrest.

63. Similar amendments will need to be made to clauses 54 and 55 if these amendments are accepted (which are the same amendments relating to Scotland and Northern Ireland).

Amendment 12 – clause 53 (sections 47G, 47H, 47M & 47O)

Clause 53, page 41, line 34 - 35, leave out 'a justice of the peace or (if that is not practicable in any case) the approval of a senior officer' and insert 'the Crown Court'.
Clause 53, page 41, leave out lines 36 to 46.
Clause 53, page 42, line 7, leave out 'a justice of the peace' and insert 'the Crown Court'.
Clause 53, page 42, line 13, leave out 'a justice of the peace' and insert 'the Crown Court'.
Clause 53, page 43, lines 19 to 20, leave out 'a justice of the peace' and insert 'the Crown Court'.
Clause 53, page 44, line 20, leave out 'A magistrates' court' and insert 'The Crown Court'.
Clause 53, page 44, leave out lines 43 to 44.
Clause 53, page 45, lines 25 to 26, leave out 'magistrates' court' and insert 'Crown Court'.
Clause 53, page 45, line 27, leave out 'Crown Court' and insert 'High Court'.
Clause 53, page 45, lines 29 to 30, leave out 'Crown Court in respect of the magistrates' court's' and insert 'High Court in respect of the Crown Court's'.

Clause 53, page 46, leave out lines 20 to 21.

Effect

64. These amendments ensure that authorisation for search and seizure powers must be given by the Crown Court not by a justice of the peace.

Briefing

65. The new sections introduced by this Bill into the *Proceeds of Crime Act 2002* set out a system where an officer of Revenue and Customs, a constable or an accredited financial investigator can seize property and search premises and people if certain conditions are met. This power can be exercised without any approval if it is not practicable to obtain that approval before exercising it. If, however, it is practicable this power should be approved by a justice of the peace or a senior officer. In any event, if the property is to be detained for more than 48 hours further retention must be ordered by a justice of the peace. However, the current provisions in relation to restraint orders (which are less intrusive than this proposed measure) require the restraint orders to be approved by the Crown Court. No reason is given as to why, at the very least, the Crown Court is not involved in providing judicial oversight. The Crown Court is the more appropriate court given the serious interference with the right to privacy and property that these provisions introduce. These amendments therefore substitute the role of the justice of the peace (and in some circumstances a senior officer) with a judge of the Crown Court.

66. Similar amendments will need to be made to clauses 54 and 55 if these amendments are accepted (relating to Scotland and Northern Ireland).

Part 6 – Extradition: see separate briefing

Part 7 – Aviation Security

Amendment 13– new provision – extraordinary rendition

To move the following clause—

'After section 24B of the Aviation Security Act 1982 (c. 36) insert—

"24C Police powers to search aeroplanes

(1) If the Secretary of State has reason to believe that an aircraft that is in flight over the United Kingdom is or has recently been or may be involved in an act of unlawful rendition then he or she may require the aircraft to land at a suitable aerodrome.

(2) If an aircraft is required to land in accordance with subsection (1), a responsible person must, as soon as practicable after the aircraft has landed, enter and search the aircraft.

(3) The Secretary of State or a responsible person must enter and search an aircraft if he or she has reason to believe that—
(a) an aircraft in an aerodrome is or has recently been or may be involved in an act of unlawful rendition; or
(b) in respect of an aircraft in an aerodrome, incomplete or incorrect information under sections 32 and 33 of the Immigration, Asylum and Nationality Act 2006 (c.13) has been supplied.

(4) For the purposes of subsections (2) and (3), a search of an aircraft is to be carried out to determine if—
(a) the aircraft has recently been, or may be involved in an act of unlawful rendition;
(b) a criminal offence has been committed; or
(c) allowing the aircraft to continue on its journey could place the United Kingdom in breach of its obligations under the European Convention on Human Rights,

but these powers may only be exercised when it is not reasonably practicable to apply for a warrant of entry in accordance with section 8 of the Police and Criminal Evidence Act 1984 (c.60).

(5) A person who carries out a search under this section may remove any items from the aircraft if it may be evidence of any of the matters set out in subsection (4).

(6) In this section—

"an act of unlawful rendition" means an act, not being in accordance with formal lawful extradition or deportation procedures, involving the forcible transportation of a person to a territory where he or she may be subjected to torture and inhuman and degrading treatment;

"a responsible person" means—
(a) the chief officer of police of a police force maintained for a police area in England and Wales;
(b) the chief constable of a police force maintained under the Police (Scotland) Act 1967 (c. 77);
(c) the Chief Constable of the Police Service of Northern Ireland;
(d) one of the Commissioners for Her Majesty's Revenue and Customs;
(e) a constable designated by any of the persons specified in paragraphs (a) to (c).'".

Effect

67. This amendment would introduce a new clause into the Bill that would amend the *Aviation Security Act 1982* to introduce new powers to direct a plane to land and to search that plane and any other plane already in the UK if there is reason to believe that the aircraft has been involved (or may be involved) in unlawful rendition.

Briefing

68. Similar amendments to this proposal were tabled in the Civil Aviation Bill and the Police and Justice Bill in 2006, neither of which was successful. Given the acknowledgment since then that planes transporting prisoners to countries where

they face torture and inhuman and degrading treatment have come within the UK's jurisdiction, we think it timely that this amendment is reintroduced. This Bill appears to be a suitable vehicle for this given the amendments being made to the *Aviation Security Act 1982*.

69. These amendments create a power to allow the Secretary of State to require any plane using UK airspace to land if she has information to believe that the plane is being used for the purposes of unlawful rendition. It also creates a specific duty requiring that if such planes are forced to land they must be searched. Further, if the Secretary of State or senior police officers or customs believe that a plane using UK airport facilities may be involved in unlawful rendition there is a power to search that plane. There are already powers to search planes under other legislation, but this does not cover all of the circumstances involving extraordinary rendition. It also gives a power to search an aircraft if there is reason to believe that incorrect or misleading information on passengers, crew and the flight path has been supplied.

70. It is unnecessary to set out here the various allegations and admissions relating to the use of UK territory and airspace for aircraft involved in extraordinary rendition. The UK government has confirmed that the UK's base on Diego Garcia was used on at least two occasions for flights involved in extraordinary rendition. The purpose of this amendment is not to consider the past incidences of unlawful rendition but will allow the means for future concerns to be properly investigated. There already exist some powers to investigate such allegations, but the main power, set out in PACE (sections 17 and 24B), must be exercised on the basis of reasonable suspicion. This is a standard that will be difficult to reach in cases of extraordinary rendition as any 'hard' evidence to suggest rendition is taking place is almost certain to be unavailable as it would only be located by a search of the plane. Evidence of extraordinary rendition is essentially circumstantial. The *Customs and Excise Management Act 1979* creates wide ranging powers of entry and search of aircraft (see especially sections 27, 28, 33 and 163), but these essentially relate to stolen or smuggled goods. The *Terrorism Act 200 (Information) Order 2002* (SI 2002/1945) (paragraph 17(4) and Schedule 7) gives police, immigration and HM Customs and Excise the power to serve on the owner or 'agents' of an aircraft arriving in the UK a notice requiring details of the crew and passengers, but this is limited to cases involving terrorism. There is therefore a gap in the existing legislation that justifies the creation

of this specific power. If the government is committed to ensuring that the UK does not facilitate the transfer of a person to countries where they may be subjected to torture or inhuman or degrading treatment it should not object to this amendment.

Part 8 – Miscellaneous

Chapter 1, Safeguarding Vulnerable Groups and Criminal Records

Amendment 14 – clauses 85 and 88

Clause 85, page 111, leave out line 26 to 46. Clause 85, page 112, leave out lines 1 to 42. Clause 88, page 114, leave out lines 14 to 41. Clause 88, page 115, leave out lines 1 to 34.

Effect

71. This will remove clause 85(1) and (2) from the Bill (but keep clause 85(3)). It will do the same for clause 88(1) and (2) which relates to Northern Ireland.

Briefing

72. Clauses 85 and 88 were introduced in the later stages of the Public Bill Committee with very little explanation given for their introduction and no debate given to them. Clause 85 seeks to amend the *Safeguarding Vulnerable Groups Act 2006* (SVG) to introduce three new sections into that Act (and clause 88 amends the equivalent Northern Ireland legislation). The effect of it would be to require the new Independent Safeguarding Authority, established to provide an independent body to vet those who seek to work with children and vulnerable adults, to notify employers and others if it is considering including a person on a barred list.

73. The ISA's creation was recommended by Sir Michael Bichard in his Inquiry into the murders of Jessica Chapman and Holly Wells by Soham school caretaker Ian Huntley. The ISA is due to come into operation in October 2009, and from July 2010 all people who work with or volunteer with children and vulnerable adults will need to be registered with the ISA. Currently such people need to obtain an enhanced

criminal record certificate.[49] This certificate gives the same information as standard criminal record certificates (details of spent and unspent convictions and cautions and information about whether the individual is on the sex offenders register), but also includes any other information which, in the opinion of the Chief Officer of Police, might be relevant and ought to be included in the certificate. The type of information that can be included is very broad and does not have to relate to a conviction or even an arrest or prosecution, but can be any information that has come to the attention of the police by any means. Mere allegations that are not pursued or that are dismissed as spurious, and prosecutions that result in an acquittal can be disclosed to an employer, as can information about behaviour that is not criminal at all. This is all disclosed without the job applicant ever being given an opportunity to offer any explanation (for example, an applicant might be able to demonstrate that allegations of sexual impropriety against a student was the result of spurious allegations that had been found to be false and had been withdrawn). As was explained by Sir Michael Bichard in his report:

> *At present Enhanced Disclosure results are normally provided at the same time to the individual applicant and to the employer or voluntary body (Police Act 1997). Any objections by the job applicant to the provision of certain information could not, therefore, undo any damage done to his/ her prospects with that particular employer… This raises important issues about the fair treatment of individuals. There is a risk that careers may be blighted and job prospects lost.*[50]

74. We believe that an effective vetting system should ensure that those not suitable to working with children or the vulnerable are barred, while ensuring that potential employers remain unaware of unfair, malicious or spurious allegations. It is undeniable that details of allegations (as well as convictions) might be relevant in determining suitability to work with children and the vulnerable. However, it is also an unfortunate truth that many careers have been blighted by unfounded accusations of impropriety.

[49] See section 113B of the *Police Act 1997*.
[50] See Bichard Report, paragraphs 4.107 and 4.109.

Case study

Susan[51] was employed by an NHS Trust and successfully applied for a student nurse place through the Trust. She had started her first week at university when her enhanced criminal record certificate came back. The certificate showed that Susan was currently on police bail for suspected fraud. Susan had been put on bail after a bank account had been opened in her name through which thousands of pounds had been processed. No charges were brought against Susan for the offence and she agreed to appear as a witness for the prosecution of another suspect. The offender later pleaded guilty and received a custodial sentence.

Susan was given no opportunity to make representations to the police or any other body regarding what information was recorded by the police and included in the enhanced criminal record certificate. When the enhanced criminal record certificate was received by her employer Susan was immediately suspended and instantly lost her student nurse place at university. The CRB subsequently wrote to say that the information regarding Susan's bail should not have been included on the certificate, and after a disciplinary hearing her job was reinstated. However, by this time Susan had already lost her place at university and suffered the hardship and embarrassment of being suspended from work. Although the information was deleted from her enhanced criminal record certificate record, the information regarding details of her disciplinary hearing remains on her personal employment file. This file can be viewed by her managers and used when providing references, and, as a result of the information on the file, she feels she has been discriminated against by her colleagues.

75. It was because of problems like this that we believed that the ISA could provide an effective new independent vetting body. The SVG Act set up three different situations in which a person could be included on the barred list. In the first situation, an applicant is automatically barred from registration in certain prescribed circumstances (for convictions and cautions for mainly sexual offences). In the second situation a person is barred and may make representations to be taken off the barred list (for convictions and cautions for other serious offences). The third situation is where the ISA is considering barring a person because the person has in the past engaged in certain behaviour (which may relate to convictions or cautions, or may only relate to arrests or allegations) or if it appears to the ISA that he or she is a risk to children or vulnerable adults. In this third category the affected person is

[51] This is based on a real life situation but all names have been changed.

entitled to make representations to the ISA as to why he or she should not be included on the barred list.[52] This would allow those who had allegations made against them to make those representations without an employer being made aware of those allegations if the person is successful in being deemed suitable for inclusion on the register.

76. We believe that the main purpose of a system such as this is to ensure that only those matters that the ISA deem to properly affect a person's suitability to work with children or vulnerable adults is disclosed to the employer. Clauses 85 and 88 are therefore curious and disappointing. If passed they would require the ISA to notify the employer (or other registered person, i.e. a voluntary agency) that it is proposing to include a person on the barred list but has not yet taken a final decision – because it is awaiting the making of representations. This means that although the ISA has not made any decision, and although it may ultimately decide the person should not be included on the barred list, the employer will be made aware of this fact. This seems to defeat the purpose of the creation of an independent body and indeed the process of allowing a person to make representations. Indeed, when the Safeguarding Vulnerable Groups Bill was progressing through Parliament the government explained that it was necessary for the ISA to receive all information and for it to make the decision as to what would be sent to the employer, and noted that:

> *If information referred to the IBB is obviously false, spurious or insufficient to result in inclusion on a barred list, the intention is that it should not consider the information further than is necessary to establish that fact. There will be no detrimental effects on the person who is the subject of the referral.*[53]

77. Yet, now the government proposes to allow the employer to have knowledge of the fact that the ISA is considering barring the person. Even if ultimately the person is not barred it is not difficult to imagine how an employer, erring on the side of caution, may decide not to make a job offer to someone who is not automatically cleared to work. Indeed, when introducing this clause in Committee the government even endorsed a hypothetical example[54] whereby an employer might, on receiving information that barring is being considered, "*suspend the person*", despite no

[52] See Schedule 3 of the SVG Act.
[53] See comments of the Parliamentary Under-Secretary of State for Education and Skills (Mr. Parmjit Dhanda) on 11 July 2006, Standing Committee B, Hansard, column 31, available at: http://www.publications.parliament.uk/pa/cm200506/cmstand/b/st060711/am/60711s06.htm
[54] Public Bill Committee, 14th sitting, 24 February 2009, column 544.

decision having been made, and on the basis of 'soft' intelligence (i.e. unproven allegations). Liberty receives communications from many people who have been barred from working with children or the vulnerable. While some bars are of course justified, it is clear that there are many people whose careers have been blighted by an unjustified, possibly malicious allegation that has been dismissed by the police but has not been weeded out from the vetting process. Clauses 85 and 88 would defeat the main purpose of an independent vetting system which allows a certain category of people to make representations regarding soft information. We believe these clauses should be removed from this Bill.

Amendment 15 – Repeal of certain provisions of the *Safeguarding Vulnerable Groups Act 2006*

Schedule 8, page 199, in column 2, before line 4 insert—

'Section 15(b) and the ", or" immediately before it.
Section 15(3)(a) and (7) and (8).
Section 24(6).'.

Schedule 8, page 199, in column 2, after line 10 insert—

'Section 44(2)(e) and the ", and" immediately before it.
Section 47(2)(e) and (3)(e) and the ", and" immediately before it.
In Schedule 5—
paragraph 1(b) and the ",or" immediately before it.
paragraph 2(a)
paragraph 5(b) and the ",or" immediately before it.
paragraph 6(2)(a) and (3)(d) and the ", and" immediately before it.
paragraph 7(2)(a) and (3)(d) and the ", and" immediately before it.
paragraph 8.
paragraph 9(2)(a) and (3)(d) and the ", and" immediately before it.
paragraph 10(2)(a) and (3)(d) and the ", and" immediately before it.
paragraph 11, 12 and 12A.
In Schedule 6, paragraph 2.

In Schedule 9, paragraph 14(4).'.

Effect

78. This will repeal all provisions in the *Safeguarding Vulnerable Groups Act 2006* which allow for an enhanced criminal record certificate to be issued in relation to a person who is also subjected to monitoring by the ISA.

Amendment 15A – Police Act 1997

To move the following clause—

'(1) The Police Act 1997 (c. 50) is amended as follows.

(2) In section 113B(1), for "The Secretary" substitute "Subject to subsection (2B), the Secretary".

(3) After subsection (2A) insert—

'(2B) The Secretary of State must not issue an enhanced criminal record certificate if the registered person who countersigned or who acted as the registered person in relation to the application is required to ascertain whether the applicant is subjected to monitoring under the Safeguarding Vulnerable Groups Act 2006.'".

Effect

79. This will introduce a new clause to amend the *Police Act 1997* to ensure that an employer who is required to check whether a person is subjected to monitoring under the SVG Act cannot also be issued with an enhanced criminal record certificate (in addition to receiving information supplied to them by the ISA).

Briefing

80. As already explained, the ISA was developed to provide an effective new vetting system following the Soham murders tragedy. As Sir Michael Bichard noted in his report:

There are, I think, sufficient problems with the current arrangements, even if these were improved, to justify a different approach to establishing the basic suitability of those who want to work with children or vulnerable adults (although the latter falls outside this Inquiry's remit).[55]

81. The Bichard Inquiry Report proposed vetting though the ISA model saying:

The central body would take a decision on the basis of the information above and notify the applicant. At that stage, no other employer, individual or institution would be informed. Under this system, employers would still decide whether or not a job required the postholder to be registered with the central body…Employers would also retain the ultimate decision about whether or not to employ someone, using references and interviews.[56]

82. It is of course understandable that an employer would still need to interview and take up references. However, it is a reasonable presumption that Sir Michael Bichard did not envisage the need for Enhanced Disclosure to continue once the ISA came into operation. Yet, this is what is provided for in the *Safeguarding Vulnerable Groups Act 2006* and it clear that the government intends to operate a duel vetting system once the ISA is up and running. One possible justification for the presumed need to continue with Enhanced Disclosure is that the ISA will not provide all relevant details. The ISA website comments on this saying it:

[D]oes not check for malpractice or all criminal convictions, and therefore registration with the ISA does not guarantee that a person has no criminal history.
A CRB check provides a fuller picture of a person's criminal history and allows employers to make informed decisions as to whether that person is suitable for a particular role or position.[57]

When Liberty enquired with the Home Office about the perceived need for continuing Enhanced Disclosure from the CRB, the example given was that of a school bus driver. The Home Office stated that before the employment of a school bus driver

[55] See Bichard Report paragraph 4.113.
[56] See Bichard Report paragraphs 4.117 and 4.118.
[57] See Frequently Asked Questions on ISA website: http://www.isa-gov.org.uk/default.aspx?page=327

could commence it would be necessary to show not only that they had ISA clearance but also that they did not have, for example, a conviction for dangerous driving which would make them unsuitable for such employment. We agree that extra disclosure might be necessary to determine suitability in this type of situation. However, this information would be available through an application by the employer for Standard Disclosure.[58] Standard Disclosures show current and spent convictions, cautions, reprimands and warnings held on the Police National Computer. What it will not show is any record of allegations. We cannot think of a situation where information not available through Standard Disclosure might be relevant to the employment of someone who has been cleared by ISA vetting.

83. It might be suggested that the weeding of intelligence information could be done by the police to ensure that enhanced criminal record certificates do not contain inappropriate information. However, concerns over the ability of the police to operate an effective and consistent weeding policy were a significant issue identified in the Bichard Report. It concluded:

> *The current regime also leaves the police to make some very difficult judgements, for which they may not be best placed…There was a clear consensus in the evidence, including that from ACPO, in favour of taking the decision about what information should, and should not, be disclosed out of police hands. That consensus is, in my view, supported by a range of compelling arguments.*[59]

84. We believe that allowing employers to continue to access enhanced criminal record certificates in addition to ascertaining if a person has been ISA cleared, potentially breaches Article 8 of the *Human Rights Act 1998* (the right to respect for privacy and family life).[60] Article 8 is not an absolute right. Article 8(2) allows for limitations if they are prescribed by law, serve a legitimate purpose, and are proportionate (or 'necessary in a democratic society'). Enhanced criminal record certificates are prescribed by law under the *Police Act 1997*. The legitimate purposes set out in Article 8 include *"the prevention of disorder or crime"* and the *"protection of the rights and freedoms of others"*. The first two conditions do not

[58] Under section 113A of the *Police Act 1997*.
[59] See Bichard Report paragraphs 4.102 and 4.105.
[60] Article 8 of the European Convention on Human Rights as incorporated by the *Human Rights Act 1998*.

therefore appear to raise any issues. We would however dispute that the continuation of enhanced criminal record certificates is proportionate. The need to be *"necessary in democratic society"* implies the existence of a *"pressing social need"* for the interference with Article 8 (see *Dudgeon v UK* (1981) 4 E.H.R.R. 39). Once the ISA is in operation we cannot see how there can be a pressing social need for enhanced disclosure to continue.

85. We cannot see justification for a continuation of the 'belt and braces' approach for professions where the ISA will now operate. As such the amendments proposed above seek to ensure that the Enhanced Disclosure scheme cannot continue side-by-side with ISA registration. We believe that the creation of the ISA represents an opportunity for a vetting system which safeguards children and the vulnerable and which also ensures greater fairness for those who are subject to spurious or unfounded allegations. We believe that such a system would appropriately address the problems identified by Sir Michael Bichard, and as such there is no need for the two systems to operate side-by-side. Finally we would stress that we support a robust and well-coordinated safeguarding system that protects children and the vulnerable from risk. We are merely seeking adherence to a system that is fair and which deals with the problems identified by Sir Michael Bichard

Amendment 16– clause 92

Clause 92, page 117, stand part.

Effect

86. This amendment will remove clause 92 from the Bill.

Briefing

87. Clause 92 seems to us to be unnecessary, costly and potentially discriminatory. It provides that if a person has applied for a Criminal Record Check for the purposes of employment, an immigration control check can also be carried out if an additional fee is paid by the applicant. The stated intention is to "*assist employers in avoiding the employment of illegal workers*".[61] This amendment is completely unnecessary.

[61] See Explanatory Notes at paragraph 456.

Employers can already find out this information by checking an applicant's passport and, if necessary, making inquiries of the UK Borders Agency. It is not necessary to include this as part of a criminal records check. To do so will incur a fee, the amount is not yet stated (it is to be prescribed), which will inevitably have to be paid by a job applicant. It is unlikely that a British citizen will be asked to include this information when applying for a criminal records check, meaning non-nationals will have a fee imposed on them unnecessarily. While we appreciate the need for employers to determine if there are any immigration controls on a person before they are employed, this can already be done through the normal checking process. Indeed, the Explanatory Notes state that this will be an optional service and "*there will remain other ways for employers to satisfy themselves of an individual's right to work status*". This is not a measure designed to help people exploited by unscrupulous employers, nor is it a measure that will help to stop employers from employing illegal workers. Those that employ illegal workers generally know that they are doing so and do so in order to gain cheap labour. This measure will not stop this practice in any way: it provides nothing new to employers and simply imposes an additional cost on job applicants which in straightened economic times cannot be considered either fair or useful.

Chapter 2: Retention and Destruction of Samples (DNA and fingerprints)

Amendment 17 - clauses 96-98

Clause 96, page 120, stand part.
Clause 97, page 121, stand part.
Clause 98, page 122, stand part.

Effect

88. These amendments will remove clauses 96-98 from the Bill.

Briefing

89. Clauses 96 to 98 seek to amend the *Police and Criminal Evidence Act 1984* (PACE) to empower the Secretary of State to make Regulations that will set out a system regarding the retention, use and destruction of fingerprints and DNA and

other samples and the information derived from them, as well as impressions of footwear and certain photographs.[62] Detail of how the DNA database will continue to operate and whose DNA and fingerprints will be destroyed will all be set out in the Regulations. The Regulations will be subject to the affirmative resolution procedure, but there will be no chance for Parliament to propose any amendments to the Regulations. In addition, the time permitted for the debate of secondary legislation is generally restricted to 90 minutes. As James Brokenshire MP said in the Public Bill Committee after these clauses were introduced:

> *Given the significance and importance of the topic, why is it being swept under the affirmative resolution procedure? With that procedure, I assume that it will not be possible to amend the regulations and we will only have an hour and a half of debate in Committee on these fundamental issues. There are serious issues of public confidence, as Ministers have identified. The other place almost has a convention of not rejecting secondary legislation. I have serious concerns about how the issue is being approached. …Simply to present a set of regulations and, in essence, say, "Take it or leave it" will not allow the necessary scrutiny, debate and consideration that the issue rightfully demands… The issue demands primary legislation that can be properly scrutinised and examined, in detail, line by line to ensure that appropriate protections are provided.*[63]

90. On 7 May 2009, after first making the announcement in the media, the government published a consultation document setting out the retention policy it intends create by way of the Regulations. Liberty believes that an issue of such importance - the retention of DNA profiles on a centralised database - should be properly debated and considered by Parliament and not left to secondary legislation, which is why we advocate removing clauses 96-98 in their entirety. Indeed, these clauses were introduced in the last week in which the Bill was before the Public Bill

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[62] These photographs will have to be of the type taken using powers under PACE, namely photographs of suspects for the purposes of an investigation or the prevention of crime, see for example, sections 54A and 64A of PACE.

[63] Hansard, Public Bill Committee in the House of Commons, 16th sitting, 26 February 2009, column 617, available at: http://www.publications.parliament.uk/pa/cm200809/cmpublic/policing/090226/pm/90226s07.htm See also the comments by Paul Holmes at column 618 in relation to this "*It is entirely wrong and unsatisfactory to ask us to simply give the Government advance permission to introduce regulations that would not be subject to major debate, vote and amendment in the House*".

Committee. As such, there was no debate on these issues at Second Reading and only limited debate in Committee. As Paul Holmes MP said in Committee:

> *These new clauses are of crucial importance. They concern the DNA database which has been a long-running and controversial issue in Parliament, but they were introduced by the Government last Friday at the end of recess week. They were made available publicly on Monday of this week. A number of organisations that would normally respond on something like this have not had time to get to grips with it. We looked at it and tabled some amendments, but it was too late for the Tuesday midday deadline for them to be considered here. On such a major issue that is completely unacceptable.*[64]

It is disappointing that Parliament has not, to date, been given the opportunity to fully debate this issue. As this is our first briefing in relation to this amendment we have, below, provided parliamentarians with a full background as to the relevant issues.

Existing law

91. Under PACE the police have the power to take fingerprints and DNA samples (and footwear impressions) from a person following their arrest for a recordable offence.[65] A recordable offence[66] is defined as being any offence punishable by imprisonment as well as 68 other named offences which include such minor offences as drunkenness in a public place, begging and riding a bicycle without the owner's consent. PACE currently provides that fingerprints and DNA samples may be retained after they have fulfilled the purpose for which they were taken (including from volunteers in most circumstances), but does not deal with when, if ever, such material may be destroyed.[67] As such, destruction of samples is currently dealt with by each individual police authority, acting under guidance from the Association of Chief Police Officers (ACPO). ACPO guidance says that fingerprints and DNA samples taken on arrest should only be destroyed in 'exceptional circumstances'.

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[64] Hansard, Public Bill Committee in the House of Commons, 16th sitting, 26 February 2009, column 618, available at: http://www.publications.parliament.uk/pa/cm200809/cmpublic/policing/090226/pm/90226s07.htm

[65] See sections 61 and 63 of PACE.

[66] See the definition in s 118 of PACE and the *National Police Records (Recordable Offences) Regulations 2000*.

[67] See section 64(1A) of PACE.

The two examples given of what would constitute exceptional circumstances are where the original arrest or sampling was found to be unlawful or where it turns out that no offence had actually been committed by anyone (e.g. if someone dies and murder is suspected but then it turns out the death was from natural causes).[68] The guidance also states that when a person asks to have his or her DNA sample or fingerprints removed from the database it should be refused in the first instance as a matter of course and the applicant will need to write in a second time in order to demonstrate exceptional circumstances.[69] If no exceptional circumstances exist the current policy is that DNA samples and fingerprints will be retained until a person reaches 100 years of age.

S and Marper v UK

92. On 4 December 2008 the European Court of Human Rights (ECtHR) in the case of *S and Marper v the United Kingdom*[70] (in which Liberty intervened), ruled that the UK's policy of indefinite retention was in breach of the European Convention on Human Rights. 'S' was 11 years old when arrested on suspicion of armed robbery. His fingerprints and DNA samples were taken following arrest, but despite being acquitted at trial the police refused to destroy the samples. Mr Marper was arrested in 2001 and charged with harassment of his partner. Two months later he had reconciled with his partner and no charges were pressed and proceedings were discontinued, however the police refused to destroy samples of his DNA and his fingerprints taken following arrest. The ECtHR held that the "*blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of people suspected but not convicted of offences*" breached the applicant's right to respect for private life under Article 8 of the European Convention on Human Rights.[71]

93. The right to privacy is not an absolute right – it can be limited by a law if it is necessary to do so in a democratic society for a number of wide ranging interests. Previous cases have held that the mere storing of data relating to the private life of a

[68] *Exceptional Case Procedures for Removal of DNA, Fingerprints and PNC Records*, 16 March 2006, available at: http://www.homeoffice.gov.uk/documents/Bichard_Step_Model_Retention.pdf?view=Binary
[69] Ibid at pages 12 and 14.
[70] *S and Marper v UK*, Grand Chamber judgment, 4 December 2008, available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=marper&sessionid=22986969&skin=hudoc-en
[71] *S and Marper v UK*, at paragraph 125.

person amounts to interference under Article 8.[72] Whether or not the storing of such information can be permitted under Article 8 will turn on context including, among other things, factors such as the nature of the information; the purpose of its storage; the access regime etc. In their strongly worded unanimous judgment, the Court in *S and Marper* reiterated that DNA samples "*contain a unique genetic code*" which contains highly personal information.[73] The Court accepted that the retention of DNA information and fingerprints pursued the legitimate purpose of crime detection and prevention, but went on to say that the indefinite retention of such material is not necessary in a democratic society as it fails to strike a fair balance between competing public and private interests and is a disproportionate interference with the right to privacy.[74] In particular, the Court made the following observations and findings in relation to the UK DNA database:

- Most other states take DNA samples and fingerprints from people suspected of having committed offences of a certain level of gravity, whereas in the UK it is taken on arrest for any recordable offence.[75]
- In most other European jurisdictions, including Scotland, DNA samples are required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge.[76] In fact, England, Wales and Northern Ireland are alone within the Council of Europe in allowing indefinite retention of such material from persons of any age suspected of any recordable offence.[77]
- The DNA database has contributed to the detection and prevention of crime but many of the matches on the DNA database could be made simply by taking the DNA on arrest but not by indefinitely retaining it.[78]
- The power of retention is blanket and indiscriminate, as the material may be retained irrespective of the nature or gravity of the offence, the age of the suspected offender; the retention is indefinite; there is no provision for

[72] See *Leander v Sweden,* 26 March 1987, ECtHR at paragraph 48.
[73] *S and Marper v UK*, at paragraph 72. The Court also held that fingerprints also contain unique information about a person allowing his or her identification with precision in a wide range of circumstances and as such retaining them may, in itself, give rise to important private-life concerns, see paragraphs 84-85.
[74] See paragraph 125.
[75] See paragraph 108.
[76] See paragraph 108.
[77] See paragraph 110.
[78] See paragraphs 116-117.

independent review and only limited possibilities for an acquitted person to have their data removed.[79]

- Every person has the right to be presumed innocent until proven guilty, and acquitted persons must be treated in the same way. The National DNA Database risks stigmatising people, as inclusion on the database leads to the perception that suspicions exist in relation to that person.[80]
- The retention of samples and profiles of unconvicted people may be especially harmful in relation to children, and that currently unconvicted children and minority ethnic people are over-represented on the database.

Effect of decision

94. It is important to note from the outset that this decision does not dispute or aim to undermine the important role that DNA evidence can play in the detection and prevention of crime. While DNA is only ever relevant in a small number of crimes, it can be extremely useful in bringing criminals to justice. The decision in *S & Marper* will not prevent the police from doing extremely important investigatory work using DNA. Rightly it does not prevent DNA being taken from suspects arrested in the course of an investigation and it does not prevent that DNA from being retained while the investigation is actively ongoing. The judgment does not seek to prevent DNA taken from those on arrest being cross-referenced against unidentified crime scene DNA. Importantly also, it does not require the DNA profiles of those convicted of violent and sexual offences to be deleted from the NDNAD. Instead its primary impact is to offer protection to those who have not been convicted of any offence and potentially those convicted of minor offences. The decision relates only to the period of time that samples can be kept once people have, for example, been released without charge or acquitted. Contrary to some subsequent media reports, implementation of the judgment would <u>not</u> have prevented convictions in several recent high profile murder cases. Specifically those that led to the convictions of Peter Tobin, Steve Wright and Mark Dixie. Tobin already had a conviction for violent sexual assault; Wright was already a suspect because of CCTV footage; and Dixie had his DNA taken following arrest for another offence. What this judgement *should* do is introduce human rights values of proportionality and necessity to the complex issue of DNA retention.

[79] See paragraph 119.
[80] See paragraph 122.

Government consultation

95. The government consultation paper published on 7th May 2009 sets out the government's proposed response to the *S and Marper* decision.[81] It is clear from the consultation proposal that the government intends to do the bare minimum it considers necessary to try to comply with the Court's decision. Specifically, the government proposes to retain indefinitely the DNA profiles of everyone convicted of a recordable offence (regardless of the severity of the offence) and to retain the DNA of innocent people[82] for six years for most offences and 12 years for violent and sexual offences and terrorism related offences, and those on control orders. The only concession for children is that innocent children can have their DNA taken off the database (if arrested for a minor offence) when they turn 18, and if convicted once of a minor offence can have their DNA removed on turning 18 (but will have it retained indefinitely if convicted of two or more minor offences). What will be considered a 'minor' offence is not clear. Offences that fall within the meaning of 'violent and sexual offences' are listed in the consultation document and include intentionally using insulting words or behaviour to cause a person harassment, alarm or distress; careless driving when under the influence of drink or drugs; and numerous sexual offences that have now been repealed, including procuring others to commit homosexual acts.[83] One of the logical reasons for retaining DNA of those convicted of some violent and sexual offences is that DNA is most relevant as evidence in these type of cases. However, many of the offences listed in the consultation (and some of the examples given above) are clearly not offences where DNA evidence is relevant. Several of these examples are also clearly not what most people would regard as serious violent or sexual offences. What should and should not be included in such a list should be a matter for proper Parliamentary debate, yet Parliament will not be given the chance to do this given whatever is included in any Regulations made under this proposed power will not be amendable by Parliament.

96. Blanket retention of the profiles of innocent people for six years does nothing to recognise the principle of innocence until proven guilty and to address the court's concerns regarding the risk of stigmatisation of innocent people on the database.

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[81] 'Keeping the Right People on the DNA Database: Science and Public Protection', Home Office, May 2009, available at: http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/

[82] Being all those arrested for a recordable offence who were either not charged, charges were dropped or at trial they were acquitted.

[83] See offences 56, 59, 49 and 95 in Annexure C to the consultation, pages 82-86.

Neither does automatic retention for 12 years for those arrested but not convicted of violent and sexual offences. Indefinite retention of the DNA of all those convicted of any offence fails to properly consider the nature or gravity of the offence for which the person was originally suspected and indeed fails to recognise the link between DNA retention and the relevance of DNA to the offence in question. There also remains no provision for independent review of the justification for retention according to defined criteria and the proposals fail to adequately address the over-representation in the database of ethnic minorities – all matters required by the ECtHR judgment.[84]

Liberty's position on DNA retention

97. Liberty has consistently lobbied for reform of the DNA retention regime in England and Wales. Liberty's starting point is that DNA evidence can be a highly effective crime detection and prosecution tool. Thus we take no issue with the collection of DNA from suspects for the purposes of a criminal investigation. Anyone who comes under suspicion in an ongoing criminal investigation is likely to have their DNA taken in any event. Our concerns essentially relate to the retention of DNA and believe that the human rights principles of necessity and proportionality should place limits on DNA retention. As with any database, the larger the number of entries, the greater the risks of error and abuse. It is sometimes difficult to weigh the societal impact of retaining millions of intimate genetic profiles of entirely innocent people against the intelligence benefits of an ever-larger National DNA Database. Some argue that there should be no permanent DNA retention whatsoever; others that there should be permanent retention relating to every man woman and child in the country. The first view underplays the importance of solving serious sexual and violent crimes; the second ignores both the risks of human error and costs for human privacy and dignity. While equally unrealistic, both positions have the attraction of clarity and the avoidance of making arbitrary and potentially discriminatory distinctions between different groups of innocent people. The discriminatory impact of current roll out policy means that one half of all black men can expect to have their samples retained on the National DNA Database by 2010.

98. Liberty therefore seeks to focus debate around what a necessary and proportionate database might look like and which underlying principles might aid the selection of 'trigger offences' for permanent retention. It seems to us that within the

[84] See *S and Marper v UK* at paragraphs 119, 122 and 124.

overarching principle of 'proportionate retention of DNA'; there might be three further principles that assist:

1. The relevance or probative value of DNA to the type of crime in question.
2. The potential propensity of the trigger offender to future crime of a relevant nature.
3. The gravity of both trigger offence and the type of crime feared in the future.

Liberty has suggested that applying these principles, the easiest argument for permanent DNA retention may be made in relation to those convicted of (and arguably cautioned for) offences of a sexual or violent nature. Further, the relevance, propensity and gravity factors may also suggest consideration of some other potential trigger offences (e.g. domestic burglary). If, on the other hand, one takes the view that anyone convicted of any offence should have his or her DNA retained forever, the principles of relevance, propensity and gravity have been replaced with the logic of seeking the largest possible database that one might get away with. This is a small step from the disproportionate logic of universality. Is there really any evidence to suggest that a convicted shoplifter, drunk driver or insider dealer is more likely to commit rape or murder than any other person?

99. Liberty believes that the starting point should be that a person who has been arrested but not subsequently charged with any offence and a person who has been acquitted should have their DNA removed. Either the DNA samples could be removed immediately following acquittal or at an end to the investigation; could be removed after a short period of time (as in the Scottish model[85] – and at least after a much shorter period than 12 years)[86] or there could be a rebuttable presumption in favour of removal in relation to certain serious offences. We also believe there should be a separate regime for the retention of DNA from those under the age of 18, particularly given the potentially negative impacts of early stigmatisation.

[85] In Scotland, DNA can only be retained when a person has been acquitted or not charged in respect of sexual or violent offences for 3 years, which can be extended by 2 more years if a court orders it: see *Criminal Procedure (Scotland) Act 1995*.

[86] See for example the amendment laid by the Liberal Democrats on 26 March 2009, which would require photographs, fingerprints, DNA and other samples, impressions of footwear and information derived from DNA samples to be destroyed within one month of the samples being taken or the person being acquitted where a person is released without charge or acquitted of the offence, unless the offence was of a violent or sexual nature. Where the offence is of a violent or sexual nature, the sample must be held for a period of three years, after which it must be destroyed.

100. All of these different models should be debated and considered by our elected representatives. This important detail should not be left to secondary legislation in which the only role for Parliament would be, after a 90 minute debate, to accept or reject in whole the government's Regulations. We endorse the JCHR's recommendation that the government should think again "*to ensure that there is sufficient time for scrutiny of measures which, as the European Court has held, substantially interfere with the right to respect for private life*".[87] We also note that the consultation states that the government intends "*future primary legislation to be introduced*" to provide additional provisions for the taking of samples post-arrest, post-conviction and for those convicted or certain offences overseas.[88] The National DNA Database itself needs to be put on a proper statutory footing (as its existence is currently not found in statute) and proper review and regulatory processes need to be implemented. All of these matters should be dealt with as a whole in primary legislation following open and genuine public consultation. In the meantime, Parliamentarians should reject clauses 96-98 of this Bill.

Alternative amendment 17A – clause 96

Clause 96, page 121, leave out lines 4 to 10.

Clause 96, page 121, line 23, leave out Parliament." and insert–

'Parliament.

(4) If each House of Parliament passes a resolution that regulations under that section will have effect with a specified amendment, the regulations will have effect as amended.

64D Expiry of regulation making power

Sections 64B and 64C (and any regulations made under them) expire at the end of the period of 12 months beginning with the day on which this Act is passed."'.

[87] Joint Committee on Human Rights, *Legislative Scrutiny: Policing and Crime Bill, 10th Report of Session 2008-2009*, HL Paper 68, HC 395 at [1.118].
[88] See page 19 of the Consultation paper.

NB The same amendments will also need to be made to clause 98 (for Northern Ireland).

Effect

101. These amendments will remove the power for the regulations to amend primary legislation; will enable Parliament to amend any regulations laid before it; and will insert a sunset clause ensuring the regulation-making power and any regulations made under it will expire after 12 months.

Briefing

102. These amendments are proposed as alternatives to the proposal for the removal of clauses 96-98 in their entirety. As explained above, we believe the regulation-making power should be removed from this Bill given the more appropriate way to deal with this issue is by way of primary legislation. However, if this position is not adopted we would urge parliamentarians to consider, as a bare minimum, the amendments above. It is not appropriate for secondary legislation to amend primary legislation. It is also important, that if this power is included in this Act, that Parliament have the ability to amend any regulations put before it. We also believe that a sunset clause should be included to ensure that any regulations are only in force temporarily while primary legislation is being prepared. If the government's only argument against primary legislation is that it would take too long and in the meantime the UK would not be complying with the ECtHR case, there can be no objection to a sunset clause to allow the regulations to be considered as an interim measure while primary legislation is being developed.

Anita Coles