

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's Second Reading Briefing on the Policing and Crime Bill in the House of Commons

January 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.

Liberty's policy papers are available at

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Overview

1. Reform of the criminal justice system has been a central theme of this Government. This parliamentary session is no exception with the inclusion of two Bills concerning criminal justice: this Bill and the proposed Coroners & Justice Bill. This Bill is something of an omnibus with substantive amendments being made to over 20 Acts covering a range of subjects, including aviation security, sex offences, extradition, and alcohol misuse. It is a common complaint of Liberty that recent reforms have led to unnecessary and over broad criminalisation and a statute book that is overly politicised. Several clauses in this Bill fall within these two complaints. But perhaps of most concern are the clauses relating to extradition. The *Extradition Act 2003* stripped away many fundamental principles of justice and eroded traditional protections against summary and unfair extradition. More than being just a missed opportunity for reform, this Bill contains amendments to that Act which seeks further to erode what safeguards are left. We believe that the rule of law is just as important today as it was 100 years ago. Indeed it is the foundation on which public faith in Britain's justice system is based. We hope that parliamentarians might take the occasion offered by this Bill to return to the issue of extradition and seek to restore common decency and fundamental values to a system that is currently deeply flawed.

Part 1 – Police Reform

2. Part 1 deals with police reform, placing a duty on police authorities to have regard to the views of the public, amending the method of appointment of senior officers and providing mechanisms for police cooperation. It does not include the proposal¹ to have directly elected representatives on Police Authorities (PA). We are pleased that this proposal has been shelved as we believe that direct elections of this kind could unnecessarily politicise PAs while removing local expertise. However, the compromise position contained in clause 1 appears 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

¹ Put forward in the Green Paper 'From the Neighbourhood to the National: Policing Communities Together', July 2008.

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.

3. As we said when these measures were introduced in 2006,² 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 the 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 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.

4. Clause 2 sets up a Police Senior Appointments Panel which can advise the Secretary of State in connection with the appointment of a senior officer. The Panel is to consist of members appointed and nominated by the Secretary of State and

² 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>

persons nominated by the Association of Police Authorities and by the Association of Chief Police Officers (ACPO). We understand that such a Panel already exists on a non-statutory basis and this amendment seeks to place it on a statutory footing. While we have no particular problem with the establishment of such a Panel, we do have some concerns about ACPO being given a statutory role in advising on the appointment of senior police officers. 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.³ 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 properly to 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.

5. Clauses 7 and 8 amend the *Regulation of Investigatory Powers Act 2000* (RIPA) to enable a police officer from one police force who is authorised to obtain and disclose communications data or authorise directed or covert surveillance under the Act, to give an authorisation to a member of another police force to do the same. This applies if the two police forces have entered into a collaboration agreement (as introduced by clause 5). While we do not take issue with these specific amendments we take the opportunity to note again that the provisions in RIPA demonstrate a lack

³ 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*.

of independence in the authorisation process, with no judicial oversight at all in RIPA. While we do not suggest there should be independent authorisation when applying for all lower level communications data warrants, high level RIPA powers which rely on executive authorisation are concerning. Self-authorisation is a very weak privacy protection. Without some arm's length independence from the authorising body, there will always be suspicions that proper protocol and safeguards are not being observed. Liberty believes that there is a need to overhaul the powers contained in RIPA to provide for greater levels of protection and oversight.⁴

6. 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 this effect that only apply to one or more police forces, and would also allow regulations to be made if the chief inspector thinks its 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 he or 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 is 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

⁴ See Liberty's report by Gareth Crossman, "Overlooked: Surveillance and personal privacy in modern Britain", 2007, in particular Chapter 3 and pages 112 and 125-126, available at: <http://www.liberty-human-rights.org.uk/issues/3-privacy/pdfs/liberty-privacy-report.pdf>

frequently stated that police independence and the rule of law is 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

7. Part 2 introduces a number of new offences in relation to prostitution and some mechanisms for sentencing those who provide sexual services as prostitutes. The measures proposed seem to be quite a piecemeal approach to the issue of prostitution, despite the Government's stated aim of putting in place a coordinated strategy to deal with the issues arising from prostitution.⁵ While a number of the measures proposed are welcome as they are intended to help reduce the stigma of prostitution and assist those engaged in prostitution, some of the ways in which this is sought to be achieved are questionable.

8. Clause 13⁶ introduces the offence of paying for the sexual services of a prostitute controlled by gain. This offence is drafted extremely broadly and applies regardless of whether the accused knew that any of the prostitute's activities were intentionally controlled for gain by a third person (strict liability). What 'controlled for gain' means is also very broad, encompassing any activity controlled for in the expectation of gain for anyone. Presumably this would cover the owner of a brothel. An offence will be committed whether or not the services are actually provided: it is enough simply to make or promise payment. The offence also applies regardless of where in the world the sexual services are to be provided. This last provision could conceivably mean that a person who visits a prostitute in a brothel in a country where it is legal to do so (such as in the Netherlands, Greece and some states in Australia), on their return or entry to the UK they could be arrested for committing an offence under this proposed section.⁷ There are some serious concerns about the broadly drafted nature of this offence and whether it is appropriate to make an offence of this nature one of strict liability, particularly in situations where there is no way of knowing whether a person is 'controlled for gain'. We assume that this offence will have to be

⁵ See Green Paper from 2004, 'Paying the Price: a consultation paper on prostitution'.

⁶ And the equivalent provision for Northern Ireland in clause 14.

⁷ It is interesting to note that the legal power to impose such an offence is questionable under international law if the victim or offender is not a UK citizen (and as this is currently drafted it applies to anyone within the jurisdiction of the UK).

amended during the course of its passage through the House in order to tighten up, what seems to be, a rushed and ill-thought out policy.

9. Clause 15 seems to be a sensible amendment to the *Street Offences Act 1959* to amend reference to a 'common prostitute' and to make the offence of soliciting for the purposes of prostitution only apply in cases where the prostitute 'persistently' solicits (being on two or more occasions in three months). We do however query why section 2 of that Act is being omitted given the effect of this is to remove the ability of a person cautioned in respect of prostitution (ie the prostitute) to apply to a Magistrates' Court to ensure no record is made of this. No reason is given as to why this amendment is proposed.

10. 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.

11. 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 appeared 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,⁸ 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. The type of offences this is proposed to apply to may be particularly unsuitable for a closure order, for example if the offence is one of 'grooming' a child that takes place over the internet (particularly as these offences

⁸ 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>.

can occur anywhere in the world). 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.⁹ 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.

12. 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 breached. The right to respect for private and family life under article 8 of the HRA¹⁰ 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. Proposed new 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 and its inclusion here should be explained. Proposed new section 136Q is also of concern as it 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 Secretary of State should explain who it is envisaged might be given this power. The explanatory notes give an example of local authorities being given this power. 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 and any extension of the power to make such orders should not be extended lightly.

13. Clause 22 amends the power to impose foreign travel banning orders on those who have been convicted of sex offences and, because of their subsequent

⁹ 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.

¹⁰ Article 8 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

behaviour, it is considered necessary to impose such bans to protect children in other countries. Currently this applies to protect children under 16. This amendment raises that to all children under 18. Clause 23 seeks to extend the length of the travel ban from the current 6 months to a maximum of 5 years. When foreign travel ban orders were introduced we did not take issue with them in principle as concerns about overseas child sex tourism are justified.¹¹ However, we did have some concerns about the way in which they applied and what safeguards there were. The requirements justifying the creation of an order are extremely broad as is the requirement that a person must have “*acted in a way to give reasonable cause*” which contains no comments on criminality. Banning a person from leaving the country is a serious step, particularly as it involves a potential limitation on the right under international law to freedom of movement.¹² Increasing the amount of time that a person can be banned from leaving the country (and stripping them of their passport as is proposed by clause 24) for up to 5 years is a much greater interference with the right to freedom of movement than the current time of 6 months. As such, greater safeguards should be built in to ensure more risk assessment is carried out in relation to an individual before an order can be made.

Part 3 – Alcohol misuse

14. Clause 28(3), seeks to amend the *Confiscation of Alcohol (Young Persons) Act 1997* to give police the power to remove children from an area to their place of residence or a place of safety. Currently this Act comprises only two sections and applies only to confiscating alcohol from children under 18. This amendment would seek quite radically to amend the nature and purpose of this Act. It 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 necessary to do so in the for the person’s safety or well-being or for public order. 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

¹¹ See Liberty’s *Second Reading Briefing on the Sex Offences (Amendment) Bill in the House of Commons*, July 2003, available at: <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

¹² See article 2 of the Fourth Protocol (1963) to the *European Convention on Human Rights* to which the UK is a signatory to and article 12 of the *International Covenant on Civil and Political Rights*, to which the UK is a party to. It should be noted that the right to freedom of movement is not a right incorporated into UK law by the *Human Rights Act 1998*. However, the UK remains bound under international law to comply with these provisions.

to remove children for their own safety in an emergency (see section 46 of the *Children Act 1989*). We also note that the power in the *Anti-Social Behaviour Act 2003* has a small safeguard in it that is not present here, that allows for an exception to returning a child to their place of residence if to do so would mean the child is likely to suffer significant harm. 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*. In addition, this Bill itself proposes making it an offence for a person under 18 to be in possession of alcohol in a public place on 3 or more occasions in a 12 month period, which in itself gives police greater criminal law powers. A power to move children on by the police when they have not committed any offence or disturbance is discriminatory and counter-productive.

15. Clause 29 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. 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. If children are inappropriately gaining access to alcohol this should be dealt with under child protection measures, not through counter-productive criminalisation of those that we are trying to protect.

16. Clause 30 seeks to amend section 27 of the *Violent Crime Reduction Act 2006* (which 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) to apply it to all people aged over 10 years. 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. We have seen that the police are using this power to disperse groups before any problems arise.¹³ The proposed power is overbroad, discriminatory and unnecessary as the police already have a wide array of criminal law powers to deal with problem

¹³ See the case of up to 80 Stoke City football fans who were detained for up to 4 hours and forced to leave a pub although there were no reports of any disturbances. See Liberty media release at <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2008/18-12-08-liberty-and-the-fs-fight-for-human-rights-of-football-fans.shtml>

behaviour. Allowing police to force people to leave public places simply on the basis of possible future problems that may or may not have anything to do with those particular people is unfair, divisive, counter-productive and unnecessary. It also continues a worrying trend of using the civil law in a coercive way to target the young and the vulnerable.¹⁴ 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.

Part 4 – Proceeds of Crime

17. 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 33 (and clauses 34-35 in relation to Scotland and Northern Ireland) seeks to allow property subject to a restraint order, that has been seized under another power, to be retained for the duration of the restraint order (enabling it to be sold if a confiscation order is subsequently made). Clause 36 (and clauses 37-38 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. If property has not been returned after 48 hours further retention must be ordered by a justice of the peace. However, under the current provisions in relation to restraint orders (which are less intrusive than this proposed measure) such orders must be approved by the Crown Court. No reason is given as

¹⁴ 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>

to why, at the very least, the Crown Court is not involved in providing judicial oversight.

18. This proposed amendment clearly raises issues regarding the right to privacy and peaceful enjoyment of possessions under the HRA.¹⁵ The proposed amendments are far too broad in scope, particularly as they apply even before a person has been charged with any criminal offence. There is already a power to issue restraint orders restraining the use that can be made of certain property in similar circumstances. 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 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.

Part 5 - Extradition

19. Part 5 seeks to amend the *Extradition Act 2003*. When this Act was introduced Liberty expressed serious concerns about the removal of a number of significant protections for individuals involved in extradition.¹⁶ In particular the Act gave effect to the system of the European Arrest Warrant (EAW) which removes the requirement, for certain offences, for dual criminality – that is that the offence for which the person is sought to be extradited is also an offence in the UK. There is no need for a court in the UK to determine that a prima facie case has been made out, it is enough if an EAW has been issued by an EU country in respect of a listed offence. These offences include offences that are so extremely broad to the point of being meaningless (e.g. ‘computer related crime’, ‘swindling’) and potentially speech

¹⁵ 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.

¹⁶ See Liberty’s briefing on the Extradition Bill for 2nd Reading and Committee stages in the House of Lords, April 2003, available at: <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

offences ('racism and xenophobia'). There have also been reports of people being extradited to a number of EU countries for extremely minor offences such as 'piglet-rustling'.¹⁷ The EAW is based on the presumption that EU countries all have fair and equal systems of justice which should remove the need for any other country to scrutinise the fairness of extradition to such a country. As we have said in the past, this presumption is seriously open to question. There is also a real problem with the ability of the Secretary of State, by Order in Council, to remove the need for specified non-EU countries¹⁸ to produce prima facie evidence in support of the request for extradition. The amendments proposed here in relation to the *Extradition Act 2003* do not seek to remedy any of these problems. Instead they weaken some of the existing protections.

20. Clause 55 introduces amendments to the *Extradition Act 2003* that are very confusingly drafted. Reference is made to a sentence imposed by a UK court and a sentence imposed by a foreign court, but it is often unclear which sentence is being referred to. We are particularly concerned by the proposal to enable the Secretary of State to give an undertaking, when requesting extradition of a person from any country, that the person will be returned to that country either to serve the UK imposed sentence or after having served that sentence. Proposed section 153A empowers the Secretary of State to give an undertaking to return a person who at the time of the extradition application is serving a sentence of imprisonment in another country to serve the remainder of the sentence in that country on the conclusion of the UK proceedings (it is not entirely clear if this means to serve the UK sentence or the foreign sentence). It also enables the Home Secretary to give an undertaking as to the treatment of the person while in the UK and that the person would be kept in custody until the conclusion of the proceedings. Proposed section 153B provides that if a person had been returned to the foreign country but then returns to the UK, time served outside the UK does not count towards their sentence in the UK. Proposed section 153C provides that the Secretary can give an undertaking to return any person to the extraditing country in order to serve a sentence imposed by a UK court. The only safeguard built into this is found in proposed section 153D which provides that nothing requires the return of a person where the Secretary of State is not satisfied that the return is compatible with the HRA.

¹⁷ See the article in the *Guardian*, "Door thief, piglet rustler, pudding snatcher: British courts despair at extradition requests" by Afua Hirsch, 20 October 2008:

<http://www.guardian.co.uk/uk/2008/oct/20/immigration-extradition-poland-lithuania-law>

¹⁸ The Secretary of State has made such orders in relation to a number of countries, including those such as Azerbaijan, Georgia, the Russian Federation, Turkey and the USA.

21. We are particularly concerned by the power to enable the Secretary of State to give an undertaking to return a person to any country in the world in which he or she is extradited from to serve a sentence of imprisonment. The way that this Bill is currently drafted this would also apply to UK nationals. To take a hypothetical example of how all of this would work in practice: A British citizen resident in China could be extradited to the UK to face criminal charges here and then forced to serve any sentence of imprisonment in a Chinese jail because of an undertaking given by the Secretary of State.

22. There is no way, as this is currently drafted, for the Secretary of State to be satisfied that the country of return has the same standards for incarceration as the UK. It is unclear how this would work in practice given a person sentenced by a UK court is generally given a custodial sentence setting out a minimum period before which the person can be released on licence. If that person is to serve the sentence in another country with a different penal system how will this work? It may also be that a person subject to extradition with such an undertaking is only found, once they have arrived in the UK, to have special needs that could not be met in the country to which they are to be sent back to. A topical example of this is the current request for extradition made by the USA in respect of Mr Gary McKinnon. Mr McKinnon suffers from an Asperger condition and the medical evidence is that he is likely to suffer significantly if detained in the USA in a high security Supermax prison which usually involves severe isolation from others. If there was a similar situation where the UK was requesting the extradition of a person from another country this is the type of matter that the Secretary of State would be unlikely to be able to properly take into account at the time an undertaking is given to return that person.

23. Additionally, at the time an undertaking is given conditions of detention in the particular country may give rise to no particular concern, however when the person is due to be returned there may have been a regime change or other event that would cause real concern. None of these possible problems are dealt with in these proposed amendments. All we have is a clause that provides that nothing requires the return of the person if to do so would breach the ECHR, in the view of the Secretary of State. This is insufficient to fully protect the human rights of the extradited person. It is not enough for legislation to leave this up to the discretion of the Secretary of State (with the only review rights being within the confines of judicial review). Parliament should set out specific safeguards in this Bill and not leave it to

the discretion of the Secretary of State. There are also other considerations apart from the ECHR that would have to be taken into consideration before a person could be returned to a country, such as the Refugee Convention and other international instruments. It is not clear what happens to an undertaking that is given under these powers if it subsequently cannot be honoured as a result of human rights concerns. This should be dealt with more specifically in this Bill.

24. In addition Liberty has concerns about the provisions which allow for the detention of persons under these sections pending the determination of a number of matters. In particular clause 53 (proposed new section 59(6)(b)), clause 54 (proposed new section 132(6)(b)) and clause 55 (proposed new section 153B(4)(b)) provide that if a person is returned to the UK and was entitled to be released on licence but had not yet been released while in the UK, he or she is liable to be detained on return by a constable or immigration officer until release on licence. None of these provisions incorporate any maximum time by which a person can be detained under such provisions, not even a requirement of reasonableness. This must be included if such detention can possibly be said to be proportionate as required under article 5 (right to liberty) of the HRA.¹⁹ Similarly clause 55 (proposed new section 153A(5)(b)) enables a person to be kept in custody in the UK until he or she is returned to a territory pursuant to an undertaking. No time limit is imposed on this which, given there could well be difficulties in arranging the return of the person and involve potentially considerable delays, could potentially breach of article 5. This is especially the case given that section 154 of the *Extradition Act 2003* currently provides that in cases where the Secretary of State has given an undertaking bail may only be granted in exceptional circumstances.

25. Finally we note that clause 58 allows for a judge to grant an extension of up to 48 hours for the detention of a person subject to provisional arrest under the *Extradition Act 2003* if it is not reasonable to comply with the requirement that the person be brought before the judge along with certain documents. This appears to be a matter purely of administrative convenience and no explanation has been given as to why this is necessary or proportionate which must be explained given the clear interference with article 5 (right to liberty).

¹⁹ Article 5 (right to liberty) of the ECHR as incorporated by the HRA.

Part 7 – Miscellaneous

Criminal Records

26. Clauses 62 to 72 seek to make amendments to the *Safeguarding Vulnerable Groups Act 2006* and the *Police Act 1997* to amend the application process for Criminal Record checks and checks done by the (renamed) Independent Safeguarding Authority (ISA). We are somewhat confused as to why amendments are being made to tidy up the application process in relation to Enhanced Disclosure (ED) checks but no effort has been made to avoid the duplication between ED and checks carried out by the ISA. To understand our concerns it is necessary to set out some of the history behind the creation of the ISA.

27. 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. At the time we agreed that the new body had the potential to square a difficult circle. An effective vetting system could ensure those not suitable for working with children or the vulnerable are barred, while ensuring that potential employers remained 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.

28. It was because of this that we believed that the ISA could provide an effective new body. Instead of Enhanced Disclosure records being passed directly to employers they would go to the ISA instead to allow vetting. This independent vetting would allow those who had allegations made against them (usually referred to by the police as 'intelligence information') the opportunity to make representations to the ISA if barring was being considered. It would also mean that an employer would not be aware of those allegations if the person was successful in being deemed suitable for work. The Bichard Report clearly envisaged the current system of sending Enhanced Disclosure to employers continuing until the ISA come into operation. However, the presumption from Bichard seemed to be that once the ISA began work ED need no longer be sent to employers. The Bichard Report proposed vetting through 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. (Paragraphs 4.117 & 4.118).

29. 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. However, it appears that (particularly given the amendments proposed in this Bill) employers will still be able to obtain Enhanced Disclosure directly from the Criminal Record Bureau (CRB). The only justification given for this is that an ISA check does not “*check for malpractice or all criminal convictions, and therefore registration with the ISA does not guarantee that a person has no criminal history.*”²⁰ We agree that in some circumstances some extra disclosure might be necessary to determine suitability. However, this other type of information would be available through an application by the employer for Standard Disclosure. Standard Disclosures shows 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.

30. Liberty is opposed to any attempt to allow employers to have continued direct access to Enhanced Disclosure once the ISA begins its work in October 2009. We believe any attempt to continue would be open to challenge under Article 8 (right to privacy) of the HRA. There are a range of judgements from the European Court of Human Rights that establish that the release of information held on police registers engages Article 8. The continuation of Enhanced Disclosure in such circumstances with the ISA in operation is disproportionate and we cannot see how there can be a

²⁰ See Frequently Asked Questions page on the ISA website (www.isa-gov.org.uk). Liberty also contacted the Home Office about this and we were given one example of a possible reason why employers might need access to CRB records. The example given was of the employment of a school bus driver. 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.

pressing social need for enhanced disclosure to continue. We do not wish for or advocate any vetting system that would place children or the vulnerable at risk. We are merely seeking adherence to a system that is fair and which deals with the problems identified by Sir Michael Bichard. This Bill is a perfect opportunity to include amendments to the *Police Act 1997* to ensure that this situation is remedied.

31. We also have some particular concerns with the amendments that are currently proposed in the Bill in relation to this area. Clause 69 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*”.²¹ This amendment is completely unnecessary. 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 (as stated above). 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.

32. Clause 70 seeks to amend the *Police Act 1997* to include a provision that in establishing a person’s identity it must be verified by a third person as determined by the Secretary of State and set out in regulations. This seems to be a wholly unnecessary amendment given the section it seeks to amend (section 118) already

²¹ See Explanatory Notes at paragraph 456.

provides that the Secretary of State may obtain information from agencies such as the UK Passports Authority, the Driver and Registration Authority, records of national insurance numbers, and “*by such other persons or for such purposes as is prescribed*”. This addition does not seem to add anything and its vagueness and broad nature raise questions as to why it is proposed.

Football spectators

33. Clauses 78 to 82 basically extend those subject to football banning orders in England and Wales to also ban them from attending regulated football matches in Scotland and Northern Ireland. This is not a substantial change in the law and we would simply refer parliamentarians to our response to the introduction of football banning orders in 2000.²² We would note, however, that clause 80 introduces a defence in Scotland for a person charged with a failure to comply with a requirement imposed by a banning order. Under clause 80(2) it will be a defence for a person charged with such an offence to prove that he or she had a reasonable excuse for failing to comply with the requirement. We welcome this as a small improvement to the broad nature of this offence but query why this has specifically been limited to Scotland only. This defence should apply to all persons charged with such an offence regardless of where in the country they are charged.

Anita Coles

²² See Liberty’s Briefing on the draft Football (Disorder) Bill, July 2000, available at: <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>.