

LIBERTY

PROTECTING CIVIL LIBERTIES
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Liberty response to the Home Office consultation: 'Bind Overs - a power for the 21st Century'

June 2003

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.

Introduction

1. Liberty agrees that the power to bind over to keep the peace can be a useful tool in crime prevention, and a means of regulation of aggressive behaviour without resorting to the imposition of a criminal conviction.
2. However, it is difficult to comment in detail on concerns that we may have about proposed changes to the use of bindovers. Para 7.3.3 says “It is recommended that: courts should not specify ‘to keep the peace’ or to ‘be of good behaviour’ rather that the individual is bound over to do or refrain from doing specific activities.” We would need to have some indication of what those specific activities are. For example could ‘not drinking’ be such an activity? It is safe to assume that those activities would not themselves be criminal (as there would then be no need to be bound over). We would be extremely wary of endorsing a system that allowed for the effective criminalisation of behaviour that did not breach the criminal law.
3. We have frequently expressed concerns about the use of Anti Social Behaviour Orders as an unwelcome mix of criminal and civil law. We do appreciate that the government is trying to make bindovers compatible with domestic and convention law and fully support proposals to create a criminal burden of proof for the making of orders and for breach proceedings. However we would not wish this general support to overrule concerns about the nature of what constitutes ‘specified behaviour’.

General

4. Accordingly, we support the recommendation that the courts should retain the power to bind over a person to keep the peace, so long as the powers are exercised in accordance with the European Convention on Human Rights, and in line with the Strasbourg case law. (*Steel v UK* (1998) 28 EHRR 603, *Hashman and Harrup v UK* (2000) 30 EHRR 241.)

5. Liberty disagrees that the power to bind over a person to be of good behaviour should be preserved in any form. If there is a perceived need to retain this power in addition to the power to bind over to keep the peace, it is not accepted that this power is capable of being Convention compliant. It is likely that the preservation of the power will give rise to more uncertainty and would be the subject of further challenge under the HRA and Convention.
6. The case of *Hashman* clearly indicated that a bind over to be of good behaviour was in breach of Article 10(2) of the Convention, in that it was insufficiently certain or precise to allow an individual to regulate his conduct. The matter does not end there, and the matter cannot be remedied by specifying the types of behaviour: Article 10(2) requires that any restrictions placed on the right to freedom of expression must be proportionate. Whilst Strasbourg court has accepted that the definition of a breach of the peace is sufficiently certain to be prescribed by law, and that it amounts to the pursuance of a legitimate aim, it has not given a blanket approval to the imposition of restrictions on the behaviour of others which are thought to be undesirable. It is submitted that unless the behaviour is *in itself* capable of amounting to a breach of the peace, no legitimate aim is being pursued, and restriction on individual freedom will be neither necessary or proportionate.
7. As mentioned above it is not clear in the consultation document what types of behaviour the courts would be told that they could bind over an individual to do or refrain from doing. It is not accepted that an anticipatory power to require individuals to refrain from certain types of behaviour which do not necessarily give rise to a risk of a breach of the peace can be Convention compliant. Further, it is not accepted that a bind over to adopt certain modes of behaviour is legitimate in this context. Failure to adopt certain modes of behaviour, such as co-operating with an authority, or refrain from alcohol, may not give rise to any breach of the peace at all.
8. It is submitted that the tenor of the Strasbourg case law requires that any prohibited conduct should be related to a risk of a breach of the peace – and that the power to bind a person over to keep the peace already covers this

ground. Accordingly, it is difficult to see how a power to bind over a person to be of good behaviour is necessary, or circumstances where it could be imposed in a Convention compliant way where a bind over to keep the peace would not also be available or appropriate. Powers to bind over to keep the peace, and other statutory orders such as the Anti-Social Behaviour Order are more than adequate in the circumstances.

9. It is further observed that case law specifically prohibits the imposition of such definition of good behaviour: *Ayu* [1959] 43 Cr App R 31, *Goodlad v Chief Constable of South Yorkshire* [1970] Criminal Law Review 51. This case law was specifically referred to in argument at para 17 of *Hashman and Harrup*. It would appear to reinforce the point that the power to bind over to be of good behaviour is in its essence incompatible with the Convention. There is no need for it, or good reason to tinker with it now.
10. Liberty strongly agrees that with the recommendation that the criminal standard of proof is appropriate both for the imposition of a bind over **and** for any subsequent allegation of breach, and strongly supports the recommendations that time and legal representation be available to those with notice that a bind over would be imposed. It similarly supports the recommendation of more extensive rights of appeal. It would argue that the rules of criminal evidence would be similarly appropriate both at the imposition and breach stage.

Parental bind overs

11. It is submitted that the terms of section 150(2) of Powers of Criminal Courts (Sentencing) Act 2000 are insufficiently precise to be prescribed by law in the event of a breach. Liberty does not agree that these powers should remain unchanged – the provision that a parent should enter into a recognisance ‘*to take proper care of him and exercise proper control over him*’ for an individual to predict the outcome of any particular conduct.

12. Accordingly, it is submitted that this power should be reviewed to make it compliant with the Convention.

Committal to prison for default of entering into a recognisance

13. Liberty generally agrees with the recommendations in paragraph 7.10, specifically the observation that the use of imprisonment ‘*would be difficult to sustain in the light of the judgment in Steel.*’ Concern is therefore raised about paragraph 7.10.9, which appears to sanction the use of imprisonment for 1 month – it would argue that a short period of imprisonment would be as difficult to sustain as a longer one in the light of the judgment above.

14. Further, we disagree that imprisonment can be used ‘*in the most exceptional circumstances.*’ It is submitted that imprisonment in this context is disproportionate in all cases. It is difficult to imagine an individual’s conduct being so bad as to justify imprisonment – for the circumstances to be sufficiently exceptional, there would surely have to exist sufficient evidence to resort to prosecution for the index behaviour as an alternative.

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