

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's second reading briefing on the Domestic Violence, Crime and Victims Bill in the House of Lords**

**December 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 welcomes the government's stated commitment to combating domestic violence. Although we have a number of serious concerns about a considerable amount of the detail in the Bill, we would not wish these to detract from our support for the government's clear intentions. In general, we believe that domestic violence would be better tackled by the greater application of present powers rather than the creation of new powers. One of the central problems in tackling domestic violence is that existing powers are under-utilised.

## **Part 1 – Domestic Violence etc**

### **Breach of a non-molestation order to be a criminal offence**

2. Liberty has been concerned for some time about the continuing trend and tendency towards a blurring of the criminal and civil law. Given that non-molestation orders are issued on the basis of a civil burden of proof, it is concerning that criminal sanctions will apply for a breach (Clause 1). In many cases, the sorts of breaches of a non-molestation order that would cause the greatest concern will be criminal offences in their own right.
3. Although as an organisation, Liberty does not usually comment on the question of sentencing, we note with considerable concern that the penalty for a breach of a non-molestation order could be as much as five years imprisonment. Once again, given that serious breaches of a non-molestation order are likely of themselves to amount to a criminal offence, we would question whether such a sentence is excessive. Furthermore, the present law provides for a sentence of up to two years
4. Liberty also questions whether the criminalisation of non-molestation orders will have the desired deterrent effect. Indeed, it is even possible that the effect will be counter-productive. A victim may be dissuaded against seeking a non-molestation

order if they are concerned that their partner – particularly in an ongoing relationship - could receive a criminal record as a consequence. In 2001-2002 there were approximately 178,000 incidents of domestic violence reported to the police, but only 28,000 applications for non-molestation or occupation orders. It would be most regrettable if the consequence of criminalising a breach was to lead to an under-utilisation of a valuable remedy.

### **Cohabitants to include same sex couples**

5. We welcome the extension of the definition of cohabitants to include same-sex couples and cohabiting heterosexuals who are not married (Clause 2). Protection against domestic violence must extend to all groups, communities and lifestyles in order to give greater access to important remedies.

### **Extension to non-cohabiting couples**

6. Liberty also welcomes the extension of the law to non-cohabiting couples (Clause 3). A full and coherent approach to domestic violence should not be dependent on establishing that the couple were cohabiting at the exact time of the incident or during the series of incidents. Neither should it be crucial that the relationship was ongoing at the exact time of the offence.

### **Causing or allowing the death of a child or vulnerable adult.**

7. Clauses 4 and 5 attempt to deal with a problem recognised for many years. It has been defined by the Law Commission<sup>1</sup> as follows:
8. *A child is cared for by two people (both parents, or a parent and another person). The child dies and medical evidence suggests that the death occurred as a result of ill-treatment. It is not clear which of the two carers is directly responsible for the ill-treatment which caused death. It is clear that at least one of the carers is*

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<sup>1</sup> Children: Their Non-Accidental Death or Serious Injury - consultative report (LC Report 279)

*guilty of a very serious criminal offence but it is possible that the ill-treatment occurred while one carer was asleep, or out of the room.*

9. *As the law stands, as a result of the Court of Appeal's ruling in (the case of) 'Lane and Lane' it is likely that such a trial would not proceed beyond a defence submission of 'no case to answer'. As a result, neither parent can be convicted, and one or other parent, or both, might well have literally 'got away with murder'. It should be remembered that even though one parent may not have struck the fatal blow or blows, he or she may be culpable either through having participated in the killing actively or by failing to protect the child. In many cases of this type it is difficult, or impossible, to prove this beyond reasonable doubt, and therefore neither parent can be convicted.*
  
10. The bill attempts to deal with this situation in two ways. Clause 4 creates a new offence of causing or allowing the death of a child. A person will be guilty of an offence if a child or vulnerable person dies as the result of an unlawful act by a member of the same household who had frequent contact. There must have been a risk of serious physical harm. The defendant must have either caused or been aware of the risk of death. If they were aware of the risk of death they also must have failed to take steps to do anything and the death must have occurred in foreseeable circumstances. Crucially, under Clause 4(2), if there are two (or more) people charged and it is established that one of them must have caused the death and the other failed to take reasonable steps to prevent it, the prosecution does not have to prove which was which. This means that the situation where both are acquitted because it cannot be proved against either, as in *Lane and Lane*, does not have to arise.
  
11. Clause 5 creates a change to evidential rules when someone is charged under Clause 4. It provides for special rules that if a person is charged with both offence under Clause 4 and murder (or manslaughter) and the court can draw adverse inference over failure to give evidence in relation to the Clause 4 charge, then that inference can also be drawn in relation to the murder charge. This can be done even when there would normally be no case to answer on the murder charge.

12. Liberty emphasises that we appreciate what the Government is attempting to do. The consequence of *Lane and Lane* is that the murder of children is going unpunished. Because of this we support the creation of the Clause 4 offence. Although there are aspects of this offence that we believe could be improved, we will not make any observations on this until committee stage, as this would deflect from our support in principle for the creation of the offence.
13. We do, however, have concerns about the consequences of Clause 5. It might appear reasonable that an adverse inference from the defendant's silence can be used to secure conviction when otherwise there may not be a case to answer. Deferring the question of whether there is a case to answer until the end of the case (as opposed to after the end of the prosecution case as is normal) would also appear acceptable. However, there are serious fair trial implications. It might appear that our objections are based in 'lawyers' arguments' rather than an appreciation of the reality of child death cases. In the contrary, we would emphasise that these fair trial protections exist to ensure that, for example, a woman who is afraid to give evidence against a violent man does not find her silence leading to a conviction for murder.
14. We presume the drawing of adverse inference for a Clause 4 offence can be used in the alternative murder/manslaughter charge because the elements in Clause 4 are far easier to establish in order to successfully require there to be a case to answer. Once there is a case to answer, the adverse inference can be drawn. If this inference can be transferred to the murder/manslaughter charge it can establish a case to answer in that case.
15. The bald implication of this proposal is that weak cases which do not otherwise amount to a case to answer would be left to a jury. Child homicide is always highly emotive and juries can be predisposed to convict. Hence, this is an extremely dangerous suggestion.
16. We doubt that this is compatible with the right to a fair trial under Article 6 of the Human Rights Act 1998 (The Right to a Fair Trial). The European Court of Human Rights has been at pains to construct a framework of requirements for a

fair trial within which an inference of guilt may be 'proper'. These include that the circumstances are such as to call for an answer, and that the only sensible explanation for silence is guilt.

17. The essential point which the bill overlooks is that the privilege against self-incrimination (the right of silence) is a necessary corollary of the burden of proof. Logically, unless the burden is to shift to the defendant at the outset, in the form of some general duty to give an account, an explanation is only called for when the prosecution have made out a case which calls for an answer. This is not to say that general inference can never be a component of a case to answer. Plainly, inferences of fact inevitably play a part. **However, an inference (albeit provisional) of guilt from silence can only be proper and fair where a case has been made out in the first place.**
  
18. A number of questions illustrate the unworkability of this proposal. What objective evidential threshold is required before the court can additionally rely on the lack of explanation to complete a case to answer? The 'half-time' test is whether a reasonable jury, properly directed, could convict. So, in child homicide cases alone, it appears the court have to embark on a two-stage exercise. Firstly, a finding that there is some evidence (short of a case to answer) that D caused the death and, secondly, a further finding that a reasonable jury could nevertheless convict if they relied on an inference from silence. This does not make sense. The jury itself could only rely on such an inference if satisfied that the case against the defendant calls for an answer. However, the proposal is meant to apply where there is no case to answer!
  
19. The bill attempts to sidestep these problems in subsection (2) by postponing any consideration of whether there is a case to answer until the end of the defence case. Again, this is intended to remove the ability of a defendant to obtain an acquittal at the conclusion of a weak prosecution case. Our analysis of the combined effect of the proposals leads us to conclude that, in practice, postponement will effectively remove that safeguard whether or not the defendant gives evidence.

20. The effect of subsection (2) differs depending on whether the defendant chooses to give evidence or not. However, whether he chooses to give evidence or not his case will be jeopardised.
21. If the defendant gives evidence his submission will be likely to fail. The defendant's evidence becomes evidence in the case. As a result, any submission can now be met with the irresistible argument that the state of the evidence has now changed since the close of the prosecution case.
22. If they wish, the jury are now able to treat it as additional support for the prosecution. Presumably, the question for the judge at this stage would be whether a reasonable jury *could* treat the defendant's evidence as supporting the prosecution - if so, there are few cases which would not pass that test.
- 23. It follows, therefore, that defendants who give evidence will generally become unable to make a submission of no evidence on the facts.**
24. If the defendant chooses not to give evidence, this will also create a problem. In deciding whether to withdraw the case from the jury at the end of the defence case, the judge must have express regard not only to the evidence, but also to "such inference which it would be proper from the defendants failure to give evidence or refusal to answer a question" (see Clause 5(1) (b)).
25. Accordingly, by the time a defendant who has not given evidence is permitted to make a submission, he will find that the case against him now *must* include the additional component of a possible inference of guilt.
- 26. It seems, therefore, that the judge will be obliged to proceed on the basis that an inference of *guilt* may be drawn from the defendant's silence. Accordingly, it appears that those who do not give evidence will also be unable to make submissions in practice.**

27. Presumably, to be fully effective this proposal also requires the abolition of the right to apply for charges to be dismissed, following transfer to the Crown Court on the basis that there is no case to answer. It does seem, therefore, that a case can proceed from automatic transfer to conviction without any necessity for a case to answer at any point in the process.
28. We believe that Clause 5 is fundamentally flawed and fear that a desire to secure conviction will result in convictions for murder when silence arises from nothing more than fear.

### **Establishment and conduct of reviews**

29. Given the widespread and under-reported nature of domestic violence, we welcome in principle establishing guidance on conducting domestic homicide reviews in order for relevant agencies to learn valuable lessons. We would hope that such reviews would be conducted with due care and attention to the feelings of the relations of the deceased. We would welcome clarification of what training will be made available for those conducting such reviews.

## **Part 2: Criminal Procedure etc**

### **Making common assault an arrestable offence**

30. Liberty is not opposed to making common assault and battery an arrestable offence (Clause 7) and appreciates that this change in the law may allow the police to deal with cases of domestic violence with greater efficiency.

### **Restraining orders**

31. We are conscious of and sympathetic to the government's intentions in this area (Clause 8). Given that so few cases of domestic violence lead to prosecution, and the undoubtedly harrowing experience endured by the complainant, it is easy to understand why there are grounds for seeking to ensure that the complaint may be spared two separate court hearings. However, Liberty has serious concerns about

the further blurring of the distinction between the civil and criminal law and the undermining of the presumption of innocence. The purpose of a criminal trial is to test the prosecution's evidence against a defendant and where a not guilty verdict is arrived at, that defendant is entitled to be considered innocent of the crime alleged. We have been particularly concerned about the way in which the Government has announced and discussed this measure in the media. Its spin alone (to the effect that the intention is to prevent acquitted defendants from "getting away with it") further contributed to the culture of disrespect for the presumption of innocence.

32. Mercifully, the clauses are less bullish than the soundbites. We note for example, the discretionary nature of such orders and the possibility of further defendant evidence. However, the following serious concerns remain:

- Opposing a restraining order after an acquittal would inevitably undermine the not guilty verdict by allowing a mechanism whereby the court could treat the acquitted individual as a wrongdoer. Although the formal verdict would be not guilty, there would be a clear implication of guilt by association with the imposed restraining order.
- An additional problem could be the attitude that an acquitted defendant could take to an imposed restraining order. Given the substantial effects that such orders have on an individual's liberty, they will undoubtedly be interpreted by the acquitted defendant as a form of punishment. It is difficult to escape the conclusion that a defendant who has been found not guilty could well find it difficult to accept the justification behind the imposing of an order. As the key purpose of such an order is preventative, this central aim could be undermined from the outset.

33. We would invite the government to consider alternative measures of providing support and assistance to the complainant rather than effecting a uncomfortable merger of criminal and civil proceedings. At the very least, we would like it to

consider providing express procedural safeguards for acquitted defendants facing and indeed receiving such orders on the face of the legislation.

### **Trial by jury**

#### **Clauses 9 –12**

34. Liberty remains fundamentally opposed to limiting trial by jury. Furthermore, we are concerned that these restrictions on jury trial reflect a trend. The recent Criminal Justice Act has already removed jury trial in a number of key areas. Whilst there are potential cost savings in removing jury trial, Liberty does not believe that this can justify undermining a central plank of our criminal justice system.
35. Liberty does not accept that repeated and persistent offending conduct renders jury trial inappropriate or unfeasible. Trial by jury on sample counts only is a recipe for serious injustice and we believe that it should remain perfectly possible for a jury to be presented with evidence relating to a pattern of repeated behaviour in a clear and concise fashion.
36. Given the potential sanctions a defendant may face in such circumstances, we believe that it is appropriate to retain trial by jury for the entirety of the trial.

#### **Part 3: Victims etc**

37. Whilst Liberty welcomes many of the measures under Part Three of the Domestic Violence, Crime and Victims Bill, we feel many of these proposals represent a first step. The Government needs to go further if it is to honour its commitment to victims of crime and provide them with significant rights and protection.
38. Clause 13 provides for the creation of a Code of Practice in respect of services provided to victims of crime by persons who have functions relating to victims or

the criminal justice system as a whole. Liberty have argued in the past<sup>2</sup> that the impact of the Victim's Charter was severely limited by the absence of a supporting legislative framework, and we would once again call for the creation of legally enforceable rights for victims of crime. Whilst the Code of Practice provides a valuable framework of principles that must be adhered to, with possible investigation of any breach of the Code, it nevertheless does not impose a legal duty or obligation upon service providers.

39. Clause 14 extends the jurisdiction of the Parliamentary Commissioner to investigation of possible breaches of the Code of Practice. Clause 15 allows for the creation of a Commissioner for Victims and Witnesses. The primary function of this Commissioner will be to promote their interests, take steps to encourage good practice in their treatment and keep the Code of Practice under review.<sup>3</sup> In fulfilling these goals, the Commissioner can report to the Secretary of State, commission research, and make recommendations. The Commissioner is excluded from exercising his functions on behalf of individual victims and witnesses. A Victims' Advisory Panel is also proposed.
40. These proposals fall short of fulfilling their potential. The government should appoint an Independent Commissioner whose role it is to protect and advocate the rights of victims. To be truly effective, the Commissioner must have wide-ranging and more effective powers to enforce change.
41. The proposed Code of Practice is to be supported by the right of complaint to the Parliamentary Commissioner, as outlined above. However, the creation of a Commissioner with far greater and significant powers would significantly reduce the likelihood of complaints and problems arising in the first place; and we see benefits in the creation of a specific Victims' Ombudsman.
42. Liberty strongly supports an increase and enhancement in the rights of victims of crime. The proposals under the Domestic Violence, Crime and Victims Bill

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<sup>2</sup> The Rights of Crime Victims, A Manifesto for the Better Treatment of Victims in the Criminal Justice System, Liberty February 2003

<sup>3</sup> Explanatory notes to the Bill

comprise a welcome first step, but should be taken further if real progress is to be made. Victims' rights must be firmly enshrined in statute; the Commissioner should be granted more powers and complaints should be referred to an Ombudsman dedicated to the issues around victims' rights.

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**Sections relating to the death of a child or vulnerable adult were drafted with the assistance of Edward Rees QC at Doughty Street Chambers.**

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