

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty response to the Home Office
Consultation paper on Domestic Violence
“Safety & Justice”**

September 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. In June 2003 the Government launched a consultation paper entitled “*Safety and Justice: The Government’s Proposals on Domestic Violence*”.

2. Liberty welcomes the Government’s attempt to provide greater legal protection for victims of domestic violence. For practicality this briefing adopts the current definition of domestic violence used by the Crown Prosecution Service, namely: “Any criminal offence arising out of physical, sexual, psychological, emotional or financial abuse by one person against a current or former partner in a close relationship, or against a current or former family member.”¹ However, we agree with the organisation Rights of Women who argue that a stronger and more inclusive definition used by the United Nations Special Rapporteur on Violence against Women encompassing but not being limited to “physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation” is appropriate for framing the government’s strategy.

3. Domestic violence, which is overwhelmingly perpetrated by men against women, is a grave social problem in the UK. Although these crimes occur very frequently, the majority of cases go unreported and the perpetrators carry out their crimes with impunity, blighting the lives of women and children. Even when cases are reported, investigation often proves difficult and women frequently come under enormous pressure not to give evidence against the man concerned. For this reason, many cases concerning domestic violence collapse before coming to trial. There is a widespread feeling that too many perpetrators of domestic violence are getting away with it and that the law has not proved effective in combating these crimes.

4. For these reasons, Liberty welcomes the Government’s initiative to provide better prevention, legal protection and support for the victims of domestic violence.

¹ CPS Policy on Prosecuting cases of domestic violence, November 2001, available on www.cps.gov.uk

Domestic violence is properly regarded as a form of inhuman and degrading treatment and Liberty notes that the case law of the European Court of Human Rights has established that state parties must provide positive legal protection of their citizens from inhuman and degrading treatment at the hands of other private individuals.² It is also important, however, that the legal measures to address this problem are truly necessary and proportionate, so that they do not infringe human rights or undermine the fair trial safeguards which protect the innocent.

5. Our response will primarily focus on proposals contained in part 3 of the consultation. Before we look at these in detail it is important to emphasise that the rights of victims and the rights of defendants are not exclusive. Liberty has produced a manifesto for victims³ which makes several recommendations which are directly relevant to victims of domestic violence. Although these relate specifically to the criminal rather than family courts we feel it is important to reiterate these proposals.

4. Our main proposals are:

- To support the creation of legally enforceable rights. The existing ‘Victims Charter’ creates no legal duty or obligation upon service providers. We believe the principles should be supported by an enforceable legislative framework.
- The right to receive information about these rights and information about the criminal justice system as soon as practicable after the reporting of an offence.
- The establishment of a Victims Commissioner with power to take on test cases and conduct enquiries.
- The elimination of insensitive and inaccurate treatment of victims by criminal justice agencies.
- A right to be fully informed about the progress of any criminal proceedings and to be given advance notification of hearing dates, adjournments and grants of bail to the defendant and of release following imprisonment.

² Article 3 of the European Convention of Human Rights provides: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’ The cases referred to are *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112; *A v United Kingdom* (1998) 27 EHRR 611.

³ ‘The Rights of Crime Victims – a manifesto for better treatment of victims in the criminal justice system’ Tazeen Said Liberty 2003 available on www.liberty-human-rights.org.uk

6. While the rights above have universal applicability to criminal proceedings it is important to emphasise that domestic violence is gendered in that it predominantly affects women. We are pleased that the consultation recognises that men suffer from domestic violence. However, while it may be true that one in six men will be victims the British Crime Survey of 2001/2 found that 81% of victims were women. Because of this we believe it is appropriate that the allocation of resources for support of victims reflects this inequality.

7. Following on from this it is also important to recognize that certain types of domestic violence are experienced almost exclusively by women from ethnic minority groups. 'Honour' crimes are an example of ethnically specific violence which needs to be approached with particular sensitivity.

8. Liberty broadly welcomes the proposals contained within the consultation paper. In particular, we welcome the Government's assertion that domestic violence is unacceptable in any circumstances. Liberty believes that it is important that domestic violence is treated as an issue of public importance and recognized to be one that it is in the public interest to tackle. We support the Government's recommendation in Part 2 to provide information to victims of crime to enable them to access support and legal services, as well as to preventing domestic violence offenders from re-offending. We note that domestic violence creates both direct victims (usually the woman who is attacked) and indirect victims, such as children who experience one parent attacking another. We also note that domestic violence and being a victim of crime generally can have secondary effects (e.g. on housing, employment, family issues) and are pleased that Part 4 of the consultation goes some way to addressing these concerns about double victimization and the consequential effects of crime and violence

9. Our concern is that a lack of direct or indirect central funding will undermine many of the stated good intentions. The 'Women against Sexual Harassment' helpline was recently forced to close down due to funding difficulties. This provided essential support, counselling and legal advice for victims of domestic violence. We trust that a desire to support victims extends to ensuring those private and public bodies that provide assistance receive sufficient funding to function properly. As the proposals

will create new systems and rights it is also important that the need for Community Legal Service funding is anticipated and available for victims of domestic violence so that they are able to pursue available courses of action. We know that the average cost of privately obtaining a non-molestation order is £2000. If someone is not eligible for legal aid and yet not comparatively wealthy obtaining an order can be prohibitive.

Anonymity for Complainants

10. The Sexual Offences (Amendment) Act 1976 affords complainants in rape cases a limited degree of anonymity, as the press are prohibited from reporting any details that would lead to their public identification. The name, address and photograph of the victim are the most obvious examples of such details. The 1976 legislation has been extended by subsequent legislation to protect complainants against public identification in cases involving a wide range of sex offences.⁴

11. These limitations are an exception to the principle of open justice, which recognizes that open court proceedings and press reporting are essential to maintaining public confidence in the administration of justice. These limitations in respect of sex offences are supported by Liberty for two main reasons. First, sex offences invariably involve the most personal and intimate details coming before the court and it was clear that public reporting of these matters was greatly adding to the victims' humiliation and suffering. Secondly, it is important to encourage the reporting of sexual offences to the police and to that end it was deemed vital to assure potential complainants that they would be spared further humiliation through public identification.

12. These reporting restrictions apply automatically, but in order to protect the interests of the defendant the law provides that a judge has the discretion to lift these restrictions, where that is necessary to induce potential witnesses to come forward and the applicant's defence at the trial is likely to be substantially prejudiced if they remain in place.⁵

⁴ Sexual Offences (Amendment) Act 1992, section 2.

⁵ Sexual Offences (Amendment) Act 1992, section 3.

13. Cases involving domestic violence range from instances of harassment and common assault, through to offences of violence causing injury, sexual offences and murder. Liberty is not aware of any evidence to suggest that it is fear of publicity which prevents victims of domestic violence from coming forward to give evidence. Rather it appears to be a fear of further violence from the abuser which acts as the greatest impediment to the reporting of these offences. However if there is evidence to suggest that our assessment is wrong then it may be appropriate to consider anonymity.

14. Where it is proposed to deviate from a basic legal principle such as open justice, the onus is on those proposing the measure to establish that it is truly necessary. At the present time, Liberty is not persuaded that the automatic imposition of reporting restrictions is necessary in cases of domestic violence. The government has already legislated for a power allowing judicial discretion - see section 46 of the Youth Justice and Criminal Evidence Act 1999 - but it has not been brought into force. Section 46 would enable a judge to impose a reporting direction preventing identification of a witness over 18 if the direction is likely to improve the quality of evidence given by that witness or the level of cooperation given by that witness to any party to the proceedings.

Register of domestic violence offenders

15. The proposal for a register of domestic violence offenders is based on the so-called sex offenders' register introduced by the Sex Offenders Act 1997. The term sex offenders' register is a misnomer, as no specific register of sex offenders exists. Rather, the purpose of the 1997 legislation was to ensure that the names and addresses of sex offenders on the Police National Computer remained up to date.⁶ This aim was achieved by introducing "notification requirements" on certain sex offenders, so that the police are swiftly informed of the current address of any offender and of any subsequent change of name or address. Failure to comply with these notification requirements is, in itself, a criminal offence.

⁶ Following conviction for any criminal offence, a person's details and the details of the conviction are recorded on the Police National Computer (PNC).

16. The rationale for these measures was the danger posed by predatory paedophiles against children and fears that sex offenders were able to evade monitoring or detection by the police by “disappearing”. The aims of the legislation were first, to help the police to monitor offenders’ whereabouts and to identify and locate suspects if a crime was committed, and secondly to act as a deterrent to potential sex offenders.⁷

17. By way of contrast, domestic violence, by definition, occurs between parties who are known to each other through an existing or previous relationship. The element of “stranger danger” does not arise and the police will not have any difficulty identifying perpetrators of these crimes. In the vast majority of cases the parties will still be living together or nearby to each other, so few issues of trace-ability should arise. It is also extremely difficult to define ‘domestic’. Is there a need for cohabitation or for a particular length of relationship? We would also be concerned that violence against women that did not fall into the definition would be considered less serious. Because of this Liberty is not persuaded that it is necessary to impose notification requirements on persons convicted of offences involving domestic violence.

Criminalising the breach of non-molestation orders

18. The real problem with the law on domestic violence is not the lack of legal means of redress for the victims, but the fact that the existing legal means of redress are only being utilized in a small minority of cases. The Government’s consultation paper states that in 2001/2002 there were approximately 178,000 incidents of domestic violence reported to police. Yet in 2001, only 7,129 people were proceeded against under the Protection from Harassment Act 1997, while there were only 28,000 applications for non-molestation and occupation orders. We would welcome research to reveal if there are reasons why victims of domestic violence are being dissuaded from relying on those remedies that currently exist.

⁷ See e.g. Baroness Blatch in *Hansard* HL Vol 587 col 545.

19. Non-molestation orders were introduced in the Family Law Act 1996 and enable a court, on application by an applicant or of its own motion in the course of family proceedings, to impose a non-molestation order against a respondent in order to secure the health, safety and well-being of the applicant or any relevant child. Molestation is not defined in the legislation, but the term was clearly envisaged to embrace the sort of conduct that characterizes domestic violence. The court is also empowered to attach a power of arrest to the order and if a respondent subsequently breaches the order he will be in contempt of court, conduct which is punishable with up to two years' imprisonment. The court may also make an order without the respondent being present in court (a "without notice" order), but the respondent has the right to apply to have the order discharged.

20. At present, non-molestation orders may only be imposed between a respondent and "another person who is associated with a respondent", this class of associated persons being defined by section 65 of the Act. At present, this definition does not include same-sex couples that are cohabiting and relationships where the parties have never lived together at any stage. The Government propose to amend the Act to include these categories of persons and Liberty welcomes this change in the law, which will extend the availability of this important remedy.

21. The Government also proposes to make it a criminal offence to breach a non-molestation order. The key issue here is whether criminalising the breach of non-molestation orders will restrain potential offenders and encourage potential claimants to seek such orders in the first place. In terms of deterrence, it is doubtful whether criminalising the breach of such orders will provide significant additional deterrence given that the existing sanction for contempt of court is imprisonment for up to two years. From the point of view of potential claimants, particularly in the context of ongoing relationships, the prospect of their partner getting a criminal record may not be welcomed. We are aware of anecdotal evidence where victims seeking orders have been concerned that the person against whom the order was to be made should not have a criminal record as a consequence. It might be counterproductive if victims are dissuaded from seeking orders because of this. Where it is proposed to criminalise any conduct through the creation of new offences, the onus is on the Government to

justify such measures. At present, Liberty is not persuaded of the need for this measure.

22. The Government is also proposing that breach of non-molestation orders, even when made ‘without notice’, would constitute a criminal offence. The present position in Northern Ireland is that ‘without notice’ orders are effective from the moment they are made, so it is possible for criminal proceedings to be brought against a person who has breached an order without having knowledge of its existence. In practice, however, the Police Service of Northern Ireland have introduced a policy of not proceeding with criminal prosecutions unless an order had been served on the defendant, thereby mitigating this potentially severe provision.⁸

23. It is a fundamental principle of human rights law that any restriction of rights must be in accordance with a law that is sufficiently clear, precise and accessible in order for the person affected to regulate their conduct. Clearly, none of these essential requirements pertain if the respondent is not even aware that a non-molestation order has been obtained against him. Liberty regards prosecutions in such circumstances as unacceptable and cannot see how such a practice could possibly be compatible with the European Convention of Human Rights. The fact that following legal advice the Police Service of Northern Ireland does not proceed without notice shows that they share this view. It is also not acceptable that the policy of serving a notice on a defendant informing them of the existence of the order should be left to executive discretion, as in Northern Ireland. Rather, the law should provide that no prosecution may be proceeded with unless it can be proved the defendant has had notice, namely that an order, setting out in detail its terms and the consequences of any breach, had been served on that defendant prior to the acts for which he is being prosecuted.

24. We do not believe that the criminalisation of non-molestation orders will provide a solution. It is far more important that the police have the resources and training to be able to react appropriately. Rights of Women have said they frequently receive calls from women who have non-molestation orders with powers of arrest attached. When they have called the police to complain of a breach they are told that

⁸ *Protection and Justice*, pp 33-34.

‘catching burglars and terrorists’ is a more pressing concern. Ensuring that the police treat calls appropriately will be far more effective than criminalising orders.

Restraining Orders

25. Restraining orders are a remedy which were first made available to the courts with the Protection from Harassment Act 1997. This legislation, which was introduced in response to the problem of stalking, has proved useful in relation to incidents of domestic violence, owing to the broad and flexible definition of the offence which embraces any course of conduct causing alarm or distress.⁹ On conviction the court may, in addition to imposing any other sentence, impose a restraining order, which prohibits the defendant from doing anything described in the order. Breach of the order amounts to a criminal offence carrying a prison sentence of 5 years in the Crown Court and six months in the Magistrates’ Court.

26. The Government’s first proposal is to make restraining orders available when a court sentences a person for any offence of violence. In the context of harassment cases, the rationale for restraining orders was to prevent an offender from repeat offending in future in circumstances where a past course of conduct of harassment had been proved. The purpose of the restraining order was to prevent circumstances arising where further offences might be committed, for example, if a man had harassed a particular nurse an order could be imposed preventing him from going to the hospital where she worked. The orders were supposed to be specific as to the conduct prohibited. This is because any general prohibition, such as ‘to refrain from harassing X’ serves no purpose, as it would simply reflect the existing criminal law.

27. Restraining orders are, potentially, a significant restriction upon an individual’s liberty. If restraining orders are to be made available for all offences of violence, then they should be confined to those cases where there is a demonstrable risk of repeat offending in the future. The burden should be on the Prosecution to establish that the order is necessary to protect the victim of the instant offence and

⁹ Section 1(1) of the Protection from Harassment Act 1997 provides: A person must not pursue a course of conduct - (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other. Section 7(2) of the Act provides: References to harassing a person include alarming the person or causing the person distress.

that the terms of the order are proportionate to the risk involved. If such safeguards are not put in place, there is a real danger that such orders will be imposed in cases where they are not necessary and in sweeping terms that dramatically curtail the liberties of the person concerned. Although such orders would always be open to challenge on appeal, by placing a burden on the Prosecution and setting out clear criteria for the exercise of the discretion in the relevant legislation, these problems could be prevented.

28. Secondly, the Government proposes to make restraining orders available to criminal courts where a person is charged pending a trial. It is questionable whether restraining orders are necessary in these circumstances, given that the courts are empowered to impose bail conditions aimed at preventing the commission of further offences and protecting witnesses from any form of interference. Common examples are bail conditions not to make contact, directly or indirectly, with the complainant and not to go to a particular location. If a defendant breaches any of their conditions of bail, the court may remand them in custody. Given the existing safeguards, Liberty is not persuaded that this additional measure is required.

29. The Government's third proposal is to make restraining orders available to criminal courts when there is insufficient evidence to convict but the court considers that it is necessary to make a restraining order to protect the victim. Liberty regards this proposal as fundamentally flawed because such a measure blurs the fundamental distinction between guilt and innocence. The whole purpose of a criminal trial is to test the prosecution's evidence against a defendant to enable the court to decide whether or not a defendant is guilty of the crime alleged. Where a defendant is found not guilty, they are entitled to be regarded as innocent of the crime. Enabling the courts to impose a restraining order after a defendant has been found not guilty would totally undermine the "not guilty" verdict by allowing the court to treat the acquitted person as a wrongdoer. Although the verdict might be not guilty, the message would be guilt by association with the order.

30. In a typical case where a restraining order would be sought, there will have been a straightforward conflict of evidence between the complainant and the defendant. In the overwhelming majority of such cases where there is an acquittal,

that will be because the tribunal of fact, having heard the evidence, is not sure that the complainant is telling the truth. Yet what the government proposes is that the person whose evidence did not persuade the court, should then be the beneficiary of a court order which is premised on the truth of the allegations that have just been found wanting. This contradicts established principles of criminal justice and has no logical justification.

31. Furthermore, a restraining order imposed after a criminal trial and which will result in a significant interference with the liberty of the person concerned, will be seen as a form of punishment by that person. It will be very hard for the acquitted person to accept that although he has been found not guilty, the court is nonetheless entitled to impose such an order. As the purpose of such orders is preventative, their aims will be undermined from the outset if the persons on whom they are imposed do not respect them.

32. For all of these reasons, Liberty is strongly opposed to the imposition of restraining orders in cases where the defendant has been acquitted and believes that such orders should be confined to cases where a defendant has been convicted and the order is necessary to protect the victim of the offence, taking into account the existence and duration of any custodial sentence imposed.

Referring domestic violence cases to the Sentencing Advisory Panel

33. The Government proposes to refer the issue of domestic violence to the Sentencing Advisory Panel, which exists to provide guidance on sentencing to the Court of Appeal, which is responsible for issuing sentencing guidelines. Domestic violence embraces a whole range of offences from minor forms of harassment thorough to murder. Yet there are factors particular to domestic violence offences that a more sophisticated approach to sentencing might take into account. The Government notes in the consultation paper that attitudes towards domestic violence have changed from widespread acceptance, to widespread recognition that it is wrong and unacceptable. Sentencing practice for such offences has, however, lagged behind societal recognition of the harm caused by domestic violence.

34. Domestic violence cases are complex because the charged offence will usually be part of a pattern of mistreatment perpetrated, in the majority of cases, by men against women. The abusive relationship may also have a profound impact on other people, from children to other relatives. The emotional scars may be as important as the physical scars and the harmful consequences of the abuse may embrace many aspects of the victim's lives, affecting, for example, the schoolwork and life prospects of children in such homes. In this context, Liberty welcomes the Government's proposal to refer the issue of domestic violence to the Sentencing Advisory Panel, whose guidance may bring much needed clarity and sophistication to sentencing in this field.

Conclusion

35. Liberty welcomes the government's stated commitment to combating domestic violence. We are aware that our comments have focussed on concerns over the appropriateness and desirability of many of the proposals in Part 3 but we would not want this to detract from our support of the Home Offices' clear intentions. As we have stated on several occasions throughout this briefing we believe that the need is not for further and greater powers, as those currently available are being under utilised. Instead the focus must be on education, on appropriate training for criminal justice professionals and most importantly on dispelling attitudes that domestic violence is less important than other demands on police resources. Furthermore, unless central funding through the Community Legal Service allows access to the measures proposed in 'Safety and Justice', many victims will be denied protection.

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