

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's response to the Home Office Consultation - 'Strengthening Powers to tackle anti-social behaviour'**

**February 2007**

## **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.

## **Liberty Policy**

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

[www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml](http://www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml)

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## Introduction

1. The consultation ‘Strengthening Powers to tackle anti-social behaviour’ is the latest in a series of initiatives and consultations focusing on the ‘respect’ agenda. Anti-social behaviour remains at the top of the government’s agenda and we appreciate that this consultation is likely to be followed by new legislation possibly in the current session.

2. In their introductions to the consultation both the Prime Minister and the Home Secretary use the phrase ‘*rebalancing the criminal justice system in favour of the law abiding majority*’. The implication of this is that there are two simple groups that each of us will fit into. We are either ‘law abiding’ or ‘criminal’. Of course the reality is far different. The most ‘decent’ family can be torn apart by drug use, mental health problems or through domestic violence. Other families can be labelled ‘anti-social’ not because they commit any crime but because their neighbours do not like their lifestyle. The former Home Office minister Hazel Blears once said in a television interview that an incident was anti-social if the victim believed it was. Such vague and open ended definitions lead to overbroad and poorly defined lawmaking.

3. The true complexity of anti-social behaviour is reflected on the Home Office ‘Respect’ website<sup>1</sup>. A variety of behaviour and activity are listed which ‘covers a wide range of selfish and unacceptable activity that can blight the quality of community life’<sup>2</sup>. Examples of anti-social behaviour listed are nuisance neighbours, yobbish behaviour and intimidating groups taking over public spaces; vandalism, graffiti and fly-posting; people dealing and buying drugs on the street; people dumping rubbish and abandoned cars; begging and anti-social drinking; the misuse of fireworks and the reckless driving of mini-motorbikes. The activities listed cover a massive spectrum of activity. At one end is serious criminal activity such as drug dealing. This is clearly best dealt with by criminal process involving charge and prosecution. At the other end of the spectrum is behaviour that people might dislike but which in itself is clearly not criminal. Examples include being a nuisance neighbour or being part of a group taking over a public space. In the middle of the spectrum is a range of minor criminal or borderline criminal activity such as begging,

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<sup>1</sup> <http://www.respect.gov.uk>

<sup>2</sup> <http://www.respect.gov.uk/article.aspx?id=9066>

'yobbish' behaviour and reckless driving. It is this grey area of 'criminality' that has most-commonly been the focus of enforcement powers such as Anti-social Behaviour Orders (ASBOs) and curfew and dispersal powers created under Section 30 of the Anti-social Behaviour Act 2003 (ASBA).

4. Liberty's concerns over the use of ASBOs are well-documented. We believe they mix criminal and civil law, set people up to breach them, are increasingly counterproductive and used as a panacea for all ills. Our concerns over S. 30 ASBA powers are similar in that there is no need that any individual be suspected of involvement in criminal activity before being subjected to a dispersal order. Breach of an order (such as by returning to the area) is a criminal offence. Similar to an ASBO the behaviour leading to breach does not have to be criminal. There have recently been moves towards extensions of the ASBO/dispersal order model. Control orders created under the Prevention of Terrorism Act 2005 impose restrictions on movement and association similar to an ASBO. The Serious Crime Bill currently before Parliament has introduced a new Serious Crime Prevention Order. This is a hybrid of ASBOs and control orders that impose control order style restrictions following court process similar to that used for the ASBO. It also appears that a new Violent Behaviour Order is being considered. A variant of the Section 30 ASB dispersal order was introduced with the power to disperse people to avoid a risk of future drink related disorder under Section 27 Violent Crime Reduction Act 2006. Again there is no need for any criminal behaviour to be made subject to an order and breach (again mainly by returning to the location) is a criminal offence.

5. When the Crime and Disorder Act 1998 was passed the ASBO was intended to be the targeted response to a specific problem. It would be used to address difficulties faced by individuals in using traditional civil law remedies such as an injunction to prevent anti-social behaviour. Instead the state would take action on the individual's behalf through the ASBO. Since then the civil order with breach a criminal offence has been the answer to nearly every problem of crime or disorder. There has been a constant and persistent blurring of what constitutes criminal activity and a continued move away from the courts as the mechanism for imposing preventative and punitive sanction. This looks set to continue with the proposals set out in the consultation such as increasing dispersal powers and extending powers to

close crack houses so that they can be used against anti-social tenants and owner occupiers. Having said this we appreciate that there is also much in the consultation about positive early intervention and the use of pre-court disposal in preference to prosecution. ASBOs and other non prosecution alternatives are more effective if targeted such as being used as a ‘last chance saloon’ to avoid a criminal record. The problem with over use and over reliance on these orders is that rather than providing an alternative to prosecution, they become a fast track to criminality. The study on ASBOs carried out by the Youth Justice Board published in November 2006 found that *‘nearly half of the young people whose case files were reviewed, and the vast majority of young people who were the subjects of in-depth interviews, had been returned to court for failure to comply with their order. The majority had ‘breached’ their ASBO on more than one occasion.’*<sup>3</sup> Ever increasing extension of and reliance on non criminal orders is likely to exacerbate the many concerns highlighted in the Youth Justice Board report.

6. As we have said there are proposals with merit in the consultation. If we do not comment on a section it is because we do not take issue with it or because it relates to mainly procedural or logistical issues best dealt with by practitioners. For example, while some of the suggestions in Chapter 3 of the consultation would seem sensible, we have concerns about others:

- We are concerned that some byelaws will be too uncertain or require too complicated a subjective assessment to be capable of enforcement through penalty notices. There is not detail in the consultation about how it will be determined which byelaws should be enforced in this way and which should still be enforced through the independent courts.
- We have commented separately on the proposals to deal with breaches of court orders summarily.<sup>4</sup> We are concerned about the constitutional and practical implications of this proposal which would extend the powers of administrators, as opposed to the courts, to re-sentence individuals.

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<sup>3</sup> <http://www.yjb.gov.uk/publications/Resources/Downloads/ASBO%20Summary.pdf>

<sup>4</sup> See Liberty’s response to the Home Office Consultation “Making Sentencing Clearer”, January 2007, paras 13 to 16

- The practical implications of the proposals to require parents to pay penalty notices given to their children will also need to be considered when any legislation designed to achieve this is published.

## **Proposals for new tools and measures**

7. Chapter 2 sets out plans to create new powers. It points out that there are already a range of measures currently used when concerns are raised about the behaviour of an individual. Interventions include warning letters, home visits and the use of Acceptable Behaviour (ABCs). The use of voluntary ABCs, with their emphasis on trying to impress on a person the consequences of their behaviour, appear to be a sensible and appropriate method of early intervention. However as they are voluntary a refusal to take up an ABC should not by itself lead to a decision to escalate and seek an ASBO or eviction from social housing. There should be other grounds justifying the taking of more drastic action.

8. Commentating on ASBOs the consultation states that because of the serious consequences of breach, there are proper safeguards for the defendant. These include *‘in the application hearing, the need to prove, to the criminal standard, that anti-social behaviour has occurred’* and that there is *‘a criminal standard of proof in relation to breach proceedings’*<sup>5</sup>. The case of McCann<sup>6</sup> in the House of Lords determined that although ASBOs are made in civil courts where the burden of proof is the ‘balance of probability’ the court must be satisfied to the criminal standard of ‘beyond reasonable doubt that anti-social behaviour took place. However, this is some way short of saying outright that the criminal standard now applies. The court does not have to be satisfied that there was any involvement in criminality. Rather the proof beyond doubt must be that there was involvement in undefined ‘anti-social behaviour’. Furthermore McCann established that the normal restriction on hearsay evidences that exist in criminal case do not apply to ASBO proceedings. Instead the civil rules would apply permitting multiple hearsay. This means that an ASBO can be

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<sup>5</sup> Page 10

<sup>6</sup> House of Lords – *Clingham (formerly C (a minor)) v Royal Borough of Kensington and Chelsea* (on Appeal from a Divisional Court of the Queen’s Bench Division); *Regina v Crown Court at Manchester Ex p McCann (FC) and Others (FC)*.

imposed on the basis of a 2<sup>nd</sup> or 3<sup>rd</sup> hand account that someone was involved in anti-social behaviour. It is true that a conviction for breach will require proof beyond doubt according to the rules of criminal evidence. However, it should be remembered that the breach may well result from behaviour that is not in itself criminal, such as walking on a road from which the person has been banned. It still remains the case that the use of ASBOs can lead to a criminal conviction without a court ever needing to be satisfied that a person has committed a crime.

9. The implication given by the consultation is that ASBOs have been an unqualified success. The selective use of appropriately tailored ASBOs can help reduce local anti-social behaviour. However, widespread use for inappropriate reasons can undermine any effectiveness they have. There are frequent reports in the media of bizarre orders such as placing bans on sarcasm or from answering the door in underwear. Aside from these specific incidences of unusual restriction there is growing concern that excessive use of ASBOs is proving counterproductive. The Youth Justice Board report said that they were increasingly being actively sought as a 'badge of honour'. With breach rates exceeding 50 % in some areas the danger of ever increasing reliance on ASBOs has serious implications both in terms of effectiveness and cost<sup>7</sup>. We believe that the Government's constant and increasing reliance on the use of civil orders as a tool to combat crime has severely undermined their effectiveness and credibility. Until there is a significant policy reverse so that civil orders are used sparingly in a specific and targeted manner this trend will continue.

10. The consultation comments that some practitioners have argued that the use of dispersal powers under S.30 ASBA be extended. The justification for this is that there is a gap in the ability of the police to deal with situations that require more than an oral warning but are not so extreme as to justify an ASBO. At the moment S. 30 powers can only be used in 'designated' areas. At present, in order to designate an area as one where S. 30 powers can be used, a Police Superintendent must have reasonable grounds for believing that '*members of the public have been intimidated, harassed, alarmed or distressed as a result of the presence or behaviour of groups of two or more persons in public places*' and '*that anti-social behaviour is a significant*

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<sup>7</sup> The cost of breach potentially being the cost of a prison place while ASBOs themselves cost on average £2500 each according to respect website (although other sources have claimed higher)

*and persistent problem in the relevant locality*'.<sup>8</sup> A further requirement is that a local authority must agree to the order being made. The reason for these limitations on use was due to the fact that the dispersal order is essentially a summary power to impose restrictions breach of which can lead to conviction. Limitation to areas where there was a specific problem with anti-social behaviour at least provided recognition that dispersal orders were exceptional powers and introduced a degree of proportionality into their use. By their nature dispersal orders are based on the subjective assessment of a situation by a police officer. This is difficult to challenge as the criminal offence is committed at the time of breach (by the person returning). Creating a general nationwide dispersal power would be a significant and unjustified increase in summary policing powers. The lack prior designation would in our view make such a move disproportionate and subject to challenge under the right to free assembly under Article 11 of the Human Rights Act 1998 (HRA).

11. We would also add that this proposal is symptomatic of the manner in which legislation has been introduced in recent years. Exceptional powers will be contained in a Bill with limitations on use. These limitations are used to justify introduction by explaining that they are only intended to deal with specific situations. Once the powers are bedded in further legislation will be proposed on the basis that the powers have proved useful. This, it is argued, means they should be used more generally. Concerns are addressed by saying that the powers are already on the statute book so nothing new or radical is being proposed.

12. The consultation also proposes that existing powers to issue Penalty Notices for Disorder (PNDs) be modified. As well as immediate issue there would be a power to defer them. This would allow them to have some preventative impact so that if conditions imposed (under an ABC for example) are complied with then the PND will be discharged. We do have a general concern about the use of summary powers for essentially subjective determinations of whether there has been disorder. Notwithstanding this, we can see some sense in the idea of deferring PNDs. It gives a person the opportunity to discharge a PND and should have genuine preventative impact. If a person believes the conditions to be imposed excessively onerous then

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<sup>8</sup> Anti-social Behaviour Act 2003 S.30 (1)

they would presumably accept the PND. The consultation does, however, suggest that a deferred PND would be used alongside an ABC, i.e. as a deterrent against the “offender” breaching the ABC. Entry into and compliance with an ABC would effectively become compulsory with refusal to agree to an ABC or breach of the ABC resulting in a fine. This is inconsistent with the current and intended status of ABCs as a voluntary, non-coercive agreement between the state and the “offender”, in which the state agrees to provide assistance and support to the “offender” who, in turn, agrees to regulate his/her behaviour. This was intended as an alternative to the state taking coercive action against the “offender” such as obtaining ASBO or commencing a criminal prosecution and it is for this reason that, at present, there are no direct legal consequences for breaching an ABC.

13. The consultation also proposes extending existing powers to close down properties which are used for the sale of class A drugs. The wider definition would now allow for closure of properties for anti-social behaviour. Behaviour that could result in the closure of a property includes frequent drunken parties; high numbers of people leaving and entering, intimidating residents and criminals running businesses from properties. It also proposes that closure will apply equally to owner occupiers and private tenants as to those in social housing. This broader definition is already in use in Scotland. Initially a Police Superintendent would need to have grounds for believing there was a problem with anti-social behaviour. If so he could authorise a closure notice. Once issued, only the resident could then stay to sort out alternative accommodation pending application for a full closure order. This application would need to be made by a court within 48 hours. If granted, an order would allow closure of the property for 12 weeks which could be extended in exceptional circumstances. Return during closure would be a criminal offence.

14. Existing closure powers have been described as ‘working well and ... welcomed by local communities for bringing immediate relief to their neighbourhoods’.<sup>9</sup> This may be true. When closure orders were originally proposed Liberty agreed that they were a proportionate and potentially effective way of addressing a significant problem. However, we are concerned to see that drug related

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<sup>9</sup> Page 14

closures appear to be having unfortunate consequences. In November 2006 *The Guardian* newspaper ran a story saying that closures were resulting in displaced drug dealers taking over properties of the vulnerable, a practice called ‘cuckooing’. ‘*They [drug dealers] are now targeting older people, vulnerable young people or people with mental health problems on housing estates, befriending them, giving them drugs and then taking over their homes.*’<sup>10</sup> We hope that the police and local authority community safety teams in areas where closures are taking place are aware of any problem with cuckooing and are ensuring that the vulnerable are protected.

15. Cuckooing demonstrates that closure does not necessarily end a problem but can merely displace it. The same will apply to anti-social behaviour closures if they come into effect. Simply closing a property will not address the cause of anti-social behaviour. The consultation states that ‘the closure should not be used in isolation but rather as a more strategic and holistic response aimed at tackling the underlying causes of anti-social behaviour.’<sup>11</sup> We recall that the need for post closure planning was similarly emphasised when drug closures were proposed. The model as proposed seems to only give maximum 48 hours between a police notice being issued and court closure notice being made. This seems little time in which to ensure that suitable arrangements have been made, especially if there are children or vulnerable adults concerned.

16. The consultation emphasises that closure would only be considered as a last resort and would require multi-agency involvement. It also states that the safety of the young and vulnerable cannot be compromised. The implication of this being that a court would not be able to make an order unless satisfied that proper arrangements were in place to protect their interests. Notwithstanding this, closure remains a drastic step. Closure for anti-social behaviour will usually differ from drug related property closures. Drug closures are more likely to be properties used primarily for the sale of drugs without settled residents. Anti-social behaviour closures are more likely to affect properties used as a main family residence. Closure notices are envisaged for activity which cannot be described as remotely unlawful such as having people frequently entering and leaving property. We do not accept that removal and

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<sup>10</sup> <http://society.guardian.co.uk/drugsandalcohol/story/0,,1947501,00.html>

<sup>11</sup> Page 15

displacement of a family could be a proportionate response to any annoyance caused by late night visitors.

17. There are already a range of powers that can be used against social and private tenants. Section 13 ASB contains provisions allowing social landlords to apply for injunctions to prohibit anti-social behaviour. A power of arrest or exclusion from specified premises can be attached where there is the use or threat of violence or a significant risk of harm. Sections 14 and 15 ASB allow local authorities, Housing Actions Trusts and registered social landlords to apply to the county court to bring a tenure to an end and then replaced with a less secure tenancy by way of a 'demotion order'. Actual repossession of property takes place by way of action under the Housing Act 1996. Section 16 ASB expanded the grounds for the making of a possession order on nuisance grounds to specifically include the impact that anti-social behaviour has had or might have on the local area. Part 6 of the Housing Act 2004 (HA 2004) further extended powers available against social tenants. Section 179 extended powers for local authority landlords to impose introductory tenancies that can be terminated if a tenant fails to conduct themselves satisfactorily during the introductory period. The HA 2004 also contained a range of powers restricting the right to buy housing stock by anti-social tenants.

18. Powers to deal with anti-social tenants in private housing are generally exercised through the contractual agreement between the landlord and tenant through the landlord's ability to reclaim the property and evict the tenants if they act in a manner in breach of that agreement. In recognition of the fact that some private landlords do not take any action against problem tenants, Part 3 of the HA introduced licensing schemes operated by local authorities. These schemes can ensure that only landlords who prove to be both willing and able to take action when necessary could be licensed. Conditions could be placed on licences requiring, for example, that landlords obtain suitable references and obliging them to take practical steps to combat anti-social behaviour.

19. It is clear that sweeping powers are already in existence for addressing the anti-social behaviour of social tenants. A more detailed consideration of these existing powers is beyond the scope of this consultation response. The substantive differences

between existing repossession powers and the proposed closure orders are that closure orders will take place much more quickly and will be only for a limited time. The consultation states that an order *'is not an eviction tool nor a fast track to eviction. It is about providing immediate respite to communities suffering from the misery caused by anti-social neighbours'*.<sup>12</sup> As a consequence it could be argued that an order is in fact a step that could be sought instead of full possession proceedings intended to avoid the need for formal repossession. A similar argument might be used in respect of private tenancies where an order might avoid the need for a landlord to seek formal eviction through the courts. If closure orders are to be introduced it is important that they are approached in this manner. It is easy to use a white paper to describe the use of powers as a last resort. The reality in practice is that closure powers will provide a relatively straightforward mechanism allowing for the swift removal of anti-social tenants. As with ASBOs and many of the other powers created to deal with anti-social behaviour, excessive use is likely to become counterproductive as local authorities attempt to deal with ever increasing numbers of displaced families living in temporary accommodation and possibly being split up. This type of temporary and uncertain existence is unlikely to address anti-social behaviour, instead exacerbating existing problems.

20. Inherent to the exercise of these powers is the need for compliance with the Human Rights Act 1998. 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 Privacy and Family Life under Article 8 HRA is most likely to be engaged. Any attempt to interfere with this must be for a legitimate purpose,<sup>13</sup> in accordance with the law and proportionate. The removal of children and vulnerable adults will increase the prospect of a decision to issue an order being disproportionate. As the consultation says closure orders are a drastic step. It is possible that the government will avoid introducing safeguards against excessive use by referring to the protections offered by the HRA. However, more is needed. Article 8 for example will provide less protection to tenants without children even if their behaviour has not been particularly 'anti social' (such as the late night coming and going referred to as justifying the order).

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<sup>12</sup> Page 17

<sup>13</sup> The legitimate purposes permissible under Article 8 being the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

Because of this there need to be specific safeguards against excessive use and oppressive impact written into the face of any legislation.

21. The consultation states that these powers might be exercisable against owner occupiers as well as tenants. While this possibly has a rationale, in that owners can be as anti-social as tenants, this would be a major policy decision for the Government to take. Unless under arrest, the forced removal of people from property that they own is permitted by law only in exceptional circumstances such as when necessary for their own protection or when civil contingency powers permit mandatory evacuation. Removal of owner occupiers is also likely to raise issues under the Right to Peaceful Enjoyment of Possessions under Article 1 of the First Protocol to the HRA. This is not an absolute right and can be limited in the public interest.<sup>14</sup> Whether the public interest would extend to the use of closure orders is debatable and we imagine any attempt to do so would be subject to challenge through the courts and, rightly, subject to intense Parliamentary and public scrutiny.

**Gareth Crossman**

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<sup>14</sup> This public interest limitation be used to justify compulsory purchase for example