

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Serious Crime Bill**

### **Liberty's Briefing and Amendments for Committee Stage in the House of Lords (Part II)**

**March 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

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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## Introduction

1. There is no doubt whatsoever that serious crime causes human misery and massive cost to society (financial and otherwise). Recently uncovered people smuggling operations have, for example, shown the horrific, sometimes lethal, conditions that people are forced to endure at the hands of smuggling rings.<sup>1</sup> The state has a moral responsibility to take steps to combat serious crime. What these individual steps should be and where we should allow them to take us in the long-term is, however, an entirely different matter. This is where Liberty sometimes, though not always,<sup>2</sup> parts company with the Government.

2. Liberty's proposed amendments are not designed to undermine the ability of the state to tackle serious, organised crime. Instead, we hope they will help Parliament to scrutinise whether the measures in the Bill are really necessary and whether they are really likely to work. We also hope they will give parliamentarians the opportunity to debate whether serious crime could be tackled in a way which does less damage to our democratic values, our human rights and the rule of law.

3. The amendments proposed in this briefing relate to Part II of the Bill.<sup>3</sup> Part II of the Bill is designed to fill perceived gaps in the criminal law allowing prosecution of those who have peripheral involvement in serious and organised crime. This is based upon work carried out by the Law Commission suggesting the need for new offences.<sup>4</sup> Liberty does not take issue in principle with the creation of such offences. We do, however, consider that, in their current form these go further than is appropriate and that additional defences are necessary to avoid injustice.

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<sup>1</sup> <http://news.bbc.co.uk/1/hi/england/london/5405870.stm>

<sup>2</sup> We agreed, for example, with the setting up of the Serious Organised Crime Agency (SOCA). Previously the UK had a tradition of semi-independent devolved regional policing bodies which made it difficult to optimise the use of resources and information in order successfully to combat complex national and international criminal activity.

<sup>3</sup> We have proposed amendments to Part I of the Bill (see <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>). We also intend to propose amendments to Part III of the Bill.

<sup>4</sup> The Law Commission, "Inchoate Liability for Assisting and Encouraging Crime", Law Com No 300, July 2006 ([http://www.lawcom.gov.uk/assisting\\_crime.htm](http://www.lawcom.gov.uk/assisting_crime.htm))

## Amendment 1 – Removal of “Belief” Offences

Clause 40 – stand part

Clause 41 – stand part

### **Effect**

4. This amendment would remove the proposed offences of “encouraging or assisting an offence believing it will be committed” (Clause 40) and “encouraging or assisting offences believing one or more will be committed” (Clause 41). The only new offence that Part II of the Bill would therefore create is the offence of intentionally encouraging or assisting the commission of an offence in Clause 39.

### **Briefing**

5. We agree that where a person acts with the *intention* of encouraging or assisting the commission of an offence, his/her state of mind is sufficiently fault-worthy to justify a criminal conviction. In this context we would expect intention to mean, in effect, that the *purpose* of the person’s actions is to make the commission of a criminal offence more likely by encouraging or assisting it. It is understandable that society should wish to prohibit and punish such behaviour in the hope of deterring actions which, while otherwise lawful, are designed to increase the likelihood of criminal behaviour by others.

6. We are not, however, convinced that *belief* that one’s actions will encourage or assist the commission of an offence by someone else is sufficiently fault-worthy to justify criminalisation. The effect of the belief offences in the Bill would be to criminalise behaviour which is otherwise lawful and which is not designed or intended to encourage criminal behaviour by another person. The person concerned could have other entirely legitimate reasons for continuing with the lawful course of action. The Law Commission’s 2006 report provides many examples of situations which the belief offence would unjustifiably encompass:

“extending liability beyond cases where it is D’s intention that the conduct element of the principal offence should be committed, raises the spectre of D incurring criminal liability for ostensibly lawful acts. A protestor may believe that his or her lawful protest will encourage the commission of retaliatory criminal conduct by others. Authors, journalists and publishers may believe that material which highlights what some would consider to be cruel or barbaric practices will encourage others to commit offences against those carrying out the practices”.<sup>5</sup>

Other examples of lawful and reasonable acts which would be caught by the offence, again set out in the Law Commission’s 2006 report include:

“D, a motorist, changes motorway lanes to allow a forthcoming motorist (P) to overtake, even though D knows that P is speeding;

D, a reclusive householder, bars his front door to a man trying to get into his house to escape from a prospective assailant;

D, a member of a DIY shop’s checkout staff, believes the man (P) purchasing spray paint will use it to cause criminal damage”.<sup>6</sup>

As one commentator has explained:

“the belief offence differs from the intent offence in that it will sweep up persons who have to deviate from normally lawful routines to avoid criminal liability: taxi drivers, fertiliser sellers, weighbridge operators, generous hosts, shopkeepers and so on. If they carry on providing their services or ministrations, knowing or believing that they will assist a crime, they will commit the belief offence.”<sup>7</sup>

7. We do not believe that it would be appropriate to punish D in those kinds of situations. Even if D believed that an offence would be committed and that it would be assisted and/or encouraged by his/her otherwise lawful actions, that belief does not, in our view, constitute sufficient mental fault to justify a criminal conviction. The

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<sup>5</sup> Ibid, para 5.81

<sup>6</sup> Ibid, para A.63

<sup>7</sup> G.R.Sullivan, “Inchoate Liability for Assisting and Encouraging Crime – the Law Commission Report”, *Criminal Law Review*, 2006, Dec, 1047-1057, at 1054

Law Commission and Home Office both seem to agree with this assessment. Nevertheless, rather than considering whether the offence is, in reality, drawn too widely they seek to address the concern by other indirect and in our view unsatisfactory means:

- By providing a defence where D can prove that his actions were reasonable in the circumstances that s/he believed to exist (Clause 46). The uncertain nature of the concept of “reasonableness” in this context has been discussed below as is the unfairness inherent in requiring the defendant to prove the reasonableness of his/her actions.
- The Law Commission’s 2006 report suggests that the over-extensive nature of the offence could be remedied by the Human Rights Act 1998. It argued that the 1998 Act would prohibit the state from charging a defendant with an offence where this would violate his/her rights:

“Activities such as reporting, writing, publishing and protesting engage Articles 9, 10 and 11 of the European Convention on Human Rights and Fundamental Freedoms ... We envisage that some prosecutions for the new offences will engage the relevant Articles ... Since the rights under Articles 9, 10 and 11 are not absolute, cases will turn on their individual facts. The issue will be whether charging D with encouraging or assisting the commission of an offence engages D’s rights under Articles 9, 10 and 11 and, if so, whether, on the facts, convicting D would be a disproportionate response in all the circumstances of the case.”<sup>8</sup>

While we do not dispute the fact that the Human Rights Act 1998 *should* apply to prevent an unjustified charge or prosecution in some cases we consider that a better safeguard against inappropriate prosecutions would be a more appropriately drafted offence. We are also concerned about the fact that the Human Rights Act 1998 would not apply where the otherwise lawful action of the defendant does not engage any human right. It would not, for example, apply where “D, a motorist, changes motorway lanes to allow a forthcoming motorist (P) to overtake, even though D knows that P is speeding” because there is no human right to change motorway lanes.

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<sup>8</sup> Paras 5.82 to 5.83

## **Amendment 2 – Intention required for Encouragement offence**

(Alternative to Amendment 1)

Clause 40, page 25, line 12, delete “Encouraging or”

Clause 40, page 25, line 14, delete “encouraging or”

Clause 40, page 25, line 18, delete “encourage or”

Clause 41, page 25, line 19, delete “Encouraging or”

Clause 41, page 25, line 21, delete “encouraging or”

Clause 41, page 25, line 26, delete “encourage or”

Clause 41, page 25, line 29, delete “encouraged or”

Clause 42, page 26, line 8, delete “encourage or”

Clause 42, page 26, line 12, delete “encourage or”

Clause 42, page 26, line 14, delete “encourage or”

Clause 42, page 26, line 19, delete “encourage or”

Clause 42, page 27, line 32, delete “encouraged or”

Clause 42, page 27, line 36, delete “encouraging or”

Clause 42, page 27, line 38, delete “encouraged or”

### ***Effect***

8. This amendment would remove the offences of “encouraging an offence believing it will be committed” and “encouraging offences believing one or more will be committed”. As a result encouragement would only constitute an offence where the person intended that encouragement to encourage the commission of an offence.

### ***Briefing***

9. In 1993 the Law Commission published a consultation paper on assisting and encouraging crime.<sup>9</sup> In this paper it suggested two separate offences, one for encouraging crime and another for assisting crime. One of the major reasons for

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<sup>9</sup>“Assisting and Encouraging Crime”, Law Commission Consultation Paper No 131

concluding that separate offences were necessary was the view that the fault (or mental) element for encouraging crime should be narrower than for assisting crime:

“If D’s conduct can truly be said to assist the commission of crime, and he is aware that that is so then there are strong arguments for imposing legal inhibition upon it, even though the giving of such assistance was not D’s purpose. Where, however, D’s conduct is not of assistance to P, but merely emboldens or fortifies P in committing a crime, it seems to extend the law too far to make D’s conduct itself criminal, unless D intended it to have that effect.”<sup>10</sup>

The Commission expressed concern that, unless purpose or intention was required in relation to encouragement, D would incur liability for “the unlooked-for outcome of his comments on a matter of public interest”.<sup>11</sup> This would seem to follow the position under the common law offence of “incitement”, which the encouragement offence would replace. The dominant view would appear to be that the defendant must intend the person s/he is inciting to commit an offence. Smith and Hogan comment: “The *mens rea* of incitement is crucial to the offence ... It comprises two elements. First, as with attempts, D must intend the consequences specified in the actus reus...”<sup>12</sup> The Law Commission’s 2006 paper also comments “One leading case suggests that it must be D’s purpose that P should commit the principal offence or at least that P should be encouraged to commit it (ref *Marlow*. [1997] *Criminal Law Review* 897)”.<sup>13</sup>

10. The 2006 Report provides some very compelling examples of why it would not be appropriate to criminalise a person’s conduct unless s/he *intended* his/her conduct to encourage another to commit a crime:

“extending liability beyond cases where it is D’s intention that the conduct element of the principal offence should be committed, raises the spectre of D incurring criminal liability for ostensibly lawful acts. A protestor may believe that his or her lawful protest will encourage the commission of retaliatory criminal conduct by others. Authors, journalists and publishers may believe that material which highlights what some would consider to be cruel or

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<sup>10</sup> Ibid, para 4.154

<sup>11</sup> Ibid

<sup>12</sup> *Criminal Law* (11<sup>th</sup> ed 2005), p.353

<sup>13</sup> para 3.45

barbaric practices will encourage others to commit offences against those carrying out the practices”.<sup>14</sup>

In the absence of intention to encourage another to commit an offence we are not convinced that it would be appropriate to criminalise otherwise lawful acts such as protesting, making a statement or publishing a document. Limiting the mental state required for the encouragement offence to “intention” would preclude the criminalisation of such actions.

11. Despite being aware of these concerns the Law Commission abandoned the view that “intent” should be required in relation to “encouragement” in its 2006 Report. It concluded that “belief” should suffice. This is the position taken in the Bill. We are not convinced by the reasons for this change of approach. It would seem to result primarily from a desire to merge the acts of “encouragement” and “assistance” into single offences, on the basis that it is not easy to separate these activities. Because the Commission has taken the view that “belief” is an appropriate fault element in relation to assistance it therefore argues that “belief” must also be sufficient in relation to “encouragement”:<sup>15</sup>

“If there were to be different fault elements, a troublesome and unnecessary distinction would arise, which would give rise to problems of charging and would be a recipe for legal arguments at trial”.<sup>16</sup>

We are not convinced that these practical arguments are sufficiently persuasive to outweigh the principled concerns about lowering the fault element for encouragement from “intention” to “belief”. Neither are we convinced by the argument that the principled concerns outlined above would be satisfactorily dealt with by the use of the defence of “acting reasonably” in Clause 46 (see Amendment 4) or by the fact that the Human Rights Act 1998 would prohibit a prosecutor charging, or a court convicting, a defendant in a situation on the basis that it would breach his/her rights to freedom of expression or association.

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<sup>14</sup> Ibid, para 5.81

<sup>15</sup> It had sought comments on this in its 1993 paper and the 2006 report comments that the majority of respondents considered that liability for assistance should be on the basis of “knowledge of belief”, rather than a requirement for intention

<sup>16</sup> Para 5.79

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### **Amendment 3 – Removal of Recklessness**

Clause 42, page 26, line 25, at end insert “or”  
Clause 42, page 26, line 26, delete sub-clause (ii)  
Clause 42, page 26, line 33, delete “or”  
Clause 42, page 26, line 34, delete sub-clause (ii)

#### ***Effect***

12. This amendment would return Clause 42(5) of the Bill to the test set out in the equivalent provisions of the Law Commission’s Bill of 2006.<sup>17</sup>

#### ***Briefing***

13. This amendment would change the text of Clause 42(5) of the Bill so that it follows that in the equivalent provisions of the Law Commission Bill. The Explanatory Notes to the Bill describe the purpose of these provisions as follows:

“125. Subsection (5) sets out what must be proved ... if the offence that it is alleged a person intended or believed would be encouraged or assisted requires proof of fault, circumstances or consequences. In such cases, it must be proved that the person who provided encouragement or assistance either believed that, were another person to do the act, that person would have the necessary fault (subsection (5)(a)(i)) *or he was reckless as to whether or not another person would have the necessary fault (subsection (5)(a)(ii))* or he himself would have the necessary fault (if he were to do the act himself) (subsection (5)(a)(iii)).

126. Subsection (5)(b) sets out what must be proved under clauses 39, 40 and 41 if the offence that it is alleged a person intended or believed would be encouraged or assisted requires proof of particular circumstances or consequences. In such cases, it will also be necessary to demonstrate that a person who provides encouragement or assistance *either* believed, *or was*

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<sup>17</sup> Clause 1(2)&(3) and Clause 2(3)&(4)

*reckless as to whether*, were another person to do the act, that person would do so in those circumstances or with those consequences.”

127. Requiring some degree of belief in relation to circumstances ensures that a person would not be guilty of an offence of encouraging or assisting a strict liability offence unless he believes *or is reckless* as to whether those circumstances exist. For example, D asks P to drive him home from the pub as he has had too much to drink. P is insured to drive D's car but unknown to D and P, P was disqualified from driving the day before. P is committing the principal offence of driving whilst disqualified, despite the fact he is not aware that he is disqualified, as this is an offence of strict liability. However it would not be fair to hold D liable in such circumstances.

128. Requiring some degree of belief in relation to consequences ensures that a person would not be guilty of an offence that requires certain consequences to arise for it to be committed, unless he believes *or is reckless* as to whether those consequences should arise. For example, D gives P a baseball bat and intends P to use it to inflict minor bodily harm on V. P however uses the bat to attack V and intentionally kills V. It would not be fair to hold D liable for encouraging and assisting murder, unless he also believes or is reckless as to whether V will be killed.” [emphasis added]

14. The Government has amended the Law Commission provisions to include the concept of “recklessness” rather than just, as the Commission had proposed, “belief”. The Government has provided no justification for changing the Law Commission proposals in this way. Given that this could make it significantly easier to establish guilt, we believe that such a justification should be given. This amendment should require the Government to explain why this change was considered necessary.

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#### **Amendment 4 – Acting reasonably**

Clause 40, page 25, line 18, delete “.” and insert “; and”

Clause 40, page 25, after line 18, insert –

“(c) his act was unreasonable.”

Clause 41, page 25, line 27, delete “.” and insert “; and”

Clause 41, page 25, after line 27, insert –

“(c) his act was unreasonable.”

Clause 46 – stand part

### ***Effect***

15. This amendment would remove the defence of acting reasonably. In its place it would require the prosecution to establish that a defendant’s act was unreasonable in order to convict him/her of an offence under either of Clauses 40 or 41 of the Bill.

### ***Briefing***

16. The need for a defence to cover the kinds of behaviour envisaged clearly demonstrates the extensive scope of the Clause 40 and 41 offences (see Amendments 1 and 2 above). The defence of acting reasonably in Clause 46 is designed to enable a defendant (“D”) to escape liability for the new offences in the following kinds of situation:

“D, a motorist, changes motorway lanes to allow a forthcoming motorist (P) to overtake, even though D knows that P is speeding;

D, a reclusive householder, bars his front door to a man trying to get into his house to escape from a prospective assailant;

D, a member of a DIY shop’s checkout staff, believes the man (P) purchasing spray paint will use it to cause criminal damage”.<sup>18</sup>

We entirely agree that in the above scenarios a defendant should not be convicted of a criminal offence. The behaviour described is not, in our view, criminally culpable. There can be little doubt that it would be entirely reasonable for some people to continue with an action even if they believe that it will encourage or assist the commission of an offence which will be committed.

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<sup>18</sup> Law Commission 2006 Report, para A.63

17. Nevertheless, as presently drafted, a person would be committing an offence in such circumstances unless s/he can prove that s/he was acting reasonably. In our view the offences in the Bill present an unjustifiably low evidential hurdle on the prosecution, given the very wide scope of the offence. Once this has been crossed, in order to escape unjustifiable criminal liability, the defendant is then required to jump a very high hurdle - s/he has to persuade the jury that his/her actions for the defendant were reasonable and should not, therefore, carry criminal liability. This may well prove difficult given the inherently uncertain concept of “unreasonableness”. We believe that the burden of showing the unreasonableness of the defendant’s actions should be borne by the prosecution. Shifting the burden in this way would appropriately limit the scope of the otherwise excessively broad offences.

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### **Amendment 5 – Not Criminalising Victims**

After line 29, page 28, insert following new Clause –

**“48 Principal Offence Committed - Victims not liable**

A person is not guilty of an offence under this Part if -

- (a) the offence capable of being encouraged or assisted by his act is committed;
- (b) he was the principal target and victim of the offence; and
- (c) no other person has suffered significant harm as a result of the offence.

### ***Effect***

18. This amendment would create a new defence. It would apply where a person is the principal victim of the offence which s/he encouraged or assisted and where no other person suffers significant harm from the offence.

### ***Briefing***

19. We are concerned that the new offences could inadvertently lead to a victim of crime being convicted for the crime committed against him/her. Take the following hypothetical example:

*Two men are having a drunken argument in a pub. The first (Mr A) says to the other (Mr B) “go on then, if you are so tough, punch me!” Mr B punches Mr A repeatedly, causing grievous bodily harm.*

In that case, Mr B could be prosecuted for grievous bodily harm. What is strange is that Mr A, the victim of the attack, could also be prosecuted and receive the same sentence as Mr B. This is because Mr A’s jibe - “go on then, if you are so tough, punch me!” - was an act capable of encouraging the attack which Mr A intended or believed might occur.<sup>19</sup>

20. We do not believe the Government could really intend to criminalise victims in this way. One would think that, in such a case like, the victim would already have suffered enough without then facing the possibility of a prosecution. The act of provocation would, of course, often be relevant to determining the appropriate sanction for the perpetrator of the principal offence. Under the current law, such provocation would commonly be taken into account as a mitigating factor impacting on the sentence imposed.

21. We can see why it would be wrong for any victim of an offence that s/he has encouraged or assisted to escape liability. For example, a minor shareholder should not escape liability if she persuades a company director to embezzle company assets in order to seek revenge against the major shareholder. The minor shareholder would not be able to rely on our proposed defence as she would not be the principal victim and target of the offence. The defence also recognises that where one’s acts of provocation lead to third parties being injured, criminal liability may be appropriate (if, for example, a person knowingly provoked another person with a sub-machine gun to start firing in a crowded room).

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<sup>19</sup> Clause 39 or 40

## **Amendment 6 – Rationalising the Statute Book - Encouragement of Terrorism**

After line 4, page 31, insert following new Clause –

### **“55 Abolition of encouragement of terrorism offences**

The offences in section 1 (Encouragement of Terrorism) and section 2 (Dissemination of Terrorist Publications) of the Terrorism Act 2006 (c.11) are abolished.”

### ***Effect***

22. This amendment would repeal the offences in sections 1 and 2 of the Terrorism Act 2006. The offence in section 1 is the controversial encouragement of terrorism offence, commonly referred to as “glorification of terrorism”. The offence in section 2 is the offence of disseminating terrorist publications.

### ***Briefing***

23. The Law Commission’s 2006 Report comments that the current uncertainty of the common law on encouragement and assistance has given rise to a distortion of other inchoate offences.<sup>20</sup> This is given as a major reason for enacting new statutory inchoate offences. The Commission focused primarily on the way judicial decisions courts have distorted the law. We believe that the same argument would apply to the laws that have been placed on our statute book in recent years. The Government has sought to justify the making of unacceptably broad inchoate statutory offences on the basis that the common law offences are unsatisfactory or do not go far enough.

24. The most notable example of such offences are, in Liberty’s view, contained in sections 1 and 2 of the Terrorism Act 2006. These created specific statutory offences of encouragement of terrorism, by either making public statements or disseminating certain publications. The Government sought to justify these statutory offences on the

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<sup>20</sup> Para 3.9ff

basis of failings that the general common law on incitement at the time did not go far enough:

“It is already an offence directly to incite a person to commit a specific act of terrorism. What is not an offence is to incite people to engage in terrorist activities generally or to incite them obliquely by creating a climate in which they may come to believe that terrorist acts are acceptable, and we are trying to close that gap.”<sup>21</sup>

25. We believe that these perceived gaps in the common law offence of incitement are clearly filled by the statutory offences contained in Clause 39 to 41 of this Bill, i.e.:

- Oral statements and the dissemination of publications which are capable of encouraging or assisting in the commission of a terrorist offence would be covered by the offences.
- Clause 41 is specifically designed to cover a situation where the defendant does not know what offence will, in fact, be committed.
- Clause 44(1) of the Bill specifically states that “a person may commit an offence under this Part whether or not any offence capable of being encouraged or assisted by his act is committed.”
- Clause 59 specifically states that the offences would cover “indirectly encouraging or assisting” the commission of an offence.

When these statutory offences of encouragement or assistance are enacted there should no longer be any need for the offences in Section 1 and 2 of the Terrorism Act 2006. We therefore propose that these controversial, excessive and unjustifiable provisions should be repealed when this Act comes into force.<sup>22</sup>

## **Jago Russell, Liberty**

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<sup>21</sup> HC Deb, 2 Nov 2005, Col 871 (Hazel Blears MP)

<sup>22</sup> For more information on Liberty’s objection to these offences see: <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>