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PROTECTING CIVIL LIBERTIES
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Liberty's briefing on the Draft Anti-Social Behaviour Bill

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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.

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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

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Introduction

1. The Draft Anti-Social Behaviour Bill was published in December 2012 for pre-legislative scrutiny by the Home Affairs Select Committee following a Home Office consultation¹ and White Paper² on reforming the framework for dealing with anti-social behaviour. The Draft Bill broadly incorporates the proposals in the preceding consultation and White Paper as well as proposals to extend eviction powers contained in a Department of Communities and Local Government consultation in 2011.³ The Draft Bill also contains proposals on a new %community remedy+which, confusingly, the Home Office is still consulting on.⁴

2. Created under the *Crime and Disorder Act 1998*, Anti-Social Behaviour Orders (ASBOs) have now been in force for well over a decade. Over that time, many other civil orders - intended to catch activity as diverse as suspected terrorism to bad parenting - have been created and legislated for. These include among other things, control orders; terrorism prevention and investigation measures orders; intervention orders; crack house closure orders, premise closure orders, brothel closure orders; gang-related violence injunctions; designated public place orders; special interim management orders; gating orders; dog control orders; letter clearing notices; noise abatement orders; graffiti/defacement removal notices; directions to leave; dispersal orders etc.

3. We had hoped, following the Home Secretary's announcement of a review in July 2010, that the Government would undertake a comprehensive evaluation of the ASBO and other civil orders; reviewing the practical experience to date, the underlying principles of the legislation and producing reasoned conclusions about

¹ *More effective responses to Anti Social Behaviour*, Home Office, February 2011 available at: <http://www.homeoffice.gov.uk/publications/consultations/cons-2010-antisocial-behaviour/asb-consultation-document?view=Binary>.

² *Putting Victims First – More Effective Responses to Anti-Social Behaviour*, White Paper, Home Office, May 2012, available at: <http://www.official-documents.gov.uk/document/cm83/8367/8367.pdf>.

³ A New Mandatory Power of Possession for Anti Social Behaviour, Department for Communities & Local Government, August 2011, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/8460/1959275.pdf.

⁴ Community Remedy Consultation, Home Office, December 2012 available at: <http://www.homeoffice.gov.uk/publications/about-us/consultations/community-remedy-consultation/?view=Standard&pubID=1143402>

what has and hasn't been effective. In our view, a review of the ways in which these orders operate, their effectiveness and potential replacement is long overdue. Sadly, while the Home Office consultation document presented some alarming statistics about the failures of the current regime; its assumptions, conclusions and stated objectives lacked any kind of genuine new thinking in this area. The greatest preoccupations of the document were the perceived bureaucracy of the current system; the complications inherent in the sheer number of civil orders now available to public bodies; the desire to create a less centralised system; and the belief that the current penalties for breach are not tough enough.

4. The proposed remedy is a simplified system containing fewer specific orders which will be framed to cover even wider categories of behaviour and activity. The new framework will contain fewer bureaucratic safeguards that have previously protected against the most unfair, arbitrary and perverse aspects of the policy; will impose more onerous positive activity requirements on those affected and will attract tougher sanctions for breach.

5. Liberty's concerns over the use of ASBOs and other similar orders are well-documented. We believe that many of them dangerously blur the distinction between serious criminal activity and nuisance; create personalised penal codes that set the young, vulnerable or mentally ill up to fail; and are open to inappropriate use and contrary to their original policy intention, have the effect of fast-tracking individuals into the criminal justice system rather than diverting them away. Indeed, the experience of the past 13 years and the statistics presented in the consultation document, and gathered since, support our concerns which we elaborate on further below.

6. While reform of the current regime is badly needed, Liberty urges the Government not to press ahead with the ill-thought through reforms outlined in the Draft Bill. The proposed system contains most of the faults and weaknesses of the current regime and, by removing certain safeguards, will likely lead to even greater unfairness.

ASBOs: The story so far

7. 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 to deal with social problems, such as an injunction to prevent anti-social behaviour. Instead the State would take action on the individual's behalf through a specific civil order - the ASBO. Breach of which would be a criminal offence. Since then the creation of new types of civil order seems to have been the Government's answer to nearly every social disorder problem. There has been a persistent blurring of what constitutes criminal activity and a move away from the criminal justice system as the mechanism for imposing increasingly punitive sanctions.

8. As the Home Office consultation fleetingly recognised, the breach rate for ASBOs is incredibly high and particularly high in relation to children. Of the 21 645 ASBOs issued between 1 June 2000 and 31 December 2011, 57.3% were breached at least once with 42.9% breached more than once.⁵ By the end of 2011, juveniles accounted for 37.7% of all ASBOs issued and for 44.9% of all ASBOs breached.⁶ Of the ASBOs breached, 52.7% of individuals were given an immediate custodial sentence with an average custodial length of 5.1 months.⁷ Juveniles on average received 6.3 months in custody for breach of an ASBO compared with 4.8 months for adults.⁸ The disturbingly high and consistent breach rates for ASBOs, and the custodial repercussions for children, amount to an ongoing failure of public policy.

9. In addition to unsettling Government statistics on breach and custodial consequences, examples abound of unrealistic and at times farcical restrictions being imposed via the ASBO. While this is unfortunate, it is not unsurprising. As the consultation identified, the term "anti-social behaviour" *"describes a range of every day nuisance, disorder and crime, from graffiti and noisy neighbours to harassment and street drug dealing"* and the range of restrictions that can be imposed under an ASBO are limitless. This lack of statutory guidance has inevitably led to the overuse and misuse of the tool. Indeed there are frequent reports in the media of bizarre orders being imposed for behaviour that has been deemed to fall within the statutory definition such as bans on sarcasm or answering the door while wearing only underwear. By way of example, in 2010 a man from Loch Ness, appeared in court in

⁵ Statistical Notice: Anti Social Behaviour Orders Statistics England and Wales 2011, Ministry of Justice, October 2012, available at <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/asbo-stats-england-wales-2011/asbo11snr?view=Binary>.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

breach of an ASBO that banned him from laughing, staring or slow-clapping⁹ and in 2008, a 99-year ASBO was given to a 49 year old homeless alcoholic who suffered from mental health problems.¹⁰ In 2004 an ASBO was given to a profoundly deaf 17 year old girl for spitting in the street. She subsequently breached her ASBO and was given a custodial sentence.¹¹ Also in 2004, a 13-year-old was banned from using the word 'grass+anywhere in England or Wales.¹²

10. The breadth of restrictions that can be imposed has meant that onerous and unhelpful requirements have been placed on individuals who would arguably be better suited to a different type of intervention. For instance, in 2009 a 16-year old was given an ASBO which banned him from every street in the area in which he lives, except his own. This meant that he was unable to leave his road on foot and could only travel by bus or car.¹³ Also in 2009, another teenager was given an ASBO that prevented him from entering or trying to enter any privately owned property including industrial yards, car parks, schools grounds and private homes including gardens in the entirety of England and Wales unless invited.¹⁴ The overly broad conditions are often impossible to comply with and fail to tackle the causes of the behaviour in question, resulting in individuals - and frequently young people - being alienated from their community and funnelled into the criminal justice system.

11. One of the key problems with the regime is the frighteningly low trigger for an ASBO to be imposed. The test for imposition is that a person has acted in anti social manner *that is to say in a manner which has caused, or is likely to cause, harassment, alarm or distress to one or more persons* and that such an order is considered *necessary to prevent relevant persons from further anti-social acts*.¹⁵ Examples of behaviour that could be deemed as anti-social are listed on the (now archived) Home Office anti-social behaviour website and include a wide spectrum of activity including, rowdy, noisy behaviour, jobbish behaviour; vandalism, graffiti and fly-posting; dealing and buying drugs on the street; fly-tipping rubbish, aggressive

⁹ <http://www.guardian.co.uk/society/2011/jan/04/asbos-antisocial-behaviour-orders>

¹⁰ <http://www.heraldscotland.com/homeless-alcoholic-s-99-year-asbo-absurd-1.896970#>

¹¹ See <http://www.independent.co.uk/news/uk/crime/a-generation-of-troubled-youngsters-criminalised-535533.html>

¹² See <http://business.timesonline.co.uk/tol/business/law/article702494.ece>.

¹³ See <http://www.statewatch.org/asbo/ASBOWatch.html>

¹⁴ See

http://www.southwalesargus.co.uk/news/4575939.Chepstow_teen_banned_from_gardens_and_roofs/

¹⁵ Section 1 of the *Crime and Disorder Act 1998*.

begging; street drinking; and setting off fireworks late at night.¹⁶ At one end then is activity which is deemed to be serious criminal activity (such as drug dealing) and at the other end of the spectrum is behaviour that might be disturbed or dysfunctional but which in itself is clearly not serious, threatening or criminal such as being a drunk in a public space. In the middle of the spectrum is a range of minor criminal or borderline criminal activity such as ~~yo~~obnoxious behaviour, graffiti, flyposting. It is this grey area of ~~cr~~iminality that has most-commonly been the focus of enforcement powers. Despite the obvious differences in culpability for the behaviour described and the way in which the past conflation of behaviours has caused grave problems in practice, it is clear from the Draft Bill that the Government believes that the concept of ~~an~~ anti-social behaviour is a useful one.

12. The ASBO was intended to address the misery and distress caused by harassment and intimidation in local communities. While tackling this social ill is clearly important and while the highly selective use of appropriately tailored civil orders may well help reduce this type of distressing behaviour, their widespread use in inappropriate circumstances has laid bare the weaknesses inherent in the policy. Further there is evidence that excessive use of ASBOs has proved counterproductive. The Youth Justice Board have previously reported that ASBOs were being actively sought as a ~~bad~~ge of honour

13. Until there is a significant policy reverse so that civil orders are used sparingly in a specific and targeted manner this trend will continue. Sadly however, the impression given by the consultation paper that preceded the present Draft Bill is that, putting aside their lack of uptake in recent years, ASBOs have been a success and could benefit from becoming easier to obtain and available in a wider range of circumstances.

Clauses 1 – 20: Injunctions to prevent nuisance and annoyance

14. Injunctions to prevent nuisance and annoyance will replace a number of civil orders and injunctions, namely the ASBO, the Anti-Social Behaviour Injunction, the Individual Support Order and the Intervention Order. Put simply the mechanism will operate in a way similar to ASBOs save for the fact that breach of an injunction will

¹⁶ See <http://webarchive.nationalarchives.gov.uk/20100418065544/http://www.homeoffice.gov.uk/anti-social-behaviour/what-is-asb/>

not be criminal offence but rather a breach of a civil injunction dealt with by way of contempt of court for adults and by a new scheme of punitive criminal-type sanctions for children.

Test for imposition

15. A chief constable, local authority, provider of social housing, the Environment Agency, the Special Health Authority and other bodies¹⁷ will be able to apply for an injunction. A court may grant an injunction against anyone aged 10 and over if (a) *the court is satisfied ... that the respondent has engaged or threatens to engage in conduct capable of causing nuisance or annoyance to any person*¹⁸ and (b) the court considers it *just and convenient to grant the injunction for the purpose of preventing the respondent for engaging in anti-social behaviour*.¹⁹ The Bill sets out that the required standard of proof will be the civil standard, the *balance of probabilities*.

16. The test for the imposition of an injunction is much weaker than the present test for imposing an ASBO. First, the lower burden of proof, means that an applicant authority will have to provide much less evidence that an individual had engaged or threatened to engage in anti-social behaviour than is currently the case for an application for an ASBO. The ASBO was originally intended to be able to be imposed when anti-social behaviour was evidenced to the civil burden of proof. However, the case of McCann²⁰ 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 due to the *seriousness of the matters involved*.²¹ The Law Lords inserted this modest safeguard into the regime in recognition of impact of an ASBO on fundamental rights and freedoms. Clearly unhappy with this test, the Government is now seeking to lower the burden of proof to allow an injunction to be imposed where there is relatively little evidence of past or threatened anti social behaviour. The inclusion of hearsay evidence raises the possibility that the test could be met merely by the reported testimony of an absent individual.

¹⁷ Clause 4.

¹⁸ Clause 1(2).

¹⁹ Clause 1(3).

²⁰ 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)*.

²¹ Per Lord Steyn in *McCann* [2002] UKHL 39 at para 37.

17. Not happy with just relaxing the level of proof that anti-social behaviour has, or is likely to, take place, the new injunction also significantly broadens the (already broad) definition of targeted behaviour and further weakens the test. The current test for imposition of an ASBO is that that the individual's behaviour "*had caused, or was likely to cause, harassment, alarm or distress*" and that the imposition of an order was "*necessary to prevent relevant persons from further anti-social acts*".²² The new definition embraces any "*conduct capable of causing nuisance or annoyance to any person*" and switches the requirement that an order is deemed "*necessary*" to "*just and convenient*". This new power is breathtakingly wide. How many times a day do we cause nuisance and annoyance to others. Irritatingly noisy passersby? The excessively opinionated dinner party guest? The test as it currently stands has allowed for a frighteningly broad range of behaviour to be brought within the scope of the ASBO regime. Indeed, the already wide definition of "*behaviour likely to cause, harassment, alarm or distress*" is arguably one of the reasons that the orders have to date been so inappropriately and over used. Widening the definition yet further is only going to make grossly inappropriate use even more likely. At the very least, the test for imposition should remain the same as the (still) flawed ASBO test and the requirement for intention should also be included.

Positive Obligations

18. It is proposed that an injunction will impose *requirements* as well as prohibitions. Under the ASBO regime, individuals can be required to desist from certain actions or activities i.e. from engaging in particular behaviour, or being present in particular areas. However, the new proposed injunction may, for the purpose of preventing the respondent from engaging in anti-social behaviour "*require the respondent to do anything described in the injunction*".²³ The consultation that preceded the draft Bill explained that the CPI could include "*positive requirements to address underlying issues*". No further detail of the type of requirements has been offered, save for an example in the Explanatory Notes that "*the requirements in an injunction may include, for example, attendance at a course to educate offenders on alcohol and its effects and to reduced re-offending*".²⁴ The Explanatory Notes also

²² Ibid at footnote 15.

²³ Clause 1(4).

²⁴ Page 111, para 73.

meekly acknowledge that injunction requirements *do not conflict with the European Convention on Human Rights*".²⁵

19. Positive obligations will necessarily engage a number of rights protected by the European Convention on Human Rights as incorporated into domestic law by the *Human Rights Act 1998*, in particular the right to liberty, the right to private and family life, the right to free expression and assembly. While ASBO-type restrictions already engage (and sometimes infringe) those rights, positive obligations will necessarily have the potential for greater engagement and possible infringement. Without any guidance in statute about the type of restrictions and obligations that may be imposed, the courts will have to judge on a case by case basis whether or not the terms of an injunction unjustifiably infringe a person's rights, and as with control orders²⁶ and re-branded Terrorism Prevention and Investigation Measures (TPIMs)²⁷ the extended powers and discretion proposed will undoubtedly lead to human rights infringements. In addition to the damaging impact on individuals whose rights may be breached there will likely be a significant cost to the public purse as restrictions and obligations are challenged in the courts.

20. Allowing positive obligations to be imposed under the new injunction will make the regime, in practice, a lot more aligned to recently enacted ~~GANGBO~~²⁸ or TPIM regime and much more akin to a community sentence imposed post-conviction. This represents a significant shift from the original model where the stated emphasis was on injuncting or restricting someone from doing ~~anti social~~ things, not prescribing positive sanction and punishment. Justification for the imposition of punitive obligations under the control orders/TPIMs and GANGBO schemes has in the past been based on the supposed threat and danger posed by those who will be subjected to the requirements. It is difficult to see how any such justification can be made for anti social behaviour injunctions.

21. Under the current regime, the restrictions imposed through the ASBO system can be intrusive, in some instances making breach almost inevitable. Reform which would require (as yet unspecified) positive obligations to be placed on individuals will inevitably create greater burdens making compliance even less likely.

²⁵ Page 100, para 24.

²⁶ Prevention from Terrorism Act 2005.

²⁷ Terrorism Prevention & Investigation Measure Act 2011.

²⁸ Gang-related Violence Injunctions as enacted in the *Policing and Crime Act 2009*.

Duration

22. Clause 1(6) allows an injunction to have a specified duration or to be indefinite in nature. As we have rehearsed here a number of times already, civil orders and injunctions can become unhelpfully counter-productive when they are overly ambitious and unrealistic. Long-running injunctions will make breach even more likely increasing the likelihood of fines, imprisonment etc for failing to comply with what may be onerous and unjustified obligations.

Breach – Adults

23. Clause 3 permits a power of arrest to be attached to any prohibition or requirement contained in the injunction. Clause 10 and Schedule 1 make provision for remand following arrest for breach. The maximum period that a person may be remanded is 8 days and a person may be remanded on bail or in custody. For adults, breach of an injunction, beyond reasonable doubt, will be punished as a contempt of court through a fine or custody. The *Contempt of Court Act 1981* (CCA) sets out the penalties that a court can impose when it has the power to punish for contempt of court. Section 14 of that Act provides that when a superior court has the power to commit a person to prison for contempt, the maximum period of imprisonment is two years and there is no limit on the amount the court can fine a person.²⁹

24. These sanctions are severe. It is worth remembering that such detentions will be imposed on individuals who have not been prosecuted or convicted of criminal activity, all that is required is that the court is satisfied beyond reasonable doubt that an injunction requirement has been breached. This could include, for example, walking along a road from which the person has been banned, using certain prohibited words, or not attending a particular activity required in the injunction.

25. While the preceding consultation was at pains to explain that breach of an injunction would not be a criminal offence, the type of sanctions which could be applied under the Draft Bill appear just as punitive (if not more) than the range of sentencing options post conviction for a summary offence.

Breach - children

²⁹ Currently a Magistrates Court can impose a custodial sentence of no longer than 6 months on conviction for a single offence.

26. Powers of a youth court in dealing with breach of an injunction by a child are provided for in clause 11 and Schedule 2. Part 2 of Schedule 2 governs supervision orders. Specifically a youth court may make a supervision order to a detention order if satisfied beyond reasonable doubt that the child is in breach.³⁰ A supervision order imposes one or more of the following requirements . a supervision requirement, an activity requirement and/or a curfew requirement. These requirements range from specified activities over a number of days; attending appointments; and curfews for a maximum of 8 hours a day. Supervision orders can last for up to 6 months but if satisfied that a child has failed to comply with a requirement of the supervision order, the court may revoke it and make a new one. Paragraph 1(6) provides that a youth court may also make a detention order if satisfied by the severity or extent of the breach that no other power is appropriate. This means that a child may be detained at a secure training centre, youth offender institution or secure accommodation under a detention order for a period of 3 months.

27. The preceding consultation observed that for children *“breach could not be dealt with through contempt of court, as there are no powers to detain anyone under 18 for contempt and fines are difficult to enforce.”* Indeed, as the power of a court is to commit a person to prison for contempt, and as legislation provides that children cannot be committed to prison for any reason,³¹ breach of an injunction by a child cannot lead to imprisonment. Rather than recognising that this problem highlights just one of the many problems with using the civil law to impose punishment by the backdoor, the Government is seeking to create a menu of draconian new sanctions for breach of a civil injunction that can be imposed only on children.

28. The lineage of Home Office policy in this area is particularly controversial. When GANGBOs were first introduced through the *Policing and Crime Act 2009*, they were intended only for adults. Despite this, concerned Parliamentarians questioned whether they would eventually be sought to apply to children. In response, the then Minister for Security, Counter-Terrorism, Crime and Policing, Mr Vernon Coaker MP, recognised that *“Changing the law to enable the courts to use injunctions for under-*

³⁰ Although Paragraph 1(5) prevents a detention order being made against a person under 14.

³¹ See section 89 of the *Powers of Criminal Courts (Sentencing) Act 2000* as amended by the *Criminal Justice and Court Services Act 2000*.

18s would involve a major change in how civil law interacts with minors.³² And the Labour Government made clear on several occasions that they would not seek to apply gang injunctions to children. However, almost before the ink was dry on the *Policing and Crime Act 2009*, the Government introduced the *Crime and Security Bill* (now Act 2010) which amended the gang injunction provisions so that they can apply to anyone aged over 14 and granted civil courts the power to impose a supervision order or detention order on anyone under 18 who breaches an injunction. Breach of a gang injunction by a child can lead to a host of punitive sanctions almost identical to those now proposed in the Draft Bill.

29. Any arguments that these powers are to be used for the child's own benefit are spurious. These are punitive powers designed to impose coercive sanctions on a child who has not been found guilty of any offence. Child protection laws exist to protect children from harm, and criminal laws exist to prosecute law-breakers. There is no need for additional bespoke powers such as these.

30. Liberty does not believe it is appropriate to grant ever more coercive powers to courts in relation to children . powers that do not exist with respect to adults. If an adult breaches an injunction he or she can be asked by the court to apologise, be fined, or imprisoned. Yet, under these proposals, a child will be subject to additional sanctions such as being required to undertake unspecified activities, subjected to lengthy curfew and electronic tagging, and still potentially be liable to imprisonment in a young offenders institution. Civil detention will still arguably fast track children into the criminal justice system. While it may not give them a criminal record, it will do little to divert them away from the criminal justice system; separating them from their parents and interring them with offenders who have committed crimes.

31. Article 37(b) of the *United Nations Convention on the Rights of the Child*, which the UK is a signatory to, provides:

The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

³² Hansard, 26 February 2009, column number: 566, available at: <http://www.publications.parliament.uk/pa/cm200809/cmpublic/policing/090226/am/90226s01.htm>.

However, as the UN Committee on the Rights of the Child said in its last report on the UK, the number of children deprived of liberty in the UK is high, indicating that detention is not always applied as a measure of last resort.³³ The UN Committee also considered the use of ASBOs against children, noting that they did not appear to be in the best interests of children and recommended that there be *an independent review of ASBOs, with a view to abolishing their application to children*.³⁴ It is disappointing that instead of considering this recommendation, the Government has instead chosen to internally review the ASBO regime and has concluded to expand the range of coercive powers available and give civil courts new powers to imprison children.

32. Far from demonstrating any new thinking in this area, the new proposed framework mirrors identically the model adopted for the GANGBO regime at the very end of the New Labour Administration. While, unlike the ASBO, breach of an injunction will not be a criminal offence, it is highly likely that the existence of an injunction and any breach will be held on police records and potentially disclosed to future employers. Whether or not it is a formal criminal record, the imposition and breach of an injunction will likely still have an impact on a child's ability to gain future employment.

What will change?

33. Confusingly, while the Government has acknowledged the stunningly high breach rates for ASBOs, it has provided no explanation as to why or how the replacement injunction will fare any differently. Based on current statistics then we can assume that approximately 56% of those issued with an injunction will find themselves in breach, leading to adults being fined and imprisoned for contempt and children made subject to activity requirements, curfews and detention. Indeed, given the more onerous nature of the obligations that will be imposed it is probably safer to assume that breach rates are going to be even higher. While individuals will no longer receive criminal convictions for breach, they will be subjected to community sentence style punishments such as curfews, fines, supervision, and custodial penalties including detention for up to 2 years. Records will also likely be kept by

³³ Committee on the Rights of the Child, Concluding Observations on the United Kingdom and Northern Ireland (2008) available at: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf> at Paragraph 77.

³⁴ Ibid at Paragraphs 79-80.

police and shared and disclosed with other public bodies and potential employers. This will have the same damaging effects on future life chances as formal criminal convictions.

34. ASBOs and other non prosecution alternatives are more effective if targeted such as being used as a last chance saloon. The problem with ill-defined powers of this sort is that they invariably lead to over use and over reliance so that rather than providing an alternative to prosecution, they become a fast track to criminal style sanction and all the repercussions that flow. The CPI is effectively going to be a super-punitive ASBO which will be easier to obtain for even more broadly defined behaviour. It is likely therefore that it will be used even more than the current ASBO and the damaging ramifications of this policy even more widely felt.

Part 2 - Criminal Behaviour Orders

35. Clause 21 creates a new Criminal Behaviour Order (CBO) intended to replace the current ASBO-on-conviction (CRASBO). A CBO can be made against someone convicted of a criminal offence if two conditions are met . first that the court is *satisfied that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as the offender* and second, *that the court considers that making the order will help in preventing the offender from engaging in such behaviour.*³⁵ A CBO will be more punitive than as CRASBO as it will permit the imposition of positive requirements designed to address the underlying causes of the recipient's anti-social behaviour (such as drug treatment and anger management courses).³⁶ For children, the duration of a CBO must be between 1-3 years and for adults an order must last for at least two years but could be indefinite.³⁷

36. Clause 26 allows for interim orders to be made and clause 27 governs variation and discharge. Variation and discharge can be ordered on application by either the offender or the prosecution. The power to vary an order includes the power to include an additional prohibition or requirement or extend the period for which the CBO has effect. Breach of a CBO is a criminal offence attracting a period of 6 months imprisonment (on summary conviction) and 5 years imprisonment (on

³⁵ Clause 21(3) and (4)

³⁶ Clause 21(5).

³⁷ Clause 24.

conviction on indictment).³⁸ A child could be detained for a period of up to 2 years for breach of a CBO.

37. The Government has stressed that the CBO would be “*additional to the court’s sentence for the offence, not a substitute for it*”. While this is useful clarification, there has been no further explanation as to why CBOs are required in addition to a court’s current sentencing powers. Options such as drug treatment and anger management courses are already available as sentences through community orders or by way of conditions imposed when a prisoner is released on licence or on probation. Bringing such requirements under the umbrella of the CBO appears to us to be unnecessary duplication and in practice will easily lead to double punishment for the same activity. CBO restrictions and the sanctions available for breach could result in gravely disproportionate outcomes for a one- off, minor, criminal conviction. If the current range of positive requirements available through the community sentencing or licence regime are not being utilised to address the underlying causes of criminal behaviour, then the reasons for that should be investigated and addressed. Duplicating such powers under a different banner will not, of itself, result in their increased effectiveness.

Part 3 – Dispersal Powers

38. Clause 31 creates a general dispersal power which will be made available to police constables and PCSOs. It is intended to replace a number of dispersal powers that are already on the statute book, combining elements of the current general dispersal power under section 30 of the *Anti-Social Behaviour Act 2003* (ASBA) with elements of the alcohol related dispersal powers available under section 27 of the *Violent Crime Reduction Act 2006* (VCRA) and the DPPO. Under clause 31 police and PCSOs will be given a general power to direct a person away from an area for a 48 hour period where the officer or PCSO suspects that the behaviour of the person has contributed to, or is likely to contribute, to members of the public being harassed, alarmed or distressed or to the occurrence of crime or disorder. The constable or PCSO must also consider the direction necessary for the purpose of removing or reducing the likelihood of harassment, alarm or distress, crime or disorder. The direction must be given in writing unless this is not reasonably practicable in the

³⁸ Clause 28.

circumstances.³⁹ The constable or PCSO must specify the area from which the person is excluded and may specify when and by which route they must leave the area.⁴⁰ If a person appears under the age of 16 the constable or PCSO can take them home or to a place of safety.⁴¹ Clause 33 contains a secondary power which permits the constable or PCSO to require the person being given the direction to surrender any items being used in the anti-social behaviour. Under clause 35 a person who fails to comply with a direction to leave commits an offence and is liable on summary conviction to imprisonment for up to 3 months and/or a fine not exceeding level four on the standard scale.

39. The various direction powers currently on the statute book have often proven disastrous in practice. This Draft Bill proposes removing some of the few safeguards that presently exist, widening the availability of dispersal and creating the power to require the surrender of property. In broad terms, section 27 VCRA gives the police power to direct individuals to leave a locality(undefined) for up to 48 hours if they are considered to be likely to cause or contribute to the occurrence of alcohol-related crime or disorder. Under the ASBA the police currently have similar powers to disperse children. Specifically, a senior police officer is able to issue an authorisation for a locality where he believes that members of the public have been intimidated, harassed, alarmed or distressed by the presence of groups of two or more and where he believes that anti-social behaviour is a persistent problem. The authorisation can remain in place for a period of 6 months and during that time, police officers and PCSOs are authorised to disperse children in groups of 2 or more and require them not to return to the locality for a 24 hour period if they have reasonable grounds to believe that the presence or behaviour of the children has resulted in or is likely to result in intimidation, harassment, alarm or distress.

40. With regard to present powers, Liberty has found that localitywhich is not defined in the statute, has been interpreted by police to include a very wide area, so that people have been excluded from areas as large as Greater Manchester(an area of 493 square miles) or from whole counties like South Yorkshireor West Yorkshire. It appears that this will continue to be the case under the Draft Bill. While exclusion from a small area may assist to diffuse a problem, exclusion from a whole county raises a whole different set of issues. Can it really have been intended that

³⁹ Clause 31(5).

⁴⁰ Clause 31(5).

⁴¹ Clause 31(7).

someone be banned from an area of almost 500 square miles for up to 48 hours merely because a police officer considers them likely to contribute to members of the public feeling harassed, alarmed or distressed? Such a large exclusion zone also raises practical problems of enforcement. How is the individual to leave the county? What if they travelled there with someone who does not present any risk of alcohol related disorder, such as a designated driver? How are the police to monitor the individual's departure from such a large exclusion zone, short of escorting them (which in many cases will amount to detaining them)?

Section 27 - South Yorkshire (2008)

On 6 December 2008, South Yorkshire Police issued section 27 directions to a large group of Plymouth Argyle fans, most of whom had visited the same public house in Doncaster. These fans had driven in cars and minibuses right across the country from the Plymouth area to Doncaster, but before the match commenced, they were directed by police to return home, wasting the entire day and a very lengthy journey. Again, there was no disorder in the public house and it is assumed that the police's actions were motivated by unspecified intelligence. No arrests were made.

On this occasion, at least one supporter (who had not even been to the pub) was ordered to leave the football ground in order to drive his friends back to Plymouth. Another supporter, an 11 year old boy, was compelled to leave with his father. Not all those forced to leave were given a written direction, but a selection of people, apparently at random, were issued with directions to leave South Yorkshire. Some of the supporters were subject to a high profile, expensive and humiliating escort down the motorway by several police vans, cars and motorbikes, right across South Yorkshire and into Derbyshire and Leicestershire.

Again, the South Yorkshire Police have accepted that their actions on 6 December 2008 were unnecessary and disproportionate and have agreed to pay compensation to those affected.

Section 27 – Greater Manchester (2008)

On 15 November 2008, Greater Manchester Police used the section 27 power against 90 Stoke City fans who were peacefully enjoying a pre-match drink at a public house in Irlam, Greater Manchester. The landlord of the pub had no concerns about the supporters' behaviour, and has said he would welcome them back to his pub. The supporters were not one single group, but rather a collection of small groups who had chosen the pub following discussion on internet message boards, for ease of access to Old Trafford. Apparently as a result of intelligence received about planned disorder, all 90 supporters were detained by the police for approximately two hours in the public house, before being made to board coaches arranged by the police, and driven back to Stoke on Trent, missing the most eagerly anticipated match of the season, against Manchester United. One of the coaches had no toilet facilities, and the supporters were instructed to urinate in cups and bottles placed on the floor, which spilled when the coach moved making conditions very unpleasant.

No attempt was made by the police to identify anyone about whom intelligence was held, although they had every opportunity to do so. Each person present was individually given a written section 27 direction to leave, but without any attempt by the police to weed out any who might have presented a risk of disorder, from those who clearly did not.

The locality from which supporters were excluded on this occasion was specified as the whole of Greater Manchester, an area of some 493 square miles.

The Greater Manchester Police have subsequently admitted that the power was misused, and have paid compensation to many of those involved. However, retrospective compensation is no real answer to abuse of power. Fans' ability to secure damages depends on their being able to obtain legal representation, which will not always be possible.

41. The current section 27 VCRA power requires that specific areas are designated by a police officer of the rank of superintendent or above before a constable or PCSO has the power to disperse and section 30 of ASBA has a similar authorisation requirement. However under clause 31 of the Draft Bill, any police officer or PCSO would have dispersal powers which could be used at any time. Add to this the power to confiscate items contributing to the anti-social behaviour, including the power to confiscate mobile phones and other personal items and it is clear that the new power will be much more widely used with much greater impact. This indiscriminate power has significant potential to impact on people's right to property, private and family life, liberty, and freedom of assembly and association.

42. In seeking to harmonise the various regimes it appears that the upper limit of 48 hours as permitted under section 27 VCRA has been chosen, rather than the 24 hours under the Anti-Social Behaviour Act 2003. Liberty believes that an order not to return to the area within 48 hours is particularly excessive. If the purpose of the power is to disperse a group of individuals with immediate effect, it is difficult to justify why an individual should be prevented from returning to the area the next day.

43. It is also proposed that community support officers also be permitted to exercise the dispersal power. If such powers are to be re-legislated and extended, we believe that they should only be exercised by fully trained police officers. Draconian, summary powers of dispersal and confiscation will inevitably lead to resistance from those against whom they are applied and will conceivably result in potentially volatile situations. Liberty does not believe that community support officers have the training or expertise to satisfactorily deal with such situations.

44. Current dispersal powers are already defined incredibly broadly and the Draft Bill proposes replicating their flaws and removing some of the minimal safeguards in place. Liberty is unconvinced that it will be possible to give such discretionary powers to frontline officers in way that will preserve an individual's rights under Article 11 of the HRA (the right to free assembly).

Part 4 – Community Protection

45. Part 4 of the Draft Bill creates Community Protection Notices (CPNs), Public Space Protection Orders (PSPOs) and creates powers for Closure of Premises Associated with Nuisance or Disorder.

46. Clause 38 creates the power for an authorised person (constable, local authority, designated person)⁴² to issue a CPN if satisfied on reasonable grounds that (a) the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality and (b) the conduct is unreasonable. A CPN can impose a requirement to stop doing specified things; to do specified things or to take reasonable steps to achieve specified results.⁴³ A CPN may be issued only if the subject of the CPN has been given written warning that the notice will be issued unless his or her conduct ceases and the person issuing the notice is satisfied that the person to whom the CPN relates has had enough time to deal with the matter and his or her conduct is still having the effect. An appeal against the CPN is granted to the Magistrates Court.⁴⁴ It is an offence not to comply with a CPN liable to a fine not exceeding level 4 in the case of an individual. Upon conviction of an offence under clause 43, a court may make

⁴² Clause 48.

⁴³ Clause 38(3).

⁴⁴ Clause 41.

*whatever order the court thinks appropriate for ensuring that what the notice requires to be done is done*⁴⁵ which can include requirements to carry out specific work or allow work to be carried out by the local authority (LA). A further appeal is granted to the Magistrates Court.⁴⁶ Forfeiture powers also flow from a CPN: upon conviction under clause 43 a court may order the forfeiture of any item that was used in the commission of the offence and may require destruction. Search and seizure may be ordered by a justice of the peace to recover such an item⁴⁷ and a Fixed Penalty Notice may be issued by the police or LA to allow the convicted person to discharge liability.⁴⁸

47. Clause 53 grants a power for a LA to make a PSPO where: activities carried on or likely to be carried on in a public place will have or have had a detrimental effect on the quality of life of those in the locality; and the effect of the activities is persistent, makes the activities unreasonable, and justifies the restrictions imposed. The order can prohibit certain activities in that area or require people carrying out a particular activity to do certain things. The order can affect everyone or specified categories. The order can have effect for up to 3 years and may be extended by a further 3 years.⁴⁹ Failure to comply with the order is a criminal offence liable to a level three fine on the standard scale.

48. As is the case elsewhere in the Bill, highly intrusive powers are granted under these clauses on the basis of extremely vaguely defined behaviours. Instead of defining the behaviours that the powers are targeting, the powers instead flow from being deemed to lower the quality of life of the community. The fact that there is no requirement for pre-judicial authorisation before a CPN or PSPO is ordered only exacerbates the potential for unfairness and abuse. CPNs and PSPOs significantly broaden the powers available to police and LAs to impose notices and orders on residents and individuals in the locality. Given the severe consequences and financial liabilities that flow from breach of these orders and notices, we would expect, at the very least, tighter definitions of the type of activities that are to be prohibited and pre-judicial authorisation.

⁴⁵ Clause 44(1).

⁴⁶ Clause 44(7).

⁴⁷ Clause 46.

⁴⁸ Clause 47.

⁴⁹ Clause 54.

49. Chapter 3 is intended to consolidate and extend existing premises closure powers. The powers it provides will be granted to police (rank of inspector and above) and LAs. The test for issuing the notice will be that the police or LA reasonably believes that there is, or is likely soon to be, a public nuisance or there is or is likely imminently to be, disorder in the vicinity of and related to the premises and that the notice is necessary in the interest of preventing such disorder.⁵⁰ A closure notice may prohibit access to a premises by all persons except those specified; at all times or at specified times. But it may not prohibit access to those who habitually live on the premises or the owner of the premises.⁵¹ When a notice has been issued, an application must be made to a Magistrates Court for a closure order which must be heard no later than 48 hours after service of the closure notice. The court may make a closure order if it is satisfied (a) that a person has engaged is likely to engage in disorderly, offensive or criminal behaviour on the premises or (b) that the use of the premises has resulted in or is likely to result in serious nuisance to members of the public or (c) that there has been, or is likely to be disorder near those premises associated with the use of those premises and that the order is necessary to prevent the behaviour, nuisance or disorder from continuing.⁵² A closure order may prohibit access to a premises for a maximum of 3 months and may prohibit access by all persons, all except those specified and either at all times or those specified. Closure orders can be extended by a justice of the peace for a closure period not exceeding 6 months.

50. As with all other proposals in this Draft Bill, the threshold for imposition of closure notices and orders is remarkably low. While the current overlap in powers is certainly unnecessary and unhelpful, purpose-specific orders are undoubtedly preferable to the catch-all powers now being proposed. The grave consequences of a closure order . which could result in homelessness including for family members who have nothing to do with anti-social behaviour . make the need for specificity all the greater. Placing such a general power into the hands of police and LAs, without clarification as to the behaviour that is being targeted is a highly risky approach to legislating.

51. Disappointingly, the proposals will do nothing to address the problems with the current closure order regime, such as cuckooing. In November 2006 *The*

⁵⁰ Clause 66.

⁵¹ Clause 66(4).

⁵² Clause 70(4).

Guardian newspaper ran a story saying that crack-house closure orders 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.*⁵³ Cuckooing demonstrates that premises closure does not necessarily end a problem but can merely displace it and make its consequences worse. Sadly, the Draft Bill makes no attempt to address this recognized consequence of premises closure.

Chapter 5 - Recovery of possession of dwelling houses

52. Clause 83 introduces a new mandatory ground for possession of a dwelling that is subject to a secure tenancy. This proposal - to give courts a mandatory power to evict tenants from social housing - was consulted on by the Department of Communities and Local Government in August 2011.⁵⁴

53. Ground 2, Schedule 2 of the Housing Act 1985 and Ground 14, Schedule 2 of the Housing Act 1988 contain current powers for landlords to evict tenants who are behaving anti-socially.⁵⁵ Ground 2 of Schedule 2 to the Act provides for a power of eviction if a person residing, or even simply visiting, the house in question is found guilty of causing, or is deemed likely to cause, a nuisance or annoyance to a person living, visiting or doing anything lawful in the locality. An eviction order may also be granted if a person has been convicted of using the house (or allowing the house to be used) for illegal or immoral purposes or where he has been convicted of an indictable offence committed at, or in the locality of, the house.⁵⁶ Further, Ground 1 of Schedule 2 to the Act provides for a power of eviction where *“Rent lawfully due from the tenant has not been paid or an obligation of the tenancy has been broken or not performed”*. This ground can be used to evict tenants who have breached tenancy agreements that forbid them engaging in criminal or anti-social behaviour. By way of example, Wandsworth Council in London has a tenancy agreement which on its face

⁵³ Dens of iniquity, *Guardian*, 15 November 2006 available at: <http://www.guardian.co.uk/society/2006/nov/15/drugsandalcohol.guardiansocietysupplement>.

⁵⁴ *A new mandatory power of possession for anti social behaviour*, Department of Communities & Local Government Consultation Paper, August 2011, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/8460/1959275.pdf.

⁵⁵ The former for secure tenants and the latter for assured tenants (tenants of housing associations and landlords in the private rented sector).

⁵⁶ Ground 2, Schedule 2 of the Housing Act 1985 (for secure council tenants) and Ground 14, Schedule 2 of the Housing Act 1988 (for assured housing association tenants).

prevents tenants or members of their household engaging in “anything which causes or is likely to cause a nuisance to anyone living in the borough of Wandsworth”.⁵⁷

54. A number of reforms over the past decade have increased landlord powers in relation to tenants suspected anti social behaviour. Section 12 of the *Anti Social Behaviour Act 2003 (ASBA)* amended the *Housing Act 1996* to require local housing authorities, housing action trusts and registered social landlords prepare policies and procedures in respect of anti social behaviour. Sections 13 . 15 ASBA allow social landlords to apply for injunctions to prohibit anti social behaviour and to apply to the county court to for a demotion order which replaces a secure tenure with a less secure tenancy on grounds of anti social behaviour.⁵⁸ Section 16 ASBA expanded the scope 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.⁵⁹

55. Accordingly there are already a number of grounds on which a social landlord can apply for a possession orders and/or the police or the local authority can apply for premises to be entirely shut down. The courts have discretion to grant eviction if it is satisfied that anti-social behaviour has occurred and that it would be reasonable to grant possession and/or suitable alternative accommodation is available. Any application for possession must be proportionate, as the courts have confirmed that tenants have a right to challenge eviction proceedings under the *Human Rights Act 1998*.⁶⁰

56. Clause 83(1) inserts a new section 84A into the *Housing Act 1985* which makes it mandatory for a court to grant possession if any of the conditions in new section 84A are made out; the notice requirements have been met and the new review procedures followed. The conditions will be met if the tenant, a member of the tenants household or a person visiting the property has been .

(a) convicted for a serious offence

⁵⁷ See *Tenancy Conditions* for Wandsworth Council (from 5 January 2009), available at www.wandsworth.gov.uk/download/197/tenancy_conditions_at_page_6.

⁵⁸ See sections 153 of the *Housing Act 1996*; section 82 of the *Housing Act 1985*; and section 20B of the *Housing Act 1988*.

⁵⁹ Amending section 85A of the *Housing Act 1985*.

⁶⁰ The Supreme Court in *Manchester City v Pinnock* [2010] UKSC 45 held that tenants have a right to challenge eviction proceedings under Article 8 (right to respect for a private and family life). The Court held that public (though not private) landlords should consider the proportionality of applying for possession orders.

- (b) found by a court to have breached an injunction to prevent nuisance and annoyance obtained under clause 1 of the Bill or
- (c) convicted for a breach of a CBO obtained under clause 21 of the Bill.

The offence or anti social behaviour must have been committed in the dwelling house or in the locality of the dwelling house.

57. The preceding consultation described the new route to possession in cases of proven serious, housing related anti-social behaviour. Yet of the three triggers for mandatory possession, only one relates to conviction for serious violence. The other triggers attach to the breach of an injunction or CBO provided for elsewhere in the Draft Bill. This could mean that eviction (including of an entire family) could be triggered merely by breach of an injunction restriction (such as being present in a prohibited place, not attending a required course etc). As previously discussed breach rates for ASBOs are notoriously high and breaches of injunctions and CBOs are likely to continue in this trend. These clauses would therefore create a mandatory eviction power applicable to the many thousands who will breach their conditions and could lead to homelessness for them and their families.

58. By removing the requirement of reasonableness/alternative available accommodation, the Government is creating an automatic and blunt eviction tool, triggered by the lowest possible threshold and constrained only by a requirement that the landlord meets certain procedural requirements. In the Explanatory Notes the Government states *Tenants of public authorities may raise the issue of proportionality as a defence to possession proceedings: see Manchester City Council v Pinnock [2011] 2 AC 104.*⁶¹ In *Manchester City v Pinnock*⁶² the Supreme Court held:

*If our law is to be compatible with Article 8, where a court is asked to make an order for possession of a person's home at the suit of a local authority, the court must have the power to assess the proportionality of making the order.*⁶³

While this precedent is now binding on lower courts, the Government's reliance on it here is disingenuous. It will always be open for defendants to argue that eviction will

⁶¹ Explanatory Notes to the Draft Bill, page 134, paragraph 258.

⁶² [2010] UKSC 45

⁶³ Per Lord Neuberger, *ibid*, at paragraph 29.

violate their Article 8 right to a private and family life, a judicial requirement to consider (at the very least) Article 8 considerations should be written on the face of the Bill to prevent disproportionate cases from falling through the cracks, where the relevant arguments are not put forward by the defendant.

59. The Government's stated intention in introducing the proposed wider power is to speed up evictions, reduce costs for landlords, and reduce pressure on court resources.⁶⁴ While faster disposal of cases may be beneficial to Government budgets, those facing eviction will have insufficient time or means to challenge an eviction and judges will be unable to grant appropriately tailored remedies. Liberty does not believe that a mandatory eviction power makes practical sense. It also allows for double punishment for social tenants which will not apply to those living in private housing with criminal convictions/injunction breaches.

60. Continuing the trend of automatic sanction and double punishment for the poor, clause 87 adds a new ground for possession under Schedule 2 of the Housing Act 1985 and Part 2, Schedule 2 of the Housing Act 1988 so that a landlord can apply for possession where someone living in the tenant's property is convicted of an offence committed at the scene of a riot which took place anywhere in the UK.

61. Liberty has first hand experience of the unfairness and suffering that is caused when eviction powers are applied in a blunt and knee-jerk way. In 2011 Wandsworth Council threatened to evict Liberty client, Maite de la Calva, and her young daughter if her son was convicted of a crime committed during the riots in August 2011. Ms de la Calva's son was arrested and charged following the disorder. He had moved out of his mother's property earlier in the year but she was still served with a Notice of Seeking Possession by Wandsworth Council shortly after, stating she was likely to have breached her tenancy agreement as a result. The authority vowed to apply for an order of possession, evicting the innocent Ms de la Calva and her daughter, if her son was convicted. The threat came despite Ms de la Calva's contribution to her local area over the last five years. She has been described as a credit to her housing estate by neighbours and spends her limited spare time volunteering with a youth charity and working with domestic violence victims. Ms de la Calva has committed no crime herself and would not have faced such a threat had she lived in a mortgaged house. Liberty agreed to represent her and fight

⁶⁴ See the Consultation Paper, at pages 9 and 10.

Wandsworth Council's attempt to punish her and her daughter for her son's conviction. While we ultimately succeeded in persuading Wandsworth Council to back down, this was not before considerable anxiety and suffering had been inflicted. If the eviction powers set out in the Draft Bill are enacted, there will be many more cases such as this, and it is unlikely that that outcomes will be as positive.

62. It is difficult to see how removing a person and their family from social housing will lead to less rather than more crime and anti-social behaviour. Dispossession will rather shift the problem elsewhere while creating new and greater problems (for the individuals concerned and their families). Private housing may be unavailable or unaffordable for many families. Criminal conduct may well proliferate with the disruption and homelessness that ensues. These unintended consequences appeared to receive little consideration in the heated post-riot atmosphere of 2011. We urge the Government to pause and seriously reconsider this new and highly punitive powers.

Part 6 – Local involvement and accountability

63. Liberty will be responding to the Home Office consultation on these proposals.

Isabella Sankey