



Anti-Social Behaviour, Crime and Policing Bill

**Written evidence to the Joint Committee on Human Rights
and the Public Bill Committee**

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Summary

- **The criminal standard of proof should apply to IPNAs;**
- **The nuisance or annoyance test is far too low a threshold and should be replaced by the current ‘harassment, alarm or distress’ test, as well as a test of necessity for IPNAs and CBOs;**
- **All terms imposed must be required to be necessary and proportionate;**
- **Maximum duration of terms must be specified;**
- **Positive requirements must be formed from an exhaustive list, take account of care arrangements and not duplicate existing community orders;**
- **Orders should not be available for children. If they are, Acceptable Behaviour Agreements should first be tried. Reporting restrictions should remain in place to protect children. Imprisonment for breach should not be an option;**
- **Dispersal powers should only be available where there is a significant and persistent problem, not exceed 24 hours and not be available to PCSOs. Non-compliance should not be made an offence as public order offences already exist;**
- **The time limit for all extradition appeals should be 14 days. Discretion to extend should be available in exceptional circumstances where the interests of justice so require;**
- **A leave requirement should not be imposed upon requested persons. If introduced, this should extend to requesting states, and be subject to review. Legal aid must remain available and be granted expeditiously;**
- **Compensation for miscarriages of justice must not be limited to cases where new evidence shows beyond reasonable doubt that the person is innocent. The current test should remain, that no reasonable jury could convict.**

Introduction

1. Established in 1957, JUSTICE is an independent law reform and human rights organisation. It is the United Kingdom section of the International Commission of Jurists.
2. This briefing focuses upon the creation of the Injunction to Prevent Nuisance and Annoyance (Part 1), the Criminal Behaviour Order (Part 2), and the Dispersal Power (Part 3) since these are the anti-social behaviour proposals with which our organisation

has most concern at this stage.¹ We also consider proposed amendments to extradition proceedings in Part 11 and compensation for miscarriages of justice in Part 12. Silence as to any other part of the Bill should not be taken as approval of the proposed reforms.

3. Whilst not the focus of this briefing, we note that the proposals in Part 4 to create powers to issue Community Protection Notices (Chapter 1), Public Spaces Protection Orders (Chapter 2) and Closure Notices for premises associated with nuisance or disorder (Chapter 3) raise important issues and have attracted the concern of other organisations.

Anti-Social Behaviour

4. We welcome the recognition by the Government in last year's White Paper² that anti-social behaviour is a local issue which needs local responses and, where possible, this should avoid the criminal or civil justice systems. We also welcome the intention to tackle the drivers of anti-social behaviour which in our view cannot be solved by imposing draconian, restrictive orders, but need to be resolved through treatment and support.
5. JUSTICE has longstanding concerns about the breadth of anti-social behaviour orders, and other similar civil orders, and the scope for them to be used inappropriately.
6. We believe that it is appropriate and indeed desirable for public authorities to apply for civil orders to restrain illegal acts causing injury to the community and/or vulnerable individuals. However, these should only be available to restrain unlawful behaviour, rather than acts that are merely, or likely to be, distressing or irritating. Furthermore, any such order should be limited in scope. In particular, in the context of criminal orders, they should not become equivalent to community sentences available upon conviction. They should contain only prohibitions and (perhaps rarely) positive

¹ JUSTICE welcomed the Home Affairs Committee's pre-legislative scrutiny of the Draft Anti-Social Behaviour Bill. This briefing is largely based upon our response to the Committee. We previously responded to the Home Office consultation: *More Effective Responses to Anti-Social Behaviour* (2011) in similar terms.

² Home Office, *Putting Victims First: More Effective Responses to Anti-Social Behaviour*, Cm 8367 (May 2012)

injunctions closely linked to the unlawful behaviour itself and necessary to prevent it. The overall restriction of a person's liberty should be proportionate to the seriousness of the illegality that the order seeks to restrain and to the status of the order as a civil preventative measure. The orders should be time-limited and regularly reviewed. Finally, the powers available upon breach of an order should reflect the nature of the breach and the context in which it occurred. The most concerning development over the last decade in the attempt to curb anti-social behaviour has been the imprisonment of people, not because they committed crime, but because they breached an order that they were almost certainly going to fail to keep.

7. We support the use of informal and out of court disposals in tackling anti-social behaviour that keep people from being drawn into the criminal justice system and believe that restorative approaches should be used in reducing anti-social behaviour for both children and adults. We recommend that Acceptable Behaviour Agreements, neighbourhood mediation and support for families be used in preference to coercive orders. JUSTICE has long argued for such an approach, most recently in our report *Time for a New Hearing* which details how restorative justice could be fully incorporated into the youth justice system of England and Wales.³ We therefore welcome the focus in Part 6 of the Bill on restorative justice and out of court disposals. In particular the Community Remedy has the potential to provide a positive means of addressing anti-social behaviour outside of the court system.
8. However, we are disappointed that the government has not taken the opportunity in this Bill to conduct a comprehensive reform of the anti-social behaviour regime. There is a lack of imagination and innovation in the reforms and for the most part what has been proposed simply tinkers with labels, while framing the proposed orders to cover even wider categories of behaviour than the existing measures. 'Criminal Behaviour Orders' and 'Injunctions to Prevent Nuisance and Annoyance' risk creating individual community sentences for people who have not committed any crime or civil wrong. 'Dispersal Powers' will allow people to be dismissed from public places without sufficient safeguards for people to explain their presence and could be used inappropriately against protestors and young people.

³ JUSTICE and The Police Foundation, *Time for a New Hearing* (Independent Commission on Youth Crime and Antisocial Behaviour, 2010) available at:

<http://www.justice.org.uk/data/files/resources/22/Time-for-a-New-Hearing.pdf>

9. All of the proposed powers are, we believe, likely to be used disproportionately against children and young people and particular care is needed to avoid locking children into the criminal justice system as a result. Evidence for this can be found in the current regime where 38% of anti-social behaviour orders have been issued to 10-17 year olds, despite them comprising only around 13% of the population.⁴

Part 1: Injunctions to Prevent Nuisance and Annoyance

10. Part 1 of the Bill creates a new civil order to replace, inter alia, the Anti-Social Behaviour Order on application (ASBO) issued under s1 Crime and Disorder Act 1998 (CDA), and the currently limited Anti-Social Behaviour Injunction (ASBI) pursuant to the Anti-Social Behaviour Act 2003.

General concerns

11. We do not support the use of ASBO's for under 18s and are therefore concerned at the proposed continued application of the replacement Injunction to Prevent Nuisance and Annoyance (IPNA) to children aged 10 to 17.
12. As we observed in the creation of 'Injunctions to prevent gang-related violence' by the Policing and Crime Act 2009,⁵ the procedural guarantees of the criminal process as guaranteed under article 6(3) European Convention on Human Rights (ECHR) - and the criminal standard of proof – should apply. This is because IPNAs are ASBOs in all but name but attract much milder behaviour, without the safeguards that are currently available before the criminal courts and applying criminal evidential standards. In the well-known case of *McCann*⁶ the House of Lords held in relation to ASBOs that, given the seriousness of the matters involved, at least some reference to the heightened civil standard of proof – *which was all but indistinguishable from the criminal standard* – should apply. The Court decided that as a matter of pragmatism, the criminal standard of proof should be applied in ASBO cases.⁷

⁴ Ministry of Justice, *Anti-Social Behaviour Order Statistics - England and Wales 2011* (2012), Table 1.

⁵ Our briefings in relation to the passage of the Bill are available on our website here <http://www.justice.org.uk/resources.php/141/policing-and-crime-bill>

⁶ *R v Manchester Crown Court, ex parte McCann* [2002] UKHL 39

⁷ Notwithstanding the Government's view that the civil standard was appropriate, the JCHR most recently considered that the criminal standard should apply in relation to injunctions to prevent gang-

13. In our view, the civil standard is not appropriate and applications should continue to be dealt with before the criminal courts. Irrespective, the defence of reasonable conduct available to defendants in response to an ASBO application should remain,⁸ to ensure an opportunity to explain any behaviour or conduct. Legal aid should also be available for representation at the hearing, for both adults and children, given the complexity of these types of case and the frequent vulnerabilities of those facing such orders.

Clause 1 - Threshold Test

14. We welcome the move away from criminalising conduct which the IPNA provides, and that the detention periods for breach would be shorter than those available in ASBO breach proceedings. However, we are concerned that the IPNA would be available in circumstances where no pre-existing civil wrong has been committed and that the scope of the order could result in wide-ranging restrictions upon a person's liberty which are both disproportionate to and insufficiently closely connected with the wrong giving rise to the injunction. The effect could be not only a disproportionate interference with their right to private and family life pursuant to article 8 ECHR, but also punishment of vulnerable people who upon breach of an injunction may face a term of imprisonment that leads to engagement with, rather than diversion from, crime.
15. The 'nuisance or annoyance' test is far too low a threshold to ensure reasonable application. Whilst this test currently applies in ASBIs⁹, these are only available to social landlords and must relate to housing management functions and behaviour against persons within a neighbourhood. Further, ASBIs only allow 'prevention of engagement in conduct causing nuisance and annoyance'. The proposed IPNAs would afford wide ranging terms to be imposed for very broad types of behaviour, occurring anywhere. Clause 1(2) only requires the respondent to the injunction to have (1) engaged or threaten to engage in (2) conduct *capable* of causing nuisance or annoyance to (3) *any* person. The test is far too subjective to accord with principles of legal certainty, irrespective of whether the criminal or civil standard applies. It would enable the possibility of someone, simply by standing on the pavement in a busy high street, being given an injunction because their presence could have caused

related violence, given the similarity to ASBOs and the reasoning in *McCann*, which it concluded equally applied in this context, JCHR, *Legislative Scrutiny: Policing and Crime Bill (gang injunctions)*, 10th Report of Session (2008-2009), HL 68/HC 395 (18th December 2008) at [1.26]- [1.34]

⁸ Pursuant to section 1(5) CDA.

⁹ Section 153A Housing Act 1996

annoyance to passers-by. This is draconian and unreasonable. As drafted the injunction could also be applied to impede freedom of speech and peaceful assembly, rights protected by articles 10 and 11 ECHR, which can only be interfered with in pursuance of a legitimate aim and by necessary and proportionate means.

16. The test of 'behaviour causing or likely to cause harassment, alarm or distress' which is currently applied for ASBOs should continue to be applied for the proposed injunctions to ensure that minor problems are not brought into the courts. Whilst 'nuisance and annoyance' may be considered the appropriate test in housing related disputes because people living in close proximity and affecting each other's enjoyment of their private lives and property rights, it is not for wide ranging anti-social behaviour.
17. Equally, a test of 'necessity' as required for ASBOs¹⁰ should continue to be applied, to ensure that courts assess whether the impact upon the article 8 ECHR rights of the respondent to respect for their private and family life is proportionate in all the circumstances.

Clause 1(4) –(5) and Clause 2 - Injunctive Terms

18. Clause 1(4)(b) of the Bill introduces positive requirements into the IPNA. It is our view that if positive requirements are to be included in an order as non-specific and easily available as an IPNA, it is essential that some limitations are placed upon the types of requirements that can be imposed. This is important to ensure that individuals' rights are protected, that IPNAs remain proportionate to the behaviour that they seek to prevent and that breach does not become almost inevitable.
19. We note that clause 1(5) of the Bill places only limited restrictions on the range of positive requirements that may be imposed. This list must be extended to include any caring obligations towards children or dependants. We believe that legislation should specify the maximum number of hours per week that positive requirements can last, to prevent them becoming unmanageable and at risk of breach. We also consider that the types of requirements to be included should be exhaustively identified in legislation to prevent widely divergent approaches across the country and the application of orders that amount in all but name to community sentences, which currently can only

¹⁰ Section 1(1)(b) CDA: 'that such an order is necessary to protect relevant persons from further anti-social acts by him'.

be imposed in the criminal courts after rigorous assessment of appropriateness by probation services and experienced tribunals.

20. Clause 2 sets out conditions for the imposition of a requirement, but in fact only seeks evidence about suitability and enforceability to be given by the person or organisation responsible for supervising the requirement, and other demands upon how they must carry out that function. We consider that the legislation must expressly require the imposing court to be *satisfied* that a requirement is suitable and enforceable, bearing in mind that positive requirements are always more intrusive than prohibitive ones, and more difficult to formulate. Indeed, in order to comply with article 8 ECHR, we consider a proportionality check must be carried out by the court for the imposition of any term in the injunction, be it preventive or mandatory. The current proposal does not require the court to do anything but assess whether the injunction is ‘just and convenient’ (clause 1(3)). The court must also be required to assess whether the terms of the injunction are proportionate.¹¹ In the case of children we believe that this order should only be available in circumstances where informal support and an acceptable behaviour agreement has been attempted and has failed.
21. Although we support measures that may assist a respondent to resolve underlying problems such as drug dependency or anger management, we are concerned that positive requirements may be difficult for people to comply with and that imposing such requirements may be setting people up to fail. We propose that, while prohibitive elements should take into account the views of the complainant, society and the respondent, positive requirements should be focussed on rehabilitation of the respondent alone. Sufficient resources must be made available to ensure that the respondent can comply with the requirements that are imposed and be properly supported in order to do so.¹²

Clause 1(6) - Duration

22. We are concerned that the Bill does not provide a maximum duration for the IPNA, leaving this to the discretion of the courts. An indicative maximum duration must be given to prevent wide divergence in approach and improve legal certainty. Because these orders are more wide ranging and likely to be more restrictive than other civil injunctions, in our view IPNA’s should last for a maximum of two years and should be

¹¹ *R v Boness* [2005] EWCA Crim 2395

¹² This is particularly relevant given the intention behind the Offender Rehabilitation Bill, currently before the House of Lords.

reviewable during that period. We welcome the inclusion in clause 1(6) of a maximum period of 12 months where an injunction is imposed on a respondent before they reach the age of 18 years.

Clause 4(1)(c) - Applicants

23. We do not consider it appropriate that the police be able to apply for a civil injunction. Police officers have a unique responsibility to fight crime and should only engage these powers in the criminal context and in relation to criminal conduct. If the government seeks to reduce anti-social behaviour by dealing with it at a community level, it is not appropriate to involve police forces unless there is a breach. Moreover, the police could apply for an injunction where criminal conduct exists because it will be an easier and quicker process, rather than ensuring that the person is properly prosecuted through the criminal courts. If a criminal offence is suspected, the Crown must establish the ingredients of the offence in accordance with criminal evidential rules. In all cases, where clear criminal conduct is alleged, this should be properly investigated and prosecuted in accordance with fair trial standards.

Clause 11 and Schedule 2 - Sanctions for Breach

24. Whilst we welcome the acknowledgment that children should be dealt with differently to adults in relation to breach, we do not consider that detention should be available in any circumstances where children breach an injunction. If detention remains available, this should not be possible for a first breach of an injunction, when it would be highly unusual for detention to be ordered by a criminal court upon a first offence, unless the offence was particularly grave.¹³ Detention should always be a last resort for children¹⁴. Equally we consider that the referral order is the most appropriate response to a first breach rather than moving immediately to a supervision order. Children in breach of an order need additional support, not a draconian and criminalising response.

Clauses 17 and 22(8)(a) - Reporting restrictions

25. We share the concerns of the Standing Committee for Youth Justice (SCYJ) regarding the continued presumption in favour of naming children subject to anti-social behaviour

¹³ See Powers of Criminal Courts (Sentencing) Act 2000 ss16 and17.

¹⁴ Article 37 UN Convention on the Rights of the Child 1989.

proceedings.¹⁵ The Bill states that section 49 Children and Young Persons Act 1933, which restricts reports on proceedings in which young people are concerned, does not apply to proceedings involving IPNAs or Criminal Behaviour Orders.

26. Not only is this contrary to the approach in the youth justice system where young people are given anonymity, it is our view that reporting is unnecessary and that the presumed justification that naming young people would help members of the community spot and report anti-social behaviour is outweighed by the detrimental impact upon young people and their rehabilitation. We believe a presumption in favour of naming children would be a disproportionate interference with their article 8 ECHR right to privacy. We support the SCYJ recommendation of a presumption *against* the reporting of court proceedings involving persons under 18.

Part 2: Criminal Behaviour Orders

27. Part 2 of the Bill creates the Criminal Behaviour Order, which a court can impose upon a person convicted of any offence. This replaces the current post-conviction ASBO issued under s1C CDA.

General concerns

28. We are opposed to the creation of a Criminal Behaviour Order (CBO), and fail to see how the order is necessary or appropriate in the criminal context. The use of post-conviction ASBOs has fallen in recent years by almost two thirds from 2,271 in 2004 to 863 in 2011¹⁶ and it can therefore be assumed to be of limited effectiveness in comparison to the many community sentencing options available to the courts. The CBO would become available because a person has been convicted of an offence; however it will not comprise the sentence for the offence but rather an additional injunctive measure to the sentence that will be imposed. In our view, if the behaviour being targeted by the CBO forms the subject of the conviction, the existing sentencing options available to a court are sufficient, and the defendant should not be sentenced twice for the same offence. If the behaviour is unconnected to the offence, then this

¹⁵ SCYJ, *Anti-Social Behaviour, Crime and Policing Bill*, House of Commons Second Reading (10 June 2013),

http://www.scyj.org.uk/files/ASB_Crime_Policing_Bill_second_reading_briefing_June_5_2013.pdf

¹⁶ Ministry of Justice, *Anti-Social Behaviour Order Statistics - England and Wales 2011* (2012), Table 3.

should be dealt with separately using an IPNA (as amended by our above suggestions).

29. The CBO has, we believe, an undesirable mixture of criminal and civil aspects. Its name, the fact that it becomes available because of a criminal conviction and the breadth of obligations and prohibitions that can be imposed suggest that it is criminal in character; however, it appears to be available on the civil standard of proof. We believe that if the order is to be available in this form, the criminal standard of proof should apply, as should the guarantees of a fair trial in criminal proceedings pursuant to article 6 ECHR and the decision in *McCann*.¹⁷

Clause 21(3) and (4) - Threshold Test

30. The threshold for making a CBO is that the court a) is satisfied that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to a person, and b) considers that making the order 'will help in preventing the offender from engaging in such behaviour'. This test is broader than the current power in which the court considers whether the order is 'necessary to protect persons from further anti-social acts by the offender'.¹⁸

31. We are concerned that the second limb of the test is much lower than the current threshold and is far too vague to be a meaningful restriction on the making of such orders. The test of 'necessity to protect persons' is the appropriate test to ensure legal certainty and justification for the restriction, and should continue to apply if CBOs are introduced.

Clause 21(5) - Injunctive Terms

32. Clause 21(5)(b) of the Bill introduces positive requirements into the CBO. This again marks a change from the current regime. We repeat our concerns outlined above with regard to positive requirements in relation to IPNAs.

33. Further, there should be no 'double sentencing' – the community sentence for the offence that has been committed (which could encompass a curfew, restraining or exclusion order and requirements to attend at a specific location) should be taken into account when a court is considering whether to impose a CBO. As should any licence conditions if imposed in conjunction with a custodial sentence. The necessity test is

¹⁷ See note 6 above.

¹⁸ Section 1C(2)(b) CDA 1998.

equally required to ensure that any terms in a CBO are appropriate in addition to the sentence.

Children

34. We do not support the use of CBOs for children and young people under 18. They will act as an accelerator into the criminal justice system and therefore into custody. Recent data provided by the Ministry of Justice for the period 1999 to 2011 reveals that the overall breach rate by children and young people subject to ASBOs is 68% compared to 52% of adults.¹⁹ Custody has been used as a sanction for breach by 10-17 year olds in 38% of cases.²⁰ Moreover research published by the Prison Reform Trust highlights specific problems faced by children and young people in complying with orders and the negative effects that breach has (including acceleration into custody).²¹ This is likely to occur with CBOs more than with post-conviction ASBOs due to the inclusion of positive requirements, which may be more easily breached.
35. We believe that, as indicated above, informal measures such as Acceptable Behaviour Agreements and more dedicated support for children and families should be offered to prevent genuine anti-social behaviour. However, if CBOs are to be used against defendants of this age then it is essential that their personal circumstances and care arrangements are assessed before the order is imposed. The assessment should cover factors including (but not limited to) mental health, learning and communication difficulties (all of which can affect ability to participate in the proceedings, understanding of the order and ability to comply with its terms), parental supervision and home environment. Clause 21(9), which specifies that any requirements must avoid conflict with religious beliefs; times of work or education; and other court orders, does not in our view afford sufficient discretion to the courts to consider the factors impacting upon children.

Part 3: Dispersal Powers

¹⁹ MoJ, note 16 above, Table 11.

²⁰ Ibid, Table 12.

²¹ D. Hart, *Into the Breach: the enforcement of statutory orders in the youth justice system*, (Prison Reform Trust, 2011), available at:

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Into%20the%20Breach.pdf>

36. The dispersal powers as proposed could be widely and inappropriately used in violation of article 11 ECHR (protecting freedom of assembly and requiring safeguards against arbitrary interferences with that right).
37. The proposed dispersal power would enable a constable to direct a person to leave an area, in contrast to the current prior authorisation requirement. The current regime requires the dispersal to be in the context of anti-social behaviour that is a significant and persistent problem in the locality. In contrast, the proposed power would be available simply in relation to members of the public being harassed, alarmed or distressed, or the occurrence of crime and disorder. Without the existing parameters, the power available in the proposed amendments could have wide ranging effect. Furthermore, inappropriate use of the power will be difficult to restrain because subsequent litigation will depend upon funding arrangements and willingness of individuals to bring proceedings. In any event, inappropriate use of the power will be difficult to prove because of the breadth of the provision.
38. We do not consider that the power should be available to disperse the commission of general 'crime'. If a criminal offence has been committed for which the person is suspected, they should either be arrested and conveyed to a police station for investigation, or summarily dealt with by an out of court disposal as appropriate. The power should be limited to causing harassment, alarm or distress, or disorder in the locality.

Clause 32 – Length of dispersal

39. A dispersal order may, under the current regime, not exceed 24 hours. We do not consider that there is any justification for extending a direction to 48 hours. Twenty four hours is a sufficient restriction on peoples' ability to enter a location without evidence to demonstrate otherwise.

Clause 34 – Restrictions

40. Whilst the proposal includes a number of important restrictions in clause 34, which we welcome, we would include a further restriction that the constable must not give a direction for a person or group to disperse where a reasonable excuse has been put forward for their conduct. This would reduce the danger of arbitrary use of the power, in the context of people exercising their right to peaceful assembly, and ensure that the requirement of necessity set out in clause 32(3) is properly engaged.

Clause 37 – Offences

41. We are particularly concerned that non-compliance with the new direction will constitute a criminal offence and carry a maximum penalty of three months' imprisonment. Given that the dispersal is an alternative to pursuing a conventional response to offending, where a person returns and continues to commit the same type of behaviour in spite of the dispersal power, they should then be processed or investigated for the offence in accordance with existing powers. If disorder is engaged, a penalty notice could be administered, pursuant to section 1 Criminal Justice and Police Act 2001. This encompasses a wide range of disorderly conduct. For children and young people for whom penalty notices are not appropriate, an out-of-court youth restorative disposal should be used. Anything more serious should be properly investigated and charged if sufficient evidence of a crime is made out. We do not consider it appropriate or necessary to create a new offence in this context, particularly one with a custodial term attached.

Clause 38 – Powers of community support officers

42. The proposal will allow Police Community Support Officers (PCSOs) to direct a dispersal with the same powers as constables once an authorisation has been given. Whilst this power is available under the 2003 Act, we nevertheless consider that PCSOs should not be able to carry out law enforcement powers which require the exercise of a broad discretion, such as this. This is a role for qualified police officers.

Part 11 – Extradition

43. Part 11 makes certain technical changes to the Extradition Act 2003 (EA) to clarify language and strengthen the procedural safeguards for the requested person. We welcome these changes in general, particularly in relation to asylum claims as a ground for discharge in clause 128.

Clause 127 – Appeals

44. We also welcome the attempt to provide flexibility in the time limit for appeal from a decision to surrender under Part 1 of the EA or extradite under Part 2. However, at the same time as introducing flexibility, the clause creates a limit upon the possibility of appeal by the introduction of a leave requirement. This will make it more difficult for requested persons to prevent an extradition or surrender request against them taking effect.

Extension of time

45. Section 26 of the EA provides a time limit of seven days to appeal, and sections 103 and 108, 14 days. The reason for extra time in the latter sections is not because of greater complexity in those cases. It is because it relates to Part 2 extraditions. Part 1, on the other hand, gives effect to the European Arrest Warrant (EAW) procedure which has a very strict time scale in order to comply with the EU framework decision and therefore shortens the process wherever possible. We welcome the intention in the clause to introduce discretion to the court to consider an appeal. As Lord Mance observed in the majority Supreme Court decision in *Lukaszewski v The District Court in Torun, Poland*,²² '[t]he problems of communication from prison with legal advisers in the short permitted periods of seven and 14 days are almost bound to lead to problems in individual cases. It is no satisfactory answer that a person wrongly extradited for want of an appeal as a result of failings of those assisting him might, perhaps, be able to obtain some monetary compensation at some later stage'.²³ The provision has led to some notable injustices,²⁴ particularly where people are remanded in custody and unrepresented.²⁵ Without amendment, the statute is capable of generating considerable unfairness in individual cases.²⁶ Clause 127 introduces flexibility into this process in this way:

²² [2012] UKSC 20.

²³ At [37].

²⁴ Such as in *Garry Mann v City of Westminster Magistrates' Court and others* [2010] EWHC 48 (Admin) where Moses LJ observed 'Neither Parliament, in enacting the strict statutory scheme relating to Part 1 extraditions in the 2003 Act, nor the House of Lords in *Mucelli* and in *Hilali*, nor this court in *Navadunskis* can possibly have envisaged one man being deprived of proper legal assistance by two sets of lawyers in two separate jurisdictions on two distinct occasions. Yet I accept this court is powerless to act. It has no jurisdiction' at [17]. See also Fair Trials International report <http://www.fairtrials.net/cases/garry-mann/>.

²⁵ See the facts of *Lukaszewski* where all three appellants were remanded in custody at HMP Wandsworth following decisions to surrender them to Poland. None had legal representation. They were assisted by the prison officers in the Legal Services Department to file their notices of appeal. The officers do not have a legal background. They faxed the applications to the Court, which returned a sealed front page. The Legal Services Department then faxed only these front pages to the Crown Prosecution Service without the rest of the applications. The CPS objected that this did not amount to service, with which the High Court agreed, though the Supreme Court reversed the decision. This process has been repeated on numerous occasions.

²⁶ *Lukaszewski*, at [35].

But where a person gives notice of application for leave to appeal after the end of the permitted period, the High Court must not for that reason refuse to entertain the application if the person did everything reasonably possible to ensure that the notice was given as soon as it could be given.

46. We understand that the wording follows *Lukaszewski* where the Court held that '[the High Court] must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring and notify timeously.'²⁷ However, it is curious to include this level of explanation in legislative form. The Court in the same paragraph also held that:

'the statutory provisions concerning appeals can and should all be read subject to the qualification that *the court must have a discretion in exceptional circumstances to extend time for both filing and service.*' (Emphasis added)

We would propose that a formulation akin to the italicised wording is used. It is more appropriate for legislative drafting and leaves the exceptional circumstances in which an extension of time may be allowed to be defined by the court, in the interests of justice. This will avoid the appellant having to satisfy a further requirement of proving whether they did 'everything reasonably possible' to submit in time.

47. We also consider that a 14-day period of time to appeal is the more appropriate period in Part 1 as well as Part 2 cases, in addition to the court's discretion to extend time. This is because it can often take time for a legal aid application to be considered, during which it is not possible for lawyers representing the requested person to undertake any work on the case. Were a 14-day period available this might reduce the number of flawed notices that are submitted by unrepresented people.

Leave

48. Clause 127 also creates a requirement for leave of the High Court to be granted before a requested person's appeal against an extradition order will be allowed to proceed. Currently appeals can be submitted as of right and proceed straight to the merits. The leave test intends to introduce a paper sift of applications for prospects of success in

²⁷ *Ibid*, per Lord Mance at [39].

order to reduce the burden of appeals upon the High Court.²⁸ It is unclear why the leave requirement is limited to the appeals of requested persons and does not include appeals by the requesting state. Both parties should be subject to the same requirements in order to foster the equality of arms. In extradition cases, the requesting state is already assisted by specialised CPS extradition lawyers, Eurojust and the European Judicial Network. The requested person may only receive the assistance of an inexperienced duty solicitor.

49. The proposed amendment does not provide for procedure or appeal. The Scott Baker Review recommended leave should be sought and granted on paper with right of appeal against refusal to a judge at an oral hearing.²⁹ A review of the decision must be provided in order to make the process fair. At a minimum this process should be clarified either in the EA or in the Criminal Procedure Rules.
50. Nevertheless, we are concerned that the introduction of a leave process will prevent meritorious appeals from being heard. Many appellants within the seven day period for appeal are unrepresented and can manage only the bare minimum in the submission of their appeal.³⁰ Despite the appropriate course being to file a notice of appeal containing the grounds of appeal with the court and then serve the court sealed copy of the notice and grounds upon the CPS within seven days, the Supreme Court in *Lukaszewski* has indicated that a failure to do so under the current system can be cured during the case management process of the appeal.³¹ If a leave procedure is introduced, it will be necessary for appellants to satisfy the High Court upon application that they have an arguable case that the extradition judge's decision was wrong in fact or law. Without legal representation this process will risk the extradition of people who have meritorious grounds for refusal but cannot express them in terms that will satisfy the sifting judges.
51. Even if the requested person had the assistance of a duty solicitor at court for the extradition hearing, this does not necessarily mean that a legitimate concern will be

²⁸ See Sir Scott Baker, *A Review of the United Kingdom's Extradition Arrangements* (Home Office, 2011), available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf

²⁹ At [10.14].

³⁰ Consider the facts of *Lukaszewski*.

³¹ At [19].

raised, since duty solicitors are not required to undertake training in extradition law. As Edward Grange, a specialist extradition solicitor, has explained,

At present there are over 400 individual solicitors signed up to the extradition rota at Westminster Magistrates' Court. The majority of individual solicitors have never had conduct of an extradition case before and yet these are the solicitors that are entrusted to provide appropriate advice and assistance to those arrested on extradition warrants. The Extradition Act 2003 is complex and the case law it has generated is vast.³²

52. Mr Grange refers to the case of *Juszczak v Poland*³³ to illustrate his concerns, where the High Court overturned a decision to surrender on the ground that the requested person was the essential carer of his 17 year old daughter with severe four limb cerebral palsy and to surrender him would interfere with their family life pursuant to article 8 ECHR. No mention of this was made to the extradition judge during the hearing. Mr Justice Collins went so far as to say,

That shows, on the face of it, a failure of the duty by that solicitor, and I hope some inquiries will be made to see whether that solicitor should indeed remain as one who is available to appear in extradition cases at Westminster Court.³⁴

Under a leave application, before new lawyers could be found to properly present the evidence, Mr Juszczak could have been returned to Poland.

53. Whilst it is hoped that this type of case is a rare occurrence, if a leave procedure is to be introduced, the extension of the time limit to 14 days is even more important as a mechanism to ensure effective access to the High Court. To satisfy a leave condition will require specialised and complex work. We believe that a 14-day time limit to enable fair access to the court justifies the potential failure to comply with the strict time limit of the EAW framework decision.

³² E. Grange, 'Leave it out', *The World of Extradition*, 12 May 2013, <http://worldofextradition.wordpress.com/2013/05/12/leave-it-out/>

³³ [2013] EWHC 526

³⁴ At [17].

54. It is equally essential that legal aid is granted expeditiously and prior to the leave decision. Currently, the means testing requirements in extradition cases can operate to prevent legal representation at the extradition hearing. This is unacceptable.³⁵ Given the Government proposals for price competitive tendering at the magistrates' court and removal of legal aid for judicial review hearings,³⁶ it is by no means certain that sufficient defence expertise will be accessible at the initial or appeal stages of the extradition process.

Part 12 – Criminal Justice and Court Fees

Clause 132 – Compensation for miscarriages of justice

55. Clause 132 proposes the amendment of section 133 of the Criminal Justice Act 1988 which provides for the payment of compensation to a person whose conviction has been reversed, or they have been pardoned, owing to the discovery of new evidence, which shows beyond reasonable doubt that there has been a miscarriage of justice. The duty falls upon the Secretary of State to pay such compensation. The proposed amendment would re-define the test for a miscarriage of justice, limiting it to circumstances 'if and only if the new or newly discovered fact shows beyond reasonable doubt that the person was *innocent* of the offence.'
56. Between 1957, when JUSTICE was founded, and 1997, when the Criminal Cases Review Commission ('CCRC') was established, JUSTICE was the leading organisation concerned with correcting miscarriages of justice in the UK. The Court of Appeal and the Criminal Cases Review Commission were set up following cases involving undoubted 'miscarriages of justice' – a phrase which has now entered everyday parlance. Following the abolition in 2006 of the *ex gratia* compensation scheme, section 133 is now the only means by which a person who has suffered a miscarriage of justice can obtain financial redress from the State. It is vital that the threshold for obtaining such compensation is not set unattainably high. It would be perverse, for example, if none of the notorious miscarriage of justice cases which led to the establishment of the CCRC would now qualify for compensation under section 133.³⁷ Restricting compensation under section 133 to cases where the applicant can

³⁵ See Scott Baker Review at [11.85].

³⁶ Ministry of Justice, *Transforming legal aid: delivering a more credible and efficient system*, Consultation Paper CP 14/2013.

³⁷ The cases of the Birmingham Six, the Guildford Four, The Maguire Seven, The Cardiff Three and Judith Ward would not satisfy the proposed innocence test.

demonstrate his innocence is unduly narrow, and does not provide adequate redress in cases where the criminal justice system has gone seriously wrong.

57. The UK Supreme Court considered the test for ‘miscarriage of justice’ in *R v Adams*³⁸. JUSTICE intervened in that case to ask the court to find that Lord Bingham’s formulation in *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1 at [4] is correct. Lord Bingham stated that compensation should be paid where the applicant is (a) innocent, or (b) ‘whether guilty or not, should clearly not have been convicted’ or where ‘something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.’

58. The Supreme Court in *Adams* did not go as far as this, but decided that the test should be:

A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it.³⁹

59. In coming to this conclusion, Lord Philips considered a test that requires innocence,

...will deprive some defendants who are in fact innocent and who succeed in having their convictions quashed on the grounds of fresh evidence from obtaining compensation. It will exclude from entitlement to compensation those who no longer seem likely to be guilty, but whose innocence is not established beyond reasonable doubt. This is a heavy price to pay for ensuring that no guilty person is ever the recipient of compensation.⁴⁰

60. We agree with this analysis. It is also an unnecessary price to pay since the Government indicates in the Explanatory Notes that only four individuals have been awarded compensation by the Secretary of State under s.133 since 2010.⁴¹ There can

³⁸ [2011] UKSC 18.

³⁹ *Ibid.* at [55].

⁴⁰ At [50].

⁴¹ See Explanatory notes: Anti-Social Behaviour, Crime and Policing Act Bill 2013 at [71], available at <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0007/en/14007en.htm>

be no justification for seeking to narrow the test further when so few applications are currently granted.

61. The test was considered by the Divisional Court in *R (Ali and others) v Secretary of State for Justice*⁴² following re-applications for compensation on the *Adams* test, which the Secretary of State again refused. The Court re-formulated the test in this way and we agree that this is the appropriate and fair test to apply:

40. In our view, it is highly desirable that the test should be formulated in a practicable way, and with reference to the system of criminal justice that obtains in England and Wales. It must accommodate the fundamentals of that system: the burden and standard of proof, and the tribunals of fact who reach conclusions on guilt or innocence... In the test formulated by [Lord Phillips], and specifically in the phrase "no conviction could possibly be based upon it", we do not understand him to convey anything other than a consideration of what a jury (or magistrates) might do when properly directed as to the law and acting reasonably. In his phrase, the word "possibly" stands proxy for the high standard, demanded by the statute, by which a claimant must prove that no reasonable jury could properly convict. The formulations preferred by Lord Clarke and Lord Kerr did this in a different way, and one that we consider is more sensitive to the trial processes in this jurisdiction.

41. With great deference to Lord Phillips, we suggest that the following formulation, derived from those of Lord Clarke and Lord Kerr, carries an identical meaning to the test he formulated, but may be more readily useful to lawyers advising claimants and the Secretary of State:

"Has the claimant established, beyond reasonable doubt, that no reasonable jury (or magistrates) properly directed as to the law, could convict on the evidence now to be considered?"

62. A test of innocence will be impossible for many to satisfy. As Lady Hale observed in *Adams*, the Court's favoured test, as opposed to one requiring innocence,

⁴² [2013] EWHC 72 (Admin) (25th January 2013).

is the more consistent with the fundamental principles upon which our criminal law has been based for centuries. Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty. A person is only guilty if the state can prove his guilt beyond reasonable doubt... He does not have to prove his innocence at his trial and it seems wrong in principle that he should be required to prove his innocence now.⁴³

63. It also reflects the intention and purpose of section 133 as drafted. The section gives effect, almost verbatim, to section 14(6) of the International Covenant on Civil and Political Rights 1966. Nothing in the Covenant itself, or in the *travaux préparatoires*, demonstrates a consensus among the States Parties that compensation should be paid only to the innocent. As Lord Bingham noted in *Mullen*, 'every proposal to that effect was voted down. The *travaux* disclose no consensus of opinion on the meaning to be given to this expression. It may be that the expression commended itself because of the latitude in interpretation which it offered.'⁴⁴ To that extent, an amendment to limit compensation to the factually innocent would breach the UK's international obligations to give effect to the ICCPR.
64. Furthermore the proposed amendment may infringe article 6(2) ECHR (which provides for the presumption of innocence). The European Court of Human Rights has applied the presumption of innocence to a variety of scenarios following acquittal and concluded that the right under article 6 will be violated where a statement or decision reflects an opinion that the person is guilty, unless he has been proved so according to law.⁴⁵ If compensation is not awarded following the quashing of a conviction because the Secretary of State is not satisfied of the applicant's innocence, this will be a clear interference with the presumption of innocence that the person is entitled to.
65. Finally, were the Secretary of State to attempt to decide on the innocence of an applicant whose conviction has been reversed, they would find themselves manifestly ill-suited to the task. The serious difficulties faced by the Home Office in reviewing criminal convictions in potential miscarriage of justice cases were outlined by JUSTICE

⁴³ At [116].

⁴⁴ *Supra* at [9(2)].

⁴⁵ *Hussain v United Kingdom* (2006) 43 EHRR 22 (concerning a decision on costs following acquittal); *Lamanna v Austria* (App no. 28923/95, 10 July 2001) (concerning compensation for detention on remand).

in its 1968 report *Home Office Reviews of Criminal Convictions*, were recognised in 1993 by the Runciman Commission, and led to the establishment of the CCRC as a body better equipped, by reason of its independence and expertise, to carry out that fact finding function. This was without a requirement to consider whether a person is innocent beyond reasonable doubt. There may be little assistance from the Court of Appeal since it does not make a finding of innocence on quashing a conviction⁴⁶ and in no other than the clearest cases will the judgment reveal actual innocence.

66. We can see no justifiable reason to overturn the decisions of the courts in *Adams* and *Ali*, other than to restrict access to compensation for those who have had their convictions overturned. Many of these people have spent significant periods in prison and have endured hardship, stigma and deprivation as the result of wrongful conviction. It is unfair and unreasonable to deny them compensation for that treatment.

Jodie Blackstock
JUSTICE
June 2013

⁴⁶ In the Birmingham Six case, *R v McIlkenny and others* [1992] 2 All ER 417, the Court of Appeal held: 'Nothing in s.2 of the 1968 Act or anywhere else obliges or entitles us to say whether we think that the appellant is innocent. This is a point of great constitutional importance. The task of deciding whether a man is guilty falls on the jury. We are concerned solely with the question whether the verdict of the jury can stand' at [424-5].