Anti-Social Behaviour, Crime and Policing Bill

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Summary

Anti-Social Behaviour (pp 3-16)

- **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.**

Stop, search and detain under the Terrorism Act 2000 (pp 16 – 22)

- **The proposed reforms in Schedule 8 are welcome but do not go far enough.**
- **The powers in Schedule 7 of the Terrorism Act 2000 are overly broad, arbitrary and discriminatory in their application, and inconsistent with the rights guaranteed by the European Convention on Human Rights and the common law.**
- **Schedule 7 enables significant interference with individual rights to privacy and liberty – for example, envisaging the seizure, copying and retention of significant personal data when personal electronic devices such as smartphones are seized – without any justification based on reasonable grounds that the person concerned poses a risk.**
- **Nothing in the proposed reforms would limit the exceptionally broad discretion which allows for individuals to be stopped whether or not any grounds exist for suspecting that they may have an involvement in terrorist activity.**
- **Without amendment to introduce a requirement for 'reasonable suspicion' and to introduce clearer safeguards for its operation, this power will remain overly broad, draconian and unjustifiable.**

Extradition pp 23-30

- **Amendments to the flawed extradition process are welcome. However, proportionality checks should apply to requests for a person to serve a sentence as well as to try them;**
- **Extradition should be barred where the requesting state has not made a decision to charge *and try* the person, and should not be conditional upon the person's absence from that state;**
- **Temporary transfers must be subject to procedural safeguards;**
- **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;**
- **Further amendments are necessary to make the procedure fair. At a minimum these are: bar to extradition where the person can serve their sentence in the UK, bar to extradition where there is shown to be mistaken identity; non means-tested legal aid.**

Miscarriages of Justice pp 30-36

- **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 port and border controls in Part 11, extradition proceedings in Part 12, and compensation for miscarriages of justice in Part 13. 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.

4. We welcome the strong criticism of the Joint Committee on Human Rights ("JCHR") with regard to the lack of legal certainty and potential infringement of human rights that the proposals would bring.[2]

Anti-Social Behaviour

5. We welcome the recognition by the Government in last year's White Paper[3] 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

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[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] JCHR, *Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill*, Fourth Report of Session 2013-2014, HC 713/HL 56 (London: TSO, 11th October 2013) (the "JCHR Report").

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

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.

6. 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.

7. 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 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.

8. 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. Anti-social behaviour is often attributed to young people and those otherwise vulnerable due to a mental or physical impairment, addiction or homelessness. These are the most visible people, but also those most in need of support rather than formal court procedures and orders that they cannot hope to comply with.[4] We recommend that Acceptable Behaviour Agreements, neighbourhood

[4] Statewatch has compiled a collection of ASBOs that have been imposed upon vulnerable persons where alternative approaches would have been more appropriate, http://www.statewatch.org/asbo/asbowatch-mentalhealth.htm. For example, Amy Beth Dallamura was reported to suffer from a serious emotional disorder and had been rescued by emergency services over

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.[5] We therefore welcome the focus in Part 6 of the Bill on restorative justice and out of court disposals.[6] In particular the Community Remedy has the potential to provide a positive means of addressing anti-social behaviour outside of the court system.

9. 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.

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50 times from suicide attempts. She was given an ASBO that banned her from going onto beaches and into the sea. She breached this at least five times (December 2007, http://news.bbc.co.uk/1/hi/wales/mid/7151025.stm); The National Association of Probation Officers gave evidence to the 2005 Home Affairs Committee Inquiry on Anti-social Behaviour, highlighting similar cases. These included a homeless man who received an ASBO for begging in a non-aggressive way in a shop car park; he was jailed for breach and died before finishing his sentence; and an 87-year-old man who, among other things, was forbidden from being sarcastic to his neighbours (July 2003), Fifth Report of Session 2004-2005, HC 80-III (22nd March 2005), http://www.publications.parliament.uk/pa/cm200405/cmselect/cmhaff/80/80we20.htm.

[5] 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.

[6] This approach was endorsed by Assistant Chief Constables and Policing and Crime Commissioners in evidence before the Public Bill Committee (PBC). See in particular ACC Richard Bennett, Hansard, PBC, House of Commons, 1st Sitting, 18th June 2013, col. 66:

> Our experience of using youth restorative disposals is that that is very often exactly what is required. What we need in terms of offenders is very quickly for them to face the impact of their offending, to understand that there are consequences to it and to accept responsibility for offending. For the lower end of offending, very often an apology is one of the most simple ways of achieving that.

10. 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.[7]

Part 1: Injunctions to Prevent Nuisance and Annoyance

11. 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

12. We do not support the use of ASBOs for under 18s and are therefore concerned at the proposed continued application of the replacement Injunctions to Prevent Nuisance and Annoyance (IPNA) to children aged 10 to 17.

13. As we observed in the creation of 'Injunctions to prevent gang-related violence' by the Policing and Crime Act 2009,[8] the procedural safeguards of the criminal justice system 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*[9] 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.[10]

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

[8] 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.

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

[10] 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-related violence, given the similarity to ASBOs and the reasoning in *McCann,* which it concluded

14. Furthermore, the defence of reasonable conduct available to defendants in response to an ASBO application should remain,[11] 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

15. 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.

16. The 'nuisance or annoyance' test is far too low a threshold to ensure reasonable application. Whilst this test currently applies in ASBIs,[12] 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, to be given an injunction because their presence could have caused annoyance

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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].

[11] Pursuant to section 1(5) CDA.

[12] Section 153A Housing Act 1996

to passers-by.[13] 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.

17. 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.

18. Equally, a test of 'necessity' as required for ASBOs,[14] rather than the proposed test that an IPNA is 'just and convenient'[15] 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. During the Public Bill Committee, and in correspondence with the JCHR, the Minister referred on a number of occasions to the requirement upon the courts to consider the proportionality of the order and its terms. This is because the civil courts, in considering whether to impose civil orders have interpreted the 'just and convenient' test in light of the obligations under article 8 ECHR that an order to be necessary and proportionate. At a time when Convention rights are regularly critiqued and are being curtailed in other areas of law,[16] and given the extensive changes proposed to the anti-

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[13] For further examples see ACC Bennett's evidence in PBC, *supra*, col. 65:

> One of our concerns is that one person's annoyance may be another person's boisterous behaviour, or young people behaving as they do. We certainly get complaints from members of the public about people using playing fields, for instance, which the rest of the community thinks is the appropriate thing to do, but if you live next to the playing field it can be very annoying.

and PCC Ron Ball, col. 66:

> The most curmudgeonly, miserable individual should not be able to determine standards of behaviour in their neighbourhood. There must surely be some test of reasonableness.

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

[15] Clause 1(3).

[16] The Immigration Bill makes amendments to the application of article 8 ECHR in immigration proceedings.

social behaviour legislation, it is appropriate to indicate to the courts, expressly and clearly, how their remit should be exercised.

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

19. 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.

20. 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 other dependants.[17] A vote was passed in PBC to amend this provision but this is not apparent in the current version of the Bill. We also 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. Furthermore, the range of positive requirements 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 be imposed in the criminal courts after rigorous assessment of appropriateness by probation services and experienced tribunals.

21. 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

[17] We are grateful to the Minister for explaining in PBC that the Bill does not seek to obstruct these, or any other commitments a person holds, and that the courts should consider these commitments when applying the 'just and convenient' test (see Hansard, PBC, House of Commons, 5th Sitting, 25th June 2013, col. 146). The Minister also relied upon clause 2 and the duties of the individual or organisation to ensure any requirement is 'suitable and enforceable.' Nevertheless, clause 1(5) prioritises certain activities that the injunctive requirements must avoid conflict with. In our view, the rights of a dependent child are as important as religious beliefs, work and educational requirements, and should be expressly stated on the face of the Bill. This would comply with the duty under the UN Convention on the Rights of the Child to consider the best interests of the child as a primary consideration.

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)). However, again, the court should also be required to assess whether the terms of the injunction are proportionate.[18] 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.

22. 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.[19] However, in PBC, the Minister made clear that no additional funding will be made available for ensuring that these courses are available and run effectively. With respect to requirements that incur costs, he stated: 'We will require agencies that already have considerable amounts of public money available to them to fund a lot of the initiatives.'[20] Another impact upon the application of injunctive requirements, both positive and negative, will be the lack of probation officers in the county courts to advise upon suitable programmes that can assist in the reduction of anti-social behaviour.[21] There do not appear to be any efforts envisaged to apportion probation officers to assist during IPNA hearings.[22]

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[18] *R v Boness* [2005] EWCA Crim 2395

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

[20] Jeremy Browne, Hansard, PBC, House of Commons, 6th Sitting, 25th June 2013, Col. 173.

[21] See Home Affairs Committee, *The Draft Anti-social Behaviour Bill: pre-legislative scrutiny,* 12th Report of session 2012-2013, HC 836-1, 12th February 2013, para 70: 'There were further risks associated with a move to County Courts. Magistrates Courts would typically have a Duty Probation Officer in attendance who would be able to arrange any practical follow-up provisions, such as make-good in the community provisions. As Swindon Borough Council noted, "the County Court can imprison

Clause 1(6) - Duration

23. 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 IPNAs should last for a maximum of two years and should be 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

24. We do not consider it appropriate that the police are 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

25. Whist 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.[23] Detention should always be a last resort for children.[24]

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a defendant for breach of Injunction or fine a defendant. But it is simply not equipped to offer reform, rehabilitation and reparation."'

[22] The issue was raised in PBC, but no discernable answer was given, see 6th Sitting, *supra,* per Gloria de Piero col. 191.

[23] See Powers of Criminal Courts (Sentencing) Act 2000 ss16 and17.

[24] Article 37 UN Convention on the Rights of the Child 1989.

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

26. 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 proceedings.[25] 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.

27. 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

28. 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

29. We are opposed to the creation of a Criminal Behaviour Order (CBO), and fail to see how the order is necessary or appropriate. The use of post-conviction ASBOs fell by almost two thirds from 2,271 in 2004 to 863 in 2011[26] 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

[25] SCYJ, *Anti-Social Behaviour, Crime and Policing Bill*, House of Lords Second Reading (29 October 2013), http://scyj.org.uk/files/ASB-Bill-Lords-Second-Reading-briefing.pdf.

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

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

30. 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*.[27]

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

31. 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'.[28]

32. 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

33. 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.

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[27] See note 6 above.

[28] Section 1C(2)(b) CDA 1998.

34. 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. So too should any licence conditions if imposed in conjunction with a custodial sentence. The necessity test is equally required to ensure that any terms in a CBO are appropriate in addition to the sentence.

Children

35. 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. 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.[29] Custody has been used as a sanction for breach by 10-17 year olds in 38% of cases.[30] 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).[31] 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.

36. 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.

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[29] MoJ, note 16 above, Table 11.

[30] Ibid, Table 12.

[31] 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

Part 3: Dispersal Powers

37. 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).

38. 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.

39. 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

40. 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. The issue was canvassed in PBC where the Minister made this observation: 'the powers are likely to be used at night, conceivably over a weekend, and a 48-hour order would mean there could be a period of peace for such a time, which might be useful in practical terms.'[32] This assumption did not appear to be based on any established practice or findings. In our view, twenty four hours is a sufficient restriction on peoples' abilities to enter a location, unless actual evidence demonstrates otherwise.

[32] Damian Green, Hansard, PBC, House of Commons, 8th Sitting, 26th June 2013, col. 239.

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 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 dispersals 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.

Clause 132, Schedule 8 - Powers to stop and detain at ports

43. Clause 132 and Schedule 8 propose a number of changes to Schedule 7 of the Terrorism Act 2000. Schedules 7 and 8 of the Terrorism Act 2000 (TACT 2000) make provision for police, immigration or customs officers to question at a port or border any person in order to determine whether the person appears to be a terrorist; that is a

person who 'is or has been concerned in the commission, preparation or instigation of acts of terrorism' (Section 40(1)(b), TACT 2000). The officer need have no grounds or justification for the decision to stop any specific person. TACT 2000 makes no provision for reasonable suspicion or any other standard to be satisfied before a stop may take place. Nevertheless, a person stopped can be questioned for up to nine hours and may be searched, with their belongings held for up to seven days. If a person is detained at a police station their fingerprints and DNA may be taken.

44. JUSTICE has a long history of engagement with the human rights issues arising from terrorism and counter-terrorism. We do not consider the problems faced by Government in combating the threat of terrorism are easily solved. However, too often, in the past decade, counter-terrorist legislation has shown our Government willing to curtail fundamental rights unnecessarily and without adequate justification. Many of the counter-terrorism measures adopted have not only been wrong in principle, but have proved ineffective, unnecessary and even counterproductive in practice. Schedule 7 TACT 2000 shares this unfortunate history.

45. We not oppose the use of stop and search without reasonable suspicion in every circumstance. For example, we have recognised that a circumscribed power, subject to time and geographical restriction; designed to allow for blanket searches based on specific intelligence; that supports a real and immediate risk, could be justifiable (for example, an order to search a particular flight, or series of flights from a particular destination or into a particular airport, in connection with a bomb threat). However, compulsory powers of stop and search exercised by State authorities require weighty justification.[33] We regret that the power in Schedule 7 is exceptionally broad and accompanied by few safeguards to protect individuals who are detained or to circumscribe the discretion open to individual officers.

Background

46. In January 2010, the European Court of Human Rights (the Strasbourg Court) in *Gillan and Quinton v UK* (2010) EHRR 45, held that a stop and search power, without provision for reasonable suspicion, in Section 44 TACT 2000 breached the right to respect for privacy guaranteed by Article 8 ECHR because of its lack of safeguards

[33] See for example, JUSTICE Response, Home Office Review of Counter-Terrorism and Security Powers, August 2010, http://www.justice.org.uk/data/files/resources/20/JUSTICE-response-to-CT-review-aug-10.pdf

against the arbitrary use of state power. In particular, in that case, the Court expressed concern about the breadth of the discretion afforded to individual officers, and the lack of any clear requirement on the persons authorising the search to make any assessment of the proportionality of the measure. It concluded that weak provisions to limit the geographical area of a search were not a sufficient limit on the power of the executive. Furthermore, the ability to seek judicial review after the event was not an effective safeguard. The Court concluded: 'in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was properly exercised.' Section 44 has since been repealed and replaced with an alternative, more circumscribed power. Section 47A TACT 2000, now allows for stop and search without suspicion in circumstances where an officer reasonably suspects an act of terrorism is about to take place.

47. JUSTICE considers that without revision, Schedule 7 is open to the same criticism that the Court levelled at Section 44 TACT 2000. These issues are currently being litigated both in domestic courts and at Strasbourg, where the Government seeks to argue that as the powers in Schedule 7 apply only to ports and borders, they are distinguishable from Section 44.[34] We note, however, the emphasis placed by the Strasbourg Court on the inadequacy of the geographical restrictions in Section 44. Despite the Schedule 7 powers being confined to ports and borders, their use is not proscribed in the legislation by the need to be justified, necessary and proportionate. Without a requirement for officers to show that stops are based on rational grounds, we consider that there is a real risk that these powers will be found to be arbitrary and disproportionate.

48. Statistics on the use of this power already show that the majority of persons subject to stop and search under Schedule 7 are from ethnic minorities (in 2012/13, the figures showed 79 per cent of persons stopped were not white). The Independent Reviewer of Terrorism Legislation has commented on these disproportionate figures. He has noted that while the figures themselves do not automatically provide a basis for criticism, there is 'no room for complacency' given the possibility for negative impacts on minority communities.[35] Prior research had already found that ethnic minority communities are significantly affected by the operation of without suspicion stops, with

[34] See for example, *Malik v UK* App No 32968/11 and *Beghal v DPP* [2013] EWHC 2573.

[35] Report of the Independent Reviewer of Terrorism Legislation (2012), paras 9.23-26.

reported questioning regularly focussing on religious or cultural activities, including mosque attendance and frequency of prayer.[36]

The Proposed Reforms

49. Following recommendations made by the Independent Reviewer that Schedule 7 be subject to review, accompanied by specific recommendations for reform, the Government launched a consultation on the operation of Schedule 7 in September 2012. However, before the Government response to the consultation exercise was complete, the current proposals in the Bill were published.[37] Clause 132 would give effect to Schedule 8 of the Bill, which proposes the following reforms to the Schedule 7 TACT 2000 power:

    a. The maximum period for questioning is reduced from 9 hours. A distinction is to be drawn between persons stopped pursuant to paragraphs 2 and 3 of Schedule 7 (who may be questioned for up to an hour) and those stopped subject to paragraph 6 of Schedule 7 (who may now be questioned up to a maximum of 6 hours);
    b. A periodic review of any detention under Schedule 7 will be introduced. The intervals for any such review are to be specified in delegated legislation;
    c. Only immigration officers designated by the Secretary of State will now be capable of exercising powers under Schedule 7;
    d. The Secretary of State will be required to issue a code of practice on training for officers designated for the purpose of Schedule 7 and governing the procedure for designating such officers;
    e. Persons stopped subject to paragraph 2 will not be subject to any intimate search. Only persons stopped pursuant to paragraph 6 of the Schedule can be made subject to a strip search. A strip search may only be conducted if the officer has a reasonable suspicion that the person is concealing evidence that they are involved in terrorist activities and it is authorised by a senior officer not involved in the questioning. The power to take intimate samples is removed;
    f. Additional safeguards currently only applicable to powers exercised under Schedule 7 at police stations, including in respect of access to

[36] See Choudhury, T and Fenwick, H, *The impact of counter-terrorism measures in Muslim communities; EHRC Research Report, 72* (EHRC, 2011).

[37] JCHR Report, para 100

legal advice, are extended to all instances of detention, including at ports and airports.

50. While JUSTICE welcomes the changes proposed, we are concerned that they do not go far enough to tackle the serious injustice and unfairness which results from the operation of stop and search without suspicion at our ports, airports and other borders. We note that the JCHR shares this view, making significant proposals for the further amendment of Schedule 7. Without such amendment, the JCHR does not consider that the Government has demonstrated the necessity for the intrusive powers currently provided by Schedule 7.[38]

51. Nothing in these proposals would change the broad discretion afforded to individual officers in deciding whether to conduct a search. It is clear that the stops considered in *Gillan,* which were limited to durations significantly shorter than an hour, engaged Article 8 ECHR and could not be justified without effective circumscription to limit their arbitrary use. Detention under Schedule 7 is still envisaged to last for up to 6 hours (albeit that detention for the maximum limit is expected to be rare). This is a significant period which, in our view, is likely to engage the right to liberty protected by Article 5 ECHR. Although the proposed reforms are welcome, they leave significant powers in the hands of individual officers, which without reasonable grounds to justify the reason for their exercise, may be difficult to justify.

52. While the proposal to introduce a review is welcome, little information is provided on how this would be conducted or the frequency, leaving these to be determined by the Secretary of State. Ultimately, the value of any review is undermined while detention remains justified without a requirement for reasonable grounds for suspicion.

53. A number of amendments were proposed during the Bill's consideration in the House of Commons, including amendments which would insert a requirement for reasonable suspicion before any powers under Schedule 7 could be exercised or limiting the powers that could be exercised without such suspicion, but none were pressed to a vote. The Minister explained that the Government was awaiting the recommendations

[38] In its report on the Bill, the JCHR welcomes these changes, but expresses their concern that further reform is needed, see JCHR Report, paras 103-104. It goes on to add "We have considered carefully whether the Government has demonstrated the necessity for these more intrusive powers being exercisable without reasonable suspicion, and we are not persuaded that they have" (para 112).

of David Anderson QC, in his report on the exercise of Schedule 7 powers in the Miranda case. JUSTICE considers that the case for reform is clear. Members should press the Minister to explain why the Government considers that powers of this breadth can be justified.[39] This justification is the responsibility of Government, not the Independent Reviewer. Clearly the opinion of the Reviewer will be a valuable contribution to the debate on the Miranda case. He has already expressed significant concern. However, both Ministers and Members are responsible for conducting their own review of the operation of this legislation, and there is adequate evidence already available (including through the Government's own consultation exercise) which illustrates that further reform is necessary.

54. For an example of the breadth of interference imposed on individuals once subject to a stop, consider that there is nothing in the proposed reforms which would restrict the power to seize individual property – including personal data held by individuals on electronic devices such as laptops and smartphones; There is no restriction on the face of the Bill to limit the harvesting of data subject to compulsion and it is difficult to imagine that wholesale gathering and retention of data could be justified in all cases where no reasonable grounds exist to stop the individual concerned, let alone examine and process their personal data. Yet, on the contrary, the proposed reforms clarify that the power to seize includes a power in all cases to make copies of the information seized and to retain that material, including for use as evidence in criminal proceedings. JUSTICE regrets, particularly in light of the controversy surrounding the David Miranda case, that the Government has not taken this opportunity to revisit the application of these compulsory powers in contemplation of the expanding use of personal technology to transport significant amounts of personal information. In considering the proposed reform in new paragraph 11A, Members may wish to call on Ministers to justify the breadth of this power and to challenge its necessity, given that persons will be stopped without any suspicion that they are terrorists, and most will be able to easily demonstrate they are not terrorists. Given the likely limited benefit to the State, compared with the significant impact upon personal privacy, of permitting authorities to cull personal data without reasonable suspicion, or any safeguards as to its use and processing, we consider that this activity is also likely to violate Article 8 ECHR in practice. The JCHR shares this view, and has recommended significant amendment:

[39] HC Deb, 15 Oct 2013, Col 634

> In our view, the powers to search personal electronic devices are so intrusive, given the nature of the information held on those devices that we do not consider these references in the Code [*the Code of Practice which applies to the exercise of Schedule 7 powers*] to be sufficient to circumscribe the width of the powers".[40]

55. New paragraph 11A expressly envisages this information – procured by compulsion - being produced as evidence in subsequent criminal proceedings. It is regrettable that the Bill provides for this prospect. Both the Independent Reviewer and the domestic courts have expressed a view that it is likely to be incompatible with the right to a fair trial for the product of this type of procedure to be used in a subsequent criminal trial. There is ongoing litigation in *Beghal* which will consider whether the discretion of the court to exclude prejudicial material in Section 78 PACE 1984 is sufficient to protect the individual's right to a fair hearing.[41] However, this Bill could be used to expressly clarify that no material gathered using Schedule 7 powers may subsequently be used to convict an individual of a criminal offence. In light of the breadth and nature of this power, JUSTICE considers that the subsequent use of material garnered through the use of Schedule 7 to found a prosecution of an individual would seriously endanger the right to a fair hearing, including the presumption of innocence, as guaranteed by Article 6 ECHR.[42]

56. However, while supplementary reforms to Schedule 7 may reduce the risk that specific issues may give rise to violations of Articles 8 (personal data) and 6 ECHR (subsequent use), without further circumscription of the power itself by the application of an objective requirement for reasonable suspicion to justify the need to stop an individual, we consider that Schedule 7 will remain vulnerable to challenge as disproportionate, arbitrary and incompatible with the right to privacy and individual liberty. Without such significant amendment, JUSTICE would support repeal of the powers in Schedule 7.

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[40] JCHR Report, para 122.

[41] [2013] EWHC 2573. In this case, the High Court concludes that Section 78 PACE is adequate to protect the right of individuals subject to Schedule 7 questioning to a fair hearing. However, this case is subject to further appeal.

[42] The right not to self-incriminate is not absolute. For example, see *Brown v Stott,* [2003] 1 AC 681 (JUSTICE intervened in that case to argue that Article 6 ECHR did not extend to protection against a requirement to identify the driver of a vehicle).

Part 12 – Extradition

43. Part 12 makes significant changes to the extradition regime. It contains amendments to the Extradition Act 2003 (EA) that clarify language but more importantly strengthen procedural safeguards for the requested person. We welcome these changes in general, particularly a proportionality requirement, temporary transfer arrangements, limitations on the consequences of consent, and the addition of asylum claims as a ground for discharge in clause 143, which show that the Government has listened to the concerns of practitioners and the Scott Baker Review.[43] However, we have some concerns about the operation of these proposed amendments, which we set out below.

Clause 137 – Extradition barred if no prosecution decision in requesting territory

44. The provision introduces a new bar to extradition that reflects the problem, observed in a number of cases, of requests for extradition made prematurely. This is where a decision to charge a person has been made, but the suspect must be officially charged and questioned before the prosecution can be further advanced towards trial. The EAW framework decision allows the requesting state to ask for a person to be surrendered for the purposes of conducting a prosecution.[44] Yet it is often the case that people are returned to the requesting state and have to wait lengthy periods of time before being tried, if in fact a trial takes place at all.[45]

45. The problem with clause 137 is that, as drafted, if the UK judge is satisfied that a decision to charge has been taken, they must still order extradition. Furthermore, proposed sections 12A(1)(a)(ii) and (b)(ii), would still afford the extradition to take place where it is found that the person's absence from the requesting state is the reason for the failure to make a decision to charge or try the person. In almost all cases the person's absence will be the reason for that failure, otherwise an EAW would not have been sought. We do not see how, as drafted, this provision will mitigate the problem of lengthy delay in the requesting state once the person has been returned. We agree

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[43] Sir Scott Baker, *A Review of the UK's Extradition Arrangements*, (Home Office, 30 September 2011), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf.

[44] Council Framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) OJ L 190/1 (18.07.2002), article 1(1).

[45] This was a particular issue for the Greek, Italian, Portuguese and Spanish systems identified in our report *EAWs: Ensuring an Effective Defence* (JUSTICE, 2012).

with Fair Trials International that, at a minimum, the court should be required to canvass the possibility of a temporary transfer or video conference hearing (as envisaged in clause 140) for formal proceedings to be instituted against the requested person prior to their surrender.[46]

Clause 138 - Proportionality

46. The Bill proposes a new s21A to the EA that would provide for a proportionality test prior to the judge deciding whether to surrender a person to a Part 1 territory (European Union Member State). We welcome the amendment since it addresses a particular problem with the EAW scheme that allows requesting states to seek the surrender of a person for a minor or trivial offence. This was never intended, given the context of its adoption following the 9/11 New York terrorist attack, and the desire to create a mechanism for the speedy return of serious and organised cross border crime.[47] The current filter is that warrants may only be issued in respect of offences for trial which carry a sentence of 3 years imprisonment or more[48], or for the service of a sentence of at least 12 months.[49] However, there is no requirement that this sentence will actually be imposed upon the requested person, and, like the UK, every Member State has a range of sentencing provisions which carry maximum sentences that would never been imposed for certain offences. In the UK, for example, a minor shoplifting offence still has a potential sentence of seven years imprisonment[50] (which will partially be resolved by the proposed amendment at clause 152 for low-value shoplifting).

47. The proportionality provision is, however, limited to EAWs for prosecution, not for the service of sentence. We see no reason for the distinction. Often EAWs are issued for the service of a sentence to which, while it complies with the minimum requirements in

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[46] Fair Trials International, *Briefing, Anti-social Behaviour, Crime and Policing Bill, Second Reading, House of Lords*, October 2013.

[47] As propounded by the ECJ in Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, [2007] ECR I-03633, paras 57 and 58.

[48] Where the offence is one on the European framework list of agreed offences, or 12 months if it would also be an offence in the UK, pursuant to s64 EA.

[49] Where the offence is one on the European framework list of agreed offences, or 4 months if it would also be an offence in the UK, pursuant to s65 EA.

[50] Pursuant to s7 of the Theft Act 1968, as amended.

the framework decision, there are alternative measures that would be less coercive available.[51]

Clause 140 – Temporary transfer

48. The proposed new s21B would mitigate the impact of extradition upon a requested person by enabling the preparation of the trial against them to be undertaken prior to the extradition. This would mean less time spent in custody pending trial in the requesting country. We welcome in particular the provisions in s21B(2)(b) and (3)(b) which would allow the requested person to speak with the requesting authorities. However, further detail as to how these processes are envisaged to operate is required, to ensure that the procedural safeguards and the freedom of movement during a temporary transfer of the requested person are guaranteed.[52]

Clause 141 - 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 specify 14 days. The reason for extra time in the latter sections is not because

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[51] For example, it is often the case in Poland that a person serving a suspended sentence is recalled by way of an EAW if they have breached the reporting requirements of their sentence, or failed to pay a fine, which results in the court imposing a prison term as punishment. However, provision for remote reporting, or the payment of the fine would negate the recall to a prison term and enable the person to continue living and working in the UK.

[52] For example, if a person is going to speak with the requesting authorities, this should be done via a video-link of adequate quality, with the possibility of legal representation and protection of the presumption of innocence. It should also include a recording process and the provision of interpretation where necessary. The Criminal Procedure Rules should be amended to provide the necessary safeguards, and take into consideration annex 3 to the Civil Procedure Rule 32 Practice Direction, as well as articles 10(5), (6) and (9) of Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01) OJ C 197/9 (12.07.2000).

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,*[53] '[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'.[54] The provision has led to some notable injustices,[55] particularly where people are remanded in custody and unrepresented.[56] Without amendment, the statute is capable of generating considerable unfairness in individual cases.[57] Clause 141 introduces flexibility into this process in this way:

> 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

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[53] [2012] UKSC 20.

[54] At [37].

[55] 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/.

[56] 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.

[57] *Lukaszewski*, at [35].

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.'[58] However, we consider the provision unnecessarily detailed, and could impose to specific a burden upon an appellant to prove. 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)

The judgment shows that the requirement is for a judge to be afforded discretion to allow further time, in the interests of justice.

47. We also consider that a 14-day period of time to appeal is more appropriate for 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. This was the period proposed by the Scott Baker review.[59]

Leave

48. Clause 141 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 order to reduce the burden of appeals upon the High Court.[60] It is unclear why the leave requirement is limited to the appeals of requested persons and does not include appeals by the requesting state. In extradition cases, the requesting state is already assisted by specialised CPS extradition lawyers, Eurojust and the European Judicial

[58] *Ibid*, per Lord Mance at [39].

[59] Scott Baker, p304.

[60] Scott Baker, pp 305-307.

Network. Yet the requested person may only receive the assistance of an inexperienced duty solicitor. Both parties should be subject to the same requirements in order to foster the equality of arms.

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.[61] 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.[62] 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.[63] 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 raised, since duty solicitors are not required to undertake training in extradition law. 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

[61] At [10.14], p307.

[62] Consider the facts of *Lukaszewski*.

[63] At [19].

> those arrested on extradition warrants. The Extradition Act 2003 is complex and the case law it has generated is vast.[64]

52. Mr Grange refers to the case of *Juszczak v Poland*[65] 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.[66]

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 all the 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.

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.[67] Given the Government proposals for price competitive tendering at the magistrates' court and removal of legal aid for judicial review hearings,[68] it is by no means certain that

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

[65] [2013] EWHC 526

[66] At [17].

[67] See Scott Baker Review, para. 11.85. p. 335.

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

sufficient defence expertise will be accessible at the initial or appeal stages of the extradition process.

55. We are disappointed that further important amendments have not been made to the extradition regime. We agree with Fair Trials International that provision should be made for a refusal ground where the person is a UK national or resident, on the proviso that they will serve their sentence in the UK, an option which was available in the framework decision but never implemented in UK law. Such a provision would enable the person to remain in closer proximity to their family in the UK, and avoid them enduring poor prison conditions. We also agree with FTI that there should be a bar to extradition where information clearly shows there is a case of mistaken identity. Currently, only a request for further information can be made, but nothing can be done with this information unless a human rights bar could be made out. Under the existing regime, the requesting state must withdraw the warrant.[69] We also agree that the means testing requirements for legal aid are incompatible with the speed required in EAW proceedings. While a legal aid application is being processed, requested persons can find themselves unrepresented, which can lead to injustice.[70]

Part 13 – Criminal Justice and Court Fees

Clause 151 – Compensation for miscarriages of justice

55. Clause 151 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

[69] This particular problem was demonstrated by the case of Edmund Arapi, see FTI briefing.

[70] Per Thomas, LJ., in *Stopyra v District Court of Luplin, Poland* [2012] EWHC 1787 (Admin), and Scott Baker Review, p. 18, para 1.37: 'We received uncontradicted evidence from the extradition judges at City of Westminster Magistrates' Court and from practitioners of the problems and potential injustice caused by the delay in means testing for legal aid.' The Review considered a re-introduction of non means-tested legal aid would not only ensure that the UK complies with the right to legal assistance provided by article 11(2) of the Framework Decision, but that it would promote fairness, reduce the length of the process and remove the burden placed upon extradition judges having frequently to deal with unrepresented persons, many of whom do not speak sufficient English or have familiarity with the court process.

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.[71] Restricting compensation under section 133 to cases where the applicant can 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 a 'miscarriage of justice' in *R v Adams*[72]. 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.[73]

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[71] 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.

[72] [2011] UKSC 18.

[73] *Ibid.* at [55].

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.[74]

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.[75] There can 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*[76] 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 Philips], 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

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[74] At [50].

[75] 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.

[76] [2013] EWHC 72 (Admin) (25th January 2013).

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,

> 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.[77]

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.'[78] 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.

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[77] At [116].

[78] Supra at [9(2)].

64. Furthermore the proposed amendment will 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.[79] In July the ECtHR ruled in *Allen v UK*[80] that the UK compensation scheme does not violate article 6 ECHR. It made this ruling expressly on the basis that the current regime does not require an applicant to demonstrate their innocence[81]. 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. In correspondence with the JCHR, the Government did not consider *Allen* to be determinative of the current proposal. We fail to see how this conclusion was reached.[82]

65. Finally, if the Secretary of State were 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 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

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[79] *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).

[80] Application no. 25424/09, 12th July 2013.

[81] At [133]. There are other difficulties with the findings of the Court, which may conflict with the Supreme Court's ruling *Adams*, making it difficult to satisfy both judgments in practice. But this problem will be academic if clause 152 is agreed to since virtually no one will be able to satisfy the proposed test.

[82] See JCHR Report, para 155, and discussion during Report, Hansard, House of Commons, Report, Second Sitting, 15th October. The JCHR concludes clause 152 would violate article 6 ECHR.

Appeal since it does not make a finding of innocence on quashing a conviction[83] 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
Angela Patrick
JUSTICE
October 2013

[83] 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].