WRITTEN EVIDENCE FROM JUSTICE (CJB0010)

Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible, and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This submission sets out JUSTICE's response to the call for evidence on the Criminal Justice Bill (the "**Bill**") published by the Joint Committee on Human Rights (the "**Committee**").JUSTICE is opposed to this legislation in so far as it seeks to expand the use of civil measures to tackle anti-social behaviour, "begging" and "rough sleeping".[1] We are concerned that current imposition and enforcement practices relating to the use of Community Protection Notices ("**CPNs**"), Public Spaces Protection Orders ("**PSPOs**") and Dispersal Powers ("**DPs**") under the Anti-social Behaviour, Crime and Policing Act 2014 (the "**2014 Act**") are not compliant with human rights. In particular, lack of training, insufficient investigation process and the draconian conditions that can be imposed via orders has led to situations where those subject to them experience infringements of their rights under Article 5 and 8 of the European Convention on Human Rights ("**ECHR**"). Certain populations are more likely to be impacted by CPNs, DPs and PSPOs, increasing the risk of discrimination under Article 14 ECHR. Opaque appeals process and difficulties accessing support to challenge PSPOs, CPNs and PSPOs have a significant impact on the exercise of procedural rights under Article 6 ECHR. Furthermore, JUSTICE also expresses concern regarding the proposal to introduce electronic monitoring requirements for those subject to Serious Crime Prevention Orders ("**SCPOs**"),[2] which we consider will have a detrimental impact on Article 5, Article 8, 9, 10 and 11 ECHR. Moreover, we oppose the amendments to expand the availability of such orders to those who have been acquitted of an offence before a court and those who are appealing a conviction on the basis that the conditions imposed by an SCPO and the consequences of breaching an Order are severe, and could amount to a

[1] See Criminal Justice Bill, clauses 46 – 80.

[2] Ibid. clause 42.

punishment in an of itself.[3] This gives rise to concerns relating to Article 5 and Article 8 ECHR.

3. JUSTICE also expresses strong opposition to the provisions in the Bill regarding the transfer of prisoners to foreign prisons, as outlined in Clauses 32-36. The proposal to transfer prisoners from England and Wales to foreign prisons abdicates government responsibilities and jeopardizes due process rights for UK prisoners. There is significant potential that violations of Article 5 will emerge in relation to the voluntariness of transfers, delays, the effectiveness of remedies, and conformity to substantive and procedural rules, as well as to Article 8 ECHR in regard to potential repercussions on prisoners' psychological well-being, social interactions, and family relationships. JUSTICE also scrutinizes Clause 28, which permits the use of force to compel offenders' attendance at sentencing hearings, and raises potential human rights violations under Articles 3, 5, 6, and 8 ECHR. The new provisions regarding compulsion offer nothing more than what is already available to the Crown Courts, while condoning uses of force to achieve these ends is highly problematic. JUSTICE asserts that the ends sought to be addressed by these measures would be better achieved by increased support for victims and families outside the criminal justice process, rather than through the use of violence against prisoners.

4. In responding to the questions set out by the Committee, JUSTICE draws upon the findings of its 2023 report: *"Lowering the Standard: A review of Behavioural Control Orders in England and Wales"* (the **"Report"**). That report, which was produced in consultation with members of the police, local authority enforcement officers, legal professionals and trainers, explored the function and effectiveness of Behavioural Control Orders. Behavioural Control Orders is a term adopted to explain civil orders that impose conditions or requirements on a person to regulate their behaviour, and which result in a criminal offence if breached ("**Orders**"). The report analysed various Orders that exist across the justice system, including but not limited to CPNs, DPs and PSPOs.[4] We also refer to an advisory legal opinion, dated 8 September 2023 which discusses the human rights implications of Behavioural Control Orders (the "**Advisory Opinion**") - in particular their compliance Article 5, 6, 8, 9, 10 and

[3] Ibid. clause 45.

[4] JUSTICE, 'Lowering the Standard: a review of Behavioural Control Orders', (2023).

11 ECHR - and the need for careful assessments to be undertaken by enforcement bodies to ensure that they are proportionate.[5]

Transfer of Prisoners – Clauses 32 - 36

5. JUSTICE is strongly opposed to the existence of any arrangements for the transfer of prisoners outside the United Kingdom. The proposal to allow for the transfer and detention of prisoners detained in England & Wales to foreign rented prisons abdicates the government's responsibilities and risk undermining the rights to due process for UK prisons. JUSTICE identifies three key areas of concern:
    a. Violations of Article 5 ECHR;
    b. Violations of Article 8 ECHR; and
    c. Practical concerns.

6. With respect to Article 5 of the ECHR, there are a number of issues inherent to this proposal, in regards to the voluntariness of transfers, possible delays in transfer, the effectiveness of remedies for opposing transfer, and whether the transfer conforms to substantive and procedural rules.

7. While the government deems that this measure does not breach Article 5 as "*it is solely for the purpose of the transfer of prisoners to prisons overseas, and their detention at all times will be accordance with Article 5(1)(a) or 5(1)(c)*," leaving EHCR rights of prisoners to be protected through international agreements is far from a guarantee. Multi-juridical frameworks designed to protect foreigners' human rights in other countries are routinely ignored in practice leading to egregious abuses of basic rights. Where prisoners are to be reintegrated into British society, they may instead be used as an exported commodity undermining the goal of rehabilitation. International agreements cannot on their own ensure that prisoners' human rights are protected, that a regime comparable to that of prisons in England and Wales is provided, and that adequate remedies in cases of human rights violations are available.

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[5] JUSTICE, 'Annex 2: Advisory Opinion on the Human Rights Implications of Behavioural Control Orders' (2023)

8. With respect to Article 8 ECHR, there are potential repercussions of being transferred overseas on prisoners' psychological integrity, social interactions and family relationships, as well as with respect to maintaining the confidentiality of correspondence.

9. The Government's analysis of the Bill in the ECHR Memo recognises that the provisions for transfer in the Bill "*need to operate in accordance with Article 8*" and that "*a prisoner's individual circumstances will be required to be considered in advance of transferring any prisoner to a prison overseas*." While consideration for personal context is important, this raises concerns for possible discriminatory effects flowing from this measure in terms of which criteria are used to assess transfer: for instance, whether the prisoner has family support domestically or has exhibited good behaviour.

10. Significantly, the Bill does not explain how individual prisoners will be selected for transfer, or how this will fit with the existing categorisation and allocation frameworks. Rather, it leaves that decision to the Secretary of State's discretion. Of note, it appears that both remand and sentenced prisoners are liable to be imprisoned abroad, as well as civil prisoners, those imprisoned for contempt, and foreign national prisoners who have completed their sentences but are being held under immigration powers. The Government has not seen fit to provide for any sort of protocol around who will be selected.

11. Although the Government's impact assessment states that as part of the policy, it will need to ensure prisoners' rights to family life are protected in accordance with Article 8, including *"access to visitation on a par with what would be provided in HMPPS [HM Prison and Probation Service]", the impact assessment notes that "it has not been decided who would bear the costs of these visits".*

12. Considering this, there remain a whole host of practical concerns that are likely to arise in association with this proposal, including the magnitude and apportionment of costs associated with transportation of prisoners overseas, ensuring access to visitation and legal consultation, and availability of staffing. For instance, it is understood that the Ministry of Justice has been in talks with Estonia about using space in its prisons. While one of these is located in the capital, Tallinn – itself a three-hour flight from London, with no direct flights from elsewhere in the UK – the other two are 150-200km away by road. This is one illustration of the difficulties which will arise in facilitating family visits to those imprisoned abroad wherever

they are, and of course access must also be provided to HM Chief Inspector of Prisons, Independent Monitoring Board members, and legal representatives.

13. Moreover, it is unclear whether or how the Prison Rules 1999 will apply; what the position will be in relation to rules of adjudication, incentives, or access to regimes for work, education and exercise; and what staffing arrangements will exist – which is particularly significant given the likely linguistic barriers. Given that these individuals will (quite properly) be returned to the United Kingdom before their ultimate release, it is essential for their reintegration into society, as well as public safety, that access to rehabilitative opportunities is guaranteed. It is also unclear whether thought has been given to the impact these arrangements may have on the United Kingdom's extradition obligations should a request be received for the extradition of a person who has been transferred into custody abroad, or indeed if such a person is accused of a further offence in custody.

14. Attempting to address prison overcrowding in this way misses the main drivers of prison population rates, such as excessive use of pre-trial detention and overcriminalisation. It should not be left to secondary legislation or individual treaty arrangements entered into by the executive to ensure that adequate procedural and substantive protections are available for prisoners and their families where a prisoner is to be transferred abroad. In any event, those in State custody remain the responsibility of the British State, and it is contrary to principle to transfer that responsibility elsewhere. For all these reasons, **JUSTICE urges the abandonment of these clauses**.

Compelling Attendance at Sentencing Hearings – Clauses 28 - 31

15. Clause 28(1) inserts two new sections into the Sentencing Act 2020: new section 41A (power to order offender to attend) and new section 41B (power to order production of offender). The offender commits a contempt which may be punished as criminal contempt if they fail without reasonable excuse to comply with an order to attend.

16. With respect to section 41A, a preliminary point to note is that the Crown Court already has inherent powers to direct a defendant's attendance at any hearing in relation to any offence, and failure to attend can be addressed as a contempt of court. The Crown Court may commit an individual for contempt for up to two years. As such, new section 41A adds nothing to

existing powers of the court (as subsection 41A(8) effectively recognises); when and whether they are to be exercised is for judges to decide.

17. Notwithstanding that compelling attendance is already possible and has been reviewed by the courts, JUSTICE would emphasize that the proposed provision would engage human rights concerns, necessitating the implementation of appropriate safeguards. Key rights to be engaged are Article 5 (the right to liberty), given that the provision may result in further deprivation of liberty, and Article 6 (the right to a fair trial), given that that such would take place in the context of criminal proceedings.

18. Nonetheless, the government considers the new section 41A to be compatible with Article 6 ECHR because the "advanced procedural safeguards" in the criminal context will apply when punishing an offender's non-attendance with contempt.

19. The proposed section 41B, however, is more problematic, insofar as it permits prison officers to use reasonable force to give effect to an order requiring the defendant's production. Again, courts already order the production of prisoners for attendance at court hearings, whether via video-link or in person, and JUSTICE is concerned that permitting prison officers to use reasonable force to secure compliance with that order may place both prisoners and custody officers at risk, in the event of actual or perceived resistance.

20. Permitting the use of force would engage fundamental human rights, chief among them Article 3 ECHR, the absolute prohibition of inhuman or degrading treatment. As well, Article 8, the qualified right to bodily integrity and respect for private life, may also be engaged where a use of force is required. Because the use of force to produce a prisoner (aged 18 or over) must be necessary, reasonable, and proportionate, the government considers section 41B to be compliant with Articles 3 and 8 ECHR. However we can see that the use of force by the State can result in serious harm or even death of an individual, such that it is vital that any use is proportionate, reasonable and necessary in the circumstances.

21. Further, established data on disproportionality in the use of force mean that offenders from racialised minorities are at greater risk in the case of any excesses in the use of force. There is no reason to believe that the outcomes would be any different where production at court is mandated. It is also worth noting that using force to mandate attendance could risk the safety of staff and may result in disruptive and offensive behaviour in the court in front of victims

and/or their families causing further distress. If this power is deployed at a greater frequency and in the context of those unwilling to appear, we envisage the need to implement greater training, support, and guidance to safeguard against these risks.

22. Ultimately, JUSTICE considers that it is more important to provide victims and families with greater support outside the criminal justice process than to expect that they will achieve closure via sentencing – particularly if the offender does not wish to be present and chooses to express this at court. JUSTICE would urge the development of greater external services, including mental health support and proper accountability mechanisms, to ensure all victims and their families are able to heal. For these reasons, JUSTICE expresses caution with respect to the introduction of these clauses.

Expansion of powers to tackle anti-social behaviour – Clauses 73 - 81

23. **The expansion of CPNs, DPs and PSPOs is likely to have a detrimental impact on human rights.** The proposals include measures to reduce the age at which an individual can become subject to a CPN from 16 to 10 years old, expanding the power to impose PSPOs to the police, increasing the duration of a dispersal order from 48 hours to 72 hours (and increasing the upper limit of fixed penalty notices for breach of a CPN or PSPO to £500.

24. Based on the findings of our Report, we consider that these proposals **(i) are not evidence-based nor have they been subject to adequate consultation or evaluation, (ii) will not prevent nor significantly reduce anti-social behaviour and are therefore likely to be disproportionate (iii) will increase the rate by which members of the public are criminalised for innocuous or mundane activities, impacting upon their rights under Article 5 and Article 8 (iii) in respect of Article 14 ECHR, risk marginalising and discriminating against vulnerable populations including children, those experiencing homelessness and those experiencing mental ill-health, substance use disorders and learning difficulties, and (v) in the light of current practice, will worsen the inconsistent enforcement practices across the country, which has led to postcode lotteries and personalised penal codes which is both deeply unfair and undermines legal certainty and the rule of law.** Furthermore, until the Government reviews the appeal process for CPNs, DPs and PSPOs, **JUSTICE is concerned that those subject to Orders will continue to experience severe access to justice issues when trying to challenge the imposition or enforcement of an Order. Given that a breach of an Order amounts to a criminal**

offence, the inability to contest an Order has implications for Article 5 and Article 6 ECHR.

25. The Government has failed to provide adequate evidence to justify the expansion of the Orders in this way. Whilst we are advised that the proposals are influenced by a report exploring police perceptions of powers within the 2014 Act,[6] this is insufficient. It does not consider the experience of other enforcement bodies, nor other agencies including victim's groups, social workers or those subject to Orders themselves. Concerns about the lack of adequate consultation on measures relating to anti-social behaviour and the failure to provide a robust evidence base are not new. Indeed, such factors led to JUSTICE conducting its own review of Orders, including those under the 2014 Act, in 2022-2023.[7]

Human rights concerns arising out of current practice

26. The current regime of CPNs, PSPOs and DPs, under the 2014 Act, gives rise to several of human rights concerns. In particular:

    a. **Inability to monitor human rights impacts, including potential breaches of Article 14 ECHR, due to significant shortfalls in evaluation and data collection:** The imposition and enforcement of CPNs, PSPOs and DPs are not monitored by the Home Office; data on their use is not routinely collected or published centrally. FOI requests identify worrying variations in the types of data collected by enforcement bodies, the quality of data collected, the means of inputting the data, the location of the data, and the ability for the data to be extrapolated and shared internally, as well as with relevant agencies where appropriate to do so. Of particular concern is how enforcement bodies are monitoring their use of Orders to identify room for improvement and training, and compliance with the Public Sector Equality Duty. We are particularly concerned about the inability to monitor discriminatory practices and possible breaches of Article 14, owing to the gaps in data collected by enforcement bodies.

    b. **Insufficient evidence to demonstrate that criminalisation via the use of Orders is a proportionate means to achieve the aim of preventing anti-social behaviour:** Research shows that coercion and punishment are not necessarily an

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[6] Home Office, 'Police perceptions of powers within the Anti-social behaviour, Crime and Policing Act 2014' (2023)

[7] JUSTICE, 'Lowering the Standard: a review of Behavioural Control Orders', (2023).

effective deterrent. Whilst the orders under the 2014 Act are frequently referred to as rehabilitative, their ability to affect positive behavioural change is largely dependent on the resources available to the enforcement body. For example, in circumstances where Orders provide for individuals to attend therapeutic programmes, the ability of the person to comply with the Order is likely to depend on their willingness to change their behaviour, whether wrap-around support is provided to them, the availability of services within the area and the quality of the programme. Years of local government cuts mean that often, only the punitive aspects of orders can be enforced.[8] Several contributors we spoke to as part of our research, felt that the Government had "*passed the buck"* and put pressure on enforcement bodies to make the Orders work, regardless of whether they were capable of achieving positive change.[9] As set out in the Advisory Opinion, enforcement bodies must undertake a series of assessments to ensure that orders are proportionate and this includes an assessment of whether the order and the conditions imposed by it will be effective at preventing the harm, in the absence of other, less intrusive measures.[10]

c. **Inconsistent enforcement practices across the country and variation in the way that Orders are used, undermine legal certainty and the rule of law:** CPNs, PSPOs and DPs are being used inconsistently by enforcement bodies – in terms of the volume of Orders imposed, the types of behaviours that they are used to target, the conditions included and the procedures followed in imposing and enforcing them. Not only does this lead to post-code lotteries for victims but creates problems for the rule of law and legal certainty. Members of the public living in one area of the country can find themselves criminalised for behaviours that others, living in another, are at liberty to undertake.[11] This is at odds with the principle that laws and principles must be definite and clear.

d. **Arbitrary use of CPNs, PSPOs and DPs leading to possible infringements of Article 5 and Article 8:** Gaps in the statutory guidance, lack of monitoring to

[8] Ibid., para 3.119

[9] Ibid., para 3.4

[10] JUSTICE, 'Annex 2: Advisory Opinion on the Human Rights Implications of Behavioural Control Orders' (2023), p.37, paras.101-107.

[11] Leading some contributors to suggest that Orders under the 2014 Act create "personalised penal codes" or *ad hominem criminalisation*

ensure that statutory guidance is being complied with, and the vague statutory tests applicable to CPNs, PSPOs and DPs have led to Orders being imposed or enforced in response to behaviour that is innocuous or falls far below the threshold of harmful or criminal activity.[12] For example, CPNs and PSPOs have been used to target behaviour such as "feeding the birds", "picking up stones", "climbing trees", "advertising charity bake sales", "shouting", "looking in a neighbouring window", "wearing a hat", or "flying model aircraft". Furthermore, persons experiencing homelessness have reported being woken up whilst sleeping in empty car parks by police officers, enforcing a DP against them.[13] This is despite DPs being intended to prevent disorder or behaviour that is likely to contribute to members of the public being harassed, alarmed or distressed. [6] As set out in the Advisory Opinion: "*the European Convention on Human Rights requires Behavioural Control Orders to adhere to general principles of the rule of law, including certainty, proportionality and protection against arbitrariness. Where the conditions or requirements are overly harsh or restrictive, unclear, unforeseeable and insufficiently linked to the purpose of the particular order, they may fall foul of these requirements*".[14] According to those that represent victims, the use of Orders to target arbitrary, non-harmful conduct , belies the true nature of the harms experienced by victims of anti-social behaviour. It also diverts resources away from responding to more serious allegations of harm in the community.[15]

e. **Conditions imposed by Orders leading to potential infringements of Article 8, 9, 10 and 11 ECHR** – the conditions imposed by CPNs and PSPOs can be far-reaching. DPs can be used to restrict a person from being present in areas for up to 48 hours. In some cases, DPs have been used to exclude individuals from whole towns or cities. As explained in the Advisory Opinion, Orders may impose a wide

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[12] Via their website, the Manifesto Club have collected countless case studies showing the arbitrary use of CPNs and PSPOs to criminalise activities which they argue call into question the appropriate use of police powers. https://manifestoclub.info/pspos-the-use-of-busybody-powers-in-2022/.

[13] V. Heap, A. Black and C.Devany, 'Living within a Public Spaces Protection Order: the impacts of policing anti-social behaviour on people experiencing street homelessness', (Sheffield Hallam University, Helena Kennedy Centre),

[14] JUSTICE, 'Annex 2: Advisory Opinion on the Human Rights Implications of Behavioural Control Orders' (2023), para 36.

[15] Ibid., para 3.10

range of conditions and requirements which give rise to a prima facie infringement on one or more of a recipient's rights under Articles 8, 9, 10 and / or 11.[16] For example: restrictions on a recipient's movements such as prohibitions on being in a particular location at particular times may prevent an individual from establishing and developing relationships, in breach of their right to private life under Article 8. This is particularly true for those whom are experiencing homelessness, and who live out their daily lives in public areas. Restrictions on a recipient's ability to see or be present in an area with friends, family and other people may also infringe their right to a private life, as well as family life under Article 8 and their right to freedom of association under Article 11.[17] Prohibitions on going to certain geographical locations may cut individuals off from personal support services and, potentially infringe on their ability to attend places of religious worship in contravention of Article 9.

f. **The failure of enforcement bodies to conduct robust investigations before imposing/enforcing Orders, undermining procedural fairness and the proportionality of possible infringements on rights:** Given the impact that Orders can have on a person's Convention rights, enforcement bodies must carefully weigh up the proportionality of the measures before imposing or enforcing them. This includes undertaking an assessment of the specific harm that an individual's behaviour poses to another individual or to society at large, the nexus between that harm and the proposed condition; the likely effectiveness of the measure; the availability of other, less intrusive measures; and the gravity and scope of the infringement on the recipient's Convention rights.[18] However**,** CPNs are regularly imposed on members of the public, or PSPOs enforced, without sufficient investigations taking place. Individuals who have been subject to DPs have complained of not being provided with reasons for them being asked to move on. Enforcement decisions can be left to individual officers, exercising individual discretion and conducting "on the spot" investigations. This has led to persons becoming subject to incredibly onerous conditions which can limit their

[16] Ibid., p.36

[17] See for example PSPOs, which often include restrictions on "loitering" or which prevent individuals from meeting up in groups. Some PSPOs have been used to prevent more than 2 people from congregating in this manner, and often they are enforced disproportionately on children.

[18] JUSTICE, "Lowering the Standard: A review of Behavioural Control Orders in England and Wales" (2023)

ability to engage in day-to-day activities, socialise with friends and family and even access support services, for behaviour that falls far below the criminal threshold and are therefore unlikely to be proportionate. For example, a family with an autistic child was issued a CPN for "*closing the door too loudly";* at-risk women have been issued Orders for *"crying too loudly"* in their home; a vulnerable, elderly woman was let suicidal after being wrongfully subject to a CPN following a complaint to the council by her anti-social neighbour.[19] Lack of funding to provide training, inadequate opportunities to communicate with other enforcement bodies and pressure from central Government to use the Orders, has compounded the problem.[20] *Specific concerns with new proposals*

27. It is also worth noting that using force to mandate attendance could risk the safety of staff and may result in disruptive and offensive behaviour in the court in front of victims and/or their families causing further distress.

28. Until the human rights problems inherent within the existing regime have been fully addressed, JUSTICE considers it irresponsible to increase the use of Orders or expand their scope. Doing so will only worsen a system that is already non-compliant with human rights. Moreover, we have particular concerns regarding the new proposals:

    a. **Increasing the duration of a dispersal order from 48 hours to 72 hours:** Recent academic research, studies and casework undertaken by Liberty and the Manifesto Cub have highlighted that DPs affect those experiencing homelessness,[21] substance use disorders[22] and children and young people disproportionately to others.[23] This gives rise to possible infringements under Article 14. Not only that but JUSTICE is aware of inappropriate practices whereby individuals are

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[19] Anti-social Behaviour Crime and Policing Act 2014, s.72(4)(b)

[20] JUSTICE, "Lowering the Standard: A review of Behavioural Control Orders in England and Wales" (2023)

[21] V. Heap, A. Black and C.Devany, 'Living within a Public Spaces Protection Order: the impacts of policing anti-social behaviour on people experiencing street homelessness', (Sheffield Hallam University, Helena Kennedy Centre).

[22] Release and Liberty. 'Joint response to the Government's Anti-Social Behaviour Plan'. (2023)

[23] See.' Met Police issues apology and admits officers acted unlawfully after homeless people's tents removed and destroyed.' (2024).

excluded from large areas of towns or cities, resulting in them being cut-off from support services including limiting their ability to access food, medical treatment and safe shelter – leading to possible breaches of Article 8. We also consider that DPs fail to address the underlying issues causing anti-social behaviour, by simply "moving the problem" on to another area. For these reasons, we consider that extending the time limit of DPs is unlikely to be compliant with human rights on the basis that they will lead to disproportionate infringements on people's rights under Article 8 as well as possible Article 14 infringements.

b. **Reducing the age at which an individual can become subject to a CPN from 16 to 10 years old in line with the age of criminal responsibility:** The age of criminal responsibility in England and Wales has been widely criticised, both domestically and internationally as being unduly low. Both the UN Committee on the Rights of the Child and the UN Committee Against Torture have called for it to be increased.[24] Considerable research demonstrates the detrimental outcomes associated with the use of criminal measures against children. Orders, such as CPNs, are more likely to draw children into the criminal justice system and risk damaging trust between children and enforcement bodies.[25] The conditions imposed by CPNs particularly those that restrict social interactions and the ability of an individual to associate with their peer groups – are likely to have a disproportionately harmful effect on children and potentially push them further from support.[26] Preventing children from socialising peers also risks breaching Article 15 of the UN Convention on the Rights of the Child which states that every child has the right to associate freely in public spaces. The possible Article 8 infringements that may arise as a result of lowering the age limit are explicitly

[24] See, UN Committee on the Rights of the Child. 2019. General comment no. 24 on children's rights in the child justice system (2019) and UN Committee Against Torture. 2019. Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (2019.

[25] The Edinburgh Study of Youth Transitions and Crime concluded that the best approach to reducing re-offending by young people is a policy of "maximum diversion", see, L. McAra, and S. McVie, Criminology & Criminal Justice, 'Youth crime and justice: Key messages from the Edinburgh Study of Youth Transitions and Crime',(2010).

[26] 9 A. Orben, L. Tomova and S. Blakemore, (2020). 'The effects of social deprivation on adolescent development and mental health', The Lancet Child and Adolescent Health; see also concerns raised by The Children's Society, Children's Rights Alliance and Just for Kids regarding KCPOs and other Orders (The Children's Society, 'Written evidence submitted by The Children's Society (BYC013)' (2019); Children's Rights Alliance for England, 'State of Children's Rights in England 2018, Policing and Criminal Justice' (2018), p.16; Just for Kids Law 'Government urged to scrap "flawed and disproportionate" Knife Crime Prevention Orders', (February 2019).

acknowledged in the Human Rights Memorandum that accompanies the Bill.[27] It recognises that the measure may limit children's ability to socialise. However, we are not convinced by the argument made therein that Statutory Guidance will prevent infringements. As explained, the Statutory Guidance does not prevent misuse of CPNs, PSPOs or DPs currently. Children are considerably more likely to breach CPNs, owing to difficulties in understanding the conditions imposed on them, being ambivalent about the consequences, or simply forgetting. This means breaches of Orders by children are almost inevitable. Indeed, 68% of all ASBOs issued to children since 2000 were breached. Youth justice experts repeatedly call for approaches that divert children from the criminal justice system. We consider that the use of 'non-legal measures', such as acceptable behaviour agreements, are a more appropriate tool to use against children, and have high resolution rates when used appropriately.

c. **Expanding the power to impose PSPOs to the Police –** Research shows that PSPOs - which can currently only be imposed by Local Authorities but can be enforced by both Local Authorities and the Police - are being used in ways that discriminate against vulnerable populations, especially those experiencing homelessness and/or substance use disorders, giving rise to possible infringements of Article 14.[28] A significant number of PSPOs and CPNs specifically target behaviours associated with homelessness,[29] e.g., prohibiting leaving personal belongings on the street, sitting on a pavement, or having an "open receptacle" mental ill-health[30] whilst even those that contain "neutral" conditions like prohibitions on "loitering" or "having alcohol on your possession" are more likely to be enforced against those with substance use disorders or mental ill-health. This is despite wording, which existed until recently, in the Statutory Guidance for PSPOs prohibiting this.[31] JUSTICE is concerned that expanding the power of

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[27] Home Office, 'European Convention on Human Rights Memorandum on Criminal Justice Bill', para 185

[28] V. Heap, A. Black and C.Devany, 'Living within a Public Spaces Protection Order: the impacts of policing anti-social behaviour on people experiencing street homelessness', (Sheffield Hallam University, Helena Kennedy Centre),

[29] JUSTICE, 'Lowering the Standard: a review of Behavioural Control Orders', (2023) paras 3.69-379

[30] Ibid para 3.43 – 3.51

[31] We are alarmed by the removal of wording in the 2014 Act statutory guidance which warns against the use of PSPOs to target homelessness. No notice nor explanation for its removal has been provided by the Home Office.

creating PSPOs to the Police to the police, will lead to an increase in PSPOs and therefore an increase in potentially discriminatory practices. Not only are those experiencing homelessness, mental ill-health or substance use disorders often unfairly targeted without having committed any harmful behaviour, but in these circumstances, criminalisation cannot address the underlying issues which are complex. It punishes people for behaviours outside their control and which they are unlikely to be able to change via the imposition of an Order – thereby calling into question the proportionality of the approach.[32] Those experiencing mental ill-health, those with learning difficulties and those with complex needs, including unhoused individuals, are also more likely to be indirectly discriminated against by the Orders, as they are more likely to have difficulty complying with conditions, paying fines, or getting proper legal advice in order to defend against the imposition or enforcement of an Order.[33] We also note that as currently drafted, the Bill envisages that the Police would consult with themselves before imposing a PSPO as per s.74 of the 2014 Act which is clearly unsatisfactory and illogical.

d. **Increasing the upper limit of fixed penalty notices for breach of a CPN or PSPO to £500 is disproportionate:** Under the Bill, a person issued with a Fixed Penalty Notice ("**FPNs**") for breaching a CPN or PSPO will be required to pay a penalty of £500. This is a substantial increase from the current penalty of £100. We question the fairness and logic of increasing the penalty – especially given the relatively low-level behaviours, mentioned above, which have led to FPNs being issued. Moreover, His Majesty's Inspectorate of Constabulary and Fire & Rescue Services ("**HMICFRS**") found that: *"The concept of penalty notices is to provide swift, simple and unbureaucratic justice. The system only works efficiently if the penalty is paid within the stipulated 21-day period."*[34] Notwithstanding this,

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The wording alone did not prevent the misuse of PSPOs in this way but we are deeply concerned that its removal signals the Home Office giving enforcement bodies a "green light" to impose them in this manner.

[32] V. Heap, A. Black and C.Devany, 'Living within a Public Spaces Protection Order: the impacts of policing anti-social behaviour on people experiencing street homelessness', (Sheffield Hallam University, Helena Kennedy Centre), p.101. As Toby, a person experiencing street homelessness, who was interviewed for the report, explains, addictions are not something that can be deterred with a policing presence: *"What it is, it's trying to scare us to move us on or trying to scare us to stop us doing something but you won't stop people from doing what they're doing if they've got addictions. People with addictions need more help".*

[33] JUSTICE, 'Lowering the Standard: a review of Behavioural Control Orders', (2023)

[34] His Majesty's Inspectorate of Constabulary and Fire & Rescue Services, 'Getting the balance right? An

JUSTICE understands that FPNs for breaches of PSPOs are routinely left unpaid. Moreover, the groups most likely to be issued with FPNs, including those who are homeless, are least likely to be able to pay the fines and therefore, end up with a criminal record as a result.[35]

29. JUSTICE also understands that 43 councils employ private contractors to issue FPNs and there is at least some risk, that higher penalties might incentivise the increased use of FPNs in inappropriate circumstances, owing to the fact that private contractors have been found to receive commission and/or be entitled to legal cost awards.[36]

30. In addition to the points raised above, we are concerned that any proposal to expand the existing measures under the 2014 Act will worsen an already deficient appeals system, infringing a person's procedural rights under Article 6. The current system to appeal the imposition of a CPN or PSPO and/or resulting enforcement measures, is unfit for purpose. We consider that the proposals to increase the use of Orders will make the situation untenable, with severe impacts on the ability of recipients to defend themselves. Those subject to a CPN have only 21 days to challenge the Order at the Magistrates Court. All too often, recipients are provided with no support or guidance to do so, although we note good practice in certain areas. Those wishing to challenge a CPN or PSPO often face considerable barriers in identifying what an Order means, how to challenge it and where to go for advice. There is no functioning system of legal aid and parties are often left unrepresented, against legal counsel and thereafter facing adverse costs if their case fails. To challenge a PSPO, parties must appeal to the High Court – an altogether more complex process. There is no merits-based appeal route[37] and only two challenges of PSPOs have been brought since 2014. Both have been unsuccessful.

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inspection of how effectively the police deal with protests' (2021), p.140.

[35] Similar patterns also resulted from the use of FPNs to punish breaches of Covid-19 measures. See, Joint Committee on Human Rights: 'The Government response to Covid-19 : fixed penalty notices' (2021)

[36] Manifesto Club, 'Private Enforcement Corrupts the Courts', 2023

[37] See Anti-Social Behaviour Crime and Policing Act (2014), s.66 which sets out that interested persons (those who live in, work in or regularly visit the area covered by the Order, can appeal to the High Court within 6 weeks of the Order being made on the basis that that the local authority did not have power to make the order or variation, or to include particular prohibitions or requirements imposed by the order; or (b) that a requirement under the statute was not complied with in relation to the Order

31. **We do not consider that the current safeguards envisaged by the Bill provide enough protection against these problems, given that many of the issues identified here, pre-date the Bill**. The use of such powers should not be expanded until measures have been introduced to address the existing issues relating to non-compliance with human rights.

"Nuisance Begging" and "Nuisance Rough Sleeping" – Clauses 46 - 72

32. **The provisions regarding "*nuisance begging*" and "*nuisance rough sleeping*" risk breaching Article 14 and Articles 8, 9, 10 and/or 11 ECHR on the basis that they unfairly discriminate against those experiencing homelessness and poverty. We consider that they will fail to address anti-social behaviour and therefore any human rights breaches arising out of them cannot be justified on the grounds of proportionality.** JUSTICE considers these measures a further example of the Government targeting what they perceive as "problem people", rather than making genuine efforts to prevent the underlying causes of homelessness and anti-social behaviour e.g., poverty, lack of affordable homes, under-funded public services.

33. As set out in response to the previous question, those experiencing homelessness are already unfairly discriminated against via the use of existing Orders. They experience substantial interference with their right to a private and family life under Article 8. As explained above the use of measures under the 2014 Act can also give rise to interferences with Articles 9, 10 and 11 ECHR owing to the wide range of conditions that they can impose. **The lack of appropriate investigations and appeal process gives rise to concerns about procedural fairness and the right to fair hearing under Article 6.** These concerns are exacerbated in light of the proposals which directly target those experiencing homelessness and poverty; are extremely broad in nature (amounting as they do to 6 new measures) and can result in imprisonment for breach. This is in spite of the fact that street homelessness, in and of itself, should not be construed as harmful.

34. JUSTICE considers that the proposed measures are likely disproportionate. As explained in our Report, the introduction of new Orders should be founded upon a robust evidence base which demonstrates why they are needed, what harm they will address, and why they will work. This is reflective of the special status of Orders that can lead to a person being found guilty of a criminal offence, upon a civil standard of proof and without ever attending a court. This is extremely important in the context of the proposed measures which we consider are

extremely broad, vague and subject to abuse. For example, the statutory definitions for "nuisance rough sleeping" and "nuisance begging" are incredibly wide, and based on subjective assessments. Begging is considered by the Bill to be "nuisance begging" if it causes, or is reasonably likely to causes someone "*harassment, alarm or distress*" or a person reasonably believes that they or any other person may be harmed or any property may be damaged.[38] The areas listed in the Bill where nuisance begging can take place are incredibly broad and in particular in dense cities there are likely to be few areas not covered by the provisions.[39] Nuisance rough sleeping orders may be imposed to prevention orders may be imposed to prevent someone doing "*something that is a nuisance*"[40] which is defined as anything that: causes or is merely capable of causing, "damage, disruption, harassment or distress"; creates a health, safety or security risk; or prevents the determination of whether there is a health and safety risk.[41] Distress is defined to include "*the display of any writing, sign, or other visible representation*" that is "*insulting*".[42]

35. Given these broad definitions the measures could well be seen to amount to a blanket, or near blanket, prohibition on begging and rough sleeping despite Government stating that it does not.[43] An individual will not unlikely to be able to "freely choose another place to sleep, or beg"[44] without risking being made subject to another direction, notice or order.

36. The long-lifespan of the Orders (3 years for "nuisance rough sleeping" and 5 years for "nuisance begging"), along with the fact that a person can be imprisoned for breach of the direction / notice / order further evidences the severe interference that the new measures can have on a person's rights under Article 5 and 8 ECHR.

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[38] Clause 57(3).

[39] These include within 10 metres of an ATM, ticket or vending machine and within 5 metres of the entry or exist of any retail premises (Clause 57(2)).

[40] Clause 61(2).

[41] Clause 69(4).

[42] Clauses 57(4) and 69(5).

[43] Home Office and Ministry of Justice, "Criminal Justice Bill – European Convention on Human Rights Memorandum", para 183.

[44] Home Office and Ministry of Justice, "Criminal Justice Bill – European Convention on Human Rights Memorandum", para 176.

37. Any infringement of a right must be proportionate, and a careful assessment must take place to justify it. This includes an evaluation of the specific harm posed by a person (or group) to another, the nexus between that harm and the proposed condition; the likely effectiveness of the measure; the availability of other, less intrusive measures; and the gravity and scope of the infringement on the recipient's Convention rights. This assessment is particularly important in the context of Orders imposed by executive authorities.[45] However, the Government has failed to provide evidence establishing the nexus between homelessness and/or begging and public safety and rates of anti-social behaviour. In fact, research shows that those experiencing homelessness are likely to be victims of anti-social behaviours themselves. Multiple case studies taken from across the country demonstrate this. A study demonstrated that in a 12-month period, 77% of those experiencing street homelessness had been victims of some form of violence or anti-social behaviour, and three in ten had reported being deliberately hit or kicked.[46] Many of the contributors we spoke to for our Report, including bodies that represented victims of anti-social behaviour, explained that the preoccupation with targeting this population, in the absence of them causing any harm, actually detracts from the 'real culprits' of antisocial behaviour – most of whom do not fit this demographic.

38. JUSTICE considers that the new measures are highly unlikely to achieve their stated aim of preventing or reducing "*crime, disorder and the social ills associated with nuisance rough sleeping and begging*". Individuals experiencing street homelessness are far more likely to be suffering from multiple disadvantage. Only when the underlying social and economic causes of homelessness are addressed – such as poverty, mental ill-health, domestic abuse – will it be prevented. Whilst the government purports that the new measures are "rehabilitative", we are unconvinced. Vital support services, such as those addressing mental ill-health and substance use disorders are chronically under-funded and unavailable in many areas. Enforcement bodies that we spoke with for our Report unanimously agreed that the proper function of the State should be to provide wraparound support to those with complex needs and those that are homeless. However, they also explained that years of cuts to local

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[45] JUSTICE, 'Annex 2: Advisory Opinion on the he Human Rights Implications of Behavioural Control Orders'. (2023), para 106.

[46] M. Whiteford, 'New Labour, Street Homelessness and Social Exclusion: A Defaulted Promissory Note?', (published online 2012). J. Harding and A. Irving, 'Anti-Social Behaviour among Homeless People: Assumptions or Reality?' (2014).

government funding had limited their ability to re-direct individuals appropriately, under the existing regime of Orders. It is therefore irrational to assume that the current service levels will be able to cope with the increased demand caused by the new measures, short of significant investment. Even then, and for reasons set out above, those with complex needs face significant barriers in complying with conditions. Finally, the penalty for breaching the measures is one month's imprisonment. Not only are short-term prison sentences costly, but they are also ineffective and can have an adverse impact on re-offending. Given the shortages in prison space, there are serious questions as to the workability of these measures.

39. We also consider that the new measures are unnecessary. The 2014 Act currently provides for a range of extremely broad powers that can be used to tackle anti-social behaviour and alarming or distressing behaviours and are currently employed against those experiencing homelessness – often without adequate justification. In fact, our Report found that enforcement bodies are often left confused by the volume of Orders currently available under the 2014 Act. The different statutory tests, processes for enforcement and appeal routes have caused challenges for enforcement. We came across multiple examples whereby Orders had been applied wrongly. In response to an FOI request submitted to a local authority regarding their use of PSPOs, JUSTICE was advised that the power "was still relatively new" and therefore they were still adapting their processes, despite PSPOs having been in operation for 9 years.[47] Far from requiring more powers, it is clear that enforcement bodies would benefit from the existing orders being streamlined and training put in place to support their appropriate use.

40. **We consider that these measures are likely to be non-compliant with human rights and must be abandoned.** Rather than creating new, unworkable and draconian Orders which unfairly stigmatize society's most vulnerable, JUSTICE considers that the Government should focus on ensuring that existing Orders are fit for purpose and being implemented as Parliament originally intended: to tackle genuine instances of anti-social behaviour that are causing demonstratable harm, whilst investing in services and earlier interventions "up-stream" to address the root causes of it.

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[47] JUSTICE, 'Lowering the Standard: a review of Behavioural Control Orders', (2023), para 3.125.

Expanding the lawful purposes for which the police can access DVLA driver licence records – Clause 27

41. Clause 27 would replace Section 71 of the Criminal Justice and Court Services Act 2000, allowing the Secretary of State to create regulations which grant police digital access to DVLA records for "*purposes and circumstances as are related to policing or law enforcement*". Currently, police forces can only directly access and search DVLA data in relation to road traffic offences, and must phone the DVLA in relation to any other offences.

Concerns

42. There is no mention of facial recognition technology on the face of the Bill, nor in the Explanatory Notes. However, it has emerged during the Committee Stage of this Bill that this *may* be the intended purpose, or one of the intended purposes, of Clause 27. We say "may" because the position is unclear: Chris Philp, Policing Minister, described the power as one "*to allow police and law enforcement, including the NCA, to access driving licence records to do a facial recognition search, which, anomalously, is currently quite difficult*."[48] However, in a later Committee session, he stated "w*e are not passing clause [27] expressly to authorise the use of DVLA data for facial recognition or indeed for any particular law enforcement purpose*."[49]

43. JUSTICE is troubled by this lack of clarity, since it is only in light of the intended use and purpose of Clause 27 that it can be adequately scrutinised during the legislative process. That scrutiny is particularly important for new powers granted to law enforcement, here to have access to bulk data. If the intended use of that access to bulk data is to then process the data through algorithmic tools, like facial recognition technology, this needs to be clear so that the proportionality, responsibility and safety of such use can be understood and debated. JUSTICE makes three observations on such use:

44. **Privacy** - Faces are personal biometric data. The protection of personal data is of fundamental importance to an individual's enjoyment of their right to respect for a private life under Article 8 ECHR (*S and Marper v United Kingdom* [2008] ECHR 1581).[50] In the facial

[48] Criminal Justice Bill, Committee Stage (first sitting), HC Deb (12 December 2023) col 14.

[49] Criminal Justice Bill, Committee Stage (eighth sitting), HC Deb (16 January 2024) col 230.

recognition case of *Bridges v Chief Constable of South Wales Police* [2020] EWCA Civ 1058, the High Court held, and the Court of Appeal later agreed, that Article 8 is engaged "*if biometric data is captured, stored and processed, even momentarily*". There is no question that public safety and law enforcement are legitimate aims which can be properly engaged when lawfully interfering with the right to privacy. However, having a legitimate aim alone is not the test – interference also has to be in accordance with the law, as well as necessary and proportionate.

45. First, it is not clear that processing of biometric data here will be "*in accordance with the law*" due to the lack of clarity in Clause 27. In accordance with the law is not simply a requirement for a legal gateway in domestic law, but rather "*it also ensures that the law is not so wide or indefinite as to permit interference with the right on an arbitrary or abusive basis*."[51] Simply permitting bulk data access for "*purposes and circumstances as are related to policing and law enforcement*" is concerningly wide, and there is no indication of the scope or breadth of the intended Code of Practice.

46. Second, JUSTICE further questions if the power is necessary and proportionate. This requires considering whether less intrusive measures could be adopted without unacceptably compromising the objective, and whether a fair balance has been struck between the rights of the individual and the interests of the community.[52]

47. It is concerning that the Home Office's Equalities Impact Assessment ("**EIA**") of the Bill clearly signals a step change in the kind of use law enforcement will make of DVLA records and in the volume of such use. Despite stating that "*the Department does not expect significant changes to the number of times driver licence data is accessed*", the EIA goes on to say "*the legislation will also pave the way for changes to the purposes for which DVLA data can be used when provided automatically. It is likely that this will reduce the some 1,000 requests made by police forces directly to the DVLA. The Department estimates that this measure will be used up to around 100,000 per year*."[53] This 100-fold potential increase

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[50] See the helpful analysis of biometric data and human rights law in Matthew Ryder KC, *Independent legal review of the governance of biometric data in England and Wales* (Ada Lovelace Institute, 2020), pp22-23.

[51] *Catt v Commissioner of Police of the Metropolis* [2015] UKSC 9, Lord Sumption at para 11.

[52] Proportionality test as set out in Bank Mellat v HM Treasury (No 2) [2013] UKSC 39

[53] Home Office measures in the Criminal Justice Bill: Equalities Impact Assessment (January 2024), p14.

requires immediate explanation, and will directly impact our understanding of the proportionality of the provision.

48. We consider the concerns of the Scottish Biometrics Commissioner on these plans are well expressed:

> "*The police in the UK [...] already have the technological means to view a person's driving licence image when dealing with a road traffic matter [...] However, none of this can be done in the form of a routine bulk wash of the images of innocent citizens against images derived from the scene of a minor crime.* ***Doing so in my view would place citizens in a permanent police 'digital lineup' and would be a disproportionate breach of privacy***."[54]

49. It is troubling that there is not more in the Bill and its documents to explain, rationalise, and otherwise allow Parliament – and civil society – to conduct a proportionality analysis. However, in the current state of the Bill and its accompanying EIA, with so little detail given about the intended uses of Clause 27, JUSTICE agrees.

50. **Equality** - Facial recognition technology is powered by the data on which it is trained. It is widely known that there have been various examples of facial recognition software which produce biased outputs, with examples in the literature particularly highlighting the potential for inaccurate results for women and those with darker skin.[55] Of course, in the context of facial recognition technology used by the police and law enforcement, the potential impacts can be significant: being wrongly suspected of or investigated for criminal offences. Despite these high stakes, there is no evidence that there has been any consideration by the Government of whether Clause 27, and the intended purposes to which it will be used, will have any disproportionate impact on those with protected characteristics, such as women and minoritised ethnicities. Again, JUSTICE is concerned, given the discussion of facial recognition technology during the Committee Stage, with the absence of any clear explanation, justification and/or reassurance, given in the EIA or elsewhere, considering the clear potential for Clause 27 to have discriminatory effects.

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[54] Dr Brian Plastow, 'Is Scotland 'sleepwalking' towards its place within a UK surveillance state in 2024?', Scottish Biometrics Commissioner, 8 January 2024.

[55] For a comprehensive explanation of bias in facial recognition technologies, see David Leslie, *Understanding bias in facial recognition technologies: an explainer* (The Alan Turing Institute, 2020).

51. **Rule of Law** – Finally, the fact that facial recognition technology has emerged as a purpose of Clause 27, and not been clear on the face of the Bill or in the accompanying documents, is concerning from a rule of law perspective. It is only when law-making is done with clarity that the rule of law is upheld in the legislative process, especially when rights of equality and privacy are engaged.

52. In the wake of the Horizon scandal, and with emerging technologies advancing at such a rate that the UK Government thinks fit to create a whole new Safety Institute for Artificial Intelligence, it is stark that this provision has been so poorly and opaquely presented to Parliament. JUSTICE considers there should be a concerted effort across society to be transparent about the intended use of data-driven technologies, and proactive in strengthening protections against unsafe, unreliable or unfair technology in the hands of the state. The way Clause 27 has been drafted and introduced, however, does the opposite. Instead, it seeks to provide the state with extensive access to bulk data, with no clarity in the purpose or the use of that data, algorithmic or otherwise.[56]

53. **We consider that the Government has not been clear about Clause 27's intended, which is in our view incompatible with democratic and transparent law-making. In its current state, the provision risks breaching the right to privacy and shows inadequate consideration of equalities impacts. Without significant further clarification and justification and detail, JUSTICE recommends the Clause is abandoned.**

Serious Crime Prevention Orders – Clauses 42 - 45

54. Clause 42 of the Bill amends the Serious Crime Act 2007 to allow Serious Crime Prevention Orders to include electronic monitoring requirements**. In our view this may constitute a disproportionate interference with an individual's article 8 rights.** The use of electronic monitoring constitutes a significant intrusion upon a person's private life. Electronic monitoring is proven to have significant practical and psychological impacts on those subject to it, including leading to increased financial and emotional stress, difficulties engaging in relationships, sleeplessness and feelings of dehumanisation and stigmatisation.[57] Our report on Behavioural Control Orders found that there is a lack of evidence to "*quantify the scale of*

[56] For example, see the recently added provision in the Data Protection and Digital Information Bill which permits DWP surveillance over all bank accounts inked to any kind of social security, Clause 128 and Schedule 11 of the DPDI Bill

[57] Liberty, 'Written Evidence to the Public Bills Committee on the Public Order Bill' (2022)

the impact [of electronic monitoring and polygraph testing] *on reoffending and public safety*",[58] and the utility of these measures have been the subject of academic debate.[59] In this context, electronic monitoring may constitute a disproportionate interference with an individual's Article 8 ECHR rights in this context.

55. JUSTICE is **particularly concerned about the human rights implications of the electronic monitoring proposals in conjunction with the proposals to allow imposition of Serious Crime Prevention Orders, on those who have been acquitted by the courts**. Where the imposition of an Order entails grave consequences, it can amount to imposition of a criminal charge under Article 6.[60] In such circumstances, additional safeguards ordinarily available under the criminal limb of Article 6, in particular a standard of proof which is higher than the balance of probabilities standard applicable in civil cases, should apply. Given that the Supreme Court has held that curfews facilitated by the use of electronic monitor can constitute imprisonment at common law, [61] clearly the consequences of imposing SCPOs with electronic monitoring would be severe. However, the Bill will allow SCPOs to be imposed following an acquittal if the court is merely "*satisfied"* the person has been involved in serious crime (whether in England and Wales or elsewhere)".[62]

(19 February 2024)

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[58] In the context of including polygraph testing and electronic monitoring as positive requirements within Sexual Risk Orders and Sexual Harm Prevention Orders, see Home Office, 'Impact Assessment: Police, Crime, Sentencing and Courts Bill' (30 June 2021), p.51

[59] See for example, Scottish Government 'Electronic monitoring: uses, challenges and successes', (April 2019)

[60] JUSTICE, 'Annex 2: Advisory Opinion on the Human Rights Implications of Behavioural Control Orders' (2023), pps.10-16;

[61] The Queen (on the application of Jalloh) v Secretary of State for Home Department [2020] UKSC 4

[62] Clause 45(2).