Neighbouring on the Oppressive:

The Government's 'Anti-Social Behaviour Order' Proposals

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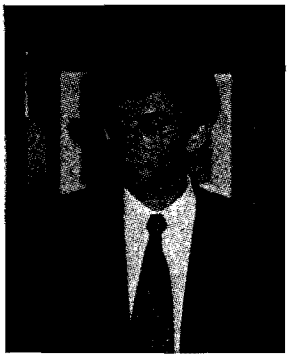

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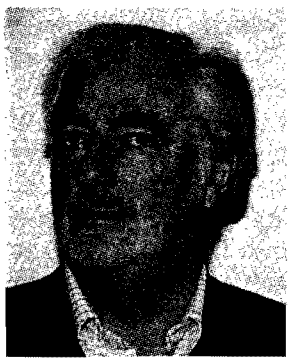

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It has been our hope that the new Government would take a more sober and realistic approach to criminal justice issues than has prevailed in recent years: one that concentrates on what really might be helpful in alleviating the impact of crime, that avoids posturing stances, and that takes care that the fundamental rights of citizens are not violated. While the Labour Party has long spoken of being tough on crime as well as its causes, we had hoped that, in Government, this would be the toughness of realism and fundamental decency that a free society requires.

Harassing behaviour directed against neighbours is clearly a serious problem, acutely affecting the lives of many citizens, especially in blighted neighbourhoods. Vulnerable residents of these neighbourhoods, particularly the elderly and members of ethnic minorities, bear the brunt of these depredations disproportionately. Some legislative steps have already been taken to address this problem: particularly, the authority to issue injunctions contained in the Housing Act 1996, and the civil and criminal measures in the Protection from Harassment Act 1997. There have also been some effective local policing and community initiatives operating within the existing law to deal with problems of this kind on so-called 'sink' housing estates.1 Additional legislative and policy changes may yet be needed to cover situations not sufficiently addressed by these measures. But such changes need to be carefully targeted to the actual problems involved.

Unfortunately, the Government's latest legislative proposal is neither sensible nor carefully targeted. It takes sweepingly defined conduct within its ambit, grants local agencies virtually unlimited discretion to seek highly restrictive orders, jettisons fundamental legal protections for the grant of those orders, and authorises potentially draconian and wholly disproportionate penalties for violations of them. While the Government claims that this measure is aimed at those who terrorise their neighbours, its actual reach is far broader and

covers a wide spectrum of conduct deemed 'anti-social', whether criminal or not. We think it unfortunate that one of the Government's first major proposals on criminal justice policy is of such a character.

The basic outline of the Government's proposal was put forward in June 1995, while the Labour Party was still in opposition, in a consultation document entitled *A Quiet Life*. We were much disturbed by that proposal, which seemed already to confuse irritating neighbours with criminals, and we outlined our objections in an article published in October of that year.2 The newer version of the proposal was sketched in a September 1997 consultation paper,3 and now appears as part of the Government's Crime and Disorder Bill. This remedies few of the defects we mentioned - and indeed, makes the scheme worse in some respects.

The Government's scheme, as set out in the Crime and Disorder Bill, contains several distinctive elements:

* It is aimed at 'anti-social behaviour', defined in the most sweeping possible way. This embraces not only repetitive crimes, but a wide range of non-criminal conduct as well. Conduct may be regarded as anti-social even if no-one was actually affected, so long as it was likely to affect people adversely. Thus there is no requirement that the behaviour have a victim.

* When a person is suspected of such behaviour, a senior police officer or local authority official may seek an order against him or her called an 'Anti-Social Behaviour Order' (ASBO). The order is obtained from the magistrates' court sitting as a civil court. The standard of proof is accordingly reduced to the balance-of-probabilities standard applicable in civil cases.

* The court may issue an ASBO requiring that the anti-social behaviour cease. In addition, however, the order may contain a wide range of other directives or prohibitions - including, for example, curfew and exclusion orders. An ASBO runs for a minimum of two years but could run for much longer, or even for indefinite, periods.

* Violation of the ASBO would be a criminal offence subject to severe criminal sanctions. The maximum term of punishment would be five years' imprisonment, and conditional discharges for minor violations are ruled out.

We think the whole proposal is problematic for a society that takes liberty and the rule of law seriously. Let us explain why.

Definition of the Offending Behaviour

The proposal purports to be a measure aimed at criminal neighbours who engage in a pattern of terrorising their neighbours. However, the conduct involved need not constitute criminal conduct at all. Any behaviour that is 'anti-social' can trigger the issue of the order, and 'anti-social' behaviour is defined in clause 1(1)(a) of the Bill as behaviour 'that caused or was likely to cause harassment, alarm or distress to two or more persons not of the same household' as the person whose behaviour it is. The words 'two or more' are presumably added to keep the territory of ASBOs distinct from that of anti-stalking orders under the Protection from Harassment Act 1997, while the 'not of the same household' requirement is to distinguish ASBOs from remedies against domestic violence. The words 'harassment, alarm or distress' are adopted from the Public Order Act 1986, where two very sweeping and highly controversial public order crimes are defined in the same terms. However, the behaviour triggering the issue of an ASBO need not constitute an offence under the 1986 Act. Offences under the 1986 Act must involve 'threatening abusive or insulting words or behaviour, or disorderly behaviour', whereas the issue of an ASBO has no such precondition. Moreover offences under the 1986 Act are committed only if the harassment, alarm or distress was intentionally inflicted, or else the behaviour took place 'within the hearing or sight of a person likely to be caused harassment, alarm or distress'. Neither of these restrictions applies to the definition of 'anti-social behaviour' in the present proposals. Moreover it is a defence under the 1986 Act that the

behaviour 'took place within a dwelling', while this, needless to say, is no barrier to the issue of an ASBO.

The consequence, unless the sweeping and vague standard of clause 1(1)(a) is substantially narrowed during the progress of the Government's Bill, is that a great deal of non-criminal conduct, and indeed behaviour that is not unlawful by civil law standards either, will be sufficient to trigger the issue of an ASBO. Playing a TV or CD player too loud or too late, failing to control noisy children, trespassing, uttering supposedly defamatory utterances, or even complaining vigorously to neighbours about their behaviour, are examples that might qualify. The expression of dissident political views - for example, through a demonstration or the putting up of posters or banners - could also be covered. There is also a risk that ASBOs could be used in a discriminatory way. In earlier outlines of the proposal a provision was promised barring the police and local authorities from discriminating on grounds of race, religion, sex, sexual orientation or disability in applying for or enforcing ASBOs, but no such provision appears in the Crime and Disorder Bill. Even if the police and local authorities can be trusted to be scrupulous in avoiding discrimination on these grounds - and we are not sure that they can - this is no obstacle to these orders being used as weapons against other unpopular types, such as ex-offenders, 'loners', 'losers', 'weirdos', prostitutes, travellers, addicts, those subject to rumour and gossip, those regarded by the police or neighbours as having 'got away' with crimes, etc. ASBOs are thus capable of being used not only against repetitively criminal actors, but also those with a variety of unconventional lifestyles. Even though the courts may resist the grossest abuses, when these come to their attention, this will not necessarily prevent the police and local authorities from trying, perhaps zealously, to obtain orders against unpopular residents, in an effort to persuade local complainers that they are doing something. The powers are perhaps particularly likely to be employed against teenagers who, possibly for want of an alternative venue, gather on street corners, and whose very presence may serve to irritate and intimidate older residents who live nearby. All this is unpleasantly reminiscent of powers granted in former East Germany to housing block committees - which also had unrestricted powers to regulate residents' lives.

These features would also involve a huge transfer to local officials of the power effectively to criminalise conduct. Until now, British law has remained broadly faithful to the principle that the criminal law should not have its scope determined on a discretionary basis by officials of the executive. Parliament and the courts announce what conduct is to be criminal, and we are all given the chance, thanks to such announcements, to avoid getting entangled with the criminal law. The ASBO proposals threaten to criminalise people's activities by stealth, through the decisions of local officials. It is true that ASBOs will not in themselves be criminal disposals, but civil orders. Nevertheless, they effectively bring people into the grasp of the criminal law on a discretionary basis. Since the definition of anti-social conduct is so sweeping, police officers and local authorities will have wide discretion in determining what counts as an instance of such conduct. To judge by the existing broad interpretation of the words 'harassment, alarm or distress' in the Public Order Act 1986, the courts will have no stricter legal definition to fall back on in deciding whether to issue the order. Once the order is issued, the person covered by it will be in much the same position as if the conduct had been declared criminal by law.4 If anything is likely to force people deeper into criminality it is such a measure, which sends them into a kind of internal exile, under a legal Sword of Damocles, at the behest of the police and local councils, perhaps inspired by local prejudices, and without their necessarily having violated any criminal statute nor having enjoyed the procedural protections of a criminal defendant. It seems astonishing that a Labour Government would wish to give local officials this vast power to create a new breed of outcasts and outlaws, particularly in view of the government's professed wish to remedy the social exclusion bequeathed by 18 years of Tory rule.

Low Standards of Proof

Not only is the offending conduct vaguely defined, but the criteria for proof are inappropriately low. The standard of proof is the civil norm of 'balance of probabilities', rather than the higher criminal standard of proof 'beyond reasonable doubt'. As mentioned, moreover,

there need be no proof than anyone has actually been harassed at all: it suffices for the police to produce evidence that the conduct 'would be likely to cause harassment, alarm or distress'. And finally, it seems that, like other civil orders, the order may, in principle, be granted *ex parte,* i.e. without the defendant having been heard.

Through this proposed procedure, two fundamental due-process protections of English law, those relating to standard of proof and to cross-examination, are jettisoned. Eliminating these protections also goes against the spirit, and probably the letter, of the European Convention on Human Rights (a charter which the Government is now incorporating into English law). Article 6.2 of the Convention has been interpreted as requiring proof beyond reasonable doubt for criminal charges, and Article 6.3(d) declares the right of cross-examination. The government may expect legal challenges to the ASBO legislation under these Articles to begin as soon as the first ASBOs are granted.

The reason offered by the Government for eliminating these protections, which will presumably be the reasons it also offers before the European Court of Human Rights, is that identification of witnesses could result in their intimidation, and the higher criminal proof standard would make it more difficult for ASBOs to be obtained. We find these arguments unconvincing. Serious crimes such as robbery, burglary, or assault are also endemic in some poorer urban areas. This has not, however, been deemed reason for convicting burglars or robbers on hearsay evidence under a reduced standard of proof. Witness intimidation is a growing problem, but there are better-targeted ways of tackling it.5 The European Court of Human Rights defends the rules of witness confrontation and the 'beyond reasonable doubt' standard of proof precisely on the ground that it *should* be difficult for the state to criminalise and punish people. Depriving people of their rights and liberties because of what they are supposed to have done should never be easy. It is scarcely an answer to this to say that ASBOs will be difficult to obtain unless this principle is ignored. Nor, in view of the points we made in the preceding section, is it much of an answer to say that a ASBO is not a criminal disposal. It is quite clear that the government has devised this method of *de facto* criminalising through the civil courts precisely as a device to get round the due process protections of the criminal law. It is a transparent device and will not carry much conviction in the European Court of Human Rights where the question will be whether issuing a ASBO is criminalising people in substance, whether or not the procedure formally goes by that name. (It should be recalled that the Court, in 1996, treated punitive poll-tax proceedings as being criminal for purposes of the Convention's fair-trial guarantees, notwithstanding the fact that the English statute creating those procedures declared them not to be criminal.6)

The low standard of proof compounds the problem of a vague standard of proscribed behaviour. Not only could sweepingly defined 'anti-social conduct' trigger an order, but it may be far from clear that the conduct in fact occurred. It would suffice that a policeman - or the 'professional witnesses' which the scheme also contemplates7 - have observed conduct which would harass hypothetical victims. A law that depends so much on the word of the a policeman or paid witness invites abuse, and should not survive more than a few moments of careful scrutiny.

Scope of the Order

One might expect that a ASBO would simply be an order that the offender desist from the offending conduct. The proposal, however, goes far beyond this. The ASBO could proscribe a wide variety of conduct that is otherwise wholly legal and could by itself harass nobody: anything, indeed, which is thought 'necessary for the purpose of protecting [local people] from further anti-social acts by the defendant.' It could include imposition of a curfew - even if the person involved is an adult.8 It also could contain an exclusion order, barring the person from a particular address or a particular area. Nothing in the proposal would prevent the order from being very burdensome indeed: to require the offending person to curtail his movements drastically, or even to leave his residence (without funds being made available to find alternative accommodation). The burdensome character of such an order would be increased by the duration of the order; the

Bill gives the courts no discretion to issue ASBOs for any period of less than two years, nor to discharge them before two years have passed. In some cases they would be of indefinite duration.

Disproportionate Character of the Penalty

If a ASBO is issued, and its subject disobeys it, criminal penalties ensue. These would be of great potential severity: the maximum prescribed penalty is five years' imprisonment. This is the same as the maximum sentence for, to take but two examples, aggravated vehicle-taking which causes death, and violent disorder when it is tried on indictment. The government also removes the power to issue a conditional discharge, so that the court loses one key method for dealing with technical or de minimis infractions.

It is a fundamental principle of justice that sentences should be proportionate with the seriousness of the offence. Indeed, that principle is embodied in English law, in the provisions of Criminal Justice Act 1991 which require that custodial sentences be imposed only for serious offences, and that the duration of confinement be 'commensurate' with the gravity of the offence. Having reasonable statutory maxima helps ensure that disproportionate sanctions are not imposed. It may be that minor criminal offences, when perpetrated repeatedly on a victim or group of victims over a period of time, constitute a course of misconduct of a more serious nature. But how much more serious? It strains credibility to assert that up to five years' custody could be a proportionate sanction in any case in which the defendant could not instead have been tried under the existing law for an ordinary criminal offence, such as one of the graver forms of aggravated assault.

What makes the problem of disproportionality so much more troublesome is that the conduct giving rise to the issue of the ASBO could be of a quite minor character, or not even criminal at all. The September 1997 Consultation Paper emphasised that it is not the gravity of the underlying conduct that should determine the sanction, but the mere fact of violating the order itself: in the paper's words, 'it should be regarded as a particularly serious matter that the terms of the Order have been breached whatever the conduct that led to the breach.'9 We do not yet know whether the judges will adopt this approach. But if they do, we regard it as contrary to fundamental principles that an accused should be punished for the mere fact that he does not respect the law, irrespective of the gravity of his crime.10

Three Hypothetical Cases: Vicious Vic, Loud Harry, and the Bus Stop Kids

To illustrate the proposal's potential effect, let us consider three hypothetical cases. The first one is of an individual we might name Vicious Vic. He is the kind of person at whom this measure ostensibly is aimed. He terrorises his neighbours, by being drunken and aggressive in public, by targeting some victims for repeated physical and verbal abuse, and by threatening anyone who complains with drastic retribution. Against such an individual, a variety of measures exist already. Some are civil: if he lives in a housing authority, he may be evicted; injunctions may also be issued against his behaviour. Criminal sanctions also exist, since his conduct already violates the criminal laws against assault, harassment, and so forth. The only reason why ASBOs could conceivably be needed to deal with Vicious Vic is that it is difficult to enforce the criminal law against him. But, as we already explained, it should be difficult to convict and punish citizens - the due process protections *should* be great. It could be said that Vicious Vic makes the matter even harder because he tends to silence the witnesses and abuse the protections which the law bestows upon him in a calculated and cynical way. The answer, however, is not to withdraw the protections but to strengthen the will of witnesses and the competence and resources of the police. The government never ceases to remind us that with rights come responsibilities, and this applies to Vicious Vic's neighbours as much as to Vicious Vic himself. The way forward lies with the development of schemes, of a type already being piloted in some areas, to provide mutual protection against intimidation for complainants and witnesses, and to devote more resources

to community policing and similar confidence-building measures.

Alongside Vicious Vic, we might consider another hypothetical individual, whom we might call Loud Harry. Unlike Vicious Vic, he does not commit or threaten to commit criminal offences against anyone. He simply is a nuisance to his neighbours. He keeps his premises in a mess, cooks obnoxious-smelling foods, plays his music too late and too loudly, is argumentative and abusive, makes sexist remarks and gestures to female residents. Under the Government's proposal, Harry could be made subject to a ASBO, since he acts in a purportedly 'anti-social' way that could well cause distress to some of his neighbours. If a ASBO is sought against him, he will have reduced opportunity to contest it: the police or a 'professional witness' need merely testify that the conduct is occurring and could disturb neighbours; no complainant need appear. Nor need he be present: the order may be obtained in his absence. He thus would have no opportunity of cross examination, and reasonable doubts whether the behaviour is occurring would not clear him. Thus there is real risk that Harry is innocent of some or all of the misbehaviour charged, as well a real question of whether it is misbehaviour of a kind in which the criminal law ought ever to be involved.

The order, when issued, need not concern itself merely with the alleged misconduct that induced it - it could extend to barring Loud Harry from otherwise wholly permissible conduct. He could be prohibited from playing music at all, or barred from conversing with neighbours. Perhaps he could subjected to a curfew that restricted when he could leave his flat; or conversely, evicted without compensation. Should he violate the order, he could be imprisoned for up to five years. The trivial nature of his initial misconduct would be no reason for alleviating the punishment, since it is the violation of the order in itself that is deemed to make his violation serious.

Worse still, Harry would not even have to persist in the tiresome behaviour which initially gave rise to the order, in order to be punished severely. This is because, as just noted, the ASBO is not just limited to a cease-and-desist order, but may extend far beyond the original conduct involved. If he violates the order in *any* respect, he is subject to the proposal's potentially harsh punishments. Suppose, for example, that Harry stops being abusive after the order issues, but that the ASBO also seeks to confine him to his flat or effectively to evict him. If he does not abide by those latter burdensome requirements (as well he might not) then he faces potentially severe criminal sanctions even if there is no evidence of continuing disruptive behaviour on his part. This technique - of fashioning the order so that it virtually invites infringement - could be used against neighbours who are simply deemed undesirable.

In its application to Loud Harry, this measure clearly is not one addressed to criminal neighbours. It would function, instead, as an Undesirable Persons Act, permitting severe restrictions on normal civil liberties and draconian penalties to be imposed on those deemed engaged in undesirable lifestyles. It has no place in a free society.

Finally, let us imagine a third case, this time one concerning a group of teenage friends living in a run-down council estate, the Bus Stop Kids. They need a place to congregate and, lacking any other recreational facility, meet at a local bus shelter. They commit no serious criminal infractions there, but do take the facility over, drop litter and kick cans, sit on local residents' garden walls, behave boisterously and talk loudly, and show by words and demeanour that others are not very welcome. Their conduct elicits protests from other residents, who put pressure on the local authority, or the police, to evict the Kids from the shelter and its environs, so that it can revert to its normal and intended use.

In these circumstances, resort to a ASBO would become all too tempting a shortcut, for it would show the authorities as having taken resolute action, and what is more against the whole group rather than against named individuals, thus circumventing the need to prove anything at all against a particular Kid. But this solution is anything but a constructive one. It does nothing to alleviate the problem: the absence of a facility at the estate for teenagers to meet. And it will make criminals out of these youngsters. Some of the Kids may be intimidated by the Order; but at least a few are likely to defy a directive

which, in their eyes, expels them unfairly from their turf. Those Kids will, by their mere act of continuing to use the shelter to meet - or indeed by their mere act of meeting or leaving their homes after dark, if the Order so provides - be guilty of a serious criminal offence. The measure will have criminalised a group of merely rowdy youths. And here, unlike in the Loud Harry scenario, no ill will on the authorities' part is presupposed. The police or local officials would be acting merely in response to local demands to 'do something' about the Kids, and the ASBO would be all too easy a weapon to use. Sadly, it would do more harm than good. It is one thing to show Zero Tolerance of crime. It is quite another to show Zero Tolerance of exasperating youngsters irrespective of their crime.

Questions of Workability

We doubt also the workability of the proposal. Dealing with nuisance neighbours requires a careful targeting of particular kinds of problematic behaviour, and development of enforcement routines. A variety of approaches, relying chiefly on the civil law, should be experimented with. These should build on the measures already authorised, especially through the Housing Act 1996 and the Noise Act 1996. Where additional criminal enforcement powers are contemplated, they should be devised carefully. It might, for example, be useful to create a new crime of course-of-conduct harassment, involving the repeated victimisation of the same persons. Such a crime, however, should be based at least in part on conduct that is criminal in itself, and at least some of the incidents should be of an aggravated character. Sentencing for such an offence should be subject to the proportionality requirements of the Criminal Justice Act 1991.

Without carefully worked-out, well-targeted responses, however, even a minimum of success is unlikely. The ASBO proposal - precisely because of its sweeping character - is likely to impede the development of such responses. What it does is give local officials and courts a wholly unstructured discretion about what to do about disruptive or tiresome neighbours. Given such wide powers, each affected locality is likely to go its own way - with some affected localities making little use of the new powers, and others occasionally resorting to drastic interventions. With the grant of these excessive powers, there will be little incentive to develop more modest, proportionate, and constructive techniques.

Can the Faults in the Scheme be Remedied?

Could this scheme be remedied? Or is it so fundamentally flawed that it simply should be abandoned - in favour of more modest and carefully targeted measures? Certain changes could be made to alleviate the scheme's very worst features. Thus:

(1) The conduct triggering an order can, under the present proposal, be wholly legal behaviour. A requirement could, however, be added that at least some of the conduct involved must constitute a criminal offence.

(2) The proposal covers 'antisocial' conduct in the most sweeping and vague terms. Instead, reasonable effort could be made to specify the generic types of misconduct being addressed.

(3) Standards of proof need not be so low. At minimum, it could be required that a conviction be obtained (with the normal criminal standard of proof and with the opportunity for cross-examination) for at least some of those aspects of the conduct that are criminal (see (1)). Moreover, there needs to be a showing that someone actually has been harassed, not merely that a hypothetical person might be.

(4) The scope of the ASBO should be limited to a requirement that the person cease and desist from the disturbing conduct that triggered the order. Comprehensive powers to order curfews, exclusions, or anything else, should be eliminated.

(5) In case of a criminal prosecution for violation, the normal proportionality requirements of ss. 2 and 6 of the Criminal Justice Act 1991, as amended, should apply. For purposes of assessing proportionality, it is the seriousness of the underlying conduct triggering the order that should count, and not the fact of a violation of the order *per se*. In addition an element of mens rea should be introduced into the violation offence.

Even with these changes, however, the scheme would remain a troublesome one. It would still give local officials an extensive (albeit not *quite* so sweeping) discretion effectively to criminalise a wide range of now-legal conduct. It still could be used to harass unpopular individuals, even when their conduct is not seriously injurious to neighbours. And it is unnecessary: legislation dealing with the problem of criminal neighbours should build on the civil and criminal measures that are available already. Any new remedies (and we mention some possibilities above) should be developed carefully over time - with extensive monitoring of what specifically is needed. Blunderbuss solutions do not help, and serve only to politicise what are very real problems for those who live in poorer neighbourhoods. Our judgment is that this scheme should be abandoned altogether.

1. See Sheridan Morris, *Policing Problem Housing Estates,* (Police research group, Crime detection and prevention series, paper 74, 1996).

2. 'Overtaking on the Right', *New Law Journal*, October 13, 1995.

3. *Community Safety Order: A Consultation Paper* (Home Office, September 1997)

4. Presumably the reason why a conditional discharge for breach of an ASBO has been ruled out in the Bill is that an ASBO is already strikingly similar to a conditional discharge for a crime - except that for an ASBO to be issued no crime need have been committed, and no criminal trial need have taken place! This reinforces our sense that an ASBO effectively criminalises those against whom it is issued.

5. There is a specific offence of witness intimidation in s. 51 of the Criminal Justice and Public Order Act 1994. Complementarily, many police forces have developed sophisticated witness protection schemes and some are piloting schemes to strengthen social solidarity against intimidators. See also the modest but constructive proposals in *Witness Intimidation: Strategies for Prevention* (Home Office paper No 55, 1997)

6. *Benham v. United Kingdom,* Judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III.

7. The September 1997 consultation paper proposes the employment of professional witnesses to help obtain ASBOs.

8. The Criminal Justice Act 1991 authorises imposition of a curfew on an adult offender as a sentence for a criminal offence, and the power now extends to those aged 10 to 15 inclusive under the Crime (Sentences) Act 1997. This power, however, is limited by the proportionality provision of Section 6 of the 1991 Act, requiring such sanctions (as other non-custodial sanctions) to be commensurate with the gravity of the act. The ASBO, by contrast, is formally to be classed as a civil measure (notwithstanding the criminal-law consequences of violation), and is not to be subject to the criminal law's proportionality requirements or any comparable constraints.

9. *Community Safety Order,* page 4.

10. It is true that the law on Contempt of Court already allows people to be committed to prison for violation of orders issued by the civil courts. However, there must exist a civil cause of action for such an order to issue, and the maximum duration of confinement for a violation of the order is two years. Here, no cause of action need exist - as the conduct triggering the order need not be either criminal or tortious. And the maximum sentence for infringing the order is five years instead of two.