SCYJ WRITTEN SUBMISSION
TO THE JOINT COMMITTEE ON HUMAN RIGHTS ON THE
ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL

ABOUT SCYJ
The Standing Committee for Youth Justice (SCYJ) is a coalition of over 30 voluntary sector organisations, which advocates a child-focused youth justice system that promotes the integration of such children into society and thus serves the best interests of both the children and their communities. For further information please contact SCYJ’s Policy and Parliamentary Officer, Ali Crossley, at a.crossley@scyj.org.uk

SUMMARY
The Standing Committee for Youth Justice (SCYJ) believes that the Anti-social Behaviour, Crime and Policing Bill raises wide-ranging and significant human rights issues. We are particularly concerned about the implications for children of several aspects of the Bill, including:

- The use of imprisonment as a sanction for children breaching the new orders;
- The proposed change of the definition of ASB to ‘causing nuisance and annoyance’;
- The removal of the criminal standard of proof test of ‘beyond reasonable doubt’;
- The lack of a pre-order assessment of mental health and welfare needs;
- The ‘naming and shaming’ of under 18’s involved in ASB proceedings; and
- The mandatory eviction clause.

HUMAN RIGHTS ISSUES RAISED BY THE BILL

DEFINITION OF ANTISOCIAL BEHAVIOUR (clause 1)

1. SCYJ is seriously concerned that the adoption of the lower threshold of ‘conductor capable of causing nuisance and annoyance’ as the test for the injunction to be granted will have a particularly detrimental effect on children.1 The existing test – ‘harassment, alarm and distress’ - is already low and has the scope to encompass a wide range of

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behaviour. Lowering the threshold risks children being made subject to such orders simply for being ‘annoying’, thus widening the net of children subject to ASB orders. Frontline professionals have informed us that ASBOs are already imposed inappropriately on children for mere ill discipline, such as swearing loudly in large groups; they question why the threshold needs to be lowered further. In recent months, a range of children’s charities, ACPO and several Police and Crime Commissioners have warned that the new threshold risks being ‘too subjective’ and could ‘unnecessarily criminalise’ children.²

2. In its 2008 report on the UK, the UN Committee on the Rights of the Child expressed concern that the ASBO – with the higher threshold – was potentially a breach of Article 15 (1) of the UN Convention on the Rights of the Child (UNCRC) – ‘rights of the child to freedom of association and to freedom of peaceful assembly’. This, together with concerns that ASBOs merely facilitate the entrance of children into the youth justice system, led the Committee to call for an independent review of ASBOs, with the aim of stopping their imposition on children.³ The definition will catch behaviour within the scope of Articles 8, 10 and 11 of the European Convention on Human Rights (ECHR) which is of such a low-level (it need not have caused any harm if it is simply capable of being ‘annoying’) that the legislation is likely to be disproportionate, and it is so wide and subjective that it falls short of the principle of legal certainty, leading to restrictions on the liberty of many people without them even knowing they have committed a civil wrong.

THE BURDEN OF PROOF (clause 1)

3. It is unacceptable that granting an injunction will only require the civil standard of proof – balance of probabilities – to be met, rather than the more rigorous, currently-used criminal standard test, ‘beyond reasonable doubt’. We view this lower test as all the more problematic given that imprisonment is available as a sanction for breach by children.⁴ This, along with the fact that the orders can be imposed when the court considers them ‘just and convenient’ (rather than ‘necessary’, as currently), also makes it less likely that the orders will be considered a legitimate restriction on children’s rights.

³ UN Committee on the Rights of the Child 2008

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under Articles 8, 9, 10 and 11 of the ECHR. The reform notably contravenes the principle of the 2002 House of Lords judgement that the criminal standard of proof should be used in ASBO cases, even though they are civil proceedings.5 Furthermore, given that the new orders do not have the same protections that are available in criminal law, but comprise equally, if not more, demanding requirements, we believe that there is a real risk that the new orders may be used as a more easily obtainable alternative to criminal justice orders. Given what is at stake for children in such cases, and the nature of the conduct regulated, these rules may not comply with Article 6 of the ECHR. The test of ‘beyond reasonable doubt’ set out in McCann should be included in the new statutory provisions.

ASSESSMENT OF NEED

4. Evidence shows that between one to two-thirds of ASBO recipients have mental health problems and/or learning difficulties.6 Despite the acknowledgement in the ASB White Paper of the strong links between ASB and health issues,7 nowhere in the Bill is there provision to assess and appropriately tailor orders to such needs. Without proper assessment, children with mental health problems risk being made subject to inappropriately imposed and ‘undoable’ ASB orders. Failure to conduct a proper assessment might reasonably be seen as a breach of Article 3 of the UNCRC,8 and the right to be free from discrimination contained in Article 14 of the ECHR and in conjunction with other conventions. This is particularly so given the potential restrictions of injunctions and orders and breach thereof. Children should receive a full health and social assessment before any ASB order is granted.

‘NAMING AND SHAMING’ (clauses 17, 22 (7) and (8), 29 (5))

5. We are concerned that the Bill specifically disapplies section 49 Children & Young Persons Act 1933 – the presumption against revealing details of a child’s identity – to children subject to ASB proceedings, including breach. This means that children as young as 10 are able to be publicly named. Such practice clearly contravenes the right to

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5 R (on the application of McCann and others) v Crown Court at Manchester [2002] UKHL 39; [2003] 1 AC 787
privacy under Article 16 of the UNCRC, and Rule 8 of the Beijing rules, and probably also infringes Article 3 – ‘that the best interests of the child shall be a primary consideration’. The provision ‘almost certainly’ breaches Article 8 of the ECHR, and could potentially open the government to legal challenges if implemented.

6. Allowing the identification of under-18s is clearly a safeguarding issue as it makes public the details of often vulnerable children. ‘Naming and shaming’ is also a barrier to successful rehabilitation. It can label the child as an ‘offender’ at a critical stage in the formation of their identities, as well as precluding them from obtaining training or housing, both of which can increase their likelihood of offending. Publicising the identity of children is particularly troubling in our age of the internet and social media, because details are indelible once revealed. Being named can also be a ‘badge of honour’; an incentive for a child to engage in ASB.

7. SCYJ also highlights the fact that children in criminal proceedings, who have typically committed more serious offences, are entitled to the presumption of anonymity under s49 Children & Young Persons Act 1933. Notably, in criminal proceedings the court still has the discretion to lift reporting restrictions. It is disproportionate that children who have committed ASB, a civil offence, are not entitled to the same protections as children who have been accused of and convicted of offending. This likely undermines the principle of equality of arms, which underpins Article 6 of the ECHR.

8. We firmly believe that the Bill should be amended to apply the presumption against revealing details of a child’s identity (s 49 Children & Young Persons Act 1933) to ASB proceedings. This would protect children from the blanket reporting and resulting harms outlined above, but would still enable the court to lift the reporting restrictions if it was felt to be necessary.

**IMPRISONMENT AS A SANCTION FOR BREACH (clauses 11, 29 & 37)**

9. We are particularly troubled by the proposal that imprisonment is available as a sanction for children who breach the new orders (two years detention for breach of a Criminal Behaviour Order [CBO] and three months for breach of an injunction or dispersal

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order). The sanction proposed here is in our view not in accordance with Article 37 UNCRC, which provides that the arrest, detention or imprisonment of a child should be used only as a last resort. Acting in accordance with the UNCRC is a requirement of government. The policy is also counter-intuitive to the government’s own policy, namely that one of the three key aims of the youth justice system is to reduce the numbers in custody, and secondly the introduction of the higher remand threshold as introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It is also perverse that children in ASB proceedings are not afforded the same protections from custody as those in criminal proceedings: a requirement (where he/she commits an offence that crosses the custodial threshold) that courts consider non-custodial alternatives and give reasons if they elect not to use them.

10. Detention is widely shown to be counterproductive and particularly harmful for children. Only the most serious and dangerous children receive custodial sentences in the youth justice system. Yet, under the new ASB framework, children could be sent to custody for breaching an order imposed on them for ‘causing nuisance and annoyance’. The availability of custody in the much less serious circumstances envisaged by the Bill is a clear contravention of Article 3 of the UNCRC. Previous experience with the ASBO shows that children frequently breach their ASB orders and are resultantly sent to custody: nearly 7 in 10 children breach their ASBOs and imprisonment is imposed as a sanction for child ASBO breach in 38% of cases. Long-lasting ASBOs, in particular, have been criticised for making breach ‘almost inevitable’ as children cannot see the end in sight and, thus, have little incentive to comply.

11 Baroness Hale in ZH v Tanzania [2011] UKSC 4 ‘This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law’
12 The Anti-social Behaviour, Crime and Policing Bill does say that the court must be of the opinion that no other power available to it is appropriate – but these powers do not include disposals that represent a statutory alternative to detention.
11. We do not believe that custody can be justified for children as a sanction for breach of civil orders that are imposed for non-criminal behaviour. Serious breaches should instead be addressed by means of robust community alternatives.

**MANDATORY EVICTION (clause 86)**

12. This clause raises serious human rights concerns. The clause introduces a range of undemanding conditions to enable the eviction of tenants with reference to ASB, which, if met, and eviction is sought by the landlord, trigger the commencement of eviction order proceedings by the court. Conditions include: that a tenant of or person visiting the dwelling breaches their injunction or CBO, or commits a serious offence. It is clear that clause could have severe implications for under-18s, affecting both blameless children residing in such houses and children who breach or offend. The proposals interfere with the right to private and family life under Article 8 of the ECHR, and the severe impact of eviction is unlikely to be proportionate. Also of relevance here is Article 27 of the UNCRC: ‘States Parties recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development’ and ‘States Parties…shall take appropriate measures to assist parents…to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing’.

13. The proposals are all the more troubling given the fact that nearly 7 in 10 children breach their ASB orders, typically due to lack of support rather than willful non-compliance. Such a sanction would fail to address the underlying causes of the behaviour and may serve to perpetuate it by increasing the vulnerability of children who are made homeless. SCYJ recommends the deletion of this clause.

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