



**Serious Organised Crime and Police Bill
Parts 3-6 (not including cl. 124)**

Briefing for House of Lords Second Reading

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1. JUSTICE is an all-party organisation, largely of lawyers, dedicated to advancing justice, human rights and the rule of law. We are also the British section of the International Commission of Jurists.
2. This briefing concerns the Serious Organised Crime and Police Bill and, in particular, Parts 3 to 6 of the Bill. Provisions dealing with hatred against persons on racial and religious grounds will be the subject of a separate JUSTICE briefing. A further JUSTICE briefing will also deal with Parts 1 and 2 of the Bill.

Summary

3. Many of the provisions in this Bill raise serious concerns regarding fundamental rights protected under the European Convention on Human Rights (“the Convention”) and other international instruments. The aim of this briefing is to identify our concerns regarding Parts 3 to 6, in particular:
 - Overbroad provisions granting too much discretion to the Home Secretary and police officers;
 - Lack of adequate and effective safeguards against arbitrary exercise of powers;
 - Removal of safeguards for suspects’ rights;
 - The development of a confusing patchwork of overlapping criminal offences; and
 - Disproportionate restrictions on peaceful protest.
4. We are also concerned that the size of the Bill and the number of days allotted for debate has restricted the scrutiny to which it has been subject in the Commons. Because of its size, we do not offer comment on every provision but only on those about which we have serious concerns.

Part 3 – Police Powers etc.

Clause 106 – Powers of arrest

5. While we do not object in principle to the simplification of the criteria for arrest, we are concerned that this clause grants too much discretion to individual officers and will lead to large numbers of unnecessary arrests.
6. We are concerned that the language of being ‘about to’ commit an offence has been retained in new subsections 24(1)(a) and (c). Preventative detention otherwise than for the purpose of initiating a criminal prosecution is not permitted by Article 5 of the Convention.¹ The police (and others) have powers under section 3 of the Criminal Law Act 1967 to use reasonable force in the prevention of crime. In addition, in many cases a person about to commit an offence will be committing the offence of criminal attempt under section 1 of the Criminal Attempts Act 1981 and therefore can be arrested under new subsections 24(1)(b) or (d).
7. We are concerned about a general power of arrest under new subsections 24(5)(e) and (f). These conditions are drafted very broadly and it will be very easy for an officer to justify an arrest under one or both of them. Since officers often have to make rapid decisions about whether to arrest, it will be natural, particularly for the relatively inexperienced, to err on the side of caution. This will lead to further overcrowding of custody suites, and to an increased use of police time and resources in dealing with people arrested for minor offences.
8. In addition, JUSTICE is concerned that there is considerable scope for abuse of these subsections, and that they may be applied arbitrarily or in a discriminatory fashion against certain sectors of the community (for example, against ethnic minorities). Article 5 of the Convention does not permit arbitrary procedures for arrest.²
9. Where none of new subsections 24(5)(a)-(d) apply, we believe that arrest and detention is not justified for minor offences, since the incentive for a suspect to abscond is small, and the ultimate sanction that the court can impose is not severe. A person should only spend time in police custody in relation to an offence for which they would not be imprisoned on conviction where this is absolutely necessary. We believe that subsections (e) and (f) should apply only to offences that are currently arrestable, and should certainly not apply to offences not punishable by imprisonment.

¹ See *Lawless v. Ireland (No. 3)* (1961) 1 EHRR 15 and *Ireland v. United Kingdom* (1978) 2 EHRR 25.

² *Winterwerp v. Netherlands* (1979) 2 EHRR 387, at para. 37.

Clause 107 – Powers of arrest: supplementary

10. This clause does not merely enact consequential amendments. It introduces major extensions to a variety of important police powers. We are concerned that amendments of this magnitude are being introduced in a Schedule to a large Bill where little time is allotted for Parliamentary debate.
11. We endorse the comments of the Joint Committee on Human Rights³ regarding the Bill's proposal to make police powers currently available only in investigations into 'serious arrestable offences' apply to all offences triable in the Crown Court.⁴ The relevant powers include such fundamental provisions of the Police and Criminal Evidence Act as section 8 (giving a justice of the peace power to authorise entry and search of premises), section 43 (power for magistrates to issue warrants of detention without charge for a further 36 hours), section 56 (power for police to delay entitlement to have a friend or relative informed of arrest for up to 36 hours) and section 58 (power to delay detainee's consultation with solicitor for up to 36 hours).
12. When these powers were created, Parliament recognised their potentially draconian nature and the need to ensure proportionality by restricting their exercise to the context of investigations into 'serious arrestable offences', which comprise the most serious criminal offences, such as murder, rape, and hijacking, and offences with serious consequences, including serious injury or death, etc.⁵ Clause 107 proposes to extend them to a large proportion of all offences investigated, including crimes such as, *inter alia*, shoplifting, possession of a bladed article and possession of cannabis.
13. The relevant powers engage fundamental rights, including the rights to liberty and privacy and the right to a fair trial. In addition, the rights to consult a solicitor and to contact a friend or relative are essential safeguards against the unfair treatment of suspects in detention. For this reason, they have been given the status of statutory entitlements in the relevant sections of the Police and Criminal Evidence Act.
14. We are not aware of the existence of a pressing social need necessitating the extension of the relevant powers to less serious offences. We fear that it may lead to their being exercised in an arbitrary or disproportionate manner. In the case of police powers, we are not convinced that the issue of a Code of Practice will prevent disproportionate interferences with the rights to liberty and to privacy.

³ Joint Committee on Human Rights, Session 2004-2005, Eighth Report, at para. 2.26 – 2.28.

⁴ See Sch. 7, Part 3. In particular, see paras. 31, 36-39.

⁵ See Police and Criminal Evidence Act 1984, s. 116 and Sch. 5.

15. The same arguments are applicable to certain proposed extensions in Schedule 7 to powers currently exercised only in relation to 'arrestable' offences.⁶ The relevant extensions cover, *inter alia*, powers of search and seizure and power to extend detention.
16. If clause 106 is passed, consequential amendments will be necessary, but we believe that the amendments should maintain the levels of offence seriousness currently present in the relevant legislation.

Clauses 109 and 110 – Search warrants: premises and Search warrants: other amendments

17. Powers of police search of premises and seizure of evidence engage the right to privacy. In its current form, section 8 of the Police and Criminal Evidence Act provides safeguards against the arbitrary exercise of these powers through a regime of prior judicial scrutiny. We fear that, if passed, these clauses will undermine the safeguards in this regime, giving rise to opportunities for unlawful speculative searches, harassment, and unnecessary searches that are potentially dangerous and a waste of police time.
18. We believe that the types of warrants created in clauses 109 and 110 would only be genuinely appropriate where for a valid operational reason the police would not be able to return to court for each separate warrant (for example, where they would need to enter premises at very short notice to conserve evidence).
19. In many of these circumstances, measures could be adopted that would not remove judicial oversight: for example, provision could be made for emergency warrant applications by telephone (on a par with emergency applications for interim injunctions made by telephone to a judge).
20. If this were not deemed practicable, we would recommend that further safeguards be inserted into the clauses; for example, the court should be satisfied that for a valid operational reason, it is not reasonably practicable for individual warrant applications to be made in the normal way regarding different premises/different entries to the same premises.

Clause 112 – Photographing of suspects etc.

21. The non-consensual photographing or video capture under this provision of people who have not been arrested for any offence engages the right to privacy protected by Article 8 of the European Convention, as does the retention of the images.

⁶ Police and Criminal Evidence Act 1984, section 24 and Schedule 1A.

22. The purpose of this provision, as stated by the Government, is to prevent disputes as to whether the person charged with an offence was the person who was required to wait with the Community Support Officer or issued with a fixed penalty notice, etc.⁷ This purpose is therefore achieved when either the proceedings are concluded or the decision is made not to initiate proceedings against the relevant person.
23. Where the decision is taken not to proceed against a person or issue them with a fixed penalty notice, we believe that there is no legitimate reason for the images to be retained by police. Since the person has not admitted, or been convicted of, any offence, there is no reason why their image should find its way onto a police database of potential suspects or be shared with other agencies. We believe that the interference with privacy occasioned by such retention and/or disclosure of these images would not be necessary in a democratic society or proportionate. It would also give scope for arbitrary or discriminatory treatment by police of people on the database, who may not be guilty of any crime. We fear that it might lead to the unfair targeting of ethnic minority groups.
24. We therefore recommend that this provision be amended to specify that the images of people who have not been arrested or issued with a fixed penalty notice must be destroyed as soon a decision is made not to proceed against them in relation to the circumstances leading to the taking of the photograph. We are pleased to see that clause 113 includes such a provision for fingerprints. We believe that there is no logical distinction in this area between fingerprints and photographs or videos.

Clauses 116 and 117 – Staff custody officers: designation and Custody officers: amendments to PACE

25. JUSTICE opposes the designation of civilian police staff as custody officers. We believe that '[t]he custody officer acts as the guarantor of the suspect's rights and ... is a major guardian of the standards of the whole system.'⁸
26. It is vital that the person exercising the important powers of a custody officer be properly independent and accountable. The police custody officer is accountable as an officer of the Crown. He is subject to police disciplinary procedures. He is expected to resist an illegal order. Civilian staff will be more likely to worry about the consequences for their employment if they act independently.

⁷ Joint Committee on Human Rights, 2004-2005 session, Eighth Report, para. 2.41.

⁸ The Efficiency Scrutiny into "Administrative Burdens on the Police in the Context of the Criminal Justice System", commissioned by the Prime Minister in 1994.

27. Further, a police custody officer must by virtue of section 36(3) of PACE, hold at least the rank of sergeant. A sergeant is an experienced police officer, who has years of familiarity with police procedures. By contrast, there is no requirement that the civilian custody officer have any particular experience or training. A police custody sergeant can also use his rank to ensure that police constables treat suspects correctly and follow the PACE Codes of Practice. A civilian member of staff will find it much more difficult to assert authority over constables and therefore to safeguard suspects' rights.

28. We believe that suspects' rights will be insufficiently safeguarded if these clauses become law. We therefore recommend that they be removed from the Bill in their entirety.

Part 4 – Public Order and Conduct in Public Places etc.

Clause 121 – Harassment intended to deter lawful activities

29. The Protection from Harassment Act 1997 engages the right to freedom of expression: 'harassment' includes alarming a person or causing them distress and the relevant harassing 'conduct' can include speech.⁹ Many types of legitimate speech and other types of expression can cause alarm or distress; handing out leaflets with a distressing picture of a human or animal rights abuse, for example, would qualify. Any proposed extension to the offence of harassment must, therefore, be justified under Article 10(2) of the Convention.
30. The Bill's Explanatory Notes state that the extension proposed in this clause it is intended to protect employees of a company from harassment where there have been separate incidents against individual employees. We do not believe that this offence is a proportionate response to this problem.
31. The more serious types of conduct that can constitute harassment are already restrained by other legislation.¹⁰ If the harassment consists simply, for example, in contacting someone, then absent threats or intimidation etc. we believe it is the *repetition* of the conduct that forms the mischief of the offence. We do not believe that merely contacting two people on one occasion each in order to persuade them of a certain view should constitute a criminal offence *per se*. We therefore question whether it is necessary to enact this provision at all.
32. We are concerned that the offence is so broadly drafted as to infringe the principle of legal certainty, and to allow arrest and prosecution for this offence to be carried out almost arbitrarily. We therefore question whether the offence would be 'prescribed by law' for the purposes of Article 10.
33. We are concerned at the potential 'chilling effect' of this provision, whereby people may not carry out peaceful protests (even those permitted under this legislation) or other lawful acts of expression because they are fearful of prosecution. The effect of the legislation in this regard could be severe; it could prevent almost all protest against the activities of corporations, as well as many other types of campaigning activity (since there is no reference to companies or employees in the provisions).
34. While we are glad that the defence of reasonableness under section 1(3) of the 1997 Act has been made applicable to this offence, the onus is on the defendant to show that his conduct

⁹ Protection from Harassment Act 1997, subsections 7(2) and (4).

¹⁰ E.g., sections 4, 4A and 5 of the Public Order Act 1986, and section 1 of the Criminal Damage Act 1971.

was reasonable. We fear that it will not, therefore, prevent the arrest and prosecution of peaceful protestors, nor will it counteract the 'chilling effect' outlined above.

35. We therefore recommend that if this offence is retained in the Bill, it be amended so as to mitigate the extent of its restrictions upon freedom of expression.

Clause 122 – Harassment etc. of a person in his home

36. JUSTICE recognises that people should not suffer campaigns of unreasonable harassment and intimidation. However, we believe that this clause is a disproportionate response to the problem, which will severely restrict freedom of expression.
37. In particular, the range of conduct covered by the offence is extremely wide; it is not necessary that the conduct be intimidating or unreasonable. It need only be likely to cause harassment, alarm or distress. Since the conduct is measured by its actual or potential *effect*, rather than its nature, the effect of the clause is to criminalize legitimate and peaceful protest.
38. For example, if a former dictator, or, say, a Nazi war criminal, took up temporary or permanent residence in England, and a person stood outside his house with a sign telling him that he should leave and displaying a distressing picture of a victim of human rights abuses in his country, that person would be committing this offence and could be imprisoned.
39. We are extremely concerned that, unlike the offences in the Public Order Act 1986 covering similar conduct, and unlike clause 121 above, this clause does not give a defence to the person whose conduct is reasonable. Combined with the breadth of the offence and the potential punishment, this will, we believe, result in a substantial 'chilling effect' on freedom of expression, whereby people forbear to protest outside people's houses for fear of prosecution.
40. Many other offences and police powers already exist to combat the type of conduct at which this clause is aimed; for example, the Public Order Act 1986 contains provisions prohibiting threatening behaviour and the causing of harassment, alarm or distress, and the Protection from Harassment Act 1997 prohibits harassment and allows the harassed to obtain injunctions.
41. Furthermore, Section 42 of the Criminal Justice and Public Order Act 2001 allows an officer to make directions to a person engaging in such conduct in the vicinity of a person's home (including an order to leave) where he reasonably believes that the resident is likely to suffer harassment, alarm or distress, and failure to comply is an imprisonable offence. While we have concerns about section 42, the requirement that the officer give directions before the

offence can be committed at least allows people to know when they will be committing an offence and therefore does not stifle all protest for fear of prosecution.

42. In our view, this clause places disproportionate restrictions on freedom of expression. We are particularly concerned that an offence with such a low standard of culpability should be punishable by imprisonment. We therefore recommend that this clause be removed from the Bill in its entirety. If it is retained, we recommend that it be confined to behaviour that is threatening or intimidatory.

Clause 123 – Harassment etc.: police direction to stay away from person's home

43. JUSTICE opposes the substantial extension of police powers proposed by this clause. The effect is to allow the police effectively to prevent what may be legitimate or lawful protest, without its lawfulness being determined by a court. There is nothing to prevent such a direction being repeated at three-monthly intervals, effectively preventing any such lawful protest from being carried out.
44. We question the necessity of this provision in the light of existing offences and police powers. If a person's presence in the vicinity of a dwelling constitutes an act of harassment or a public order offence, then they can be arrested, convicted and sentenced. If they return and commit a further offence, they will probably receive a heavier sentence for the second offence and/or be in breach of bail.
45. Furthermore, we believe that the clause disproportionately restricts freedom of expression. No police officer, especially a low-ranking officer, should have the power to prohibit protest in an area for three months, particularly where there is no opportunity for a court to review his decision. The clause requires only 'reasonable belief' on the part of the officer that the presence of the person(s) in the vicinity of the dwelling is likely to harass, alarm or distress the resident. The concept of 'reasonable belief' is a legitimate one in circumstances where an officer must make a quick decision about an action which is subsequently reviewed, such as arrest, or which has no long-term consequences, such as dispersal. It is not appropriate for a power that is not subject to judicial review, and which has a substantial, long-term impact on the exercise of fundamental freedoms.

Clauses 125 to 127 – Trespass on designated site

46. JUSTICE has concerns about the prohibition of acts of simple trespass, where there is no ulterior intent. An efficient security apparatus can restrain simple trespass; occupiers have the

power in law to use reasonable force to remove trespassers from their land, if necessary. We query whether the failure of security arrangements to protect the royal family on several recent occasions could be addressed by reviewing those arrangements, rather than by creating a new criminal offence.

47. Various offences already exist to prohibit acts of trespass committed with an ulterior intent. They may constitute a criminal attempt under section 1 of the Criminal Attempts Act 1981. If the trespass involves entry into a building, it may constitute an offence of burglary under section 9(1)(a) of the Theft Act 1968 (which includes intent to rape, cause grievous bodily harm or commit criminal damage as well as intent to steal). The offence of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994 criminalizes trespass where trespassers intimidate people or obstruct or disrupt lawful activity, and police have powers under section 69 to direct people committing or intending to commit this offence to leave the land (with failure to comply being a criminal offence).
48. These clauses have been said to arise from an investigation following an intrusion into Windsor Castle.¹¹ However, they are entirely disproportionate to the legitimate purpose of protecting the royal family. A great deal of Crown land is outside the royal residences and comprises many forms of private and public space. Furthermore, the power to designate any site on the grounds of national security will allow the designation of any land in the jurisdiction, with only very limited judicial review of the Home Secretary's assertion that national security requires the designation.
49. We believe that these clauses as drafted allow severe restrictions on the movement of persons about the United Kingdom. Furthermore, we fear that they may be used to prohibit the peaceful exercise of freedom of expression and assembly. A site could be designated surrounding, for example, an airbase, an embassy or a government office, and protestors would then be unable to protest outside the relevant base or office.
50. If these clauses are retained, we recommend that they be amended to apply only to the royal residences and their grounds. If wider designations are permitted, we recommend that safeguards such as prior judicial scrutiny should be inserted.

Clauses 129 to 135 – Behaviour in vicinity of Parliament

51. JUSTICE has grave concerns about the severe restrictions on peaceful protest proposed by these clauses. In light of the weight given to the protection of political speech under Article 10 of the Convention, we are particularly concerned at measures that seek to inhibit public protest on the doorstep of Parliamentary democracy itself. It seems an unpleasant irony that,

should these provisions become law, freedom of expression will be most at risk in the one place where it should be most protected.

52. Under existing legislation, the police may place conditions on processions if they reasonably believe that the purpose of the organisers is to intimidate or if the procession may result in serious public disorder, serious damage to property or serious disruption to the life of the community.¹² We therefore question whether these further restrictions are necessary to achieve any legitimate aim.
53. In fact, we are unclear as to the aim of these provisions. If it is to regulate static assemblies (as opposed to processions) by allowing the police to impose conditions in the interests of public safety etc., we believe that this could be achieved in a more proportionate manner.
54. We believe that the Commissioner should not be able to impose conditions on demonstrations on the grounds of 'disruption to the life of the community' other than serious disruption. The concept of 'disruption' is vague; any large-scale protest will inevitably cause some disruption. We are concerned that the inclusion of this ground would allow disproportionate restrictions on protests.
55. We are similarly concerned that the Commissioner should be able to impose conditions upon the number and size of banners or placards used, and upon the maximum permissible noise levels. The effect of such conditions may be to make protestors unseen and unheard; they go to the very substance of the Article 10 right. We do not believe that the condition on placards is necessary to fulfil any legitimate aim; the suggestion that these could raise security concerns is, we believe, improbable and capable of being addressed in a manner that does not restrict freedom of expression to this degree. The condition on noise may be unworkable and easily breached, since people cannot assess, to a nicety, the amount of noise they are making. Any truly excessive or long-lasting noise could, we believe, be prevented by more proportionate means.
56. The proposed ban on loudspeakers in the designated area in clause 134 is, we believe, a disproportionate restriction on freedom of expression and could have unintended consequences. Loudspeakers allow people's voices to be heard by the parliamentarians with whom they wish to communicate, and facilitate the hearing of their voices by others above urban noise. A total ban on the use of loudspeakers by protestors in the designated area is not only arbitrary as to the area but also disproportionately restricts freedom of expression. In addition, loudspeakers are frequently used in large demonstrations, not only to lead and amplify chants, songs and slogans, but also to marshal demonstrators and ensure that they

¹¹ Joint Committee on Human Rights, 2004-2005 session, Eighth Report, para. 2.65.

¹² Part II of the Public Order Act 1986.

follow the correct route. To ban loudspeakers could make large processions more chaotic and dangerous, which can hardly be the intended effect.

57. We recognise that the incessant or long-term use of loudspeakers at high volume may result in considerable disturbance to people in nearby buildings. We recommend that if this were occurring, a more proportionate response would be to allow applications in the civil courts for injunctions against noise nuisance where the noise is loud and long lasting.
58. We are very concerned by the requirement in clause 130 that protestors should give six clear days' notice of any demonstration to the Commissioner. The current law on advance notice for public processions requires 6 days' notice but makes provision for circumstances where this is not reasonably practicable.¹³ Static protests are not currently subject to any notice requirements.
59. Parliamentary business is often timetabled at short notice. The six days' notice requirement would prevent protestors from making their concerns known to members of Parliament debating certain measures by protest. We believe that provision should be included in the legislation for circumstances where six days' notice is not reasonably practicable.
60. We are extremely concerned by the extent of the designated area. We believe that if these provisions are retained the area should be designated by Parliament, rather than by granting a discretion to the Home Secretary. We believe that the maximum radius proposed is greatly excessive; a protest one kilometre from Parliament would not be heard or seen from Parliament Square. The area proposed would encompass Trafalgar Square, a traditional and important focal point for protests. It would also cover parts of Millbank, Whitehall, parts of St. James's park and stretch across the Thames onto the south bank. Much of the area does not contain parliamentary or government buildings. We believe that there is no legitimate reason for extending the area in this way.

Clauses 135 to 140 – Anti-social behaviour

61. JUSTICE opposes the granting of power to the Home Secretary under clause 136(3) to add to the list of 'relevant authorities' who may apply for anti-social behaviour orders (ASBOs) under section 1 of the Crime and Disorder Act 1998. While JUSTICE disagrees in general with anti-social behaviour orders, we believe that if they are to remain on the statute books they should only be applied for by police and local authorities. These are public bodies that are accountable, and their actions can be properly reviewed. If the Secretary of State specified that individuals, unofficial groups or private companies might apply for orders this could, we believe, result in a proliferation of illegitimate applications, and possibly applications in bad

faith. We believe that the policing of behaviour in communities should be left to those public bodies responsible for safety and crime prevention there.

62. JUSTICE is strongly opposed to the proposal in clause 138 to reverse the presumption of the withholding of the identity of a child accused of breaching an ASBO to the public. The importance of only rarely indicating the identity of such young persons in the courts was underlined in a relatively recent case.¹⁴
63. The current legislative presumption that a child subject to criminal proceedings should not be identified enshrines the principle of Article 40 of the UN Convention on the Rights of the Child.¹⁵ Article 40(1) states that:

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Article 40(2)(vii) states that states parties shall ensure that children alleged as or accused of having infringed the penal law shall have the guarantee that their privacy shall be fully respected at all stages of the proceedings.

64. This provision therefore infringes the United Kingdom's obligations under international law. Publication of a conviction for breaching an ASBO can be even more prejudicial to a child than publication of an ordinary conviction since it indicates that they are regarded as a menace to their society. Local media assiduously cover ASBO proceedings. We believe that this provision will seriously impair the welfare of children and their opportunities for rehabilitation.
65. In addition, the threat of publication will do little to deter anti-social behaviour or breaches of ASBOs by children. Amongst some children and young people the ASBO has come to be regarded as a badge of honour: publicity will only enhance this view. Children have difficulties in appreciating the long-term consequences of their behaviour; the threat of damage to their future prospects will be unlikely to deter them from breaching their orders. Furthermore, since anti-social behaviour is often a manifestation of mental health difficulties, this provision will in some cases allow particularly vulnerable children to be stigmatised.

¹³ Public Order Act 1986, section 11.

¹⁴ *R. v. Leicester Crown Court, ex. p. S (a minor)* 94 Cr App R 34.

66. We are extremely concerned by the proposal in clause 139 to allow local authorities to contract out their functions in relation to anti-social behaviour orders. As stated above, applications for orders that restrict the fundamental liberties of citizens should be handled by public bodies that are fully accountable and are the bodies responsible for dealing with public safety and crime reduction in their areas. Private bodies may have a financial incentive for seeking orders against people and are not sufficiently accountable. We can see no legitimate reason for the inclusion of this provision. We recommend that it be removed from the Bill in its entirety.

Clause 141 – Parental compensation orders

67. JUSTICE opposes the creation of parental compensation orders as envisaged in Schedule 11 to the Bill. A child under 10 is not, in law, capable of committing a criminal act. Where no criminal act has been committed, we believe that the recovery of financial compensation for wrongs should remain within the province of the civil courts.
68. We are concerned by the provision in new section 13A(1)(b) of the Crime and Disorder Act 1998, as inserted by para. 2 of the Schedule, that the magistrates should make an order if satisfied that it would be desirable to prevent repetition of the behaviour in question. This seems to indicate that the making of the order is in some way a penal sanction against the parents (like a fine) and that one purpose of the sanction is to encourage the parents more closely to regulate the behaviour of their offspring.
69. We are further concerned to see that the enforcement of the compensation under new section 13A(6) is to be analogous to that of a fine. The magistrates have power under section 76 of the Magistrates' Court Act 1980 to issue a warrant of distress or a warrant committing the defaulter to prison where fines are not paid.
70. The combined effect of these provisions is that the compensation order in fact takes the form of a penal sanction. That the proceedings are in fact criminal in character is further suggested by the fact that appeal against the order lies to the Crown Court in England and Wales under new section 36D. This is of great concern to JUSTICE because, firstly, the sanction is based on the behaviour not of the parents but on that of a third party, the child. Parents may effectively be fined where their own behaviour may not have been at all at fault. This is contrary to the most basic principles of the criminal law.
71. Secondly, the standard of proof in section 13A is specified as the civil standard. Since the consequences that may follow of a finding under section 13A(1) are serious, we believe that if

¹⁵ Ratified by the United Kingdom on 15th January 1992.

these orders are retained the applicable standard should be the criminal standard for at least the condition in subsection (2) as to the behaviour of the child. This would be in line with the decision of the House of Lords that the criminal standard of proof should apply as to past behaviour on an application for a freestanding Anti-Social Behaviour Order.¹⁶

Clauses 142 to 146 – Protection of activities of certain organisations

72. It is clearly undesirable that people should be hampered or prevented from carrying out lawful activities by acts or threats of violence or damage to property. However, we are concerned that this group of clauses is neither a principled nor a proportionate response to the problems it seeks to address. They make civil wrongs criminal in certain circumstances but not in others. They also re-criminalize existing criminal conduct in certain circumstances, but without creating a principled hierarchy of offences. We are concerned that this will cause problems for the police, prosecutors and sentencers, and result in the arbitrary application of different offences to people who have committed similar acts, leading to a lack of public confidence in the criminal justice system.
73. It should be recalled that the following offences already exist to criminalize aspects of the behaviour that the clauses seek to prevent:
- a) Threatening to destroy or damage property, contrary to section 2 of the Criminal Damage Act 1971;
 - b) Riot, violent disorder, and affray, contrary to sections 1, 2, and 3 of the Public Order Act 1986, which can be committed by persons threatening unlawful violence so that a person of reasonable firmness present at the scene would fear for his personal safety;
 - c) Sections 4, 4A and 5 of the Public Order Act 1986, which cover words, behaviour or the display of any writing, sign or visible representation likely to cause harassment, alarm or distress to a person who is present;
 - d) Offences under the Protection from Harassment Act 1997;
 - e) Making a threat to kill, contrary to section 16 of the Offences Against the Person Act 1861;
 - f) Common assault; and
 - g) Aggravated trespass, contrary to section 68 of the Criminal Justice and Public Order Act 1994.

Associated behaviour may also result in liability for conspiracy to commit, or inciting a person to commit, other substantive offences against the person and against property. It should be recalled that some offences against the person can be committed by the infliction of psychological harm.

¹⁶ In *Clingham v. Kensington and Chelsea LBC; R. v. Manchester Crown Court, ex p. McCann and Ors* [2002] UKHL 39. See para. 56 per Lord Hope.

74. We are concerned that clauses 142 and 143 cover an extremely wide range of conduct; sentencing courts would need careful guidance to ensure that appropriate and consistent sentencing took place. We are also concerned that conduct ordinarily constituting a very minor crime may be made very serious because it falls within the section, whereas equally culpable offenders falling outside the section may not be subject to the same punishments.
75. We believe that torts (civil wrongs) and threats to commit torts should not be criminalized by these offences. Injunctions can be obtained to restrain torts; where an injunction has been obtained for conduct amounting to harassment, the claimant can apply for a warrant for the defendant's arrest if the injunction is breached. Authorities can also apply for ASBOs to restrain people who are committing torts. We believe that creating serious criminal offences is a disproportionate method of dealing with what may be minor civil wrongs.
76. It is wrong in principle to create specific offences in relation to one particular group of victims unless they can be distinguished from other victims on legitimate grounds (e.g. specific offences against children). The animal research industry is not distinguishable on legitimate grounds from other actual or potential victims of the type of behaviour the Secretary seeks to restrain. To create victim-specific offences in this manner is overtly to politicise the criminal justice system.
77. We suggest that clause 146 is not included. If the relevant offences are created, there should be Parliamentary oversight of any extensions, to ensure that they are justified on legitimate grounds and are not politicised moves against or in favour of certain groups or industries. Criminalizing conduct should be a function of the legislature, not the executive.

Clause 149 – Power to seize etc. vehicles driven without licence or insurance

78. JUSTICE opposes the granting of this power to the police. The right to peaceful enjoyment of possessions is protected by Article 1 of the First Protocol to the European Convention, which is one of the rights incorporated by the Human Rights Act 1998. We believe that the seizing of motor vehicles in this manner amounts to executive expropriation of property and is a disproportionate interference with the right to peaceful enjoyment of possessions. It also engages Article 6 of the Convention, which provides for a fair hearing before an independent and impartial tribunal in the determination of any civil right.
79. Furthermore, the clause effectively provides for a penal sanction (the temporary or permanent confiscation of a vehicle) without a prior judicial determination that the person was in fact committing the relevant offence. The fact that someone is driving without their licence or

insurance documents in their possession, or fails to stop, is not, we believe, good evidence that they do not in fact hold a valid licence or insurance.

80. A car may be worth considerably more than the maximum fine available for either of the relevant offences; to confiscate it permanently would therefore be a punishment greater than could be inflicted on conviction for the relevant offence. The legislation does not provide that the police must return the vehicle if the relevant documents are produced. While we anticipate that the Home Secretary is likely to make provision for this in the regulations, even a temporary confiscation of property may constitute a disproportionate interference with the peaceful enjoyment of possessions.
81. If the officer reasonably suspects that the driver is unlicensed and unable to drive properly, then the general arrest conditions under section 25 of PACE may be satisfied and the driver may therefore be prevented from further driving by an arrest. Drivers who are uninsured, or who are able to drive properly although unlicensed, are not necessarily more likely to injure or to damage property by their driving and therefore should not be subject to arrest. We therefore question whether these clauses are necessary.

SALLY IRELAND

9 March 2005