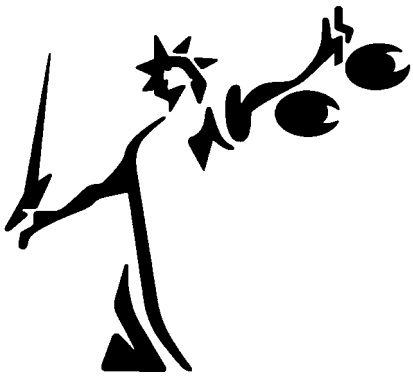

Violent Crime Reduction Bill

Briefing on Second Reading
House of Lords

March 2006

For further information contact
Sally Ireland, Senior Legal Officer (Criminal Justice)
E-mail: sireland@justice.org.uk Tel: 020 7762 6414

JUSTICE, 59 Carter Lane, London EC4V 5AQ Tel: 020 7329 5100
Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

Introduction

1. JUSTICE is an independent British-based human rights and law reform organisation with around 1600 members. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. We have provided a briefing to the Commons Standing Committee and to the Parliamentary Joint Committee on Human Rights regarding this Bill, and also provided suggested amendments for Committee Stage in the Commons.

Summary

3. We welcome the main aims of this Bill - to safeguard members of the public from violent crime by lowering the prevalence of two of its causes – the excessive consumption of alcohol and the possession of firearms.

4. However, we retain concerns about the effects of some provisions upon individual rights. In summary, our primary concerns are are:

- **The provisions regarding drinking banning orders (DBOs) should be more tightly drafted in order to ensure that they are not granted in inappropriate cases; some aspects of DBO procedure also raise concerns under Article 6 of the European Convention on Human Rights (the European Convention);**

- **Charges should not be levied against businesses in Alcohol Disorder Zones (ADZs) that do not contribute to alcohol-related crime and disorder in the locality, and should be the subject of a right of appeal;**

- **Clause 22 (directions to individuals who represent a risk of disorder) creates a sweeping power that could be exercised arbitrarily;**

- **The minimum sentencing provisions in Part 2 of the Bill may distort the ordinary sentencing regime; in particular, children should not be subject to minimum sentences;**

- **Football banning orders should not be put on a permanent basis before their operation thus far is reviewed to ensure that they are being used appropriately.**

Drinking Banning Orders

5. Drinking Banning Orders (DBOs) may serve as a useful alternative to criminal proceedings where a person is guilty of persistent low-level criminal behaviour in public places as a result of drinking alcohol to excess in public houses, bars and/or nightclubs. In these circumstances, individual criminal prosecutions may be an inefficient way of dealing with the relevant behaviour, while criminal convictions may have adverse social consequences (by damaging employment prospects, for example).

6. We welcome the amendment of the Bill in the House of Commons to provide that breach of a DBO will not be an imprisonable offence. This will largely prevent DBOs from having the effect that ASBOs have had in raising the maximum sentence for minor criminal offences for those subject to them. It will also prevent the influx into prison of individuals for technical breaches of very widely drawn orders.

7. However, we retain concerns about DBOs – in particular, that, like ASBOs, the legislation is drafted so broadly as to allow them to be used against people for whom they are probably not intended, and for whom they are not appropriate: the homeless, alcoholics, people suffering from mental illness and/or people with conditions such as Asperger's or Tourette's syndrome, in addition to those guilty of merely harmless high-spirited behaviour.

8. There are also few limits placed on the types of prohibitions that can be imposed by a DBO. We note in this regard the comments of the Joint Committee on Human Rights in its scrutiny of this Bill.[1]

9. We further note the comments of Mr. Alvaro Gil-Robles, European Human Rights Commissioner, on the subject of ASBOs:

> It seems to me that detention following the breach of an ASBO drawn up in such a way as to make its breach almost inevitable…and which was applied on the basis of hearsay evidence in respect of non-criminal behaviour, would almost certainly constitute a violation of

[1] Cf Joint Committee on Human Rights, *Fifth Report* (2005-2006), para 3.10.

Article 5 of the ECHR. Such cases would appear to occur and, in so far as they do, the functioning of ASBOs needs to be addressed.[2]

Specific problems:

- **The threshold criteria in clause 2(2) for the imposition of a DBO are too broad**

10. The criteria in clause 2(2) are, in our opinion, far too broad. It is, we believe, uncontroversial that mere high-spirited behaviour (which most law-abiding people have indulged in at some time) should not result in a coercive order of this nature. However, such behaviour could be described as 'disorderly' – a word capable of extremely wide interpretation.

11. A further problem is that the phrase 'while under the influence' does not carry the necessary implication of either *excessive* alcohol consumption or drunkenness, or that the consumption of alcohol either caused or contributed to the behaviour complained of. Further, the statute contains no express requirement that 'disorderly' behaviour need have taken place on more than one occasion.

12. We expect that the definition in clause 2(2)(a) could be applied to a large percentage of the adult population of the UK – for most of whom DBOs would not be appropriate. In particular, any definition that revolves around 'disorder' will necessarily embrace some behaviour caused by mental conditions. Particularly egregious examples of ASBOs said to have been reported by the British Institute for Brain Injured Children include a 12 year old autistic boy punished for staring over his neighbour's fence, and another boy with Tourette's syndrome given his order for swearing.[3]

13. DBOs may be passed upon adults and young people in analogous circumstances. In fact, unlike ASBOs, there is not even a threshold criterion that the person has acted in a manner 'likely to cause harassment, alarm or distress'. Nor is there any requirement that the court disregard behaviour that the person shows was 'reasonable in the circumstances'.

---

[2] Report of Mr. Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on his visit to the United Kingdom, 4th-12th November 2004, for the attention of the Committee of Ministers and Parliamentary Assembly, CommDH(2005)6, para 116.

[3] Jane Elliott, 'Tourette's children 'given asbos', BBC News, Monday, 15 August 2005.

14. While under clause 2(2)(b) the order must be 'necessary' to prevent further conduct, the relevant 'conduct' need only be 'disorderly' conduct. This extra criterion will therefore not prevent inappropriate orders from being passed. This is, in part, due to the fact that many courts will, we predict, interpret their powers broadly and be slow to refuse orders applied for – as in the case of ASBOs.[4]

15. Since DBOs may interfere with qualified rights under the Convention, it is necessary that they are passed 'in accordance with the law': namely, that adequate safeguards be provided to prevent these interferences from being arbitrary. The language of the statute should also be sufficiently clear to comply with the requirement of legal certainty so that people can order their conduct to prevent themselves becoming subject to a DBO. The language of clause 2(2) is, in our opinion, too broad to satisfy these requirements, at least in the absence of clear and public guidance. It is also, of course, necessary that restrictions on rights are proportionate - the criteria allow the imposition of a DBO where a coercive measure of this nature is arguably, *per se*, a disproportionate response to the type or severity of behaviour complained of.

16. The further safeguard provided by the obligations imposed upon the courts and applicant authorities by section 6 of the Human Rights Act 1998 is not, in our opinion, sufficiently specific in this regard adequately to deter the arbitrary imposition of orders. The existence of guidance in itself has also, in the case of ASBOs, not prevented authorities applying for inappropriate orders in some cases nor courts from granting them. We are also concerned that the appeals system and its attendant jurisprudence may, in practice, be insufficient to prevent such orders from being passed, due to their not being appealed and/or to insufficient 'trickle-down' of jurisprudence to the lower courts and especially to authorities applying for the orders.

- **The prohibitions imposed under a DBO may invite breach, and may form disproportionate interferences with Convention rights**

17. We welcome the provisions of clause 1(4), which, if passed, will prevent DBOs from having some unintended and counterproductive effects. However, we are concerned at the wording of clause 1(3), which mandates the court to make such prohibition as it considers necessary upon the person's entry to licensed premises. This is of

[4] Cf S. Macdonald, 'A suicidal woman, roaming pigs and a noisy trampolinist: refining the ASBO's definition of 'anti-social behaviour'', (2006) 69(2) *Modern Law Review* 143-182, at n107: 'Tellingly, 3826 ASBOs were imposed nationwide to the end of September 2004, whilst only 43 applications for orders were refused (Home Office website).'

particular concern since while the court is mandated to decide whether a DBO is necessary, it is not asked to consider if it is *appropriate*. It is clear that the imposition of such a prohibition may pass the necessity test but remain inappropriate, for example, in the case of a person suffering from alcohol dependence and/or a mental condition.

18. It is open to the court under clause 1 to pass a DBO barring a person completely from all licensed premises in any radius, providing that 'relevant persons' would be affected by his purchasing alcohol there. Further prohibitions could include a ban on drinking in public and even on drinking *altogether*.

19. Where a person is suffering from alcohol dependence and/or a mental condition, it is in our opinion clearly inappropriate to pass prohibitions of this type upon behaviour that is caused by that dependence or condition. The dependence or condition will evidently have an enormous effect upon the person's ability to comply with the order. In particular, to ban an alcoholic from buying or consuming alcohol is a prohibition that *invites* breach.

20. Such a prohibition can also be medically inappropriate, as an enforced sudden withdrawal from alcohol in the case of an alcoholic can, we understand, be dangerous and even result in fatality in some cases. It should be noted, in this regard, that the government is under positive obligations to safeguard the right to life under Article 2 of the Convention.

21. It is therefore essential that the court satisfies itself as to whether an addiction or mental condition is present – if necessary of its own motion, particularly since some people may be unrepresented at the application (and since the Bill provides for *ex parte* interim orders). If there is a possibility of addiction or a mental condition then the court should not make any prohibitions unless satisfied on receipt of medical evidence both that they would not be medically inappropriate and that the person's capacity to comply will not be severely restricted by their addiction or mental condition.

22. Further, we recommend that as a general requirement the court should be satisfied before making a DBO not only that it is necessary but also that it would be appropriate in all the circumstances.

23. Orders should not be allowed to remain in place when they become inappropriate at a later stage. In this regard, we are concerned at the provisions in clauses 4(6) and 7(7), which state that discharge is only available where the relevant authority consents or after half the order has expired. While some provision to prevent vexatious applications for discharge is valid, it should not have the effect of keeping an order in place where there has been a change in circumstances meaning that its restrictions are no longer rational or proportionate.

24. We therefore recommend that the current provisions should be replaced with a threshold requirement of a change in circumstances before an application for discharge can be considered, perhaps accompanied by a *short* minimum time period before the application can be made.

25. We are further concerned in this regard at the possibility of infinite renewal of interim DBOs under subclause 8(7).

- **The procedures under which DBOs can be passed may not satisfy Article 6 of the Convention**

26. Following the *McCann*[5] case, we expect that the standard of proof required to fulfil clause 2(2)(a) would be the criminal standard. We would, however, recommend that in order to guarantee this it should be expressly included in the Bill.[6] However, in accordance with the House of Lords' judgement in *McCann,* hearsay evidence will, we expect, be admissible to fulfil the test.

27. While we acknowledge the policy aim behind the use of hearsay evidence in some ASBO cases (witnesses' reluctance to come forward and fear of reprisal in some cases) we are not convinced that this will apply in the majority of DBO applications – since we envisage that most of these will concern behaviour in urban centres or on and around licensed premises, rather than neighbour disputes. Furthermore, we are concerned that *McCann* may not have been correctly decided, since arguably applications for orders such as ASBOs and DBOs would satisfy the Strasbourg test

[5] *Clingham v. Kensington & Chelsea London Borough Council: R. v. Manchester Crown Court, ex parte McCann and others* [2002] UKHL 39.

[6] See also Joint Committee on Human Rights, *Fifth Report* (2005-2006), at para. 3.14 – the Committee stated that it would be 'preferable' if the standard were 'stated clearly on the face of the Bill'.

for 'criminal proceedings', which looks, in addition to the characterisation in domestic law, at the substance of the sanctions imposed.[7]

28. Further, we are not convinced that the criminal standard of proof can be satisfied on an application where most or all of the evidence is hearsay, sometimes from anonymous witnesses. We note the comments of the European Commissioner of Human Rights in this regard:

> For my own part, I find the combination of a criminal burden of proof with civil rules of evidence rather hard to square; hearsay evidence and the testimony of police officers or 'professional witnesses' do not seem to me to be capable of proving alleged behaviour beyond reasonable doubt. The rational [sic] behind the admissibility of such evidence is stated to be that witnesses may be afraid to testify in respect of anti-social behaviour they have themselves been victims of for fear of future reprisals – suggesting that activity causing serious and actual harassment is what is meant to be targeted. It is unfortunate, therefore, that ASBO proceedings are drawn up in such a way as to permit a range of behaviour that is merely disapproved off [sic] (even by only very few people) to be brought with their scope.[8]

29. In terms of procedure, we are particularly concerned by clause 8 of the Bill. This allows interim orders to be made without notice to the subject and to be renewed on any number of occasions. In the case of *R (M) v. (1) Secretary of State for Constitutional Affairs and Lord Chancellor (2) Leeds Magistrates' Court and Leeds City Council (Interested Party)*[9] the Court of Appeal found that Article 6(1) of the Convention was not engaged on an interim ASBO application. One argument considered by the court was that applications for interim relief

---

[7] See e.g. Andrew Ashworth QC, 'Social Control and 'Anti-Social Behaviour': The subversion of Human Rights?' (2004) 120 LQR 263-291 at 290: **'In holding that the anti-social behaviour order is not a penalty, the House of Lords in the [McCann] decision** attributed much less significance to the possible consequences of breaching the order than the Strasbourg Court might do'.

[8] Gil-Robles (2005) at para. 115.

[9] [2004] EWCA Civ 312.

> are only regarded as determinative if they cause irreversible prejudice to the defendant's interests, and drain to a substantial extent the final outcome of the main proceedings of its significance[10].

30. We believe that if an interim order is repeatedly renewed it may have the effect of robbing the final proceedings of their significance: the period over which it is renewed may be no shorter than the final DBO sought, the prohibitions in it may be similar to those sought, and the same sanctions can be applied on breach. We therefore recommend that there should be a limit on the number of times that an interim order can be renewed; in our view, difficulties of evidence gathering, etc., cannot justify a delay of more than a few months at the very most. However, clause 8 currently contains no upper limit for the number of renewals.

31. Further, when considering an application for renewal of an interim DBO, the court should consider whether the extension is in the interests of justice, having regard to the seriousness of the conduct alleged, as well as any difficulties experienced by the applicant in gathering evidence. An 'interests of justice' test for renewal should be inserted into clause 8; there is currently no test in subclause 8(7).

32. Where interim proceedings do operate so as to rob final proceedings of their significance, we believe that the provisions of Article 6(1), including the guarantee of equality of arms, will be engaged.[11] Where an application can be made without notice we therefore believe that the interim order should not be allowed to be repeatedly renewed for an excessive period without an *inter partes* hearing at which the necessity test is applied.

33. Further, in the *Leeds* case it was noted by the court that in that case the interim order did not become effective until the subject had notice of it. This guarantee should be inserted into the Bill.

34. Clause 6 of the Bill mandates criminal courts sentencing a person for an offence committed under the influence of alcohol to consider the application of a DBO in addition to a sentence or conditional discharge. In this context, it should be noted that the Court of Appeal has said with regard to post-conviction ASBOs that:

[10] Judgement, at para. 31.

> In our judgment the making of an order of this sort should not be a normal part of a sentencing process, particularly in cases which do not in themselves specifically involve intimidation, harassment and distress. It is an exceptional course to be taken in particular circumstances.[12]

- **The privacy of young people subject to DBOs should be protected**

35. The usual legislative presumption that a child or young person subject to criminal proceedings should not be identified enshrines the principle of Article 40 of the UN Convention on the Rights of the Child.[13] 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.

36. DBO proceedings are arguably criminal, or at least quasi-criminal in nature. Publicity of such an order is in fact more damaging to a child than publicity of some convictions would be, because it indicates that they are regarded as a menace to their society that needs to be restrained.

37. We are not wholly convinced by the argument that publication of orders is necessary in order that breaches can be reported. Firstly, if this is indeed the case, it is in our view an argument against applying DBOs to children at all. Secondly, DBOs will often relate to behaviour in urban centres and on or around licensed premises.

---

[11] *Markass Car Hire v Cyprus*

[12] *R. v. Kirby (Lee)* [2005] EWCA Crim 1228, David Clarke J.

[13] Ratified by the United Kingdom on 15th January 1992.

These areas are presumably more likely to be policed than residential areas, allowing police officers or PCSOs to witness and report breaches.

38. At the very least, we recommend that publication of orders should be limited to interested parties – for example, to licensees in the relevant area.

39. With regard to DBO breach proceedings, the argument in favour of publication on the grounds of enforcement does not even apply. Further, breach proceedings are undeniably criminal in nature. Subclause 10(9) of the Bill therefore infringes the United Kingdom's obligations under international law.

40. In addition, the publication of orders and their breach will, in our opinion, do little to discourage young people from crime or disorder. Among some children and young people the ASBO has come to be regarded as a badge of honour; it is likely that DBOs will be regarded in the same way, particularly since they are concerned with drinking, which is often regarded by teenagers as an activity which gives them status amongst their peers.

Alcohol disorder zones

41. We are concerned that these zones discriminate insufficiently between premises that are a cause of alcohol-fuelled crime and disorder and other premises that merely happen to be in the same locality. In particular, we are concerned about clause 12(7)(b), which provides that premises whose main purpose is the sale of alcohol may not be exempted from charges.

47. Firstly, we believe that those premises that are not contributing to offending behaviour should be exempt from charges. Secondly, the premises for which exemptions are allowed by subclause 12(7) may include those that are contributing substantially to disorder – there may even be legal argument as to whether nightclubs are included.

48. We also recommend that the charge should be levied according to the size of the business or that discounts be offered to small businesses. A large corporation may take the view that the cost benefits associated with encouraging excessive alcohol consumption outweigh the charge payable. Small businesses, by contrast, may suffer; independent off-licences and smaller, traditional pubs, which may not even be contributing to the disorder, could even go out of business if the charges are high.

49. We are concerned by the lack of a right of appeal for licence-holders against charging decisions. We note, in this regard, the comments of the Joint Committee on Human Rights.[14]

Clause 20 - Offence of persistently selling alcohol to children

50. We are concerned at the provision that a payment by a person of a fixed penalty under Part 1 of the Criminal Justice and Police Act 2001 should be evidence against a person in proceedings for this offence. Firstly, fixed penalty notices (FPNs) do not generate a criminal record and could be seen by some as a way of avoiding the trouble of contested proceedings. If they are to be used against a person in future proceedings, then that should be made clear at the time when the person is issued with the notice.

51. Secondly, a payment by somebody else (say an employee) of an FPN (or indeed their acceptance of a police caution or guilty plea to an offence) should not be conclusive evidence against the employer as the employee may have chosen to pay the FPN/plead guilty or accept the caution for their own reasons, of which the employer may well not be aware. Unless the employee is willing to be a witness for the defence, the employer may be unable effectively to challenge the facts behind the FPN. This, in our view, could affect the fairness of the trial.

Clause 22 – Directions to individuals who represent a risk of disorder

52. The exercise of this power could interfere with Convention rights, notably those under Article 11 and Article 2 of Protocol 4 to the Convention (which protects freedom of movement). The test in subclause 22(2) is a very difficult one to determine as a matter of objective fact; we are concerned that such a broadly drawn power may be applied arbitrarily – for example, on the grounds of ethnicity or clothing. We believe that the extent of this power is disproportionate: while the exercise of a power of dispersal in a crowd control situation, for example, may be justified, the requirement to stay away for up to 48 hours could not, we believe, be justified on this basis unless a continuing situation of disorder for approaching 48 hours in a locality was anticipated. This is evidently not the case in the paradigm situation for which this

[14] Fifth Report (2005-2006), paras 3.23-3.26.

provision is designed: evening/night-time disorder by club and pub-goers in urban centres. Further, since there are no limits on how often the power can be exercised against a particular person it would be possible for it to be used repeatedly against an individual, effectively preventing him ever from entering a certain locality.

53. Such broadly drawn powers are often used in circumstances quite other than those for which they were intended. This power, for example, could be used as a way of repeatedly 'moving on' homeless people. Because its criteria do not require that the person against whom it is used is himself responsible for 'alcohol-related crime or disorder', it could be used against innocent people on the grounds that their presence may provoke crime or disorder in others. For example, a black person could be dispersed under this clause because a locality contained a known hang-out of neo-Nazis who were likely to attack him.

54. The police already have extensive powers to tackle alcohol-related crime and disorder. They have the power to arrest someone who is drunk and disorderly, or when they apprehend a breach of the peace. There are many applicable public order and other criminal offences, as well as the dispersal power in s30 Anti-Social Behaviour Act 2003 in areas where an authorisation has been put in place due to problems with anti-social behaviour in the locality. Licensees can also bar troublemakers from their premises. This Bill itself contains other measures that can be taken against irresponsible licensees.

55. In the recent House of Lords case of *R (Gillan and another) v Commissioner of Police for the Metropolis and another*[15], in considering the legality of a broadly drafted power (s44 Terrorism Act 2000), it was said that

> The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly-accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any

[15] [2006] UKHL 12.

interference with or derogation from a Convention right must meet if a violation is to be avoided.[16]

56. In deciding that s44 met that test, it was noted that there was a Code of Practice which described the procedure 'in detail'.[17] A Code or other public guidance for the exercise of the power under clause 20 is, we believe, necessary.

Firearms and other offensive weapons

57. We are concerned by the minimum sentencing provisions in Part 2 of the Bill. While it is important for the government to safeguard the public from violent crime, minimum sentences distort the ordinary principles of the sentencing regime, in which sentencers consider the five purposes of sentencing laid down in section 142(2) of the Criminal Justice Act 2003: the punishment of offenders, the reduction of crime (including its reduction by deterrence), the reform and rehabilitation of offenders, the protection of the public and the making of reparation by offenders to persons affected by their offence. The Act does not indicate that any one of these purposes takes priority. The overarching principle of seriousness is described by the Sentencing Guidelines Council as 'the key factor in deciding the length of a custodial sentence'.[18] 'Seriousness', according to the Criminal Justice Act and the Council, is 'determined by two main parameters; the **culpability** of the offender and the **harm** caused or risked being caused by the offence'.[19]

58. Section 51A of the Firearms Act 1968 makes provision for 'exceptional circumstances'. In the recent case of *Rehman*,[20] which concerned section 51A, it was held that exceptional circumstances existed if 'to impose five years' imprisonment would result in an arbitrary and disproportionate sentence.'[21] The court said that the 'purpose of the provision is to ensure that absent exceptional circumstances the courts will always impose deterrent sentences'.[22]

---

[16] Lord Bingham, at para 34.
[17] Ibid., at para 35.
[18] Sentencing Guidelines Council guideline – 'Overarching Principles: Seriousness', 16 December 2004, at 1.3.
[19] *Ibid*., at 1.4.
[20] *R v. Rehman (Zakir) (2) Wood (Garry Dominic) (2005) [*2005] EWCA Crim 2056.
[21] At para. 16.
[22] At para. 14.

59. Despite this judgement, we remain concerned at the proportionality of sentencing under these provisions – since their effect may, in cases where exceptional circumstances cannot be made out, result in sentences that would not otherwise be thought justified. It is notable that in the case of the second appellant in *Rehman*, whose minimum sentence was upheld, both the sentencing judge and the Court of Appeal expressed regret or reluctance at coming to the conclusion that there were no exceptional circumstances in his case.

60. Provisions of this sort can also have negative consequences for relative proportionality (i.e. the relationship of firearms sentencing to sentencing for other offences of equivalent seriousness). Courts may be obliged to pass minimum sentences where an offence of equivalent seriousness (even merely a different firearms offence) would not attract such a sentence. This can, indirectly, discriminate between different socio-economic groups. We are particularly concerned, in this regard, that the imposition of minimum sentences for firearms offences, where such provisions do not exist for other crimes of similar seriousness, may have a disproportionate effect upon some ethnic minority groups.

61. The use of these minimum sentences also seems likely to contribute to further increases in the rate of imprisonment and to prison overcrowding. The European Commissioner for Human Rights observed that:

> One might pause to note that the 50% increase in the prison population over the last decade has resulted in the United Kingdom having the highest rates of detention in Western Europe (around 140 per 100,000, in comparison, for instance, to 93 in France and 98 in Germany). This sharp rise would appear to result from a combination of longer and more frequent custodial sentences. UK courts have not over this period been dealing with more offenders nor an increase in serious offences that might otherwise explain this development.
>
> Quite apart from the cramped conditions inevitably entailed, such high levels of overcrowding impact on all aspects of prison regimes. [23]

[23] Gil-Robles (2005) at paras. 123 to 124.

62. We are even more concerned by the imposition in this Bill of mandatory minimum sentences to 16 and 17 year-olds. This is absolutely in contravention of both the Convention of the Rights of the Child and the government's stated policy of only putting children in custody as a last resort and for the shortest appropriate period time.

63. In its most recent set of concluding observations on the United Kingdom, the United Nations Committee on the Rights of the Child said that it was 'deeply concerned at the increasing number of children who are being detained in custody at earlier ages for lesser offences and for longer sentences imposed as a result of the recently increased court powers to issue detention and restraining [sic] orders. The Committee is therefore concerned that deprivation of liberty is not being used only as a measure of last resort and for the shortest appropriate period of time, in violation of article 37 (b) of the Convention'.[24]

Football Banning Orders

65. We are concerned that paragraph 6 of Schedule 1 of the Bill lengthens the duration of banning orders made on complaint. Three years is, in our opinion, an excessive prescribed minimum period for an order of this nature – and may offer the courts insufficient flexibility in dealing with less serious cases. The extension of the minimum period is of particular concern since although there is an appeal against the granting of an order, a person made subject to an order may only apply for it to be terminated after two thirds of the order's duration has passed.[25] If there is a change in circumstances meaning that the order is no longer necessary or appropriate, its restrictions will therefore remain inappropriately in force for a longer period of time. This is not consistent with an order that is intended to be preventative in nature.

66. While case-law[26] has modified the application of the FBO provisions in order to safeguard against their use in inappropriate cases, we remain concerned at the extremely broad drafting of the provisions. If they are to be put on a permanent basis in this Bill, their operation thus far should be examined in order to ensure that they are only being used where appropriate and in a proportionate manner.

---

[24] CRC/C/15/Add.188, 9 October 2002, at para. 59.

[25] Section 14H of the Football Spectators Act 1989, as inserted by the Football (Disorder) Act 2000, Sch. 1, para. 2.

[26] Cf *Gough v Chief Constable of Derbyshire* [2002] EWCA Civ 351.

SALLY IRELAND

28 March 2006