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Police Reform and Social Responsibility Bill

Bill 116 of 2010-11

RESEARCH PAPER 10/81 9 December 2010

This briefing on the *Police Reform and Social Responsibility Bill* has been prepared for the Second Reading debate on the Bill in the House of Commons.

Part 1 of the Bill would replace police authorities with directly elected Police and Crime Commissioners, which the Government says will improve police accountability. Critics have expressed concerns about the cost of holding elections and the risk of politicising the police.

The alcohol licensing reforms introduced in 2005 are widely perceived to have contributed to social problems and public disorder. Part 2 of the Bill would amend and supplement the *Licensing Act 2003* with the intention of "rebalancing" it in favour of local authorities, the police and local communities.

Part 3 of the Bill sets out a new framework for regulating protests around Parliament Square. Relevant sections of the *Serious Organised Crime and Police Act 2005* would be repealed and the police would be given new powers to prevent encampments and the use of amplified noise equipment.

Clause 149 would enable the Home Secretary to temporarily ban drugs for up to a year. Clause 150 would remove the statutory requirement for the Advisory Council on the Misuse of Drugs to include members with experience in specified activities.

Clause 151 would introduce a new requirement for private prosecutors to obtain the consent of the Director of Public Prosecutions prior to the issue of an arrest warrant for "universal jurisdiction" offences such as war crimes or torture. The Government says this would prevent the courts being used for political purposes, but critics argue that it would hamper efforts to bring those accused of such offences to justice.

Sally Almandras
Philip Ward
John Woodhouse
Elena Ares

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Contributing Authors:

Sally Almandras, Home Affairs, police, arrest warrants
Philip Ward, Home Affairs, licensing
John Woodhouse, Home Affairs, protests around Parliament
Elena Ares, Science and Environment, misuse of drugs

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Summary

The Bill was introduced in the House of Commons on 30 November 2010 and is scheduled to have its Second Reading on 13 December 2010.

Part 1 of the Bill would abolish police authorities, which are currently responsible for overseeing police forces, and replace them with directly elected Police and Crime Commissioners. The Commissioners would themselves be monitored by new Police and Crime Panels, formed of local councillors and two co-opted independent members. These changes would, the Government says, improve police accountability and give the public a greater say in local policing. However, critics have expressed a number of concerns, including the predicted cost of the elections and the potential politicisation of policing.

Part 2 of the Bill would amend the *Licensing Act 2003*. Licensing authorities themselves and local health bodies would be given the power to make representations about new or existing licences. The "vicinity test" and the limited category of "interested party" would be abolished, enabling anyone to make relevant representations about new or existing licences. Temporary event notices (TENs) would be overhauled and penalties for underage sales would be strengthened. Licensing authorities would acquire the power to introduce a late night levy on premises opening after midnight. At least 70% of the income would go to the police, the remainder to the local authority. Note that the Bill does not include any provision to ban the sale of alcohol below cost price. The Government has indicated that such legislation (if deemed necessary) will not now be introduced until 2012.

Part 3 of the Bill covers demonstrations around Parliament Square. The Bill would repeal sections 132 to 138 of the *Serious Organised Crime and Police Act 2005*, meaning that notice would no longer be required for demonstrations in the vicinity of Parliament and it would no longer be an offence to use a loudspeaker in this area. However, the Bill would also introduce new provisions making it an offence (with limited exceptions) to operate amplified noise equipment in Parliament Square. It would also be an offence to erect and keep tents in the area. Police would have new powers to seize any property used in connection with prohibited activities. Westminster City Council and the Greater London Authority would also be given enhanced powers to prevent and suppress nuisance in the area.

Clauses 149 and 150 relate to the misuse of drugs. Clause 149 would enable the Home Secretary to temporarily ban a drug for up to a year. Clause 150, which has proved controversial, would remove the statutory requirement for the Advisory Council on the Misuse of Drugs to include members with experience in specified activities. The Government's rationale is that this would allow for greater flexibility. However, a number of scientific groups have questioned whether the Council would be capable of objectively evaluating substances if there was no requirement for its members to have specified experience.

Clause 151 would amend the law on arrest warrants for private prosecutions of universal jurisdiction offences (e.g. war crimes and torture) by introducing a new requirement for the Director of Public Prosecutions to consent to their issue. This has been prompted by a number of incidents in which private individuals or campaign groups have applied to the courts for arrest warrants in respect of foreign military or political figures who have been visiting (or due to visit) the UK. The Government is concerned that such figures might not be willing to visit the UK in future, which might in turn damage the UK's ability to help in conflict resolution or to pursue a coherent foreign policy. It says that the proposed change would prevent the courts being used for political purposes. However, human rights organisations argue that it would hamper efforts to bring suspected war criminals to justice.

1 Introduction

The Bill was introduced in the House of Commons on 30 November 2010 as Bill 116 of 2011-10. It is scheduled to have its Second Reading on 13 December 2010.

The Bill covers five distinct policy issues:

- police accountability and governance, in particular the abolition of police authorities and the introduction of directly elected police commissioners;
- alcohol licensing;
- the regulation of protests around Parliament Square;
- misuse of drugs, in particular the temporary banning of drugs and the composition of the Advisory Council on the Misuse of Drugs; and
- the issue of arrest warrants in respect of private prosecutions for universal jurisdiction offences.

The Bill follows a number of policy reviews and consultation papers in these areas, which are discussed in more detail in the relevant sections of this paper.

The Bill applies to England and Wales. Clauses 149 and 150, which cover the misuse of drugs, will also apply to Scotland and Northern Ireland. This would enable the Home Secretary to temporarily ban drugs on a UK-wide basis.

2 Police reform

Part 1 of the Bill would abolish police authorities, which currently have responsibility for setting police force budgets and holding chief constables to account, and replace them with directly elected Police and Crime Commissioners supervised by appointed Police and Crime Panels. The Government is proposing that the first Commissioner elections will take place in May 2012.

The Home Office estimates that the annual running costs of Commissioners and Panels (including salaries and administrative costs) would be the same as the current running costs of police authorities: between £52 million and £78 million.[1] However, the need to hold Commissioner elections would give rise to an additional cost estimated at £136.5 million over a ten year period. There would also be transitional costs of approximately £5 million to cover, among other things, the cost of redundancy payments to current police authority staff.[2] Specific provision for these additional costs was made in the Comprehensive Spending Review settlement for the Home Office.[3]

2.1 Oversight of police forces: the current structure

Responsibility for policing is currently based on a tripartite relationship between the Home Secretary, police authorities and chief constables:

> In theory, the tripartite arrangement sets out that the Home Secretary is responsible to Parliament for the overarching efficiency and effectiveness of the service in England and Wales, as well as the maintenance of minimum service standards. Chief

1 Home Office, *Impact Assessment HO0021 – Police and Crime Commissioners*, 30 November 2010, p9
2 Ibid, p2
3 HM Treasury, *Spending Review 2010*, Cm 7942, October 2010, pp54-55

> constables are responsible for the operational effectiveness of police forces. Police authorities are responsible for setting the strategic direction for each force and holding the chief constable to account on behalf of the local community, by holding the budget and deciding how much council tax should be raised for policing; appointing the chief constable and senior officers; consulting with local people to find out what they want from their local police and setting local policing priorities and targets for achievement accordingly; monitoring the force against these targets; ensuring best value; and overseeing complaints.[4]

The current structure and role of police authorities is governed by the *Police Act 1996* and the *Police Authority Regulations 2008*. Most police authorities have 17 members: 9 local councillors and 8 independent members, at least one of whom must be a magistrate.[5] The councillor members are appointed by the local council(s) that lie wholly or partly within the police authority's geographical boundaries. The council(s) must ensure that the councillors they appoint:

- represent the interests of a wide range of people within the community in the police area of the police authority;
- include persons with skills, knowledge or experience which are perceived by them to be under-represented among the existing members of the police authority;
- promote diversity within the force and the police authority in question; and
- are likely to commit sufficient time to take an effective role in the work of the police authority.[6]

The independent members are appointed by the existing members of the police authority and should also (so far as reasonably practicable) meet the above criteria.[7]

A police authority's responsibilities include:

- securing the maintenance of an efficient and effective police force for its area;
- holding the chief constable to account for the exercise of his functions;
- issuing a policing plan setting out the short and long term policing objectives for the area (having consulted the chief constable and the local community);
- appointing the chief constable and, in certain circumstances, calling on him or her to resign;
- collaborating with other police authorities to jointly provide equipment, premises, or other material or facilities, and staff and services where appropriate;
- holding and administering the police fund, agreeing the police budget and setting the precept element of police funding.[8]

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4 Home Affairs Committee, *Policing in the 21st Century*, 10 November 2008, HC 364-I 2007-08, para 232

5 Devon and Cornwall, Greater Manchester, Thames Valley, Dyfed Powys and South Wales police authorities all have 19 members: 10 councillors and 9 independents. The Metropolitan Police Authority has 23 members: 12 members of the London Assembly and 11 independents.

6 *Police Authority Regulations 2008, SI 2008/630*, regulation 8A

7 Ibid, regulation 39

When discharging its functions, every police authority is under a statutory duty to take into account the views of the local community, and to make arrangements for obtaining the views of local people on policing matters (e.g. via surveys or meetings).

2.2 Criticisms of the current structure

In recent years, the tripartite structure – and police authorities in particular – has begun to be criticised on the grounds that it lacks sufficient democratic accountability. Concerns have been expressed that there is a "democratic deficit" in policing and that local people do not have enough input into setting policing priorities or holding the police to account, and there is a certain amount of statistical evidence to show that the public are unclear as to what police authorities are or what they do. For example, in 2008 Louise Casey's *Engaging Communities in Fighting Crime* review said:

> There is also confusion and uncertainty amongst the public when it comes to holding the police to account. In a survey of members of the public for the review in May:
>
> - Two-thirds (67%) of the public said they would not know who to go to with a complaint if they were unhappy about the way their local area was being policed.
>
> It was also clear from these findings that the public think it is difficult to challenge local police on the way they police their area:
>
> - 59% said they would find this difficult or very difficult.
>
> (...)
>
> In a survey of the public carried out for the review in May, just over two-thirds (68%) agreed that, locally, there should be a person elected by local people to hold the police to account on behalf of the community.[9]

Further statistics on public views of police accountability are set out in the Home Office Impact Assessment for Police and Crime Commissioners.[10]

2.3 Parties' proposals for reform

Each of the main political parties has at some point proposed remedying the perceived democratic deficit by introducing some form of direct election into policing.

In 2008, the Labour Government had planned to legislate via its *Policing and Crime Bill* to reform police authorities so that the majority of members would no longer be local councillors but directly elected "Crime and Policing Representatives". However, this plan was later dropped and the Bill as introduced included no such provisions. The then Home Secretary Jacqui Smith explained that this was due to concerns about the politicisation of the police. More detailed background can be found in Library Research Paper 09/04, *Policing and Crime Bill,* 15 January 2009 (pages 10 to 14). Labour's 2010 election manifesto did not include any further proposals to reform police authorities.

The Conservatives have backed proposals for directly elected Police and Crime Commissioners for some time now. The reform was first proposed in the party's 2005 election manifesto.[11] The idea was discussed in more detail in a 2007 policy review

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8 A comprehensive list of the statutory powers and responsibilities of police authorities has been published by the Association of Police Authorities: *List of Police Authorities' Statutory Duties and Powers*, May 2010

9 Cabinet Office, *Engaging Communities in Fighting Crime: a review by Louise Casey*, June 2008, p83

10 Home Office, *Police and Crime Commissioners: Impact Assessment (IA No: HO0021)*, 30 November 2010, section A.1

11 Conservative Party, *Are you thinking what we're thinking?*, 2005, p15

document by Nick Herbert, now minister for policing,[12] and appeared in the party's 2010 election manifesto:

> Policing relies on consent. People want to know that the police are listening to them, and the police want to be able to focus on community priorities, not ticking boxes.
>
> We will replace the existing, invisible and unaccountable police authorities and make the police accountable to a directly-elected individual who will set policing priorities for local communities. They will be responsible for setting the budget and the strategy for local police forces, with the police retaining their operational independence.
>
> Giving people democratic control over policing priorities is a huge step forward in the empowerment of local communities, and we will go further by giving people the information they need to challenge their neighbourhood police teams to cut crime.[13]

The Liberal Democrats have previously been opposed to individual directly elected commissioners, arguing that a police authority should be representative of the whole community:

> But police authorities must be representative of the whole community, including women and ethnic minorities, which is why we reject Labour and Tory plans for elected sheriffs. We propose a mixed system with a majority elected by fair votes.[14]

The party's February 2010 policy document *Safer Streets – More and Better Police* explained the proposed "mixed system" in more detail:

> **We would give local people a real say over their police force through the direct election of police authorities by fair votes**. Where council and police force borders are the same, the council would be the police authority. In the other 35 police forces in England and Wales, two-thirds of members would be elected by Single Transferable Vote and one-third nominated from councils. Authorities would still be able to co-opt extra members to ensure diversity, experience and expertise. The public should know and be able to hold to account their police authority representatives in line with the liberal principle on no taxation without representation. Until voters can hold decision-takers directly to account, there will be overwhelming pressure on central government to interfere. Fair votes would ensure that all the strands of opinion, minorities and the quirks of geography are represented.
>
> Where a police force fell within the same geographical boundary as a single council, the Liberal Democrats proposed that the council should also constitute the police authority. Where a police force straddled the boundaries of two or more councils, the proposal was for a third of the police authority to be nominated councillors and two thirds to be directly elected by single transferable vote.[15]

The proposal for directly elected police authorities appeared in the party's 2010 election manifesto.[16]

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12 Conservative Party, *Policing for the People*, 2007, chapter 7
13 Conservative Party, *Invitation to Join the Government of Britain*, 2010, p57
14 Liberal Democrat Justice and Home Affairs Team, *Cutting Crime: Catching Criminals With Better Policing*, October 2008, p3
15 Liberal Democrats, *Safer Streets – More and Better Police*, February 2010, p3
16 Liberal Democrats, *Liberal Democrat Manifesto 2010*, p72

2.4 Developments since the general election

Following the 2010 general election and the formation of the coalition, the Government made the following commitment as part of its "programme for partnership government":

> We will introduce measures to make the police more accountable through oversight by a directly elected individual, who will be subject to strict checks and balances by locally elected representatives.[17]

A "Big Society" survey conducted shortly after the election examined public views on several policy proposals, including the direct election of policing representatives. The police element of the survey covered 1,868 British adults and was conducted between 14 and 20 May 2010. Participants were first told about the current police authority structure. Half were then asked whether they supported the following statement:

> Currently the general public do not directly vote people on to the police authority. One suggestion that has been made is to replace these authorities with a directly-elected individual who would be responsible for setting the priorities for the local police force and would be accountable to local people.[18]

40 per cent expressed support for this statement, 26 per cent were opposed and 33 per cent were either neutral or answered "don't know".

The other half were read the above statement but with the addition of the following sentence:

> However, some senior police officers say they are worried this will bring politics into the running of police forces.[19]

32 per cent expressed support for this version of the statement, 37 per cent were opposed and 32 per cent were either neutral or answered "don't know".

The consultation paper: Policing in the 21st Century

In July 2010, the Government published a consultation paper setting out a number of proposed policing reforms.[20] Included in this was a proposal for police authorities to be replaced with directly elected Police and Crime Commissioners:

> Scope and Remit of the Police and Crime Commissioner
>
> 2.8 We are determined to embed this reform into the existing force boundaries that people already understand. A single Commissioner will be directly elected at the level of each force in England and Wales with the exception of the Metropolitan Police (where local accountability is already strong) and the City of London Police. The British Transport Police, the Civil Nuclear Constabulary and the Ministry of Defence Police will not have Commissioners.
>
> 2.9 The Commissioner will hold the Chief Constable to account for the full range of his or her current responsibilities. Police and Crime Commissioners will have five key roles as part of their mission to fight crime and ASB:
>
> - Representing and engaging with all those who live and work in the communities in their force area and identifying their policing needs;

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17 Cabinet Office, *The Coalition: our programme for government*, May 2010, p13
18 Ipsos Mori, *Big Society – what do we know?*, Summer 2010, pp62-3
19 Ibid
20 Home Office, *Policing in the 21st Century: Reconnecting police and the people*, Cm 7925, July 2010. See also HC Deb 26 July 2010 cc723-731

- Setting priorities that meet those needs by agreeing a local strategic plan for the force;

- Holding the Chief Constable to account for achieving these priorities as efficiently and effectively as possible, and playing a role in wider questions of community safety;

- Setting the force budget and setting the precept. Our intention is to make precept raising subject to referendum. Further detail will be set out by the Department for Communities and Local Government (in England) and the Welsh Assembly Government (in Wales); and,

- Appointing - and, where necessary, removing - the Chief Constable.[21]

The consultation paper went on to propose that Commissioners should serve for up to two terms of four years:

> *Elections*
>
> 2.12 The Government wants candidates for Commissioners to come from a wide range of backgrounds, including both representatives of political parties and independents. Commissioners will have a set four year term of office and term limits of two terms. The Government intends to apply the existing framework for the conduct of local government and Parliamentary elections including the recognised eligibility criteria for standing for public office, in preparing for the first set of elections in May 2012. We are considering the appropriate voting system, and believe that a preferential voting system is the right option. We will work closely with local government representatives and the Electoral Commission to ensure that these elections are coordinated effectively and represent good value for money.[22]

The operational independence of chief constables would, the paper said, be protected:

> *Role of the Chief Constable*
>
> 2.13 The operational independence of the police is a fundamental principle of British policing. We will protect absolutely that operational independence. Giving Chief Constables a clear line of accountability to directly elected Police and Crime Commissioners will not cut across their operational independence and duty to act without fear or favour. In fact Chief Constables will have greater professional freedom to take operational decisions to meet the priorities set for them by their local community – via their Commissioner. This will include being able to appoint all of their top management team.[23]

The key "check and balance" on a Commissioner would be the ballot box: the public would ultimately be able to vote out a Commissioner who failed to deliver effective policing. However, an additional check and balance would be provided by new Police and Crime Panels made up of local councillors and independent members:

> *Local Government and independent scrutiny*
>
> 2.26 At the core of our proposals for appropriate checks and balances to the power of the new Police and Crime Commissioners is the establishment of a new Police and Crime Panel. This will ensure there is a robust overview role at force level and that

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21 Ibid, paras 2.8-2.9
22 Ibid, para 2.12
23 Ibid, para 2.13

> decisions of the Police and Crime Commissioners are tested on behalf of the public on a regular basis. We will create Police and Crime Panels in each force area drawn from locally elected councillors from constituent wards and independent and lay members who will bring additional skills, experience and diversity to the discussions. We are clear that these relate to the Commissioner and not the force itself.
>
> 2.27 This Panel will be able to advise the Commissioner on their proposed policing plans and budget and consider progress at the end of each year outlined in a 'state of the force' report. If the Panel objects to the Commissioner's plans or budget they will be free, in the interests of transparency, to make their concerns public, or in cases of misconduct, to ask the Independent Police Complaints Commission (IPCC) to investigate the Commissioner. They will be able to summon the Commissioner to public hearings, take evidence from others on the work of the Commissioner, and see papers sent to the Commissioner as a matter of course except where they are operationally sensitive. They will hold confirmation hearings for the post of Chief Constable and be able to hold confirmation hearings for other appointments made by the Commissioner to his staff, but without having the power of veto. However, they will have a power to trigger a referendum on the policing precept recommended by the Commissioner.[24]

The Home Secretary would continue to provide strategic direction in relation to matters of sufficient risk or importance to warrant national oversight: for example national security issues or the policing of the 2012 Olympics.

The consultation paper asked for views on a range of matters, including whether the proposed checks and balances would provide effective but unbureaucratic safeguards for the work of Commissioners, and what could be done to ensure that candidates standing for election as Commissioners came from a wide range of backgrounds.[25]

Responses to the consultation

A summary of consultation responses was published on the same day as the Bill.[26] The summary highlighted the following views regarding the proposed introduction of Commissioners.[27]

Role of Commissioners

Some were concerned that a Commissioner, as a single individual, would not be effective across a whole police area and would find it difficult to engage with communities. Suggestions to remedy this included appointing a deputy commissioner or board of executives to support the Commissioner.

Some agreed that the proposed checks and balances were at the right level, others thought they might prove overly bureaucratic or create confusing lines of accountability, and others felt they were too weak and queried whether Police and Crime Panels would provide real challenge and scrutiny.

Some agreed that current police accountability is not local or powerful enough, and that a Commissioner would be better placed to set local policing priorities and represent the public. However, others expressed concern about the political nature of Commissioners – in

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24 Ibid, paras 2.26-2.27
25 Ibid, p18
26 Home Office, *Policing in the 21st Century: Reconnecting police and the people – Summary of consultation responses and next steps*, December 2010
27 Ibid, pp8-9

particular the involvement of candidates supported by the main political parties – and the risks that this might pose to operational independence.

Affordability

A number of respondents wanted further clarity on the costs of Commissioners, and whether these would be higher than those currently incurred by police authorities: particularly as some noted that many police authorities already feel under-resourced.

Many also questioned the decision to incur the new costs of holding Commissioner elections at a time when public spending is being cut.

Elections

Some were concerned that Commissioner candidates might make commitments during election campaigns that the local force could not meet, either because it did not have the resources or because it was not within the force's remit to do so. This might create tension between the newly elected Commissioner and the chief constable and damage public confidence.

There was strong support for allowing independent candidates to stand. Respondents made a number of recommendations aimed at broadening the diversity of candidates to reflect the needs of local people: for example, requiring candidates to live within the force area and holding local pre-election meetings to identify potential independent candidates.

However, there was concern that independents would lack the resources and practical support needed to stand, and that special interest or minority party candidates might be successful and end up damaging community relations.

Some of the key individual responses to the consultation

Association of Chief Police Officers
ACPO response to Policing in the 21st Century: Reconnecting police and the people

Association of Police Authorities
Response to Policing in the 21st Century: Reconnecting police and the people

Liberty
Liberty's response to the Home Office consultation Policing in the 21st Century: Reconnecting police and the people

Local Government Association
Local Government Association's response to the Government's Policing in the 21st century consultation

Police Federation
Policing in the 21st century: reconnecting police and the people – the response of the Police Federation of England & Wales

Police Superintendents' Association
Policing in the 21st Century: Reconnecting police and the people – Response of the Police Superintendents' Association Of England And Wales (PSAEW)

The role of Police and Crime Panels

There were concerns that tensions might develop between Commissioners and Panels, particularly where there were opposing political viewpoints. Some suggested that this could be mitigated by giving Panels a statutory role in setting strategic policing priorities.

A few queried the need for Panels at all, saying that they would dilute the clear local accountability offered by Commissioners. Others suggested that Panels seemed to simply be the current police authority structures under a new name, and expressed concern that their members would be drawn largely from the same pool of elected councillors.

The Home Affairs Committee report

The Home Affairs Committee also published a report into the Government's proposals for Commissioners.[28] The report considered a range of issues including:

[28] Home Affairs Committee, *Policing: Police and Crime Commissioners*, 1 December 2010, HC 511 2010-11

- whether a single Commissioner would be able to represent an entire police area or cope with the workload;
- the potential for losing corporate knowledge if new support teams were appointed every time a new Commissioner was elected;
- the danger of policing priorities simply mirroring the views of a vocal minority (the "fearful safe") rather than the community as a whole;
- whether former senior police officers should be able to stand for election as Commissioners in the same areas in which they had served;
- whether Commissioners would have adequate powers to be more effective in holding chief constables to account than police authorities are at the moment;
- whether the concept of "operational independence" should be clarified, for example in a memorandum of understanding between the Home Secretary, chief constables and Commissioners;
- what the role of the Home Secretary should be in setting national strategic direction and priorities; and
- whether Panels should be independent scrutinising bodies, or whether they should have a more collaborative advisory relationship with Commissioners.

Ipsos Mori research on behalf of the Association of Police Authorities

While the Home Office consultation was open, the Association of Police Authorities commissioned Ipsos Mori to conduct eight discussion workshops aimed at exploring the public's views on police accountability and governance.[29] At the workshops, held during August 2010, a variety of governance options, including those proposed in the Home Office consultation, were explained in more detail to the participants. They were then asked to discuss these options and develop their own preferred model of police governance. Ipsos Mori said that the findings suggested there was "a strong preference for a visible and named figurehead for police accountability in each area", but that there was also a need for that individual to demonstrate political independence. Of the eight workshops, six developed a preferred structure involving an individual (in some cases elected, in others appointed) and a scrutiny panel. The other two developed structures similar to existing police authorities.

2.5 The Bill

Part 1 of the Bill sets out the clauses that would abolish police authorities in England and Wales and replace them with Commissioners and Panels. Detailed analysis of the clauses is set out in the Explanatory Notes to the Bill. Some of the key provisions are described below.

Police and Crime Commissioners

Structure, function and staffing

Clause 1 would abolish most police authorities in England and Wales[30] and replace them with Commissioners. Each Commissioner would be a "corporation sole", meaning the office would have its own legal personality separate from the person holding it at any given time.

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29 Ipsos Mori, *Police accountability and governance structures – Public attitudes and perceptions*, 23 September 2010

30 Other than the police authorities for the City of London, the Metropolitan Police, the British Transport Police, the Civil Nuclear Police and the Ministry of Defence Police.

This would enable the Commissioner to own property, employ staff, make contracts and take part in legal proceedings in the same way as a police authority currently can.

The core functions of a Commissioner would be the same as those currently undertaken by police authorities: namely, to secure the maintenance of an efficient and effective police force and to hold the chief constable to account.[31] **Schedule 1** would require each Commissioner to appoint a chief executive and a chief finance officer. The latter would automatically be delegated as "monitoring officer", with a duty to report any unlawful conduct or maladministration by the Commissioner.

Clause 3 would make equivalent provision for the Metropolitan Police. The Metropolitan Police Authority would be abolished and replaced with a new body known as the Mayor's Office for Policing and Crime. Whoever was serving as Mayor of London would automatically also be the occupant of the Mayor's Office for Policing and Crime.[32] Again, this office would be a corporation sole and would have the same core functions as other Commissioners. Chief executive and chief finance officers would also be required.[33]

In addition to the mandatory chief executive and chief finance officer, each Commissioner and the Mayor's Office would also be able to appoint such other staff as he or she thought appropriate to enable him or her to exercise the functions of Commissioner of Mayor's Office.

Under the *Local Government and Housing Act 1989*, certain police authority staff members are currently deemed to hold "politically restricted positions".[34] Anyone holding a politically restricted post is subject to the *Local Government Officers (Political Restrictions) Regulations 1990, SI 1990/851*. These essentially prohibit those who hold politically restricted positions from most political activity, including:

- standing as candidates in elections;
- acting as an agent or sub-agent for candidates standing in elections;
- being an officer of a political party or a member of any committee of such a party;
- canvassing on behalf of a political party or a candidate for election;
- speaking publicly in support of a political party;
- or publishing any written or artistic work in support of a political party.

Library Standard Note SN/PC/3883 *Local government: politically restricted posts* gives a more detailed overview of the 1989 Act and the 1990 Regulations.

Part 3 of Schedule 15 to the Bill would amend the 1989 Act by deleting the reference to police authorities and inserting a new provision to the effect that **every** member of staff

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31 Under clause 18 Commissioners would be able to delegate some of their functions, but would be required to carry out core functions such as issuing a police and crime plan and determining policing objectives themselves.

32 Although note that the Mayor would be able to delegate all of his or her functions as the Mayor's Office for Policing and Crime to a deputy mayor for policing and crime (clause 19), in recognition that the Mayor's other responsibilities mean (s)he is unlikely to have enough time to fulfil this role.

33 The requirement for a chief finance officer would be derived from the *Greater London Authority Act 1999* and so does not appear in the Bill.

34 Sections 1, 2 and 21 of the 1989 Act. For an example of how police authorities currently manage politically restricted positions under the 1989 Act, please see Gwent Police Authority, *Politically Restricted Posts – Annual Review 2010*, 14 June 2010

appointed by a Commissioner or the Mayor's Office would be deemed to hold a politically restricted position.[35] They would therefore be subject to the 1989 Act and the 1990 Regulations in the same way as some police authority staff members currently are. This reflects the following statement in the Home Office's summary of consultation responses:

> Whilst the PCC will be able to appoint staff to advise and assist them, all staff must be appointed on merit and will be politically restricted posts. Party political office holders and active party members will not be able to be appointed to the PCC's staff.[36]

Police and crime plans

Clauses 5 and 6 would require each Commissioner and the Mayor's Office for Policing and Crime to issue a police and crime plan, and enable him or her to make subsequent issues or variations. When issuing or varying a plan, the Commissioner or Mayor's Office would have to have regard to any strategic policing requirement issued by the Home Secretary.[37] He or she would also be required to consult the relevant chief constable and send the draft plan to the local Police and Crime Panel. No plan could be issued or varied without the relevant chief constable's agreement. Under **clause 7**, the plan would have to cover the following matters:

- the police and crime objectives of the Commissioner or Mayor's Office;
- the policing that is to be provided by the chief constable;
- the financial and other resources that the Commissioner or Mayor's Office is to provide to the chief constable;
- the means by which the chief constable will report to the Commissioner or Mayor's Office on the provision of policing;
- the means by which the chief constable's performance in providing policing will be measured; and
- the crime and disorder reduction grants that the Commissioner or Mayor's Office is to make, and the conditions under which any such grants are to be made.[38]

The requirement to issue a police and crime plan is similar to the current requirement for police authorities to issue policing plans.[39] However, under the current arrangements the first draft of the plan is prepared by the chief constable before being submitted to the police authority its consideration (rather than the other way round). The police authority is then required to consult the chief constable before issuing a plan that differs from his draft.

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35 Schedule 15, Part 3, paragraphs 92-3 and 97

36 Home Office, *Policing in the 21st Century: Reconnecting police and the people – Summary of consultation responses and next steps*, December 2010, para 2.12

37 See Clause 79

38 Clause 9 would permit the PCC or Mayor's Office to make a crime and disorder reduction grant to "any person" if, in the opinion of the PCC or Mayor's Office, the grant would secure (or contribute to securing) crime and disorder reduction in the relevant police area. The grant may be subject to any conditions (including repayment conditions) that the PCC or Mayor's Office thinks appropriate.

39 Section 6ZB of the *Police Act 1996* and the *Policing Plan Regulations 2008, SI 2008/312* (as amended). For examples of current police authority plans, see: Gloucestershire Police Authority and Gloucestershire Constabulary, *People First Policing: The Policing Plan For Gloucestershire 2010-2011* and Metropolitan Police Authority and Metropolitan Police Service, *Policing London Business Plan 2010-2013*

Publication of information and consultation with communities

Clause 11 would require Commissioners and the Mayor's Office to publish such information as the Secretary of State may specify by order. According to the Explanatory Notes, this order-making power would be used to ensure the publication of standard information regarding staff numbers and pay rates, items of expenditure above a certain level and any gifts or loans received.[40] Commissioners and the Mayor's Office would also have to publish the information that they considered necessary to enable local people to assess their performance and that of the relevant chief constable. Under **clause 12** each Commissioner and the Mayor's Office would have to publish an annual report, reviewing (among other things) the progress that had been made in meeting the police and crime objectives set out in the police and crime plan.

Clause 14 would require each Commissioner and the Mayor's Office to seek local people's views on draft policing and crime plans and on proposals for expenditure (including capital expenditure) in that financial year.

Funding

Under **clauses 22 and 23**, the Home Secretary's existing power to set a minimum budget requirement for a police authority would continue to apply to Commissioners and the Mayor's Office, with the new proviso that it could only be exercised if (in the Home Secretary's view) a Commissioner or the Mayor's Office had set its own budget requirement at such a low level that the public safety of people in the police area would be put at risk if it were implemented.

Clause 26 would give Commissioners[41] the power (currently exercised by police authorities) to raise funds for policing by way of setting a council tax precept. **Schedule 5** sets out further procedural requirements. In particular, Commissioners would have to notify the relevant Police and Crime Panel of the proposed precept. Panels would be able to veto proposed precepts.

Appointment and removal of chief constables

Clause 38 would give Commissioners the power (currently exercised by police authorities) to appoint, suspend and remove the relevant chief constable. This power would be subject to scrutiny and approval by the relevant Police and Crime Panel. The power to appoint, suspend and remove other senior officers would lie with the chief constable. Under **clause 83** the Home Secretary would no longer have any power to direct that a chief constable outside London be suspended or required to resign or retire.

By contrast, the Mayor's Office would not have any powers of appointment or removal over the Metropolitan Police Commissioner. Instead, due to the Commissioner's strategic importance in national policing matters, the current system whereby the Queen appoints the Commissioner upon the recommendation of the Home Secretary would continue. **Clause 42** would, however, require the Home Secretary to have regard to any recommendations made by the Mayor's Office.

Police and Crime Panels

The key oversight mechanism for Commissioners and the Mayor's Office would be Police and Crime Panels. Under **Schedule 6** of the Bill, in police areas outside London each Panel would be made up of at least ten local councillors, plus two co-opted independent members

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40 *Police Reform and Social Responsibility Bill – Explanatory Notes*, para 84

41 But not the Mayor's Office: precepts for funding the Metropolitan Police are currently proposed by the Mayor of London and approved by the Greater London Authority. This would continue to be the case following the introduction of the Mayor's Office. The *MPA Budget Factsheet* on the Metropolitan Police Authority's website provides further details on the current funding arrangements.

and (in the case of Welsh police areas) an additional member appointed by the Welsh Ministers. For the Metropolitan Police, **clause 32** provides that the Panel would be formed by a committee of the London Assembly.

The Bill does not prescribe the way in which Panels should select their members. Instead, it would be up to the local authorities within each police area to establish their own arrangements for the appointment and terms of office of members of the local Panel. For Panels outside London, paragraphs 5 and 11 of **Schedule 6** would require such arrangements to ensure that the local authority appointments reflected the geography of the police area and the political composition of the local authority or authorities, and that collectively Panel members would have the skills, knowledge and experience needed for the Panel to discharge its functions effectively.

Under **clause 28** of the Bill, the general functions of each Panel outside London would be to review and scrutinise the decisions and actions of the local Commissioner, and to make reports or recommendations to him or her. In particular, each Panel would be required to:

- review the Commissioner's draft police and crime plan and make reports or recommendations on it to the Commissioner; and

- review the Commissioner's annual report, hold a public meeting to question the Commissioner about it, and make reports or recommendations on it to the Commissioner.

Clause 33 would make equivalent provision for the London Assembly Panel responsible for supervising the Mayor's Office.

Each Panel outside London would have two key powers of veto: one relating to the level of precept proposed by the Commissioner, and the other relating to the appointment of chief constables.[42] **Schedules 5 and 8** set out the relevant procedures. In each case the power of veto would only be capable of being exercised where three quarters of the Panel's total membership agreed to it. Both Schedules would give the Home Secretary order-making powers to make regulations governing the procedure to be followed if a proposed precept or appointment is vetoed, in order to ensure that a precept can eventually be issued or an appointment eventually made.

Clause 13 would oblige Commissioners and the Mayor's Office to provide their local Panel with any information the Panel may reasonably require to carry out its functions. The Commissioner or Mayor's Office would have the discretion to withhold any information where the relevant chief constable was of the view that its disclosure would be against national security interests, might jeopardise the safety of any person, or might prejudice the prevention or detection of crime, the apprehension or prosecution of offenders, or the administration of justice.

Clause 29 would enable each Panel to call the Commissioner (or members of the Commissioner's staff) to attend before the Panel to answer questions, or to respond in writing to report or recommendations made by the Panel to the Commissioner. **Clause 33** makes equivalent provision for the London Assembly Panel.

Under **clause 30**, Panels outside London would have the power to suspend the local Commissioner if he or she was charged with an offence carrying a maximum term of imprisonment exceeding two years.

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[42] The London Assembly Panel would not have these powers of veto as the Mayor's Office would not be responsible either for setting the precept or appointing the Metropolitan Police Commissioner.

Elections and eligibility

Clauses 50 to 78 deal with the arrangements for electing Commissioners outside London.[43] Elections would take place every four years (beginning in 2012) on the same date as local government elections. The Home Office impact assessment estimates that each set of Commissioner elections would cost an additional £50 million every four years over and above the existing costs of local government elections. This additional cost would be met from the Home Office spending review settlement.[44]

Anyone who would be entitled to vote at a local government election in an electoral area falling wholly or partly within the relevant police area, and who has an address within that police area, would be entitled to vote in the Commissioner elections for that police area.

The Electoral Commission would be given a statutory duty to take such steps as it considered appropriate to raise public awareness about the Commissioner elections and how to vote in them.

Voting would be by simple majority, unless there were three or more candidates in which case the supplementary vote system would be used. A supplementary vote in this context would mean a vote capable of being given to indicate first and second preferences from among the candidates.

The cost of Commissioner elections

£35 million to hold elections in areas where there are no local government elections in 2012

£4 million to hold elections in areas where there will be a local government election in 2012

£6 million as a reserve for by-elections

£5 million to hold an election using the supplementary vote system, over and above the £45m costs of holding an election on a 'first past the post' basis

Total: £50 million

Source: Home Office, *Impact Assessment HO0021 – Police and Crime Commissioners*

By-elections would be held in the event of a vacancy in any office of Commissioner. Such vacancies could result from (among other things) the Commissioner's resignation (which may be tendered at any time), death or disqualification. The Panel must appoint a member of the Commissioner's staff as acting Commissioner in the event of a vacancy, or if the Commissioner is incapacitated or suspended.

Candidates for Commissioner would have to be 18 or over and registered in the register of local government electors for an electoral area within the police area on the dates of both nomination as a candidate and the election itself. People would be disqualified from standing for election as a Commissioner in specified circumstances, including the following:

- they had already served two terms as Commissioner for the police area in question;
- they were a chief constable, a member of a police force or a special constable;
- they were a member of staff of a Commissioner, the Mayor's Office or a police force;
- they were a member of the British Transport Police Authority, the Civil Nuclear Police Authority, the Independent Police Complaints Commission, the Serious Organised Crime Agency or the National Policing Improvement Agency;
- they were the subject of certain debt relief or bankruptcy orders; or

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[43] As the person elected as Mayor of London would automatically be appointed to the Mayor's Office for Policing and Crime, the Bill does not include any election or eligibility requirements for the Mayor's Office role. Election and eligibility arrangements for the Mayor would continue to be governed by the existing provisions of the *Greater London Authority Act 1999*.

[44] Home Office, *Impact Assessment HO0021 – Police and Crime Commissioners*, 30 November 2010, p2

- they had within the last five years been convicted of any offence and sentenced to a term of imprisonment of three months or longer.

The Home Affairs Committee had recommended that there be a four year "cooling-off" period of four years – equivalent to one term for a Commissioner – for former senior officers of the rank of assistant chief constable or above who wished to stand for election as a Commissioner in the same police area in which they had served. The Committee's concern was that without such a period conflicts of interest might arise if a former officer elected as Commissioner was required to scrutinise decisions he or she took while serving as an officer.[45] This recommendation has not been reflected in the Bill.

Reaction to the Bill

Immediate reaction to the Bill has been mixed.

The charity Victim Support and the Victims' Commissioner have welcomed the move towards elected Commissioners on the grounds that it will improve police accountability to victims.[46]

The Local Government Association has welcomed the proposals to give Panels the power of veto over precepts and chief constable appointments, but said it did not believe that Commissioners were the best way to improve accountability and was concerned that their introduction could fragment local partnerships. It also said that the majority requirement for the exercise of a Panel's veto should be set at two thirds rather than three quarters, in order to increase their authority.[47]

In the light of the recent announcement that central government police funding will be cut by 20 per cent in real terms by 2014/15,[48] some have questioned the cost of replacing police authorities with Commissioners and Panels, which has been estimated at £136.5 million over a ten year period.[49] The chairman of the Association of Police Authorities has described it as "the wrong policy at the wrong time".[50] The shadow home secretary Ed Balls has also expressed concerns about the costs of Commissioners, as well as the risk of politicising the police.[51]

3 Licensing

3.1 Background

The 2003 Act

Until November 2005 responsibility for licensing was split between local authorities, who were responsible for entertainment licensing, and the "licensing justices", magistrates who were responsible for alcohol licences. The *Licensing Act 2003* brought these separate regimes together under a single system administered by local authorities in their newly designated role as "licensing authorities". The change was presented at the time as a

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45 Home Affairs Committee, *Policing: Police and Crime Commissioners*, 1 December 2010, HC 511 2010-11, paras 25 to 26. See also "MPs want cooling-off period before officers stand for police commissioner", *Guardian*, 1 December 2010.

46 Victim Support press release, *Javed Khan responds to plans for elected police commissioners*, 1 December 2010 and Victims' Commissioner press release, *Statement by the Commissioner for Victims and Witnesses, Louise Casey CB – Police and Crime Commissioners*, 1 December 2010

47 Local Government Group of the Local Government Association, *LG Group On-The Day-Briefing: The Police Reform and Social Responsibility Bill*, 1 December 2010

48 HM Treasury, *Spending Review 2010*, Cm 7942, October 2010, p54

49 Home Office, *Impact Assessment HO0021 – Police and Crime Commissioners*, 30 November 2010, p2

50 Association of Police Authorities press release, *The Wrong Policy at the Wrong Time - APA Response to the New Policing Bill*, 1 December 2010

51 Labour press release, *Police Reform Bill goes against 150 years of keeping politics out of policing - Ed Balls*, 1 December 2010

consolidating measure which would lead to administrative simplification, the standardising of practices across England and Wales (including fee levels) and the restoration of decision-making to local people.

The most conspicuous feature of the reforms, which the press latched onto as evidence of a new era of "24-hour drinking", was the abolition of statutorily fixed hours during which alcohol might be sold. Under the 2003 Act, premises may apply to open for as long as they choose and, unless objections are raised and sustained, those hours will be written into their premises licence. Hopes were expressed that these liberalising measures would relieve the pressure points on the emergency services, especially around the time of the so-called "11 o'clock swill" when, under the old regime, pubs were emptying simultaneously. In reality, the "café culture" promised by the architects of reform never arrived. A perception arose that the reforms had made it harder for local authorities and residents to resist the granting of new applications in their areas: that the balance had tipped in favour of the licensed trade. At the same time, the growth of the night-time economy and the concentration in city centres of licensed premises targeted by younger drinkers gave the appearance of creating "no-go areas" for families and older people.[52]

The need for reform

In urging the need to redress the balance in alcohol licensing, the new Government points to the effects of alcohol on crime levels, anti-social behaviour and the health services. A document published at the same time as the Bill lists a series of statistics drawn from Home Office research and the British Crime Survey (BCS).[53] For example, in 2009/10 nearly half of all violent crime was alcohol-related. Nearly a quarter of BCS respondents considered people being drunk or rowdy in public places to be a very big or fairly big problem in their local area. Alcohol accounts for an estimated 40 per cent of attendances at Accident & Emergency and in 2009/10 there were over a million alcohol-related hospital admissions. However, adverse developments since 2005 are not necessarily the *direct result* of the 2003 Act, as the Home Office acknowledges:

> There are many unknown variables in both the current impact of the Act, and the impact of the new proposed policy measures, to predict the specific impacts.[54]

Coalition policy and the public consultation

The Coalition agreement for the new Government included a number of commitments for mitigating the social effects of alcohol:

> We will ban the sale of alcohol below cost price
>
> We will overhaul the Licensing Act to give local authorities and the police much stronger powers to remove licences from, or refuse to grant licences to, any premises that are causing problems

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52 Compare James Brokenshire, Minister for crime prevention, describing the purpose of the present Bill in a recent interview: "It goes to what I would describe as quality of life issues – the sense for some people that they don't feel they can go out in their town or the centre of their community on a Friday or a Saturday evening because of what they feel they might see or perhaps because of the sense of risk that they might attach to that. This is ensuring that communities feel that people are able to go out and enjoy themselves but not have all of the negative aspects, some of the pictures, the scenes that people have seen on the television, and saying that we can have a more positive attitude towards alcohol." Quoted in: "People power to end 24 hour drinking, says minister," *Daily Telegraph*, 29 November 2010

53 Home Office, *Responses to consultation: Rebalancing the Licensing Act*, December 2010, p4

54 Home Office, *Impact assessment for the alcohol measures in the Police Reform and Social Responsibility Bill*, November 2010, p2. For a review of the evidence in 2009, see Library Standard Note SN/SG/5189, *Alcohol policy and the effects of the Licensing Act 2003*

> We will allow councils and the police to shut down permanently any shop or bar found to be persistently selling alcohol to children
>
> We will double the maximum fine for under-age alcohol sales to £20,000
>
> We will permit local councils to charge more for late-night licences to pay for additional policing.[55]

These pledges were carried further in a public consultation over the summer of 2010.[56] The consultation ran for six weeks, between 28 July and 8 September. Some commentators[57] were concerned that this was a shorter period than the minimum recommended in guidance issued under the previous Government, which states that "consultations should normally last for at least twelve weeks with consideration given to longer timescales where feasible and sensible."[58] Although the Government concedes that the timescale was short – especially during a holiday period[59] – they point to the fact that they received a total of 1,089 individual responses to the consultation. They also organised seven regional events and seven national events to give interested parties an opportunity to discuss the proposals with Home Office officials and these discussions further informed policy formulation.[60] An Impact Assessment was published to accompany the document. The consultation sought views on the following measures:

> a. Give licensing authorities the power to refuse licence applications or call for a licence review without requiring relevant representations from a responsible authority.
>
> b. Remove the need for licensing authorities to demonstrate their decisions on licences 'are necessary' for (rather than of benefit to) the promotion of the licensing objectives.
>
> c. Reduce the evidential burden of proof required by licensing authorities in making decisions on licence applications and licence reviews.
>
> d. Increase the weight licensing authorities will have to give to relevant representations and objection notices from the police.
>
> e. Simplify Cumulative Impact Policies to allow licensing authorities to have more control over outlet density.
>
> f. Increase the opportunities for local residents or their representative groups to be involved in licensing decisions, without regard to their immediate proximity to premises.
>
> g. Enable more involvement of local health bodies in licensing decisions by designating health bodies as a responsible authority and seeking views on making health a licensing objective.
>
> h. Amend the process of appeal to avoid the costly practice of rehearing licensing decisions.
>
> i. Enable licensing authorities to have flexibility in restricting or extending opening hours to reflect community concerns or preferences.

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55 HM Government, *The Coalition: our programme for Government*, 2010, pp13-14

56 Home Office, *Rebalancing the Licensing Act: a consultation on empowering individuals, families and local communities to shape and determine local licensing*, July 2010

57 E.g. John Coulson, "Nice time for a consultation", *Morning Advertiser*, 12 August 2010, p22

58 HM Government, *Code of practice on consultation*, July 2008, p4

59 Home Office, *Responses to consultation: Rebalancing the Licensing Act*, December 2010, p5

60 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, p3

j. Repeal the unpopular power to establish Alcohol Disorder Zones and allow licensing authorities to use a simple adjustment to the existing fee system to pay for any additional policing needed during late-night opening.

k. Substantial overhaul of the system of Temporary Event Notices to give the police more time to object, enable all responsible authorities to object, increase the notification period and reduce the number that can be applied for by personal licence holders.

l. Introduce tougher sentences for persistent underage sales.

m. Trigger automatic licence reviews following persistent underage sales.

n. Ban the sale of alcohol below cost price.

o. Enable local authorities to increase licensing fees so that they are based on full cost recovery.

p. Enable licensing authorities to revoke licences due to non-payment of fees.

q. Consult on the impact of the Mandatory Licensing Conditions Order and whether the current conditions should be removed.

The majority of responses came from those involved in licensing, enforcement, police and health (36%) and members of the public or their representatives (34%). The "trade" response amounted to 15% of the total received. There was, in general, a divide between respondent types with support for the proposals from the public, licensing, police and health respondents and opposition to the proposals from the trade.[61] In December 2010 the Government published its formal response to the consultation exercise,[62] together with a detailed "independent" analysis of the responses received.[63]

One other indicator of a change of direction from the new administration is that policy responsibility for alcohol licensing has been shifted from the Department for Culture, Media and Sport (DCMS) – the Department which had overseen the drafting and implementation of the *Licensing Act 2003* – to the Home Office.[64] (Entertainment licensing remains a DCMS responsibility.)

What the Bill does not cover

Many of the issues raised in the summer consultation have found expression in the Bill. Of those that did not, some were remitted for consideration at a later date:

- The pledge to ban the sale of alcohol below cost price has been delayed until 2012, according to the Home Office forward plan.[65] A Library Standard Note explains the background to this issue.[66]

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61 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, p6

62 Home Office, *Responses to consultation: Rebalancing the Licensing Act*, December 2010

63 Published online in two parts: Part 1 and Part 2. The analysis was conducted by Tonic Consultants.

64 Written Statement by the Prime Minister on "Machinery of government changes", HC Deb 20 July 2010 c12WS. In fact, it is a move *back* to the Home Office, where responsibility had sat prior to the 2001 General Election.

65 Home Office, *Business Plan, 2011-2015*, November 2010, p14

66 *A minimum price for alcohol?* (SN/HA/5021)

- Alcohol Disorder Zones, a voluntary measure introduced by the last Government which have had no take-up from local authorities, will be repealed in the forthcoming *Rights and Freedoms Bill*.[67]

- The new mandatory licensing conditions introduced in two stages in April and October 2010 will not be repealed, but the Government will assess their impact after twelve months, "with the view to reducing unnecessary burden on business".[68] A Library Standard Note explains the background to this issue.[69]

- The Government says that it sees "merit" in the proposal to make the prevention of health harm an additional licensing objective. However, they do not intend to legislate at this stage, wishing to ensure that the issue "is considered alongside wider work to address the harm of alcohol to health".[70]

3.2 The Bill

The Bill introduces amendments to the *Licensing Act 2003* in eight distinct areas and creates a new category of "late night levy".

Responsible authorities

Under the 2003 Act, all decisions made by licensing authorities and representations made by others to the licensing authorities concerning existing licences or applications for new ones must be related to the "licensing objectives". These four objectives, as set out at the start of the Act (s4), are:

> The prevention of crime and disorder
>
> Public safety
>
> The prevention of public nuisance
>
> The protection of children from harm

"Responsible authorities" are public bodies that must be fully notified of licence applications and that are entitled to make representations to the licensing authority in relation to the application for the grant, variation or review of a premises licence. All representations made by responsible authorities are held to be "relevant" if they concern the effect of the application on the "licensing objectives". The Act (s13) defines responsible authorities as including the police, fire authorities, local authorities exercising health and safety, local planning, environmental health and child protection functions, and any licensing authorities (other than the relevant licensing authority) in whose area a part of the premises is situated.

The Bill (**clauses 103 and 104**) creates two further categories of "responsible authority". For the first time, the licensing authority itself where the premises are situated or where the licence application is lodged will be able to object to the grant of a licence or initiate a review of an existing licence, thus giving them a more pro-active role. Hitherto there was frustration that a licensing authority had to wait for other bodies authorised under the Act to enter objections before they could take action themselves.

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67 Home Office, *Responses to consultation: Rebalancing the Licensing Act*, December 2010, p8. On the history of ADZs see Library Standard Note SN/HA/4612 *Alcohol disorder zones*.

68 Home Office, *Responses to consultation: Rebalancing the Licensing Act*, December 2010, p12

69 *Mandatory conditions for alcohol sale* (SN/HA/5351)

70 Home Office, *Responses to consultation: Rebalancing the Licensing Act*, December 2010, p7

Primary care trusts (PCTs, and their Welsh equivalents, local health boards) are also added as "responsible authorities", a move indicative of a greater awareness since the Act was first drafted of the implications of alcohol use and misuse for public health. The consultation document explained this as follows:

> Designating health bodies as a responsible authority under the Act would enable them to make representations about the impact of new or existing licensed premises on the local NHS (primarily A&E departments and ambulance services) or more generally the safety of the public within the night-time economy.[71]

In the consultation the proposal to add licensing authorities to the list of "responsible authorities" found broad support. Many regarded the proposal as a move to enhance the effectiveness or strategic control of licensing authorities. Trade representatives were, in general, opposed to this proposal as they felt it would remove some of the checks and balances from the *Licensing Act*. However a small number of trade representatives noted that this policy had worked with the *Gambling Act 2005* and could be effective when applied to alcohol licensing.[72]

The proposal to add PCTs as "responsible authorities" met with a mixed response in the consultation:

> It was frequently noted that health authorities are unlikely to be in a position to provide specific case-to-case representations in the licensing process and are thus likely to make blanket recommendations. Moreover, by virtue of their interests in health, it was noted that health authorities would almost invariably only provide negative input.

On the other hand,

> Police, licensing and health representatives were broadly in favour of increasing the role of health bodies in the licensing process and suggested that there was already evidence available from sources, such as A&E departments, which would be beneficial to include in the process. Some legal and third-sector representatives questioned how this would work in practice if "health" was not also added as a licensing objective.[73]

The "vicinity" test

The 2003 Act permits "interested parties" to make representations to licensing authorities on applications for the grant, variation or review of premises licences. In addition, interested parties may themselves seek a review of a premises licence. An "interested party" is defined as a person living in the vicinity of the premises in question, a body representing people living in that vicinity (for example, a residents' association), a person involved in a business in the vicinity of the premises in question or a body representing local business people (for example, a trade association). The problem here has always been that the word "vicinity" was not defined in the legislation and was therefore understood to carry its normal dictionary meaning; different licensing authorities interpreted the word in different ways in different cases. Constituents would often complain to their MPs that they were debarred from making representations about a licence in force where, for instance, the route of noisy customers leaving a pub took them past a house which was not itself in the immediate "vicinity" of the pub.

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71 Home Office, *Rebalancing the Licensing Act: a consultation on empowering individuals, families and local communities to shape and determine local licensing*, p10

72 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, p15-16

73 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, pp26-7

Clauses 105 to 108 remove the "vicinity" test from the 2003 Act and consequently abolish the category of "interested party". They provide that anyone will be able to make representations in relation to new premises licences and to apply for the review of existing licences. However, as before, such representations must relate to one or more of the four licensing objectives and must not be "frivolous or vexatious".[74]

Regulations made under the 2003 Act place certain obligations on a licence applicant to advertise his application outside the premises and in the local press.[75] The local authority is required to maintain records of the application in a licensing register which is open to public inspection but the authority is not otherwise obliged to publicise it (though some choose to do so). With the abolition of the vicinity test and the scope for larger numbers of people to make representations comes a need for wider publicity of applications. **Clause 105(3)** provides for new regulations to be laid requiring an applicant and licensing authority to advertise the application: the applicant must advertise the application in a way which ensures that it comes to the attention of everyone in the licensing authority's area whom it may affect; the licensing authority must advertise it in a way that ensures that it comes to the attention of everyone whom it may affect.

The removal of the "vicinity" test is the only one of the proposals being carried forward from the consultation which received a majority negative response in the consultation process (56%). Respondents, from across all sectors, suggested that this proposal could lead to a rise in vexatious complaints and give disproportionate influence to non-local individuals. Generally, respondents expressed a concern that this would undermine the fairness of the licensing process. Nevertheless, those that regarded the move as positive welcomed the wider community involvement and acknowledged that a licensed premises may have an effect far beyond its immediate vicinity.[76]

The evidential burden

The 2003 Act imposes a general duty on licensing authorities to exercise their licensing functions with a view to promoting the licensing objectives. A number of specific processes require licensing authorities to take steps which are "necessary" for the promotion of the objectives. These processes, which are simply referred to by section number on the face of the Bill, are itemised in the accompanying Explanatory Notes and include applications for the grant or variation of a premises licence following relevant representations, the review of a licence and the rejection of an application for a personal licence following police objections. **Clauses 109 to 111** amend those provisions by instead requiring licensing authorities to take steps which are "appropriate" for the promotion of the objectives. In the words of the Explanatory Notes to the Bill, "this has the effect of reducing the threshold which licensing authorities must meet to achieve the promotion of the objectives, but ensures that their decisions continue to be solely for the purpose of promoting the objectives."

In the consultation, although a majority of respondents indicated that, overall, reducing the burden of proof on local authorities represented a positive step, there was concern that the proposal might undermine the fairness of the licensing decision-making process. Among those to respond positively to the proposal, it was felt that reducing the burden of proof would allow licensing authorities to make decisions based firmly on the needs of their locality. Trade representatives were generally opposed to the proposal, based on concerns around natural justice, and questioned the evidence to support it. Police representatives were broadly in favour and suggested that licensing authorities had often been reluctant to take

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74 The phrasing used in *Licensing Act 2003* s18(7)(c)

75 For details see: DCMS, *Interested parties: guidance for making representations*, 2007

76 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, pp23-4

tougher action due to fear of challenge. Some community representatives agreed with this view.[77]

Temporary event notices

The 2003 Act makes the following provisions for the licensing of temporary events:

> The system involves an event organiser (the "premises user") giving a temporary event notice (TEN) to the licensing authority and copying this to the police.
>
> TENs can be used to authorise relatively small-scale ad hoc events held in or on any premises involving no more than 499 people at any one time.
>
> The premises user must, no later than 10 working days before the day on which the event is to start, give duplicate copies of the notice to the relevant licensing authority, together with the fee of £21.
>
> A copy of the notice must also be given to the relevant chief officer of police no later than 10 working days before the day on which the event is to start.
>
> Anyone aged 18 or over can give a maximum of five TENs per calendar year.
>
> Personal licence holders can give a maximum of fifty TENs per calendar year.
>
> TENs are subject to other maximum limits:
>
> - each event covered by a TEN can last up to 96 hours
> - no more than twelve TENs can be given in respect of any particular premises in any calendar year, subject to a maximum aggregate duration of the periods covered by TENs at any individual premises of 15 days in any year
> - there must be a minimum of 24 hours between events notified by a premises user or associates of that premises user in respect of the same premises
>
> Provided that the criteria set out above are met, only the police may intervene to prevent an event covered by a TEN notice taking place or agree a modification of the arrangements for such an event and then only on crime prevention grounds.[78]

The Bill makes various changes in relation to the scrutiny and utility of temporary event notices. **Clause 112** extends the right to object to a TEN to environmental health authorities. The police and environmental health authority will be able to object on the basis of any of the four licensing objectives (not just crime prevention). For the first time, licensing authorities will be able to impose conditions on a TEN in limited circumstances if they consider that this promotes the licensing objectives (**clause 113**). Provisions will also enable premises users to give a limited number of TENs later than the existing process permits (**clause 114**) and, in any calendar year, to hold a single event under a temporary event notice for up to seven days or use a single premises for up to 21 days (**clause 115**).

The Government justifies the greater restrictions on TENs as follows:

> [The proposals] are necessary to close loopholes in the current system which allow a small proportion of unscrupulous operators to exploit them, e.g. existing clubs applying for TENs to extend their hours and then operating without the licensing conditions

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77 Ibid, pp17-18

78 Summary taken from DCMS website "Permitted temporary activities" [accessed 8 December 2010]

> which apply to them at all times. They will also allow objections to be made on noise grounds which are currently a big problem for local residents.[79]

At the same time there is, arguably, justification for relaxing other requirements:

> There are legitimate reasons why a business may require a TEN to be submitted less than 10 days before the event, for example a circus site may be waterlogged when the circus arrives so an alternative site might be required or someone may be unable to hold an event due to bereavement. (…)
>
> Organisations such as theatres and circuses have told us that they would often prefer to run events for a week, but are prevented from doing so by the current duration limit of 96 hours, resulting in a loss of business and income.[80]

The proposal to allow objections to be raised to TENs on the basis of any of the licensing objectives was generally welcomed in the consultation, "with the majority approving of the benefit to the community. Of the minority opposing the proposed measure, it was regarded as potentially onerous and unnecessary."[81] A minority, primarily trade representatives, were concerned that the ability to add conditions to a TEN could damage trade and inhibit their flexibility. However, the police were reportedly in favour of this proposal.[82] The Local Government Association's Local Government Group has concerns about allowing temporary events to run for a week:

> This change could result in more contentious, costly disputes between operators, the police, councils and the local community and the [Local Government] Group has a number of concerns it will be raising in detail as the Bill progresses.[83]

Underage sales

By consuming alcohol at high levels, children jeopardise their health and are more likely to engage in risky behaviour, such as unprotected sex. Children's drinking is also placing increasing strains on the police and health services. The 2008 Smoking Drinking and Drug Use Survey found that the average weekly intake for pupils aged 11-15 who had drunk alcohol in the week before the survey was 14.6 units, more than double the figure recorded in a 1990 survey.[84] The Tackling Underage Sales of Alcohol Campaign in summer 2007 showed an overall test purchase failure rate on licensed premises of 14.7%.[85]

The *Licensing Act 2003* (s147A) defines the "persistent" sale of alcohol to a minor as meaning sale on two or more occasions in a three month period to a child. **Clause 118(2)** increases the maximum fine on conviction to £20,000.

The Act (s169A) also offers an alternative to prosecution. Where there is evidence that the offence has been committed, as an alternative to prosecution, the individual may instead opt to close their premises for a period specified in a closure notice issued by the police and

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79 Home Office, *Impact assessment for the alcohol measures in the Police Reform and Social Responsibility Bill*, November 2010, p19

80 Office, *Responses to consultation: Rebalancing the Licensing Act*, December 2010, pp9-10

81 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, p53

82 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, pp57-8

83 Local Government Group of the Local Government Association, *LG Group on-the-day briefing: the Police Reform and Social Responsibility Bill*, 1 December 2010, p5

84 Quoted in: Home Office, *Rebalancing the Licensing Act: a consultation on empowering individuals, families and local communities to shape and determine local licensing*, July 2010, p18

85 Quoted in: Home Office, *Impact assessment for the alcohol measures in the Police Reform and Social Responsibility Bill*, November 2010, p9

trading standards officers. The closure notice discharges the individual from any further criminal liability. At present the closure notice can last for a maximum of 48 hours. **Clause 118(3)** amends the period to a minimum of 48 hours and a maximum of two weeks.

At the national consultation events, "police representatives and some representatives from children's organisations were not clear on what doubling the fine would achieve given that large fines are not given currently. Police representatives seemed in general to be in favour of increasing the period of voluntary closure."[86] At the regional consultation some participants suggested other methods that they felt would be more effective at reducing underage sales, such as Challenge 21 schemes,[87] proof of age policies, staff training and test purchasing.[88] However, Chris Sorek, chief executive of Drinkaware,[89] is quoted in the press as saying:

> "Tackling the UK binge drinking problem will require a range of measures and giving tougher penalties for underage alcohol sales is an important part of the solution. Not all young people drink alcohol but those that do are drinking more and more often - risking their health, personal safety and education."[90]

Early morning restrictions

A core principle of the reform of licensing law embodied in the *Licensing Act 2003* was that there should be no "one-size-fits-all" solutions. This was underlined at several points in the Guidance issued to local authorities originally by DCMS and now (in revised form) by the Home Office:

> 10.13 The Act requires that licensing conditions should be tailored to the size, style, characteristics and activities taking place at the premises concerned. This rules out standardised conditions which ignore these individual aspects.[91]

The 2010 consultation document explained that there has been a change of mind on this point:

> (...) Many practitioners have reported that this advice is confusing and contrary to what local areas would like to do.
>
> 6.17. The Government intends to amend the guidance to make it clear to local areas that they can make decisions about the most appropriate licensing strategy for their area. Licensing authorities will be encouraged to consider using measures including fixed closing times, staggered closing times and zoning where they are appropriate for the promotion of the licensing objectives in their area.[92]

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86 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, p61

87 Challenge 21 is a scheme introduced by the British Beer and Pub Association aimed at preventing young people from gaining access to age restricted products including cigarettes and alcohol. Under the scheme, customers attempting to buy age-restricted products are asked to prove their age if in the retailer's opinion they look under 21.

88 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, pp67-8

89 According to its website, "Drinkaware is an independent UK alcohol awareness charity that provides consumers with information to make informed decisions about the effects of alcohol on their lives and lifestyles." Established in 2007, Drinkaware is "funded by the alcohol industry and works alongside the medical community, government and alcohol manufacturers and retailers to achieve its goals."

90 "Late drinking set to be cut by new charge", *Independent*, 1 December 2010

91 Home Office, *Amended guidance issued under section 182 of the Licensing Act 2003*, October 2010, p84

92 Office, *Rebalancing the Licensing Act: a consultation on empowering individuals, families and local communities to shape and determine local licensing*, July 2010, p15

At present a licensing authority can impose an early morning restriction order to prohibit the sale of alcohol between 3am and 6am in the whole or part of its area.[93] **Clause 119** extends that power, giving authorities greater flexibility, so that they will be able to make orders for the whole or part of their areas for a period of any duration between midnight and 6am and impose different restrictions on different days.

In the consultation, one of the minority (30%) of negative respondents commented that this further potential for imposing standardised conditions marked "a fundamental reversal of the principles of the *Licensing Act 2003*". Otherwise, the proposal apparently received strong support in the consultation, although a minority of respondents (from the trade) were wary of the knock-on effect to well-run businesses.[94]

Failure to pay fees

Holders of premises licences and club premises certificates have to pay an annual fee to the local authority. If they fail to pay by the due date, the authority has to pursue them for the debt and no other sanction is available against the debtor. **Clause 120** gives the authority a new power to suspend a licence or certificate for non-payment of an annual fee. The consultation document published in summer 2010 described this as "a simple change that could save local authorities many thousands of pounds currently spent in recovering unpaid annual fees through councils' won recovery sections and bailiffs".[95]

This proposal met with general approval in the consultation. Many licensing respondents noted that, usually, debts incurred by non-payment are so low that they are written off at a loss to the licensing authority. Some suggested mitigating the severity of the measure with a warning for non-payment prior to revocation of the licence.[96]

Licensing policy statements

At present a licensing authority has to prepare and publish a statement of its licensing policy every three years and to keep that policy under review and revise it as appropriate during the three-year period. **Clause 121** extends the period from three years to five years.

This was a suggestion that arose from the consultation events held in summer 2010 and is in line with the Government's stated commitment to "reducing the burden and bureaucracy of licensing".[97] The consultation document itself suggested that many licensing statements were too narrowly drawn and were not representative of the views of the community. It promised that the statutory guidance would be revised "to encourage licensing authorities to consult more widely when determining their licensing policy statement".[98]

Late night levy

Clauses 124 to 138 create a new power for licensing authorities to impose a "late night levy" on premises which serve alcohol during a set period between midnight and 6am. Most of the income -- at least 70% as prescribed in **clause 130** -- will go to the police to help them meet the cost of keeping additional officers on the streets in the early hours. The remainder -- up

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93 *Licensing Act 2003*, s172A. This is itself a recent amendment to the 2003 Act, which was introduced by way of the *Crime and Security Act 2010*, s55)=.

94 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, pp37-8

95 Home Office, *Rebalancing the Licensing Act: a consultation on empowering individuals, families and local communities to shape and determine local licensing*, July 2010, p21

96 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, p76

97 Home Office, *Responses to consultation: Rebalancing the Licensing Act*, December 2010, p11

98 Home Office, *Rebalancing the Licensing Act: a consultation on empowering individuals, families and local communities to shape and determine local licensing*, July 2010, p10

to 30% -- will go to local government to alleviate their costs in reducing alcohol-related crime and disorder in the night-time economy.

The Local Government Association's Local Government Group has commented:

> The late night levy does not address the fundamental problem of council tax payers subsidising the licence fees, as the bulk (70% minimum) of the levy is payable to the police.[99]

Regulations will require a licensing authority to consult the police and holders of late-night licences before making a decision to introduce a late night levy in their area, or to vary or revoke it once introduced (**clause 133**).

If local authorities choose to introduce it for their area, the levy will be set at a uniform rate across England and Wales. The levy rate will be prescribed in regulations (**clause 127**). The new, additional rate will be set using the existing rateable value bands which already form the basis for calculating the annual fee.[100] The Home Office estimates that annual levy charges will range from £299 to £4,480, depending on the size of the premises.[101] In the event of non-payment of the late levy, the authority will have power to suspend the licence of the premises in question (**clause 128(6)**) much as they will be able to suspend it for non-payment of the regular annual fee.

Clause 134 provides for regulations to be made allowing exemptions and discounts. The intention is that incentives of this sort will encourage premises to become involved in industry-backed schemes to help prevent crime and anti-social behaviour such as Best Bar None,[102] Purple Flag[103] or Business Improvement Districts.

The Government estimates that between a quarter and a half of premises that currently open after midnight in an area that operates the levy will opt to amend their licences to avoid being required to pay the levy on its introduction.[104]

The consultation floated the idea that the local authority might be given discretion in setting the levy rate. This did not find favour:

> Amongst those to support the measure, it was often with the caveat that there should be national parameters set to prevent local authorities from placing a high burden on businesses. Indeed, trade respondents expressed the most opposition to the proposal,

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99 Local Government Group of the Local Government Authority, *LG Group on-the-day briefing: the Police Reform and Social Responsibility Bill*, 1 December 2010, p5

100 Office, *Responses to consultation: Rebalancing the Licensing Act*, December 2010, p8

101 Home Office, *Impact assessment for the alcohol measures in the Police Reform and Social Responsibility Bill*, November 2010, p20

102 According to its website, Best Bar None (BBN) is "a national award scheme supported by the Home Office and aimed at promoting responsible management and operation of alcohol licensed premises." Its aim is "to reduce alcohol related crime and disorder in a town centre by building a positive relationship between the licensed trade, police and local authorities." The process of becoming recognised by BBN includes meeting minimum standards.

103 According to its website, Purple Flag is a "new accreditation scheme that recognises excellence in the management of town and city centres at night." It "aims to raise standards and improve the quality of our towns and cities at night." It has been "developed by the Association of Town Centre Management from original research undertaken by the Civic Trust".

104 Home Office, *Impact assessment for the alcohol measures in the Police Reform and Social Responsibility Bill*, November 2010, p21

> stating that potentially the local authority may use the power to levy punitive rates on businesses.[105]

At national consultation events, police representatives suggested that "the biggest costs for policing the night-time economy came from police overtime and that even if the levy were introduced, if police are cutting back on overtime this could be more problematic."[106]

The proposal that the levy should be used to fund the additional costs of services such as taxi-marshalling or street cleaning met with approval, particularly from public and licensing respondents. Trade respondents were concerned that the new levy would be overly burdensome; many felt that such services should be part of their already high business rates.[107] The proposal to offer reductions to those businesses which participate in best-practice initiatives was generally welcomed, although some members of the public were reportedly sceptical about the effectiveness of schemes like Best Bar None.[108]

Brigid Simmonds, chief executive of the British Beer & Pub Association, has suggested that the new levy would fail to engage with so-called "pre-loading":

> "A new night-time levy would add to cost for pubs without recognising that problem behaviour increasingly results from people drinking at home before they go out."[109]

Clause 123 requires the Home Secretary to review the amendments introduced by the Bill where they may impose a regulatory burden. The sections of the 2003 Act to which this applies are itemised in clause 123. The review must take place "as soon as reasonably practicable" five years after the measures have been enacted and a copy of the Secretary of State's report must be laid before Parliament. The Impact Assessment adds that it is the Government's intention to review these provisions earlier than five years. They also promise that "regulations deriving from the Bill, once enacted, will be subject to sunsetting."[110]

4 Protests around Parliament Square

Policing public protest often generates controversy, perhaps unsurprisingly given the conflicting interests that have to be balanced. These include the interests of protestors, those of the people against whom they are protesting, and those of the general public. This balancing of interests is even more delicate in relation to protests around Parliament, with the freedom to protest near the seat of democracy having a particular practical and symbolic importance. However this freedom needs to be weighed against the need for Parliament to be able to function properly and the area's special security and heritage concerns.

4.1 Legislative background

The *European Convention on Human Rights* confers a number of relevant rights, including the right to freedom of expression (article 10) and the right of peaceful assembly (article 11). As such, the state is obliged to facilitate peaceful protest. However, these rights are not absolute and the police inevitably have to balance competing interests when dealing with demonstrations. For example, the rights of protestors have to be considered alongside those of the general public and, sometimes, the rights of those who are the target of protest or those holding counter-demonstrations.

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105 Home Office, *Analysis of consultation responses: an independent report to the Home Office Alcohol Strategy Unit*, December 2010, p43
106 Ibid, p44
107 Ibid, p47
108 Ibid, p45
109 "Half of late night bars could close early to avoid new levy", *Daily Telegraph*, 1 December 2010
110 Home Office, *Impact assessment for the alcohol measures in the Police Reform and Social Responsibility Bill*, November 2010, p27

At national level, demonstrations in England and Wales are mainly governed by part II of the *Public Order Act 1986*, which covers "public processions" (marches) and "public assemblies" (static demonstrations).

Section 11 of the 1986 Act requires the police to be given written notice specifying the time, date, organiser and proposed route of any **public procession** that will do any of the following:

- demonstrate support for, or opposition, to the views or actions of any group
- publicise a cause or campaign; or
- mark or commemorate an event.

Under section 12 of the Act, the police may impose conditions on a procession if they reasonably believe it may result in serious public disorder, serious damage to property or serious disruption to the life of the community. These conditions might include the route of the procession and a possible prohibition on it entering specified public places.

Section 14 of the Act applies to **public assemblies**. Again, a senior police officer has the power to impose conditions on an assembly in order to prevent public disorder, serious damage to property, intimidation or serious disruption to the life of the community. These conditions relate to the place at which the assembly may be (or continue to be) held, its maximum duration or the maximum number of persons who may participate.

4.2 Special provisions around Parliament Square

Parliament Square Garden is managed by the Greater London Authority (GLA) under the *Greater London Authority Act 1999*. Section 385 of the 1999 Act empowers the GLA to make byelaws relating to the proper management of Parliament Square Garden.

The perimeter pavements to the east and south of the Square (the sides flanked by Parliament and Westminster Abbey) are managed by Westminster City Council. Under section 235 of the *Local Government Act 1972,* the Council has the power to make byelaws for good rule and government and the suppression of nuisance.

For many years, additional provisions for the area surrounding Parliament (apart, that is, from byelaws)[111] have taken the form of Sessional Orders (in the House of Commons) and Stoppages Orders (in the House of Lords) instructing the Metropolitan Police Commissioner to make sure that the passageways to and from Parliament were kept free of obstruction. The House of Lords still passes a Stoppages Order each session,[112] but the last such Sessional Order in the House of Commons was passed on 17 May 2005.[113] In response to the Orders, the Commissioner of the Metropolitan Police gives directions to constables under section 52 of the *Metropolitan Police Act 1839*.

In 2003, the Procedure Committee conducted an inquiry into whether the Commons Sessional Order was appropriate in the light of recent experience of demonstrations. The review was triggered by complaints about protests: most notably the demonstration by Brian Haw, which began on 2 July 2001, against Government policy in Iraq.[114] Complaints centred

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111 See for example the Greater London Authority *Trafalgar Square and Parliament Square Gardens Byelaws 2000*, as amended, available from the *Trafalgar Square Byelaws* page of the GLA website [both accessed on 7 December 2010]

112 For the most recent, see House of Lords Minutes of Proceedings, 18 November 2009

113 HC Deb 17 May 2005 c28

114 Further information on the protest is available on Mr Haw's website [accessed on 7 December 2010]

on the demonstration's long-standing and "visually unattractive" nature, but also concerned the use of loud hailers by demonstrators generally.[115] Legal action had been taken against Mr Haw in 2002 on the grounds that he was obstructing the pavement, but the High Court ruled that the obstruction was not an unreasonable obstruction in view of the inaccessibility of the pavements in Parliament Square to pedestrians.[116]

The Procedure Committee's report, published in November 2003, pointed out that directions under the 1839 Act did not, in fact, confer any extra legal powers on the police at all.[117] Evidence from the House authorities and the police indicated that legislation was necessary, and the Government's response, published in May 2004, recommended the introduction of a Bill to prohibit long-term demonstrations and to ensure access to Parliament.[118]

The argument to change the law was given further momentum when Countryside Alliance marchers clashed with police in Parliament Square on 15 September 2004 while, inside the Commons, business was temporarily suspended when five activists gained access to the Chamber.[119]

In a 2004 consultation paper on police powers,[120] the Government indicated that it was considering further legislation and consulted on whether it should legislate for powers to impose conditions on demonstrations around Parliament. Police stakeholders and the Mayor of London supported the proposal, recognising that existing police powers to deal with demonstrations in Parliament Square were insufficient.[121]

4.3 Current position: the *Serious Organised Crime and Police Act 2005*

Sections 132 to 138 of the *Serious Organised Crime and Police Act 2005* (SOCPA) introduced new police powers regarding demonstrations near Parliament Square.

The Act created a new offence of demonstrating without authorisation in a "designated area." This area is defined by order, but must be within one kilometre of Parliament Square.[122] Under the provisions of SOCPA, people organising the demonstration have to give the police at least 24 hours notice in writing, and if "reasonably practicable" they will have to give six days' notice. If the notice complies with the requirements set out in the legislation, then the Metropolitan Police Commissioner has to give authorisation, but he may impose conditions on those taking part in or organising a demonstration, if he reasonably believes they are necessary for the purpose of preventing any of the following:

- hindrance to any person wishing to enter or leave the Palace of Westminster;
- hindrance to the proper operation of Parliament;
- serious public disorder;
- serious damage to property;

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115 Procedure Committee, *Sessional Orders and Resolutions*, HC 855 2002-03, November 2003, para 17
116 *Westminster City Council v Brian Haw (2002)* [2002] EWHC 2073 (QB)
117 Procedure Committee, *Sessional Orders and Resolutions*, HC 855 2002-03, November 2003, paras 11-16
118 Procedure Committee, *Sessional Orders and Resolutions: The Government's Response to the Committee's Third Report of Session 2002-03*, HC 613 2003-04, May 2004, paras 21-22
119 "Invasion of the commons", *Guardian*, 16 September 2004
120 Home Office, *Modernising Police Powers to Meet Community Needs*, August 2004
121 Home Office, *Policing: Modernising Police Powers to Meet Community Needs Summary of Responses*, January 2005
122 Other 'designated areas' that are protected in the interests of national security include: 10,11 and 12 Downing St, Chequers, the Ministry of Defence building on Whitehall and UK and US military bases

- disruption to the life of the community; or
- a security risk in any part of the designated area.

The Act also bans the use of loudspeakers in the designated area, although there is a list of exceptions (when used by the emergency services, for example).

4.4 Reaction to the SOCPA provisions

The powers introduced by sections 132 to 138 of SOCPA have proved controversial. Free speech activists were prosecuted for staging picnics in Parliament Square in an attempt to exploit the ambiguity surrounding what the police could regard as a "demonstration" under the Act.[123] Maya Evans and Milan Rai were prosecuted for an unauthorised protest that involved reading aloud the names of British soldiers and Iraqi citizens killed during the conflict in Iraq.[124] Protestors, including the comedian Mark Thomas, tried to overwhelm the police authorisation process by applying for permission for large numbers of simultaneous "lone" protests.[125]

Brian Haw's demonstration continued despite the legislation and other protestors took up residence in Parliament Square, most recently as part of a "Democracy Village" that appeared during May 2010. A police raid on the day of the Queen's Speech on 26 May 2010 saw Mr Haw arrested, reportedly on charges of obstructing the police.[126]

Liberal Democrat peer, Baroness Miller of Chilthorne Domer, introduced a private members' bill, the *Public Demonstrations (Repeals) Bill*, in the 2006-07 parliamentary session. The Bill would have repealed the SOCPA provisions but did not proceed further than its Lords second reading stage.

4.5 Labour proposals to repeal the SOCPA provisions

In July 2007, the Labour Government under Gordon Brown published a green paper on constitutional reform.[127] This noted that there were "strong views" on the restriction of protests around Parliament.[128]

A consultation document on proposed changes followed in October 2007.[129] This observed that the police had raised practical concerns about the different conditions applying to marches and assemblies, in particular the difficulties of distinguishing between the two when groups travel to an assembly point. It proposed aligning the conditions, thus giving the police "greater discretion when managing assemblies". It also noted that the *Human Rights Act 1998* would "prevent the imposition of excessively strict conditions on the assembly as they would be open to challenge under Article 11 (right to freedom of assembly and association)."

The consultation document noted a number of considerations relating to protests around Parliament, including:

- the need to allow the business of Parliament to proceed, balanced against the view that Parliament is and should be a focus for demonstration;

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123 "You can be arrested for picnicking now", *Independent*, 7 April 2006
"Parliament protestors lose appeal", *BBC News*, 20 December 2006

124 Their convictions were upheld on appeal – see *Blum and others v Director of Public Prosecutions and others* [2006] EWHC 3209 (Admin), CO/2218/2006, CO/2849/2006, CO/2894/2006 AND CO/5557/2006

125 "So many causes, so little time", *Guardian*, 12 October 2006

126 "Anti-war protestor Brian Haw arrested as mayor cracks down on camp", *Telegraph*, 26 May 2010

127 Ministry of Justice, *The Governance of Britain*, Cm 7170, July 2007

128 Ibid, p48

129 Home Office, *Managing Protest around Parliament*, Cm 7235, October 2007

- security risks; and
- equal rights for all groups to protest peacefully.[130]

In March 2008 the Ministry of Justice published three documents as Command Paper 7342: a white paper setting out the main proposals,[131] an analysis of responses to the consultation,[132] and a draft *Constitutional Renewal Bill*.[133] The analysis of responses made clear that the majority of respondents favoured a repeal of sections 132 to 138 of SOCPA.[134] Provisions to repeal these sections were contained in clause 1 of the draft *Constitutional Renewal Bill*.

Select Committee scrutiny of the proposals

In a July 2008 report, the Joint Committee on the Draft Constitutional Renewal Bill agreed that the SOCPA provisions should be repealed.[135] It endorsed "the general presumption that protest must not be subject to unnecessary restrictions", while acknowledging the need for this to be balanced against safeguarding the proper functioning of Parliament.[136] Its conclusions on the question of access were that "as a general rule there should be unrestricted access to the Houses of Parliament for Members, staff and the public, but there must also be a willingness to accept some disruption during large scale protests".[137]

On the question of noise, the Committee said that the reasonable use of loudspeakers should be allowed, but that to deal with exceptional occasions when they caused serious disruption, there was a need "either to develop or make better use of existing powers".[138] At a minimum, there should be a statutory power to move an individual or confiscate equipment. It noted that opinion was divided on the question of permanent or overnight protests, and called for a comprehensive review of this.[139] The Committee considered that the *Public Order Act 1986* gave sufficient powers to the police to impose conditions on protests on security grounds, and supported the removal of the legal requirement to obtain prior permission for protests.[140]

The Joint Committee on Human Rights also endorsed the proposed repeal as part of a wider report into policing protest.[141] The Committee recommended the removal of the requirement to obtain prior permission,[142] and that the Government should work with the relevant authorities over managing noise levels.[143] It saw no good reason to support the introduction of arbitrary limits on the duration of protests, but felt that the police should be able to impose conditions on protests to facilitate protests by others.[144]

The Government's response to the Joint Committee on Human Rights was published in May 2009 and agreed with many of the Committee's recommendations on protests around

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130 Ibid, p15
131 Ministry of Justice, *The Governance of Britain: constitutional renewal*, Cm 7342-I, March 2008
132 Ministry of Justice, *The Governance of Britain: analysis of consultations*, Cm 7342-III, March 2008
133 Ministry of Justice, *The Governance of Britain: draft Constitutional Renewal Bill*, Cm 7342-II, March 2008
134 Cm 7342-III, March 2008, p8
135 Joint Committee on the Draft Constitutional Renewal Bill, *First Report*, HL 166/HC551 2007-08, July 2008
136 Ibid, para 24
137 Ibid, para 35
138 Ibid, para 48
139 Ibid, para 60
140 Ibid, paras 45-72
141 Joint Committee on Human Rights, *Demonstrating respect for rights? A human rights approach to policing protest*, HL 47/HC 320 2008-09, March 2009, para 127
142 Ibid, para 128
143 Ibid, para 133
144 Ibid, para 134

Parliament.[145] However it did not agree that special powers to facilitate multiple protests were necessary.[146] In its July 2009 response to the Joint Committee on the Draft Constitutional Renewal Bill, the Government was again generally in agreement with the Committee's recommendations.[147]

The Constitutional Reform and Government Bill

In April 2009, Tamil protestors staged a demonstration in Parliament Square, which lasted several weeks. Initially the protestors did not obtain permission, but they subsequently sought and received authorisation for fifty people to protest under the name of British Tamil Students in the north-east corner of Parliament Square.[148] On occasion, the numbers exceeded that by several thousand, and other Tamil organisations joined the protest.

The Joint Committee on Human Rights revisited its enquiry on policing protest at this time, concluding:

> The careful management of the Tamil protest in our view struck an appropriate balance between protecting the right of the Tamils to protest in Parliament Square and the need to maintain access to Parliament for Members, staff and the public. It is notable that we received no evidence from individual Tamils or their organisations complaining about how their protest was handled by the police. The protest did cause inconvenience to some, but this is a small price to pay for living in a vibrant democracy.[149]

The Tamil protests highlighted the weaknesses in the provisions of the SOCPA in the face of spontaneous and large-scale protest outside Parliament. The Labour Government concluded that the protests showed that "a compulsory prior notification scheme is impractical when communities feel very strongly about an issue and want to make their views known quickly."[150]

The *Constitutional Reform and Governance Bill* contained provisions to repeal sections 132 to 138 of SOCPA. However, the relevant provisions were dropped during the 'wash-up' period before the general election and do not appear in the *Constitutional Reform and Government Act 2010*.

4.6 The Bill

The Coalition Programme of May 2010 included a commitment to "restore rights to non-violent protest".[151] When the *Police Reform and Social Responsibility Bill* was published on 1 December, the Home Secretary, Theresa May, commented:

> We fully support the public's right to peaceful protest; however this does not mean allowing individuals to take over a public space, particularly a historic site like Parliament Square, and prevent others from enjoying it.

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145 *Government Reply to the Seventh Report from the Joint Committee on Human Rights Session 2008-09 HL 47/HC 320 Demonstrating respect for rights? A human rights approach to policing protest*, May 2009

146 Ibid, p10

147 *Government response to the report of the Joint Committee on the Draft Constitutional Renewal Bill*, Cm 7690, July 2009

148 Metropolitan Police, personal communication, 12 June 2009

149 Joint Committee on Human Rights, *Demonstrating respect for rights? Follow-up*, HL 141/HC 522 2008-09, July 2009, para 44

150 *Government Reply to the Seventh Report from the Joint Committee on Human Rights Session 2008-09 HL Paper 47, HC 320 Demonstrating respect for rights? A human rights approach to policing protest*, May 2009

151 p11

> These proposals will put a stop to the most disruptive elements such as tents which have turned Parliament Square into a campsite and prevented tourists and Londoners from enjoying this historic landmark.[152]

Clause 139 of the Bill would repeal sections 132 to 138 of SOCPA. The effect of this would be that notice would no longer be required for demonstrations in the designated area, that it would no longer be an offence for a demonstration to be held without the authorisation of the Metropolitan Police Commissioner and that it would no longer be an offence for a person to use a loudspeaker in the designated area.

The repeal of section 132(6) of SOCPA would mean that section 14 of the *Public Order Act 1986*, which allows the police to impose conditions on **public assemblies** in the rest of England and Wales, would once again apply in the vicinity of Parliament.

Repeal of section 138 of SOCPA would mean that the designated area around Parliament as set out in the *Serious Organised Crime and Police Act 2005 (Designated Area) Order 2005* would no longer apply.

Clause 140 defines the "controlled area of Parliament Square" for the purposes of the Bill. This area comprises:

- the central garden of Parliament Square
- the footways that immediately adjoin the central garden

A map attached to Annex A to the Bill's Explanatory Notes illustrates the controlled area.

Clause 141 covers the activities that would be prohibited in the prohibited area and the powers of police constables or other authorised officers.

Subsection (1) gives a constable or authorised officer the power to direct a person to stop doing (or not to start doing) a prohibited activity which he reasonably believes a person is doing (or about to do) in the controlled area of Parliament Square.

A person who fails to comply with a direction commits an offence and is liable to a fine of up to £5,000 (under subsection 8).

Subsection (2) sets out the activities that would be prohibited in the controlled area:

- operating any amplified noise equipment;
- erecting (or keeping erected) any tent or other structure designed or adapted for the purpose of facilitating sleeping or staying in a place for any period of time;
- using any tent or other such structure for the purpose of sleeping or staying in the area;
- placing or keeping in place any sleeping equipment with a view to its use for the purpose of sleeping overnight in the area; and
- using any sleeping equipment for the purpose of sleeping overnight in the area.

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[152] Home Office press release, *New reforms put public at the heart of policing*, 1 December 2010

Later subsections of **clause 141** state that the activities listed in subsection (2) would not be prohibited if carried out by the emergency services, by or on behalf of an authorised authority (a Minister or a government department, the Greater London Authority or Westminster City Council) or where the GLA or Westminster City Council authorise a person to use amplified noise equipment.

Amplified noise equipment is defined under subsection (4) as any device that is designed or adapted for amplifying sound including (but not limited to) loudspeakers and loudhailers.

Sleeping equipment is defined under subsection (7) as "any sleeping bag, mattress or other similar item designed or adapted (solely or mainly) for the purpose of facilitating sleeping in a place".

Under subsection (6), the provisions of part 3 would apply to any tents or sleeping equipment placed in the controlled area of Parliament Square **before** the provisions came into force.[153]

Clause 142 makes further provisions relating to prohibited activities, including that:

- a direction requiring a person to cease doing a prohibited activity may also include a direction requiring the person not to resume the activity;

- a direction requiring a person not to start doing a prohibited activity has effect for a period specified by the constable or authorised officer, such period to be no longer than 90 days (if no time limit is specified, the direction remains in force for 90 days); and

- a direction (which may include an oral direction) can only be given to a person to cease operating (or not to start operating) amplified noise equipment where it appears to a constable or authorised officer that the person operating (or about to operate) the equipment is producing an audible sound that other persons in, or in the vicinity of, the controlled area can hear or are likely to hear.

Clause 143 would enable a constable or authorised officer to seize (with reasonable force, if necessary) and retain a prohibited item that was on land inside or outside the controlled area of Parliament Square where it appeared that the item had been used in connection with a prohibited activity.

The property would have to be returned to the person from whom it was seized, unless the court ordered its forfeiture (see below). If the owner of the property was not known, it could be returned to another person appearing to have rights in it; otherwise the property could be disposed of 90 days from the time it was seized.

Clause 144 would give the court the power, after convicting a person of an offence under clause 141(8), to order the forfeiture of an item used in connection with the offence. The court would also be able to make an order preventing a person from participating in prohibited activities in the controlled area; this could include prohibiting him from returning to the controlled area for a set period of time.

Clause 147 would ensure that the provisions of part 3 of the Bill would not result in the same behaviour being criminalised twice. Any byelaws which would have the effect of prohibiting or restricting the already prohibited activity in the controlled area would cease to have effect

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[153] This suggests that existing Parliament Square encampments, including that of Brian Haw, would be covered by the prohibitions in the Bill.

(to the extent of the overlap) when the Bill's provisions came into force. The powers of the Greater London Authority and Westminster City Council to enact byelaws would be limited to prevent any dual criminality in relation to prohibited activities.

Clause 148 would add a new sub-section to section 237 of the *Local Government Act 1972* enabling local authorities to attach powers of seizure and retention of any property in connection with a breach of a byelaw relating to the prevention and suppression of nuisance (as made under section 235 of the 1972 Act).

Section 385(4)(b) of the *Greater London Authority Act 1999* enables the Greater London Authority to make and enforce byelaws for the management of Parliament Square Garden and Trafalgar Square. It currently gives the GLA a power of seizure in relation to the breach of a trading byelaw. **Clause 148** would also amend section 385(4)(b) of the 1999 Act so that the current power of seizure could be used in relation to a breach of any byelaw.

5 Misuse of drugs

Part 4 of the Bill includes proposals to amend how the Government receives advice on drugs and to introduce powers to temporarily ban drugs.

Clause 149 would allow the Secretary of State to introduce temporary class drugs orders of up to a year for drugs that are not classified, and that in his view are likely to be misused and have a harmful effect. There would not be any requirement for the Secretary of State to consult or seek advice before introducing a temporary ban.

Clause 150 would remove the requirement for certain appointments to the Advisory Council on the Misuse of Drugs (ACMD) to be representatives from various areas of science and medicine. The Explanatory Notes summarise the provisions as follows:

> [The clause would] remove the requirement on the Secretary of State to appoint to the Advisory Council on the Misuse of Drugs at least one person with wide and recent experience in each of six specified activities - medicine, dentistry, veterinary medicine, pharmacy, the pharmaceutical industry and chemistry - and persons with wide and recent experience of social problems connected with the misuse of drugs.[154]

The amendment effectively removes the requirement for the ACMD membership to have any particular kind of expertise.

The Minister for Crime Prevention, James Brokenshire, explained on the BBC website that the aim was to allow greater flexibility in relation to the expertise that could be drawn on for advice on drugs:

> Scientific advice is absolutely critical to the government's approach to drugs and any suggestion that we are moving away from it is absolutely not true. Removing the requirement on the Home Secretary to appoint to the Advisory Council on the Misuse of Drugs at least one person with experience in six specific areas will allow us greater flexibility in the expertise we are able to draw on. We want the ACMD to be adapted to best address the challenges posed by the accelerating pace of challenges in the drugs landscape.[155]

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154 *Police Reform and Social Responsibility Bill – Explanatory Notes*, para 365

155 "Politics v Science yet again", *BBC news: Mark Easton's UK blog*, 6 December 2010

5.1 Professor Nutt's Removal

There was controversy in October 2009 when the previous Government removed Professor David Nutt, then Chair of the ACMD, from his post. The reasons for this were set out by Alan Johnson, then Home Secretary, in a letter to Professor Nutt:

> It is important that I can be confident that advice from the ACMD will be about matters of evidence. Your recent comments have gone beyond such evidence and have been lobbying for a change of government policy. This goes against the requirements on general standards of public life required by your position.
>
> (...)
>
> ...it is not the job of the chair of the Government's advisory council to comment or initiate a public debate on the policy framework for drugs".[156]

Professor Nutt had commented on the relative harm caused by legal and non-legal drugs. He had also criticised the Government for reclassifying cannabis as class B, despite the ACMD's advice to the contrary, and for failing to follow the ACMD's advice to downgrade ecstasy from class A to class B. There had been earlier calls for his resignation in February 2009 after he wrote a journal article comparing the risks of taking ecstasy with those of horse riding:

> Campaigners said Prof Nutt's comments were ill-judged, coming ahead of the council on whether to downgrade the drug from A to B.
>
> David Raynes, an executive councillor at the National Drug Prevention Alliance said: "Professor Nutt has made numerous unwise comments prejudging the ACMD review of Ecstasy. Is he on a personal crusade against the laws enacted by Parliament?
>
> "He is entitled to his opinion, but if his personal view conflicts so very strongly with his public duties, it would be honourable to consider his position.
>
> "If he does not, the Home Secretary should certainly do it for him."
>
> The advisory council insisted that Prof Nutt was writing in the journal "in respect of his academic work and not as chair of the ACMD".
>
> A spokesman said: "Prof Nutt's academic research does not prejudice the work that he conducts as chair of the ACMD."[157]

Five members of the ACMD resigned in protest at Professor Nutt's removal in the weeks following his removal. Two further members, Dr Polly Taylor and Eric Carlin, resigned in March and April 2010, when the "legal high" mephedrone was classified. Dr Taylor's resignation letter set out concerns about how the then Government treated independent scientific advice:

> We had understood that the requirement of us, as advisers, was to comply with the Code of Practice for Scientific Advisory Committees, and not to maintain the favour or trust of a minister with our advice and its communication.
>
> Senior scientists and advisers set out these objections in detail, as did the ACMD's submission to the government's consultation on that document. The same points were made by the Science and Technology Select Committee in their letters to the government.

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156 "Nutt gets the sack", *BBC news: Mark Easton's UK blog*, 30 October 2009

157 "Ecstasy 'no more dangerous than horse riding'", *Telegraph*, 7 February 2009

> I am therefore surprised and dismayed that the government has rejected these concerns in the publication this week of a final version of the principles, the first of which is a requirement for "mutual trust" backed up by sanctions against independent advisers irrespective of whether the code of practice has been complied with.
>
> I feel that there is little more we can do to describe the importance of ensuring that advice is not subjected to a desire to please ministers or the mood of the day's press.[158]

Eric Carlin also expressed concerns about how the ACMD functioned in his letter of resignation:

> As well as being extremely unhappy with how the ACMD operates, I am not prepared to continue to be part of a body which, as its main activity, works to facilitate the potential criminalisation of increasing numbers of young people.[159]

In November 2010, the Home Office advertised for a chair and eight new members for the ACMD.

5.2 Review of the ACMD

Following the removal of Professor Nutt, the previous Government announced that a review of the ACMD would be carried out by Sir David Omand. According to a recent PQ the conclusions of this review will not be published until early 2011:

> Mr Ainsworth: To ask the Secretary of State for the Home Department (1) whether she plans to review the remit of the Advisory Council on the Misuse of Drugs in formulating her Department's 2010 drugs strategy;
>
> James Brokenshire [holding answer 18 November 2010]: The Government have no intention of reviewing the remit of the Advisory Council on the Misuse of Drugs (ACMD). The processes and function of the ACMD are currently being reviewed by Sir David Omand in line with Cabinet Office guidelines. The purpose of the review is to consider whether the ACMD is discharging its function that it was set up to deliver within the existing legislation. Sir David Omand's review is expected to conclude early in 2011.[160]

5.3 Reaction to the Bill

Imran Khan, the Director of the Campaign for Science and Engineering, commented on the impression the proposals would make on the scientific community:

> While the Home Office may genuinely feel that the ACMD needs to be reformed and brought up to date, not only good practice but history demands that any such reform must be done sensitively and with care. Unilaterally removing requirements for expertise is not the way to go about it. It gives the impression of a lack of respect for the independence and importance of expert scientific advice, which we hope is not the reality.[161]

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158 "Drug adviser Dr Polly Taylor's full resignation letter", *BBC news*, 29 March 2010
159 Eric Carlin, *My ACMD resignation letter to the Home Secretary*, 1 April 2010
160 HC Deb 30 Nov 2010 c772W
161 Imran Khan, *Scientific Advice and the ACMD – why the Government should pause for thought*, 5 December 2010

The Drug Equality Alliance, a not-for-profit organisation that campaigns for a "rational and objective legal regulatory framework", also expressed concerns about the proposal to remove the need for consultation and expert advice:

> The Police Reform and Social Responsibility Bill if enacted would effectively emasculate and by-pass the expert Advisory Council on the Misuse of Drugs (ACMD). This would allow the government free reign to control various drug users, without the need for the statutory consultation process nor any of the required scientific expertise being present on the council.
>
> Sections 149 and 150 to the Bill entirely negate the whole ethos of the legislation that sought to bring expert evidence to the heart of the drug user classification system.[162]

Sense about Science, a charitable trust aimed at promoting good science and evidence in public debates, expressed concerns about how the Government would ensure objective evaluation of substances if there was no requirement for scientific appointments to the ACMD:

> In 2009, following concerns over the dismissal of Professor Nutt from the ACMD, and the ensuing resignation of seven other expert members of the ACMD, the scientific community proposed new Principles for the Treatment of Independent Scientific Advice that set out to Government three principles: academic freedom, independence of operation and proper consideration of advice. A version of these Principles was agreed by the previous Government and the current Government included these in the Ministerial Code.
>
> Dr Leonor Sierra, of Sense about Science who first published the Principles for the Treatment of Independent Scientific Advice, said: "We are rather surprised that instead of improving on the scientific constitution of the advisory council to deal with any shortcomings in the original legislation this bill proposes doing away altogether with the requirement for scientists. Given the recent history, the Government really needs to explain how it will maintain objective clarity around evaluation of substances, particularly new substances, in the face of sensationalist or knee-jerk debates."[163]

6 Arrest warrants

Clause 151 of the Bill would introduce a new requirement for the Director of Public Prosecutions to consent to the issue of arrest warrants to private prosecutors in respect of universal jurisdiction offences. Universal jurisdiction essentially enables the national courts of a state to try a person for a crime committed outside that state, even where there is no link between the prosecuting state and the suspect, the victim or the place of crime. Examples of universal jurisdiction offences include war crimes, torture and hostage-taking.

The proposed change has been prompted by controversy over recent efforts by private prosecutors to obtain arrest warrants in respect of foreign political and military figures who have been visiting (or proposing to visit) the UK. Library Standard Notes SN/HA/5281 *Private prosecutions* and SN/IA/5422 *Universal jurisdiction* provide detailed background.

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[162] Drug Equality Alliance news release, Commentary on Police Reform and Social Responsibility Bill, 6 December 2010

[163] Sense about Science, Government plans to remove the statutory requirement for scientists on the ACMD, 6 December 2010

6.1 Offences requiring consent to prosecute

A private prosecution is "a prosecution started by a private individual who is not acting on behalf of the police or any other prosecuting authority or body which conducts prosecutions".[164]

The right of a private individual to bring a criminal prosecution is a historical one originating in the earliest days of the legal system. Although the need for private individuals to bring (and pay for) criminal prosecutions has largely disappeared since the creation of the office of Director of Public Prosecutions (DPP) in 1879,[165] the right to do so nevertheless remains.[166] It has been described as a "useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law".[167]

The right to bring and conduct a private prosecution is, however, subject to a number of restrictions. In some cases, the institution or carrying on of criminal proceedings is prohibited unless the consent of the Attorney General or the DPP is obtained. The Crown Prosecution Service website provides details of the rationale behind consents to prosecution:

> Consent cases are statutorily created, with the requirement for consent being imposed in order to prevent certain offences being prosecuted in inappropriate circumstances. In a memorandum to the 1972 Franks Committee, the Home Office set out five reasons why certain offences require consent:
>
> - To secure consistency in prosecution, e.g. where it is not possible to define the offence very precisely so that the law goes wider than the mischief aimed at or is open to a variety of interpretations;
> - To prevent abuse or bringing the law into disrepute, because the offence is a kind which may result in vexatious private prosecutions;
> - To enable account to be taken of mitigating factors, which may vary so widely from case to case that they are not susceptible to statutory definition;
> - To provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial, such as race relations; and
> - To ensure that prosecution decisions take account of important considerations of public policy or international nature such as may arise, for example, in official secrets or hijacking.[168]

One category of offences that generally requires the Attorney General's consent to prosecute is that of "universal jurisdiction" offences. The UK has universal jurisdiction under the *Geneva Conventions Act 1957* (and other legislation) for serious offences including war crimes, genocide, torture and hostage taking. The last bullet listed above is particularly relevant here, as universal jurisdiction essentially enables the national courts of a state to try a person for a crime committed outside that state, even where there is no link between the prosecuting state and the suspect, the victim or the place of crime. The consent of the

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164 Crown Prosecution Service website, *Private Prosecutions* [accessed on 8 December 2010]

165 "Before the *Prosecution of Offences Act 1879* there was no public prosecutor to take criminal cases to court. People had to find their own lawyers or present the prosecution case themselves." Crown Prosecution Service website, *History* [accessed on 8 December 2010]

166 *Prosecution of Offences Act 1985*, s6(1)

167 *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70

168 CPS website, *Consents to Prosecute* [accessed on 8 December 2010]

Attorney General is therefore required before a prosecution for any of these offences can be instituted.[169]

However, as described more fully in the next section, under section 25 of the *Prosecution of Offences Act 1985* the courts are not prevented from issuing an arrest warrant **before** the Attorney General's consent has been obtained, or even sought.

Obtaining an arrest warrant prior to consent

An individual can bring a private prosecution by laying an "information" (essentially a statement describing the allegation and the accused) before a magistrate. Under section 1 of the *Magistrates' Courts Act 1980*, the magistrate will then decide whether to issue a summons or an arrest warrant:

> (1) On an information being laid before a justice of the peace that a person has, or is suspected of having, committed an offence, the justice may issue -
>
> (a) a summons directed to that person requiring him to appear before a magistrates' court to answer the information, or
>
> (b) a warrant to arrest that person and bring him before a magistrates' court.

A summons, namely a notice requiring the recipient to attend court at a certain time to answer the allegations, would usually be appropriate where the alleged offence was a minor one. An arrest warrant, namely a document authorising the police to arrest the person named therein and bring him or her before the court, would be suitable for more serious offences such as universal jurisdiction offences.

Case law has established the matters that the magistrate should consider as a bare minimum when deciding whether to issue a summons or warrant:

> It would appear that he should at the very least ascertain: (i) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (ii) that the offence alleged is not 'out of time'; (iii) that the court has jurisdiction; (iv) whether the informant has the necessary authority to prosecute.[170]

Determining whether the individual laying the information has "the necessary authority to prosecute" would, in the case of a summons, require the magistrate to satisfy himself that any consent required for prosecution had been obtained **before** issuing the summons.[171] However, there is **no such requirement** where the magistrate is considering issuing an arrest warrant, as would usually be the case in respect of alleged universal jurisdiction offences. This is because section 25 of the *Prosecution of Offences Act 1985* currently provides that any requirement for consent shall not prevent the issue or execution of an arrest warrant:

> **25 Consents to prosecutions etc**
>
> (1) This section applies to any enactment which prohibits the institution or carrying on of proceedings for any offence except—

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169 *Geneva Conventions Act 1957*, s1A(3); *International Criminal Court Act 2001*, s53(3); *Criminal Justice Act 1988*, s135; *Taking of Hostages Act 1982*, s2

170 *R v West London Justices, ex parte Klahn* [1979] 2 All ER 221

171 *Price v Humphries* [1958] 2 All ER 725

> (a) with the consent (however expressed) of a Law Officer of the Crown or the Director; or
>
> (b) where the proceedings are instituted or carried on by or on behalf of a Law Officer of the Crown or the Director;
>
> and so applies whether or not there are other exceptions to the prohibition (and in particular whether or not the consent is an alternative to the consent of any other authority or person).
>
> (2) An enactment to which this section applies—
>
> (a) shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence; (...)

The purpose of this section is:

> ...to enable the arrest, charging and remand in custody or bail of a person against whom proceedings may have been commenced without the consent of the Attorney General or Director; it covers action that needs to be taken to apprehend the offender and detain him if there is not time to obtain permission.[172]

A magistrate can therefore issue a warrant of arrest, and the warrant can be executed, **prior** to the prosecutor having sought or obtained any necessary consent from the Attorney General. However, the Attorney General's consent would still subsequently need to be sought before the prosecution could proceed any further.

The fact that an arrest warrant can be issued without consent has led to some recent controversy in the context of arrest warrants issued in respect of political and military figures for alleged war crimes. In November 2010, the Lord Chancellor and Justice Secretary Kenneth Clarke said that there had been approximately ten applications for arrest warrants in respect of universal jurisdiction offences in the last ten years, two of which were granted.[173] For example:

- In April 2002, human rights activist Peter Tatchell applied to Bow Street magistrates' court for a warrant for the arrest of Henry Kissinger, the former US Secretary of State. The application accused Mr Kissinger of involvement in war crimes in Vietnam, Laos and Cambodia in the late 60s and early 70s. The application was refused on the grounds that the allegations were too general and there was insufficient evidence.[174]

- In September 2005, Bow Street magistrates' court issued a warrant for the arrest of Major Doron Almog, former head of the Israeli forces in the Gaza Strip. The warrant was issued following the laying of an information by the law firm Hickman & Rose, backed by evidence from the Palestinian Centre for Human Rights.[175] Major Almog landed at Heathrow but received warning that the police were waiting at the airport to execute the warrant; the police decided against boarding the aeroplane to arrest Major Almog and he flew back to Israel without disembarking.[176]

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172 *R v Lambert* [2009] EWCA Crim 700
173 HC Deb 9 November 2010 c204W
174 "Why Milosevic, but not Kissinger?", *Guardian*, 25 April 2002
175 Hickman & Rose press release, *UK court issues warrant against Israeli General*, 11 September 2005
176 "Investigation urged after Israeli officer avoids arrest", *Guardian*, 13 September 2005

- In November 2005, members of the Falun Gong group applied to Bow Street magistrates' court for a warrant for the arrest of Chinese trade minister Bo Xilae, who was accompanying the Chinese President on a trip to the UK. The application accused Bo Xilae of conspiracy to torture, but was refused on the grounds of state immunity.[177]

- In December 2009, it was reported that Westminster magistrates' court had issued a warrant for the arrest of Tzipi Livni, Israel's former foreign minister and current opposition leader. Ms Livni would not have had diplomatic immunity due to her status as a former rather than serving minister. However, the warrant was later withdrawn after it emerged that Ms Livni had cancelled a proposed visit to the UK and was therefore not on British soil.[178]

In response to the news of the Tzipi Livni arrest warrant, the then Foreign Secretary David Miliband said that the Government was "looking urgently at ways in which the UK system might be changed in order to avoid this sort of situation arising again".[179]

Some called for the law to be changed so that the Attorney General's consent would be required for the issue of the arrest warrant itself, as well as for any subsequent prosecution. Andrew Dismore, then chairman of the Joint Committee on Human Rights, supported this view on the grounds that the courts should not be used as "campaign forums":

> ...I would like to see our courts protected from being used as campaign forums by politically motivated groups that are not really interested in justice, but are interested in scoring party political or other political points in this long-running conflict in the middle east, which is not going to be resolved in courts of law. Our courts have been left dangerously open to political manipulation and being brought into disrepute. There is a way forward by allowing the Attorney-General to decide whether this should happen. The Attorney-General is, in the end, responsible for deciding which prosecutions should go ahead, based on the likelihood of both a conviction and a public interest test. We may have the embarrassment of leaders being arrested but no prosecution following on from that.[180]

However, others criticised this proposal on the grounds that the Attorney General's involvement would politicise the judicial process. Instead, they suggested that the DPP, who unlike the Attorney General is independent of the Government, would be better placed to give any consent needed:

> Justice, the all-party law reform and human rights organisation, believes instead that the Director of Public Prosecutions (DPP) is better placed than the Attorney for such decisions.
>
> It says: "The role of the Attorney-General has been in issue since the controversial intervention of Lord Goldsmith in a case relating to Saudi Arabia and a subsequent consultation as part of the Government's Governance of Britain programme."
>
> (...)
>
> Daniel Machover, chairman of [Lawyers for Palestinian Human Rights], ... warns:

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177 "Supporters and protesters divided by the Mall as Chinese leader arrives for royal reception", *Independent*, 9 November 2005

178 "UK ponders law change after Tzipi Livni arrest warrant", *BBC News website*, 15 December 2009

179 Foreign and Commonwealth Office news release, *Response to UK arrest warrant for Tzipi Livni*, 15 December 2009

180 HC Deb 12 January 2010 c200WH

> "Restricting the present system, including the long-standing judicial arrest warrant procedure, for narrow political interests will risk endangering human rights everywhere. Meanwhile, there is no evidence of judges falling short of high standards in making these decisions."[181]

The Labour Government's proposals for change

On 4 March 2010, the then Justice Secretary Jack Straw set out proposed changes to the law governing the issue of arrest warrants in respect of universal jurisdiction offences.[182] In essence, the right to bring a prosecution for such an offence where it was alleged to have been committed by a foreign national on foreign soil would have been restricted to the Attorney General or the DPP. No arrest warrant could have been issued in relation to such offences unless the information had been laid by or on behalf the Law Officers or the DPP. A private individual or organisation would therefore only be able to bring a private prosecution or apply for an arrest warrant in respect of such an offence where either the suspect was a UK national or the offence was alleged to have been committed on UK soil. The Ministry of Justice published a background briefing on the proposals and a draft clause setting out the necessary legislative amendments.[183]

Recognising the controversial nature of the proposed changes, Jack Straw indicated that he would undertake a brief consultation prior to legislating. On 6 March 2010 he therefore wrote to the Justice Committee, asking it to consider the Government's proposals and requesting a response by 6 April 2010.[184] The Committee indicated that, given the proposed timetable for consultation, it would be unable to undertake an appropriate process. It recommended instead that interested parties should respond directly to the Ministry of Justice.[185] The Committee also "commended this topic to our successor in the new Parliament for early attention", noting that any legislation implementing changes to the private prosecution regime would not be brought forward until after the May 2010 general election.

Developments since the general election

Following the general election, the new Lord Chancellor and Justice Secretary Kenneth Clarke announced that the coalition would be continuing with plans to change the law. He made the following written ministerial statement:

> The United Kingdom has asserted universal jurisdiction over war crimes under the Geneva Conventions Act, and over a few other offences of exceptional gravity, because of our international obligations and our commitment to ensuring that there is no impunity for those accused of such crimes. That commitment is unwavering.
>
> It is important, however, that universal jurisdiction cases should be proceeded with in this country only on the basis of solid evidence that is likely to lead to a successful prosecution-otherwise there is a risk of damaging our ability to help in conflict resolution or to pursue a coherent foreign policy. It is unsatisfactory that, as things stand, an arrest warrant for these grave offences can be issued on the application of a private prosecutor on the basis of evidence that would be insufficient to sustain a prosecution.

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181 "War crimes: should a magistrate still have the right to issue a private arrest warrant?", *Times*, 14 January 2010. See Library Standard Note SN/HA/4485 *The Law Officers* for a general overview of the Attorney General's role and functions.

182 HC Deb 4 March 2010 cc118-9WS

183 Ministry of Justice, *Arrest warrants – universal jurisdiction, Note by the Ministry of Justice*, 17 March 2010 and *Draft clause: Prosecution of certain extra-territorial offences: England and Wales*

184 Letter from Jack Straw to Alan Beith, *Arrest warrants – universal jurisdiction*, 6 March 2010

185 Justice Committee press release (No. 18 of Session 2009-10), *Informal reference of matter to the Committee: arrest warrants - universal jurisdiction*, 19 March 2010

> The Government have concluded, after careful consideration, that it would be appropriate to require the consent of the Director of Public Prosecutions before an arrest warrant can be issued to a private prosecutor in respect of an offence of universal jurisdiction. This would interfere as little as possible with the existing rights of private prosecutors, and would not prevent them from initiating prosecutions for these offences where the evidence justified that course.
>
> A suitable legislative amendment will be brought before Parliament at the first opportunity.[186]

6.2 The Bill

Clause 151 of the Bill would amend section 1 of the *Magistrates' Courts Act 1980* and section 25 of the *Prosecution of Offences Act 1985* so that where a private prosecutor laid an information in respect of a "qualifying offence" alleged to have been committed outside the UK, the magistrate would have to ensure that the DPP's consent had already been obtained before issuing an arrest warrant. The DPP's consent would effectively become a condition precedent to the issue of an arrest warrant for such offences. The Bill does not prescribe how the DPP should reach a decision as to whether to give consent, or what factors (e.g. weight of evidence, likelihood of subsequent prosecution) he should take into account.

The "qualifying offences" are listed in the clause and include piracy, breaches of the Geneva conventions, hostage-taking, hijacking, offences relating to nuclear material, torture, endangering safety at aerodromes, hijacking ships and attacks on UN workers.

The Foreign Secretary William Hague said:

> This government has been clear that the current arrangements for obtaining arrest warrants in respect of universal jurisdiction offences are an anomaly that allow the UK's systems to be abused for political reasons. The proposed change is designed to correct these and ensure that people are not detained when there is no realistic chance of prosecution. It is now important that the amendment is considered by Parliament in line with normal constitutional practice.[187]

Human rights groups have, however, criticised the proposals on the grounds that they will hamper efforts to bring alleged war criminals to justice. Kate Allen, UK Director of Amnesty International, said that the changed risked introducing delays that might enable suspects to "flee from justice":

> This is a dangerous and unnecessary change. Unless a way of guaranteeing a means of preventing suspects fleeing can be built into the proposals, then the UK will have undermined the fight for international justice and handed war criminals a free ticket to escape the law.[188]

The law reform and human rights group Justice said that the proposals "amount to a free pass for any suspected war criminal planning a weekend visit to the UK".[189]

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[186] HC Deb 22 July 2010 c47WS – see also Ministry of Justice news release, *New rules on universal jurisdiction*, 22 July 2010

[187] Foreign and Commonwealth Office press release, *Foreign Secretary comments on universal jurisdiction*, 1 December 2010

[188] Amnesty International press release, *War crimes arrests: New measures show UK is 'soft' on war crimes and torture*, 1 December 2010

[189] Justice press release, *Changes to arrest warrant rules will undermine universal jurisdiction for war crimes and torture*, 1 December 2010