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The Serious Crime Bill

Bill 103 of 2006-07

This paper discusses the *Serious Crime Bill*, which has been considered by the House of Lords, was introduced in the House of Commons on 10 May 2007 and is due to be debated on second reading on 12 June 2007.

The Bill is designed to remove what the Government considers to be remaining gaps in the UK's capability in dealing with the threat posed by serious organised crime. Its main provisions would: create a new civil order called a serious crime prevention order, aimed at preventing serious crime; reform the law on encouraging and assisting crime by replacing the common law offence of incitement with three new statutory offences; introduce measures intended to facilitate information sharing for the purposes of preventing fraud; and make amendments to the proceeds of crime legislation, including the abolition of the Asset Recovery Agency and the redistribution of some of the Agency's functions.

Other measures confer additional investigatory powers on HM Revenue and Customs in connection with the investigation of serious tax fraud; and additional powers on police constables to search for firearms.

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Summary of main points

The *Serious Crime Bill 2006-07* contains provisions designed to implement proposals set out in a 2006 consultation paper, in which the Government identified what it sees as continuing gaps in the UK's capability in dealing with the threat posed to it by serious organised crime. A 2004 white paper previously set out plans for a new, more strategic approach to dealing with organised crime. This set out the Government's plans for new powers for law enforcement agencies and the courts in dealing with those involved in serious organised crime, which were enacted in the *Serious Organised Crime and Police Act 2005.* It also proposed the creation of the Serious Organised Crime Agency (SOCA), which brought together staff and resources from a number of different agencies and came into being on 1 April 2006.

Part 1 of the Bill seeks to add a new type of civil order – a serious crime prevention order (SCPO) - to the growing list of civil orders, including anti-social behaviour orders (ASBOs) and control orders, available for use in relation to the prevention of crime or anti-social behaviour. The High Court and in some cases the Crown Court will be able to impose an SCPO on a person involved in serious crime with the aim of preventing, restricting or disrupting the person's future involvement in it. There has been some controversy about the breadth of the restrictions and prohibitions that might be included in the new orders and their potential effect on third parties. The new orders will be available to courts in England and Wales and Northern Ireland, but not in Scotland, although the offence of being in breach of an SCPO will extend to Scotland.

Part 2 of the Bill is designed to create new offences in England and Wales and Northern Ireland of assisting and encouraging crime, which will replace the common law offence of incitement. The current law in this area has long been considered to be unsatisfactory and the provisions are based on the recommendations set out in Law Commission report on *Inchoate Liability for Assisting and Encouraging Crime* published in 2006.

Part 3 of the Bill includes measures which seek to facilitate information sharing for the purposes of preventing fraud. They do so by explicitly allowing public authorities to disclose information to specified anti-fraud organisations and by amendments to the *Data Protection Act 1998.* These provisions also place on a statutory footing the data matching exercises conducted periodically by the Audit Commission, and make separate provision for this in Wales and Northern Ireland. The key issue here lies in the extent to which any interference in the European Convention right to privacy can be considered proportionate in the light of the fight against fraud.

Part 3 of the Bill also contains a number of measures relating to the recovery of the proceeds of crime. In particular, the Bill would abolish the Asset Recovery Agency (ARA) and redistribute some of its functions. ARA's powers relating to the civil recovery of the proceeds of unlawful conduct would be taken on by SOCA. Part 3 of the Bill will also give additional powers to "accredited financial investigators", including the power to seize any property subject to a restraint order (to prevent its removal from England and Wales or Northern Ireland) and the power to search for cash on a person or premises and seize it if it is suspected that it is the proceeds of unlawful conduct or intended for use in such conduct. Such powers are already enjoyed by constables and officers of Her Majesty's Revenue and Customs. Financial investigators would be granted these powers of seizure if they fell within

a description of investigator specified for this purpose by an order made by the Secretary of State.

Additional surveillance and interception of communications powers would become available to HM Revenue and Customs: they can already deploy these investigatory techniques in relation to matters formerly the provenance of HM Customs and Excise. If the measures in the Bill were enacted they would be able to use them to investigate serious tax fraud.

The Bill also contains a provision, introduced in the House of Lords through an amendment opposed by the Government, which is intended to enable a police constable who has reason to believe that someone is carrying a firearm within a particular area to arrange, on his own authority, for that area to be sealed off and for people or vehicles in that area to be searched for firearms by whatever means the constable considers appropriate.

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I Background

Organised crime groups are essentially businesses. Like legitimate businesses they are affected by issues of supply and demand and are sensitive to factors affecting their markets and the business environment in which they operate. Their activities may include drug and people trafficking, financial crime and fraud against businesses and private individuals, intellectual property theft, counterfeiting, VAT and excise duty evasion and other forms of fraud against the public sector. Many organised crime groups are involved in more than one of these activities and some have involvement in almost all of them. Their activities, which have a UK turnover of many billions of pounds annually, are underpinned by sophisticated money-laundering operations.[1]

A. The scale of organised crime

It is very difficult to measure accurately the scale of organised crime and there has been little work carried out on this topic, either in the UK or internationally. The Home Office has embarked on a programme of research to look at the economic and social costs of organised crime, the level of public concern about such crime and the size of the criminal market. Preliminary results suggested that the losses and harms caused by all forms of organised crime may be up to £40bn.[2]

The abuse of class A drugs, produced by or smuggled into the UK by organised criminals, has costs of at least £13bn a year[3]. Broad estimates put the economic and social costs of serious organised crime, including the economic and social costs of combating it, at over £20 billion a year.[4] Estimates suggest that up to 35 tonnes of heroin are smuggled into the UK each year, along with 45 tonnes of cocaine.[5]

It is estimated that in 2002/03, £7bn in revenue was lost from all forms of indirect tax fraud; much of this was the result of organised fraud activity.[6] National Economic Research Associates (NERA) has estimated the economic cost of all fraud to the UK at £14bn per year.[7]

The overall size of criminal proceeds in the UK is not known nor is the amount of money that is laundered. HM Customs and Excise have suggested that the annual proceeds from crime are in the region of £19bn to £48bn[8]. Home Office estimates suggest that about £2 billion of the profits of crime remain within the UK while about £3.3 billion is sent overseas.[9]

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1 *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime* Cm 6167 March 2004 p.1
2 ibid. p.8
3 ibid.
4 *Serious Organised Crime Agency Annual Plan 2007/08* April 2007 p.7 http://www.soca.gov.uk/assessPublications/downloads/SOCAAnnualRep2006_7.pdf
5 NCIS,*UK Threat Assessment 2003*
6 *One Step Ahead A 21st Century Strategy to Defeat Organised Crime* Cm 6167 March 2004 p.8
7 NCIS, *UK Threat Assessment 2003,*
8 UK Threat Assessment 2003, NCIS
9 *SOCA Annual Report 2006/07* May 2007 p.11

The *Proceeds of Crime Act 2002* imposed an obligation on banks and other organisations that form part of "the regulated sector" to submit Suspicious Activity Reports (SARs) to NCIS where they had knowledge or suspicion of money laundering activities. Since 2000 the number of SARs has been steadily increasing, with almost 95,000 submitted in 2003. There were 67,000 SARs submitted to NCIS in the first half of 2004, an increase of 55% on the first half of 2003.[10] In a written answer of 10 July 2006 the Home Office minister Vernon Coaker said a total of 127,918 SARs had been received by NCIS from the banking sector in 2005, representing just over 65 per cent of all SARs received in that year.[11] This would suggest that more than 196,000 SARs were received by NCIS in 2005.

B. The Government's strategy for dealing with organised crime

In March 2004 the Government published a white paper *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime*[12] which included the following definition:[13]

> For the purpose of this paper, we have taken the definition of organised criminals used by NCIS:
>
> "those involved, normally working with others, in continuing serious criminal activities for substantial profit, whether based in the UK or elsewhere."
>
> This captures the essential point that many organised crime groups are, at root, businesses and often sophisticated ones. In practice, most criminal groups exist on a spectrum of organisation. There is no clear cut-off point at which any group should be categorised as being involved in organised crime. But those at the top end of the spectrum pose a unique threat.

The 2004 white paper set out plans for a new approach to dealing with the threat posed to the UK by organised crime in general. This new approach involved deterring and impeding the activities of criminal gangs by

- making better, more strategic use of existing powers;
- introducing new powers to disrupt criminal activity and convict those responsible; and
- creating a Serious Organised Crime Agency.

The *Serious and Organised Crime and Police Act 2005* (SOCAP) created the Serious Organised Crime Agency (SOCA) which came into being on 1 April 2006. It brought together: staff from the National Criminal Intelligence Service (NCIS) and the National Crime Squad (NCS); staff and resources from HM Revenue and Customs (HMRC) to support the transfer to SOCA of investigative and intelligence work relating to serious

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10 HL Deb 11/10/04 c19wa
11 HC Debates 11 July 2006 c1784W
12 *One Step Ahead – A 21st century strategy to defeat organised crime,* Cm 6167, March 2004, http://www.homeoffice.gov.uk/docs3/wp_organised_crime.pdf
13 *One Step Ahead*, section 1.1

drug trafficking and the recovery of related criminal assets; and some of the staff from the Home Office who had been dealing with organised immigration crime. SOCA's functions are to:

- prevent and detect serious organised crime;
- contribute to its reduction in other ways and to the mitigation of its consequences; and
- gather, store, analyse and disseminate information relevant to the prevention, detection, investigation or prosecution of offences, the reduction of crime in other ways or the mitigation of its consequences.[14]

In July 2006 SOCA published a report entitled *The United Kingdom Threat Assessment of Serious Organised Crime* which provides information about how serious organised criminals operate and the principal sectors in which they are currently involved. The chapter of the report setting out its key judgements notes that:

> Most of those known to be involved in serious organised criminal activity in and directly affecting the UK are British nationals, including from minority ethnic communities. However, a significant number of foreign nationals are also involved, both in the UK and abroad, reflecting the fact that the trades in illicit goods mostly originate outside Europe and transit the EU and neighbouring countries.[15]

The same chapter includes the following comments about how serious organised criminals operate:

> 2.3 With few exceptions, serious organised criminal activity is directly or indirectly concerned with making money. Its division into sectors reflects the law and organisational responsibilities for its enforcement. Most serious organised criminals, especially the more established and successful ones, are involved in more than one sector.
>
> 2.4 Serious organised criminals have an excellent and dynamic understanding of criminal markets and are quick to respond to threats from law enforcement measures or rivals and to seize and create money-making opportunities.
>
> 2.5 Profitability alone cannot explain the choices serious organised criminals make. They also look to manage risk by threatening and using violence; by transferring 'hands-on' risks to lower-level criminals or dupes; by corrupting law enforcement officers and others involved in the criminal justice process; and by using professionals to handle their affairs, especially to launder their criminal proceeds.
>
> 2.6 Most serious organised criminal activities require some measure of criminal collaboration and infrastructure, and this lies behind the formation of organised crime groups and networks. A wide range of structures exists. Some serious organised criminals belong to established groups with clear hierarchies and

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14 *Serious Organised Crime and Police Act 2005* ss.2,3

15 *The United Kingdom Threat Assessment of Serious Organised Crime 2006/7* Serious Organised Crime Agency 31 July 2006 p.7
http://www.soca.gov.uk/assessPublications/downloads/threat_assess_unclass_250706.pdf

> defined roles, but many are part of looser criminal networks and collaborate as necessary to carry out particular criminal ventures. Such contacts are reinforced by links of kinship, ethnicity, or long association.
>
> 2.7 Serious organised criminals make use of 'specialists' who provide a service, often to a range of criminal groups. Services include transportation, money laundering, or the provision of false documentation (identity fraud underpins a wide variety of serious organised criminal activities).
>
> 2.8 Time spent together in prison is the basis for many later criminal collaborations.[16]

The *Serious Organised Crime and Police Act 2005* enacted a number of other measures proposed in the 2004 white paper, including provisions:

- giving law enforcement agencies powers to issue Disclosure Notices requiring recipients to answer questions, provide information and/or produce documents relevant to an investigation, subject to certain restrictions on what can be asked and the use which can be made of evidence produced under compulsion.
- giving law enforcement agencies powers to use incentives such as immunity from prosecution or a reduction in sentence to encourage criminals to inform on their associates.
- giving courts a new sentencing disposal called a Financial Reporting Order, which is available in relation to certain qualifying offences. The Orders may last up to 15 years (20 years if the offender is sentenced to life imprisonment) and require the offender to make reports providing specified information about his financial affairs. Failure to comply with the order, or the provision of false or misleading information, is an offence punishable by up to 12 months' imprisonment.

In a speech in a recent debate on a statutory instrument, which made additions to the list of qualifying offences in respect of which Financial Reporting Orders are available, Lord Bassam of Brighton said thirteen such orders had been made since they were introduced, eleven in connection with SOCA cases and two in connection with Her Majesty's Revenue and Customs (HMRC) cases.[17]

The first use of the power to grant immunity from prosecution under the 2005 Act came when it was granted to four witnesses who testified against the cocaine smuggler Brian Brendon Wright, who was convicted of conspiracy to smuggle and supply drugs and sentenced to 30 years' imprisonment in April 2007 after an 11 year investigation which was the last to be carried out by HMRC.[18]

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16 ibid.

17 HL Debates 3 May 2007 c1255

18 "Head of drugs gang convicted: Brian Brendon Wright guilty of cocaine smuggling" – HM Revenue & Customs press notice 2 April 2007 http://www.gnn.gov.uk/environment/fullDetail.asp?ReleaseID=276026&NewsAreaID=2&NavigatedFromDepartment=False "The unravelling of a drugs empire" – *BBC News* 3 April 2007 http://news.bbc.co.uk/1/hi/england/london/6500919.stm

SOCA's first annual report, published in May 2007, stated that the agency had made 22 Disclosure Notices. The report added that the agency had found all of its powers under the 2005 Act to be effective.[19]

The *Serious Organised Crime Agency Annual Plan 2007/08* which describes the organised crime threats to the UK and the UK Control Strategy for organised crime was published in April 2007.[20] It sets out the following strategic imperatives agreed by the SOCA Board:

- To build knowledge and understanding of serious organised crime, the harm it causes, and of the effectiveness in tackling it
- To increase the amount of criminal assets recovered and increase the proportion of cases in which the proceeds of crime are pursued
- To increase the risk to serious organised criminals operating in the UK, through traditional means and by innovation within the law
- To collaborate with partners, join up domestic and international efforts to reduce harm and provide high quality support to our partners; and as appropriate seek theirs in return
- To build capacity and capability to make a difference

The *Serious Organised Crime Agency Annual Report 2006/07* noted the following headlines for 2006/07:

> Establishing a new law enforcement agency with new tasks and different functions has been a challenge for the organisation and for its staff, but operational success in year one has demonstrated that the approaches adopted are effective and have the potential to deliver significant impact on organised crime in the years ahead. The highlights of that operational work this year were:
>
> - the consolidation of the existing intelligence picture which resulted in the identification of a significant number of individual criminals judged to be amongst the most harmful to the UK but who had not previously been operational priorities;
>
> - more than 1,700 arrests made in the UK and around the world flowing from SOCA work;
>
> - high quality domestic criminal justice casework, delivered in partnership with UK prosecutors, with success in the courts in terms of guilty pleas and convictions running at around 95%;
>
> - the seizure of in excess of 74 tonnes of Class A drugs, which, if sold in the UK for the market price would have raised in excess of £3bn and generated considerable associated acquisitive crime, and which certainly cost the criminals who owned them at least £125m;
>
> - the exclusion of potentially dangerous individuals from the UK using the Home Secretary's "non-conducive" powers to exclude individuals for

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19 *SOCA Annual Report 2006/07* May 2007 DEP 07/1189 p.17

20 *Serious Organised Crime Agency Annual Plan 2007/08 SOCA April 2007* http://www.soca.gov.uk/assessPublications/downloads/SOCAAnnualPlan2007_8.pdf

organised crime reasons; the arrest and return of 264 individuals sought in other European countries; and the facilitation of the arrest within the EU of 91 individuals sought by UK law enforcement agencies;

- activity against international aspects of crime on a new scale for the UK, particularly against money laundering – where SOCA has disrupted gangs believed to be laundering hundreds of millions of pounds each year – and even in parts of the world in which operation for anyone, let alone foreign law enforcement, is difficult, such as Afghanistan;

- £29m recovered from criminals and returned to its owners, and £27m criminal assets restrained by the Courts;

- continued specialist support to police forces, including averting at least 35 threats to life and recovering more than 150 illicit firearms and large amounts of ammunition;

- preventing fraud which, had it been successful, could have secured tens of millions of pounds; and

- the issue of warnings to a large number of organisations in both the public and private sectors to assist them in managing organised crime threats that could affect them.[21]

The report's concluding chapter gave the following description of the agency's impact in its first year of operation:

> SOCA has been tasked to achieve over time a sustained impact on criminal markets, which will feed through into the nature and scale of the harms that are caused by serious organised crime.
>
> In this first year, there were operational successes, as well as progress in putting in place longer term actions that will increase the risk faced by organised criminals who affect the UK. In tactical outputs, such as arrests, drugs interdictions and crimes detected and prevented, the Board believe that SOCA has made a good start.
>
> In 2005, the then Home Secretary described a range of ways in which SOCA's progress towards the longer term aim of harm reduction would be assessed. Of these, the two that should appear first as SOCA develops are:
>
> - growth in SOCA's own capacity to make a difference, with particular focus on the quality of understanding of organised crime; and
> - performance in asset recovery work.
>
> Both are assessed earlier in this report, but SOCA has also taken some important steps that should help to make the UK a more hostile environment for organised crime in the future. Some highlights have been:
>
> - developing and agreeing with partners a single strategy against organised crime (the Control Strategy);

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21 *SOCA Annual Report 2006/07* May 2007 p.4
http://www.soca.gov.uk/assessPublications/downloads/SOCAAnnualRep2006_7.pdf

- identifying and targeting people who matter, including a number who have not previously been operational priorities;
- putting in place directed activity to fill information gaps in a concerted way, which has improved the knowledge picture in some key areas;
- expanding interception facilities;
- embedding officers with key partners, so they can enrich the information and operational flow between SOCA and those partners;
- integrating financial investigation expertise into inherited and new casework, to maximise longer term performance against criminal assets;
- improving systems designed to make more effective use of information about suspicious financial transactions contained in SARs;
- developing and using new tools to make organised crime harder to commit, for example by helping individuals and institutions to better protect themselves; and
- establishing mechanisms to track and manage the risk posed by serious organised criminals in prison and on probation.

Further effort is needed build on this work, both in terms of improving SOCA's own capacity to make a difference, and enhancing work with partners so that together it is possible to translate successful tactical activity into impact that affects the criminals strategically and is felt in communities.

In addition, the Home Secretary said he wished to see evidence of dislocation of criminal markets, including evidence that criminal groups were finding the UK a less attractive market, with these dislocations ultimately being reflected in trends in underlying harms caused by organised crime. This would not be expected at this stage in SOCA's development. In particular, it would take time to improve the level of knowledge and understanding sufficiently to know which activities have the most impact and what the real drivers for criminal decision making are.

The effect of greater targeting against most significant individuals already achieved can be expected in time to increase the overall effect of these activities on criminal views of risk, but this has not yet been systematically reflected in the UK. In some areas of business, for example against cocaine entering Europe and international money flows, the scale of SOCA activity has been greater than that achieved before, and the impact of those activities will be examined closely over the coming year. New work against organised immigration crime and fraud looks promising, but time is needed to develop it. While results from the new tools deployed are encouraging as far as they go, it is too soon to make a judgement about the impact they can generate overall and longer term.

The tactical success achieved by SOCA has, like precursor work, caused at least some probably temporary disruptions to criminals and their operations in the UK. As well as in the direct risk created by criminal enforcement work, there are a number of areas in which SOCA can show that it has prevented crime, including some very serious crime, directly or through others. Encouragingly also, there have been some signs that organised criminals recognise that SOCA is different from what came before, and that they regard it as a greater threat. These have been expressed in indications that some criminals have decided to move their criminal business away from the UK, and others displaying behaviour consistent with increased perception of risk. But these examples are not yet sufficiently systematic to feed into overall effects on criminal markets and, therefore, the overall impact on harm.

Overall, therefore, the evidence that has been gathered during SOCA's first year of existence is sufficient, in the Board's view, to validate the direction of travel taken so far. The challenge in the years ahead will be to pursue the strategy proposed by SOCA and agreed by Ministers to the point where the isolated incidents of criminal discomfort become an established pattern.

In July 2006 the Home Office published a green paper *New Powers Against Organised and Financial Crime* which set out further proposals designed to build on those set out in the 2004 white paper.[22] The paper's executive summary included the following comments about the Government's new approach:

> The fundamentals of this new approach are simple. We are turning away from defining success by the number of essentially tactical outputs like volumes of seizures, or the number of arrests or operations. Instead we want to measure our success by the extent to which we can prevent organised crime harms in the first place; to demonstrate that we have disrupted illicit markets and to change profoundly the risk / reward relationship which currently favours the criminal.[23]

The 2006 green paper noted the progress made since 2004, including institutional changes, such as the creation of SOCA, a more focused approach by law enforcement agencies, and rulings by the House of Lords clarifying the rules on disclosure. The paper went on to identify what it suggested were continuing gaps in the UK's capability and set out proposals designed to remove these remaining gaps by

- Creating a new type of civil order, to be called a serious crime prevention order, designed to prevent organised criminal activity by individuals, businesses or organisations by imposing conditions and prohibitions on them.

- Further developing data-sharing within the public sector, and between the private and public sectors, to improve the detection and prevention of fraud.

In its summary of responses to the green paper, the Government noted that the paper had been well received with respondents generally supporting proposals to enhance the powers available to law enforcement to tackle serious organised and financial crime.[24]

The *Serious Crime Bill 2006-7*, which was introduced in the House of Lords on 16 January 2007, includes provisions based in part on the proposals in the green paper. The Bill is also designed to:

- Amend the proceeds of crime legislation and merge the Asset Recovery Agency (ARA) with the Serious Organised Crime Agency (SOCA).

- Establish new inchoate criminal offences of encouraging or assisting a criminal act with intent, or encouraging or assisting a criminal act believing that an offence may be committed. These provisions are based on proposals in the Law Commission's report on *Inchoate Liability for Assisting and Encouraging Crime*[25] published in July 2006.

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22 *New Powers Against Organised and Financial Crime* Home Office July 2006 http://www.homeoffice.gov.uk/documents/cons-2006-new-powers-org-crime/cons-new-powers-paper?view=Binary

23 ibid. p.4

24 *New Powers Against Organised and Financial Crime: A Summary of Responses* Home Office November 2006 p.5 http://www.crimereduction.gov.uk/organisedcrime/organisedcrime013.pdf

25 Law Com No. 3000 CM 6878 July 2006

II The *Serious Crime Bill 2006-07*

A. Serious Crime Prevention Orders

1. Background

Part 1 of the *Serious Crime Bill* seeks to create a new type of civil order, to be called a serious crime prevention order, which is intended for use against those who have been involved in serious crime as a means of preventing, restricting or disrupting their involvement in it.

In the July 2006 consultation paper *New Powers Against Organised and Financial Crime* the Government noted that its ultimate objective in dealing with organised crime was to prevent it from happening in the first place.[26] The paper suggested that in having a choice that was often restricted to prosecution or taking no action, law enforcement was now operating at a disadvantage in tackling organised crime, compared with other types of unlawful activity, where a greater range of measures and remedies was available:

> We have been working with law enforcement to identify possible new tools which could help prevent crime, examining in particular the sort of range available to agencies dealing with fraud and regulators.
>
> The widest range of such tools, covering administrative, civil and criminal remedies, tends to rest in the hands of some of the newer agencies like the Financial Services Authority (FSA). This wide range of potential disposals gives considerable flexibility and arguably increases the likelihood of voluntary settlement with those subjected to investigation. The purpose of the disposals includes preventing future harms and redressing past ones.
>
> This approach reflects a general trend in regulation, exemplified in the Hampton Review, which stressed the importance of a risk based approach, targeting the more invasive regulatory tools in the areas where breaches are most likely.
>
> In a parallel process, successive Governments over recent years have introduced a new category of civil orders against individuals for harm or crime prevention purposes. There are a range of such orders, covering areas like anti-social behaviour, sexual offences, restraining orders and football banning orders.[27]

The consultation paper added that:

> These orders constitute a significant toolkit of approaches for those involved with tackling anti social behaviour and certain sorts of serious crime. In comparison, the armoury available to those tackling organised crime is relatively bare.
>
> SOCA and police forces are developing a range of regulatory and other responses to make organised crime more difficult to commit. The powers in POCA and the new Financial Reporting Orders in SOCPA have considerable potential for disrupting convicted criminals' ongoing criminal finances. SOCA is working hard with colleagues in the National Offender Management Service

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[26] *New Powers Against Organised and Financial Crime* Cm 6875 July 2006 p.9
[27] ibid. p.28

> (NOMS) and the Immigration and Nationality Directorate (IND) to ensure full use is made of existing probation and immigration powers to target organised criminals who are on licence or potentially liable to immigration action.
>
> In addition, some police forces have developed approaches to using other administrative powers (eg planning, health and safety) against organised crime groups, working in partnership with local authorities and other regulators. But these approaches tend to be piecemeal and rely heavily on individual relationships. The use of such powers must obviously fall within the normal framework for action, if interventions are not to be seen as simple harassment.
>
> Moreover, these powers all have weaknesses. They are overwhelmingly focused on individual offenders. Most can only be used against offenders who have been convicted and only apply to the period of their sentence. Immigration powers obviously only apply to those who are subject to immigration control.[28]

The Government suggested that there remained a gap in arrangements for dealing with organised crime which could be filled by a new civil order, to be known as a "serious crime prevention order". It added:

> The purpose of the order would not be punitive, but to impose binding conditions to prevent individuals or organisations facilitating serious crime, backed by criminal penalties for breach.
>
> This would be a civil order, and given the range of potential restrictions, would probably need to be made in the High Court. Orders should be appealable to the Court of Appeal.
>
> The courts would be able to impose an order if they believe on the balance of probability that the subject
>
> - Has acted in a way which facilitated or was likely to facilitate the commissioning of serious crime
> - That the terms of the order are necessary and proportionate to prevent such harms in future.
>
> This order could be imposed following a contested hearing, or the terms could be agreed between the subject and prosecution and the order validated by the court. We would envisage the courts having the option of publicising, or not, the existence of orders, depending on the circumstances of the case.
>
> It will ultimately be for the courts, as a public authority under the Human Rights Act to decide if this test is met, and if the restrictions being applied for are compatible with human rights obligations. Most significant will be the need to ensure proportionality, particularly in cases where the degree of complicity in crime is unclear, and in cases where an order could cut across the interests of third parties.[29]

The paper noted that the proposals to impose civil orders on organisations drew on American experience of the effectiveness of the exceptionally broad powers under the federal *Racketeer Influenced and Corrupt Organisations Act (RICO)*, enacted in 1970. The paper suggested that the use of civil orders in the USA had been more successful in

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28 ibid.
29 ibid. p.29-30

tackling organised crime than earlier attempts to tackle organised crime through prosecution alone:

> These orders against organisations draw on US experience on Civil RICO (Racketeer Influenced and Corrupt Organisations). Civil RICO is an exceptionally broad power. USC §1964(a) sets out procedures for orders
>
> > "including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person...or ordering dissolution or reorganisation of any enterprise, making due provision for the rights of innocent persons"
>
> From 1970, the Teamsters Union had had over 340 officers convicted for mafia related crimes, but these prosecutions altered nothing in the mafia domination of parts of the union, as convicted individuals were simply replaced. Only when civil measures began to be taken to introduce court ordered administrators into particularly corrupt 'locals' (union branches) did the threat of mafia influence begin to be tackled effectively.[30]

The 2006 consultation paper emphasised that the fundamental purpose of the proposed new order would be preventative and that those deciding whether to prosecute or pursue a civil order would need to decide which course of action was most likely to reduce harm in the long run, while taking due account of the public interest in prosecutions. The paper noted the following considerations that might apply:

> For ASBOs, the underlying behaviour justifying the order does not itself need to be criminal, so prosecution is not necessarily an option. This is much less likely to be the case for organised crime, particularly if action is taken to address the various problems with the law around conspiracy, promoting and encouraging crime. There may still be cases where a prevention order can have clear harm reduction benefits while the illegality of the underlying behaviour is borderline [.....]
>
> Where the underlying behaviour is criminal, the prosecuting authorities will obviously need to consider carefully whether prosecution or civil orders are the appropriate way forward. We can envisage circumstances in which civil orders could play a role where prosecution *is not feasible*, *alongside* prosecution or *as an alternative* to prosecution.
>
> In the first category would fall cases where there is sufficient evidence to justify an order to a civil standard, but insufficient for a conviction. This may be because of the absolute quantity of evidence, or because some of it is in a form not admissible in a criminal proceeding but which can be used in civil cases (eg certain types of hearsay evidence).
>
> Law enforcement might also have evidence of crimes committed overseas which cannot be prosecuted in the UK, or the subject of an order might have been released after conviction overseas in circumstances where we would expect them in the UK to be subject to strict licence conditions – the prevention order would enable us to put such controls in place.

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[30] ibid. p.34-35

> Secondly, orders could be an additional option in the run up to a criminal prosecution, imposed to restrict the harm the subject can do while the case is being prepared, in cases where the subject is aware of law enforcement interest already. The orders might be used *alongside* prosecution, for example as part of a deal to turn Queen's Evidence, ensuring that the QE subject is bound to conditions of good behaviour. One option might also be to enable the courts to impose an order as part of a disposal after conviction, over and above the standard licensing conditions, although this would obviously have implications for the licensing system.
>
> There are also, however, likely to be cases where orders are an appropriate tool as an *alternative* to prosecution. In practice, law enforcement and prosecutors need to make difficult decisions around putting cases together for court. The courts have reasonable practical and case management reasons for objecting to over-large trials. But in the case of organised crime investigations, there may be significant numbers of individuals at the fringes who cannot be pursued in the main trial, and for whom a separate trial is not thought worthwhile. Such individuals' role might have been marginal and not warrant a prosecution, but an order might be sufficient to deter future criminal activity.
>
> At present, this sort of case essentially leaves law enforcement with a choice between prosecution or no action, and the risk remains that these essentially peripheral players can step up to leadership in the organised crime group once the principals have been convicted. A preventative order disrupting future criminal activity by these currently minor players could play an important role in preventing them taking over the organisation in the leaders' absence.
>
> An important consideration will be the degree of knowledge of those who are subject to the order, or whose interests will be affected by it. Clearly this will be an important consideration both for the prosecution in deciding whether to apply for the order, and for the court in deciding whether it would be proportionate to make it.[31]

In its report on the Bill the House of Lords Select Committee on the Constitution commented:

> 4. Since Dicey's heyday, there have been inroads into the sphere of personal liberty in the sense that he described it. However, until relatively recent times, criminal law was in practical terms the only legal mechanism to punish criminal activity. Recognising the risk of miscarriages of justice and the wrongful deprivation of the liberty of the subject, our constitutional arrangements have long included a range of procedural and substantive protections in the criminal justice system. These include: trial by jury for serious offences (often regarded as having its roots in the Magna Carta); a burden and standard of proof requiring prosecuting authorities to prove their case beyond all reasonable doubt; and a prohibition on hearsay evidence.[32]

The Committee noted that over the past 20 years public policy had increasingly reflected the view that criminal prosecutions and sentences alone might not be an adequate legal response to criminal and other unacceptable behaviour. It added:

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31 ibid. p.30-31

32 *House of Lords Select Committee on the Constitution Second Report of Session 2006-07 Serious Crime Bill: Report* HL Paper 41 2 February 2007 para. 4
http://pubs1.tso.parliament.uk/pa/ld200607/ldselect/ldconst/41/41.pdf

> The statute book now contains a growing number of examples of a different model: powers enabling individuals or public authorities to seek civil orders from a variety of courts to prohibit undesirable behaviour, backed by criminal sanctions if the subject of the order breaches the order.[33]

The Committee's report went on to list the civil orders currently available and to summarise the circumstances in which they apply:

- The Company Directors Disqualification Act 1986 created a civil remedy of disqualification, which enabled the court to prohibit a person from acting as a director; breach of such an order is subject to criminal sanction.

- Part 5 of the Criminal Justice and Public Order Act 1994 created a power for police to request that a local authority make an order to prohibit trespassory assemblies which could result in serious disruption of the life of a community or cause damage; breach of an order made under these provisions may result in criminal prosecution.

- Part 4 of the Family Law Act 1996 conferred powers to make residence orders (requiring a defendant to leave a dwelling house) and non-molestation orders (requiring a defendant to abstain from threatening an associated person); criminal sanctions are available for disobedience to these orders.

- The Protection from Harassment Act 1997 created a criminal offence of harassment (section 1), but section 3 also created a civil remedy, enabling individuals to apply for an injunction in the High Court or a county court to restrain another person from pursuing conduct which amounts to harassment, and breach of such an order was made a criminal offence.

- The Crime and Disorder Act 1998 created anti-social behaviour orders (ASBOs); local authorities were empowered to seek orders from the magistrates' court where a person acted "in a manner that caused or was likely to cause harassment, alarm or distress" (section 1). The Act also created sex offender orders; a chief officer of police was given power to seek such an order where a person is a sex offender and that person acts "in such a way as to give reasonable cause to believe that an order under this section is necessary to protect the public from serious harm from him" (section 2).

- The Football (Disorder) Act 2000 created "banning orders", designed to prevent known football hooligans from causing further trouble at home and abroad. Breach is subject to criminal penalty.

- The Anti-social Behaviour Act 2003 amended Part 8 of the Housing Act 1996 to give powers to housing authorities to seek ASBOs.

- Part 2 of the Sexual Offences Act 2003 (which repealed the Sex Offenders Act 1997) created "sexual offences prevention orders", "foreign travel orders" and "risk of sexual harm orders".

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[33] ibid. para. 5

- The Prevention of Terrorism Act 2005 created control orders "against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism" (section 1) and "a person who, without reasonable excuse, contravenes an obligation imposed on him by a control order is guilty of an offence" (section 9).

In *R (McCann) v. Crown Court at Manchester*[34] the House of Lords concluded that proceedings to obtain an anti-social behaviour order (ASBO) were civil proceedings and that they did not involve the determination of a criminal charge. Ordinarily the standard of proof that would apply in civil proceedings would be the civil standard (balance of probabilities or "more likely than not") rather than the criminal standard ("beyond reasonable doubt") but in the *McCann* case the House of Lords held that because the imposition of an ASBO had potentially serious consequences the courts should apply a higher standard ("being satisfied so that they were sure") than the normal civil standard. The court also concluded that hearsay evidence was admissible in such proceedings.

Civil rules, including a different regime for disclosing material to the defence, apply where civil orders are concerned and the greater use of hearsay means that, for example, professional witnesses like police officers or council officials are able to testify about anti-social behaviour in cases involving applications for ASBOs where neighbours or other members of the public are too intimidated to do so.[35]

2. Part 1 of the *Serious Crime Bill 2006-07*

The provisions designed to create serious crime prevention orders (SCPOs) are set out in Part 1 of the Bill. In most cases applications for serious crime prevention orders should be made on an application to the High Court[36] although it will also be possible for the Crown Court to make an order where it is sentencing a person who has been

- convicted of a serious offence by the Crown Court or
- committed to the Crown Court for sentence after being convicted of a serious offence by the magistrates' court.[37]

The Explanatory Notes comment that:

> As with proceedings before the High Court, it is intended that the proceedings will be civil rather than criminal for ECHR purposes.

As with the other civil orders used to restrain criminal or anti-social behaviour the standard of proof to be applied by either court in proceedings concerning SCPOs will be the civil standard of proof ("the balance of probabilities") rather than the criminal standard

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34 [2003] 1AC 787

35 *New Powers Against Organised and Financial Crime* Cm 6875 July 2006 p.29 http://www.homeoffice.gov.uk/documents/cons-2006-new-powers-org-crime/cons-new-powers-paper?view=Binary (on 23 May 2007)

36 Clause 1

37 Clause 20

("beyond reasonable doubt"). The Explanatory Notes refer to this in commenting on the classification of proceedings in relation to serious crime prevention orders in the High Court:

> This classification will be effective for domestic law purposes. It is also intended that proceedings for an order will be classified as civil rather than criminal for the purposes of Articles 6 and 7 of the European Convention on Human Rights. A consequence of *subsection (1)*, as set out in *subsection (2)*, is that the standard of proof applied by the High Court will be the civil standard. This is only one consequence of the proceedings being classified as civil. There will be other consequences which are not specified in the Bill, for example, hearsay evidence will be admissible in the proceedings. In the case of R (McCann) v. Crown Court at Manchester [2003] 1 AC 787, the leading case on antisocial behaviour orders, the House of Lords held that although the civil standard of proof would apply in relation to an application for an anti-social behaviour order the standard is a flexible one ranging from proof on the balance of probabilities, at the lowest level, to beyond reasonable doubt, at the highest. The House of Lords stated that they would expect a high standard of proof to be applied in relation to anti-social behaviour applications and the same principle is likely to apply in relation to applications for serious crime prevention orders.[38]

Where proceedings in the Crown Court are concerned there will be a number of additional consequences of the proceedings being civil rather than criminal. Two of these are set out expressly in the Bill. They are that the court

- Will be able to take account of evidence, such as hearsay evidence, that would not have been admissible in the criminal proceedings in which the person concerned was convicted; and

- Will be able to adjourn proceedings, even after sentencing the person.[39]

Clause 35 of the Bill is intended to enable the power to make rules of court under section 1 of and Schedule 1 to the *Civil Procedure Act 1997* to be exercisable in relation to the Crown Court where its jurisdiction concerning serious crime prevention orders is concerned. The Explanatory Notes comment that:

> This is to take account of the fact that because the Crown Court will be exercising a civil jurisdiction in relation to an order the normal criminal procedure rules will not be appropriate and so something needs to be put in their place. However, because the Crown Court is not normally a court of civil jurisdiction the Civil Procedure Rules will not apply without something express.

An application to the High Court or the Crown Court for an SCPO will be made by the Director of Public Prosecutions; the Director of Revenue and Customs Prosecutions; the Director of the Serious Fraud Office (or, in the case of Northern Ireland, the Director of Public Prosecutions for Northern Ireland).[40]

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38 *Explanatory Notes* paragraph 110
39 Clause 35(3)
40 Clause 9

The Bill seeks to enable the court to which an application for an SCPO is made to make an order if the following two-part test is satisfied:

a) it is satisfied that a person has been involved in serious crime in England and Wales, Northern Ireland, or elsewhere; and

b) it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales (or Northern Ireland in the case of applications made to the High Court or the Crown Court in Northern Ireland).[41]

The first part of this test is concerned with a person having been involved in serious crime anywhere, while the second part is concerned the person's potential involvement in further serious crime in England and Wales (or Northern Ireland). The courts will not have the power to make serious crime prevention orders to prevent a person's future involvement in serious crime in another jurisdiction.

Clauses 2 and 3 of the Bill set out the circumstances in which a person may be considered to be "involved in serious crime" and what is meant by "involvement in serious crime". The provisions concerning what is meant by a person being "involved in serious crime" in England and Wales, Northern Ireland or elsewhere, are broadly similar. In the case of England and Wales a person will be considered to have been involved in serious crime if he:

- has committed a serious offence in England and Wales;
- has facilitated the commission by another person of a serious offence in England and Wales; or
- has conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence in England and Wales, whether or not such an offence was committed.

Potential future "involvement in serious crime" in England and Wales will likewise consist of one or more of the following:

- The commission of a serious offence in England and Wales
- Conduct which facilitates the commission by another person of a serious offence in England and Wales
- Conduct which is likely to facilitate the commission, by the person whose conduct it is or another person, of a serious offence in England and Wales (whether or not such an offence is committed).

A person will be considered to have "committed a serious offence" if he has been convicted of it and the conviction has not been quashed on appeal and he has not been pardoned of the offence.[42]

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41 Clauses 1, 20
42 Clause 5(1)

The Explanatory Notes comment that "facilitation" will have its natural meaning of "to make easier". In deciding whether or not a person has facilitated the commission by another person of a serious offence, the court will be required to ignore any act that the person can show to be reasonable in the circumstances. Any other aspect of the person's intentions, or their mental state, will be irrelevant for the purposes of deciding this issue.[43]

A "serious offence in England and Wales" is defined as an offence which, at the time the court considers the application for the order or the matter in question:

- is specified or falls within a description specified in Part 1 of Schedule 1 of the Bill, or
- is an offence which, in the particular circumstances of the case, is considered by the court to be so serious that it should be treated as if it were specified in this way.

The offences specified in Part 1 of Schedule 1, and the equivalent offences for Northern Ireland specified in Part 2 of Schedule 1, include the more serious offences relating to the following types of criminal conduct:

- Drug trafficking
- People trafficking
- Arms trafficking
- Prostitution and child sex
- Money laundering
- Fraud
- Corruption and bribery
- Counterfeiting
- Blackmail
- Intellectual property offences
- Environmental offences

Clause 5(4) of the Bill seeks to give the Secretary of State the power to amend Schedule 1 by order.[44] This is intended to enable the Government to keep the list of offences up to date without the need for further primary legislation. Orders made under this provision will be subject to the affirmative procedure and will therefore have to be approved by each House of Parliament.[45]

Clause 6 of the Bill gives examples of the type of provision that might be made by a serious crime prevention order, while emphasising that in doing so it is not seeking to limit the type of provision that a court might make. The examples include prohibitions, restrictions or requirements in relation to places outside England, Wales and Northern Ireland.[46]

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43 Clause 5(2)
44 Clause 5(4)
45 Clause 79(3)
46 Clause 6(2)

Examples of possible prohibitions, restrictions or requirements that the orders might impose on individuals, including partners in a partnership, include any relating to:

a) an individual's financial, property or business dealings or holdings;
b) an individual's working arrangements;
c) the means by which an individual communicates or associates with others, or the persons with whom he communicates or associates;
d) the premises to which an individual has access;
e) the use of any premises or item by an individual;
f) an individual's travel (whether within the United Kingdom, between the United Kingdom and other places or otherwise).
g) an individuals' private dwelling, including prohibitions or restrictions on, or requirements relating to, where he or she may reside.

Examples given of prohibitions, restrictions or requirements that the orders might impose on bodies corporate, partnerships and unincorporated associations include any relating to:

a) their financial, property or business dealings or holdings;
b) the types of agreements to which they may be a party;
c) the provision of goods or services by them;
d) the premises to which they may have access;
e) their use of any premises or item;
f) their employment of staff .

A serious crime prevention order may also require a person to answer specified questions, provide specified information or produce particular documents described in the order. Clause 6(5) is designed to allow the details of how these requirements are to be fulfilled to the discretion of a law enforcement officer concerned. Depending on the circumstances of the case, the officer may be a constable, designated member of the staff of the Serious Organised Crime Agency, officer of Revenue and Customs, or a member of the Serious Fraud Office. The officer's discretion is, however subject to the general restrictions on what a serious crime prevention order may require a person to do, which are set out in Clauses 12-15 of the Bill. These restrictions are intended to ensure that an order does not require a person to:

- answer questions, or provide information orally
- answer any question, or provide information or any document which is covered by legal professional privilege
- produce any "excluded material" as defined by section 11 of the *Police and Criminal Evidence Act 1984* and its Northern Ireland equivalent"[47]
- disclose any information or produce any document which is the subject of a duty of confidence from a banking business, unless the person to whom the duty is owed consents to the disclosure or production and either the order expressly

[47] Such as personal records acquired in the course of any trade or business etc. which a person holds in confidence; human tissue or tissue fluid taken for the purpose of diagnosis or medical treatment which a person holds in confidence; or journalistic material such as documents or other records which a person holds in confidence

requires the disclosure of banking information in general, or it requires the disclosure of specified information or documents which amount to banking information.

- answer questions, provide information or produce documents if this would be prohibited under any other enactment

A person who complies with a requirement imposed by a serious crime prevention order to answer questions, provide information or produce documents will not be considered to have breached any obligation of confidence or any other restriction on disclosing the information concerned.[48]

Clause 16 of the Bill seeks to protect the privilege against self-incrimination, or "right to silence", by providing that statements made in response to requirements imposed by serious crime prevention orders may not be used in evidence against the person who makes them in any criminal proceedings unless

a) the proceedings relate to the offence under Clause 26 of failing to comply with a serious crime prevention order, or
b) the proceedings relate to another offence, the person who made the statement gives evidence in those proceedings and while doing so makes a statement inconsistent with the statement made in response to the requirement imposed by the order, and in the proceedings evidence relating to the latter statement is adduced, or a question about it is asked, by the person or on his behalf.

Statements made in response to requirements imposed by serious crime prevention orders will be able to be used against the person who made them in civil proceedings, including subsequent proceedings relating to the orders themselves.[49]

The Bill seeks to ensure that the Crown Court's power to make or vary a serious crime prevention order in respect of a person extends to cases where the Court gives the person an absolute or conditional discharge. Clause 35(6) accordingly provides that serious crime prevention orders may be made in spite of the provisions in sections 12 and 14 of the *Powers of Criminal Courts (Sentencing) Act 2000*, under which a person who is given an absolute or conditional discharge is treated as having not been sentenced for the offence and as not having a conviction of the offence.

3. Safeguards in relation to serious crime prevention orders

As has already been noted, the High Court or the Crown Court will only be able to make a serious crime prevention order following an application by the Director of Public Prosecutions; the Director of Revenue and Customs Prosecutions; the Director of the Serious Fraud Office; or, in the case of Northern Ireland, the Director of Public Prosecutions for Northern Ireland.[50] The orders will be available only in relation to individuals who are aged 18 or over.[51] There are no other exceptions on the face of the

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48 Clause 37
49 Clauses 34-35
50 Clause 9
51 Clause 7

Bill and the court will therefore be able to impose an order on any "person" which includes individuals, bodies corporate, partnerships and unincorporated associations.

Clause 8 seeks to give the Secretary of State the power to make orders providing that other specified categories of person may not have orders imposed on them. Orders made under this provision will be subject to the negative resolution procedure.

Where the court's exercise of its powers in relation to serious crime prevention orders would be likely to have a significant adverse effect on a person who is not the subject of the order that person will have a right to make representations at the hearing. This will also be the case where a court is considering an appeal in relation to an order.

The Bill does not require that a serious crime prevention order be made or varied in the presence of the person to whom it relates. Clause 11 of the Bill does, however, provide that a person will be bound by an order or by the variation of an order only if

- he is represented (whether in person or otherwise) at the proceedings at which the order is made or varied; or
- a notice setting out the terms of the order or variation has been served on him.

A notice of this kind will be considered to have been served on the person concerned if it is delivered to him in person or sent by recorded delivery to his last known address. A constable or other authorised person who is attempting to deliver a notice to a person who is the subject of a serious crime prevention order will be entitled to enter and search any premises where he has reasonable grounds for believing the person to be, and to use force in doing so if necessary.[52]

Serious crime prevention orders will last for up to 5 years and the court will have the power to make a new order to the same or similar effect after the previous order has ended, or in anticipation of it ceasing to be in force.

The Bill seeks to enable SCPOs to be varied by the court on an application by the authority which applied for it, the subject of the order or by a third party. The court will only be able to consider an application for a variation from the subject of the order if it considers that there has been a change of circumstance affecting the order. The court will only be able to consider an application for a variation from a third party if the third party can show that they are significantly affected by the order and:

- In earlier proceedings relating to the order, the third party has successfully applied for an opportunity to make representations under clause 10 or has applied to do so in some other way, and there has been a change in circumstances affecting the order, or
- The third party did not make an application of any kind in earlier proceedings relating to the order and can show that it was reasonable in all the circumstances not to have done so.

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[52] Clause 11

A third party will not be able to apply for variations for the purpose of making orders more onerous on the person who is the subject of it.

The Crown Court will have additional powers to vary serious crime prevention orders where it convicts a person of a serious offence and the person is already the subject of a serious crime prevention order, or following the conviction of a person for the offence under Clause 26 of breaching a serious crime prevention order.

Prosecuting authorities, the subjects of serious crime prevention orders and third parties will be able to apply to the High Court for the orders to be discharged, in circumstances similar to those in which they may be varied.[53] The Crown Court will not have the power to discharge an order.

Section 16 of the *Supreme Court Act 1981* provides a right of appeal from the High Court to the Court of Appeal and section 35 of the *Judicature (Northern Ireland) Act 1978* makes similar provision in relation to Northern Ireland. Clause 24 of the *Serious Crime Bill* is intended to provide an additional right of appeal to the Court of Appeal for third parties who wish to appeal decisions by the High Court to make serious crime prevention orders, to vary or not to vary serious crime prevention orders, or decisions not to discharge them. The right of appeal will be exercisable by any third party who was given an opportunity to make representations in the proceedings relating to the order.

There will also be a right of appeal from the Crown Court to the Court of Appeal, with the leave of the Court of Appeal, against a decision of the Crown Court concerning the making or variation of a serious crime prevention order. This right of appeal, set out in Clause 25, will be exercisable by the subject of an order, the authority which applied for it and any third party who was given an opportunity to make representations in the proceedings relating to the order.

It will be an offence punishable by up to five years' imprisonment and a fine for a person to fail to comply with a serious crime prevention order without reasonable excuse.[54] The court before which a person is convicted of this offence will also have the power to order the forfeiture of any thing in the possession of the subject of the order at the time of the offence which the court considers to have been involved in the commission of the offence. Where another person claims to be the owner of the item to be forfeited, or to have an interest in it, the court will have to give that person an opportunity to make representations. The court will be able to make any other provision it considers necessary to give effect to the forfeiture, including provision for the item's retention, handling, destruction or other disposal.

The provisions in Part 1 of the Bill relating to SCPOs will extend to England and Wales and Northern Ireland but not to Scotland. The offence of being in breach of an SCPO will, however, extend to Scotland, as the Government is concerned that Scotland might otherwise offer a bolt hole for those subject to an SCPO in England, Wales or Northern Ireland. As the creation of criminal offences in this area is a devolved matter, the

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53 Clause 19
54 Clause 26

Government lodged a Legislative Consent Motion (a "Sewel motion") seeking the Scottish Parliament's consent to the extension of the offence to Scotland.

The Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions and the Director of the Serious Fraud Office will have powers under Clause 28 to petition the court for the winding up of a company, partnership or relevant body which has been convicted of the offence under Clause 26 if the Director considers that it would be in the public interest for the company, partnership or relevant body to be wound up. The court to which the petition will be addressed will be the High Court, or the county court if the company's share capital is £120,000 or less.[55] Clause 29 aims to make similar provision in relation to Northern Ireland.

Provisions concerning the operation of serious crime prevention orders against bodies corporate, partnerships and unincorporated associations are set out in Clauses 30-32. Clause 33 is designed to enable the Secretary of State to make orders by statutory instrument, subject to the negative procedure, modifying Clauses 30-32 in their application to bodies formed under the laws that have effect outside the UK. The Explanatory Notes comment that:

> This provision is included to take account of the fact that special provision may be needed to enable orders to be made against, and function in relation to, overseas bodies.

B. Comment

In its summary of responses to the 2006 green paper, the Government summarised the views of respondents on the proposal to create serious crime prevention orders:

> The majority of respondents agreed that the creation of a flexible civil order, as proposed, would provide a useful tool to law enforcement in their fight against serious crime. There was concern from some of those who responded that any such order should be fully compliant with the European Convention on Human Rights in the terms it imposed on individuals. The Government is committed to balancing the rights of the victims of organised crime with those upon whom an order might be imposed in a way which is consistent with the Convention. Only the courts will be able to grant an order and, as public authorities for the purposes of the Human Rights Act, they will only impose such conditions as are compliant with the Convention.
>
> Another concern which was raised was the potential impact of the orders on 3rd parties, i.e. those affected by the order but not subject to it. The comments made have been very helpful in developing policy on how this situation will be handled. We will provide that, as part of the procedure for making an application for an order, prosecutors will have to give consideration to, and bring to the court's attention, the potential impact on 3rd parties. The courts will then be able to make an informed decision as to what terms of the order might be reasonable.
>
> One issue on which the majority of respondents agreed was that, if the orders were to be useful, there would need to be flexibility in the terms of the order for

[55] *Insolvency Act 1968* s.117

> the courts to be able to respond to the evolving threat posed by organised crime.[56]

The summary also noted respondents' views on the types of situation in which an SCPO might prove useful and proportionate in preventing organised criminality, saying:

> The key policy aim here must be to reduce the harm caused by those engaged in serious and organised crime, before it happens, but this cannot be achieved through any single measure.[57]

It added:

> This will fill the gap which exists where, for example, harm needs to be averted while a prosecution is being prepared or where a prosecution, for several possible reasons, is not appropriate.
>
> A large proportion of those responding to the Green Paper felt that this option would be useful to law enforcement and could readily provide instances in which they thought the use of an SCPO would bring about a more positive outcome than was currently possible. The sorts of situations envisaged included imposing orders:
>
> - on owners of saunas or restaurants which have knowingly employed trafficked persons;
> - during investigations into very lengthy or complex fraud cases; or
> - where individuals regularly travel to particular locations to conduct illegal activity such as sourcing drugs, money laundering or sex tourism.
>
> This is not to say, though, that there were not concerns raised with regard to the orders and whether there would be the appropriate safeguards in place to ensure that they were not used oppressively or unreasonably by law enforcement.
>
> It should be emphasised that SCPOs will not be used simply as an alternative to prosecution in those types of situation where a prosecution would be the appropriate way of dealing with the matter. The role of the three prosecuting authorities as mentioned above will ensure this.
>
> In developing the policy on these orders, we have always been concerned to ensure that they were fully consistent with the European Convention on Human Rights. The courts will obviously play a central role in ensuring this in practice and we will continue to work with them to ensure that the appropriate guidelines and training are in place.[58]

In its report on the *Serious Crime Bill* the House of Lords Select Committee on the Constitution noted the potential impact of the measures in the Bill concerning SCPOs on the constitutional principle in favour of liberty of the subject.[59] The committee quoted the famous constitutional expert Professor A.V. Dicey, who wrote in 1914:

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56 *New Powers Against Organised and Financial Crime: A Summary of Responses* Home Office November 2006 p.5 http://www.crimereduction.gov.uk/organisedcrime/organisedcrime013.pdf

57 ibid. p22

58 ibid.

59 House of Lords Select Committee on the Constitution, *Serious Crime Bill: Report,* HL Paper 41 2006-07, 2 February 2007, paras. 4-5, http://pubs1.tso.parliament.uk/pa/ld200607/ldselect/ldconst/41/41.pdf

> The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restraint is in England *prima facie* illegal and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it.[60]

The Committee expressed concern about the "wide and deep" constraints that could be imposed by an SCPO and noted that they were capable of having a considerable impact on third parties. It said:

> We draw to the attention of the House the fact that the far-reaching restrictions of a SCPO may be placed on a person against whom no criminal proceedings have been instituted or who has been convicted of no criminal offence. Moreover, the restrictions which can be imposed are not limited to conduct forming part of the particular type of crime which has been proved, by civil standards, against the defendant. ASBOs and other types of control order that now exist on the statute book generally deal with small-scale antisocial behaviour and have little impact on third parties associated with the subject of those orders. SCPOs will have a much wider reach.[61]

The Committee expressed concern about Clause 5, which sets out the types of restrictions and prohibitions that may be contained in an SCPO, and queried whether it provided "sufficient legal certainty, which is a key element of the rule of law".[62] It expressed similar doubts about the list of "serious offences" in Schedule 1 of the Bill, which is capable of including any offence if the court considers it to be sufficiently serious. On the subject of the standard of proof, the Committee said:

> **Given the gravity of the potential restrictions that may be placed on a person subject to a SCPO, the House may wish to consider whether the requirement of proof on the balance of probabilities is a sufficiently high degree of protection.** As we have noted above, the Appellate Committee in the *McCann* case held that a higher than normal standard was required ("being satisfied so that they were sure") in relation to ASBOs.[63]

The committee concluded its report by saying:

> It is not for our Committee to consider whether the scope of SCPOs constitute a deprivation of liberty or amount to a criminal charge for the purposes of Article 5 and 6 of the European Convention on Human Rights. We simply note that the Appellate Committee's ruling in the *McCann* case dealt with ASBOs and does not necessarily indicate that the courts will take the same approach to SCPOs. The issue here is whether a SCPO is simply a prohibition against conduct of the kind already committed by the defendant or amounts to a penalty depriving him of, or limiting him in, the exercise of his normal rights. Our concern is with constitutional principles. **A broad question for the House is whether the use of civil orders in an attempt to prevent serious criminal activity is a step too far in the**

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60 A.V.Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edition (1959) pp.207-8
61 ibid. para.9
62 ibid. para.12
63 bid. para.15

> **development of preventative orders. Whether or not the trend towards greater use of preventative civil orders is constitutionally legitimate (a matter on which we express doubt), we take the view that SCPOs represent an incursion into the liberty of the subject and constitute a form of punishment that cannot be justified in the absence of a criminal conviction.**

The Joint Committee on Human Rights published a report on the Bill on 25 April 2007. The report's summary said:

> In the Committee's view the Bill's provisions on SCPOs raise three significant human rights issues:
>
> > (1) whether SCPOs amount to the determination of a criminal charge for the purposes of the right to a fair trial in Article 6(1)ECHR;
> >
> > (2) whether the standard of proof in proceedings for an SCPO should be the civil or the criminal standard; and
> >
> > (3) whether the power to make SCPOs is defined with sufficient precision to satisfy the requirement that interferences with Convention rights be "in accordance with the law" or "prescribed by law" (paragraphs 1.1-1.6).
>
> The Government argues that SCPOs do not involve the determination of a criminal charge and therefore do not attract the full panoply of fair trial protections contained in Article 6 ECHR. In the Committee's view, however, in most cases an application for an SCPO is likely to amount to the determination of a criminal charge for the purposes of Article 6 and therefore to attract all the fair trial guarantees in that Article. In the Committee's view, the human rights compatible way to combat serious crime is not to sidestep criminal due process, but rather to work to remove the various unnecessary obstacles to prosecution (paragraphs 1.7-1.15).
>
> It can be said to be implicit in ECtHR case law that in criminal proceedings proof beyond reasonable doubt is necessary. The Bill, however, expressly provides that since proceedings for SCPOs are civil proceedings, the standard of proof to be applied by the court is the civil standard. But it follows from the Committee's view, expressed above, that SCPOs amount to the determination of a criminal charge, that the standard of proof should be the criminal standard not the civil standard. The Committee therefore recommends that the Bill be amended to make explicit on the face of the Bill that before making a SCPO the court must be satisfied *beyond reasonable doubt* that the person has been involved in serious crime (paragraphs 1.16-1.20).
>
> In the Government's view the Bill provides the necessary legal certainty while maintaining valuable flexibility. The Committee remains concerned, however, by a number of features of the Bill which in its view give rise to doubt about whether the power to interfere with various Convention rights by imposing a SCPO is sufficiently defined in law to satisfy the requirement of legal certainty, which is a fundamental feature of human rights law, including the ECHR. In the Committee's view, amendments should be made to the Bill in order to provide the requisite degree of legal certainty (paragraphs 1.21-1.30).[64]

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[64] *Joint Committee on Human Rights Twelfth Report Session 2006-07* HL91/HC490 p.1 http://pubs1.tso.parliament.uk/pa/jt200607/jtselect/jtrights/91/9102.htm

In its briefing for the second reading debate on the Bill in the House of Lords the civil liberties pressure group Justice expressed the view that it was "axiomatic" that criminal prosecution should remain the primary legal response to serious criminal activity because:

- It enabled the state to place restrictions upon liberty and other freedoms, such as imprisonment, which would not otherwise be constitutionally legitimate, but which were necessary in the circumstances for legitimate purposes such as the protection of the public from harm and deterrence of further crime; and
- The criminal justice system included a range of procedural and substantive protections, including trial by jury and the burden and standard of proof requiring that a case be proved beyond reasonable doubt.

Justice also commented that:

- Civil orders of this type cannot provide sufficient protection for the public in very serious cases;
- SPCOs can be imposed in too wide a range of circumstances, compromising legal certainty;
- There is no requirement that a person intentionally participates in criminal activity; innocent people could be given a SPCO because they unwittingly facilitate a crime;
- The controls that can be imposed on the recipient could be so severe as to amount to a criminal penalty; in these circumstances, the civil standard of proof is inappropriate;
- A SCPO should not be made unless the person is present or they have deliberately absented themselves from the proceedings.[65]

In its briefing for the second reading debate on the Bill in the House of Lords the civil liberties pressure group Liberty was highly critical of the provisions relating to SCPOs and described the creation of civil orders, breach of which is a criminal offence, as "a familiar legislative trick of this Government". Liberty added:

> We urge parliamentarians to take stock of this worrying trend and to ask themselves whether they are content to allow the criminal justice system in this country to be eroded by these kinds of legal shortcuts.[66]

The briefing by Liberty went on to express concern that SCPOs, like ASBOs and control orders, could be seen as blurring the boundary between civil and criminal law. It added:

> They enable criminal sanctions to follow from doing something that is not in itself a crime. In effect, they give the civil courts the power to create new criminal offences, albeit offences which only apply to one person. We do not doubt for a minute that, if required to do so, the courts will perform this task responsibly; but is it right for the courts to be given such a task? Establishing different legal regimes for different people certainly sits uncomfortably with the rule of law and

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65 JUSTICE, *Serious Crime Bill (HL) Part I Briefing for House of Lords Second Reading* February 2007 http://www.justice.org.uk/parliamentpress/parliamentarybriefings/index.html

66 *Serious Crime Bill: Liberty's briefing for Second Reading in the House of Lords* Liberty, February 2007 http://www.liberty-human-rights.org.uk/pdfs/policy07/serious-crime-bill-2nd-reading-lords.pdf para.5

> with the principle of equality before the law. This approach also has a significant and worrying practical impact. Liberty and others have pointed out how, rather than providing a last chance for young people to avoid the criminal justice system conviction, ASBOs provide a short cut into it. Up to December of 2003, 42% of all ASBOs were breached with 55% of breaches resulting in custody. We fear that SCPOs will have the same effect and, in the longer-term, lead to even higher levels of incarceration. By their nature they are also likely to be regularly breached as the restrictions imposed will presumably impact upon those activities and associations suspected of linking a person to crime. For many of the people and organisations in question these are likely to be their day to day trade or employment activities and associations.
>
> The British legal system and post-War human rights framework apply more rigorous fair trial standards to criminal trials than civil proceedings. This is because civilized, democratic states can only justify using its great force to punish an individual if it has established beyond reasonable doubt that the individual has committed an offence and the individual has been given a fair opportunity to defend him/herself. In front of our courts and in Parliamentary debates the Government is careful to describe SCPOs, Control Orders and ASBOs as preventative rather than punitive measures. It does this to justify the fact that lower fair trial safeguards should apply to them. Liberty is not convinced. An order does not become preventative rather than punitive just as a result of putting "prevention" in the title (i.e. Serious Crime *Prevention* Orders). We believe that this new breed of civil orders is, in reality, more akin to criminal punishment. Indeed, this is clear in some of the comments of Government Ministers, designed for a different audience to the courts and Parliament. Vernon Coaker MP described SCPOs as a way to "get at those people who currently feel ... almost that they are beyond the law" – language more akin to punishment for something that someone has done something wrong than a non-punitive measure which is designed to prevent future illegal activity.[67]

Liberty also noted:

> An SCPO would certainly attach the badge of serious criminality to those who are given one even if, as will often be the case, they have not actually committed any criminal offence, serious or otherwise. The "honest trader" would be likely to suffer massive loss of reputation and trade as their peers will assume that anyone made subject to an SCPO must be involved in some type of criminal behaviour. The restrictions imposed on an Order could also be very detrimental. Legitimate and non-criminal customers and suppliers may well be deterred from using a business which is subject to a requirement to pass on details of everyone they work with or if they fear that their communications with that business may be intercepted. It even appears that a person could find themselves in a catch-22 situation where an order leaves them with no choice but to breach a legal obligation not to disclose confidential information (under the tort of breach of confidence or contract) or face a criminal prosecution.
>
> The experience of ASBOs and Control Orders reveals several risks about how SCPOs might operate in practice. In particular it suggests that the restrictions imposed on an Order may well be drafted in an uncertain manner; include standard restrictions rather than restrictions which are tailored to each case; and that there will be no regular review of the Order with the result that restrictions will stay in place which are no longer necessary or proportionate.[68]

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67 ibid. para.9-10

68 ibid. paras 11-12

The provisions in Part 1 of the Bill relating to serious crime prevention orders were not significantly amended during the Bill's passage through the House of Lords. During the Bill's committee stage a number of peers, including the former law lord, Lord Lloyd of Berwick,[69] and the Conservative peers (and former Attorney-Generals) Lord Mayhew of Twysden and Lord Lyell of Markyate expressed concern that the Bill did not specify the criminal standard of proof in relation to the making of SCPOs, although the Government clearly anticipated that a civil standard which was effectively as high as the criminal standard would apply.[70] A number of peers also suggested that, although the Government described the orders as preventive, they were essentially penal provisions and should therefore attract the criminal standard. There was also criticism of the open-ended nature of the prohibitions and restrictions that could be included in the orders under the provisions set out in Clause 5 of the Bill.[71]

The Chair and Director General of the Serious Organised Crime Agency held a private meeting with members of the House of Lords under Chatham House rules shortly before the start of committee proceedings on the Bill and several peers made general reference to comments made in the course of the meeting in their speeches in the debates on the Bill.

In her speech during the debate in committee on Clause 1 of the Bill the Home Office minister Baroness Scotland said:

> It is clear from the number of noble Lords and noble and learned Lords who have spoken that it might be advantageous if I contextualise where we are and how these orders will work. The orders are preventive measures, and perhaps I may explain why. Regrettably, and particularly with serious crime, serious criminals are generally those who will commit crimes again and again. I will check this, but the figures show that around 85 per cent of very serious criminals are recidivists. When they come out of prison, they go back to committing more crimes, in a way that is complex and difficult. The task is not only simply to catch and convict them of a particular crime, but also to try to prevent them from committing further crimes, to interdict that criminal behaviour and to look at the methodology that they adopt and try to target a preventive order that makes it more difficult for them to perpetrate those or similar crimes again.[72]

She went on to say:

> These orders are not simply to say whether an individual is guilty or not; they are preventive in nature. To take up the point made by the noble and learned Lord, Lord Lyell, the Strasbourg jurisprudence makes it clear that a measure will be held as criminal only if it is punitive. These measures are not punitive, but preventive; they are not an alternative to punishment through criminal law, but another string to the bow of the agency that is seeking to interdict crime. The punitive element comes into play only if there is a breach.
>
> We need to be frank. If one has an injunction made by a civil court not to behave in a specific way and one breaches that injunction, there is a punitive element there, too—either contempt or some other provision to enforce the order made by

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69 HL Debates 7 March 2007 c.237
70 ibid. c.238, c239-240
71 ibid.c.247
72 ibid. c242

> the court. It has never been suggested in those circumstances that those are criminal in nature, albeit that they are punitive to enforce an order.[73]

Baroness Scotland also made the following comments about the individuals and organisations at whom the new measures were aimed:

> We are dealing with groups of criminals who have previously been convicted of offences and whom we wish to prevent adopting a similar modus operandi and committing future crimes. We are also dealing with individuals—quite often third-party—used by those criminals to undertake legitimate activity for an iniquitous purpose. For example, there may be an arrangement whereby a criminal buys vehicles with false bottoms in which to transport people and/or drugs. The third party involved never sees the criminal or has an explicit conversation with that individual, but it is clear that the use to which the vehicles are being put, such as people-trafficking or drugs, is iniquitous. At present, there is a difficulty because such third parties will seek to rely on the fact that the activity is legal, commercial and cannot be interfered with. The orders would enable us to prevent that continuance in order to prevent serious crime being facilitated. That is why it is important.[74]

Speaking for himself rather than for his party, the Liberal Democrat peer Lord Goodhart suggested that a better solution for dealing with individuals who had not been convicted of serious crime would be to make it a criminal offence for a person to facilitate criminal activity by providing goods and services or the use of property.[75]

The issue of the burden of proof in relation to the new orders was raised during the debate on Clause 1 in committee in the House of Lords. In her speech Baroness Scotland said:

> The first limb of the test for obtaining an order is whether the person has been involved in serious crime. The burden of proof is on the relevant applicant authority. The standard of proof will be the civil standard but, given the seriousness of the conduct alleged, following McCann, the standard the court will expect to be reached is likely to be close to "beyond reasonable doubt".
>
> The second limb of the test for obtaining an order—this is a two-limbed clause—is whether the order will protect the public by preventing, restricting or disrupting the person's involvement in serious crime. It is not a question of fact but one of judgment for the court. As a consequence, there is no burden of proof or any corresponding standard of proof. It is for the potential subject of the order—the respondent—to prove. The burden is on the respondent to prove that his actions were reasonable and should not form part of the court's decision on whether his actions facilitated or were likely to facilitate a serious offence, and the standard of proof will be the civil one. As the burden is on the respondent, we would expect the court to apply the standard of "on the balance of probabilities".
>
> There are parallels here with a criminal prosecution. In a criminal prosecution the burden of proving the offence is on the prosecution and the standard is "beyond reasonable doubt". If the defendant raises a defence, it will usually be for him to prove the defence but the standard of proof would be lower than for the prosecution; namely, "on the balance of probabilities". However, although in the

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73 ibid. c243
74 ibid. c244
75 ibid. c274

> context of burden and standard of proof there are parallels with a criminal prosecution, there are still important differences that mean that there are advantages to obtaining a civil order over a criminal prosecution. The two limbs would act together. We therefore say that this is a civil order; it is a preventative order. You still need McCann and you still need to understand how the two fit together—but within the civil not the criminal framework.[76]

Baroness Scotland and the Liberal Democrat peer Lord Thomas of Gresford had the following exchange on the same issue during the debate in committee on the two part test set out in Clause 2 of the Bill:

> **[Baroness Scotland of Asthal]:** ….I remind noble Lords that in civil proceedings it remains the case that he who asserts must prove; the applicant for these orders at the end of the case will have to have demonstrated to the court's satisfaction, taking into account the two limbs that we explored earlier and the nature of the judgment in McCann, that they have discharged that responsibility. That puts a heavy burden on the applicant to satisfy a court and we think that it must be right that the people who will have the particular knowledge of the reasons why they did or did not do what it was alleged they did or did not do should be the ones to tell the court about it, as opposed to the applicant for the order. That is a reasonable and practicable approach. Therefore, I invite the noble Lord to withdraw his amendment.
>
> **Lord Thomas of Gresford:** The noble Baroness will recall that earlier this afternoon she told us in no uncertain terms that the burden of disproving in Clause 1(1)(b) was on the respondent and that it was not for the applicant for the order to require proof under Clause 1(1)(b).
>
> **Baroness Scotland of Asthal:** I hope that nothing I said earlier was inconsistent with what I have just said. I have tried to explain that the applicant will have to prove it; the respondent will have to produce information about the reasonable excuse, as I have described. That is what I was talking about earlier; perhaps it is difficult when one takes some of these issues out of context, but that is when it happens. The assertion is made and the individual then says, "I have a reasonable excuse", and has to produce information on what that is. However, at the end of the day, the applicant who seeks the order will have to satisfy the court on the balance of probabilities that the elements have been satisfied to justify the order. The noble Lord will be familiar with the process, having been in courts even longer than I have.
>
> **Lord Thomas of Gresford:** Far too much longer, I am afraid. With the greatest of respect to the Minister, I say that she has shifted her ground. Earlier today, she was undoubtedly saying that the burden of disproving in Clause 1(1)(b) rested on the respondent. Now she is saying that there is an evidential burden on the respondent to raise the issue and that Clause 1(1)(b) means that it remains for the applicant to disprove the issue, once it has been raised. She knows from the number of years that she has practised in the courts that there is a distinct difference between the evidential burden and the primary burden that the prosecution or, in this case, the applicant always carries. She has shifted her ground and I am pleased to hear it, because she will recall that I suggested earlier that if the burden rested on the respondent to disprove under Clause 1(1)(b), that would be an even greater breach of the European Convention on

[76] ibid. c244-5

> Human Rights than I had appreciated. However, even though she has shifted her ground, what remains is not at all satisfactory.[77]

Several peers expressed concern about the imposition of SCPOs on third parties who were not involved in serious crime. Baroness Scotland commented on the position of third parties during the debate in committee on the right of third parties to make representations, which is set out in clause 9 of the Bill:

> We hope that some third parties will be disadvantaged by these orders, and I am confident that they will make life significantly harder for criminal associates who would normally work to commit serious crimes with or for the subject of an order—and for that we make no apology, because that is the whole purpose.
>
> However, regarding the other ramifications, it is possible that the proposed terms of an order or the terms of an order already in place will have knock-on consequences for individuals who are not involved in serious crime. It is vital that those circumstances are taken into account by the court when considering whether to impose, vary or discharge an order. As a consequence, Clause 9 allows third parties to make representations to the court in hearings concerning the making, variation or discharge of an order. Clauses 17 and 18 allow third parties, in certain circumstances, to make applications for the variation or discharge of an order.
>
> However, we need to set limits on the rights of third parties, so that the proceedings are not tied up with spurious or frivolous applications. The court should be obliged to hear from only those who genuinely need to be heard. It will be the court that makes the decision as to whether the third party is or is not significantly affected. As a result, Clause 9 sets out that a third party must be likely to be significantly adversely affected by the court's decision before being allowed to make representations. The courts will be able to make a reasoned decision as to whether an adverse effect is significant on the basis of the application by the third party.
>
> Clause 17 sets out that a third party can apply for variation only if a three-part test is met. First, the third party must be significantly adversely affected by the order. Secondly, one of two conditions must be met: either the third party made representations at an earlier hearing, or an application in earlier proceedings other than under Clause 9, and there has been a change of circumstances affecting the order; or the third party has not appeared in earlier proceedings but he can show that this was reasonable in all the circumstances. Thirdly, the third party must not be applying to make the order more onerous. That test is a very important safeguard and sieve.[78]

III Encouraging or assisting crime

Part 2 of the *Serious Crime Bill* is concerned with reform of the law relating to "inchoate" offences. The *Oxford Dictionary of Law* defines "inchoate" as follows:

> **inchoate** adj. Incomplete. Certain acts, although not constituting a complete offence, are nonetheless prohibited by the criminal law because they constitute

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77 ibid. c280-281

78 HL Debates 14 March 2007 c796

> steps towards the complete offence. These inchoate offences include incitement, attempt and conspiracy.

The law relating to this form of secondary liability for criminal acts is derived from common law. The Law Commission published a consultation paper in 1993 entitled *Assisting and Encouraging Crime – An Overview*[79] in which it noted that the present common law was unsatisfactory. The Commission proposed that it be replaced by a new structure of statutory offences, but its proposals were the subject of what the Commission itself noted was "searching criticism" and it undertook no further work on the subject until 2002.

The Commission took the criticisms that had been made of its earlier proposals into account in publishing the first of two reports: *Inchoate Liability for Assisting and Encouraging Crime*[80] in July 2006. The report noted that:

> Despite its importance, the law governing the criminal liability of those who seek to encourage or assist others to commit crimes is complex, unsatisfactory and arbitrary. [81]

In its July 2006 report the Law Commission proposed that two new inchoate offences be created: encouraging or assisting a criminal act ***with intent***;[82] and encouraging or assisting a criminal act ***believing***[83] that an offence will be committed. The Commission also suggested that provision be made for the situation in which a person provides encouragement or assistance believing that one of a number of different offences will be committed, but without knowing exactly which one. The press release issued by the Law Commission to accompany the report's publication described the defect in the current law which the suggested offences were intended to cure:

> The major defect of the law is that, whereas those who encourage a crime are instantly guilty of inciting the crime whether or not the offence takes place, those who actively seek to assist a crime can only become guilty of assisting the crime if the offence is subsequently committed. If D lends P a knife with which to murder V, D is not guilty of any offence if P is arrested before he can murder V.
>
> We are recommending that those who do acts capable of encouraging or assisting a crime should be guilty regardless of whether the crime takes place. They should be liable to the same maximum penalty as if they had actually committed the crime.

The Law Commission press release went on to quote the Commissioner leading the project, Dr Jeremy Horder, as saying:

> Our recommendations are intended to deter people from encouraging or assisting others to commit crimes. Such conduct ought to be punished

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79 Law Commission consultation paper 131

80 Law Com No. 300 http://www.lawcom.gov.uk/docs/lc300.pdf

81 "Assisting somebody who intends to commit a crime should make you criminally liable – even if the crime does not take place" – Law Commission press release, 11 July 2006 http://www.lawcom.gov.uk/docs/press_release_lc300.pdf

82 That is , with what is usually referred to as "direct" intention.

83 The clause in the Law Commission's draft Bill provided that for the purposes of establishing "belief" it was sufficient that the defendant believed that the criminal act would be done if certain conditions were met.

> irrespective of whether the crime is subsequently committed. Increasingly the police, by the gathering of intelligence, can identify acts of encouragement or assistance before the crime is subsequently committed. Yet, at present the police may have to forego at least some of the advantages of intelligence led policing by having to wait until a crime is committed.

In its green paper *New Powers Against Organised and Financial Crime* published in July 2006, the Home Office said:

> We are conscious of possible gaps in the criminal law as it applies to those who encourage and assist offences. This is particularly important in relation to organised crime where the relationships between those involved in offences are more complex and key players often go to great lengths to distance themselves from the actual commission of offences they have encouraged or assisted. The 2004 White Paper highlighted a concern that the current law does not always provide a practical means of addressing peripheral involvement in serious crime and committed to review the law of conspiracy.[84]

In the green paper the Government welcomed the Law Commission's recommendations and said it believed that, if implemented, they would help strengthen the criminal law.[85] The paper noted that the Government was particularly keen to obtain views on whether the second offence proposed by the Commission of encouraging or assisting the commission of an offence believing that it will be committed or that one of a number of offences will happen but with no knowledge of which one, should be widened:

> The Law Commission argues that because the Bill deals with inchoate offences, it is necessary to ensure the offences do not have too wide a reach, particularly in relation to the Clause 2 offences where it is not D's purpose that an offence be committed, rather he is indifferent as to whether it is committed.
>
> The Government agrees that it is important to ensure that these offences are carefully drafted in order to ensure that liability is not extended too far, but we also need to ensure that those who could be said to have a reasonable degree of belief that an offence was likely to take place, and that their act would provide assistance or encouragement, could not escape prosecution by arguing that they were not absolutely certain that the offence would take place.
>
> The Government believes therefore that it might be necessary to lower the threshold for this offence to cover those who might be able to claim not to have the degree of certainty implied in saying that they believed something would happen but who are nevertheless in a position where they know it is highly likely that it will or have strong suspicion that this will be the case.
>
> The decision as to what level of belief should be required for this offence will need to be carefully thought through. The aim of the offence is to ensure that it can be used where there is evidence that D had a good degree of knowledge or suspicion that an offence would take place but was not 100% certain. It is not the intention to widen criminal liability to every person who has some idea that their acts could assist others to commit offences. As such we would welcome views as to what level of belief should be required for liability to arise.[86]

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84 *New Powers Against Organised and Financial Crime* Cm 6875 July 2006 p.24
85 ibid. p24-25
86 ibid. p.25

The Government's published summary of responses to the green paper noted that while most respondents thought it was right to make this sort of behaviour a criminal offence there were differing views on the exact behaviour that should be criminalized. Responses were divided between those who felt that the offence should be restricted to those who "believe" that an "offence will" be committed, as had been suggested by the Law Commission, and those who thought it should be widened, as had been suggested by the Government. The paper summarizing the responses commented:

> The main reasons put forward in favour of restricting the offence to "belief" were concerns about criminalising actions taken by legitimate businesses, concerns about overlaps with existing legislation (for example money laundering offences) and concerns about extending liability too far. Others thought an offence that went too wide would be difficult to prosecute. Some respondents set out their view that "belief" would not equate to certainty and would therefore sufficiently capture all behaviour that should be considered criminal.
>
> The main reason put forward in favour of widening the offence was a concern that "belief" would be difficult to prove. There was a concern that this could be given a narrow interpretation by the courts. As such several respondents put forward alternative suggestions including widening the offence to cover those with "reasonable grounds to believe", "suspicion" or "wilful blindness". Others concentrated on the use of the word "will" (i.e. belief that an offence will happen) and suggested this should be replaced with the word "may".
>
> Several respondents mentioned that although they would support the widening of the offence, they felt that it was important to ensure that the offence does not go too wide and should not criminalise individuals or firms where their actions are determined by legislation. An example given by one organisation responding was a financial institution that opens accounts for a person whom they believe might be involved in money laundering. In this situation the institution would report the suspicious transaction to the Serious Organised Crime Agency but would open further accounts so as to avoid tipping the suspect off. They thought it would be important to ensure this behaviour would not be caught by the new offences.[87]

The Law Commission published the second of its reports on the law in this area on 10 May 2007: *Participating in Crime.*[88]

Part 2 of the *Serious Crime Bill* is based on the recommendations in the Law Commission's 2006 report. It is designed to abolish the common law of incitement and replace it with three new statutory offences. The new offences, set out in Clauses 41 to 43 of the Bill, involve:

- Intentionally encouraging or assisting an offence (Clause 41). A person would commit this offence if he did an act capable of encouraging or assisting the commission of an offence and intended to encourage or assist its commission. The mere fact that it was foreseeable that his act would encourage or assist in the commission of an offence will not be sufficient for the purposes of establishing intention in relation to this offence.

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87 New *Powers Against Organised and Financial Crime: A Summary of Responses* Home Office November 2006 p.19 http://www.crimereduction.gov.uk/organisedcrime/organisedcrime013.pdf

88 Law Com No. 305 http://www.lawcom.gov.uk/docs/lc305.pdf "Helping someone to commit crime: developing a principled approach to criminal liability" – Law Commission press notice 10 May 2007 http://www.lawcom.gov.uk/docs/participating_in_crime_press_release.pdf

- Encouraging or assisting an offence believing it will be committed (Clause 42). A person would commit this offence if he did an act capable of encouraging or assisting the commission of an offence and believed that the offence would be committed and that his act would encourage or assist its commission.

- Encouraging or assisting offences believing one or more will be committed (Clause 43). A person would commit this offence if he did an act capable of encouraging or assisting the commission of one or more of a number of offences and believed that one or more of those offences would be committed (but had no belief as to which) and that his act would encourage or assist the commission of one or more of them. It will be immaterial whether the person had any belief as to which offence would be encouraged or assisted by his act. An indictment for this offence will have to specify a number of offences that the accused is alleged to have believed might be committed. It will not, however, be necessary for every offence that could have been encouraged or assisted by his act to be specified in this way.

Clause 44 of the Bill sets out what will need to be proved in order for a person to be convicted of the offences in Clauses 41, 42 and 43 and Clause 45 makes further provision concerning proof in relation to the wider offence under Clause 43.

Clause 46(1) provides that:

> A person may commit an offence under this Part whether or not any offence capable of being encouraged or assisted by his act is committed.

Clause 47 seeks to provide a person charged with an offence under Part 2 of the Bill with a defence if he can prove that he acted reasonably, in that in the circumstances he knew existed, or in the circumstances he reasonably believed existed, it was reasonable for him to act as he did. The Clause lists a number of factors that may be considered by the court when determining whether it was reasonable for a person to act as he did, but the list is not intended to be exhaustive. As originally drafted the Bill provided a defence of crime prevention, or prevention or limitation of harm, which would have been a defence to all three of the offences in Part 2 of the Bill, and a separate defence of reasonableness, which would not have been available in relation to the offence of intentional encouragement or assistance set out in Clause 41. During the Bill's report stage in the House of Lords Baroness Scotland successfully moved an amendment replacing these two defences with a single defence to all the offences in the Bill. In moving the amendment she said:

> We have looked at the defences closely and believe that it would be simpler to provide one defence to all the offences in the Bill. We therefore propose that it should be a defence to all the offences in Part 2 if the defendant can show that his act was reasonable in the circumstances. That might be because he acted to prevent a crime or to limit harm, but it might be for another reason. For example,

> a person might commit an act capable of encouraging or assisting an offence to expose wrongdoing or for any other reason.[89]

Clause 48 of the Bill aims to provide a statutory basis for the common law exemption from liability in respect of "protective offences". This exemption was originally established in a nineteenth century case called *Tyrrell*.[90] The statutory version set out in Clause 48 seeks to ensure that a person is not held liable in relation to an offence under Clauses 41, 42 or 43 if the offence he is alleged to have encouraged or assisted exists, whether wholly or in part, for the protection of people such as himself. The Explanatory Notes provide the following example of this exemption from liability in relation to a "protective" offence:

> For example, D is a 12 year old girl and encourages P, a 40 year old man to have sex with her. P does not attempt to have sex with D. D cannot be liable for encouraging or assisting child rape despite the fact it is her intent that P have sexual intercourse with a child under 13 (child rape) because she would be considered the "victim" of that offence had it taken place and the offence of child rape was enacted to protect children under the age of 13.

The maximum penalty for an offence under clauses 41, 42 or 43 will be the same as the maximum available for the offence which the person has been convicted of encouraging or assisting (the relevant "anticipated" or "reference" offence). If that offence is murder the maximum penalty will be life imprisonment. It is intended that the offences under Clauses 41 or 42 should be triable in the same way as the anticipated offence, while those under Clause 43 involving multiple offences will be triable on indictment. Where the anticipated offence has been committed and it cannot be proved whether a person committed the offence itself or encouraged or assisted in its commission Clause 52 seeks to ensure that the person can still be convicted of an offence under Clauses 41, 42 or 43.

Paragraphs (4) and (5) of clause 46 aim to ensure that a person cannot be convicted under Clause 42 or 43 of encouraging or assisting an offence where the offence being encouraged or assisted is itself an offence under Clause 41, 42 or 43 or is one of the statutory forms of incitement and other statutory offences involving assisting or encouraging crime listed in Schedule 3 of the Bill. It will not be an offence for a person to encourage or assist the offences in Schedule 3 unless the person can be shown to have intended his action to assist or encourage the commission of those offences, in which case he may be convicted of the offence under Clause 41. This provision, which follows the scheme set out in the draft Bill accompanying the Law Commission's report, is intended to ensure that liability for inchoate offences does not extend too far. The Secretary of State will have the power to make orders changing the list of offences set out in Schedule 3. As a result of a Government amendment introduced during the Bill's third reading in the House of Lords any order amending Schedule 3 will have to be approved by both Houses of Parliament under the affirmative procedure.[91]

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89 HL Debates 25 April 2007 c742-3
90 *R. v. Tyrrell* [1894] 1 Q.B.710
91 HL Debates 25 April 2007

Provisions relating to jurisdiction for the offences in Clauses 41, 42 and 43 are set out in Clause 49 and Schedule 4. They seek to enable a person who knows or believes that what he anticipates might take place wholly or partly in England, Wales or Northern Ireland to be convicted of an offence under Clauses 41, 42 or 43 regardless of his own location. The Explanatory Notes comment that:

> For example, D in Belgium sends a number of emails to P in London, encouraging him to plant a bomb on the tube. D can be prosecuted in England and Wales or Northern Ireland despite the fact he was outside the jurisdiction when he did his act.

Clause 49(2) seeks to ensure that, in cases where it is not possible to prove that the person knew or believed that what he anticipated might take place wholly or partly in England, Wales or Northern Ireland, it may still be possible, in certain circumstances, to convict him of an offence under Part 2 if the facts of the case fall within paragraphs 1, 2 or 3 of Schedule 4. Examples of the circumstances in which this provision might apply are provided in the Explanatory Notes. Prosecutions that come within the provisions of Schedule 4 will require the consent of the Attorney General in England and Wales or the Advocate General in Northern Ireland.

IV The admissibility of intercept evidence in criminal proceedings

Subject to a limited number of exceptions, evidence from intercepted communications or any related communications data is inadmissible in criminal proceedings under provisions currently set out in section 17 of the *Regulation of Investigatory Powers Act 2000*. A similar prohibition was previously set out in section 9 of the *Interception of Communications Act 1985*, which was repealed by the 2000 Act.

On 2 February 2006 the Home Secretary made an oral statement about the renewal of the *Prevention of Terrorism Act 2005*. In it, he said the Government was seeking to find a legal model that would provide the necessary safeguards to allow intercept material to be used as evidence.[92] An article in the *Times* of 9 February 2006, reporting on the aftermath of the trial and conviction of the radical cleric Abu Hamza, suggested that while a growing political consensus existed that the ban on the use of phone tap evidence in criminal trials should be lifted, with such a move being supported by senior politicians and police officers, some parts of the security services were still opposed to any change.[93]

On 28 February 2006 the Assistant Commissioner of the Metropolitan Police, Andy Hayman QPM, gave oral evidence to the Home Affairs Committee in connection with the Committee's inquiry into terrorism detention powers. In the course of his evidence, Assistant Commissioner Hayman noted that his view, and those of the Association of Chief Police Officers (ACPO), on the use of intercept evidence in court had changed over time. The transcript of his evidence to the Committee sets out his response to a question from Janet Dean MP:

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92 HC Debates 2 February 2006 c479

93 http://www.timesonline.co.uk/newspaper/0,,173-2031930,00.html

> **Q224 Mrs Dean:** You mentioned difficulties with providing intercept material of an evidential standard as a problem with allowing its use in courts. Could you give examples of such difficulties with foreign intercept material which is allowed in court?
>
> **Assistant Commissioner Hayman:** This has been a fascinating discussion over a fair amount of time and I speak from an ACPO and personal perspective. I have personally moved my position. I originally started off by being fairly unsupportive of the notion of using the material, mainly on the basis that it was starting to disclose methodology to the other side. I think that is now well and truly worn-out because I think most people are aware of that. It does not stop them still talking but they are aware of the methodology so that is a lightweight argument. The next point which I had reservations about was the true logistics about transcribing the material, where you could go into reams of material. Again, that is a fairly mute point now, given that you can be very selective about the things you are going to transcribe if you are very precise on your investigation and focussed. I think I am moving, as I know ACPO is, to a conclusion that in a selected number of cases, not just for terrorism but also for serious crime, it would be useful. I think also it does make us look a little bit foolish that everywhere else in the world is using it to good effect.[94]

The *Independent* reported on 7 March 2006 that Charles Clarke, who was then Home Secretary, was expected to propose legislation to allow transcripts of intercepted telephone calls phone interceptions to be made available as evidence in courts for the first time, particularly in cases involving terrorism and serious organised crime.[95] The article said:

> The move comes after the police changed their stance on the acceptability of phone-tap material, and MI5 and MI6 adopted a more "neutral position" on the use of intercept evidence.
>
> GCHQ, the government signals intelligence centre in Cheltenham, has also made it clear to the Home Secretary that it is not opposed to having transcripts of phone interceptions made available to courts.
>
> The agencies, however, still have some concerns about the use of phone-tap evidence and want strict safeguards included in any new laws.
>
> Home Office sources have also indicated a "softening" within the department as opposition from law enforcers diminishes. Tony Blair is also thought to favour the move.

In October 2006 the civil liberties pressure group Justice published a report entitled *Intercept Evidence: Lifting the Ban* which is available on its website.[96] The press release accompanying its publication noted:

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94 http://pubs1.tso.parliament.uk/pa/cm200506/cmselect/cmhaff/uc910-iii/uc91002.htm

95 "Clarke to allow phone-tap evidence in terrorist cases" – *Independent* 7 March 2006

96 *Intercept Evidence: Lifting the Ban* Justice October 2006 http://www.justice.org.uk/inthenews/index.html

> A major study on the use of intercept evidence in common law countries has concluded that the UK's ban on intercept evidence is archaic, unnecessary and counter-productive.
>
> The report details how prosecutors in Australia, Canada, New Zealand, South Africa and the United States regularly use intercept evidence in prosecuting serious organised crime and terrorist offences. It also shows how principles of public interest immunity are used in those countries to protect sensitive intelligence material from being disclosed in criminal proceedings.
>
> However, despite widespread support for use of evidence by senior police, prosecutors, judges and politicians (including Lord Goldsmith, the Attorney General), the government has so far refused to lift the ban.
>
> Eric Metcalfe, JUSTICE's Director of Human Rights Policy and author of the report said:
>
> > Intercept evidence is not a silver bullet but it is a bullet nonetheless.
> >
> > Rather than rely on control orders, the government should give prosecutors the ammunition they need to prosecute suspected terrorists in the criminal courts. [97]

In his report reviewing the operation of the *Prevention of Terrorism Act 2005* in 2006, which was published on 19 February 2007,[98] Lord Carlile noted that much of the information on which decisions concerning control orders were based was derived from intelligence. He went on to say:

> The sources and content of such intelligence in most instances demand careful protection in the public interest, given the current situation in which a concerted and strategic response to terrorism (and especially suicide bombings) is needed. The techniques of gathering intelligence, and the range of opportunities available, are wide and certainly in need of secrecy. Human resources place themselves at risk – not least, by any means, those who offer unsolicited information out of disapproval of conduct and events at which they may have been and might continue to be present.
>
> That is not to say that there might possibly be a few cases in which it would be appropriate and useful to deploy in a criminal prosecution material derived from public system telephone interceptions and converted into criminal evidence. Although the availability of such evidence would be rare and possibly of limited use, I restate that it should be possible for it to be used and that the Law should be amended to a limited extent to achieve that.[99]

The Joint Committee on Human Rights has also recommended that the evidence from telephone interceptions be made admissible in criminal prosecutions and has described

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97 ibid.

98 *Second report of the independent reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* 19 February 2007 http://security.homeoffice.gov.uk/news-publications/publication-search/independent-reviews/lord-carlile-ann-report.pdf?view=Binary on 11 April 2007

99 ibid paras. 34-35 http://security.homeoffice.gov.uk/news-publications/publication-search/independent-reviews/lord-carlile-ann-report.pdf?view=Binary on 11 April 2007

the current ban on the use of such evidence as one of the main obstacles to the prosecution of terrorist suspects:

> 56. In particular we regret the continued lack of progress towards detailed proposals for relaxing the ban on the use of intercept material. We do not of course regard this as a universal panacea. We recognise that Lord Carlile, for example, although in favour of a limited amendment to the law to allow the use of telephone intercept in criminal trials, is of the view that "the availability of such evidence would be rare and possibly of limited use."[41] We are well aware of other expressions of a similar view, including by the present Home Secretary and his predecessors.
>
> 57. However, this is a matter on which views diverge considerably. We note, for example, that the DPP in his recent lecture to the Criminal Law Bar Association, said not only that we need to find ways to remove the bar on the admissibility of intercept evidence, but that this "would overcome one of the main obstacles to prosecuting terrorist suspects."[42] Coming from the chief prosecutor, we think that this is a view which must be accorded very considerable weight. We intend to return to the question of how to relax the intercept ban in a future report in our ongoing inquiry. [100]

In his report for 2005-2006, published on 19 February 2007[101] the Interception of Communications Commissioner, the Rt Hon Sir Swinton Thomas, said:

> 42. In my last Report I said that the question of the admission of intercept material in criminal proceedings had been discussed at some length in Parliament, the media and beyond. The aim of all concerned in the intercepting agencies is to use the material to best advantage to detect and prevent terrorism and serious crime. If it was a simple matter to change the law to allow intercept to be used evidentially without losing the very substantial benefits delivered by the existing intelligence only regime, I have no doubt that it would have been done many years ago. The truth is that there is no simple way of achieving this. I concluded by saying that I had no doubt that the balance of argument fell firmly against any change in the law, and that any change in the law, would, overall, be damaging to the work of the security, intelligence and law enforcement agencies.

Sir Swinton went on to advise that advocates of change discuss the issue with those involved in intelligence and law enforcement so that they could achieve a greater understanding of how changes in technology were likely to impact on their work. He went on to set out more fully his reasons for opposing the lifting of the current ban:

> 46. It is impossible in Reports of this nature to discuss fully and in great detail my reasons for being firmly of this view in this complex area. But, put comparatively briefly, they are as follows;
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> i. If terrorists and criminals, most particularly those high up in the chain of command, know that interception would be used in evidence against them, they

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[100] Joint Committee on Human Rights Eighth Report of 2006-07 *Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007* HL 60/HC 365

[101] *Report of the Interception of Communications Commissioner for 2005-2006*, HC 315, 19 February 2007 http://www.official-documents.gov.uk/document/hc0607/hc03/0315/0315.pdf

will do everything possible to stop providing the material which is so very valuable as intelligence. It is sometimes said: "but surely they know now that their communications will be intercepted?" They may suspect that their communications may be intercepted, but they do not know that they will be. This uncertainty is invaluable and they continue to provide immensely valuable intelligence material which would be lost if they ceased to communicate as they do now. Like everybody else they have to communicate to forward their enterprises, and there is a real danger that they will find means of doing so which are much more difficult or impossible to decipher if they know that the material would be used in evidence, so that valuable intelligence material leading to successful investigation and eventual prosecution will be lost. As has been widely publicised the Intelligence and Security Services have disrupted and prevented a number of serious prospective terrorist and criminal attacks both before and since July 2005. The intelligence derived from intercept has been crucial to these successes which might not have occurred if the intercept had not been available, as would be likely if those communicating believed that the material would be used in evidence against them. In addition to the advantages accruing from not knowing what intercepting agencies can do or are doing, it is a considerable advantage that they do not know what they are not doing or cannot do. All these advantages would be lost if all interception techniques are laid bare.

ii. Successive reviews on this subject over the last decade have been unable to show that the claimed benefits of using intercept product in evidence to secure more prosecutions (or to shorten trials) would be worth the risks that this entails for the operational effectiveness and capabilities of the agencies involved in fighting terrorism and serious crime. The last and most comprehensive review, the conclusions of which were reported in the then Home Secretary's written Ministerial Statement of 26th January 2005 found that a modest increase in convictions of some serious criminals, but not terrorists, would come with serious risks to the continued effectiveness of the agencies. The statement added that there was no immediate prospect of removing the main risks, partly because of the difficulty of lessening the impact of the major changes expected in communications technologies over the next few years.

iii. The workload for the intelligence and law enforcement agencies in preserving and presenting intercept product as evidence would be very severe indeed, and very expensive, and would distract them from the work which they should be doing, and also from the work they are actually doing, so greatly reducing as opposed to increasing the value of the intercept. This would be counter-productive. I give one example. In a recent case a Court felt it had to order that 16,000 hours of eavesdropping (not intercept) material must be transcribed at the request of the Defence. I believe that the cost was of the order of £1.9 million. The work and cost in intercept cases would be very great indeed, and quite disproportionate to any perceived advantage. This may explain why some who tend to act on behalf of defendants in terrorist and serious criminal cases appear to be supporting the concept of a change in the law.

iv. Criminals and terrorists do not speak in a language which is readily comprehensible to juries, even if their native language is English. Many conversations are in foreign languages or slang. In those that are not, they use their own particular language. In every case interpreters and translators would be required. In many languages and dialects there are very few capable of translating and interpreting. I give one example. In an intercept case which I saw recently, the participants were speaking in a tongue which is spoken by significantly less than 1000 people in the world.

> v. Some of those who favour a change in the law take the view that if the terrorist or criminal makes a clear confession in a telephone conversation, then why should it not be admissible as evidence. That is an understandable point of view and the converse may at first sight seem to be counter-intuitive. However real life is not so simple as that and criminals and terrorists do not behave like that. Apart from the matters that I have already referred to, I know from years of experience, particularly when dealing with foreign languages that interpreters and translators very rarely agree upon the meaning of anything, and there is never any difficulty in finding one interpreter who will disagree with another.
>
> vi. The Communications Service Providers (CSPs) are very important in this process and their staff do essential work. They are very cooperative and dedicated. I talk to them regularly and they are totally opposed to the concept of intercept being admissible in Court. The present regime provides a high degree of protection to the CSPs and particularly to those members of their staff who work in this sensitive field, and their strong co-operation referred to could easily be undermined. Here again, I think that it is essential for people holding views on this subject to talk to the CSPs, and to listen to what they say, and understand the basis of their strong opposition to any change in the present law.
>
> vii. The problems with the criminal process. I have made some reference to these, with examples, above. Having looked at this problem with great care, it is abundantly clear to me that it would be exceedingly difficult to prove that a conversation is taking place between A and B. The warrants would have to be proved. How is the material received at source? How is it transferred to the Agencies? How is it transcribed? What does it mean? Lawyers will inevitably challenge every connection and every issue, because that is their job. Admitting intercept evidence would take a very long time, and would greatly increase the length of already over-long trials and the expense involved. These problems are going to increase in the future because of the huge changes taking place in telecommunications technology as CSPs change to internet protocol networks. There is a real danger of criminal trials being aborted. I know that work has been done in an European Community and Human Rights law, but I have not seen any system proposed which would successfully overcome these problems. The problems are very great and should not be understated.
>
> viii. In conclusion, in my judgment, the introduction of intercept material in the criminal process in this country (other countries have different systems) would put at risk the effectiveness of the agencies on whom we rely in the fight against terrorists and serious criminals, might well result in less convictions and more acquittals and, most important of all, the ability of the intelligence and law enforcement agencies to detect and disrupt terrorism and serious crime and so protect the public of this country would be severely handicapped.[102]

During the Bill's proceedings in committee in the House of Lords the former Law Lord Lord Lloyd of Berwick, who carried out the review of anti-terrorist legislation that preceded the introduction of the *Terrorism Act 2000,* sought to introduce an amendment that would have provided for the admissibility of intercept evidence in cases involving serious crime. In his speech proposing the amendment Lord Lloyd noted that:

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[102] ibid. p.9-12

> If a defendant's house has been bugged by the police, evidence of the bugging would be available under the Regulation of Investigatory Powers Act and would be admissible in court. If a defendant's telephone conversations have been tapped by overseas agencies, the evidence would also be admissible in court. Section 17 of RIPA does not apply in such a case. However, if a defendant's telephone has been tapped in England, that same evidence would not be admissible and the High Court judge would be deprived of what might be a vital piece of relevant evidence in deciding whether the defendant was involved in serious crime. An application for the prevention order might fail in circumstances when it should have succeeded if the High Court judge had known all the evidence. It still seems to me, as it has seemed to me for the past 10 years, to be a most curious and even quixotic result of our law as it stands that he does not know all the evidence.
>
> That is the reason for my amendment, designed to make intercept evidence available in proceedings in the High Court in accordance with the Bill. The amendment goes wider because it will apply to the whole field of criminal prosecutions. Why should it not?[103]

Noting that, as with control orders under the *Prevention of Terrorism Act 2005,* it was universally agreed that prosecuting those suspected of involvement in serious crime was preferable to imposing civil orders such as SCPOs on them, Lord Lloyd went on to say:

> The fact is—and I state it as a fact—that serious criminals could be prosecuted and convicted if intercept evidence were admitted in our courts. That is now common ground between all parties. That was the evidence as I saw it when I conducted my investigation in 1996. More important is the evidence of the most recent report, the fifth review report of 26 January 2005. If some criminals could, as is common ground, be convicted by admitting intercept evidence then surely we should take that step.

Lord Lloyd added:

> I am not the only one who advocates change. Others who advocate change—and I mention only a few of them—include: the Attorney-General; Sir Ken Macdonald, the current Director of Public Prosecutions; Sir David Calvert-Smith, his predecessor; Sir Ian Blair, the Metropolitan Police Commissioner; Andy Hayman, the Assistant Metropolitan Police Commissioner; the noble Lord, Lord Carlile of Berriew, the commissioner of almost everything else; the Newton committee of the Privy Council; the House of Commons Home Affairs Committee; the Joint Committee on Human Rights and the Law Society. I suggest that at least some of them must have known what they were talking about when they advocated change.
>
> The main argument against using intercept evidence appears in paragraph 46; it has always been the same, and it is simply that if criminals realised that their communications could be intercepted and used in evidence they would find other means of communicating. Justice, in paragraphs 52 to 62 of its report, says that the argument is "profoundly misplaced". I agree.
>
> We are dealing here with highly sophisticated organised crime, crime that crosses international boundaries. If criminals know that their communications can be accepted and used in evidence against them in France, Germany, Holland and numerous other countries—every other country in the world except England—yet

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[103] HL Deb 7 March 2007 c300

> they continue to communicate in the way they always have, why should they behave in a different manner when they come to England?
>
> It is feared that interception methods would be compromised and that clever defence lawyers would soon winkle out the truth, but that argument fails to take account of the use of public interest immunity certificates. Public interest immunity is not something new and untried; its principles are used and applied day in and day out in the courts to protect sensitive sources, methods or techniques. It is used to protect informants and to protect methods of covert surveillance. I know that the noble Lord, Lord Thomas—I hope we will hear from him later—has much more experience of the use of PII than I have myself. There is no reason to suppose that such methods would not protect the methods used by GCHQ to intercept communications.
>
> If there were any doubt at all about that—I suggest that there is none—those doubts would immediately be displaced by looking at what happens in other common law jurisdictions. Intercept evidence is used regularly in Australia, Canada, New Zealand, South Africa and the United States. They are all described in great detail in paragraphs 115 to 167 of the report. In all those countries, means have been devised to protect the methods used, whether by PII as such, a variation of PII or, in some cases, by statute. Why cannot we do the same here? I find it surprising that Sir Swinton Thomas, in his comprehensive report, fails entirely to mention the use of PII and has failed entirely to refer to the powerful case made in the Justice report; nor has he dealt with the point that intercept evidence works well in the five Commonwealth countries that I have mentioned.

Noting Sir Swinton Thomas's comments about the opposition of the Communication Service Providers, Lord Lloyd said:

> I have not had talks with them for many years, though I did in the old days; but I did get a letter from them dated 14 November 2005. I shall quote two paragraphs from the letter, which is from the Mobile Broadband Group, comprising all the main companies that we know, including O2, Orange, Vodafone and so on:
>
> > "We acknowledge that you and others have been advocating for many years the relaxation of the UK's ban on the use of intercept evidence in court. While it is not our intention to challenge or take a view on this proposal, we do have some serious concerns about its implications for the safety of our staff. We would therefore urge you to consider the inclusion of unambiguous provisions that would offer protection to people giving evidence. We understand that where intercept evidence is used in other jurisdictions such as France, Germany, USA and Canada, arrangements exist to protect the anonymity of witnesses, including the employees of the telecommunications providers. We urge that your Bill include provisions to protect the anonymity of witnesses".
>
> So those companies do not oppose it, root and branch. They say that, provided that their staff are protected, they would be satisfied. There is no reason why their staff should not be perfectly well protected under the existing arrangements.
>
> I leave the last word to Andy Hayman, the assistant commissioner. On page 33 of the report he says:
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> > "I am moving, as I know ACPO is, to a conclusion that in a selected number of cases, not just for terrorism but also for serious crime, it would be useful. I think also it does make us look a little bit foolish that everywhere else in the world is using it to good effect".

> I have been hoping for the past 12 years that we would make this necessary change. I shudder to think of the number of people who might have been prosecuted and convicted if we had made it 12 years ago.
>
> Over and over again we are told that the Government are keeping the matter under consideration. It is time they moved forward from that step and took action.[104]

In opposing Lord Lloyd's amendment, the Home Office minister Baroness Scotland said the Government's position had always been that lifting the ban on intercept evidence would be an advantage of it could be safely deployed. She went on to echo the view of the Interception of Communications Commissioner, Sir Swinton Thomas, that lifting the ban in the way proposed by Lord Lloyd's amendments would cause grave damage to the UK's capability and that protection was vital:

> ….if we are to ensure that the most effective protection from terrorism and serious crime is provided and if we want to continue to benefit from the crucial co-operation of the communications industry on which we rely. [105]

Baroness Scotland added:

> Perhaps I may try to correct what appears to be a misapprehension in the amendment of the noble and learned Lord, Lord Lloyd, concerning the current inadmissibility of communications data, as defined by Section 21(4) of the Regulation of Investigatory Powers Act 2000.The noble and learned Lord will be interested to know that the current prohibition on communications data evidence extends only to data related to interception and not communications data within the meaning of Section 21(4), which is obtained separately under RIPA, Part I, Chapter II powers and widely used as evidence by a number of public bodies. I think that the comments of the noble Lord, Lord Thomas of Gresford, demonstrated the way in which those issues are dealt with.
>
> Perhaps I may again highlight the issues and expose the many misconceptions. It is frequently pointed out—the noble and learned Lord did so this evening—that there is little or almost no knowledge of the interception regimes in either the UK or overseas and that the United Kingdom is one of the few countries which do not use interception evidentially. The intimation is that a vital tool is missing from our criminal justice toolkit. However, that takes no heed of the fact that our results—what we achieve with our intelligence-only regime—are already impressive. For example, in 2003, interception led to the seizure of 26 tonnes of illicit drugs and 10 tonnes of tobacco, and the detection of £390 million worth of financial crime and 1,680 arrests. A sampling exercise carried out in the latest review showed that the resulting proportion of convictions exceeded 80 per cent of those arrested as a result of the use of interception for intelligence purposes only.
>
> Those statistics are very significant because no evidence has been produced or found to show that other countries are more effective in countering terrorism and organised crime. It has been implied by a number of noble Lords tonight that we could do significantly better if we exchanged our system for the Australian or US systems, yet I have to tell your Lordships that that is simply not true. For example,

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[104] ibid. c.302-303
[105] ibid. c309

the media have reported on the unsuccessful use of intercept product in terrorist trials in Spain and Italy.

Australia's latest published figures on interception, from the *Telecommunications (Interception) Act 1979 Report* for the year ending 2004, show that in 2003-04 there were no convictions in the five terrorism trials which used intercept evidence. The Canadian 2004 *Annual Report on the Use of Electronic Surveillance* shows that there were 84 interception authorisations in that year but that none ended with a conviction. In the United States, in 2004 there were 1,710 law enforcement interceptions—much the same figure as in the United Kingdom—but those resulted in 634 convictions, which is a success rate well below that estimated, albeit based on a small sample, for the UK.

These statistics are very powerful. They do not support the contention that the evidential use of intercept will produce more convictions than using intercept for intelligence purposes only but, rather, that there is every reason to suppose that it would not.

It cannot be disputed that no other country in the world—none—enjoys the huge benefits which the United Kingdom derives from the close relationship, including in terms of interception, between law enforcement and the intelligence agencies and with the communications service providers. Yet there are those who still propose that we adopt the interception regimes used in other countries—consequently undermining or severing those relationships. However, they fail to point out that in doing so we have little, if anything, to gain but potentially much to lose. Indeed, even if it were possible to preserve the effectiveness of intercept as intelligence entirely, while also using it evidentially—and no one has yet found a way of making that possible; that is what we are trying to do and if we could, obviously, it would be capable of being used—the evidential use of intercept would not even add significantly to the number of convictions that can be secured.

The most extensive and comprehensive review of a series of reviews culminating in January 2005 found that—even if a way could be found to protect sensitive material—the evidential results of intercept products would be modest, confined to lower and medium-level criminals and could not be sustained past the change to new technology which is beginning. It expressly found that the modest and time-limited benefits that might arise from the evidential use of intercept would not apply to terrorists at all.

The noble Lord, Lord Thomas of Gresford, asked: "Why can we have bugging and eavesdropping products used as evidence and not intercept material?" That overlooks fundamental differences between the two investigative techniques. In the case of planting microphones, a matter to which the noble Lord referred, it is the investigative agency which chooses the medium; with interception it is the criminal. The crucial distinction is that the criminal selects the way of communicating that he believes is safe and continues to provide intelligence on his intentions and preparations. That advantage would be lost to the investigation if disclosed to the criminal by evidential use.

Furthermore, one interception technique may encompass many targets, some of enormous importance, while one bug, or position of surveillance, if exposed, is unlikely to compromise any other operations. So comparisons between these entirely different techniques are neither appropriate nor helpful.

> The noble Lord, Thomas of Gresford, said that if it is vital to protect sensitive capabilities and techniques from disclosure you should devise a way of separating the two out. I remind the Committee that, frankly, that is easier said than done. The Home Office has been leading work to assess the impact of new technology on communications and their interception. That work, which has had a substantial input from a cross-section of communications service providers, has highlighted that the United Kingdom, before anywhere else in the world, is to undergo the biggest change in communications technologies since the invention of the telephone. Within just a couple of years voice communications in the UK, like e-mails or video streams, will be computer data signals carried over the internet. The old-fashioned voice signals carried down lines and through telephone exchanges will go for ever. The priority must be to ensure that we maintain our interception capabilities in the face of this change. And we cannot look to see how others are doing it because we will be the first. We have already made it clear that the ongoing work is also looking at what evidential opportunities there might be with the new technologies. That is why I have continually said we keep on looking at it. It is not that we have closed our minds or that we do not want to do it. We are looking at it to see how and if it could be done, and done safely.
>
> Noble Lords said this evening that overseas jurisdictions do not seem to have any problem with using intercept evidentially. They also asked: "Why do we think we are different?" The answer is that our system is different. We have a rigorous disclosure regime within an adversarial justice system in which evidence is probed in court to an extent that does not occur in the inquisitorial or examining magistrates' systems. In addition, the co-operation between our intelligence and law enforcement agencies is unparalleled. We need to protect this partnership. Overseas jurisdictions do not. Because their intelligence and law enforcement agencies work separately they can have evidential intercept use for law enforcement and intelligence use for intelligence. We need to protect our co-operative and collaborative approach because we think that that model is more successful. It has delivered us outstanding results on terrorism and organised crime that we believe is second to none.
>
> I repeat that there is no evidence that other countries do better than we and it simply does not make sense to dismantle our system in favour of an alternative approach unless we are sure that the benefits of doing so will outweigh the risks. It has also been said that overseas jurisdictions do that and that we should also. It remains to be seen how those other countries that allow intercept will fare in the new world of computer technology. Will they be able to continue to intercept communications and will they be able to make what material they gather stick in a court of law? Our work suggests that they will not. I respectfully say to noble Lords that that is not a sound basis on which to go forward. The Home Office has set up a cross-department programme to co-ordinate our response to the technology changes and consider the resource implications. The business case phase of that programme will be ready fairly soon. That will be followed by an implementation phase.

Baroness Scotland noted that Lord Lloyd's amendment would give the prosecution alone the right to choose when to apply evidential intercept and when to withhold it. She expressed concern that such an arrangement would not be consistent with the right to a

fair trial under Article 6 of the European Convention on Human Rights (ECHR) which requires equality of arms between the prosecution and the defence and would prohibit "cherry-picking" by the state.[106] She added:

> Finding a way to limit the exposure of sensitive material imports is extremely difficult because our disclosure rules rightly—I emphasise "rightly"—seek to provide the defence with all the information necessary to ensure a fair trial. Therefore, we can justify withholding information only when it is strictly necessary and proportionate. Our previous efforts to devise a workable legal model have shown that the increased burdens on the intercepting agencies of devising systems to meet the Article 6 requirements would be crippling and undermine their capacity to undertake crucial interception.

Baroness Scotland went on to refer to assertions that lifting the ban on the admissibility of intercept evidence would have enabled the prosecution of individuals suspected of involvement in terrorism and thereby avoided the need for the much-criticised detention provisions in Part 4 of the *Anti-terrorism Crime and Security Act 2001* and the later, equally controversial control order regime under the *Prevention of Terrorism Act 2005*:

> I can confirm that that is simply not the case. A detailed analysis of all the material in those cases, including available intercept material showed that intercept would not—I emphasise, not—have enabled those individuals to be prosecuted, even if we had been able safely to adduce it. During the most extensive review of the possible impact of intercept as evidence, that conclusion was replicated with regard to terrorist cases generally. Clearly it is a priority of the Government to ensure the conviction of those who are guilty of crimes, but we would prefer those crimes, which might include terrorist atrocities, not to be committed in the first place. In that respect, our existing interception regime has served us well both with terror and with serious crime. The London attacks on 7 July 2005 and the attempted attacks two weeks later on 21 July were truly horrendous, but other attacks have been prevented and it is vital that we do not undermine our ability to prevent future attacks by exposing our most sensitive capabilities. [107]

Baroness Scotland concluded by seeking to reassure peers that the issue had been rigorously examined and would continue to be rigorously examined during the continuing review Lord Lloyd of Berwick subsequently withdrew his amendment but said he would bring the matter back at a later stage.[108]

The issue of whether or not intercept evidence should be admitted in criminal proceedings was also discussed at length in an oral evidence session before the joint committee on human rights on 12 March 2007 at which the Director of Public Prosecutions, Sir Ken MacDonald QC, said:

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[106] In March 2007 Terence Adams was convicted of money-laundering at the end of a lengthy investigation into his criminal activities. He was sentenced to seven years' imprisonment following a prosecution which reportedly cost in excess of £4 million pounds, much of which was attributed to the cost of transcribing intercepted communications. Adams reportedly sought to use some of these transcripts in his own defence. See e.g. "Fall of the godfather" – *Guardian* 10 March 2007

[107] ibid. c308-313

[108] ibid. c314

> We have spoken, as I think you probably know, a great deal to colleagues abroad, in the United States, Canada and Australia particularly, who have systems closest to ours. The message we have had from all of them is that it would make an enormous difference. Colleagues in the Department of Justice in the United States have told us that the majority of their major prosecutions now against terrorist figures and organised crime figures are based upon intercept evidence. I think it is well known that for the first time each of the five New York crime godfathers are in prison, each of them as a result of the use of intercept evidence. In Australia, I was told by the head of the New South Wales Crime Commission that prosecutors who did not rely on intercept evidence were not being "serious" in this area of work. When I was in the United States I spoke with the National Security Agency, the Drug Enforcement Administration, the counter-terrorism section of the Justice Department, the organised crime section of the Justice Department. In Australia I spoke to the Australian Security Intelligence Organisation, all of the crime commissions, the Commonwealth DPP, the New South Wales DPP, the Australian Federal Police. Everybody without exception told us that this material is of enormous use. It is cheap, it is effective; it drives up the number of guilty pleas and it leads to successful prosecutions. We are convinced, and have been for a number of years, that this material will be of enormous benefit to us in bringing prosecutions against serious criminals, including terrorists.[109]

During the same session before the Joint Committee Lord Lloyd of Berwick also expressed strong views about the potential benefits of admitting intercept evidence in criminal proceedings, while the Interception of Communications Commissioner, Sir Swinton Thomas, expressed strong reservations about a relaxation of the current ban.[110]

When the Bill was considered on report in the House of Lords on 25 April 2007 Lord Lloyd again moved amendments designed to enable the admission of intercept evidence in cases involving serious crime. His amendments were again opposed by the Government but they were agreed to on division by a majority of 61 and are now set out in Clause 4 and Schedule 13 of the Bill.[111]

Clause 4 of the Bill seeks to enable covert investigatory material, including intercept material, to be used in the High Court in connection with the making of serious crime prevention orders. It states that the High Court may take account of any evidence already admissible under the *Regulation of Investigatory Powers Act 2000* (RIPA).

Schedule 13 of the Bill is designed to enable the prosecution, in criminal proceedings involving serious crime or offences related to terrorism, to apply to the court for permission to introduce evidence of the contents of intercepted communications ("intercept evidence") and communications data ("metering evidence"). Schedule 13(2) provides that in deciding whether to admit the evidence the court will be required to take account of all relevant considerations, including in particular:

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[109] http://pubs1.tso.parliament.uk/pa/jt200607/jtselect/jtrights/uc394-i/uc39402.htm

[110] Uncorrected transcript of oral evidence taken before the joint committee on human rights *Counter-terrorism and human rights* 12 March 2007 http://pubs1.tso.parliament.uk/pa/jt200607/jtselect/jtrights/uc394-i/uc39402.htm

[111] HL Debates 25 April 2007 c687-699

> (a) any application by the Secretary of State to withhold the evidence or part of the evidence on the ground that its disclosure, or the disclosure of facts relating to the obtaining of the evidence, would be contrary to the public interest, and
>
> (b) any submission that the evidence was obtained unlawfully.

On 7 June 2007 the Home Secretary, Dr John Reid published a *Government Discussion Document Ahead of Proposed Counter Terror Bill 2007* in which he made the following comments about intercept evidence:

> The Government's position on intercept as evidence has consistently been that we would only change the law to permit intercept evidence if the necessary safeguards can be put in place to protect sensitive techniques and the potential benefits outweigh the risks.
>
> The right approach is to address this carefully and fully before deciding on whether to use intercept as evidence. That is what we are doing. However we believe that we now need to reach a conclusion on this issue. Therefore, subject to further discussions to agree the structure and timescale, I am today announcing that we will commission a review of intercept as evidence on Privy Counsellor terms.[112]

V Prevention of fraud

A. The Bill's provisions

Chapter 1 of Part 3 aims to develop data-sharing within the public sector, and between the private and public sectors, to improve the detection and prevention of fraud. Clauses 63-66 facilitate information sharing with anti-fraud organisations while introducing an offence for unauthorised disclosure of such information; they extend throughout the UK, except where reference is made to the Scotland Act or the Scottish Parliament. Clause 67 gives effect to a schedule providing for the Audit Commission (England) to conduct data matching exercises (that is, making comparisons between sets of data); analogous provision is also made for Wales and Northern Ireland.

Clause 63 allows a public authority to disclose information of any kind, for the purpose of preventing fraud, to a specified anti-fraud organisation. The latter is defined as "any unincorporated association, body corporate or other person which enables or facilitates any sharing of information to prevent fraud or a particular kind of fraud or which has any of these functions as its purpose or one of its purposes". Such organisations would be specified by an order made by the Secretary of State and are likely to include CIFAS,[113] the UK's Fraud Prevention Service. While disclosure under this section would not breach any obligation of confidence owed by the public authority, the latter would not be authorised to disclose information in contravention of the *Data Protection Act 1998* or Part 1 of the *Regulation of Investigatory Powers Act 2000* (which regulates interception and access to communications data).

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[112] *Government Discussion Document Ahead of Proposed Counter Terror Bill 2007* Home Office June 2007 p.4 http://www.homeoffice.gov.uk/documents/ct-discussion-doc.pdf?view=Binary

[113] http://www.cifas.org.uk/

Clause 64 creates an offence of further (i.e. onward) disclosure of "protected information". This is defined in subsection 5 as any revenue and customs information disclosed by Revenue and Customs and revealing the identity of the person to whom it relates, or "any specified information disclosed by a specified public authority." The latter category of protected information would be specified in an order made by the Secretary of State. Subsection 2 provides exemptions from the offence; these include circumstances where further disclosure is for the purposes of detecting, investigating or prosecuting an offence. Subsection 4 provides a "reverse burden" defence in that it would be for the defendant, rather than the prosecution, to prove reasonable belief in the lawfulness of the further disclosure of protected information.

Offences under clause 64 would be triable either way.[114] On summary conviction the statutory maximum fine (currently £5,000) would be available, as would a prison sentence of up to 12 months. On conviction on indictment, the maximum penalty would be a two year prison sentence and an unlimited fine. The latter of these penalties mirrors that associated with the unauthorised disclosure of information from the proposed National Identity Register.[115] In England and Wales, prosecutions could only begin with the consent of the Director of Public Prosecutions or, in the case of relevant revenue and customs information, by the Director of Revenue and Customs Prosecutions. Though not mentioned explicitly, the Information Commissioner's Office might also have a prosecution role for some disclosure offences (though the consent of the DPP would be needed to proceed).

Clause 66 amends Schedule 3 to the *Data Protection Act 1998* to explicitly allow processing (e.g. disclosure) of sensitive personal data through an anti-fraud organisation, but only if this is necessary for the purposes of preventing fraud. Sensitive personal data is defined in section 2 of the 1998 Act as personal data relating to racial or ethnic origin, political opinions, religion, trade union membership, health, sexual life and, more relevantly:

> (g) the commission or alleged commission by him of any offence, or
>
> (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.[116]

No amendment is made to Schedule 2 to the 1998 Act, which provides conditions relevant to the processing of (ordinary) personal data; among the relevant existing conditions is the following:

> The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.[117]

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[114] Clause 65
[115] Section 27, *Identity Cards Act 2006*
[116] *Data Protection Act 1998,* Section 2
[117] *Data Protection Act 1998,* Schedule 2, paragraph 6

Clause 67 gives effect to Schedule 7 which provides for the Audit Commission, and analogous bodies in Wales and Northern Ireland, to carry out data matching exercises. The Audit Commission already runs a biennial data-matching exercise as part of the National Fraud Initiative, but the Bill places this on a statutory footing.[118] Data matching involves comparing different data sets with a view, in the present context, to detecting fraud. An example might be to check payroll data against benefits data to see whether any individuals were making claims to which they were not entitled. While Schedule 7 restricts data matching for the prevention and detection of fraud, there is provision (in paragraph 32H) to extend this. Amendments to the Bill at report stage explicitly restricted the additional purposes to which data matching could in future be extended to: the prevention and detection of crime (other than fraud); the apprehension and prosecution of offenders; the recovery of debt owing to public bodies.[119]

B. Policy background

The Bill's provisions on information disclosure and data matching come against a background of wider government initiatives in data sharing. Many of these are being introduced to improve access to services and avoid duplication of effort. However, this can result in the sharing of information for purposes other than those for which it was originally collected. This is one way in which there is scope for conflict with the *Data Protection Act 1998*, the principles of which include:

> Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
>
> Personal data shall be processed in accordance with the rights of data subjects under this Act.

Among the rights of data subjects under the 1998 Act are those that provide for access to one's own personal data and the right to correct or destroy inaccurate data. While one effect of the *Data Protection Act* is to achieve a measure of protection of an individual's right to privacy, this is more explicitly provided for by the incorporation, by the *Human Rights Act 1998*, into UK law of the European Convention on Human Rights. Article 8 of the convention reads:

> Article 8 – right to respect for private and family life:
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the

[118] HL Deb 7 February 2007 c 732
[119] *Serious Crime Bill 2006-07*, Schedule 7, paragraph 32H

> protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 does not explicitly state that any interference with the right to privacy should be proportionate. However, the case law of the European Court of Human Rights indicates that a restriction on a freedom guaranteed by the Convention must be "proportionate to the legitimate aim pursued".[120] There would appear to be a weaker implication of proportionality in the "nothing to hide, nothing to fear" proposition one occasionally hears.

The Government's green paper, *New Powers Against Organised and Financial Crime*, certainly places some emphasis on the need for data sharing to be proportionate, citing public support for this:

> Clearly the public want data sharing to be necessary and proportionate, with particularly confidential material like medical records rightly expected to be treated with special care. But for the majority of data, studies show that the public is most prepared to accept data sharing when this is in order to prevent or detect crime. Too often, however, we are failing to make proper use of the material which is available.[121]

The green paper also refers to perceptions that data protection legislation impedes appropriate sharing of information:

> Whenever problems with data sharing crop up, the assumption is often that there are problems with the Data Protection Act 1998 (DPA). In practice, we have found no evidence that the Act places genuine obstacles in the way of sensible and proportionate data sharing. Excessive caution about the Act's provisions are a problem, as is the common fear that disclosure will have repercussions.
>
> A more significant problem we have identified is with public sector bodies and departments whose underlying powers do, or are perceived to, set unnecessary limits on data sharing within the public sector and beyond.

At face value this might imply that the Bill's provisions in respect of data sharing are relatively modest, doing little more than clarifying a pre-existing legal situation. That this is open to dispute has been evinced in comments by both the Joint Committee on Human Rights and by some contributors during the House of Lords second reading debate.

C. Parliamentary comment

1. House of Lords second reading

In the House of Lords second reading debate, on 7 February 2007, the Minister of State, Baroness Scotland, sought to reassure the House that "every aspect of the sharing of data that will come about as a result of this legislation will be done in accordance with

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[120] See for example *Handyside v United Kingdom (1976)* EHHR 393
[121] *New Powers Against Organised and Financial Crime*, Cm 6875, July 2006

the provisions of the Data Protection Act."[122] Baroness Scotland summarised the anti-fraud provisions and their rationale in the following terms:

> The provisions of this Bill will enable the public sector to share information with the private sector, and vice versa. It offers the potential to help to identify individuals intent on defrauding the taxpayer by accessing benefits and services to which they are not entitled, and to prevent those applications from being granted where they should not be. This is not a broad gateway that allows any sharing of government information; rather, it is a narrow and targeted provision to prevent fraud.[123]

Speaking for the Opposition, Baroness Anelay of St Johns began with a reference to the Audit Commission's data matching activities:

> The Audit Commission's National Fraud Initiative has been a valuable exercise, but in Part 3 we see sweeping changes to our data protection laws that will need very careful consideration. Extensive powers are being seized by the Home Secretary that could allow, for the first time, widespread data-sharing between the public and private sectors in the name of tackling fraud. It will overturn the basic data protection principle that personal information provided to a government department for one purpose should not, in general, be used for another. Instead, the principle will now be that information will normally be shared in the public sector provided that it is in the public interest.
>
> The Bill clears the way for data-matching exercises to be carried out on a large scale, even though a Home Office consultation paper last year acknowledged that many public bodies feared that such operations could be seen as fishing expeditions, which should be justified only on a crime-by-crime basis.[124]

The Liberal Democrat Shadow Lord Chancellor, Lord Thomas of Gresford, drew an analogy with the open-ended search warrants, "writs of assistance", issued by an eighteenth century British Governor of Massachusetts:

> So what an excellent wheeze Part 3 of this atrocious Bill is. It introduces into our law a high-tech version of the writ of assistance. If the Bill goes through, the Audit Commission, whose job we thought was to concern itself with the efficient and effective delivery of public services, will appear in a new guise as spymaster general.
>
> […]
>
> Data matching—the focus of Part 3—is otherwise known as data mining. It is a process whereby large quantities of information about many individuals are gathered from many sources and are mined by mass cross-referencing in order to throw up patterns of behaviour.
>
> […]

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[122] HL Deb 7 February 2007 c 731
[123] HL Deb 7 February 2007 c 731
[124] HL Deb 7 February 2007 c 736

> Instead of a system in which a person is suspected of a crime and is then investigated by the police, a trawl using the latest computer techniques will throw up names and those people will be investigated because of their characteristics or behaviours. Suddenly, we have grounds for a serious crime prevention order under Part 1.[125]

Lord Lucas was broadly in favour of the data sharing provisions of the Bill, in so far as they represented an effective means of preventing fraud. However, he called for explicit oversight by the Information Commissioner to ensure that the data sharing powers were being used reasonably.[126] Lord Dear saw "no problem with exchanging data on a target organisation or person" but suggested that "to go on a data-sharing fishing expedition infringing the privacy of millions on the off-chance of catching a few, admittedly quite big, fish would be a step too far."[127]

While suggesting there were relatively few concerns about Part 3 (and Part 2) of the Bill, Baroness Scotland acknowledged the "issues" in relation to data protection. Following consultation with the Information Commissioner, who had expressed concerns, she was "relatively assured that what is proposed in the Bill does not trespass inappropriately on the data protection provisions." She stated the Government's commitment "to creating a transparent, proportionate and fair system which ensures that the right people receive the benefits and services that the provisions are intended to create."[128]

2. Joint Committee on Human Rights

The Joint Committee on Human Rights considered, among other things, the implications of the information sharing and data matching provisions of the Bill after the end of committee stage. Though some amendments were subsequently made in relation to data matching, the information sharing provisions have remained intact. On information sharing the Joint Committee noted that the power to disclose information was very broad, both in terms of kind and destination. It recommended:

> 1.37 In light of the above we are concerned that the power of public authorities to share information with anti-fraud organisations is drafted in terms too general to satisfy the requirement in Article 8 ECHR that interferences with the right to respect for private life be sufficiently foreseeable. Unless the law enabling the sharing of information indicates with sufficient clarity the scope and conditions of exercise of the power of disclosure, any interference with the right to respect for private life will not be in accordance with the law and will therefore be in breach of Article 8. We are also concerned by the absence of strong safeguards on the face of the Bill to ensure that the wide power to share personal information about an individual is only exercised in circumstances where it is proportionate to do so.
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> 1.38 In order to make the effect of the new power more foreseeable, and therefore more legally certain, and to make it less likely that the power to share

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[125] HL Deb 7 February 2007 cc 738-9
[126] HL Deb 7 February 2007 c 746
[127] HL Deb 7 February 2007 c 757
[128] HL Deb 7 February 2007 cc 765-6

> information will be exercised disproportionately, we recommend that the Bill be amended:
>
> - to limit the width of the power, for example by specifying the kind of information which may be disclosed and specifying the categories of people to whom the information may be disclosed in place of the open-ended authorisation of disclosure to any person to whom disclosure happens to be permitted by the arrangements of a particular anti-fraud organisation; and
>
> - to introduce additional safeguards on the face of the Bill, such as defining the threshold for reporting information on suspected fraud (the degree of suspicion that should be required), limiting disclosure so that only information on those suspected of fraud will be shared, prescribing the permissible use of shared information, and providing for individuals to have recourse to compensation if they are unfairly affected by the information held about them.[129]

The Joint Committee's concerns applied even more so to the proposed amendments to the *Data Protection Act 1998*, now embodied by clause 66. In the words of the Committee, this clause "contemplates disclosure of sensitive personal data to any person to whom the arrangements of any anti-fraud organisation happen to provide for disclosure."[130] The Committee went on:

> In our view this amounts to an inappropriate delegation of discretion to anti-fraud organisations to decide to whom they will disclose sensitive personal data. Moreover, any anti-fraud organisation can make such disclosures, not merely those specified by order by the Secretary of State. The concerns we have expressed above about the lack of proper safeguards against improper disclosure on the face of the Bill therefore apply with even greater force in relation to this provision.[131]

The Joint Committee appeared to have fewer concerns over data matching, and these may conceivably receive further amelioration by amendments subsequently made to the Bill. These amendments include a requirement on the Audit Commission (and analogous bodies in Wales and Northern Ireland) to publish a code of practice on data sharing which it would be under a statutory duty to prepare.[132] In addition, a government amendment, moved at report, inserted the following condition attaching to data matching exercises:

> A data matching exercise may not be used to identify patterns and trends in an individual's characteristics or behaviour which suggest nothing more than his potential to commit fraud in the future.[133]

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[129] Joint Committee on Human Rights, *Legislative Scrutiny: Fifth Progress Report*, 25 April 2007, HL Paper 91, HC 490 2006-07

[130] ibid. paragraph 1.41

[131] ibid.

[132] Schedule 7: new Section 32G, *Audit Commission Act 1998*; new Section 64G, *Public Audit (Wales) Act 2004*; new Article 4G, *Audit and Accountability (Northern Ireland) Order 2003*

[133] HL Deb 30 April 2007 c 893

VI Proceeds of Crime

A. Asset Recovery Agency

1. Background

The Asset Recovery Agency (ARA) was set up under the *Proceeds of Crime Act 2002* (POCA). The *Proceeds of Crime Act* allows the ARA to take both criminal and civil proceedings to recover the proceeds of crime. The Act built on earlier statutes relating to drug trafficking.[134] In particular, POCA introduced new powers to allow for civil forfeiture of assets where the ARA can prove to the civil standard (the balance of probabilities) in the High Court that those assets are the proceeds of crime.

A detailed background note to the creation of the agency, which also provides information about the civil forfeiture arrangements in Ireland and the United States, can be found in Library Research Paper 01/79, *Proceeds of Crime Bill*.[135]

ARA is headed by a Management Board, chaired by the Director. For the majority of its existence this has been Jane Earl, who has only recently left the post and has been replaced by an interim director, Alan McQuillan. An Assistant Director is responsible for the exercise of the Director's powers in Northern Ireland (pursuant to POCA 2002, Sch 1, para 3(1)(b)). The agency became operational in February 2003. It is a Non-Ministerial Department.[136] Around the time the Act entered into force, the (then) Lord Chief Justice, Rt Hon Lord Woolf, indicated that the creation of the agency was "another important aspect of the new regime and should promote real excellence in the identification, location and pursuit of criminal assets".[137]

The agency describes its broad objectives as:

- To disrupt organised criminal enterprises through the recovery of criminal assets, thereby alleviating the effects of crime on communities;

- To promote the use of financial investigation as an integral part of criminal investigation, within and outside the Agency, domestically and internationally, through training and continuing professional development.[138]

ARA currently has offices in London and Belfast.

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[134] The first of which was the *Drug Trafficking Offences Act 1986*, although legislation quickly followed to extend the regime beyond drug trafficking with the enactment of the *Criminal Justice Act 1988*

[135] available at: http://www.parliament.uk/commons/lib/research/rp2001/rp01-079.pdf (at 23 May 2007)

[136] Non Ministerial Departments (NMDs) are departments in their own right, established to deliver a specific function; part of government, but independent of Ministers. The precise nature of relationships between NMDs and Ministers vary according to the individual policy and statutory frameworks, but the general rationale is to remove day-to-day administration from ministerial control.

[137] Smith and Owen, *Asset Recovery: Criminal Confiscation and Civil Recovery*, Lexis Nexis, 2003. Further detailed information about ARA can also be found between paras 2.3-2.9

[138] http://www.assetsrecovery.gov.uk/AboutARA/AimsandObjectives/

The agency is required to produce a statutory business plan and annual report. The report for 2005-6 was laid before Parliament in June 2006.[139] The resource accounts for the year ending March 2006 were also published in July 2006.[140] The Assets Recovery Agency's annual report 2006-07 and annual plan 2007-8 were laid before Parliament on 24 May 2007.[141]

At that time, Vernon Coaker MP, the junior Home Office Minister said:

> The agency has continued to build on its earlier successes in disrupting criminal groups and seizing their assets. In 2006-07, the total amount of realised receipts from assets recovered by the agency was a record £15.9 million. The agency disrupted a total of 114 criminal enterprises, 92 in England and Wales and 22 in Northern Ireland, exceeding the total minimum target of 90. It did so by the early restraint of assets to the value of £73.6 million which exceeded the stretch target of £65 million. The agency obtained civil recovery orders and tax assessments in 40 cases with a value of £16.6 million. It also adopted 45 cases for criminal confiscation investigation against a target of 15 cases.
>
> The agency has delivered an extensive training and accreditation programme for financial investigators, again exceeding its targets […] The agency will continue to exercise its powers of investigation and asset recovery against criminals in support of the Government's commitment to taking the profit out of crime. The agency is committed to maintaining its efforts in the recovery of criminal assets during the transition period leading to the proposed merger with the Serious Organised Crime Agency, as provided for in the Serious Crime Bill
>
> **The Asset Recovery Action Plan**
>
> Seizing criminal assets delivers a wide range of benefits, from depriving criminals of capital to reducing the incentives for crime and the harm caused by crime, as well as promoting fairness and confidence in the criminal justice system. In 2006-07 the total amount recouped by all agencies involved in asset recovery in England, Wales and Northern Ireland was £125 million. This is a five-fold increase over five years. We want to build on this success. The Government are therefore publishing today an Asset Recovery Action Plan. The Action Plan has two purposes. Firstly it sets out robust proposals on how we are to reach our challenging target of recovering £250 million of the proceeds of crime by 2009-10. The Plan goes on to outline, for consultation, policy proposals for taking things further, including some radical ideas to move towards the Government's long term vision of detecting up to £1 billion of criminal assets.
>
> The consultation period will end on 23 November 2007. A copy of the Action Plan is being placed in the Library of the House.[142]

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139 The annual report is available at: http://www.assetsrecovery.gov.uk/NR/rdonlyres/8D8413B8-B0FE-4A9F-AA02-2E2A9771A809/0/ARAAnnualReport06_new.pdf (at 23 May 2007)

140 These are available at: http://www.official-documents.gov.uk/document/hc0506/hc13/1341/1341.pdf (as 23 May 2007)

141 These are available at: http://www.assetsrecovery.gov.uk/TargetsandResults/ (as at 25 May 2007) and claim that the agencies performance against 2006-7 targets were marked by "notable successes"

142 HC Deb, 24 May 2007, c85-6WS. For more information on the action plan, see for example: http://news.bbc.co.uk/1/hi/business/6686941.stm (at 25 May 2007)

a. The Asset Recovery Action Plan

The Asset Recovery Action Plan was published in May 2007 and proposes a variety of changes to the regime relating to the recovery of criminal assets.[143]

The Government has described that the "key messages" of the plan as follows:

> (1). We have delivered an almost fivefold increase in performance from the last five years. We are committed to going further, reaching £250 million by 2009-10. This is not just an aspiration – we have a robust plan and believe we can achieve it;
>
> (2). We are looking to improve co-operation between all agencies involved in asset recovery and particularly in confiscation which involves investigation, prosecution and court enforcement for successful delivery;
>
> (3). Additional powers would help our effort. Options include:
>
> - (a) New powers to seize the high value goods of those charged with acquisitive crimes and enable them to be sold if necessary to meet confiscation claims
> - (b) A new administrative procedure for cash forfeitures – cash is forfeited automatically unless the owner exercises his right to a court hearing
> - (c) Possible extension of cash seizure powers to cover other high value goods, enabling forfeiture to civil standard of goods that might have served as tools in crime – for example vehicles
> - (d) Removing loopholes in the civil recovery powers in the Proceeds of Crime Act.
>
> 4. Getting to £250m is necessary, but not enough. We are looking to embed asset recovery by clarifying as a fundamental principle of sentencing that nobody should leave the system still profiting from the crime they committed;
>
> 5. We will review the use of compensation orders, which benefit the victims of acquisitive crime, with a view to multiplying our current performance several times over. Some legislative changes may be needed here too;
>
> 6. We are also planning a fundamental review of the use of tax against criminals, with possible legislative changes;
>
> 7. Finally, we are interested in views on the possible applicability in England and Wales of US style 'qui tam' provisions, which enable private citizen whistleblowers to sue organisations defrauding the government, securing a share of the damages in return.[144]

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[143] The paper is available at: http://www.homeoffice.gov.uk/documents/cons-2007-asset-recovery/asset-recovery-consultation.pdf?view=Binary

[144] *ibid*

2. Initial difficulties at ARA

There are divergent views of how successful ARA has been in pursuing the proceeds of crime. The BBC has stated that

> A common criticism is that in the first three years of its existence ARA cost about £60m but only managed to retrieve some £8m.
>
> Comparisons are sometimes made with Ireland's Criminal Assets Bureau, one of the inspirations for the UK's agency, where running costs of some 5m euros ($6.5m; £3.3m) produced a total take of more than 21m euros in 2005-6. [145]

However, the same BBC article also indicates that:

> ARA acknowledges it made a slow start in that sense - but counters that it has frozen or seized more than £130m during its existence, effectively taking that sum out of the criminal economy. There are also signs that this year's haul of actual cash proceeds will top £15m.[146]

As the defendants' legal costs are paid from the recoverable property, the amount recovered is actually significantly less than the amount taken from the profits of organized crime. Furthermore, comparing the Irish figures may be misleading, since ARA would not have been in a position to recover money as soon as it was set up.

In June 2006, Jane Earl, the former Director of ARA, commented that "our disruptive action where we have exceeded our targets is playing a big part in making the general landscape much more difficult for criminals to operate in".[147] The Agency produced a further explanation for delays in its Resource Accounts 2005-6, where it stated that:

> A number of the powers granted to the Director under POCA were challenged in cases brought by the Director during 2005/06. These were in relation to the civil recovery proceedings contained in Part 5 of POCA and awaiting decisions in each of these cases had a significant impact on the lifetime of both these and other cases. This was because firstly the Courts would not allow a case to be continued until the preliminary legal points had been resolved, and secondly because judges in other cases were not prepared to allow those cases in which the same points were to be raised to progress until the Courts of Appeal had ruled on those points in cases in which the challenges had already been brought. Of the challenges where decisions have now been reached, each has fallen in support of the legislation that civil recovery proceedings were properly classified as civil. Each appeal decision is significant in the development and understanding of the powers exercised by the Director, create important case law and serves to strengthen the position of the Agency in future challenges.[148]

Nonetheless, other problems have been identified. The *Guardian* reported in September 2006 that:

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145 http://news.bbc.co.uk/1/hi/business/6253545.stm (at 23 May 2007)
146 *ibid*
147 http://news.bbc.co.uk/1/hi/uk_politics/5077846.stm (at 23 May 2007)
148 Asset Recovery Agency, *Resource Accounts 2005-6*, 24 July 2006, HC1341

> One problem for the ARA is the laborious machinery devised by the Home Office when first setting up the agency. The ARA was required to hire outside accountants […] to act as court-appointed receivers.[149]

These receivers were paid at commercial rates. Amendments to this regime were eventually made by s 98 of the *Serious Organised Crime and Police Act 2005* (SOCPA). This enabled the Director of the Asset Recovery Agency to apply for an asset freezing order in civil recovery cases, without there having to be an appointment of an interim receiver. The Act also allowed defendants to meet any legal expenses in respect of civil recovery proceedings (through a court controlled regime which allowed reasonable legal expenses to be drawn down). Previously there was no provision to allow for payment of legal expenses out of retained funds in civil cases, in contrast to criminal cases.[150]

In an interview with the *Guardian* in September 2006, Jane Earl admitted that:

> We were wildly optimistic, in believing that each case would only take two years from start to finish. It's turned out to be more than double that […] It's frustrating when confronted with a range of delaying tactics [...] they seem to operate on the basis of 'stick to your story and the ARA will eventually go away'. What we are involved in is like trench warfare but we will hold our nerve.[151]

Following the announcement that ARA was to be merged with the Serious Organised Crime Agency (see below), Grant Shapps MP, who had previous produced a report on the perceived underperformance of the Agency, commented that:

> The decision follows my report into the underperformance of the Assets Recovery Agency published last year where I revealed that since its inception the ARA had cost £60m, while only managing to recover £8.3m. […] When I published my report ministers tried to claim that the agency was on the brink of a breakthrough, but [...] the government has now been forced to scrap the ARA altogether.[152]

3. Recent developments

October 2006 saw the settlement of one of the most successful cases pursued by the ARA, against Dylan Creaven. Mr Creaven had been acquitted of involvement in a VAT 'carousel' fraud following an investigation by HM Revenue and Customs into allegations that he played a principal part in an international missing trader VAT fraud thorough his computer chip business in the Republic of Ireland. Following an investigation by ARA and the Criminal Assets Bureau (CAB) in Ireland, Mr Creaven agreed a settlement worth £18.5 million, which was shared between the two agencies.[153] The agreement was

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149 "Solicitor's saga highlights problems facing cash recovery unit: unrealistic financial targets for agency accused of sweeping aside civil liberties", *The Guardian*, 29 September 2006

150 *S v Customs & Excise Commissioners* [2004] EWCA Crim 2374. See also Tim Owens et al, *Blackstone's Guide to the Serious Organised Crime and Police Act 2005*, Oxford University Press, 2005, p66

151 "What we are involved in is trench warfare", *The Guardian*, 29 September 2006

152 "£60m Asset Recovery Agency to be scrapped", *The Guardian*, 11 January 2007

153 See: http://www.assetsrecovery.gov.uk/MediaCentre/PressReleases/2006/18.5MTOBERECOVEREDFROMASSETSLINKEDTOVATCAROUSELFRAUD.htm (as 30 May 2007)

reached after a mediation process. It has been suggested that this single case has accounted for approximately half of the agency's total recoveries.[154]

More recently, in February 2007, Jane Earl gave an interview to the Radio 4, in which she raised a new criticism of the original legislation, stating that the way that it had been formulated had put many criminals outside the agency's reach. In particular, she said certain criminals had "made much of their criminal proceeds back in the 1980s and they are clearly outside the grasp of the law".

She went on to state that "There are key people who we could never go after simply because of the limitation period" arguing that ARA had lived up to "very high expectations" in some respects, but it could never have gone after more established criminals, as had been expected.[155] The detail about the relevant time limits is set out in a table (Figure 1) below.

4. The National Audit Office Report

On 21 February 2007, the National Audit Office (NAO) produced a report entitled *The Asset Recovery Agency*[156]. The report stated that:

> Since it was set up, the Agency has met its targets for training Financial Investigators and for disrupting criminality. It has not, however, met its targets for the recovery of assets, including that of becoming self-financing by 2005-06, a target that the Agency is now aiming to meet by 2009-10. This report examines the reasons for the Agency's difficulties in meeting these targets, as well as its performance in training and monitoring Financial Investigators, and makes recommendations for developing its relationships with its key partner bodies and improving its internal processes.[157]

The NAO concluded, amongst other things, that:

> Problems in recovering assets have been due to poor quality referrals – particularly in the early days; defence representations, including a few cases relating to the *Human Rights Act 1998*; and weaknesses in the Agency's internal processes. The Agency needs to address these weaknesses, both in its assets recovery role and in its monitoring of Financial Investigators' Continuing Professional Development, if it is to achieve value for money.[158]

While the NAO recognised that the agency had "established important case law in respect of the *Human Rights Act 1998*, which should deter further challenges to its powers of civil recovery" and had "been successful in freezing assets and issuing tax assessments", it noted that in respect of the recovery of assets, "the Agency has collected £23 million against cumulative costs of £65 million." It identified a number of faults in the way ARA operated, including:

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154 Public Accounts Committee, Transcript of evidence 7 March 2007, HC 391-I, Q11
155 http://news.bbc.co.uk/1/hi/uk/6356165.stm (at 23 May 2007)
156 http://www.nao.org.uk/publications/nao_reports/06-07/0607253.pdf (at 23 May 2007)
157 *ibid*, p4
158 *ibid*, p5

- The Agency's case management information is poor. It does not have a single central database of cases and staff refer to different databases that hold contradictory and incomplete information. We had great difficulty in compiling a comprehensive list of cases and tracking their value and progress;
- Since it was set up, the Agency has experienced a high turnover of staff. In the year to the end of September 2006 almost a quarter of the Agency's staff had left, including almost half the legal staff, and over 40 per cent of training and development personnel;
- Staff do not record their time and therefore the Agency cannot measure the resources deployed on each case. There is no effective case management and no consistent use of targets and deadlines to incentivise staff to progress cases;
- In some cases the Courts appoint receivers to manage restrained assets. Receivers' fees, which are paid by the Agency, are expected to total £16.4 million by the end of 2006-07. In twelve of the seventy nine cases managed by receivers, the value of the fees is expected to exceed the assets managed by the end of March 2008;
- In a significant proportion of cases, the training provided, and in the case of the police, funded by the Agency is not fully utilised by Financial Investigators' employing organisations; at least 30 per cent of Financial Investigators retired or moved on from financial investigation shortly after completing their training. Although the Agency requires trained Financial Investigators to complete formal Continuing Professional Development activities, it is not effectively monitoring their performance as required under the *Proceeds of Crime Act 2002*;
- The Agency's revised expectation that it will break even by 2009-10 cannot be supported by financial modelling given the relatively short period of operation and the irregular flow of receipts, which preclude the modelling of a reliable trend. On current performance, therefore, there is a risk that the Agency will not achieve self-financing by that date.[159]

It also made a number of recommendations, which it stated would "apply equally to the new bodies responsible for the Agency's current functions." These included:

- (a) All the Agency's Memoranda of Understanding with referral partners should name a single point of contact within both the Agency and the referral partner. This would help to develop and improve relationship management with referral partners, including providing a framework to allow formal feedback to improve the quality of referrals;
- (b) The Agency should, as a matter of urgency, develop a Case Management System that contains all relevant management information and includes a time recording system to monitor the use of staff resources. Once this is established, the Agency should use the data collected to help inform case selection and prioritisation and to review its performance measurement regime so that it incorporates targets that are measurable, challenging and achievable, such as

[159] *ibid*, p5

reducing the cost and time per case. This will also help with a smooth transfer of case work to the Serious Organised Crime Agency;

- (c) The Agency should develop its formal management review of cases to incorporate a timetable for each stage in the progression of a case, to which Senior Financial Investigators, Financial Investigators and lawyers are held accountable;
- (d) The Agency should compare regularly the standard rates charged by receivers to identify those that provide the best value for money and monitor the hours billed to determine the reasonableness of the claim;
- (e) The Agency should provide an incentive to police forces, to send only those individuals on the Agency's training courses that are likely to continue to use their financial investigation skills, by putting into practice its intention to extend charging for courses to cover police forces, as well as other sponsoring bodies;
- (f) In order to fulfil its statutory role of monitoring the accreditation of Financial Investigators, the Agency should update its database, follow up individuals who have not complied with professional development requirements and, if necessary, remove their accreditation. It should also include targets for monitoring accreditation in its performance measurement regime.

Following the publication of the report, the Chairman of the Public Accounts Committee, Edward Leigh, commented that:

> The criminal fraternity must be lying back on their sun loungers laughing into their champagne glasses at the mess those trying to catch up with them are in.[160]

Adding:

> "It wouldn't be surprising if some criminals were to develop a 'they can't catch up with me' mentality."[161]

David Davis, the Shadow Home Secretary stated:

> This is yet more evidence that the government's much heralded Assets Recovery Agency has proved far more successful at generating good headlines for the government then it has at hitting serious and organised criminals in the pocket.[162]

In response the Home Office indicated that performance in respect of the recovery of criminal assets "has been very successful with over £230m worth of assets stripped from criminals in the last three years".[163]

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160 "Asset Recovery Agency ' a mess'", *Guardian Online*, 21 February 2007, available at: http://www.guardian.co.uk/uklatest/story/0,,-6430053,00.html (at 23 May 2007)
161 http://news.bbc.co.uk/1/hi/business/6382207.stm (at 23 May 2007)
162 http://www.epolitix.com/EN/News/200702/d7a0c28d-25af-4506-a11e-8bc24ffdf41c.htm (at 23 May 2007)
163 *ibid*

5. The Public Accounts Committee

On 7 March 2007, the Director of ARA along with both Assistant Directors (Charlie Dickin and Alan McQuillan OBE) gave evidence to the Public Accounts Committee. The transcript of that evidence session is available online.[164]

The session mainly focussed on issues raised in the NAO report. In particular, the Committee asked about: the perceived failure of the agency to pursue what it termed "Mr Bigs"[165]; the fact that almost half of the money received by the Agency came from a single recovery[166]; and the reasons that the Agency had been "over optimistic" about the time that it would take to recover money.[167]

In answer to a question as to why the Agency had failed to meet its financial targets, Jane Earl replied that:

> We were set up four years ago to undertake completely new processes with new legislation and we were very excited about that chance, and continue to be excited about it, but we produced our business plan within six weeks of the Agency being set up. At that time we had something less than 20 staff and no cases, and I have to say to you that although we had talked to a lot of other organisations about how long our cases might take, nobody could give us an accurate projection. We thought long and hard about how to project forward and to set ourselves some targets and we worked on the best available information which said that our cases should take approximately two years from start to finish. We turned out to be hopelessly over-optimistic about that, and I have to apologise to you and the Committee for that, we got it wrong. Our cases have taken approximately four years to get from start to finish and I am sure the Committee will want to talk about the reasons for that.[168]

The Committee also identified a number of issues which it described as "basic management failings"[169], while the Chairman, Edward Leigh, stated that:

> To sum up, you [ARA] have spent £65 million and you have recovered £23 million. You have no complete record of the cases referred to you. You have worked on over 700 cases and only managed to recover assets in a mere 52; 90% of financial investigators you have trained have not completed the courses that they need to. The fact is that, despite the very effective performance you have put up today, the criminal fraternity are laughing at us, are they not?[170]

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164 http://www.publications.parliament.uk/pa/cm200607/cmselect/cmpubacc/uc391-i/uc39102.htm (at 23 May 2007)
165 HC391-I, 7 March 2007, Q10
166 *ibid*, Q11
167 *ibid*, Qq 5, 24
168 *ibid,* Q5
169 *ibid,* See for example Qq 36, 56, 57, 58, 60, 64, 65 and 66
170 *ibid*, Q125

6. The civil liberties arguments

In addition to the difficulties listed above, there have also been criticisms of the powers granted to ARA, which may be relevant given the Government plans to transfer its functions. In particular, it has been suggested that the civil recovery procedures miss the safeguards of "trial by jury and proof beyond reasonable doubt" and that the provisions of the *Proceeds of Crime Act* are "an unjustified encroachment on the rights of ordinary citizens […] aimed at people who have been convicted of nothing."[171] When the powers were introduced, the Attorney General indicated that:

> The civil recovery process is focusing exclusively on the origin of the property. It is to be a proprietary remedy, which attached to the property. It will not be dependent on the person who holds the property having been convicted or, more to the point, having committed any offence. I illustrate that by some of the examples in which that will operate. It is not a form of prosecution. Its purpose is not to secure a conviction against any person and it cannot do so. The result of civil recovery cannot be, for example but most pointedly, a sentence of imprisonment on someone for committing serious crime. It is because civil recovery focuses on property rather than on conduct that it is properly, in the Government's view, a civil procedure. First, I want to emphasise, therefore, the hierarchy. The prosecution of offences will remain the priority in all cases. The noble and learned Lord suggested that the director—which I understood to be the director of the assets recovery agency—should prosecute. It is very important to note that the director will have no power to prosecute. The power to prosecute will be the power of the existing prosecution agencies in England and Scotland. It is clear from the hierarchy which has been identified that the prosecution of offences will remain the priority in all cases. That is not intended as a soft option. For example, it is made clear in the draft guidance that it would not be a proper exercise of the prosecutorial discretion—there are two tests for prosecution, the evidential and the public interest test—to say that in the public interest there is no need to prosecute because there is the alternative of civil recovery.[172]

These principles have been demonstrated in case law. The clearest judgment is probably that given by Mr Justice Coghlin in the case of *Walsh* [2004] NIQB 21, a case that was heard in Northern Ireland. In *Walsh*, the judge observed that:

> It seems to me that, in substance, proceedings by way of a civil recovery action under the provisions of Part 5 of the POCA differ significantly from the situation of a person "charged with a criminal offence" within the meaning of Article 6 […]there is no arrest nor is there any formal charge, conviction, penalty or criminal record, the serious personal consequences of involvement in criminal proceedings in respect of which the Convention provides the enhanced protection of Article 6 (2) and (3). The proceedings are not initiated as a result of the activity of the police nor or they conducted by the Department of Public Prosecutions. […] The functions of the Agency are directed against property rather than individuals and in most cases an important proof on behalf of the Agency will involve establishing the absence of any legitimate source of capital or income on the part of the respondent, which might account for the acquisition or accumulation of the

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171 "Ruining innocent lives", *Counsel Magazine*, August 2006

172 HL Deb, 13 May 2002, c72

> property sought to be recovered [...] In the circumstances, I have come to the conclusion that civil recovery proceedings within the meaning of Part 5 of the POCA should be classified as civil rather than criminal.

The European Court of Human Rights has also examined whether forfeiture orders which do not follow conviction constitute a criminal penalty for the purpose of article 6(3) of the *European Convention on Human Rights* (see *Butler v United Kingdom*, 27 June 2002) in which the court determined the confiscation of money, which it was believed was used in the course of drug trafficking, was not a criminal penalty.

In response to criticisms that civil forfeiture lacks sufficient procedural safeguards, ARA indicates that:

> The Assets Recovery Agency cannot take any action without the agreement of the Court. Our investigators compile strong cases and the respondents have ample opportunity to refute any allegations made. It is not in our interests to target people who we do not feel are living off the proceeds of crime. The legislation provides for a fair but effective system of asset recovery, and the Agency adheres strongly to our values of integrity, honesty and professionalism [...] The Court of Appeal has held that civil recovery proceedings are not criminal proceedings. No person is charged with an offence. Therefore, if the Agency is successful in its proceedings, there is no conviction, no sentence and no criminal record. They only affect the property which is the subject of the proceedings.[173]

a. Hierarchy

One issue that it has been reported may arise is the dilution of the hierarchy principle.[174] The BBC has suggested that:

> For many - including many inside ARA and the UK's various police forces - a key weakness of the structures set up by PoCA has been what is termed the "hierarchy". Simply put, it means that civil recovery can only be tried once criminal confiscation has failed. And only after that can criminal assets be taxed.[175]

The hierarchy was considered in the NAO report on ARA (discussed above). The report sets out the way the hierarchy works and various time limits which apply to different types of proceedings in a useful chart reproduced below:

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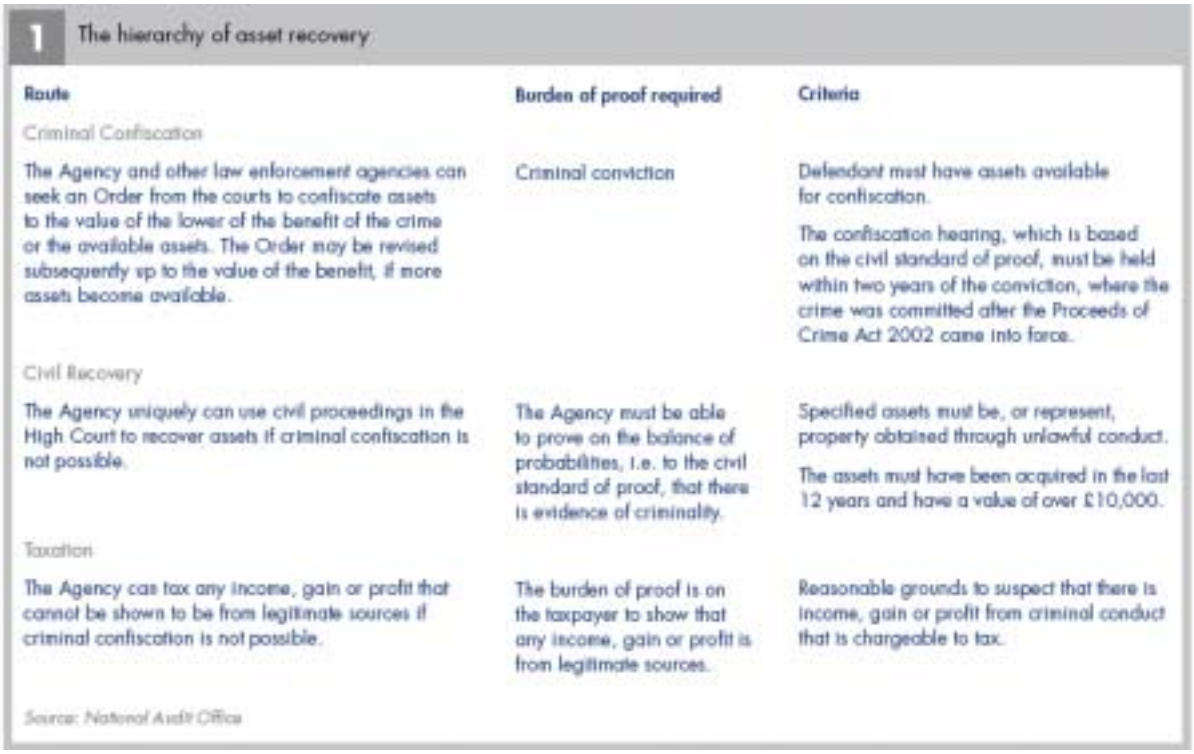
[173] http://www.assetsrecovery.gov.uk/ContactUs/FAQs/ (at 23 May 2007)
See also *R (Director of the Assets Recovery Agency) v He & Chen [*2004] EWHC 3021 and *R (ARA & Ors) v Green & Ors*, The Times, Feb 27th 2006

[174] "UK seeks new ways to make criminals pay", *BBC Online*, 11 January 2007

[175] *ibid*

Figure 1



1 The hierarchy of asset recovery

Route	Burden of proof required	Criteria
Criminal Confiscation		
The Agency and other law enforcement agencies can seek an Order from the courts to confiscate assets to the value of the lower of the benefit of the crime or the available assets. The Order may be revised subsequently up to the value of the benefit, if more assets become available.	Criminal conviction	Defendant must have assets available for confiscation. The confiscation hearing, which is based on the civil standard of proof, must be held within two years of the conviction, where the crime was committed after the Proceeds of Crime Act 2002 came into force.
Civil Recovery		
The Agency uniquely can use civil proceedings in the High Court to recover assets if criminal confiscation is not possible.	The Agency must be able to prove on the balance of probabilities, i.e. to the civil standard of proof, that there is evidence of criminality.	Specified assets must be, or represent, property obtained through unlawful conduct. The assets must have been acquired in the last 12 years and have a value of over £10,000.
Taxation		
The Agency can tax any income, gain or profit that cannot be shown to be from legitimate sources if criminal confiscation is not possible.	The burden of proof is on the taxpayer to show that any income, gain or profit is from legitimate sources.	Reasonable grounds to suspect that there is income, gain or profit from criminal conduct that is chargeable to tax.

Source: National Audit Office

This hierarchy has already been amended once – in a Ministerial Statement in February 2005, Caroline Flint MP stated that:

> Under the Proceeds of Crime Act the director must exercise her functions in the way which she considers is best calculated to contribute to the reduction of crime. In considering this, she must have regards to guidance given to her by me. The guidance to the director broadly sets out the way in which the agency must operate. This includes a set "hierarchy" in the way the different schemes for recovering the proceeds of crime inter-relate; pursuing criminal conviction first with a consequential confiscation order, if that is not possible considering civil recovery, and if that is not viable, pursuing taxation proceedings. This refers equally to both investigations and proceedings.
>
> The guidance guarantees that civil recovery and taxation will not become an easy option for the Assets Recovery Agency to pursue at the expense of criminal prosecution. Criminal investigations and proceedings remain the prime focus and objective.
>
> However, the fact that the agency cannot commence any investigation into civil recovery until prosecution is ruled out has a detrimental effect on their operational capability and hinders their effectiveness in reducing crime. This is because the period of time between being able to apply the different schemes is one in which assets can be can be dissipated before the scheme is able to be enforced. This defeats the purpose of the Act and Government to recover the proceeds of crime. An example of the benefit would be in high risk prosecutions, where ARA are presently precluded any civil recovery action until the prosecution has failed, with

> the consequent risk of assets coming out of criminal restraint and being dissipated before they can begin civil recovery action.
>
> The guidance is therefore amended to allow the Assets Recovery Agency to pursue civil recovery or taxation investigations in parallel with criminal investigations and proceedings. This will ensure that, where necessary, civil recovery or taxation proceedings can commence immediately after a criminal matter has concluded. The priority will remain criminal prosecution and investigation in the first instance. However the Assets Recovery Agency would become more effective at reducing crime and removing the proceeds of criminality if they were able to operate under the proposed guidance. I would add that my hon. and learned friend the Attorney-General, has been consulted, through the legal Secretariat to the Law Officers, and is content with the proposed amendments to the guidance.[176]

It is, nonetheless, in effect an operational safeguard which should ensure that civil recovery is not used, as the Ministers put it, as an "easy" or "soft" option. Moreover, this hierarchy has actively been referred to by the courts. In the abovementioned case of *Walsh*, Mr Justice Coghlin observed (when considering whether forfeiture was a civil or criminal proceeding) that:

> While the Director must exercise his or her functions in a way that he or she considers is best calculated to contribute to the reduction of crime the statute specifically provides that, in general, the reduction of crime is best secured by means of criminal investigations and criminal proceedings.[177]

In evidence to the Public Accounts Committee, Jane Earl said that:

> If we ever thought that civil recovery could be an easy way to bypass criminal convictions and confiscation, we would not be acting in the spirit of the legislation.[178]

7. International comparators

In its recent Asset Recovery Action Plan[179], the Government has set out details of how the UK compares internationally on asset recovery. The figures relate to total criminal assets recovered (not just assets recovered by ARA). The information has been reproduced at figure 2 below:

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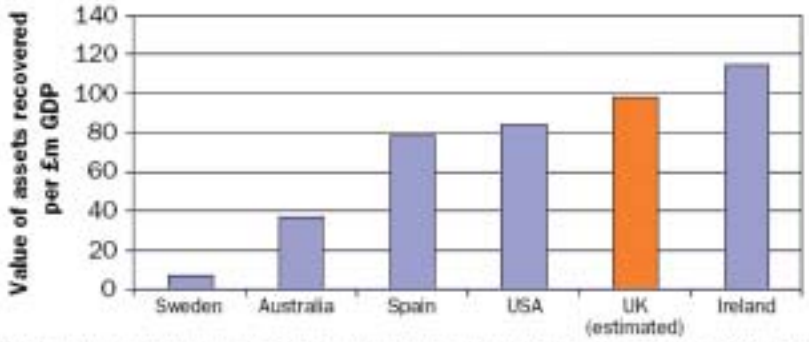
[176] HC Deb 10 February 2005, c90-91WS
[177] [2004] NIQB 21
[178] HC 391-I, 7 March 2007, Q107
[179] http://www.homeoffice.gov.uk/documents/cons-2007-asset-recovery/asset-recovery-consultation.pdf?view=Binary (as 30 May 2007)

Figure 2

When the Performance and Innovation Unit (PIU) completed its report on criminal finances in 2000, the UK lagged behind many of our partners, whether in asset recovery or in the use of money laundering convictions. Today the UK is a strong international performer. The table below shows results from 2005, the most recent year for which we have results from a range of countries.

Asset Recovery – Performance by Country



Sources: Internal Home Office Analysis; FATF* reports; Criminal Assets Bureau Annual Report 2005 (for Ireland), and IMF data for GDP figures. All data relates to 2005 or the latest available year, which varies between countries. In the case of the UK, the figures relate to 2006-07 projected performance. The UK figures do not include Scotland.

* The Financial Action Task Force (FATF) is an intergovernmental body set up in 1989 for the development and promotion of national and international policies to combat money laundering and terrorist financing. See www.fatf-gafi.org

In relation to the United Kingdom figures, it is worth noting that they relate to projected 2006/7 performance (rather than the 2005 figures used for some other countries). The figures also only refer to assets recovered – when one of the criticisms of ARA is that while it may freeze and recover assets, the costs of doing this have exceeded the money recovered.

The Criminal Assets Bureau (CAB) in Ireland is frequently referred to as a success story in seizing criminal assets.

The CAB was established as a Statutory Body pursuant to the Criminal Assets Bureau Act, 1996 on the 15th October, 1996. The Bureau is staffed by officers from An Garda Síochána, Revenue Commissioners Taxes, Revenue Commissioners Customs and the Department of Social, Community & Family Affairs. It is headed by the Chief Bureau Officer, who is a Chief Superintendent of An Garda Síochána, reporting to the Commissioner on the performance and functions of the Bureau. An annual report is prepared and submitted through the Garda Commissioner for the Minister for Justice, Equality & Law Reform and laid before both Houses of the Oireachtas in accordance with the 1996 Act.[180]

The 2005 Annual Report of the CAB is available on the An Garda Síochána website.[181]

[180] http://www.garda.ie/angarda/cab.html (as 30 May 2007)
[181] http://www.garda.ie/angarda/pub/cabrpt2005.pdf (as 30 May 2007)

B. Proposals for reform

1. Background

In a Written Ministerial Statement in January 2007, Vernon Coaker MP provided some background information on the proposals to merge the ARA with the Serious Organised Crime Agency (SOCA):

> The Assets Recovery Agency has successfully steered the radical new powers in the *Proceeds of Crime Act* through every legal challenge it has faced. It is recovering significant amounts of criminally acquired wealth, including a recent settlement worth over £12 million. There are significant synergies in merging the ARA with SOCA, as SOCA builds its understanding of organised crime and widens the toolkit used to tackle it.
>
> In recognition of the high profile, public confidence and success achieved by the ARA in Northern Ireland in tackling organised crime and dealing with organised criminals, SOCA will have a designated officer responsible for asset recovery work in Northern Ireland, and there will be no diminution in the resources available for assets recovery work there.
>
> The ARA's centre of excellence, which trains and accredits financial investigators, will be moved to the new National Policing Improvement Agency.
>
> Extending the power to launch civil recovery proceedings to prosecutors will enable us to broaden the range of cases where these powers are used, and help us take performance to the next level. The power to launch civil recovery proceedings will be extended to the three main prosecutors in England and Wales; the Crown Prosecution Service (CPS), the Revenue and Customs Prosecutions Office (RCPO) and the Serious Fraud Office (SFO). It will also be extended to the Public Prosecution Service in Northern Ireland.
>
> Subject to the passing of the necessary legislation, the merger provisions are likely to come into force from April 2008. Both the ARA and SOCA are committed to maintaining their efforts in the recovery of criminal assets during the transition.[182]

When the measures were announced, the Shadow Home Secretary, Rt Hon David Davies MP, was reported to have backed the merger in principle stating that "it is common sense to merge [ARA] with SOCA but this should not mean that its costs and level of assets recovered are no longer published. We still need to be able to monitor its effectiveness".[183]

2. The relevant clauses

The Serious Crime Bill would abolish the Assets Recovery Agency and transfer its functions to a number of different bodies, including the Serious Organised Crime

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[182] HC Deb 11 January 2007, c21-22WS

[183] "£60m Asset Recovery Agency to be scrapped", *The Guardian*, 11 January 2007

Agency. At the Second Reading debate in the Lords, Baroness Scotland set out the Government's proposals relating to asset recovery:

> In recent years, we have made significant progress in recovering the proceeds of crime. The total amounts recovered have doubled since the Proceeds of Crime Act 2002 came into force to just under £100 million in 2005-06. If we meet this year's target of £125 million, as we are on course to do, overall performance will have increased fivefold over the past five years. But we want to push on. We have therefore set a new target to double the current figure to £250 million per year by 2009-10. Not only is it right that we should not allow criminals to profit from the harm that they cause, but we must continue this success to prevent these proceeds from being a draw into serious crime and effectively a source of investment funding future serious criminal activity. As a result, we have reviewed the way in which criminal assets are recovered and have brought forward in this Bill proposals that will enable us to improve performance further.
>
> In order to bring work on the recovery of assets closer to the intelligence-gathering and investigative functions carried out by the Serious Organised Crime Agency, we have decided to merge the Assets Recovery Agency with SOCA. This will allow for easier sharing of information and intelligence and will maximise the skills and expertise of both agencies. The ARA has contributed to the total amounts recovered in recent years and has made a significant impact in disrupting serious criminal groups and freezing their assets. The Government believe, however, that more can be achieved, and the merger should enable further improvement.
>
> The ARA's powers to bring proceedings in the High Court for the civil recovery of the proceeds of crime, under Part 5 of the Proceeds of Crime Act 2002, will be shared between SOCA and the main prosecuting bodies. The ARA's powers to carry out certain taxation functions under Part 6 of the Proceeds of Crime Act will transfer to SOCA. The agency's responsibilities for the training and accreditation of financial investigators will transfer to the National Policing Improvement Agency.
>
> There are further measures in the Bill designed to drive up our overall performance in this area. Three specific powers, which are already available to the police and Revenue and Customs officers under the Proceeds of Crime Act, will be extended to certain accredited financial investigators who operate under the Act. These are powers to: seize property to prevent its removal from the United Kingdom; seize and seek the forfeiture of suspect cash; and execute search warrants. The safeguards that currently apply when police and HMRC officers use the search and seizure powers under the POCA will similarly apply to accredited financial investigators. We are also creating a new type of investigation under the Proceeds of Crime Act; namely, a detained cash investigation. This new power, requested by law enforcement agencies, will help them in the preparation of a cash forfeiture case to go before the courts.[184]

ARA does not have operational powers in Scotland, save for Revenue purposes, which is a reserved matter. Therefore the transfer of functions to SOCA would not have any effect on operational issues relating to police and criminal justice. Civil recovery and

[184] HL Deb, 7 February 2007, cc732-733

criminal confiscation in Scotland would therefore continue to be pursued through the Civil Recovery Unit and the Crown Office and Procurator Fiscal Service. The effects of the Bill in Northern Ireland are discussed in further detail below.

The relevant provisions can be found at clauses 68-76 and Schedules 8 and 9 of the Bill. The effects of some of the provisions in Schedule 8 are set out below:

- (a) Schedule 8, Part 1 (abolition of confiscation functions);
- (b) Schedule 8, Part 2 (transfer to SOCA and prosecution authorities of civil recovery functions);
- (c) Schedule 8, Part 3 (transfer to SOCA of Revenue functions and power to abolish those functions);
- (d) Schedule 8, Part 4 (transfer to SOCA of investigation functions);
- (e) Schedule 8, Part 5 (transfer of accreditation and training functions to National Policing Improvement Agency).

As will be apparent from the list above, not all powers will be transferred to SOCA. In particular, under Part 1 of the Schedule, the role of the Director of ARA under Parts 2 and 4 of POCA in respect of confiscation and restraint orders in England and Wales and Northern Ireland, respectively, would be repealed. A confiscation order is an order served by the court following conviction for a defendant to pay proceeds of his crimes. It would still be open for the Courts to make an order following the conviction of a defendant, but the agency would no longer have any role.

Under Part 3 of Schedule 8, the powers under Part 6 of POCA would be transferred to SOCA. Part 6 would enable the Director of ARA to serve on HM Revenue & Customs a notice that s/he intends to carry out certain Revenue functions. However, paragraph 100 of Schedule 8 creates a power for the Secretary of State to repeal by order Part 6 of POCA (as amended by Schedule 8). Such an order would be subject to the affirmative resolution procedure.

The reason for this change was identified in the Asset Recovery Action Plan, which states that:

> The PIU [Performance and Innovation Unit] report identified tax powers as another highly promising but under-used tool against criminal wealth. In Ireland, tax provides more than 80% of the total receipts of the Criminal Assets Bureau (CAB). There is definitely scope for tax to play a greater role than it does at present.
>
> POCA sought to address this by giving tax raising powers to ARA. It also introduced for the first time the ability to tax income whose source could not be determined, although ARA is required to establish that the income or gain arose from a trade or vocation. ARA has used tax powers particularly in Northern Ireland, but also in England, Wales and Scotland. However, criminal asset recovery by way of taxation remains low.
>
> The Serious Crime Bill transfers this ARA power to SOCA. HMRC and Home Office have however agreed to conduct a fundamental review into the use of tax powers against crime. This review is to report by March 2008, but with many key recommendations expected by September 2007. The purpose of the review is to

> decide how best to ramp up the current effort, decide on whether to concentrate the effort on taxing criminals in HMRC, SOCA or both, and assess the need for legislative changes.
>
> At present, ARA has the ability to levy tax on a slightly broader range of income than HMRC, though ARA has no power to prosecute, and lacks some other HMRC powers, for example search and seizure. In addition, ARA's capacity has been fairly limited given its size. Some early, high profile tax prosecutions against organised criminals could send a powerful signal. HMRC is currently working with RCPO and other prosecutors to produce guidance to forces and prosecutors on procedures for agreeing and running tax investigations and prosecutions.[185]

These changes will obviously have some impact on the "hierarchy" discussed above, although it is worth noting that Schedule 8, paragraph 119 includes an amendment to POCA 2002 to the effect that "a relevant authority must exercise its functions under this Act in the way which it considers is best calculated to contribute to the reduction of crime." The amendment also states that "the guidance must indicate that the reduction of crime is in general best secured by means of criminal investigations and criminal proceedings."

Section 68(3) gives effect to Schedule 9 to the Bill which, amongst other things, provides for the transfer of ARA staff to either the Serious Organised Crime Agency (SOCA) or the National Policing Improvement Agency (NPIA), which was established under s 1 of the *Police and Justice Act 2006*.

3. Northern Ireland

The work of the ARA in Northern Ireland has received more positive press coverage in comparison with the rest of the United Kingdom. In June 2005, it was reported that ARA had doubled its investigative staff in Northern Ireland from 25-50.[186]

In March 2007 the Northern Ireland Affairs Committee took evidence from Vernon Coaker MP and Paul Goggins MP about the work of the agency.[187] In May 2007, following the publication of ARA's 2006-7 annual report, the interim director, Alan McQuillan said:

> This has been another very good year for the Agency in Northern Ireland in terms of restraining assets derived from criminal activity. We disrupted some 22 criminal enterprises and froze £14.5 million worth of assets against targets of 20 to 25 and £4m to £5m respectively. This is further confirmation that we are having a real impact on the criminal economy here and ensuring that these assets are taken out of circulation pending court action to recover them. The new cases this year involved a wide range of alleged criminality including fuel smuggling, cigarette smuggling, mortgage fraud, drug trafficking, robbery, illegal money lending and benefit fraud.

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185 http://www.homeoffice.gov.uk/documents/cons-2007-asset-recovery/asset-recovery-consultation.pdf?view=Binary (as 30 May 2007), Chapter 4.5

186 http://news.bbc.co.uk/1/hi/northern_ireland/4071018.stm (as 30 May 2007)

187 Northern Ireland Affairs Committee, *The Asset Recovery Agency*, 21 March 2007, HC 417

> We are therefore making real progress in freezing assets but regrettably have not been successful in getting court orders to recover the assets in question. Last year we set a target to recover between £4.5 and £7.5 million worth of assets but were only able to realise £443,000.
>
> We face similar challenges in the rest of the UK but experience in Northern Ireland suggests that cases here are taking longer to come to the final stages and that respondents here seem less inclined to settle the case at an earlier stage, despite the fact that this may be in their own as well as in the public interest. We are therefore seeing a larger number of legal challenges here and some specific tactics by some respondents which we believe are designed to try to slow down the process.[188]

It is clear from the above figures that the Northern Ireland office is suffering from similar difficulties in actually recovering (rather than freezing) assets – recovering only about 10% of its lowest target.

During the debate in the Lords, the operation of the ARA in Northern Ireland became an issue. Concerns about the status of the new body in Northern Ireland remained amongst several Lords. Moving an amendment to the Bill, Viscount Bridgeman stated that:

> As my noble friend Lady Anelay kindly highlighted at Second Reading, my noble friend Lord Glentoran and I are concerned that the proposed merger will mean a narrower focus. The Police Service of Northern Ireland is particularly worried that that narrowing will effectively result in a reduced focus on Northern Ireland, with the risk, for example, that the intimidation of neighbourhoods and persistence of protection rackets in sectors of the local economy will simply not appear high enough on any scale of the SOCA priorities in London.
>
> The House of Commons [Select Committee on Northern Ireland] believed that the Assets Recovery Agency had made a significantly positive start within a short space of operational time. Indeed, it envisages the ARA continuing to play a key role in action against organised crime. Paragraph 40 of the report [Organised Crime in Northern Ireland][189] states: ""We welcome the growing number of referrals to the Agency, and the Agency's assurance that it pursues all viable cases referred to it, regardless of whether the cases have a loyalist or republican link. We cannot stress enough the importance of the law enforcement agencies in Northern Ireland continuing to refer cases they believe can be pursued by the Agency"."
>
> I also highlight the attention that the committee drew to the better success record of the Criminal Assets Bureau in the Republic of Ireland and the additional powers that the CAB there enjoys. I would be interested to know how the Minister envisages the proposed ARA-SOCA set-up working with the CAB.
>
> Can the Minister inform the Committee whether the Government took into account that Commons committee report when drafting the Bill? Indeed, have they consulted the Police Service of Northern Ireland or the Government of the

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[188] http://www.assetsrecovery.gov.uk/MediaCentre/PressReleases/2007/ARAFREEZES14.5MILLIONCRIMINALASSESTSINNORTHERNIRELAND.htm (as 29 May 2007)

[189] HC 886-I

> Republic of Ireland in considering the provisions in the Bill? I understand that both consider that Northern Ireland's particular circumstances have been overlooked and are concerned that there will be a cut in the resources available for asset recovery work—resources that the committee considered inadequate in the light of the particular circumstances of Northern Ireland. What assurances can the Minister give us that resources will not be filtered away from Northern Ireland asset recovery work? Will she undertake to consider a review of the adequacy of the resources in the light of the Commons committee's conclusions? It would seem to be an appropriate time if everything is to be merged.
>
> I understand that Vernon Coaker has suggested in another place that the merged SOCA-ARA body will have a designated officer responsible for Northern Ireland. A designated officer is not good enough, especially if he or she is not even based in Belfast. Will the Minister please clarify the situation and explain why, if there is to be a designated officer, the Government have not considered maintaining a unit that is actually based in Northern Ireland, as the amendment suggests? It would be a great help if, in her reply, the Minister could confirm that the Government will transfer all the Northern Irish ARA responsibilities to SOCA. Alternatively, is there truth in the rumour that tax evasion work may be transferred to Revenue and Customs?
>
> Asset recovery work is best pursued with the necessary dedication and vigour by people on the ground rather than by those based far away in London. It is essential that staff have an in-depth understanding of the history and peculiarities of Northern Ireland. The ARA has successfully built up a significant working relationship with the Garda and with units in the United Kingdom, the USA and beyond. Indeed, I believe that the measure of the ARA's success is that it is said to be hated by the paramilitaries. It is essential that those who have built up working relationships with the police service and other key agencies there are not lost, thereby setting back work possibly for months, if not longer. The Minister acknowledged that the ARA has contributed to the total amounts recovered in recent years and has made a significant impact in disrupting serious criminal groups and freezing their assets. What commitment can she provide to the Committee that the service that the Government have provided for Northern Ireland will not be lost in the newly merged units?
>
> In summary, we would like a dedicated unit, based in situ in a dedicated team with its own management and, most important, its own budget. We do not want a situation in which work cannot be undertaken in Northern Ireland because the budget has been used up in Birmingham. We also wish to make certain that the money recovered in Northern Ireland is reinvested in Northern Ireland.[190]

In reply, the Minister, Baroness Scotland, indicated that:

> The Assets Recovery Agency is a success story in Northern Ireland. The new arrangements will not change that. We will still pursue criminals and their assets with the same force as we have done to date. I endorse the words of the noble Viscount, Lord Bridgeman, on how the agency has been of particular significance in Northern Ireland. That it is disliked so much is a badge of honour and not something of which it should feel the least bit ashamed.

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[190] HL Deb, 27 March 2007, cc1588-91

We have made provision in paragraph 143 of Schedule 7 to the Bill that the Serious Organised Crime Agency must appoint and designate one of its staff as a person with responsibility in the organisation for asset recovery in Northern Ireland. In a letter of 1 March to Lady Sylvia Hermon in another place, my right honourable friend the Home Secretary said:

"SOCA are happy to confirm that the current asset recovery team in Northern Ireland will retain its distinct identity, and SOCA will ensure asset recovery retains an appropriately high public profile, reflecting the important contribution it has been making to crime reduction and community confidence".

Our aim is that this will improve and enhance our efforts on the recovery of criminal proceeds. There will be no diminution in the resources available for asset recovery work in Northern Ireland, as all staff in the Assets Recovery Agency in Belfast will have the opportunity to transfer to the Serious Organised Crime Agency.

The agency will dedicate at least the same level of resource in Northern Ireland as the Assets Recovery Agency currently spends, and SOCA's presence in Northern Ireland will be at least as large as the current office of the Assets Recovery Agency. As at present, asset recovery work in Northern Ireland will continue to be focused on local priority targets. The Northern Ireland public can be assured that the asset recovery effort will benefit from guaranteed resourcing. We shall be looking for challenging targets to increase further the performance in the Province.

I hope that we can agree that we have addressed the concerns in this amendment by the separate provision in the Bill requiring SOCA to appoint a member of staff with clear responsibility for proceeds of crime in Northern Ireland and by the earlier assurances that I have given. For these reasons, we are not persuaded that we need to make specific provision in the Bill as proposed in the amendment. Further, we are not convinced that a statutory requirement to set up such a unit of the Serious Organised Crime Agency in Northern Ireland would necessarily result in our achieving the most operationally effective way of tackling organised crime, or attacking criminal proceeds in Northern Ireland in the future. Rather, it could limit the director-general's operational capability and flexibility.

For example, at some future date the director-general may wish the Assets Recovery Agency staff in Belfast who transfer to SOCA to be part of a larger unit with a wider range of responsibility linked to the recovery of the proceeds of crime in order to maximise their effectiveness. I would also question whether the director-general should be required to set up a dedicated asset recovery unit but not, for example, specialist units for other areas of SOCA activity in Northern Ireland, since the needs of Northern Ireland have to be met as broadly as anywhere else where SOCA will have responsibility.

For all those reasons, the amendments are not necessary, but we understand why they have been tabled. The noble Viscount and the noble Baroness are properly reflecting anxiety expressed in the Province because of the inherent risks that there always are when any of us contemplate change. It is absolutely right that we all want to achieve at least the maintenance of the high performance that we have now. We would like to do a lot better, and we believe that it is possible to do even better than we do now. Given that we have made express provision in the Bill for SOCA to have an officer assigned to, and with

> responsibility for, asset recovery activity in Northern Ireland, I hope that I have addressed the spirit of these amendments and that the noble Viscount will be content.
>
> The noble Viscount also asked me specifically about the cross-border relationship with the Republic. I assure him that we have very good relations and welcome the close links that have been forged between the Criminal Assets Bureau and the ARA. We are committed to continuing this close co-operation when the ARA and SOCA are merged. We will legislate separately to enable better exchange of information between HM Revenue and Customs and the Criminal Assets Bureau on civil recovery of criminal assets, which will be a significant contribution to the combined efforts of the UK and the Republic against organised crime.
>
> The Criminal Assets Bureau in Dublin and the ARA operate in different ways. As the noble Viscount has identified, the CAB is a different model. The CAB model works well in the Republic of Ireland because the organisations involved have a national remit. Northern Ireland is one region of the UK and organisations operating there, such as HMRC and SOCA, have UK-wide responsibilities that would not be devolved to a regional unit. However, the Organised Crime Task Force in Northern Ireland provides a vehicle through which all organisations engage and come together to co-operate, including on assets recovery. One sub-group of the OCTF looks specifically at criminal finance. I hope that I have reassured the noble Viscount that that is something with very much value, which we want to consolidate and improve on if we can. Those links have been very beneficial for the CAB and for us.
>
> I hope that I have answered all the questions raised by the noble Viscount, but if I have neglected any, I will be very happy to respond further in writing.[191]

The amendment was subsequently withdrawn.

4. Other measures relating to the proceeds of crime

Part 3 of the Bill will also give additional powers to "accredited financial investigators", including the power to seize any property subject to a restraint order (to prevent its removal from England and Wales or Northern Ireland) and the power to search for cash on a person or premises and seize it if it is suspected that it is the proceeds of unlawful conduct or intended for use in such conduct.. Such powers are already enjoyed by constables and officers of Her Majesty's Revenue and Customs. Financial investigators would be granted these powers of seizure if they fell within a description of investigator specified for this purpose by an order made by the Secretary of State.

[191] HL Deb, 27 March 2007, cc1591-94

VII Other measures

A. Regulation of investigatory powers

The *Regulation of Investigatory Powers Act 2000* places on a statutory footing the interception of communications, access to communications data and surveillance operations. Clause 77 gives effect to Schedule 12 which, among other things, amends the 2000 Act to take into account the 2005 merger of the Inland Revenue and HM Customs and Excise Departments to form HM Revenue and Customs. The effect of the changes is that investigatory powers already possessed in relation to former Customs and Excise matters would now be available for former Inland Revenue matters as well. The 2000 Act and the *Police Act 1997*, which is also amended, both include requirements that interception and surveillance be proportionate, for example in their specification that they should be in relation to the investigation of serious crime. During second reading, Baroness Scotland gave assurances that this would continue to be the case:

> The Bill makes certain surveillance powers that HMRC currently has only for serious crime in relation to ex-Customs and Excise matters also available to it for serious crime in relation to ex-Inland Revenue matters.
>
> […]
>
> HMRC consulted on this change in March 2006. The majority of those who responded regarding the extension of these powers were in favour of what is proposed, provided that the powers can be used only in criminal investigations into serious tax crime and continue to be subject to the same safeguards and controls. I confirm that the safeguards and controls will be unaltered and that the powers will be used only for criminal investigations into serious tax crime. The use of the powers is also overseen by the independent Interception of Communications Commissioner and the Office of Surveillance Commissioners. None of that will change. These powers are not available for HMRC to use in exercising its routine civil compliance work—for example, tax inspectors checking that tax returns are accurate. Only the specialist teams that undertake investigations into serious tax crime may apply to use these powers.[192]

B. Power to search for firearms

Under Section 60 of the *Criminal Justice and Public Order Act 1994*, if an officer of at least the rank of inspector reasonably believes that serious violence may take place within a particular area or that people are carrying offensive weapons there, he or she may give an authorisation enabling police officers to stop and search people and vehicles within the specified locality without the requirement of reasonable suspicion that would otherwise be required under the *Police and Criminal Evidence Act 1984*. An authorisation under the 1994 Act can last for up to 48 hours.

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[192] HL Deb 7 February 2007 cc 733-4

Clause 78 of the *Serious Crime Bill* seeks to enable a police constable who has reason to believe that someone is carrying a firearm within a particular area to arrange, on his own authority, for that area to be sealed off and for people or vehicles in that area to be searched for firearms "by whatever means he considers appropriate". The area which may be sealed off is not limited and there is no provision limiting the time during which the area may be sealed off.

Clause 78 was added to the Bill through an amendment moved by the Conservative peer Lord Marlesford during the Bill's report stage in the House of Lords.[193] In opposing the amendment on behalf of the Government Baroness Scotland said:

> The noble Lord will know that it remains the view of both the ACPO lead on the criminal use of firearms, Chief Constable Keith Bristow of Warwickshire and the Stop and Search lead, Deputy Chief Constable Craig Mackey of Gloucestershire, that the following is the force's expressed position:
>
> > "a) there are sufficient powers already in existence to detain and search; b) the amendment as drafted would create a wide extension of police powers; c) the power has not been requested by the police, nor do they identify a gap in current legislation that requires such new powers".
>
> That is the ACPO position, expressed on behalf of the police force.[194]

In responding to Baroness Scotland's remarks Lord Marlesford suggested that there were differing views within ACPO on this subject.[195] The amendment was agreed to on division. The Government is expected to seek to remove the amendment during the Bill's passage through the House of Commons.

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[193] HL Debates 30 April 2007 c916-928
[194] ibid. c925
[195] ibid. c925-6