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# ***The Criminal Justice and Immigration Bill***

**Bill 130 of 2006-07**

This Bill is due to be debated on second reading in the House of Commons on 8 October 2007. It is a very wide-ranging Bill, drawing together a large number of disparate and sometimes controversial policy issues.

It includes measures on youth justice, sentencing and the release and recalls of prisoners. Provisions on criminal appeals, allowing non-legal staff to prosecute in magistrates' courts and restricting the compensation payable for miscarriages of justice have provoked some controversy.

The Bill also covers aspects of pornography and prostitution, offences relating to nuclear material and facilities, data protection penalties and international co-operation in criminal matters.

Further parts of the Bill introduce a new 'violent offender order', more measures against anti-social behaviour and changes to the police disciplinary procedures.

Finally the Bill creates a new restricted immigration status for foreign criminals who cannot be removed from the UK.

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## Summary of main points

The Criminal Justice and Immigration Bill was published on 26 June 2007 and is due to have its second reading debate in the House of Commons on 8 October 2007. It is a very wide-ranging bill, drawing together a large number of disparate policy issues.

Sentencing provisions form a large part of the Bill. In respect of youth justice, it would introduce a new generic community sentence for young offenders, incorporating the existing community orders to provide a menu of sentencing options for courts. It would also extend the current arrangements for adult conditional cautions to young offenders.

The Bill would enable the courts to stipulate that adult offenders given discretionary life sentences or indeterminate sentences serve a higher proportion of their minimum term ("tariff") before being considered for release, and end the current discounts available for offenders who are given indeterminate sentences for public protection if their minimum term is subsequently held to be unduly lenient.

Further clauses concern the early release and removal of prisoners, and recalls to prison. It would allow for offenders whom the Secretary of State deems not to be dangerous and who breach the terms of their licence to be recalled to prison for a fixed 28 day period (at present the period to be spent in prison is decided by the Parole Board), and would extend the Early Removal Scheme, which currently applies to certain foreign nationals who are due to be deported, to include prisoners who intend to live permanently abroad.

The Bill's provisions on appeals have provoked some controversy. It would prevent the Court of Appeal from quashing the convictions of offenders whose appeals are successful on procedural or technical grounds.

The Bill would put the Prisons and Probations Ombudsman, who investigates complaints from prisoners and deaths in custody, onto a statutory footing as Her Majesty's Commissioner for Offender Management and Prisons.

Other criminal justice provisions include measures designed to extend the powers of designated case workers in magistrates' courts so as to enable them to conduct trials and other proceedings, which have been controversial. The Bill also seeks to amend the arrangements governing the payment of compensation to victims of miscarriages of justice to bring them into line with those governing the payment of compensation to victims of violent crime.

In relation to pornography, the Bill would extend the definition of an indecent photograph to include images derived from photographs. It would introduce a ban on the possession of extreme adult pornography.

The Bill also amends the offence of "loitering or soliciting for the purposes of prostitution". It does not decriminalise the offence, even for people under 18, but removes the term "common prostitute" and introduces the possibility of a new sentence of "orders to promote rehabilitation" as an alternative to a fine for those convicted. The Bill does not consolidate or revise the other prostitution offences.

New offences relating to nuclear material and nuclear facilities, including some extra-territorial offences, would also be created by the Bill.

The Bill would introduce custodial sentences for unlawfully obtaining or disclosing personal information in breach of section 55 of the Data Protection Act 1998.

The European Council Framework Decision on the mutual recognition of financial penalties would be given effect through amendments made by the Bill, which also seeks to amend the law concerning mutual legal assistance in revenue matters.

The Bill would introduce a new form of "civil preventative order": the Violent Offender Order, which is intended to enable courts to impose post-sentence restrictions on violent offenders, such as restrictions on their movements and where they can live.

It also includes a number of measures intended to tackle anti-social behaviour. These include Premises Closure Orders, to allow for the closure of premises where there has been anti-social behaviour and significant and persistent disorder, and a new offence of causing nuisance or disturbance on NHS premises.

The Bill seeks to amend the primary legislation governing police discipline proceedings to enable the introduction of a number of changes in police discipline regulations.

The final substantive part of the Bill introduces a restricted immigration status for foreign criminals whom the Home Secretary does not want in the UK but who cannot be removed for human rights reasons. This follows the 2006 ruling of the Court of Appeal against the Home Secretary in the 'Afghan hijackers' case.

# CONTENTS

<b>I</b>	<b>Youth Justice</b>	<b>9</b>
	<b>A. Background</b>	<b>9</b>
	<b>B. The <i>Criminal Justice Act 2003</i></b>	<b>10</b>
	<b>C. Youth Rehabilitation Orders</b>	<b>10</b>
	<b>1. Background</b>	<b>10</b>
	<b>2. Current orders to be incorporated</b>	<b>11</b>
	<b>3. Requirements under the new Youth Rehabilitation Orders</b>	<b>12</b>
	<b>4. Commentary</b>	<b>13</b>
	<b>D. Referral Orders</b>	<b>14</b>
	<b>E. Youth Default Orders</b>	<b>15</b>
<b>II</b>	<b>Sentencing</b>	<b>15</b>
	<b>A. The purposes of sentencing for offenders under 18</b>	<b>19</b>
	<b>B. Abolition of suspended sentences for summary offences</b>	<b>20</b>
	<b>C. Community sentences</b>	<b>21</b>
	<b>1. Restriction on imposing community sentences</b>	<b>21</b>
	<b>2. Imposition of an unpaid work requirement for breach of a community order</b>	<b>21</b>
	<b>D. Indeterminate sentences: determination of “tariffs”</b>	<b>22</b>
<b>III</b>	<b>Prisoners – early release, early removal and recalls</b>	<b>26</b>
	<b>1. Background</b>	<b>26</b>
	<b>2. Fixed term recalls</b>	<b>29</b>
	<b>3. Release after a fixed term recall.</b>	<b>30</b>
	<b>4. Recall of life prisoners released on licence</b>	<b>30</b>
	<b>5. Foreign prisoners</b>	<b>32</b>
<b>IV</b>	<b>Appeals</b>	<b>35</b>
	<b>A. Appeals against conviction</b>	<b>35</b>
	<b>B. Prosecution Appeals</b>	<b>39</b>
	<b>C. Review of unduly lenient sentences</b>	<b>40</b>

<b>V</b>	<b>Her Majesty’s Commissioner for Offender Management and Prisons</b>	<b>40</b>
	<b>A. The development of the current system</b>	<b>40</b>
	<b>B. Calls for a statutory Ombudsman</b>	<b>41</b>
	<b>C. Previous legislation</b>	<b>42</b>
	<b>D. The Bill’s provisions</b>	<b>42</b>
	<b>E. Commentary</b>	<b>42</b>
<b>VI</b>	<b>Other criminal justice provisions</b>	<b>43</b>
	<b>A. Alternatives to prosecution: youth conditional cautions</b>	<b>43</b>
	<b>B. Cautions and the <i>Rehabilitation of Offenders Act 1974</i></b>	<b>44</b>
	<b>C. Extension of the powers of non-legal staff to conduct trials and other proceedings in magistrates’ courts.</b>	<b>45</b>
	<b>D. Criminal legal aid</b>	<b>47</b>
	<b>E. Compensation for Miscarriages of Justice</b>	<b>49</b>
<b>VII</b>	<b>Pornography</b>	<b>50</b>
	<b>A. The Bill’s provisions</b>	<b>50</b>
	<b>B. Policy background</b>	<b>52</b>
	<b>1. Extreme pornography</b>	<b>52</b>
	<b>2. Child pornography</b>	<b>55</b>
<b>VIII</b>	<b>Prostitution (“street offences”)</b>	<b>57</b>
	<b>A. Prostitution offences</b>	<b>57</b>
	<b>B. Reviews of the law</b>	<b>58</b>
	<b>C. Clauses 71-73</b>	<b>60</b>
	<b>1. Soliciting</b>	<b>60</b>
	<b>2. New sentencing order</b>	<b>61</b>
	<b>3. Criminal records</b>	<b>63</b>
<b>IX</b>	<b>Offences relating to nuclear material and nuclear facilities</b>	<b>63</b>
<b>X</b>	<b>Data protection penalties</b>	<b>63</b>
<b>XI</b>	<b>Part 7: International Co-operation in relation to Criminal Matters</b>	<b>66</b>
	<b>A. Background to “mutual recognition”</b>	<b>66</b>

	<b>B.</b>	<b>Possible grounds for refusal to enforce a financial penalty</b>	<b>67</b>
	<b>C.</b>	<b>Mutual legal assistance in revenue matters</b>	<b>68</b>
<b>XII</b>		<b>Violent Offender Orders</b>	<b>69</b>
	<b>A.</b>	<b>The use of civil orders to prevent crime</b>	<b>69</b>
	<b>B.</b>	<b>Violent Offender Orders</b>	<b>71</b>
	<b>C.</b>	<b>Notification Requirements</b>	<b>78</b>
	<b>D.</b>	<b>Offences</b>	<b>79</b>
	<b>E.</b>	<b>Comment</b>	<b>79</b>
<b>XIII</b>		<b>Anti-social behaviour</b>	<b>80</b>
	<b>A.</b>	<b>Previous legislation</b>	<b>80</b>
	<b>B.</b>	<b>Consultation on further proposals</b>	<b>81</b>
	<b>C.</b>	<b>Premises Closure Orders</b>	<b>82</b>
		<b>1. Closure of crack houses</b>	<b>82</b>
		<b>2. Closure Orders in Scotland</b>	<b>83</b>
		<b>3. The Bill's provisions</b>	<b>84</b>
		<b>4. Housing implications</b>	<b>84</b>
		<b>5. Commentary</b>	<b>86</b>
	<b>D.</b>	<b>Offence of causing nuisance or disturbance on NHS premises</b>	<b>88</b>
		<b>1. Background</b>	<b>88</b>
		<b>2. Responses</b>	<b>90</b>
		<b>3. The Bill</b>	<b>92</b>
	<b>E.</b>	<b>Anti-Social Behaviour Orders and Individual Support Orders</b>	<b>93</b>
<b>XIV</b>		<b>Police discipline</b>	<b>94</b>
	<b>A.</b>	<b>Background</b>	<b>94</b>
	<b>B.</b>	<b>Criticisms of the current system</b>	<b>95</b>
	<b>C.</b>	<b>The Taylor Review</b>	<b>96</b>
	<b>D.</b>	<b>The Government response to the Taylor review</b>	<b>99</b>
	<b>E.</b>	<b>Draft Regulations</b>	<b>99</b>
	<b>F.</b>	<b>The Bill</b>	<b>100</b>

<b>XV</b>	<b>Restricted immigration status</b>	<b>100</b>
<b>A.</b>	<b>Background</b>	<b>100</b>
	1. Immigration ‘leave’ and temporary admission	100
	2. Revocation of refugee status	102
	3. Deportation of foreign national criminals	103
	4. The ‘Afghan hijackers’ case	104
<b>B.</b>	<b>Part 11 of the Bill</b>	<b>106</b>
	1. A new restricted immigration status	106
	2. “Foreign criminals”	106
	3. Restrictions	108
	4. Support	109



# I Youth Justice

## A. Background

The Labour Government made wide-ranging changes to the youth justice system soon after coming into office. The *Crime and Disorder Act 1998* reformed local provision of services, with the introduction of multidisciplinary Youth Offending Teams (YOTs) to coordinate youth justice in their area and to provide services and programmes designed to reduce youth offending. The 1998 Act also established the Youth Justice Board (YJB) to oversee and advise on the system and commission custodial places for young people. A key aim of the YJB is to reduce the use of custody, and the Act specifies that the principle aim of the Youth Justice system is to prevent offending by young people.<sup>1</sup>

The 1998 Act also introduced new interventions to deal with young offenders and new sentences for the courts. These included:

- a final warning scheme, designed to end repeat cautioning and provide a progressive response to offending behaviour, ensuring that those who do re-offend after the warning are dealt with quickly through the courts; and
- new community orders, including reparation orders requiring young people to make reparations to victims, and parenting orders designed to reinforce and support parental responsibility.

Further remedies were then added to these, most notably referral orders which were introduced in 2002. These are discussed below.

The reforms were evaluated in 2004 both by the National Audit Office<sup>2</sup> and Audit Commission.<sup>3</sup> The NAO found that the YJB had successfully developed and introduced a range of new non-custodial sentences and programmes for young offenders, but that there was scope to improve forecasting and to develop clearer plans to avoid disruption of work with young people in custody. The Audit Commission found considerable improvements, with young offenders being dealt with more quickly, and being more likely to receive an intervention, and high levels of satisfaction with YOTs. Criticisms included low public awareness about the system, and too many minor offences taking up valuable court time. More recently, the former chair of the Youth Justice Board, Rod Morgan, has expressed concern about the criminalisation of young people for minor offences resulting, he said, from police targets and insufficient discretion, although he also praised other aspects of the reforms such as referral orders, and local innovation over programmes for young offenders.<sup>4</sup>

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<sup>1</sup> Section 37(1)

<sup>2</sup> NAO, *Youth offending: The delivery of community and custodial sentences*, CH 190 2003-04, 21 January 2004. [http://www.nao.org.uk/publications/nao\\_reports/03-04/0304190.pdf](http://www.nao.org.uk/publications/nao_reports/03-04/0304190.pdf), site visited 4 July 2007

<sup>3</sup> Audit Commission, *Youth Justice 2004*, January 2004, <http://www.audit-commission.gov.uk/reports/NATIONAL-REPORT.asp?CategoryID=&ProdID=7C75C6C3-DFAE-472d-A820-262DD49580BF> site visited 4 July 2007

<sup>4</sup> See for example "A new direction", *Safer Society*, Spring 2007, pages 5-8

## B. The *Criminal Justice Act 2003*

In 2000, the Government ordered a fundamental review of sentencing and its impact on reoffending. The result was the Halliday report, which was published in July 2001.<sup>5</sup> The report noted the proliferation of community orders in recent years, which it saw as an obstacle to consistent sentencing. It recommended, amongst other changes, scrapping a number of distinct orders and presenting these as requirements within a single generic “community sentence”.<sup>6</sup> Accordingly, the *Criminal Justice Act 2003* overhauled the range of community orders for adults, subsuming most of them into a new “community sentence” with various possible requirements including unpaid work, curfews and drug and alcohol treatment. Further background is in Part II below an Library Research Paper 02/76. This Bill makes similar provision for community sentences for young offenders.

## C. Youth Rehabilitation Orders

Part 1 of the Bill introduces a new generic community sentence for young people, which combines several existing community sentences.

### 1. Background

In September 2003, the Government published a green paper, *Every Child Matters*, proposing reforms to child protection.<sup>7</sup> Accompanying it was a discussion document entitled *Youth justice – the next steps*<sup>8</sup> which proposed, amongst other things, to “simplify the range of juvenile sentences, in particular replacing nine non-custodial sentences for juveniles with just one, a broader Action Plan Order”.<sup>9</sup>

17. The expanded **Action Plan Order** would normally run from 1 to 12 months and give power to impose on each occasion up to two, or exceptionally three, interventions from a comprehensive menu. Twenty-four months would be available in exceptional cases. The menu would cover fines, reparation and a range of other specified activities – personal support from befrienders; programmes covering drug and alcohol awareness, anger management, mentoring and appropriate sexual behaviour; requirements to report to and comply with specific supervising officer directions; victim–offender mediation; family group conferencing; mentoring; sessions in junior activity centres, which would be an expanded and modernised version of the present junior attendance centres, run by YOTs; other individual specified activities; residence requirements with a responsible family member; fostering including intensive fostering, capacity

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<sup>5</sup> Home Office, *Making Punishments Work: A Review of the Sentencing Framework for England and Wales*, July 2001 <http://www.homeoffice.gov.uk/documents/halliday-report-sppu/>

<sup>6</sup> paragraph 6.6

<sup>7</sup> Department for Education and Skills, *Every Child Matters*, Cm 5860, September 2003

<http://www.everychildmatters.gov.uk/files/EBE7EEAC90382663E0D5BBF24C99A7AC.pdf>, site visited 4 July 2007. Background is given in Library Research Paper 04/68

<sup>8</sup> Home office, *Youth Justice – the next steps Companion document to Every Child Matters*, September 2003,

<http://www.homeoffice.gov.uk/documents/2003-cons-youth-justice-next-ste/youthjusticenextsteps.pdf?view=Binary>, site visited 9 July 2007

<sup>9</sup> paragraph 7

for which we would need to develop over time; hostel placements and living in local authority accommodation; drug treatment and testing; alcohol treatment; and mental health treatment.

Following consultation, this intention was reiterated in the document summarising responses and setting out the Government's proposals, although the proposed name of the order had changed:<sup>10</sup>

**Sentencing in the community:** We believe that it is important for the sentencing options to be simpler and more flexible. The Reparation Order and Referral Order will maintain their distinctive roles but otherwise we shall legislate to introduce a new generic juvenile community sentence with a wide menu of interventions. This new Juvenile Rehabilitation Order will replace the eight current community sentences.

## 2. Current orders to be incorporated

There are five orders which are designated in the legislation "Youth Community Orders" and apply to offenders under the age of 16.<sup>11</sup> The Bill repeals these.<sup>12</sup> They are:

- Exclusion Orders, which last up to three months and prohibit the young person from entering a specified place;
- Action Plan Orders, which last for up to three months, and can impose a range of requirements on young people, including participating in specified activities and complying with education arrangements;
- Curfew Orders, which last for a maximum of six months, and impose a curfew of between two and 12 hours per day, which is monitored electronically;
- Supervision Orders, lasting up to three years, which put the youngster under the supervision of the local authority, probation officer or YOT member and can include a requirement to reside with a particular person or in local authority accommodation, or in serious cases with a local authority foster parent;
- Attendance Centre Orders, which restrict young people's leisure time by requiring them to go to an attendance centre for up to three hours per day (for example on a Saturday) up to a maximum of 36 hours. The centres offer various programmes for offenders to complete, including basic skills and victim awareness.

There are also some orders which now only apply to 16 and 17 year olds, but which used to apply to offenders aged 16 or over. For people aged 18 and over, they have been repealed and replaced by the new generic community sentence introduced by the *Criminal Justice Act 2003*. These orders, which are also incorporated into the new Youth Rehabilitation Order, are:

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<sup>10</sup> Home Office, *Youth Justice – the next steps Summary of responses and the Government's proposals*, <http://www.homeoffice.gov.uk/documents/259029/cons-youth-jus-next-steps-summ?view=Binary>, site visited 9 July 2007.

<sup>11</sup> Section 33 *Powers of Criminal Courts (Sentencing) Act 2000*.

<sup>12</sup> schedule 23

- Community rehabilitation orders (which until 2001 were known as probation orders) requiring supervision by a probation officer or YOT member for between six months and three years;
- Community punishment orders (which until 2001 were known as community service orders) requiring unpaid work of between 40 and 240 hours
- Community punishment and rehabilitation orders, which combine supervision and unpaid work.
- Drug testing and treatment orders, which last for between six months and three years

### **3. Requirements under the new Youth Rehabilitation Orders**

The new orders give the court a menu of different requirements to impose upon the young offender.<sup>13</sup> These are as follows:

- an activity requirement
- a supervision requirement
- if the offender is aged 16 or 17, an unpaid work requirement
- a programme requirement
- an attendance centre requirement
- a prohibited activity requirement
- a curfew requirement
- an exclusion requirement
- a residence requirement
- a local authority residence requirement
- a fostering requirement
- a mental health treatment requirement
- a drug treatment requirement
- a drug testing requirement
- an education requirement.

Most of these are modeled on existing provisions, although there are some fairly minor modifications. However, the activity requirement is new. Under it, a young offender could be required to participate in specified activities or residential exercises for up to 90 days. Activities could be at a specified place, or in accordance with instructions of a “responsible officer”, who could, for example, be a member of the YOT, or a probation officer.

There are certain things which the court would have to consider before making an order. As with the current provisions, it must ensure as far as practicable that requirements avoid conflicting with each other (where more than one are imposed) and with religious beliefs, work or school. Similarly the responsible officer would have to make sure his or her instructions did not conflict with these things.

The fostering requirement and the intensive supervision and surveillance requirement would only be imposed if the offence is punishable with imprisonment and the court is satisfied that the offences are so serious that but for the availability of these orders, a

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<sup>13</sup> Clause 1

custodial sentence would be appropriate. For offenders under the age of 15, the court must be satisfied that they are persistent offenders. A fostering requirement currently exists with supervision orders.

The new Intensive Supervision and Surveillance requirement is based on the current non-statutory Intensive Supervision and Surveillance Programme. This is a six-month programme targeted at the most serious and persistent offenders with a requirement for 25 hours of supervision per week during the first three months and a minimum of five hours thereafter. Each young offender is subject to a curfew monitored through electronic tagging and voice verification or through police monitoring. The 2003 consultation document said that the Government wanted to establish Intensive Supervision and Surveillance as “the main response to serious and persistent offending”<sup>14</sup>.

A more detailed description of the new provisions can be found in the Explanatory Notes.

#### 4. Commentary

The Prison Reform Trust made the following comments on these provisions:

PRT has a number of concerns about this new order:

- There is no overall time limit on the duration of an order. For children, the criminal justice system should be designed to limit access to those for whom there is no other option and to help them leave the system as soon as possible.
- The inclusion of requirements such as those for mental health treatment, education and fostering begs the question as to whether, if such assistance is the purpose of the order, it should not have been obtained voluntarily following diversion from the criminal justice system. PRT would advocate a national network of diversion schemes at police stations and courts.
- A generic community sentence for children reduces the hierarchy of disposals available to the court. It increases the likelihood that the court will take the view that a young person who re-offends has been given their chance and failed. A range of separately denoted disposals reduces this risk.
- The opportunity to promote the advantages of different disposals is diminished by bringing them all under one banner.
- There is no lower age limit for recipients of such an order – presumably, a ten year old child, having reached the age of criminal responsibility, could be made the subject of an order.
- There is a danger in having a large menu, that the courts could be tempted to include a number of requirements, setting the child up to fail.

PRT is pleased to note that a court could only make a youth rehabilitation order when it is dealing with someone for an offence which could be punishable with imprisonment.

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<sup>14</sup> Home office, *Youth Justice - the next steps Companion document to Every Child Matters*, September 2003, <http://www.homeoffice.gov.uk/documents/2003-cons-youth-justice-next-ste/youthjusticenextsteps.pdf?view=Binary>, site visited 9 July 2007

PRT also notes that schedule 2 allows two warnings to be given before a return to court for breaches of an order. The court is then able to order payment of a fine, amend the terms of the order, or re-sentencing for the original offence. It is especially important in dealing with children that every possible option is available to avoid the damaging effects of incarceration. PRT would suggest that the proposals are examined to clarify whether the flexibility currently available to youth offending teams in deciding whether to initiate breach action would be reduced.<sup>15</sup>

## D. Referral Orders

Referral Orders were introduced by the *Youth Justice and Criminal Evidence Act 1999* and, after pilots, were implemented nationally in April 2002. A Referral Order is now the main sentence given to a young person who pleads guilty on a first time conviction, unless the charge is serious enough to warrant custody, or so minor that the court proposes to give an absolute discharge. They require young people to attend a Youth Offender Panel, which is made up of two local volunteers and a YOT member. The panel, with the young person, their parents or carers and the victim (where appropriate) agree a contract lasting between three and 12 months with the aim of preventing reoffending.<sup>16</sup>

Currently the Referral Order is not available where the offender has previous convictions, or has been bound over to keep the peace. The Bill widens the circumstances where they can be made. Under Clause 21, a Referral Order would be possible where the offender has previously been bound over or where the offender has had one previous conviction and where, in respect of that previous conviction, a referral order had not been made.

The Regulatory Impact Assessment states that increased use of referral orders will be more expensive at the outset, but that these should be offset by savings produced by reduced reconvictions in later years:

A greater use of referral orders is expected to reduce re-offending based on the reconviction rate of 44.7% as published in 'Re-offending of juveniles: results from the 2004 cohort, Reconviction Analysis Team, RDS-NOMS, June 2006', table A5, p.18. This is significantly better than the other community sentences with the next best performing sentence, a discharge, having a reconviction rate of 57.6%.

Implementing powers for extending referral orders will produce increased cost at the outset because they largely will be replacing orders with less expensive unit costs. The savings produced by reduced reconviction should offset the increased costs in later years.

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<sup>15</sup> Prison Reform Trust, *Criminal Justice and Immigration Bill Initial briefing paper*, July 2007, <http://www.prisonreformtrust.org.uk/temp/CriminalsJusticeandImmigrationsBillsp-briefingsp0707.doc>

<sup>16</sup> *Youth Justice and Criminal Evidence Act 1999*, sections 1-5

The additional costs are Youth Offending Team (YOT) costs reflecting the increase input required from them. Court costs will, initially, remain unchanged as the offenders would still have appeared but received alternative sentences. Over time the expectation is that overall costs will fall with a reduction in re-offending, but these savings will take time to accrue.<sup>17</sup>

## E. Youth Default Orders

At present, where a magistrates' court would, but for their age, have the power to commit a person under 18 to prison for not paying a fine, the court may take enforcement proceedings against the parent or guardian.<sup>18</sup> Clause 23 would allow a magistrates' court to impose a Youth Default Order instead. The young person could be ordered to undertake unpaid work (if they were aged 16 or 17), attend an attendance centre or be subject to a curfew. The Bill would not repeal the provisions to take enforcement proceedings against the parents, so these would still be available to courts. Details are set out in schedule 1 of the Bill. The maximum number of hours of unpaid work, or attendance at an attendance centre, or curfew would depend on the amount owed by the offender.

## II Sentencing

Following major reforms to the sentencing system in 1991 and 2003, in November 2006 the Home Office published a consultation paper *Making Sentencing Clearer*, which set out further changes the Government was proposing to make to the laws governing sentencing and the early release of prisoners.

The paper includes an account of the recent history of sentencing, beginning with the following comments about the sentencing framework created by the *Criminal Justice Act 1991*:

### **Crime, Justice and Protecting the Public (1990, White Paper) and the 1991 Criminal Justice Act Framework**

1.3 The 1990 White Paper set out that the role of the courts was to impose proportionate and consistent sentences. It provided a general framework for sentence decision-making for the first time. The basic principle was that the severity of the sentence imposed should reflect the seriousness of the offence committed.

1.4 Release provisions for offenders under the 1991 Act depended upon the length of sentence:

- **Under 12 months:** *automatic unconditional release (AUR)* – in prison to half way point; no licence; at risk for second half.

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<sup>17</sup> Ministry of Justice, *Criminal Justice and Immigration Bill Regulatory Impact Assessments*, June 2007, p 41, <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill1.pdf>, site accessed 13 July 2007

<sup>18</sup> Section 81 *Magistrates' Courts Act 1980*

- **12 months to 4 years:** *automatic conditional release (ACR)* – in prison to half way point; on licence to three quarter point; at risk for final quarter.
- **More than 4 years:** *discretionary conditional release (DCR)* – in prison to half way point; release at any point between half way and two thirds when and only when the Parole Board consider the risk of release acceptable; on licence from the point of release to the three quarters point; at risk for final quarter.

1.5 *On licence* means that the offender is under the supervision of the probation service and will have to comply with various requirements, which may include living or working only where approved, attending offending behaviour programmes or being tagged. If the licence is breached the offender is liable to be recalled back into custody until the expiry of the licence. *At risk* means there are no positive obligations on the offender but if he commits a further offence the unexpired part of the sentence can be added to any new one.<sup>19</sup>

Section 2 of the *Crime (Sentences) Act 1997*, which was introduced by the Conservative Government, required a court to impose a sentence of life imprisonment on a person convicted of a serious offence, where the person was aged 18 or over and he or she had a previous conviction for a serious offence. The court was not required to impose such a sentence if it considered that there were exceptional circumstances relating to either of the offences or the offender which justified it not doing so.

The provisions in section 2 of the 1997 Act were repealed by the *Criminal Justice Act 2003*, which is discussed in more detail later in this chapter.

A new sentencing framework was introduced by the *Criminal Justice Act 2003*. The Home Office consultation paper *Making Sentencing Clearer* describes the background to the 2003 Act and its provisions:

#### **“Justice for All” (2002 White Paper) and the Criminal Justice Act 2003**

1.6 John Halliday's sentencing review, “Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales” (July 2001) followed by the Government White Paper: “Justice for All” (July 2002) set out proposals for a wide ranging programme of reform for the criminal justice system.

This formed the basis of the new sentencing framework introduced by the Criminal Justice Act 2003. The Act introduces wide changes to sentencing principles and the sentencing powers of the courts.

#### **1.7 The Criminal Justice Act 2003:**

- **Purposes of sentencing:** for the first time the purposes and principles of sentencing have been put into statute. These are: to protect the public, punish the offender, reduce and deter crime and reform and rehabilitate the offender.

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<sup>19</sup> *Making Sentencing Clearer* Home Office November 2006 p.3



- **Statutory aggravating factors:** the seriousness of an offence (and thus the severity of the resulting sentence) should be increased if the offender demonstrates hostility based upon the victim's race, religion, sexual orientation or disability. For racial and religious aggravation this re-enacts previous legislation but the provision related to disability and sexual orientation is new.
- **Firearms:** a minimum sentence of 5 years for possession or distribution of prohibited weapons or ammunition, the maximum penalty is 10 years imprisonment.
- **Sentencing Guidelines Council:** established a new Sentencing Guidelines Council which is responsible for producing comprehensive guidelines for the full range of criminal offences to help remove uncertainty and disparity in sentencing and give representatives of the police, prisons, probation and victims a voice in sentencing for the first time.
- **Community sentences:** the Act replaced the various kinds of community sentences with a single community order with a range of requirements. The court can choose from the 12 different requirements, such as unpaid work and alcohol treatment, to make up a bespoke community order.
- **Suspended Sentence Orders:** replaced old suspended sentences. They are much more demanding than old suspended sentences and more widely available. An offender will have requirements to fulfil in the community, as in a community sentence. If an offender breaches the requirements the presumption will be that the suspended prison sentence is activated.
- **Public protection sentences:** Imprisonment for public protection (IPP) and the Extended sentence for public protection (EPP) for dangerous offenders. The IPP sentence provides for release to be at a date determined by the Parole Board. The Court will set a minimum term which will be served before the Parole Board considers whether it is safe to release the offender. After release, the offender remains on licence for at least 10 years. The EPP sentence will be for a specified period in the same way as for any other determinate sentence, though it must be for at least 12 months. The court must specify a custodial period and an extension period (during which the offender will remain on licence). From the halfway point of the custodial period the offender may be released if the Parole Board determines it is safe to do so, but release will not be automatic until the end of the custodial period. After release, the offender remains on licence for the unexpired term of the original sentence (if any) and for an extended period designated by the Court when imposing sentence.
- **Sentences over 12 months:** For those serving sentences over 12 months (apart from dangerous offenders) release is automatic at the half-way point but offenders remain on licence until the end of their sentence, thus serving it in full.
- **Murder provisions:** the Act introduced a statutory framework for setting tariffs for mandatory life sentences.
- **Custody plus:** The Act changes the structure of short prison sentences. The new custodial sentences of less than 12 months will consist of a short custodial period of between two weeks and three months followed by a licence period of at least 6 months. The court will be able to set requirements similar to those available under a community order for the licence period.

1.8 The murder provisions were implemented in December 2003. Most of the other provisions were implemented in April 2005 and apply to offences committed on or after that date. The CJS review document announced that the

implementation of the custody plus sentence is being deferred to enable resources to be targeted at the more serious offenders.<sup>20</sup>

The Government expressed the view that the 2003 Act had introduced substantial improvements to the sentencing framework, but that further changes were required:

1.15 Sentencing has become tougher, with offenders more likely to get a prison sentence for almost any offence and that sentence is likely to be longer. In the last 10 years the custody rate for indictable offences in the Magistrates Court has more than doubled, increasing from 7% to around 15%, while the average sentence has remained around 3 months. In the Crown Court the custody rate has increased from 53% to 61% and sentence lengths have increased by some 6.6 months to reach an average of 27 months. The Criminal Justice Act 2003 introduced a new framework designed to achieve a better balance by enabling us to focus our custodial resources on dangerous offenders by providing longer prison sentences for them while providing tough new community orders for those who for whom prison is not the most effective response. So far the evidence is that the courts have made good use of the new sentences for dangerous offenders. The shorter sentences which were anticipated for non-dangerous offenders (as reflected in the guidelines about the new sentences issued by the Sentencing Guidelines Council) have not, however, materialised. Early evidence also suggests the new Suspended Sentence Order may be being used in cases where a community order would be appropriate. The Sentencing Guidelines Council will continue to be mindful of this distinction in the sentencing of different groups of offenders as it produces guidelines on individual offences. Following the significant increases in recent years we now want to see stability in sentence lengths and the custody rate whilst also protecting the public from the most dangerous offenders.

1.16 There are often better options than imprisonment for dealing with less serious non-violent offenders. More of these offenders should be dealt with through robust community sentences that ask a lot of them. Community orders are often more challenging than a short period in custody for less serious offenders. The community order, introduced by the Criminal Justice Act 2003, allows sentencers to attach requirements to the order to match the seriousness of the offence and the risks posed by and needs of the individual. 12 requirements are available to be used with the community order including unpaid work, a curfew backed by a tag, drug rehabilitation, programmes to tackle the offender's behaviour and supervision. The evidence so far is that the courts are not using community orders as fully as they might. The anticipated switch to these new community sentences from short terms of imprisonment that was envisaged has not happened but is a crucial part of the package of sentencing reform we wish to achieve.

1.17 Probation resources should be targeted at those that most need them – those who need intensive supervision because they are dangerous or because of their very high risk of re-offending.

1.18 Less serious offenders should be fined rather than given low-level community sentences. These are now much better enforced, hit offenders in the pocket and save taxpayer money. The use of fines has decreased significantly in the last 10 years (for indictable offences). Rebuilding the use of the fine will avoid

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<sup>20</sup> *ibid.*

probation being overloaded by low-level offenders serving community sentences. We are committed to achieving a shift back towards fines.

1.19 We must also do more to tackle prolific offenders, including drug users to try to prevent their re-offending. We are overhauling the priority and prolific offenders and drug intervention programmes to ensure that the highest crime causing drug-users are identified and targeted with more treatment and tougher conditions in the community, tougher enforcement and new follow-up assessments.

The provisions in Part 2 of the *Criminal Justice and Immigration Bill* are intended to implement further measures the Government considers necessary to ensure that the sentencing system is clearer to the public and more effective.

## **A. The purposes of sentencing for offenders under 18**

Section 142(1) of the *Criminal Justice Act 2003* provides that the purposes of sentencing where adult offenders are concerned are:

- a) the punishment of offenders,
- b) the reduction of crime (including its reduction by deterrence),
- c) the reform and rehabilitation of offenders,
- d) the protection of the public, and
- e) the making of reparation by offenders to persons affected by their offences.

This provision does not apply to:

- offenders aged under 18 at the time of conviction
- offences which attract mandatory sentences or for which custodial sentences are required
- the making of hospital orders, hospital directions or limitation directions under the *Mental Health Act 1983*.

Section 44 of the *Children and Young Persons Act 1933* sets out the principles to be observed by all courts when dealing with children and young persons. Section 44(1) provides that:

Every court in dealing with a child or young person who is brought before it, either as . . . an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.

Section 37 of the *Crime and Disorder Act 1998* sets out the overall purpose of the youth justice system:

- (1) It shall be the principal aim of the youth justice system to prevent offending by children and young persons.
- (2) In addition to any other duty to which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim.

Clause 9 of the *Criminal Justice and Immigration Bill* is intended to complement section 142 of the 2003 Act by inserting a new section 142A into that Act setting out the purposes of sentencing for offenders under the age of 18. The new section is intended to ensure that the courts have regard primarily to the principal aim of preventing offending by children and young people, that they consider the welfare of the offender, as they would be required to do by section 44 of the 1933 Act, and that they also have regard to the same principles and exceptions as would apply under section 142 of the 2003 Act in the case of offenders aged 18 and over, with the exception of “the reduction of crime (including its reduction by deterrence)” which is already largely included in the statutory aims of the youth justice system set out in section 37 of the *Crime and Disorder Act 1998*. The purposes of sentencing for offenders aged under 18 will therefore be:

- The punishment of offenders
- The reform and rehabilitation of offenders
- The protection of the public
- The making of reparation by offenders to persons affected by their offences.

Section 44 of the 1933 Act and section 37 of the 1998 Act will be amended to reflect the fact that they are intended to be subject to the additional duty on the court which is to be introduced by new section 142A. Where a young offender reaches the age of 18 before being sentenced it is intended that the court should consider the adult purposes of sentencing rather than those which will apply as a result of the provisions in Clause 9.

## **B. Abolition of suspended sentences for summary offences**

Section 189 of the *Criminal Justice Act 2003* enables a court which passes a sentence of imprisonment for a term of at least 28 weeks but not more than 51 weeks to suspend the sentence for a period of between six months and two years and order the offender to comply with one or more of a range of requirements under supervision during this period. Amongst other things the requirements listed in section 190 of the 2003 Act include unpaid work, curfews, drug rehabilitation and alcohol treatment. An offender who fails to comply with the requirements imposed by a suspended sentence order may be imprisoned.

In May 2007 the Ministry of Justice published *Penal Policy – a background paper* which noted that since the introduction of the 2003 Act:

The anticipated shift from short custodial to community sentences has not taken place although we now have much more effective community sentences in place, including programmes for prolific offenders. The evidence also suggests that the new suspended sentences are being used in cases where a community order might previously have been used and for summary offences, rather than for more serious offences and in place of custody. Just over 40 per cent of suspended sentence orders are being used for the less serious, summary only offences.<sup>21</sup>

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<sup>21</sup> *Penal Policy – a background paper* Ministry of Justice May 2007 p.9  
<http://www.justice.gov.uk/docs/Penal-Policy-Final.pdf>

In a letter to the *Guardian* on 30 June 2007 Paul Cavadino, chief executive of NACRO, commented:

Courts often misuse suspended sentences by giving them to offenders who would otherwise have received community penalties. If the sentence is later activated this “boomerang” effect increases rather than reduces pressure on prisons.<sup>22</sup>

In its background paper on penal policy the Government said it would provide for Suspended Sentence Orders to be used for the more serious offences, as it had originally intended when they were created in 2003, and that they would apply to indictable offences including either way offences, but not to summary offences.<sup>23</sup> Clause 10 of the *Criminal Justice and Immigration Bill* is designed to implement this provision by preventing courts from imposing suspended sentences on offenders convicted of summary offences. The courts will only be able to impose suspended sentences in respect of offenders convicted of offences triable only on indictment or offences triable “either way”.

## C. Community sentences

The Bill introduces two minor changes to community sentences under the 2003 Act.

### 1. Restriction on imposing community sentences

Section 148 of the *Criminal Justice Act 2003* places restrictions on the courts' power to impose community sentences. Clause 11 of the *Criminal Justice and Immigration Bill* seeks to amend section 148 by emphasizing that the imposition of a community sentence, or of restrictions on liberty under the terms of a community order or youth community order, is not mandatory but is a matter for the court's discretion in any given case.

### 2. Imposition of an unpaid work requirement for breach of a community order

At present a court dealing with an offender who has breached a community order must amend the terms of the order to impose more burdensome requirements. Where the community order does not contain an unpaid work requirement, Clause 22 of the *Criminal Justice and Immigration Bill* seeks to reduce the minimum period of unpaid work that may be imposed for breach of a community order from 40 to 20 hours. The clause is not intended to alter the position where breaches of community orders that already contain unpaid work requirements are concerned.

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<sup>22</sup> “Boomerang effect” – *Guardian* 30.6.2007

<sup>23</sup> *Penal Policy – a background paper* Ministry of Justice May 2007 p.10  
<http://www.justice.gov.uk/docs/Penal-Policy-Final.pdf>

## D. Indeterminate sentences: determination of “tariffs”

Under section 225 of the *Criminal Justice Act 2003*, where a person aged 18 or over is convicted of a serious offence (that is, an offence with a maximum penalty of 10 years' imprisonment or more) committed after 4 April 2005 and the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences, the court has two sentencing options:

- If the offence with which the person has been convicted carries life as its maximum penalty and the “court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life” the court must impose a life sentence (which will be regarded as a discretionary rather than a mandatory life sentence).
- If the offence with which the person has been convicted does not have a maximum penalty of life imprisonment, or it does but the court considers that the seriousness of the offence does not justify a life sentence, it must impose a sentence of imprisonment or detention for public protection (IPP).

The Home Office minister Gerry Sutcliffe summarised arrangements governing the release of prisoners serving extended sentences for public protection and indeterminate sentences for public protection in the following written answer of 8 November 2006:

**Mike Gapes:** To ask the Secretary of State for the Home Department what his policy is on the release of violent sex offenders on parole; and if he will make a statement.

**Mr. Sutcliffe** [*holding answer 19 October 2006*]: Under the *Criminal Justice Act 2003* implemented in April 2005, dangerous violent or sexual offenders must be sentenced either to an extended sentence for public protection (EPP) or an indeterminate sentence for public protection (IPP). Offenders serving an EPP can be considered for release by the Parole Board at the half-way point of the custodial element of the sentence. Offenders serving an IPP can apply to be released once they have served the minimum term set by the court.

For an offender to be released in either of these circumstances, the Parole Board must be convinced that the risk of re-offending and the risk to the public has been sufficiently reduced. In the case of IPP sentences the offender may never be released from custody if the risk to the public cannot be managed safely in the community.

Prisoners whose offences are committed before 4 April 2005 are sentenced under the provisions of the previous legislation (*Criminal Justice Act 1991*). Those sentenced to a determinate prison sentence of four years or more are eligible for parole at the half way point of their sentence and will be released only if the Parole Board considers that safe. If not released at this point, they must be released at the two thirds point of their sentence and remain on licence until the three quarter point. They remain at risk of recall if they commit a further imprisonable offence during the remainder of the sentence.

Under the statutory Multi-Agency Public Protection Arrangements (MAPPA) introduced in April 2001, offenders who are assessed as posing a high risk of harm to others after release from a determinate sentence undergo a more comprehensive risk assessment and more robust risk management planning and implementation. MAPPA allow relevant offenders to be identified, information to

be shared and risk assessments and action plans to be agreed. Work within MAPPA may result in, for example, increased police monitoring, special provision for victim protection, the provision of information to employers, providers of children's services, close supervision and appropriate accommodation. All sex and other violent offenders are liable to be monitored and the level of supervision will depend upon the assessed level of risk posed by the offender, following the principle that resources follow risk.<sup>24</sup>

*Blackstone's Guide to the Criminal Justice Act 2003* comments that:

If an offender has been 'assessed as dangerous' and has been convicted of an offence listed in Sch 15 [to the 2003 Act] whose maximum penalty is 10 years or more, he will receive *either* a sentence of imprisonment for public protection under s 225 of the 2003 Act *or* a discretionary life sentence. If the offender has been assessed as dangerous, and has been convicted of an offence listed in Sch 15 which carries a maximum sentence of life imprisonment, the court must consider the seriousness of the offence when deciding which of the two possible sentences to impose. For either sentence the court *must* specify a minimum term which the offender is required to serve in custody. After that point, the offender will remain in custody until the Parole Board is satisfied that the risk which the offender represents has diminished, such that they can be released and be supervised in the community.<sup>25</sup>

The Sentencing Guidelines Council has provided the following guidance on how the minimum term in cases involving indeterminate sentences should be fixed:

**Fixing the minimum term within an indeterminate sentence.**

This should be approached in the same way as for discretionary and automatic life sentences before the Criminal Justice Act 2003. In most cases, this requires the court:

- to assess the notional determinate sentence that would have been imposed if the indeterminate sentence had not been imposed taking care: to ensure that the appropriate reduction for a guilty plea is allowed, that this sentence is based on the seriousness of the offence and does not incorporate the element of risk which is already covered by the indeterminate sentence
- to identify half that term (which would have been the term actually spent in custody before release on licence)
- to deduct from that term any time spent in custody on remand (subject to the usual discretion to direct that time should not count)

There will be exceptional cases where more than half the term may be appropriate: see *R. v. Szczerba* [2002] Cr.App. R.(S.) 387.<sup>26</sup>

The Home Office White Paper *Rebalancing the Criminal Justice System in favour of the law-abiding majority: Cutting crime, reducing re-offending and protecting the public*, published in July 2006, noted that under the current arrangements:

2.25 In fact, very few offenders on unlimited sentences will be released at the halfway point – it is just the earliest point at which their release can be considered by the parole board. But it gives the public the impression that dangerous people might be released after a very short time; and we believe it is wrong to automatically apply this principle to 'halving' the sentence tariffs for dangerous

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<sup>24</sup> HC Debates 8 Nov 2006 Column 1701-2W

<sup>25</sup> Taylor, Wasik and Leng, *Blackstone's Guide to the Criminal Justice Act 2003*, (2004) p. 253

<sup>26</sup> [http://www.sentencing-guidelines.gov.uk/docs/compendium\\_update\\_may06.pdf](http://www.sentencing-guidelines.gov.uk/docs/compendium_update_may06.pdf)

offenders. We will consult on a range of options for ending this convention and will give the courts the discretion to make dangerous offenders serve a higher proportion of their tariff.<sup>27</sup>

Clause 12 of the *Criminal Justice and Immigration Bill* is designed to increase the courts' discretion to determine the minimum term or "tariff" to be served by an offender who is given a discretionary life sentence or an IPP. The background to this provision is set out in the November 2006 consultation paper *Making Sentencing Clearer*.

3.1 The case of *R v Sweeney* (12 June 2006) raised important issues about how discretionary life sentences and other indeterminate or unlimited sentences are explained and constructed. *Sweeney* was sentenced to life imprisonment for offences of kidnap, and three offences of assault of a child under 13 by penetration. Such sentences comprise three elements: the minimum term that has to be served in prison as a punishment that is determined by the trial judge; a period in prison for public protection that is determined by the Parole Board and is based on the risks posed to the public should the offender be released; and finally a period on licence in the community that for life sentences will be for the rest of the offender's life. The system means that in practice offenders are likely to serve far longer in prison than the minimum term for punishment.

3.2 In determining the minimum term to be served for punishment the judge following section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 considers how long an offender receiving a determinate sentence for the same offence would serve in prison. The starting point is half of the length of the notional determinate sentence since a determinate sentence prisoner serves half of their sentence in the community. The judge also takes into account credit that would be given for a guilty plea and time spent in custody on remand that would count towards the notional determinate sentence to be served. In the *Sweeney* case, the judge concluded that the seriousness of the offence would warrant an 18 year determinate sentence. He then reduced this by a third to 12 years to reflect the early plea of guilty. He then halved the remainder. After deducting the time already served on remand this left a period of 5 years 108 days. He went on to say "It will only be after you have served that period that the Parole Board will be entitled to consider your release. It will only be when it is satisfied that you need no longer be imprisoned for the protection of the public that it will be able to direct your release....You and more importantly the family of J and the public should understand that an early release in your case is unlikely."

3.3 We have already announced that we want judges to have more discretion so that they no longer have to reduce the sentence they impose by up to one third for an early guilty plea, regardless of the circumstances. The Sentencing Guidelines Council is currently considering whether in future judges should be able to reduce or remove the discount for an early guilty plea when the evidence against the defendant is overwhelming.

3.4 But we also need to look at options for reforming other aspects of these sentences. Although few offenders sentenced to indeterminate sentences will be released at the expiry of their minimum term, the complexity of this system can leave the public with the belief that a very serious offender might be released far earlier than is likely to be the case.<sup>28</sup>

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<sup>27</sup> Re-balancing the criminal justice system in favour of the law-abiding majority – Cutting crime, reducing re-offending and protecting the public Home Office July 2006 para. 2.25

<http://www.homeoffice.gov.uk/documents/CJS-review.pdf/CJS-review-english.pdf?view=Binary>

<sup>28</sup> *Making Sentencing Clearer* - Home Office November 2006 p.10



The consultation paper suggested a number of options for reform. Clause 12 of the Bill is designed to implement the Government's preferred option, which is to give courts involved in determining tariffs under section 82A of the *Powers of Criminal Courts (Sentencing) Act 2000* discretion to reduce the notional determinate term by less than half in two types of case:

- Case A where the court is determining the tariff for a discretionary life sentence and the seriousness of the offence, or of the offence and one or more other offences associated with it, is such as to make the crime exceptionally serious (although not serious enough to warrant the imposition of a "whole-life" tariff) and the court takes the view that halving the notional determinate term would not adequately reflect the seriousness of the offence or offences. In such cases the court will have discretion to reduce the tariff by any amount (including nil) it considers appropriate;
- Case B where the court is determining the tariff for a discretionary life sentence or for an IPP (or the equivalent provisions which apply in cases involving juvenile or young adult offenders) and it takes the view that that applying the full fifty per cent reduction in the notional determinate term would result in the offender serving little or no extra time in custody. In such a case the court will have the power to reduce the notional determinate term by less than half but by no less than one third. Providing for Case B in statute will preserve a power that the courts have already established through case-law.<sup>29</sup>

Although Clause 12 sets out the Government's preferred solution to the problem that arose in the Sweeney case, the Home Office consultation paper *Making Sentencing Clearer* noted that:

3.11 One problem with this option is that it would not allow consideration during sentence of any changes to the risk posed by the offender, as a result for example of the treatment of a mental illness. It may be necessary to consider an appropriate mechanism for dealing with such cases. The option would also result in very different periods of punishment where the offender received an indeterminate rather than a determinate sentence for the same offence.<sup>30</sup>

In its initial briefing in the Bill the Prison Reform Trust makes the following comments about Clause 12:

The potential impact of these measures requires careful consideration. PRT is concerned that, in an increasingly risk averse culture, Case A, as defined in this section, could become the default setting. The potential difficulties for a court attempting to explain to a victim, the victim's family and the local press that the seriousness of an offence is not exceptional should not be underestimated.<sup>31</sup>

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[http://www.noms.homeoffice.gov.uk/news-publications-events/publications/consultations/Making\\_sentencing\\_clearer\\_consul?view=Binary](http://www.noms.homeoffice.gov.uk/news-publications-events/publications/consultations/Making_sentencing_clearer_consul?view=Binary)

<sup>29</sup> The particular case cited in the consultation paper is *R v Lang & Ors* [2005] EWCA Crim 2864

<sup>30</sup> *Making Sentencing Clearer* Home Office November 2006 para. 3.11

[http://www.noms.homeoffice.gov.uk/news-publications-events/publications/consultations/Making\\_sentencing\\_clearer\\_consul?view=Binary](http://www.noms.homeoffice.gov.uk/news-publications-events/publications/consultations/Making_sentencing_clearer_consul?view=Binary)

<sup>31</sup> Prison Reform Trust, *Criminal Justice and Immigration Bill Initial Briefing Paper* July 2007 <http://www.prisonreformtrust.org.uk/temp/CriminalsJusticeandImmigrationsBillsp-spbriefingsp0707.doc> site visited 7 July 2007

The Law Society said it supported the sentencing provisions in the Bill which would improve public confidence by targeting prison and probation resources at serious and violent offenders but added:

However, we would urge MPs to subject these provisions to careful scrutiny to ensure that judicial discretion in sentencing and the independent role of the Parole Board in recall decisions are not displaced.<sup>32</sup>

Liberty's briefing on the Bill referred to difficulties identified by the Government itself in the consultation paper *Making Sentencing Clearer* (and quoted above), namely that the change set out in clause 12 could result in very different levels of punishment where an offender received an indeterminate rather than a determinate sentence and that it could be more difficult for changes in the dangerousness of a particular offender to be taken into account in the course of his or her sentence.<sup>33</sup>

### III Prisoners – early release, early removal and recalls

Several of the provisions in Part 2 are concerned with the release, recall or removal of prisoners. Clause 16 would provide that, where a prisoner who had been released early from prison breached the conditions of his licence, he would be recalled to prison just for a fixed period of 28 days, rather than to serve the rest of his sentence, as currently happens. Clauses 19 and 20 would extend the "Early Removal Scheme" under which foreign national prisoners can be released for deportation before the end of their sentences. These changes need to be seen in the context of the acute pressures on the prison system.

The other relevant clauses are clause 14 which makes a minor, technical change to the rules on Home Detention Curfew, and clause 15 which would allow certain foreign national prisoners liable to removal to become eligible for parole at the half way point in their sentence. This is to deal with a court finding that the existing law is incompatible with the European Convention on Human Rights.

#### 1. Background

The prison population in England and Wales has increased steadily over the past century and exceeded 80,000 for the first time in December 2006. The number of prisoners then fell, as it does each December, before starting to rise again in January. The prison population reached a record high of 81,016 prisoners on 19 June 2007 and stood at 79,767 on 13 July. There were 1,800 more prison places available on this date.

The chart below shows the growth in prison population since 1979:

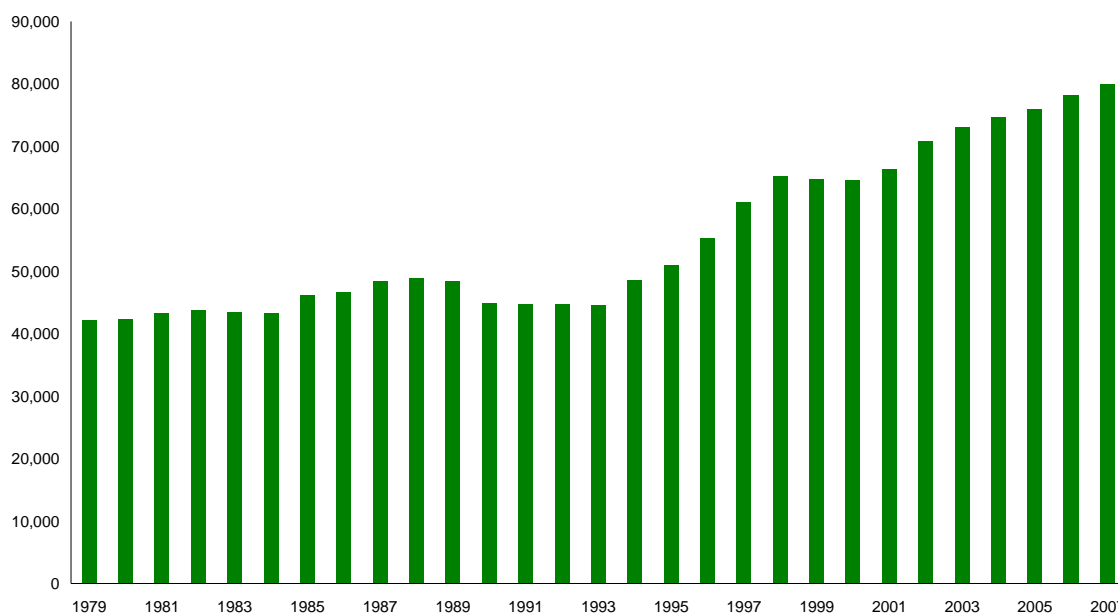
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<sup>32</sup> The Law Society, *Parliamentary Brief Criminal Justice & Immigration Bill Second Reading – House of Commons*, 23 July 2007, <http://www.lawsociety.org.uk/secure/file/167670/e:/teamsite-deployed/documents/templatedata/Internet%20Documents/Parliamentary%20briefings/Documents/criminaljusticebillcommons2R230707.pdf> site visited 7 July 2007

<sup>33</sup> Liberty, *Liberty's Briefing on the Criminal Justice and Immigration Bill*, June 2007 p.7

Annual average prison population, England and Wales, 1979- 2007

2007 data shows average for first 5 months of the year



A prison is overcrowded when the number of prisoners held exceeds the establishment's Certified Normal Accommodation (CNA). The CNA is the Prison Service's own measure of accommodation and represents the decent standard of accommodation that the Prison Service aspires to provide all prisoners.

At 31 May 2007, 85 prison establishments in England and Wales (61% of the estate) were overcrowded. In 13 of these establishments the population was more than 150% of the CNA figure. Problems associated with overcrowding include: prisoners being held further from home, or in prisons which are inappropriate for their needs; less time and space for out of cell activities, including rehabilitation programmes; more frequent transfers with consequent disruption to rehabilitation programmes; inmates "doubling up" in cells designed for one; and the expense and unsuitability of using police and court cells to house prisoners.

In October 2006, with the prison population nearing the operational capacity of the estate, the Home Secretary announced that Operation Safeguard would be implemented. This formal use of police cells to accommodate prisoners was implemented on 12 October and ceased on 22 December. The reactivation of Operation Safeguard was triggered on 22 January 2007 and there are currently 400 places in police cells available nationally. Prisoners had last been held under this provision on 20 December 2002.<sup>34</sup>

The main factor behind the increase in the prison population is tougher sentencing<sup>35</sup> and particular attention has been drawn recently to the impact of the *Criminal Justice Act 2003*. The Government has noted that there has been considerable take up of the new

<sup>34</sup> HC Deb 12/7/2006 1900-1w

<sup>35</sup> See Carter Report, page 10, and Mike Hough, Jessica Jacobson and Andrew Millie, *The decision to imprison: sentencing and prison population*, Prison Reform Trust. 2003.

indeterminate Imprisonment for Public Protection (IPPs), but without the anticipated shift to short custodial and community sentences. This point was made in the Government's consultation paper *Making sentencing clearer* published in November 2006:

1.15 Sentencing has become tougher, with offenders more likely to get a prison sentence for almost any offence and that sentence is likely to be longer. In the last 10 years the custody rate for indictable offences in the Magistrates Court has more than doubled, increasing from 7% to around 15%, while the average sentence has remained around 3 months. In the Crown Court the custody rate has increased from 53% to 61% and sentence lengths have increased by some 6.6 months to reach an average of 27 months. [...] Following the significant increases in recent years we now want to see stability in sentence lengths and the custody rate whilst also protecting the public from the most dangerous offenders.<sup>36</sup>

On 9 May 2007, the newly formed Ministry of Justice published a background paper on its penal policy which gave the following analysis of the effect on the prison population of the 2003 Act:

The courts have made a great deal of use of the new sentences for dangerous offenders which were implemented in April 2005. Over 2,200 sentences of indeterminate Imprisonment for Public Protection (IPP) have been issued so far.

On determinate sentences, there was a significant increase in lengths from 1995, and there has been only a very limited decrease since the introduction of the 2003 Act. The anticipated shift from short custodial to community sentences has not taken place although we now have much more effective community sentences in place, including programmes for prolific offenders. The evidence also suggests that the new suspended sentences are being used in cases where a community order might previously have been used and for summary offences, rather than for more serious offences and in place of custody. Just over 40 per cent of suspended sentence orders are being used for the less serious, summary only offences.<sup>37</sup>

The Justice Secretary, Jack Straw, reportedly indicated that the Government would be reviewing IPPs in view of concerns from the judiciary, prison staff, officials and prisoners.<sup>38</sup>

On 21 July 2006, following his review of the Criminal Justice system, the then Home Secretary, John Reid, announced that 8,000 new prison places would be built by 2012 on top of 900 places already under construction.<sup>39</sup> Much of the current programme of building consists of additional places at existing prisons, but a new prison is to open in

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<sup>36</sup> Home Office, *Making sentencing clearer*, November 2006, [http://www.noms.homeoffice.gov.uk/news-publications-events/publications/consultations/Making\\_sentencing\\_clearer\\_consul?view=Binary](http://www.noms.homeoffice.gov.uk/news-publications-events/publications/consultations/Making_sentencing_clearer_consul?view=Binary)

<sup>37</sup> Ministry of Justice, *Penal policy – a background paper*, 19 May 2007, <http://www.justice.gov.uk/docs/Penal-Policy-Final.pdf>

<sup>38</sup> "We may rethink 'no limit' jail terms, says Straw", *Telegraph*, 13 July 2007

<sup>39</sup> Home Secretary pledges 8,000 new prison places, Home Office Press release 21 July 2006, <http://press.homeoffice.gov.uk/press-releases/8,000-new-prison-places>

Maghull, Merseyside<sup>40</sup>, and planning permission has been obtained for another next to Belmarsh prison in South East London.<sup>41</sup> Then on 19 June 2007, the then Lord Chancellor Lord Falconer of Thoroton, announced that further funds had been made available to build an additional 1,500 places over and above the 8,000 already announced.<sup>42</sup> The areas which are considered to have the greatest strategic need are the South East, the North West, South Wales and West Midlands<sup>43</sup>. Lord Carter of Coles has been asked to conduct a review of the current plans for new prison places and of the longer-term strategic issues affecting the custodial estate.<sup>44</sup>

## 2. Fixed term recalls

As has been noted earlier in this paper, the *Criminal Justice Act 2003* made changes to early release from prison. One of these was to place all offenders serving sentences of 12 months or more on licence from the point of their release from prison to the end of their sentence. Those sentenced under the previous provisions, the *Criminal Justice Act 1991*, are only on licence until the three quarter point in their sentence. An offender who breaches the terms of his or her sentence is liable to be recalled to prison. The decision whether to recall is made administratively, but is then subject to review by the Parole Board which then considers whether to set a re-release date for the prisoner or a date for a further review of detention. The May 2007 background paper on penal policy noted that the recall population had increased as a result of the changes:

There has also been an increase in the number of recalled offenders in prison, reflecting the longer periods for which recallees are being held before they are re-released. It is important that dangerous offenders are kept in prison until they no longer pose a danger, and that the Parole Board can focus on assessing their risk. The recall population has increased from around 3,400 in April 2005 (when CJA 2003 was implemented) to nearly 5,000 in February 2007, an increase of 47 per cent.

On 3 May 2007, the *Guardian* reported comments from the Lord Chief Justice, Lord Phillips, to a probation service conference in which he expressed concern about the effect of recalls on the prison population:

Britain's most senior judge yesterday called for an end to the automatic recall to prison of released offenders who technically breach their licences. He warned that it had become a "trapdoor to prison" and was a main factor in swelling the record jail population.

Lord Phillips, the lord chief justice, said that concern about the impact of automatic recalls was so widespread within the criminal justice system, and even within the government, that with luck it would be dropped by the new justice ministry, which starts work next week when the Home Office is split.

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<sup>40</sup> <http://www.homeoffice.gov.uk/about-us/news/merseyside-prison>

<sup>41</sup> Home Secretary Announces Plans For New Prisons, 16 February 2007, <http://www.hmprisonservice.gov.uk/resourcecentre/pressreleases/index.asp?id=6342,230,608,242,0,0>

<sup>42</sup> HL Deb 19 June 2007 c97

<sup>43</sup> See for example HC Deb 7 December 2006 c647W

<sup>44</sup> HC Deb 4 June 2007 c217W

About 800 offenders a month are being sent back to prison for breaching the terms of their licences, matching the monthly growth of the prison population in England and Wales, which has once again topped 80,000.

He reportedly went on to argue that Probation Officers should have more autonomy and discretion in dealing with people who breach their licences.<sup>45</sup>

Clause 16 of the Bill contains provisions to limit recalls to prison to 28 days, provided the Secretary of State is satisfied at the time of recall that the prisoner will not present a risk of serious harm on release. It would also allow the Secretary of State to re-release any eligible recalled prisoner at any point during the period of the recall if he is satisfied that it is not necessary for the protection of the public for that prisoner to remain in prison.

### **3. Release after a fixed term recall.**

If the Home Secretary revokes a fixed-term prisoner's licence and recalls him or her to prison, the prisoner's case must be referred to the Parole Board.<sup>46</sup> If the Parole Board does not recommend the prisoner's immediate release it must either fix a date for the person's release on licence within the next twelve months or fix a date for its next review of the prisoner's case, again within the next twelve months.<sup>47</sup> Clause 17 of the Bill seeks to remove the requirement for the Parole Board to fix the date of the prisoner's next review if it chooses not to recommend his immediate release. It provides that the Parole Board may instead determine the reference by making no recommendation concerning the prisoner's release. Clause 17 also inserts a new section 256A into the *Criminal Justice Act 2003* which aims to provide further reviews of the cases of recalled prisoners by the Parole Board at annual intervals.

### **4. Recall of life prisoners released on licence**

On 17 August 2005 Anthony Rice, a discretionary lifer who was on licence, murdered Naomi Bryant. The report of an independent review by Her Majesty's Inspectorate of Probation of the Rice case noted that a powerful momentum towards release had developed during Rice's time in open conditions prior to his release on licence, alongside an increasing focus on his human rights rather than on public protection. The report of the review went on to say more generally:

Given the extent to which these characteristics of the system may apply to many prisoners who are serving Life and other indeterminate sentences we consider that it would be wrong to ignore the broader questions that are raised.

If our analysis of how Anthony Rice came to be released is accepted, some people will ask: "Does this happen in other cases too?" The answer is possibly yes. We know that over the last 15 years there has been a series of test cases and judgements that have eroded the Home Secretary's powers to determine release decisions for lifers by executive action. We observe that life-sentenced prisoners now have the right to be heard and to be represented at Parole Board

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<sup>45</sup> "Top judge attacks 'trapdoor to prison', *Guardian*, 3 May 2007

<sup>46</sup> *Criminal Justice Act 2003* s.254

<sup>47</sup> *ibid.* s.256

panel hearings. We note that they are regularly represented by counsel, while the interests of the public, victims, and Home Secretary are represented by a Prison Service official. In this context we are not alone in identifying the increasing challenge for all involved in managing offenders to ensure that public protection considerations are not undermined by the human rights considerations of each case.

We have also noted the indications of an increase both in recalls and in reconvictions as outlined in Chapter 6.1, though we are very aware that it is most unwise to jump too quickly to confident conclusions. Taken alongside the earlier points, however, we feel bound to conclude that this suggests that a closer look is required at our system for releasing Life-sentenced and other indeterminately sentenced prisoners.

We know that the number of indeterminately sentenced prisoners is projected to continue to increase as a consequence of recently implemented sentencing reform. The policy aim is to ensure that people who are dangerous should be kept in custody, while people who are safe to release should be released on licence. But this is where we are back to the science that is not an exact science. Although it is to be hoped that improved tools and skills will increase the percentage of successful assessments in the future, it is necessary to face the truth that there will always be some cases where the most skilful and conscientious people will still get it wrong.

A central issue, which is also part of the ‘whole CJS process’ of managing offenders through their sentences, is the policy and process for deciding who gets released back into the community from Life and other indeterminate sentences, and when. This is the crucial point at which a judgement is made about the level of *Risk of Harm* represented by a particular offender and whether that *RoH* can be effectively managed and even reduced in the community in order to protect the public.

In terms of public policy two questions need answering:

- Who should we keep locked up?
- What should we expect to be achieved with those released?

As a Probation Inspectorate we have indicated here and in other reports our own answer to the second question: *Take all reasonable action to keep to a minimum the offender’s Risk of Harm to others.*

However, we feel that the first question requires a major appraisal. It concerns the key decision that is the focus for ongoing public debate and it is important that so far as possible the answer provides a rational, transparent process in which we can all have confidence. It is not appropriate for the Probation Inspectorate to attempt such an appraisal, especially based on the review of one case. But we consider that there is a strong ‘on the face of it’ case for such an exercise, although we are conscious of the cost implications. We have been led to this view having examined the management of Anthony Rice in its wider context as we see it.<sup>48</sup>

The review concluded by recommending that:

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<sup>48</sup> *HM Inspectorate of Probation Serious Further Offence review: Anthony Rice* paras 11.27-11.33

***There should be a major appraisal of current policy and practice for releasing prisoners from indeterminate sentences.<sup>49</sup>***

Section 32 of the *Crime (Sentences) Act 1997* currently provides that the Secretary of State may revoke the licence of a prisoner serving a life sentence who has been released on licence and recall the prisoner to prison

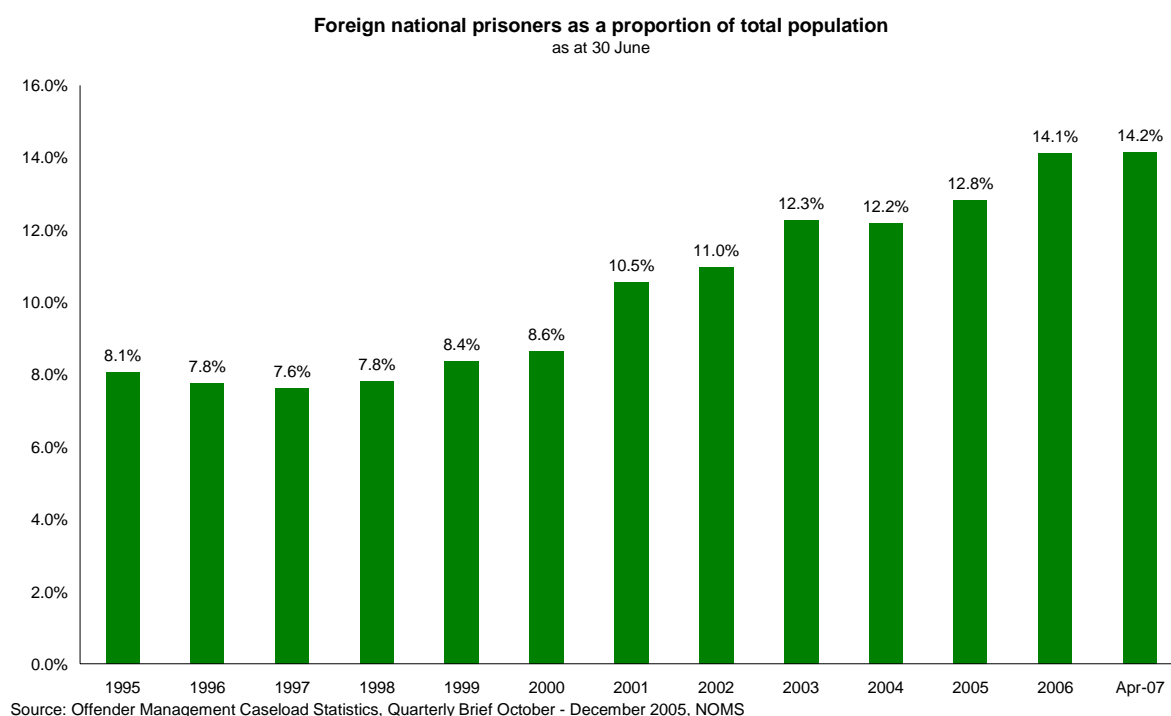
- a) If recommended to do so by the Parole Board or
- b) Without a recommendation by the Parole Board where it appears to him that it is expedient in the public interest to recall the prisoner before such a recommendation is practicable.

Clause 18 of the *Criminal Justice and Immigration Bill* seeks to amend section 32 of the 1997 Act by removing the need for a Parole Board recommendation before the Secretary of State can revoke a life prisoner's licence and recall the prisoner to prison.

## 5. Foreign prisoners

### a. Background

The proportion of foreign national prisoners in the prison population has increased steadily over the past decade. In the early/mid 1990s, foreign prisoners accounted for almost 8% of the total prison population, increasing to approximately 14% by April 2007.



<sup>49</sup> *ibid.* para 11.34



At 31 December 2005 there were over 10,000 foreign nationals in prisons in England and Wales, from 169 different countries. Ten of these countries accounted for half of the foreign nationals in prisons. Jamaica, Nigeria and the Irish Republic are the countries with the most nationals in prison establishments.

**b. Prisoner transfers during the sentence**

The UK Government has signed international agreements that allow British prisoners to be transferred from relevant countries to the UK to serve their sentences, and similarly for foreign prisoners in British jails to be transferred to prisons in their own countries. The principal international agreement is the 1983 *Council of Europe Convention on the Transfer of Sentenced Persons*, to which 57 states (including all the Member States of the European Union and the United States) are party. All in all, the UK has prisoner transfer agreements with 96 countries and territories. All of these require the consent of the prisoner.

In the United Kingdom, the 1983 convention was incorporated into domestic law by the *Repatriation of Prisoners Act 1984*. Section 1 of this allowed for the transfer of prisoners where this is covered by an international agreement between the UK and the country in question and both the prisoner and the governments of each state concerned agree.

A July 2006 policy paper which followed the Government's review of the Immigration and Nationality Department stated the Government's intention to change this:

We will seek to strengthen, extend, and, where appropriate, renegotiate prisoner transfers and will legislate to remove requirements for the consent of the prisoner.<sup>50</sup>

A Government amendment was agreed to during the Lords Report Stage of the *Police and Justice Bill*<sup>51</sup> and the provision is now contained in section 44 of the *Police and Justice Act 2006*, which came into force on 15 January 2007.<sup>52</sup> Under this, the requirement to obtain the prisoner's consent will only apply where the international agreements require this. The intention is to enable the United Kingdom to ratify and conclude prisoner transfer arrangements that do not require prisoner consent.<sup>53</sup>

The EU Justice and Home Affairs Council agreed to a Framework Decision<sup>54</sup> on the mutual recognition of sentences on 27 February 2007.<sup>55</sup> Framework decisions are used to align the laws and regulations of Member States so that they mean the same thing. They are binding as to the result to be achieved but leave the choice of form and

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<sup>50</sup> Home Office, *Fair, effective and trusted: rebuilding confidence in our immigration system*, 25 July 2006, page 11

<sup>51</sup> HL Deb 10 October 2006 cc238-43

<sup>52</sup> SI 2007/3364

<sup>53</sup> HL Deb 10 October 2006 c 239

<sup>54</sup> *Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union*, 9688/07, 22 May 2007, <http://register.consilium.europa.eu/pdf/en/07/st09/st09688.en07.pdf>

<sup>55</sup> [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/jha/92800.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/92800.pdf)

methods to the national authorities. This Framework Decision would mean that the consent of the prisoner would not be required before transfer:

- where the prisoner was a national of the state to which he was to be transferred; or
- where the prisoner was due to be deported to that state after he was released from prison.<sup>56</sup>

There are also provisions allowing for transfer without consent where the person has fled or returned to a state in view of the criminal proceedings against him or following conviction.

**c. The Early Removal Scheme**

The Early Removal Scheme provides the Secretary of State with discretion to remove from prison a prisoner who is "liable to removal from the United Kingdom". The scheme came into effect in June 2004<sup>57</sup> and instructions for it were set out in PSI 27/2004<sup>58</sup>. Further background is given in chapter 9 of Prison Service Order 6000.<sup>59</sup>

The Scheme broadly mirrors the Home Detention Curfew scheme which enables prisoners to be released subject to electronic monitoring up to 135 days before the half-way point in their sentence. This scheme makes determinate sentence prisoners who are liable to be removed or deported from the UK on release to be removed up to 135 days before their release date. Certain prisoners, including those serving extended sentences for violent or sexual offenders, are statutorily excluded.

Home Office "internal management information" released in response to a Freedom of Information request shows that around 1460 Foreign National Prisoners were removed under the Early Removal Scheme between 1st January 2005 and 31st December 2006.<sup>60</sup>

**d. The "Facilitated Returns Scheme"**

There is also a "Facilitated Returns Scheme" to encourage prisoners to return home at the end of their sentence. This scheme, which was introduced in October 2006, is available to Foreign National Prisoners (other than those from the European Economic Area) who volunteer to return home. Only the £46 discharge grant will be paid in cash and the rest is given in the form of training or business start-up costs once the individual has returned home. Further information is given in Prison Service Instruction 21/2007.<sup>61</sup>

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<sup>56</sup> article 5

<sup>57</sup> *Criminal Justice Act 2003* ss259-261 and s262 which modified the early release provisions of Part 2 of the *Criminal Justice Act 1991* for a transitional period.

<sup>58</sup> [http://psi.hmprisonservice.gov.uk/PSI\\_2004\\_027\\_early\\_removal\\_scheme\\_for\\_foreign\\_nationals.doc](http://psi.hmprisonservice.gov.uk/PSI_2004_027_early_removal_scheme_for_foreign_nationals.doc)

<sup>59</sup> HM Prison Service, *Parole, Release and Recall*, Prison Service Order 6000, ch 9,

[http://pso.hmprisonservice.gov.uk/PSO\\_6000\\_parole\\_manual\\_ch\\_09\\_those\\_liable\\_to\\_deportation.doc](http://pso.hmprisonservice.gov.uk/PSO_6000_parole_manual_ch_09_those_liable_to_deportation.doc)

<sup>60</sup> Home Office Freedom of Information Request, FOI 5946, 13 June 2007,

<http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information/foi-archive-crime/5946-Release-Detention-Curfew?view=Binary>

<sup>61</sup> [http://psi.hmprisonservice.gov.uk/PSI\\_2007\\_21\\_immigration\\_foreign\\_nationals\\_ver\\_2.doc](http://psi.hmprisonservice.gov.uk/PSI_2007_21_immigration_foreign_nationals_ver_2.doc)

**e. The Bill's changes to the Early Removal Scheme**

Clauses 19 and 20 of the *Criminal Justice and Immigration Bill* would add a new category of prisoner who is eligible for the ERS. They define these prisoners as those who have a settled intention of residing permanently abroad following removal. This new category could apply both to British and foreign nationals, in contrast with the current scheme which applies only to those who may be removed from the UK (i.e. foreign nationals who may be removed under immigration legislation). Clauses 19(6) and 20(2) remove existing exclusions which prevent certain categories of prisoner from being removed under the scheme. These include prisoners serving extended sentences (for certain violent and sexual offences) and prisoners subject to registration under the *Sexual Offenders Act 2003*.

**f. Parole for foreign national prisoners**

Clause 15 is designed to address a finding by the House of Lords that UK law was incompatible with the European Convention on Human Rights in the case of *R (Hindawi and Headley) v Secretary of state for the Home Department*.<sup>62</sup> Nezar Hindawi, a Syrian national, was jailed for 45 years in 1986 for an attempt to blow up an Israeli plane by sending his unwitting girlfriend onboard it with a bomb in a suitcase. The other appellant, Prince Charles Headley, was a Jamaican national sentenced to seven years imprisonment for drug dealing in 2000.<sup>63</sup>

Under sections 46(1) and 50(2) of the *Criminal Justice Act 1991*, the Parole Board had no power to recommend the early release on licence of prisoners subject to deportation orders and the decision was at the discretion of the Secretary of State. The House of Lords found that this was discrimination in breach of Article 14 of the European Convention on Human Rights, (which prohibits discrimination on any ground such as national origin or other status) in conjunction with Article 5(4).<sup>64</sup>

Clause 15(1) provides that the relevant sections of the 1991 Act will cease to have effect. This will mean that foreign national prisoners liable to removal from the UK and sentenced under the provisions of the 1991 Act will no longer be ineligible, at the halfway point in their sentence, to have their cases considered by the Parole Board for early release on licence.

## **IV Appeals**

### **A. Appeals against conviction**

Section 2(1) of the *Criminal Appeal Act 1968* provides that:

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<sup>62</sup> [2006] UKHL 54

<sup>63</sup> For an account of this case, see "Differential treatment of prisoners unjustifiable", *Times Law Report*, 21 December 2006

<sup>64</sup> Article 5(4) states "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

- (1) Subject to the provisions of this Act, the Court of Appeal—
  - (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
  - (b) shall dismiss such an appeal in any other case.

In September 2006 the Home Office published a consultation paper entitled *Quashing Convictions* which began with the following summary of the issues on which the Government wished to consult:

Under the current law, a convicted person can have his or her conviction quashed even where the Court of Appeal have formed the view that he or she was indeed guilty of the offence. The conviction is overturned in such cases because the Court are dissatisfied with some aspect of the trial or pre-trial process.

The Government wants to ensure that, where the Court of Appeal are of the view that a conviction is, in the normal sense of the word, 'safe', it should not be possible to quash it.

The Government acknowledges that the Court of Appeal are not in the same position as the jury and may not always be able to form a view on whether the appellant committed the offence. However, where they have formed such a view, the Government believes that they should not be empowered to allow the appeal.<sup>65</sup>

The consultation paper emphasised that the Government was not consulting on the advisability of the change it was proposing but was merely seeking views on how best to achieve it.<sup>66</sup> Clause 26 of the *Criminal Justice and Immigration Bill* is designed to implement the Government's proposed changes to the 1968 Act.

Clause 26(2) provides that a conviction is not to be considered "unsafe" if the Court of Appeal is satisfied that the appellant is in fact guilty of the offence. The Court of Appeal will still be able to allow an appeal in such a case if it thinks that dismissing the appeal would be incompatible with the appellant's rights under the European Convention on Human Rights (ECHR).

Subsections (3) and (4) of Clause 26 make consequential amendments to the 1968 Act which are discussed in the Explanatory Notes while subsection(5) is designed to give the Court of Appeal an express power to refer serious misconduct in the investigation or prosecution of an offence to the Attorney General. The Explanatory Notes comment that:

This is considered appropriate in the light of the changes to section 2 of the 1968 Act, in case preventing convictions from being quashed in those cases where the Court is satisfied as to guilt is seen as removing a deterrent to misconduct.

In its briefing on the Bill the Law Society said it was strongly opposed to the proposed amendment to the 1968 Act set out in Clause 26, which would remove the ability of the Court of Appeal to refuse to uphold a conviction based on abuse of the investigation or prosecution processes. The briefing comments that:

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<sup>65</sup> *Quashing Convictions* Office for Criminal Justice Reform September 2006 p.4

<sup>66</sup> *ibid.*

Far from protecting the integrity of the justice system, the proposals seriously endanger the very principle of rule of law by permitting convictions which are based on gross abuse to stand, thereby undermining the integrity of the system. By undermining public confidence in the fairness of the system, the changes would lead to a perception that convictions were unsafe, unreliable and unfair. The removal of this basic safeguard, which is, in any event, exercised in a handful of cases only, would create an environment in which abuse of power and corrupt practices could be effective in obtaining convictions, and would encourage 'noble cause corruption'.<sup>67</sup>

Liberty is strongly opposed to the provisions in Clause 26 and its briefing includes criticism both of the arguments put forward by the Government in support of the change and the factual basis for these arguments:

The Government has stated that this change is needed to prevent judicial outcomes which "are damaging to public confidence in the criminal justice system". In reality no evidence has been provided to support the suggestion that the current legal position has, in fact, given rise to a loss of public faith. Indeed, the current state of the law on quashing convictions does not seem to have prevented a recently reported rise in public confidence in the Criminal Justice System ("**CJS**"). One suspects that if there were a loss of faith in the CJS, connected to the law on quashing convictions, the real cause of this would be the political spin surrounding this latest policy, rather than pre-existing public perceptions. The current power for the courts to quash decisions where there has been a very serious abuse of process during or prior to trial is, in the long term, vital to maintaining confidence in the integrity of the CJS.

On reading previous Government statements on this issue, one could easily get the impression that this is an issue which affects many cases each year; that hundreds of people are escaping justice on the basis of minor technicalities. In reality this is far from true. While Part 3 of the Bill no doubt raises important constitutional issues (discussed below), it would affect not more than a handful of cases. The majority of convictions that are quashed on appeal do not involve cases in which the Court of Appeal is satisfied as to the appellant's guilt. This law change, while risking serious damage to the integrity of the CJS and important constitutional principles would, in reality, be merely tinkering at the edges in terms of the Government's aims of rebalancing the CJS "in favour of the victim and the law-abiding majority".

Even in the small number of cases which are in question here, the Court of Appeal will frequently order a retrial.<sup>14</sup> The Court already does this where the interests of justice require.<sup>15</sup> Where a retrial is ordered, the Government's primary arguments in favour of prohibiting the Court quashing the conviction in the first place fall away. If found guilty at the retrial, the person concerned would not evade punishment and justice would not be denied to the victim and the public. The Government's current proposals would prevent a conviction being

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<sup>67</sup> The Law Society *Parliamentary Brief: Criminal Justice & Immigration Bill Second Reading* – House of Commons 23 July 2007, <http://www.lawsociety.org.uk/secure/file/167670/e:/teamsite-deployed/documents/templatedata/Internet%20Documents/Parliamentary%20briefings/Documents/criminaljusticebillcommons2R230707.pdf>, site visited 7 July 2007

quashed where there has been serious abuse of process even where, once quashed, the Court of Appeal would currently order a retrial. We accept that, in some cases, a retrial might not be possible or could be stressful or burdensome for witnesses. We do not, however, consider that these factors outweigh the public interest in quashing a conviction and ordering a retrial where this is necessary to maintain the integrity of the criminal justice system and to punish serious abuse of process or illegality on the part of the prosecution or police.

The Government has previously suggested that convictions are being quashed, where the court is satisfied as to the defendant's guilt, on the basis of minor procedural errors. In reality, those cases in which this power to quash convictions is used involve very serious failings either before or at trial, or serious illegality on the part of the prosecution or police. Furthermore, we understand that the trend of the Court of Appeal has in fact been to move away from allowing appeals based on irregularities of the trial process in cases where there has been extremely strong evidence of guilt.<sup>68</sup>

Liberty's briefing refers to the case of *R v Mullen*<sup>69</sup> in which the Court of Appeal quashed the conviction (for conspiracy to cause explosions) of a man who had been rendered to the UK by the Zimbabwean authorities without legal process instead of being extradited. The briefing goes on to say:

In reality, the proposals in Part 3 of the Bill misunderstand and downplay the wider constitutional role of the Court of Appeal in appeals against criminal convictions. The proposals would restrict the Court's power to ensure the integrity of the criminal process and, in some cases, to ensure that the defendant has received a fair trial (in the wider, abuse of process sense). We also fear that it would undermine the moral standing of the Court of Appeal if it allowed a conviction to stand which resulted from serious illegality or a serious breach of procedural safeguards by another limb of the State. Rose LJ explained that the decision to quash the conviction in *Mullen* "arises from the court's need to exercise control over executive involvement in the whole prosecution process". The courts play an important constitutional role in checking abuses of power and illegality by the Executive.<sup>70</sup>

Liberty's briefing also comments that:

In many of the cases that are targeted by these proposals the issue in question was whether the prosecution was an abuse of process. In *Mullen*, for example, the trial judge would have stayed the proceedings as an abuse of process had he been aware of the circumstances of Mullen's unlawful rendition. As Rose LJ explained in the Court of Appeal, this was clearly a case where a stay of proceedings would have been called for because the state's actions were "so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed." If, as the majority of the Royal Commission considered, it is illogical for the Court of Appeal to exercise powers in respect of deficiencies

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<sup>68</sup> Liberty, *Liberty's Briefing on the Criminal Justice and Immigration Bill* June 2007 paras. 12-15 <http://www.liberty-human-rights.org.uk/pdfs/policy07/criminal-justiceand-immigration-bill.pdf> site visited 7 July 2007

<sup>69</sup> [2000] Q.B. 520

<sup>70</sup> *ibid.* para 21

in a prosecution that are not available to the trial judge, it is equally illogical to deny the Court powers to address an abuse of process that are available to the judge at first instance. We are concerned that, once the Court of Appeal's power to quash a conviction outright where there has been serious malpractice on the part of state authorities is removed, the next step will be to take that power away from the courts of first instance. The power to stay proceedings as an abuse of process is an important constitutional safeguard which should not be restricted or removed.

Nor, it should be noted, is it satisfactory to argue that the introduction of the new subsection (1B) would assuage these concerns, for although an unfair trial (contrary to Article 6 of the ECHR) will generally result in an unsafe conviction, an unsafe conviction may not necessarily be unfair, using the ECHR meaning of that term. For instance, the circumstances in *R v Mullen*, while certainly an abuse of process (a domestic law concept), may not have been in breach of Article 6 of the ECHR as they did not concern the trial, but rather how Mullen was brought to trial.

Another issue is that, in our legal system the determination of guilt or innocence is not a question for judges sitting in the Court of Appeal (Criminal Division) but for the first instance court and the jury. This is still the case, notwithstanding attempts to remove juries from some categories of case, most recently serious fraud trials. If the power of the Court of Appeal to quash convictions is expressly restricted by reference to the Court's determination of guilt or innocence, the Court would be required to make such determinations in many more cases than at present. This is indeed what is proposed, the Explanatory Notes to the Bill stating (paragraph 228) that "It would be for the Court to form their own view as to guilt on the evidence available to them". This would represent a fundamental change of the Court of Appeal's role and the usurpation of the role of the jury in determining guilt. It could also have an unfortunate practical result. If the Court of Appeal more frequently determined that a finding of guilt at first instance was incorrect, public faith in first instance trials and the ability of the jury to decide guilt would inevitably be undermined. The result would be more appeals against convictions and lower public confidence in the CJS.<sup>71</sup>

## B. Prosecution Appeals

Part 9 of the *Criminal Justice Act 2003* provides the prosecution with a right of appeal against rulings made by judges in criminal cases, including rulings that proceedings should stop and evidentiary rulings. In cases where there is a successful appeal by the prosecution against a ruling by a judge that proceedings should be halted, section 61(5) currently provides that the Court of Appeal may only order the resumption of proceedings in the Crown Court or a fresh trial there if it considers it necessary in the interests of justice to do so. If this is not the case, the Court of Appeal must order that the defendant be acquitted. Clause 27 of the *Criminal Justice and Immigration Bill* is designed to alter the current arrangements by substituting a new section 61(5) of the 2003 Act under which the Court of Appeal will be required to order that a trial be resumed or that a fresh trial take place unless it considers that the defendant could not receive a fair trial. This follows the undertaking given by the Government in the July 2006 white paper *Re-*

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<sup>71</sup> *ibid.* paras 24-26

*balancing the Criminal Justice System in favour of the law-abiding majority; cutting crime, reducing re-offending and protecting the public* that it would “restrict the ability of those the courts agree are guilty to have their convictions quashed on a technicality”.<sup>72</sup>

### **C. Review of unduly lenient sentences**

Sections 35 and 36 of the *Criminal Justice Act 1988* permit the Attorney-General to refer to the Court of Appeal, with the leave of that Court, certain types of case in which it appears to him that the sentencing of a person has been unduly lenient. The Court of Appeal may then quash the original sentence and substitute another, which may be more severe than the original. This power also extends to determinations of the minimum terms to be served by prisoners on whom sentences of life imprisonment and other indeterminate sentences have been imposed.

In cases where it decides to increase a sentence the Court of Appeal allows a “double jeopardy discount” in that, having established what it considers the original sentence should have been, it then reduces this term on the grounds that the defendant is going through the sentencing process for a second time and may be suffering distress and anxiety. This non-statutory practice was prohibited in cases involving mandatory life sentences for murder by section 272 of the *Criminal Justice Act 2003*. Clause 28 seeks to extend this prohibition to cases involving discretionary life sentences and indeterminate sentences. This would mean that the Court of Appeal would no longer allow a “double jeopardy discount” when considering references relating to unduly lenient sentences in the following cases:

- Sentences of imprisonment for life
- Sentences of detention during Her Majesty’s Pleasure or for life<sup>73</sup>
- Sentences of custody for life<sup>74</sup>
- Sentences of imprisonment or detention for public protection<sup>75</sup>

## **V Her Majesty’s Commissioner for Offender Management and Prisons**

Part 4 of the Bill would create a Commissioner to consider complaints from prisoners and to investigate deaths in prison custody. These functions are currently carried out by a non-statutory body, the Prisons and Probation Ombudsman.

### **A. The development of the current system**

The Prisons Ombudsman was established in 1994 following the Woolf Report into the riots at Strangeways and other prisons in 1990.<sup>76</sup> Lord Woolf had criticised the lack of an

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<sup>72</sup> para. 2.15

<sup>73</sup> *Powers of Criminal Courts (Sentencing) Act 2000* ss. 90,91

<sup>74</sup> *ibid.* ss.93,94

<sup>75</sup> *Criminal Justice Act 2003* cc225-226

<sup>76</sup> *Prison Disturbances April 1990, Report of an Inquiry by the Rt Hon Lord Justice Woolf (Parts I and II) and His Honour Judge Stephen Tumim (Part III)*, Cm 1456, February 1991



independent element in the Prison Service's internal grievance procedure, and recommended that there should be a system for an independent assessment of prisoners' complaints. As a result, the Conservative government created the office, which is non-statutory, and independent of the Prison Service and the Probation Service, reporting directly to the Secretary of State.

There were some early struggles over the extent of the Ombudsman's terms of reference. The 1996 version significantly limited the original 1994 remit following a clash between the Prison Service and the Ombudsman's office over the investigation of a complaint by a mandatory lifer. This centered on the extent to which ministerial decisions could be within the Ombudsman's remit, and whether he could be required to accept changes in his terms of reference.<sup>77</sup> The 2001 version of his terms of reference makes it clear that the Ombudsman is now the arbiter of his own jurisdiction.<sup>78</sup>

The newly formed National Probation Service was added to the Ombudsman's remit in 2001, and in 2004 he was given the task of investigating all deaths in prisons, following special investigations into prisoners' deaths at HMP Styal and HMP Manchester.

Prison Service guidance on the Prison and Probation Ombudsman is provided in *Prison Service Order 2520*.<sup>79</sup>

## B. Calls for a statutory Ombudsman

Following the dispute over the Ombudsman's remit in the mid 1990s, a House of Commons Select Committee investigated his role and powers. The Committee concluded, amongst other things, that the non-statutory framework was not adequate.<sup>80</sup> The Conservative Government said in response that it did not see any need for the post to be placed on a statutory footing, but that the matter would be kept under review.<sup>81</sup> However, in April 1998, a Labour Home Office minister, Lord Williams of Mostyn, said in response to a Parliamentary Question that the Government had decided to legislate for the Ombudsman.<sup>82</sup> The 2002 White Paper, *Justice for All*, gave a clear commitment to this:

The Ombudsman for Prisons and Probation has an important role in providing independent adjudication of individual cases. At present this is an administrative Home Office appointment. We feel that such a critical appointment should have a clear statutory basis and we will legislate to achieve this as soon as possible. At the same time we are considering giving the Ombudsman power to investigate suicides.<sup>83</sup>

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<sup>77</sup> Further details are given in the Ombudsman's 1996 Annual Report.

<sup>78</sup> <http://www.ppo.gov.uk/termsref.htm>, site visited 12 July 2007

<sup>79</sup> [http://pso.hmprisonservice.gov.uk/PSO\\_2520\\_the\\_prison\\_and\\_probation\\_ombudsman.doc](http://pso.hmprisonservice.gov.uk/PSO_2520_the_prison_and_probation_ombudsman.doc), site visited 12 July 2007

<sup>80</sup> House of Commons Select Committee on the Parliamentary Commissioner for Administration, *Report of the Parliamentary Ombudsman for 1995*, Cmnd 38, 16 October 1996

<sup>81</sup> Prison Ombudsman Annual Report 1996, Cm 3687, July 1997, paragraph 1.18, <http://www.ppo.gov.uk/download/annualreps/omann.html>, site visited 12 July 2007

<sup>82</sup> HI Deb 7 April 998 c611

<sup>83</sup> Home Office, *Justice for All*, Cm 5563, July 2002

## C. Previous legislation

In January 2005, the Government published the *Management of Offenders and Sentencing Bill* (HL 16 of 2004-05). The Bill was intended<sup>84</sup> to implement the recommendations of the Carter review on offender management, which were that there should be:

- “end-to-end management” of offenders, to ensure continuity both in prison and under supervision in the community
- a purchaser/provider split, with regional managers contracting services
- greater “contestability” (allowing the private and voluntary sector to compete to provide services)

The 2004-05 Bill contained provisions to establish a statutory Commissioner for Offender Management and Prisons, which were very similar to the current provisions. However, the general Carter reforms, particularly contestability, proved highly controversial with the Probation Service, and the Bill fell without having been debated by the time of the 2005 General Election, falling without having been debated. Then in November 2006, having modified its original proposals, the Government published a new *Offender Management Bill* to implement the Carter reforms. However this Bill, which at the time of writing is nearing the end of its progress through Parliament, did not contain any provisions to establish a statutory Commissioner. Further background on this Bill is available in Library Research Paper 06/62 and information on its progress through Parliament in Library Standard Note SN/HA/4280 which is available on the Library’s intranet.

## D. The Bill’s provisions

Under the provisions in Part 4 of the current Bill, the new Commissioner will have the same functions as the Prison and Probation Ombudsman currently has, namely:

- Dealing with complaints
- Investigating deaths in custody
- Carrying out other investigations at the request of the Secretary of State

## E. Commentary

The Prison Reform Trust wishes to see additions to the Commissioner’s remit in investigating deaths in custody:<sup>85</sup>

The provisions for investigating and reporting on deaths in custody should be expanded to include:

- People held in police and court cells under Operation Safeguard
- Children held in local authority secure childrens’ homes
- People who die within 72 hours of their release from a custodial setting

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<sup>84</sup> Patrick Carter, *Managing Offenders: Reducing Crime*, 11 December 2003, <http://www.probation.homeoffice.gov.uk/files/pdf/52pp.pdf>

<sup>85</sup> Prison Reform Trust, *Criminal Justice and Immigration Bill: Initial Briefing Paper*, July 2007

## VI Other criminal justice provisions

### A. Alternatives to prosecution: youth conditional cautions

Part 3 of the *Criminal Justice Act 2003* established a system of adult conditional cautions. The background to and nature of adult conditional cautions is described in Library standard note SN/HA/3008 on *Conditional Cautions*.<sup>86</sup>

In July 2006 the Government published *Delivering Simple, Speedy, Summary Justice*, the report of a cross-departmental review.<sup>87</sup> In the report the Government said it would extend conditional cautioning, including by legislating for a youth version of the conditional caution:

We also intend to legislate for a youth version of the Conditional Caution to provide a robust intervention that requires the young person to take responsibility for formal action to make amends and tackle underlying problems in a supported way. As for adults, the conditions will be set by the Crown Prosecution Service, in consultation with the police and the Youth Offending Team and free legal advice will be available. As with the adult Conditional Caution, the young person can refuse the conditions and go to court, but if they accept the Conditions, they will face prosecution for the offence they have committed if they agree to the conditions and do not carry them out.

We also want to build on the neighbourhood policing approach to do more to tackle the most minor problems with young people in a practical, common sense way.

Neighbourhood policing teams including police community support officers will be on the frontline in the respect drive, forging a new relationship with local people based on active co-operation rather than simple consent and helping to increase feelings of safety and confidence in the police within local communities. Central to this approach will be ways to deal with the types of low level misdemeanours where victims often prefer quick resolution such as a simple apology.

Simple responses for the lowest level misdemeanours are particularly important when dealing with young people. We are working with the Youth Justice Board and the Association of Chief Police Officers to develop effective restorative interventions for first misdemeanours where a formal criminal justice response that forms part of an offender's criminal record and is declarable to employers would be disproportionate. Getting a young person to apologise face to face and make amends is an important part of their learning. This is not about going soft on crime. A face to face apology is often quite difficult for a young person to do. Neighbourhood policing links need to be built with schools to embed restorative approaches where appropriate. We are looking to pilot this approach in four police force areas over the coming year.

But where behaviour merits a formal criminal justice response, we want to strengthen the robustness of our interventions. That is why we are also working with practitioners to developing a youth version of the Conditional Caution.<sup>88</sup>

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<sup>86</sup> [http://10.160.3.10:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY\\_OTHER\\_PAPER/STANDARD\\_NOTE/snha-03008.pdf](http://10.160.3.10:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHER_PAPER/STANDARD_NOTE/snha-03008.pdf)

<sup>87</sup> *Delivering Simple, Speedy, Summary Justice* July 2006  
[http://www.dca.gov.uk/publications/reports\\_reviews/delivery-simple-speedy.pdf](http://www.dca.gov.uk/publications/reports_reviews/delivery-simple-speedy.pdf)

<sup>88</sup> *ibid.* paras. 7.16-7.20

Clause 53 and Schedule 11 of the *Criminal Justice and Immigration Bill* are designed to provide for youth conditional cautions along the lines proposed by the Government in its review. The *Explanatory Notes* include a detailed explanation of how the system of youth conditional cautions will work alongside the existing arrangements for reprimands and final warnings for children and young people.

## **B. Cautions and the *Rehabilitation of Offenders Act 1974***

Under the *Rehabilitation of Offenders Act 1974*, with certain exceptions, an offender's conviction becomes "spent" after a specified period, which varies according to the sentence given. The offender then becomes a "rehabilitated person", and is to be treated for all purposes in law as a person who has not committed, or been charged with, or prosecuted for, or convicted of, or sentenced for the offence. This applies even to judicial proceedings, but with a number of exceptions, of which the most important are criminal proceedings. Other than in those proceedings, if he or anyone else is asked for information about his previous convictions, offences, conduct or circumstances the question is likely to be treated as not relating to spent convictions, and he is not subject to any liability, or otherwise prejudiced in law because of any failure to acknowledge or disclose such convictions. Any obligation a person may have to disclose matters to anyone else does not extend to a spent conviction, and it is not a proper ground for dismissing or excluding someone from any office, profession, occupation or employment.

Where a conviction results in the imposition of a custodial sentence of a nominal length exceeding 30 months, that conviction can never be "spent". In addition to this exception, there is a long list of professions, offices and employments which are exempted altogether from the provisions under which questions asked may be treated as not relating to "spent" convictions. In other words, where these professions, offices and employments are concerned, a person may have to acknowledge or disclose what would otherwise be "spent" convictions.

The *Rehabilitation of Offenders Act 1974* only applies to criminal convictions. Cautions, reprimands and final warnings and other similar measures administered by the police are not criminal convictions. They are therefore outside the ambit of the 1974 Act and can never be "spent" in the same way that convictions are.

In a consultation paper published on 19 August 1999 entitled *The Rehabilitation of Offenders Act 1974 and Cautions, Reprimands and Final Warnings* the Government said:

**1.2** After a careful review of the current situation, the Government have concluded that it is anomalous for cautions, reprimands and final warnings to be disclosable in circumstances where convictions are not. It is the Government's view that this should be tackled by bringing them within the scope of the ROA. The Government, therefore, propose that when there is a legislative opportunity these disposals should be brought within the ambit of the Act.

**1.3** The Government propose that these disposals should become spent immediately, i.e. that there should be no rehabilitation period for the purposes of the Act.

1.4 This paper also discusses whether the exceptions order to the Act should apply to cautions, reprimands and final warnings. The effect of the exceptions order is that the protections of the Act do not apply in certain circumstances, for example, where employment with children and the vulnerable, administration of the law, questions of financial probity and the integrity and efficiency of licensing schemes are in question. The Government propose that the exceptions order to the ROA should apply to cautions, reprimands and final warnings.<sup>89</sup>

Clauses 54 and 55 and Schedule 12 of the *Criminal Justice and Immigration Bill* are designed to implement the changes first proposed in 1999 and enable cautions, reprimands and warnings to be “spent” for the purposes of the *Rehabilitation of Offenders Act 1974* in the same way that convictions are. Under these arrangements it is intended that “simple” police cautions, reprimands and warnings and cautions given outside England and Wales should become spent when they are given and that adult and youth conditional cautions should become spent after three months. If the offender is later prosecuted and convicted in relation to the offence for which the conditional caution was given the Bill seeks to ensure that the rehabilitation period is extended so that it is the same as the rehabilitation period for the offence.

As noted above, the fact that a caution is “spent” does not mean that a person need not disclose it in any circumstances. The rules governing the disclosure and retention of criminal record information are discussed in Library standard note SN/HA/4317 on *Criminal Records*.

### **C. Extension of the powers of non-legal staff to conduct trials and other proceedings in magistrates’ courts.**

Clause 58 of the *Criminal Justice and Immigration Bill* aims to extend the role of designated caseworkers (DCWs) within the Crown Prosecution Service (CPS). CPS caseworkers currently undertake casework functions by assisting crown prosecutors in case management through the processing and initial preparation of casework. Their duties include casework preparation, personal casework management, attendance at court, post-court administration, assessment of professional fees and liaison with witnesses and other organisations within the criminal justice system.<sup>90</sup> They do not have to be legally qualified. Experienced caseworkers and those with a legal qualification can progress to the role of designated caseworker (DCW). DCWs present some cases in the magistrates’ court and, with training and practice, can develop advocacy skills. Some caseworkers also become managers and will sometimes manage a team of 10 to 20 caseworkers and support staff.<sup>91</sup>

Clause 58 of the Bill is designed to extend the powers and rights of audience of DCWs by enabling them to:

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<sup>89</sup> *The Rehabilitation of Offenders Act 1974 and Cautions, Reprimands and Final Warnings* Home Office August 1999 Summary p.1

<sup>90</sup> <http://www.cps.gov.uk/Publications/humanresources/cpscscareers.html>

<sup>91</sup> “Careers at the CPS”, *The Independent* 13 October 2006

- conduct summary trials in magistrates' courts
- conduct certain proceedings in magistrates' courts, including proceedings relating to offences triable only on indictment by a judge and jury at the Crown Court
- conduct applications and other proceedings relating to "preventative civil orders" such as anti-social behaviour orders (ASBOs)
- conduct certain proceedings (other than criminal proceedings) assigned to the Director of Public Prosecutions by the Attorney General under section 3(2)(g) of the *Prosecution of Offences Act 1985*.

Clause 58 has been strongly criticised by the legal professions, who have suggested that it would be contrary to the public interest. The Law Society's briefing on the Bill comments that:

The Law Society is not opposed to the deployment of paralegals in appropriate circumstances, as we recognise this will result in the time of legally qualified prosecutors being more productively used. However, allowing DCWs to undertake summary trials or contested bail applications in relation to serious offences is, in the Law Society's view, inappropriate.

The proposal is not aimed at improving the quality of the service provided to victims of crime and witnesses, but rather the Law Society is concerned that the proposal is an expedient means to save money which may have a very detrimental effect on due process. In particular, we are concerned that no qualified lawyer may be involved with a case in the magistrates' court in which the defendant is facing an imprisonable offence.<sup>92</sup>

An article in the *Law Gazette* noted:

Chancery Lane expressed concern that DCWs are not subject to any professional code of conduct or under a duty to the court. It also pointed out that they receive only limited training – currently two weeks followed by continuing training.

Law Society chief executive Des Hudson said: 'We have serious concerns on the extension of powers for DCWs. Serious cases should be dealt with by properly-qualified personnel who are responsible to the court.'

Tim Dutton QC, vice-chairman of the Bar Council, said the plan was contrary to the public interest. 'Legally-qualified advocates are required because of the burden of responsibility, the advocacy skills needed for the cases, and the need to ensure independence of prosecutions in our criminal justice system,' he said. 'Qualified lawyers are under a strict duty to be independent. Unqualified workers are not.'

The DPP, Sir Ken Macdonald QC, defended the proposal and said it would enable lawyers to focus their skills on more serious cases. He insisted that DCWs had substantial experience and knowledge of the law and court procedures, were given full training for the hearings they conducted and worked under supervision of CPS lawyers.<sup>93</sup>

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<sup>92</sup> *Parliamentary Brief: Criminal Justice and Immigration Bill Second Reading – House of Commons* Law Society 23 July 2007 p.3:

<http://www.lawsociety.org.uk/secure/file/167670/e/teamsite-deployed/documents/templatedata/Internet%20Documents/Parliamentary%20briefings/Documents/criminaljusticebillcommons2R230707.pdf>

<sup>93</sup> "Wider role for CPS caseworkers 'not in public interest'" – *Law Gazette* 19 July 2007

## D. Criminal legal aid

Clauses 59 to 61 would amend provisions in the *Access to Justice Act 1999* which relate to Criminal Defence Service funding (criminal legal aid).

Criminal legal aid may be available to defendants facing criminal charges if they pass the interests of justice test (sometimes referred to as the merits test). Following powers exercised under the *Criminal Defence Service Act 2006*, criminal legal aid applicants must also satisfy a means test in relation to criminal proceedings in magistrates' courts.

A letter sent in early June 2007 by Vera Baird, then Minister for Legal Aid at the Ministry of Justice, to various stakeholders, set out information about the proposed legal aid reforms including bringing forward the time when a grant can be made and allowing staff to access benefits databases:

First, we are intending that applications for representation orders be made and processed during the actual investigation into the offence, rather than waiting for the point of charge. This would allow the financial eligibility test to be carried out, and a decision made on the 'Interests of Justice' (IOJ) test, in cases where it is clear what charge(s) or range of charges a suspect is likely to face. Upon charge, the representation order would be formally confirmed, or if the charge differs from that anticipated, an amendment to the IOJ section of the application can be submitted. Enabling the forms to be completed, submitted and processed earlier in the life of a case will minimize the risk of delay and help ensure representation orders are in place ahead of first hearings.

Second, we propose to make it possible for a representation order to be granted before formal charges have been laid in certain specified cases. This could be particularly advantageous in those cases, such as VHCC [very high cost case] fraud, where much work is often conducted pre-charge. Clearly, careful thought needs to be given to the specific conditions which would attach to such an order, including the type of work, the appropriate level of representative authorised to undertake such work, and the correct fee structure. We will work closely with stakeholders from the legal profession and from CJS agencies in developing the detail of these proposals before any new scheme is implemented. The Attorney General has already established a Working Group to take forward a recommendation of the Fraud Review that a framework for early plea negotiations in fraud cases should be devised. This change would help facilitate such negotiations.

We are also proposing to introduce an express power to pilot schemes relating to the grant of representation orders. This will ensure that future changes can be fully tested and evaluated before being rolled out – including Crown Court implementation of the *Criminal Defence Service Act 2006* and the earlier grant of representation orders referred to above. The power would extend to all Criminal Defence Service schemes governed by secondary legislation, and would allow us to test in greater detail the wider impact on the CJS of changes to the legal aid regime. Any pilots under this power would have effect only for a specified period, not longer than 12 months unless extended by regulation (and in any case no more than 18 months). We would also like it to be possible to extend a pilot scheme if that is necessary to cover a gap between the end of the pilot and its



possible rollout on a more comprehensive basis. Pilots could apply in relation to one or more prescribed areas or locations (which could include particular court buildings or other locations such as custody suites at police stations), types of court (ie magistrates' courts or the Crown Court), offences or classes of person (such as persistent young offenders).

Lastly, in response to practical concerns raised about the working of the real time link between courts and the DWP to process means test applications from those in receipt of 'passportable' benefits, it is proposed to introduce a statutory gateway to ensure applications are dealt with as swiftly and accurately as possible. While we have already made some changes to the system to minimise error and improve functionality, the current framework will not adequately address the issues that have arisen since implementation. Therefore, the best long-term solution is for staff to be able to search the DWP database and access information about the benefit status of the individual. The statutory gateway would only allow the sharing of relevant information for the specific purpose of administering the grant of legal aid (a function of the Legal Services Commission under schedule 3 of the Access to Justice Act 1999).

The Bill is intended to enable:

- rights to representation<sup>94</sup> to be applied for and granted provisionally in prescribed circumstances (according to the Explanatory Notes this would be "before point of charge";<sup>95</sup> the Partial Regulatory Assessment refers to grants "at an earlier stage"<sup>96</sup>)
- the "relevant authority" (the Explanatory Notes refer to HM Court Service staff processing means tested applications<sup>97</sup>) to request and receive information held by HM Revenue and Customs and the Department for Work and Pensions for the purpose of assessing financial eligibility for legal aid; there would be certain restrictions on the disclosure of this information and
- the power to pilot schemes under secondary legislation relating to the grant of criminal legal aid.

Detailed information about the relevant provisions is included in the Government's Explanatory Notes published with the Bill.<sup>98</sup>

Vera Baird confirmed in a later letter to stakeholders that, as all three proposals would require regulations before they came into effect, "there will be extensive opportunities to contribute to the overall design process".<sup>99</sup> Consultation on the proposals is expected to start shortly with further detailed consultation on each proposal to take place at a future date.<sup>100</sup>

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<sup>94</sup> Representation covers the preparation of a case and advocacy at any hearing

<sup>95</sup> Paragraph 30

<sup>96</sup> <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill2.pdf>

<sup>97</sup> Paragraph 30

<sup>98</sup> Bill 130-EN, paragraphs 343 to 361,

<http://www.publications.parliament.uk/pa/cm200607/cmbills/130/en/2007130en.pdf>

<sup>99</sup> Letter dated 26 June 2007

<sup>100</sup> Personal communication 13 July 2007



## E. Compensation for Miscarriages of Justice

Clause 62 of the *Criminal Justice and Immigration* is designed to alter the compensation scheme for victims of miscarriages of justice currently provided for in section 133 of the *Criminal Justice Act 1988*. The changes seek to impose a time limit for making applications for compensation, place an upper limit on the amount of compensation that may be awarded, restrict the compensation that may be paid for loss of earnings, and will enable the assessor to make deductions from the level of compensation in the light of any contributory conduct or any previous convictions held by the applicant.

The proposed changes were first announced by the former Home Secretary, Charles Clarke, in a written statement on 19 April 2006. That statement had also announced some immediate changes to the scheme, including abolishing a second, discretionary, compensation scheme. The legislative changes proposed were as follows:

Currently, section 133 of the Criminal Justice Act 1988 limits deductions from compensation awards in respect of convictions to the amount awarded to the applicant for non-pecuniary loss. I intend to bring forward legislation as soon as a suitable opportunity arises to empower the assessor in appropriate cases to make deductions because of convictions from the whole of the award—including pecuniary loss—and to provide that in exceptional cases the amount of compensation may be reduced to nil because of criminal convictions and/or contributory conduct by the applicant.

I also intend to bring forward legislation to provide that the maximum amount of compensation payable under the statutory scheme should be £500,000 and that the maximum compensation payable in respect of loss of earnings should be one and a half times the gross average industrial earnings.<sup>101</sup>

In its briefing on the Bill the Law Society comments:

The Law Society is opposed to this provision, which would arbitrarily cap the maximum amount of compensation payable for the worst case of suffering arising from a miscarriage of justice at £500, 000, to bring it into line with claims made by victims of crime. While the Law Society would support an increase in resources available to support victims of crime, this must not be at the expense of those who have suffered a miscarriage of justice at the hands of the state and who are in fact victims themselves.<sup>102</sup>

Liberty comments that:

Clause 62 is also of particular concern. In the words of the Ministry of Justice press release which accompanied the introduction of the Bill, it is designed to “[bring] compensation for the wrongly convicted into line with that for victims of crime.” Of course Liberty agrees that victims of crime should receive compensation for their loss and suffering. The perpetrator of the crime should rightly bear the primary responsibility to provide compensation given that their

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<sup>101</sup> HC Debates 19 April 2006 c14-17WS

<sup>102</sup> *Parliamentary Brief: Criminal Justice & Immigration Bill Second Reading – House of Commons Law Society* 23 July 2007 p.3

wrong-doing is to blame. It is for this reason that a victim of crime can take a civil action against the criminal. It is also entirely right that the state should provide compensation to victims under the Criminal Injuries Compensation Scheme (the "CICS"). Although the state is not directly responsible for the victim's suffering this compensation acknowledges the fact that perpetrators of crime often have limited financial means as well as the fact that the state owes a moral obligation to provide the basic help its citizens need in difficult times.

We do not, however, accept that there is any rational connection between the levels of compensation paid out under the CICS and the amount of compensation that victims of miscarriages of justice receive. The way this is expressed in the press notice suggests that this is part of the "rebalancing the criminal justice system" agenda - as though either victims of miscarriages of justice were, in fact, perpetrators of crime getting a better deal than victims; or as though victims of crime would get more from CICS if victims of miscarriages of justice got less. Of course, neither assertion has any basis in reality.

The position of the state, and its proper responsibility to pay compensation, is entirely different in respect of a miscarriage of justice as compared to a victim of crime. The State has, at best, limited control over the criminal actions of individuals on the street. For this reason it is right that the criminal should themselves bear the main burden for, as far as possible, restoring the victim to the position they were in before the wrong-doing. By contrast, in the case of a miscarriage of justice the wrongdoing is committed by the state – no one else can be held to account for this. Where the state makes a mistake and wrongly convicts someone of a crime, there is no justification for the state escaping its responsibility for compensating the victim of the mistake so that as far as possible they are put in the same position as if the mistake had never happened. As cases like those of Angela Cannings and Sally Clarke demonstrate so clearly, full financial compensation is not in itself enough to enable people to rebuild their lives after being wrongfully convicted. It is, however, the very least that could reasonably be expected of the state when it makes a mistake which has such terrible consequences.<sup>103</sup>

## VII Pornography

### A. The Bill's provisions

**Clause 64** would implement measures to combat possession of images that are both extreme and pornographic. Extreme images are defined in clause 64(6) as those depicting life-threatening acts, acts which cause or could cause serious injury to a person's anus, breasts or genitals, and acts of necrophilia or bestiality. A pornographic image is one that appears to have been produced solely or principally for the purpose of sexual arousal. Under the *Obscene Publications Act 1959* it is already illegal to publish material meeting the above definitions, though the international nature of the Internet impedes enforcement. The present Bill would make possessing such material illegal. Any data capable of being converted into an extreme pornographic image is also included; this is presumably designed to capture data that has been encrypted.

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<sup>103</sup> *Liberty's Briefing on the Criminal Justice and Immigration Bill* Liberty June 2007 paras. 31-33  
<http://www.liberty-human-rights.org.uk/pdfs/policy07/criminal-justiceand-immigration-bill.pdf>

Clause 64 takes into account the context in which an image appears. Thus, an image that would be pornographic if taken in isolation may not be deemed pornographic if it forms an integral part of a non-pornographic narrative made up of a series of images.<sup>104</sup> Consistent with this is the exclusion, in **clause 65**, of images which form part of a video work for which a classification certificate has been issued by the British Board of Film Classification. The BBFC will have to take into account clause 64 when deciding whether to issue a certificate to a video work; in practice current guidelines for R18 certificates would appear already to exclude the kind of extreme pornography envisaged. Extracts from classified films will not benefit from the exemption if it appears that they have been produced solely or principally for the purpose of sexual arousal. Clause 65(8) refers to section 22(3) of the *Video Recordings Act 1984* which prevents classified status being preserved by works which have been altered or added to.

Defences for the possession of extreme pornographic images are set out in **clause 66**. A reverse burden of proof applies in that it would be for the person charged to prove any of the following matters:

- a legitimate reason for possessing the image concerned
- that the image had not been seen and was not known, nor suspected, to be an extreme pornographic image
- that it had been sent to the defendant without having been requested and was not kept for an unreasonable time

The latter defence might apply, for example, to cases where an innocent internet search yielded extreme pornographic images among intended hits (so long as they were not knowingly stored on the computer).<sup>105</sup> Penalties for possession of extreme pornographic images are set out in **clause 67**. On summary conviction the maximum penalty would be 12 months' imprisonment (England and Wales)<sup>106</sup> or 6 months' imprisonment (Northern Ireland) and a £5,000 fine. On indictment, the maximum penalty would be 3 years' imprisonment and an unlimited fine. For images not depicting extreme pornographic acts on a living person, a lesser maximum custodial sentence of two years will be available (this would apply to necrophilia and bestiality). Anyone of age 18 or over who received a sentence of at least 2 years' imprisonment would be subject to the notification requirements of Part 2 of the *Sexual Offences Act 2003*. In other words, they would be placed on the "sex offenders' register".

**Clauses 68 and 69** extend the definition of an indecent photograph in the *Protection of Children Act 1978*, and the equivalent Northern Ireland legislation, to include a tracing or other image derived from it.<sup>107</sup> Section 1 of the *Protection of Children Act 1978* (as amended) makes it a criminal offence to take, permit to be taken or to make, distribute, show, advertise or possess any indecent photograph or pseudo-photograph of a child

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<sup>104</sup> Clause 64(5)

<sup>105</sup> *Atkins v DPP* [2000] 2 All E.R. 425, QBD, Divisional Court (cited in Graham J H Smith, *Internet Law and Regulation*, third edition, 2002 p543)

<sup>106</sup> See paragraph 15 of Schedule 22 for a transitional provision in relation to length of the maximum sentence

<sup>107</sup> Bill 130 – EN, para 34

under the age of 18. Exceptions to the possession offence cover such instances as married couples and the investigation of crime. The 1978 Act defines a pseudo-photograph as “an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.” Data stored electronically which would be capable of conversion into a derived image as described above would also be captured by the Bill’s provisions. This already applies to data which is convertible to photographs and pseudo-photographs.

Publication of obscene material, including child pornography and extreme adult pornography, is illegal under the *Obscene Publications Act 1959*. The Act applies to internet publication but, as noted earlier, jurisdictional difficulties arise from the availability of pornography on foreign websites. Relevant offences are triable both ways; on conviction on indictment the maximum penalty is an unlimited fine and three years’ imprisonment. **Clause 70** of the present Bill would raise the latter to five years.

## **B. Policy background**

### **1. Extreme pornography**

In August 2005, the Home Office and Scottish Executive launched a consultation paper, *On the possession of extreme pornographic material*. A section on the evidence of harm included the following: “We consider that it is possible that such material may encourage or reinforce interest in violent and aberrant sexual activity to the detriment of society as a whole”.<sup>108</sup>

On 30 August 2006, the Home Office published its response to the consultation.<sup>109</sup> An accompanying press release announced the forthcoming introduction of a “New Offence To Crack Down On Violent And Extreme Pornography”:

The possession of violent and extreme pornographic material will become a criminal offence punishable by up to three years in prison under proposed new laws announced today by Home Office Minister Vernon Coaker.

The Government will legislate to make it an offence to possess pornographic images depicting scenes of extreme sexual violence and other obscene material. This will include, for example, the sort of material featuring violence that is, or appears to be, life threatening or is likely to result in serious and disabling injury.

The proposals were published today as part of the Government's response to its consultation on the possession of violent and extreme pornographic material launched a year ago.

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<sup>108</sup> Home Office, National Offender Management Service and Scottish Executive, *Consultation: On the possession of extreme pornographic material*, August 2005, para. 27. This document is not published on the Home Office or Scottish Executive websites, but a copy is available on the BBC website:

[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/30\\_08\\_05\\_porn\\_doc.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/30_08_05_porn_doc.pdf)

<sup>109</sup> Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary of responses and next steps*, 30 August 2006

<http://www.homeoffice.gov.uk/documents/cons-extreme-porn-3008051/>

The material to be covered by the ban is already illegal to publish and distribute in the UK under the Obscene Publications Act (OPA) 1959. Such material has become increasingly accessible from abroad via the internet. The new law will ensure possession of violent and extreme pornography is illegal both on and offline.

At the time the BBC reported: “the government move follows a wide consultation process after a campaign led by Reading mother Liz Longhurst. Her daughter Jane was strangled during what music teacher Graham Coutts claimed was consensual sex. He was said in court to have been addicted to violent porn.”<sup>110</sup> The same article reported wide support for the proposals while acknowledging some doubts with regard to enforceability and human rights issues. It is likely that the UK would be the first western jurisdiction to introduce a ban on simple possession of extreme material.<sup>111</sup> Coutts was recently jailed for life.<sup>112</sup>

The Government’s August 2006 press release went on to report Vernon Coaker as having said:

This is a complex issue on which we have consulted widely. Our intention to legislate in this area has the support of various organisations, including women’s and children’s groups and police forces. In addition, a petition signed by around 50,000 people objecting to extreme internet sites promoting violence against women in the name of sexual gratification was presented to Parliament.

Jim Gamble, Chief Executive of the Child Exploitation and Online Protection (CEOP) Centre and ACPO<sup>113</sup> lead for this area of criminality, referred to the need to meet the challenge posed by extreme pornography on the internet:

Legislation is only truly effective if it develops step by step with technological advances. Today starts to answer that need in respect of how the internet can be used to supplement this area of criminality.

It builds on the fundamentals of the Obscene Publications Act 1959 and helps take our fight against violent and extreme pornography to where it needs to be - in tune with technology and in line with how the modern criminal mind works.

By banning the possession of extreme pornographic material the Government’s proposals mirror the existing offence, under the *Protection of Children Act 1978* (as amended by the *Sexual Offences Act 2003*) of possession of child pornography.

Some responses to the consultation are available online.<sup>114</sup> An overview of responses, published by the Home Office, provides evidence of polarised opinions on some aspects of the proposals:

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<sup>110</sup> “Support for porn ban but doubts remain”, *BBC News Online*, 30 August 2006

<http://news.bbc.co.uk/1/hi/england/berkshire/5298700.stm>

<sup>111</sup> *Consultation: On the possession of extreme pornographic material*, Home Office, August 2005

<sup>112</sup> “Strangler jailed”, *Times*, 6 July 2007

<sup>113</sup> Association of Chief Police Officers

<sup>114</sup> <http://www.scotland.gov.uk/Topics/Justice/criminal/17543/ExtremePornographicMaterial/Response>

1. The total number of responses to the Consultation Paper was 397. Opinions were sharply divided: the vast majority of the responses to the proposals to strengthen the law to create a new offence of possession of a limited category of extreme pornography were either strongly supportive or strongly opposed. A majority of organisations responding were in favour: a majority of individuals responding opposed the proposals. Where expressed, there was a general consensus that the laws against possessing indecent photographs of children were necessary. To a lesser extent, most people were in favour of, or held no strong views about, the proposal to proscribe possession of images of bestiality and necrophilia, though some thought it would be hard to enforce in practice.

2. On the whole, those who were in favour of the proposal supported the arguments set out in the consultation paper. Many expressed the view that the boundaries of acceptability were continually expanding and would continue to do so unless action was taken now. Many felt that the proposal should go much further, and that tighter restriction on all pornography should be imposed. Virtually all of those opposed to the proposals were worried that the inclusion of material featuring 'sexual violence' and 'violence in a sexual context' would criminalise possession of images of consensual sexual acts, such as private photographs taken by a husband and wife, or material created by those practising BDSM (BDSM includes the consensual practices of Bondage, Domination, Submission and Mastery, and Sado-Masochism.). Many of those opposed also raised issues of proportionality, freedom of speech, lack of evidence of harm and police resources.

Among the critics of the Bill is Backlash, a campaigning organisation comprising a coalition of individuals and activist groups opposed to some aspects of the legislation. Backlash was created in 2005 by the Libertarian Alliance, the Spanner Trust, the Sexual Freedom Coalition, Feminists against Censorship, Ofwatch and Unfettered. Its online briefing material is introduced in the following terms:

The central issue here is not whether violent and abusive behaviour is defensible. It is not, as everyone agrees. Rather, the issue is whether this proposal will criminalise non-abusive activities engaged in by consenting adults.

The question that immediately follows is this: if the activities/material in question are not abusive, should they be outlawed because some (even most) people find them distasteful? It is worth remembering that a majority once took that view on homosexuality.<sup>115</sup>

An article that appeared in *New Law Journal* (2 February 2007) argued that some aspects of the proposed measures are anomalous:

Though argued to be harmful, specifically and generally, material showing extreme violent conduct will not be outlawed unless it is part of a context of sexual arousal. Yet why is depiction of extreme violence without a sexual context deemed less harmful than violence in a sexual context? This is a serious anomaly which makes little sense.

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<sup>115</sup> <http://www.backlash-uk.org.uk>

The new offence will also cover simulated sexual violence, which avoids the need to prove that the activity depicted was real – a rationale mirroring that of [the *Obscene Publications Act 1959*]. However, a simulation condition will mean that the illegality only exists in the depiction. Rape games in sexual relationships are not illegal in themselves, but possessing images of the simulation may become unlawful.<sup>116</sup>

On human rights considerations, the original Home Office / Scottish Executive consultation document commented:

The proposal which we have set out will impact upon the freedom of individuals to view what they wish in the privacy of their own homes. However, the material which we intend to target with this new offence is at the very extreme end of the spectrum and we believe most people would find it abhorrent. There will be no restriction on political expression or public interest matters, or on artistic expression. It is not the intention that this offence should impact upon legitimate reporting for news purposes, or information gathering for documentary programmes in the public interest and, in drafting the offence, we will give careful consideration to the best means of ensuring this. In the light of this, we have considered whether there are implications for our obligations under the European Convention on Human Rights and our view is that both our domestic courts and the Strasbourg court will find our proposal compatible with Article 10 (freedom of expression) or Article 8 (private life) if that is raised.<sup>117</sup>

## 2. Child pornography

The Home Office has recently concluded a public a consultation (closing date 22 June 2007) into the possession of non-photographic visual depictions of child sexual abuse. The associated consultation document, available online, was published on 2 April 2007.<sup>118</sup> Background is provided on the Home Office website:

This consultation paper outlines the concerns about non-photographic visual depictions of child sexual abuse, i.e. computer generated images (CGIs), drawings, animation, etc, and seeks views on proposals to make its possession an offence.

Under current law it is an offence to possess indecent photographs (including videos) and pseudo-photographs of children. However, it is not an offence to possess non-photographic visual depictions of child sexual abuse. The police and children's welfare groups report a growing increase in interest in these images, including an increase in websites advertising this sort of explicit material.

Police and children's welfare groups are concerned that these images could fuel the abuse of real children by reinforcing abusers' inappropriate feelings towards children. These images, particularly as they are often in a cartoon or fantasy style format, could be used in 'grooming' or preparing children for sexual abuse.

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<sup>116</sup> "Harmful viewing", *New Law Journal*, 2 February 2007 p 170

<sup>117</sup> The Scottish Parliament has yet to legislate in this area, but information on the Scottish responses to the consultation is available online:

<http://www.scotland.gov.uk/Topics/Justice/criminal/17543/ExtremePornographicMaterial/ExtremePornographicMaterial>

<sup>118</sup> <http://www.homeoffice.gov.uk/documents/cons-2007-depiction-sex-abuse>

Under current law owners of these explicit images could not be prosecuted for their possession, nor could the images be forfeited by the authorities.<sup>119</sup>

Unlike some adult pornography, child pornography is characterised by an absence of consent and involves illegal acts; these are key objections to it in relation to photographs. As to the harm caused by other images depicting child sexual abuse, one of the consultation questions implies a shortage of concrete evidence:

In the absence of research into the effects of these images on offenders and the general public, do you think the proposal to make it illegal to possess the material described in this consultation is nevertheless justified?

The report by the Longford Committee investigating pornography was published in 1972. A chapter on the effects of pornography more generally cited a number of individual cases where obscene material appeared to have corrupted people. However, the chapter began with a cautionary note:

Firm demonstrations of the damage done by pornography (or, for that matter, of the benefits if any) are notoriously hard to come by. It would be strange if it were otherwise. Those who have done any research work in the social sciences are well aware of the difficulty, some would say the impossibility, of establishing causal connections between particular factors and human behaviour.

Later, the Longford report added:

It is quite untrue to say, as have some enlightened persons, that there is no evidence that pornography does harm. There is plenty of evidence that it *sometimes* does harm, that it *can* therefore do harm. There is quite sufficient to confirm the instinctive reaction of most people that what strikes them as revolting is likely to damage the individual, both directly and indirectly as a member of the community whose moral standards are lowered.

Citing the acceptance that literature and art clearly have some (beneficial) effect on individuals, Longford went on:

Pornography clearly must have some effect. We ourselves have no doubt about its general tendency.

Only in very rare cases can a causal connection between pornography and anti-social behaviour be conclusively proved, if only because it is undesirable to use human beings in controlled experiments which would be necessary for conclusive proof. But we repudiate the deduction that such a connection therefore may not exist.

Tim Tate's book, *Child pornography: an investigation* (Methuen 1990) includes an appendix by Ray Wyre, a former probation officer who spent many years working with sex offenders and paedophiles. Wyre wrote:

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<sup>119</sup> *ibid.*



Child pornography (and for that matter adult pornography) is something that can be used not only for sexual stimulus, but also to confirm some of the above statements [identifying non-sexual needs met through offending] made by abusers. In working with child sex abusers one is constantly dealing with their distorted thinking. An abuser is a person seeking to make his behaviour seem as normal as possible: he will use anything – including child pornography or child erotica – to achieve this.

## VIII Prostitution (“street offences”)

This Bill is changing only one aspect of the law on prostitution: the “street offence” of loitering or soliciting for the purposes of prostitution. Its main effect is to introduce a new sentence designed to encourage rehabilitation, in place of fines which have been found to be counter-productive.

### A. Prostitution offences

Although prostitution is legal (and its proceeds taxable), there are several criminal offences closely associated with it in England and Wales which are still largely based on legislation from the 1950s. The offences cover pimps and brothel-keepers, and soliciting by and of prostitutes, but do not criminalise the exchange of money for sex between adults. One author has suggested that “the only way that prostitution can be practised without committing a criminal offence is as a one-to-one arrangement between two consenting adults in private”.<sup>120</sup> The main offences are:

- Loitering and soliciting by a common prostitute in a street or public place for the purpose of prostitution (section 1, *Street Offences Act 1959* as amended)
- Persistent soliciting of a person or persons for the purpose of prostitution (section 2, *Sexual Offences Act 1985* as amended)
- Brothel-keeping and associated offences (sections 33 to 36, *Sexual Offences Act 1956* as amended)
- Causing or inciting prostitution for gain (section 52, *Sexual Offences Act 2003*)
- Controlling prostitution for gain (section 53, *Sexual Offences Act 2003*)
- Trafficking into, within or out of the UK for sexual exploitation (sections 57-60, *Sexual Offences Act 2003*)<sup>121</sup>
- Kerb crawling (when a person in a motor vehicle attempts to solicit someone for the purposes of prostitution) (section 1, *Sexual Offences Act 1985* as amended)
- Placing of advertisements relating to prostitution in or near phone boxes (sections 46 and 47, *Criminal Justice and Police Act 2001*)
- Abuse of children through prostitution (sections 47-50, *Sexual Offences Act 2003*)

Although other sexual offences legislation has recently been consolidated and revised (in the *Sexual Offences Act 2003*) and the Government has recently published a review of prostitution offences, a consultation paper and proposals for a “co-ordinated prostitution

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<sup>120</sup> Joanna Phoenix, *Making Sense of Prostitution*, 1999, p20

<sup>121</sup> See [Library Standard Note SN/HA/4324, Human trafficking: UK responses](#), 25 April 2007

strategy”, there are no current proposals for a wholesale revision of prostitution offences. Some of the offences have however been amended by the *Sexual Offences Act 2003* to make them gender-neutral.

Before prosecuting a person for soliciting, the police will issue a “prostitute’s caution” on at least two occasions, to assist in proving that the person is a “common prostitute”. This provides an early opportunity for the police to suggest local support and advice services.<sup>122</sup> The use of new conditional cautions in response to the offence of loitering or soliciting is currently being piloted in Doncaster: the individual must agree to accept a conditional caution (unlike a prostitutes’ caution) and the conditions must be proportionate, achievable and appropriate. Failure to comply with the conditions imposed may lead to the individual being charged with the original offence.<sup>123</sup>

The *Criminal Justice Act 1982* ended the use of imprisonment as a punishment for women convicted of soliciting. People convicted of kerb-crawling also face a fine rather than imprisonment, whereas imprisonment is an option for most of the other prostitution-related offences.

## **B. Reviews of the law**

There have been calls for reform of the law on prostitution for many years, including the Wolfenden Committee’s 1957 report<sup>124</sup> and reports published in 1984 and 1985 by the Criminal Law Revision Committee on prostitution both on and off the street.<sup>125</sup>

A cross-party Parliamentary Group on Prostitution, chaired by Diane Abbott MP, was established in 1993 and published a report in July 1996. It had taken evidence from a number of statutory and voluntary agencies, and also from prostitutes themselves. The report concluded that there was considerable agreement from all the groups who gave evidence that the current legislation relating to prostitution is not working well, in particular because it is fragmented rather than coherent and integrated. It therefore recommended that the Home Secretary carry out a comprehensive review of the legislation relating to prostitution. The group also agreed on several particular recommendations relating to a review of the law, including that the offence of ‘soliciting for the purposes of prostitution’ should attract sanctions such as community-based sentences rather than fines.<sup>126</sup>

The Government announced in 1998 that it would conduct a wholesale review of sexual offences and penalties,<sup>127</sup> and that in doing so it would consider the laws relating to soliciting.<sup>128</sup> An independent review was duly set up, and published its recommendations

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<sup>122</sup> Home Office, *A Coordinated Prostitution Strategy and a summary of responses to Paying the Price*, January 2006, p. 38: <http://www.homeoffice.gov.uk/documents/ProstitutionStrategy.pdf>

<sup>123</sup> *Criminal Justice Act 2003* ss. 22-27. See also Home Office, *A Coordinated Prostitution Strategy and a summary of responses to Paying the Price*, January 2006, p. 38: <http://www.homeoffice.gov.uk/documents/ProstitutionStrategy.pdf>

<sup>124</sup> Report of the Committee on Homosexual Offences and Prostitution, Cmnd 247, p 97

<sup>125</sup> Cmnd 9329 and Cmnd 9688 respectively

<sup>126</sup> Report of the Parliamentary Group on Prostitution, July 1996, pp 39-42

<sup>127</sup> HC Deb vol. 314 c10, 15 June 1998

<sup>128</sup> HC Deb vol. 314 c358w, 22 June 1998

to Ministers in the form of a consultation document, *Setting the Boundaries*, in July 2000.<sup>129</sup> A main recommendation was that there should be a further review of the law on prostitution, which the Government accepted. In November 2002, having responded to *Setting the Boundaries*, the Government published its new policy on sexual offences in a white paper entitled *Protecting the Public*.<sup>130</sup> The *Sexual Offences Act 2003* followed, which, whilst not introducing a comprehensive new set of prostitution-related offences, did change some of the existing offences to make them gender-neutral, brought in a new offence of trafficking for sexual exploitation to replace the stop-gap provision in the *Nationality, Immigration and Asylum Act 2002*, and created new offences on the abuse of children through prostitution and pornography and on exploitation of prostitution.

In July 2004 the Home Office published a consultation paper entitled *Paying the Price: a consultation paper on prostitution*<sup>131</sup> and this was followed in January 2006 by a report summarising the responses to the consultation paper and setting out the Government's proposals for "a co-ordinated prostitution strategy".<sup>132</sup> The report's executive summary says that its key objectives are to:

- challenge the view that street prostitution is inevitable and here to stay
- achieve an overall reduction in street prostitution
- improve the safety and quality of life of communities affected by prostitution, including those directly involved in street sex markets
- reduce all forms of commercial sexual exploitation.

The prostitution strategy includes measures on:

- **prevention** – awareness raising, prevention and early intervention measures to stop individuals, particularly children and young people, from becoming involved in prostitution (*Section 1*)
- **tackling demand** – responding to community concerns by deterring those who create the demand and removing the opportunity for street prostitution to take place (*Section 2*)
- **developing routes out** – proactively engaging with those involved in prostitution to provide a range of support and advocacy services to help them leave prostitution (*Section 3*)
- **ensuring justice** – bringing to justice those who exploit individuals through prostitution, and those who commit violent and sexual offences against those involved in prostitution (*Section 4*)
- **tackling off street prostitution** – targeting commercial sexual exploitation, in particular where victims are young or have been trafficked (*Section 5*).<sup>133</sup>

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<sup>129</sup> *Setting the Boundaries: Reforming the law on sex offences*, Home Office, July 2000 (deposited paper 00/1247): <http://www.homeoffice.gov.uk/documents/vol1main.pdf?view:Binary>

<sup>130</sup> *Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences*, Home Office, November 2002 (Cm 5668): <http://www.archive2.official-documents.co.uk/document/cm56/5668/5668.pdf>

<sup>131</sup> [http://www.homeoffice.gov.uk/documents/paying\\_the\\_price.pdf](http://www.homeoffice.gov.uk/documents/paying_the_price.pdf)

<sup>132</sup> Home Office, *A Coordinated Prostitution Strategy and a summary of responses to Paying the Price*: <http://www.homeoffice.gov.uk/documents/ProstitutionStrategy.pdf>

<sup>133</sup> Home Office, *A Coordinated Prostitution Strategy and a summary of responses to Paying the Price*, January 2006, Executive summary: <http://www.homeoffice.gov.uk/documents/ProstitutionStrategy.pdf>

The report's only legislative commitment was "To legislate to reform the offence of loitering or soliciting". Some respondents had called for this offence to be repealed altogether but others felt it sent a useful message:

A number of respondents providing services to women in prostitution favoured the repeal of the loitering or soliciting offence on the basis that it would reduce stigmatisation and may be less inhibiting to women in need of help and protection. However, other respondents felt that it could send out the wrong message about the acceptability of street prostitution to young people, to those involved in providing sexual services, to those who create the demand for sex markets, and to those who control those markets.

There was a wider consensus among respondents in respect of the decriminalisation of those under 18. Respondents were concerned that the message that these young people are victims of child abuse could be undermined by their potential criminalisation. Guidance on Safeguarding Children Involved in Prostitution requires young people to be treated primarily as victims of abuse. Since its issue in 2000, numbers of cautions and prosecutions of those under 18 have dropped dramatically to only three convictions in England and Wales in 2004.

Many respondents echoed the view expressed in *Paying the Price* that the law on street offences is outdated and ineffective. They were keen to see reforms that would introduce a more rehabilitative approach to women in prostitution, with opportunities at every stage of the process for diversion into the kind of services that will directly address the underlying reasons for their involvement. It was also widely acknowledged that there must be a strong partnership between enforcement agencies and those providing protection and support if successful routes out of prostitution are to be established.<sup>134</sup>

The Government suggests that fining prostitutes for soliciting or loitering is counter-productive:

the law is widely considered to have little or no deterrent or rehabilitative value. Rather, it may have a perverse incentive in that the imposition of a fine requires the offender to be involved in further prostitution in order to pay...a local focus on increased enforcement typically only displaces those involved because it fails to address the reasons that keep them on the streets... enforcement is ineffective without support to help individuals to find routes out of prostitution.<sup>135</sup>

## **C. Clauses 71-73**

### **1. Soliciting**

**Clause 71** would amend the offence of "loitering or soliciting for the purposes of prostitution" in section 1 of the *Street Offences Act 1959*. It does not decriminalise the

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<sup>134</sup> Home Office, *A Coordinated Prostitution Strategy and a summary of responses to Paying the Price*, January 2006, p. 7: <http://www.homeoffice.gov.uk/documents/ProstitutionStrategy.pdf>

<sup>135</sup> Ministry of Justice, *Criminal Justice and Immigration Bill: Regulatory Impact Assessments* p. 98: <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>

offence, even for people under 18, but removes the term ‘common prostitute’ and introduces the possibility of a new sentence of “orders to promote rehabilitation” as an alternative to a fine for those convicted.

The amended offence would read as follows (new words in italics, words to be deleted in square brackets):

It shall be an offence for a *person* [common prostitute (whether male or female)] *persistently* to loiter or solicit in a street or public place for the purpose of prostitution.

For these purposes “persistent” would mean two or more times in any three-month period. Currently the police would expect to issue two prostitutes’ cautions in three months before considering a person a “common prostitute”, though it may be that one previous caution is enough at law.<sup>136</sup>

The Bill does not make any reference to the apparently very similar offence of “persistent soliciting” under section 2 of the *Sexual Offences Act 1985* (as amended):

A person commits an offence if in a street or public place he persistently solicits another person (or different persons) for the purpose of prostitution.

This offence is in fact quite different, as it is committed by the customer rather than the prostitute.<sup>137</sup>

## 2. New sentencing order

Currently the offence under the 1959 Act of loitering or soliciting for the purposes of prostitution attracts a maximum fine of £500, or £1,000 in the case of a second or subsequent conviction.

**Clause 72** proposes an alternative of a new “order to promote rehabilitation” for this offence (but not for any other prostitution-related offence). It would be at the discretion of the court as to whether to impose a fine or a rehabilitation order. The new order is intended “to deliver an overall reduction in the numbers involved in street-based prostitution”.<sup>138</sup> It would result in the court directing the offender to attend three sessions with an identified “referral worker” and possibly other counsellors or advisers. The referral worker is likely to come from a support project under the Government’s prostitution strategy:

The order will be sufficiently flexible to enable referral workers to be identified from within a range of organisations. A key element of the prostitution strategy is for local partnerships to ensure that dedicated support projects are commissioned to develop routes out for those involved in prostitution in all areas where they are

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<sup>136</sup> see *R v Morris-Lowe* (1984) Cr App Rep 114, CA

<sup>137</sup> *Sexual Offences Act 1985* s. 4(1), as amended

<sup>138</sup> Ministry of Justice, *Criminal Justice and Immigration Bill: Regulatory Impact Assessments* p. 96: <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>

required. These projects will be well placed to provide the different elements that will be included in the order, and to determine what those elements should be. They have the greatest expertise in dealing with those involved in prostitution; generally have established protocols with the police and mainstream services, including health services; and also offer a key worker approach which will be important in supporting those involved through a difficult challenge, and one in which few feel confident that they can succeed. This key worker approach will be extremely important in terms of encouraging compliance with the orders.<sup>139</sup>

Breach of an order would result in the person being returned to court and sentenced again for the original offence, meaning either a fine or another rehabilitation order (see **Schedule 18**). It would not be punished with imprisonment (though the person may be detained for up to 72 hours if they are arrested under a warrant following for example the breach of an order and subsequent non-attendance at court).

The Government has estimated the additional costs of the new order at £127,768 over the first five years, but suggests that a reduction in the number of prosecutions for loitering and soliciting following the publication of the new prostitution strategy could result in savings of £1.2 million over the same period (the strategy states that “only where ... help or support is refused, and the persistent loitering or soliciting is a nuisance to local residents, is prosecution likely to be appropriate”).<sup>140</sup> The Government also hopes that more people will stop being prostitutes as a result of the order, and estimates that a five per cent increase in the exit rate each year would result in a further £1.5 million of benefits to society over five years.

Parallels can be drawn with community sentencing under the *Criminal Justice Act 2003*.<sup>141</sup> Community Orders can require an offender to attend a programme on general offending, violence, sex offending, drug or substance misuse or domestic violence. However, Community Orders are available only if the offence is “serious enough to warrant such a sentence” or if the offender has had three or more previous convictions resulting only in a fine,<sup>142</sup> and failure to comply with the requirements of a Community Order can result in a custodial sentence.<sup>143</sup> The Government has suggested that soliciting is a low-level offence and therefore “does not reach the threshold of a community penalty”.

The Government’s women’s offending reduction programme supports the greater use of community sentences wherever possible.<sup>144</sup>

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<sup>139</sup> Ministry of Justice, *Criminal Justice and Immigration Bill: Regulatory Impact Assessments* p. 99: <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>

<sup>140</sup> Ministry of Justice, *Criminal Justice and Immigration Bill: Regulatory Impact Assessments* pp. 101-102 and appendix: <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>. See also Bill 130-EN para. 713

<sup>141</sup> See Part II C above and [http://www.cjsonline.gov.uk/offender/community\\_sentencing/index.html](http://www.cjsonline.gov.uk/offender/community_sentencing/index.html)

<sup>142</sup> *Criminal Justice Act 2003* s. 148(1)

<sup>143</sup> *Criminal Justice Act 2003* Schedule 8 (as amended)

<sup>144</sup> HL Deb 1 February 2007 c79-80WA



### 3. Criminal records

**Clause 71(4)** repeals the provision under which a person cautioned for loitering or soliciting could apply to the magistrate' court to have the caution removed from the police record. Apparently this has fallen into disuse.<sup>145</sup> Clause 54 and Schedule 12 of the Bill provides that cautions can now be considered "spent" under the *Rehabilitation of Offenders Act 1974*, which used not to be the case (see section VI B of this paper, above). However, even a spent caution or conviction would remain on the police record and have to be disclosed under certain circumstances, for instance when applying for a job working with vulnerable adults or children, as the Library Standard Note on *Criminal Records* explains.<sup>146</sup>

**Clause 73** provides that the rehabilitation period for someone given a new rehabilitation order would be six months from the date of conviction.

## IX Offences relating to nuclear material and nuclear facilities

Clause 74 and Schedule 15 of the *Criminal Justice and Immigration Bill* seek to amend the *Nuclear Material (Offences) Act 1983* by creating a number of new criminal offences, including extraterritorial offences, relating to acts directed at nuclear facilities; the misuse of nuclear material with intent to cause damage to the environment or recklessness as whether or not any such damage might be caused; and involvement outside the UK in the unlawful importing, exporting or shipping of nuclear material. The provisions in Schedule 15 also seek to increase the maximum sentences for the existing UK offences involving the import, export and shipment of nuclear material and make related changes to the *Customs and Excise Management Act 1979*. These new measures are intended to enable the UK to ratify a number of changes to the *Convention on the Physical Protection of Nuclear Material* (CPPNM) which were agreed in 2005.

## X Data protection penalties

Section 55 of the *Data Protection Act 1998* makes it an offence (with certain exemptions) to obtain, disclose or procure the disclosure of personal information knowingly or recklessly, without the consent of the data controller. Offences are, at present, punishable by a fine only: up to £5,000 in a Magistrates' Court and unlimited in the Crown Court.<sup>147</sup> **Clause 75** would make available to the Courts additional, custodial, penalties: up to six months on summary conviction or up to two years on conviction on indictment. Following the commencement of other legislation,<sup>148</sup> a twelve month sentence will be available on summary conviction throughout Great Britain.

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<sup>145</sup> *Criminal Justice and Immigration Bill: Explanatory Notes* Bill 130-EN, 54/2, para. 409

<sup>146</sup> [SN/HA/4317](#), 4 April 2007

<sup>147</sup> *What price privacy? The unlawful trade in confidential personal information*, Information Commissioner's Office, May 2006 [http://www.ico.gov.uk/cms/DocumentUploads/What\\_Price\\_Privacy.pdf](http://www.ico.gov.uk/cms/DocumentUploads/What_Price_Privacy.pdf)

<sup>148</sup> clause 75(3)

The current enforcement mechanisms in relation to the 1998 Act were outlined in a written answer in June 2006:

**Mr. Steen:** To ask the Minister of State, Department for Constitutional Affairs how many organisations have (a) been found guilty of breaches of the Data Protection Act 1998 and (b) been taken to court since it came into force. [78972]

**Vera Baird:** Failure to comply with the provisions of the Data Protection Act is not in itself a criminal offence. Criminal offences can be committed under section 17 (processing personal data without notification) and section 55 (unlawful obtaining and selling of personal data).

Since the Act came into force the Information Commissioner, who is the independent supervisory authority, has successfully prosecuted individuals and organisations in the criminal courts on 46 different occasions for offences under sections 17 and 55 of the Act. These figures do not include all those who have breached the Act or been served with an enforcement notice for a breach which is not a criminal offence.<sup>149</sup>

In May 2006, the Information Commissioner's Office published a report, *What price privacy?* This referred to alternative means of tackling the "unlawful trade in confidential personal information":

In this age of widespread identify theft, much criminal attention is focused on acquiring personal details for the purposes of fraud. Such crimes are usually prosecuted by other authorities under legislation which carries greater penalties, such as the Theft Act. But some recent well-publicised cases have a clear data protection element that illustrates the growing seriousness of these offences.<sup>150</sup>

After dismissing as "derisory" the fines that often followed convictions under the 1998 Act, the report went on to espouse its central recommendation:

The Information Commissioner recommends an amendment to section 60 (2) of the Data Protection Act 1998, increasing the penalty for section 55 offences committed under the Act to a term of imprisonment not exceeding two years, or to a fine, or to both, for convictions on indictment; and to a term of imprisonment not exceeding six months, or to a fine, or to both, for summary convictions. The Information Commissioner calls on the Lord Chancellor, as the Minister responsible for data protection policy, to introduce the necessary legislation into Parliament as quickly as possible.<sup>151</sup>

The Department for Constitutional Affairs, the government department then responsible (now the Ministry of Justice), responded by publishing concordant proposals in a consultation paper on 24 July 2006. Among other things it noted that prison sentences are (or will be) available for analogous offences involving the misuse of specific types of personal data. Relevant enactments include the *Identity Cards Act 2006*, the *Social*

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<sup>149</sup> HC Deb 22 June 2006 c 2073W

<sup>150</sup> *What price privacy? The unlawful trade in confidential personal information*, Information Commissioner's Office, May 2006

<sup>151</sup> *ibid.* paragraph 7.8



*Security Administration Act 1992* and the *Commissioners for Revenue and Customs Act 2005*. This consultation on *Increasing the penalties for deliberate and wilful misuse of personal data* ended on 30 October 2006. The following day, a critical article appeared in the *Times* in which Magnus Linklater argued that this “bureaucratic coup d’etat” would impede investigative journalism:

It could all too easily prevent investigative journalists looking at personal data in pursuit of a public-interest story; deter whistle-blowers from revealing malpractice; and blow wide open the confidentiality that protects the journalist and his source. The calculation is that, if these measures – jail sentences rather than unlimited fines for the misuse of private data – go through, at least one journalist a year could go to jail for breaches of Section 55 of the Data Protection Act 1998 (DPA).<sup>152</sup>

In a letter to the *Times* on the following day, the Information Commissioner, Richard Thomas, countered:

... But is Magnus Linklater seriously defending journalists and others when they engage investigators who use bribery and impersonation to obtain personal information where that cannot be justified by public interest considerations (Comment, Nov 1)?

No one is proposing new law. What is needed – as spelled out in my report, *What Price Privacy?* – are tougher sanctions to deter a widespread market in buying and selling financial, health, criminal and similar records, which is already illegal.

In detail, section 55 of the 1998 Act makes it an offence to “knowingly or recklessly, without the consent of the data controller – (a) obtain or disclose personal data or the information contained in personal data, or (b) procure the disclosure to another person of the information contained in personal data.” The origins of the section 55 offence lie in the *Criminal Justice and Public Order Act 1994*, “which responded to concerns about the activities of private investigators who made a business out of obtaining personal data.”<sup>153</sup>

There are exemptions for the prevention and detection of crime, national security, or where the data processing is authorised by another enactment, any rule of law or a court order. Furthermore, no offence is committed if it can be shown that obtaining, disclosing or procuring the personal data was in the public interest. However, with the prospect of prison, journalists and others may become more reticent about relying on a public interest defence that is not necessarily straightforward to establish. In many cases the issue will come down to a balancing act between two human rights: the right to privacy and the right to freedom of expression.

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<sup>152</sup> “Hands off whistle-blowers, we need them”, *Times*, 1 November 2006

<sup>153</sup> James Mullock and Piers Leigh-Pollitt, *The Data Protection Act explained*, 1999 p 81

## **XI Part 7: International Co-operation in relation to Criminal Matters**

### **A. Background to “mutual recognition”**

The European Council that was held in Tampere in October 1999 endorsed the principle of “mutual recognition”. It was considered that mutual recognition had a number of advantages over other forms of international co-operation<sup>154</sup>, in circumstances where people could cross relatively freely from one country to another. Following discussions in 2004 the European Council, during the Dutch Presidency, adopted a new programme for justice and home affairs issues for the years 2005–10, known as the Hague Programme. One of its goals was for a comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters. The issue of mutual recognition has caused some controversy in the British press.<sup>155</sup>

To date a number of proposals based on mutual recognition have been agreed. These are: the 2002 Framework Decision introducing the European Arrest Warrant (EAW), the 2003 Framework Decision on the execution of orders freezing property or evidence, the 2005 decision to apply mutual recognition to financial penalties, and the 2006 Framework Decision on the mutual recognition of confiscation orders. There are also a number of measures on the negotiating table which are due to be adopted in the near future, including a framework decision on the European Evidence Warrant.

Further information about justice and home affairs issues at the European Union level can be found in the Home Affairs Select Committee Report of the same name, published in June 2007.<sup>156</sup> The Committee noted that:

‘Mutual recognition’ provides a possible alternative to the formal harmonisation of standards across the EU. The principle provides that the courts of one Member State will recognise and execute judgements of a court in another Member State, with the minimum of formality and on the basis of mutual trust. A number of Member States, including the UK, have welcomed the principle of mutual recognition. However, its practical application—in light of the very different criminal justice systems existing across the EU— has raised a number of concerns. For instance, in relation to a mutual recognition instrument such as the European Arrest Warrant, objections have been voiced regarding the abolition of dual criminality (that is, the requirement that a crime be recognised as such in both countries concerned) and the protection of the rights of the defendant once surrendered.<sup>157</sup>

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<sup>154</sup> Such measures include harmonisation, approximation of legislation and practical co-operation

<sup>155</sup> See for example *Daily Express*, “Now Brits who speed abroad face fines here”, 2 October 2004 and *The Scotsman*, “European Rules of the Road” 16 November 2002. Criticisms tend to focus on the fact that there are a number of disparities in the laws of various Member States which could cause confusion (for example for those who drive abroad)

<sup>156</sup> Home Affairs Select Committee, *Justice and Home Affairs Issues at European Union Level*, Third Report Session 2006-7, 5 June 2007, available at:

<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmhaff/76/76i.pdf> (18 July 2007)

<sup>157</sup> *ibid*, para 61

The Centre for European Policy Studies has suggested that it is the UK which “very strongly pushed” mutual recognition (as opposed to harmonisation) as a founding principle of the Hague Programme arguing that “it has been very much a UK project”.<sup>158</sup>

Part 7 of the Bill (Clauses 76 to 81 and Schedule 16) gives effect to the European Council Framework Decision on the mutual recognition of financial penalties (2005/214/JHA), which was adopted in 2005. Europa, the “portal site” of the European Union, records that this initiative originated from the United Kingdom, France and Sweden.<sup>159</sup>

The Framework Decision allows a financial penalty imposed on an offender in one European Union Member State to be enforced in another Member State. The proposals were considered by the European Scrutiny Committee in two reports in 2002 and 2004.<sup>160</sup>

The Government has indicated that responsibility for the enforcement of financial penalties received from another Member State will rest with the magistrates’ court where the offender is located and its designated Fines Officer, in line with their responsibilities for enforcement of fines imposed domestically. Under Clause 77, HM Courts Service would establish a central authority in England and Wales to act on behalf of the Lord Chancellor to forward and receive financial penalties from other Member States.

Possible grounds for refusal against enforcement of a financial penalty are as set out in Schedule 16 to the Bill (and are discussed in more detail below). The Government has argued that the introduction of the provisions, along with a number of other measures, would make it easier to impose penalties on drivers with foreign registration plates<sup>161</sup>. However, the list of offences listed in Schedule 16 includes serious offences such as terrorism, murder and racketeering. The procedure by which the system will work is comprehensively detailed in the explanatory note to the Bill.

## **B. Possible grounds for refusal to enforce a financial penalty**

Clause 80 of the Bill notes that the possible grounds for refusal against enforcement of a financial penalty are as set out in Schedule 16. These reflect the grounds for refusal adopted in Article 7 of the Council Framework Decision and address:

- Double jeopardy where an offender has already been dealt with for the same conduct in the executing State or in a State other than the State issuing or executing the financial penalty;

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<sup>158</sup> Home Affairs Select Committee, *Justice and Home Affairs Issues at European Union Level*, Third Report Session 2006-7, 5 June 2007, para 179

<sup>159</sup> For details see: [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=166659](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=166659) (18 July 2007)

<sup>160</sup> See <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xii/15208.htm> and <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/42-ix/4239.htm> (18 July 2007)

<sup>161</sup> HC Deb, 24 January 2007, c1832-3W

- The absence of dual criminality,<sup>162</sup> unless the conduct concerned is specified in the list contained Part 2 of Schedule 16. This is a list of 39 offences, reproduced from Article 5(1) of the Framework Decision, where it has been agreed that co-operation should not be subject to a dual criminality requirement. The Government has indicated that the list is similar to that used in the Framework Decision on the European Arrest Warrant (2002/584/JHA) and other mutual recognition instruments;
- Territoriality, if the conduct took place outside the State of the offence;
- The age of criminal responsibility under the law of the executing State;
- Where the offender was not present and did not have an adequate opportunity to defend himself or herself; or
- Where the financial penalty falls below 70 Euros (the threshold specified in the Framework Decision).

The Home Affairs Committee report, referenced above, stated that while the Committee agreed with the Government that the abolition of dual criminality for a defined and agreed set of offences was acceptable, there were still some concerns:

Nonetheless, there is continuing anxiety in some quarters about the abolition of dual criminality in respect of the 32 [listed] offences; it remains to be seen whether particular cases throw up anomalies or perceived injustices which might undermine public support for the European Arrest Warrant.<sup>163</sup>

The European Scrutiny Committee has also commented on the issue of dual criminality, stating that:

The doctrine of dual criminality is more than a mere technicality, as it gives the United Kingdom citizen (or any other person within the jurisdiction) a guarantee that he will not be pursued by police and prosecution authorities for conduct which is lawful in this country.<sup>164</sup>

Under clause 80, subsections (2) and (3), the Lord Chancellor may, by Order, make further provision for the purpose of giving effect to the Council Framework Decision.

## **C. Mutual legal assistance in revenue matters**

Part I of the *Crime (International Co-operation) Act 2003* reformed the UK's mutual legal assistance legislation, in part to implement the *Convention on Mutual Assistance in Criminal Matters 2000* (the "MLAC"). The 2003 Act confers certain functions on the Secretary of State and police constables to execute requests for mutual legal assistance. Section 27 made provision for certain of these functions to be exercisable by HM

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<sup>162</sup> "Dual criminality" is the principle that foreign orders are not enforced unless the conduct to which they relate is regarded as criminal in both the issuing and executing State

<sup>163</sup> Home Affairs Select Committee, *Justice and Home Affairs Issues at European Union Level*, Third Report Session 2006-7, 5 June 2007, para 178

<sup>164</sup> European Scrutiny Committee, Ninth Report of Session 2005-06 (HC 34-ix), published 18 November 2005, pp. 11–12, para 1.36 available at: <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-ix/34-ix.pdf> (18 July 2007)

Customs & Excise and this was subsequently implemented through secondary legislation.<sup>165</sup> The Explanatory Notes to the 2003 Act comment:

Currently, the authorities which deal with many requests for assistance, such as HM Customs and Excise, do not have the power to nominate courts or to apply for warrants in order to execute mutual legal assistance requests, and have to rely on the Secretary of State to nominate a court or issue a direction to make an application for a warrant. Therefore, this section contains an order-making power to provide that certain functions conferred on the Secretary of State or a constable may be exercisable by customs officers or persons acting under their direction. The practical effect of this power is that it would enable requests to be sent directly to HM Customs and Excise and fully executed by them, without recourse to the Secretary of State, in circumstances where a court nomination or application for a warrant is required, and will implement the principle of direct transmission more fully<sup>166</sup>.

When this provision was implemented the administration of the UK's tax system was the responsibility of HM Customs & Excise (indirect taxes), and the Inland Revenue (direct taxes). The two departments were merged to form HM Revenue & Customs in April 2005. The Government chose to effect this merger with a 'short, early Bill'. As the two departments possessed different information and enforcement powers, the Act 'ring fenced' certain powers, so they could be used only in respect of the specific predecessor department. An extended review of the new department's powers was launched, and is ongoing.

One of the areas 'ring-fenced' in this way was the ability of HM Customs and Excise under the 2003 Act to provide evidence of crime to other jurisdictions. The *Commissioners for Revenue and Customs Act 2005* merged Customs with the Revenue; paragraph 14 of schedule 2 to the Act specified that the department could not use these powers in matters which were formerly the responsibility of the Inland Revenue (as set out in section 7 & schedule 1 of the Act - broadly speaking, anything related to direct taxes).

Clause 82 of the *Criminal Justice and Immigration Bill* seeks to remove this restriction, amending the 2003 Act, and the *Commissioners for Revenue and Customs Act 2005* accordingly; HM Treasury would be able, by Order, to provide for these functions to be exercisable by HMRC in relation to both indirect and direct tax matters.

## **XII Violent Offender Orders**

### **A. The use of civil orders to prevent crime**

In its report on the *Serious Crime Bill 2006-07* the House of Lords Select Committee on the Constitution commented:

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<sup>165</sup> SI 2005/425

<sup>166</sup> paras. 82-3

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.<sup>167</sup>

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:

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.<sup>168</sup>

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

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<sup>167</sup> *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>

<sup>168</sup> *ibid.* para. 5

"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".
- 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).

Part 1 of the *Serious Crime Bill 2006-07* seeks to introduce an additional type of civil order – a serious crime prevention order (SCPO) – which the High Court and in some cases the Crown Court would be able to impose on a person involved in serious crime with the aim of preventing, restricting or disrupting the person's future involvement in serious crime.

In *R (McCann) v. Crown Court at Manchester*<sup>169</sup> 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.<sup>170</sup>

## B. Violent Offender Orders

On 28 February 2006 Charles Clarke, who was then Home Secretary, made a written statement to the House of Commons following the publication of the report by the chief inspector of probation on the murder of John Monckton by Damien Hanson and Elliot White, both of whom were under the supervision of the London Probation Area at the

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<sup>169</sup> [2003] 1AC 787

<sup>170</sup> *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)



time.<sup>171</sup> Mr Clarke followed this with an oral statement on 20 April 2006 in which he set out further measures that the Government intended to take to protect the public from dangerous offenders. In the course of his statement he said:

There are some offenders who do not cease to be a risk to the public just because their licence has come to an end. Secondly, therefore, we must be able to deal with such offenders. There is a strong case for introducing a violent offender order along the same lines that have proved effective in the case of sex offenders. Such an order would enable the court to make specific prohibitions on offenders who have been convicted of offences of violence, breach of which would be a criminal offence subject to up to five years in prison. I will publish proposals in that area before summer.<sup>172</sup>

The proposal to introduce Violent Offender Orders (VOOs) was also set out in the July 2006 report of the Home Office's review of the criminal justice system *Rebalancing the criminal justice system in favour of the law-abiding majority*:

We will do more, by legislating to:

[...] introduce Violent Offender Orders, which will enable the court to impose requirements on those convicted of violent offences – for example, placing restrictions on where the offender can live, or preventing them associating with certain organisations or individuals. We will be able to apply them to people convicted before our new unlimited sentences were introduced, and will target the most dangerous offenders. Breach will be a criminal offence punishable by a maximum of five years' imprisonment.<sup>173</sup>

In May 2007 the Government published a summary of responses to its stakeholder consultation on VOOs. It noted:

Overall there was support for the principle of Violent Offender Orders as an additional public protection tool and preventative measure against serious violent offending. There was general recognition that an individual's risk of violence can continue after formal intervention currently ends, and that, if properly implemented, Violent Offender Orders would enable that risk to be managed effectively.

Some respondents (including Liberty, the Magistrates' Association, and the Law Society) questioned the concept of Violent Offender Orders, and in particular the suggestion that breach of a civil order should be a criminal offence. Liberty felt that the Orders 'seek to punish individuals while sidestepping the criminal due process protections that apply under Articles 6 and 7 of the Human Rights Act'.

Other key concerns raised were in terms of resource implications for the Orders, particularly in terms of costs to the Probation Service and the Police and how they would be covered; whether conditions should include positive requirements,

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<sup>171</sup> HC Debates 28 February 2006 c13WS

<sup>172</sup> HC Debates 20 Apr 2006 c.244-5

<sup>173</sup> *Rebalancing the criminal justice system in favour of the law-abiding majority: Cutting crime, reducing reoffending and protecting the public* Home Office July 2006 para. 3.40  
<http://www.homeoffice.gov.uk/documents/CJS-review.pdf/CJS-review-english.pdf?view=Binary>



for example to receive treatment or attend a particular course; and whether Violent Offender Orders should apply to juveniles as well as adults.<sup>174</sup>

Part 8 of the *Criminal Justice and Immigration Bill* is intended to provide for the introduction of VOOs. The provisions concerning VOOs are intended to mirror as far as possible the arrangements for other types of civil order, such as Anti-Social Behaviour Orders and Sexual Offences Prevention Orders, breach of both of which results in a criminal conviction.

The Bill seeks to make a Violent Offender Order (VOO) available in respect of a “qualifying offender”, who is an offender who has been:

- Given a custodial sentence of at least 12 months for a specified offence;
- Given a hospital order or a supervision order having been found not guilty of a specified offence by reason of insanity; or
- Given a hospital order or a supervision order having been found by a court to have a disability and to have done the act charged in respect of a specified offence.<sup>175</sup>

The “specified offences” are

- a) manslaughter,
- b) soliciting murder,
- c) the offence under section 18 of the *Offences against the Person Act 1861* of wounding with intent to cause grievous bodily harm,
- d) the offence under section 20 of the *Offences against the Person Act 1861* of malicious wounding
- e) attempting to commit murder or conspiracy to commit murder.<sup>176</sup>

The Bill also seeks to enable the orders to be imposed on offenders who have been convicted or have had similar findings made against them in relation to equivalent offences committed abroad.

It will be for the chief officer of police of a particular area to make an application for a violent offender order in respect of a person who resides in the chief officer’s police area, or who the chief officer believes is in the area or is coming to the area, if it appears to him that the person is a “qualifying offender”, and that since the date of the conviction or finding that made him one he has acted in such a way as to give reasonable cause to believe that it is necessary for such an order to be made against him.<sup>177</sup> Clause 85 (4) of the Bill seeks to enable the Secretary of State to make orders providing for applications for VOOs to be made by specified persons or bodies in specified conditions and for the provisions relating to the making of orders to be modified in specified ways. The orders will be subject to annulment under the negative procedure.

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<sup>174</sup> *Stakeholder consultation on Violent offender Orders: Summary of responses and next steps* Home Office May 2007 p.4 <http://www.homeoffice.gov.uk/documents/response-violent-offender.pdf?view=Binary>

<sup>175</sup> Clause 84

<sup>176</sup> Clause 83

<sup>177</sup> Clause 85

Where a magistrates' court receives an application to make a VOO the Bill intends that the court should make an order in respect of the offender concerned if it is satisfied that, since the date of the conviction or finding that made him a qualifying offender, he has acted in such a way as to make it necessary to make a VOO for the purpose of protecting the public from the risk of serious violent harm caused by him.<sup>178</sup>

Before making an order the court will have to consider whether or not the person would, at any time when the order would be in force, be subject to any other statutory provisions that would operate to protect the public from the risk of serious violent harm caused by the offender. The Government intends that it should be possible for an order to be applied for and made at any time, but that the order should not come into force at any time when the offender is:

- a) subject to a custodial sentence,
- b) on licence for part of the term of such a sentence, or
- c) subject to a hospital order or a supervision order made in respect of any offence.

In its report summarising responses to the stakeholder consultation on VOOs the Government set out its own response, including the following comments about the evidence needed to apply for a VOO:

Clarification has been sought on the evidence needed to apply for a Violent Offender Order. A Violent Offender Order is a preventative order, the key objective of which is to protect the public from serious harm. In order to apply for a Violent Offender Order the police must be certain that the individual fulfils the qualifying criteria set out in the policy paper: that he has been convicted of a (specified serious) Schedule 15 offence, has been awarded a custodial sentence of at least 12 months, that he presents a risk of serious harm to the public, and that he is not subject to any other equivalent measures to manage that risk.

In making an assessment that an individual presents a high risk of serious harm the police and other agencies will use their professional judgement, which will take into account knowledge of key risk factors and be informed where possible by risk assessment tools such as OASys. As with Sexual Offences Prevention Orders, the police will have to prove to the court in applying for a Violent Offender Order that, taking into account the whole picture, an individual has acted in such a way as to make it necessary for a Violent Offender Order to be to protect the public or any member of the public from serious violent harm from him. Under section 127 of the Magistrates Courts Act 1980, at least part of that behaviour must have taken place in the six months prior to the application being made. The police will not need to call for evidence from any potential victim in doing this, and hearsay evidence will be admissible.<sup>179</sup>

The summary included comments from respondents about who should be responsible for applying for, monitoring and enforcing VOOs:

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<sup>178</sup> Clause 86

<sup>179</sup> *Stakeholder consultation on Violent offender Orders: Summary of responses and next steps* Home Office May 2007 p.14-15

The Police Federation of England and Wales, as well as several probation areas, were of the view that the decision to apply for a Violent Offender Orders and the responsibility for monitoring and enforcing the Orders should not just be for the police but should fall to MAPP agencies as a whole. NACRO made the point that enforcement by the police risks fuelling the perception that the Orders are punitive rather than preventative.

The Justices' Clerks' Society suggested that the CPS should be allowed to consider whether an application for a Violent Offender Order should be made, as a body independent from the investigation process. CPS argued that, because the application is not made at the point of sentencing but on application, it would be more appropriate for the police to make the application.<sup>180</sup>

The summary also commented on the role of existing arrangements under MAPPA (Multiple Agency Public Protection Arrangements):

Many respondents questioned the role of MAPPA in the application, monitoring and enforcement of Violent Offender Orders. As outlined in the policy paper MAPPA will have an important role to play in the decision to apply for a Violent Offender Order in respect of an individual, however the Home Office does believe that the police are best placed to monitor and enforce these Orders. As part of their core business, for example through specialist teams dealing with domestic violence, hate crime or guns and gangs, or Safer Neighbourhood teams, and through routine intelligence checks, the police should quickly become aware if an offender subject to a Violent Offender Order is breaching the conditions of their Order. They may in some circumstances wish to refer to the MAPP agencies if they feel they might have relevant information in relation to a suspected breach, for example, but we do not wish to overburden MAPPA by requiring panels to meet regularly in respect of individuals subject to Violent Offender Orders.<sup>181</sup>

A Violent Offender Order may contain:

Such prohibitions, restrictions or conditions as the court making the order considers necessary for the purpose of protecting the public from the risk of serious violent harm caused by the offender.<sup>182</sup>

The *Summary of responses and next steps* noted that most respondents felt that it would be very problematic to impose positive requirements on individuals subject to VOOs. The summary added:

The majority of respondents felt that it would be extremely problematic to impose positive requirements on individuals subject to a Violent Offender Order. Many of the respondents from the Probation Service made the point that resources for offender behaviour programmes can be scarce in some areas, and that the Court imposing the Order would not necessarily have know whether attendance on a particular course or intervention was feasible without Probation taking a much more active role than currently envisaged. They also commented that the majority of individuals subject to a Violent Offender Order would already have been

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<sup>180</sup> *ibid.* p.6

<sup>181</sup> *Ibid.* p.14

<sup>182</sup> Clause 83(1)

through the Criminal Justice System and as such are likely to have received the sort of positive interventions that would potentially form part of a Violent Offender Order.

Difficulties with compelling individuals to comply with treatment, particularly mental health treatment, were emphasised. Many felt that the imposition of positive requirements, and the fact that breach would bring with it a criminal sentence, could be contrary to ECHR Article 6.

The Police Federation of England and Wales, the Council of District Judges, the NSPCC, ACPO, HM Courts Service, and the Justices' Clerks' Society were in favour of positive conditions but all underlined that these should be properly resourced.<sup>183</sup>

The summary concluded that the Home Office had decided not to include positive requirements in VOOs:

The Home Office has taken on board the concerns raised by the majority of respondents with respect to the intention to include positive requirements as part of a Violent Offender Order. It is clear that including positive requirements as part of an Order would represent a significant additional burden on resources particularly for the Probation Service, and that there would be potential issues in terms of requirements to access and comply with treatment particularly for mentally disordered offenders.

The decision has therefore been taken that positive requirements will not form part of the conditions available for a Violent Offender Order. There will, however, be an automatic requirement for all individuals subject to an Order to periodically notify the police about key information such as name and address.

A VOO will be in force for at least two years, unless it is discharged under Clause 87. The summary of responses included the following comments about the proposed length of the orders:

The Home Office is minded to keep the minimum length of a Violent Offender Order at 2 years. This is shorter than for Sexual Offences Prevention Orders, which is 5 years, however the nature of risk is different for violent and sexual offenders. Violent behaviour can, in many cases, be linked to a particular circumstance, situation or relationship and risk of offending may reduce when this is removed. Sexual offending, by contrast, is often much more intrinsic and measures to manage risk need to be longer term.

The Home Office has reflected upon suggestions that there should be a statutory maximum length for a Violent Offender Order. On balance the decision has been made not to impose such a maximum, but to leave it to the discretion of the court to determine length. This mirrors the arrangements for Sexual Offences Prevention Orders and Anti Social Behaviour Orders.<sup>184</sup>

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<sup>183</sup> *Stakeholder consultation on Violent offender Orders: Summary of responses and next steps* Home Office May 2007 p.7

<sup>184</sup> *Stakeholder consultation on Violent offender Orders: Summary of responses and next steps* Home Office May 2007 p.12-13+

An offender who is subject to a VOO will be able to apply to the magistrates court that made the order or (if different) a magistrates' court for the area in which the offender resides, for an order varying, discharging or renewing a VOO. The chief officer of police who applied for the order will also be able to apply for an order varying, discharging or renewing it, as will the chief officer of police for the area in which the offender resides, and a chief officer of police who believes that the offender is in, or is intending to come to, his police area. It is intended that the power to vary, renew or discharge VOOs should, however, be subject to the following restrictions:

- The court will only be able to renew an order or vary it in a way that imposes additional prohibitions, restrictions or conditions on the offender if the court considers that it is necessary to do so for the purpose of protecting the public from the risk of serious violent harm caused by the offender (and any renewed or varied order may contain only such prohibitions, restrictions or conditions as the court considers necessary for this purpose).
- The court will not be able to discharge the VOO before the end of the period of two years beginning with the date on which it comes into force unless consent to its discharge is given by the offender and the chief officer of police who applied for the order or, where the application to discharge is made by the offender, by the chief officer of police for the area in which the offender resides.<sup>185</sup>

Where a chief officer of police has made an application to a magistrates' court for a VOO but the application has yet to be determined the court will be able to make an interim violent offender order, placing prohibitions, restrictions or conditions on the offender pending the determination of the application for the full order, if the court considers them necessary to protect the public from the risk of serious violent harm caused by the offender. An interim order may remain in place for up to four weeks and may be renewed for further periods of up to four weeks, until a full order is implemented or until the application is rejected or withdrawn.<sup>186</sup>

It is intended that a person who has been made the subject of a VOO (or an interim VOO) should have a right to appeal to the Crown Court against the making, variation or renewal of an order or against the refusal of an application to discharge or vary an order. In dealing with an appeal made in these circumstances the Crown Court will have the power to make any orders necessary to give effect to its determination of the appeal and will also have powers to make any incidental or consequential orders that appear to it to be just.<sup>187</sup> The Explanatory Notes comment that:

The appeals process should be used where the offender is challenging the fact that an order has been imposed.

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<sup>185</sup> Clause 87(5)-(6)

<sup>186</sup> Clause 88

<sup>187</sup> Clause 89

## C. Notification Requirements

Clauses 90 to 97 of the Bill seek to impose notification requirements on offenders who are subject to violent offender orders or interim violent offender orders. The notification requirements are broadly similar to the requirements (also known as the “sex offenders register”) which apply to offenders convicted of sex offences under Part 2 of the *Sexual Offences Act 2003*. Detailed guidance on the notification requirements in Part 2 of the 2003 Act is available on the Home Office website.<sup>188</sup>

The notification requirements set out in Clauses 90 to 97 of the Bill seek to require an offender who is subject to a violent offender order or an interim violent offender order to attend a police station within 3 days of the order coming into force (and annually thereafter in the case of full rather than interim orders) and provide certain specified information, including his date of birth, national insurance number, name and aliases, home address and other addresses in the UK where he regularly stays. (For the purposes of determining the three day period any time an offender spends outside the UK, in custody or serving a sentence of imprisonment or service detention, or in detention in a hospital, is to be disregarded). The offender must also notify the police of any changes of name or address within three days of the change.

Offenders will have to notify the police of this information by attending any police station in their local police area and giving an oral notification to any police officer or other person authorised for the purpose by the officer in charge of the police station. An offender attending a police station to make a notification will also be required to comply with a request from the police to take his fingerprints and photograph any part of him for identification purposes.

Where a violent offender order is made in relation to an offender who is under 18 the Bill seeks to enable the court to direct that a person who has parental responsibility for the offender complies with the notification requirements in place of the offender and that the young offender accompanies the parent to the police station on each occasion when a notification is being given. Provisions set out in Clause 97 are intended to enable magistrates’ courts to vary, renew or discharge parental directions. A parental direction will last until the offender reaches the age of 18 or until an earlier date specified by the court.

Clause 94 of the Bill is designed to enable the Secretary of State to make regulations requiring offenders who are subject to the notification requirements and are proposing to travel outside the UK to notify the police before their departure of:

- the date on which they propose to leave,
- the country (or first country if there is more than one) to which they are proposing to travel and their proposed point of arrival, and
- any other prescribed information about their departure from or return to the UK or their movements while outside the UK.

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<sup>188</sup> <http://www.crimereduction.gov.uk/sexual/sexual027a.pdf>

If the offenders subsequently return to the UK, regulations made under Clause 94 may also require them to disclose certain prescribed information. Regulations made under Clause 94 will be subject to the approval of both Houses of Parliament under the affirmative procedure.

## D. Offences

Failing, without reasonable excuse, to comply with any prohibition, restriction or condition contained in a violent offender order or an interim violent offender order will be an offence punishable by up to five years' imprisonment and a fine. It will also be an offence punishable by up to five years' imprisonment and a fine for an offender who is subject to a violent offender order or an interim violent offender order to fail to comply with the notification requirements imposed as a result of the making of the order.<sup>189</sup>

## E. Comment

A number of those who responded to the Government's consultation suggested that existing sentences and orders could achieve much of what the Government was intending to do with violent offender orders. The summary reported the respondents' views along with those of the Government:

Some respondents questioned the relationship between Violent Offender Orders and other sentences already available to the courts, in particular the public protection sentences available under the Criminal Justice Act 2003, and non-molestation orders available under the Family Law Act 1996.

Public protection - extended and indeterminate - sentences introduced in the CJA 2003 have been available for those convicted of a Schedule 15 offence under that Act since April 2005. This means that, in the vast majority of cases, high risk individuals who would fulfil the eligibility criteria for a Violent Offender Order are already covered by these sentences and as such sufficient measures are in place to manage their risk for as long as it is deemed necessary. However there remain gaps into which some offenders may fall. For example, some may have been convicted of a Schedule 15 offence before April 2005 and therefore not eligible for the public protection sentences. Others may not have been assessed as sufficiently dangerous at conviction, but their risk has increased since that time. Violent Offender Orders are being created to fill these gaps.

Liberty expressed the view that non-molestation orders, breach of which will be an offence under the Domestic Violence, Crime and Victims Act 2004 from July 2007, already achieve much of what Violent Offender Orders seek to do, and would be even more effective if state agencies rather than a private individuals were able to make applications. However, non-molestation orders would presume some form of relationship between offender and victim which, while this is likely to exist in domestic violence cases, is unlikely to be the case with other forms of violent behaviour which Violent Offender Orders seek to manage.<sup>190</sup>

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<sup>189</sup> Clause 98

<sup>190</sup> *ibid.* p9

The summary also set out the Government's view of the human rights implications of VOOs, particularly in relation to the rights set out in the European Convention on Human Rights (ECHR):

The Home Office has reflected upon concerns that the introduction of Violent Offender Orders will have human rights implications. It is important to emphasise that civil orders already exist and are widely used in this country, for example Anti-Social Behaviour Orders and Sexual Offences Prevention Orders, both of which bring with them a criminal conviction for breach. Violent Offender Orders seek to mirror the arrangements for these existing orders as far as possible.

Article 6 of the ECHR provides for the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of civil rights and obligations or any criminal charge. A Violent Offender Order will be civil in nature, imposing conditions which are necessary to protect the public from the risk of serious violent harm identified. It will not have any punitive purpose. An Order will be issued by a court only when it is satisfied that the individual qualifies and the legal test for risk is met. Persons on whom Violent Offender Orders are imposed will have a statutory right of appeal, as well as the right to apply for the order to be varied or discharged. Breach of the terms of a VOO will be a criminal offence.

Article 7 of the ECHR states that there should be no punishment without law. It provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. It also provides that a heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. Again, a Violent Offender Order is not a punishment but a civil preventative measure. A previous conviction for a Schedule 15 offence is only one criterion for eligibility for a Violent Offender Order, and must be accompanied by a much more recent assessment of risk of serious harm. The VOO is not imposed as an additional punishment for a Schedule 15 offence. Breach of the conditions set as part of a Violent Offender Order will by law be made a criminal offence, in line with arrangements already in place for existing civil orders. This is in line with article 7 as breach of a VOO will be a criminal offence at the time that the breach is committed.<sup>191</sup>

### **XIII Anti-social behaviour**

#### **A. Previous legislation**

When Labour came to power in 1997, there were already many remedies to deal with anti-social behaviour, including public order offences, the *Protection from Harassment Act 1997* and powers for social landlords to deal with nuisance neighbours, particularly under the *Housing Act 1996*. The Government has introduced a large number of additional remedies, including the following:

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<sup>191</sup> *ibid.* p.11



- **Anti-Social Behaviour Orders (ASBOs)** under section 1 of the *Crime and Disorder Act 1998*, through which courts can prohibit certain behaviour where an individual has acted anti-socially
- **Individual Support Orders** under the *Criminal Justice Act 2003*, which can be made in respect of 10-17 year olds who have been the subject of an ASBO, and can impose positive obligations on them, intended to address the cause of the anti-social behaviour
- **anti-social behaviour injunctions**, which social landlords can apply for against a wide range of perpetrators of anti-social behaviour
- **dispersal powers** under the *Anti-Social Behaviour Act 2003*, whereby police can designate an area and then disperse groups, and take unsupervised children home between the hours of 9pm and 6am
- **fixed Penalty Notices for Disorder (PNDs)** under the *Criminal Justice and Police Act 2001*.

Also non-statutory Acceptable Behaviour Contracts (ABCs) have been developed. These are voluntary agreements between perpetrators and various authorities, including the police, local authorities or schools, to try to curb anti-social behaviour. They were pioneered by Islington LBC as an alternative to legal action.

In addition to legislating to deal with the problems, the Government launched the *Together* campaign in 2003 to support local agencies and residents to tackle anti-social behaviour in their communities. In September 2005, the Government established a cross-departmental Respect Task Force headed by Louise Casey, who had been the director of Home Office's Anti-Social Behaviour Unit. The task force was given direct responsibility for delivering the Respect Agenda, and its work led to the publication of the Tony Blair's *Respect Action Plan* in January 2006.<sup>192</sup> The Task Force moved to the new Department of Children, Schools and Families following Gordon Brown's ministerial reshuffle in June 2007.

A more detailed overview of available remedies is available in Library Standard Note SN/HA/4073, available on the Library's intranet.

## B. Consultation on further proposals

In November 2006, the Government published a consultation document on new proposed measures. These included:

- New front-line powers for the police, for example, to require an individual to keep away from a particular area for a particular time
- A deferred Penalty Notice for Disorder (PND), which would only be imposed if the offender failed to adhere to conditions set out in an Acceptable Behaviour Contract (this would not require legislation)
- A new Premises Closure Order (see below) allowing homes and other premises to be sealed off where there are serious nuisance or disorder problems.

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<sup>192</sup> <http://www.respect.gov.uk>

Responses to the consultation were summarised by the Government in a document published in May 2007.<sup>193</sup> This reported “overwhelming support for the proposal to introduce a premises closure order” with 86% of those responding to this question stating that it would be useful. There was some support for deferred PNDs, although concern from some police forces that this intervention should not lead to increased administrative burdens. Opinion on the new frontline preventative powers was divided.

The document went on to set out the Government’s intentions, which were:

- To “keep the situation under review” with regard to frontline powers for the police, but not to legislate at present
- revise guidance on ABCs to make it clear how these could be used with PNDs,
- to legislate to introduce the premises closure order

## **C. Premises Closure Orders**

Clause 103 of the Bill allows for closure orders to be made in respect of premises associated with persistent disorder or nuisance. This could be applied to any kind of premises – very broadly defined as “any land or any other place (whether enclosed or not)” and “any outbuildings which are or are used as part of premises”.<sup>194</sup> Thus it would apply to homes, including owner-occupied ones.

The provisions are closely modeled on the powers to close crack houses introduced in 2004.

### **1. Closure of crack houses**

Sections 1-11 of the *Anti-Social Behaviour Act 2003* introduced a new range of powers to allow the closure of properties taken over by drug dealers and users of Class A drugs, often referred to as “crack houses”. The Government’s intentions in introducing these measures were set out in its 2003 White Paper on anti-social behaviour:

3.12 For sometime local authorities, the police and local communities have been frustrated by their lack of powers to close down premises – rented, owner occupied or otherwise – where Class A drugs are being sold and used. We are determined to ensure that the ruin they can cause in communities is stopped.

3.13 We have to close down these properties from which drug dealers operate, or new dealers will simply move in. These dealers are sophisticated and devious in their methods. They can prey on vulnerable people compelling them to give over their property whilst they deal and use drugs, and intimidate both the residents and neighbours, sometimes making them too frightened to speak out for fear of retribution.

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<sup>193</sup> Home Office, “*Strengthening powers to tackle Anti-social Behaviour*” Summary of responses to a Home Office consultation paper, 29 May 2007, <http://www.homeoffice.gov.uk/documents/cons-asb-powers/response-asb-powers?view=Binary>, site accessed 15 July 2007

<sup>194</sup> New section 11K of the *Anti-Social Behaviour Act 2003*, inserted by schedule 17 of the Bill

3.14 The new powers will give police the power, after consulting the local authority, to issue notice of impending closure, ratified by a court, which will enable the property to be closed within 48 hours and sealed for a fixed period of up to six months. Drug dealers will be dealt with through the courts and the property will be recovered by the landlord.<sup>195</sup>

The relevant sections of the 2003 Act came into force in January 2004. Under these, the police can apply to the magistrates' court for a closure order, having first served a closure notice. The court must hear the application within 48 hours. To issue the order the court must be satisfied that:

- the premises have been used in connection with the production, supply or use of class A drugs;
- the activity associated with class A drugs was evident during the three months preceding the closure notice;
- the premises are associated with disorder or serious nuisance; and
- an order is necessary to prevent further disorder or serious nuisance.

The closure order can last for up to three months and can be extended to six months. During the period of closure it will be an offence to enter or remain in the property and the premises will be sealed.

## 2. Closure Orders in Scotland

The *Anti-social Behaviour etc. (Scotland) Act 2004* introduced quite similar closure powers, but these are not restricted to premises associated with drugs. Under these, an officer of superintendent rank or above can authorise that a closure notice be served where there are reasonable grounds for believing that a person has engaged in antisocial behaviour on the premises in the past three months; and that the use of the premises is associated with "relevant harm", defined as significant and persistent disorder or significant, persistent and serious nuisance to members of the public. As in England and Wales, the police must consult with the local authority before doing this, and the closure notice must include information about access to advice on housing and legal matters. The police then apply to the sheriff, who similarly must be satisfied that a person has engaged in antisocial behaviour on the premises and that the use of the premises is associated with the occurrence of "relevant harm"; and also that the making of an order is necessary to prevent recurrence of this harm. However, unlike in England and Wales, the sheriff must also have regard to two factors in determining whether to make a closure order:

- The ability of any person who habitually resides in the premises to find alternative accommodation
- Any vulnerability of any such person who has not been engaged in antisocial behaviour which has occurred in the premises.

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<sup>195</sup> Home Office, *Respect and Responsibility – Taking a Stand Against Anti-Social Behaviour*, Cm 5778, March 2003, pp40-1, <http://www.archive2.official-documents.co.uk/document/cm57/5778/5778.pdf> site visited 15 July 2007

The occupier and others with an interest then have up to 14 days to show why a closure order should not be made. Once the order is made, the police can enter and seal the property, and people contravening the order can be arrested.

According to a Home Office press release, as of May 2007, the Scottish powers had been “successfully used” on 21 occasions by May 2007.<sup>196</sup> Guidance on the Act is available on the Scottish Executive Website.<sup>197</sup>

### 3. The Bill’s provisions

Closure orders are provided for in clause 103 and schedule 17, which would add a number of new sections to the *Anti-social Behaviour Act 2003*. They are very similar to the provisions for premises where drugs are used unlawfully, but in this case either the police or the local authority would be able to apply for a closure notice, providing they have consulted each other. As with the drug-related orders, the application for a closure order would have to be heard within 48 hours.

The disorder test that the court would apply is more stringent than that used for crack houses, presumably because in the latter, a criminal offence is being committed. The court would have to be satisfied that:

- a person has engaged in anti-social behaviour on the premises;
- the use of the premises is associated with *significant* and *persistent* disorder or serious nuisance; and
- an order is necessary to prevent further disorder or serious nuisance.

As with the drug-related provisions, the hearing on the application could be adjourned for up to 14 days to allow the occupier or other person with an interest in the premises to show why an order should not be made. However, unlike in Scotland, there would be no explicit duty for the court to consider the ability of people living at the premises to find alternative accommodation, or the vulnerability of any residents. Once the order has been made, the police or authorised person could enter and seal the premises using reasonable force if necessary. Obstructing a person serving a closure notice or sealing the premises would be an offence. The order would last for up to three months, but could be extended on application for a further three months.

### 4. Housing implications

The November 2006 consultation paper made it clear that closure orders should only be used as a last resort where other interventions have been used or considered and rejected for good reason. The clear implication of a closure order served on residential premises is that the occupants will become homeless for a period of up to three months; possibly longer in cases where the order is extended. This raises the question of whether

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<sup>196</sup> Home Office Press Release, *New House Closure Powers For Neighbours From Hell*, 30 May 2007, <http://press.homeoffice.gov.uk/press-releases/new-house-closure-powers-asb>, accessed 15 July 2007

<sup>197</sup> Scottish Executive, *Guidance on closure of premises Anti-social Behaviour etc. (Scotland) Act 2004*, 2004, <http://www.scotland.gov.uk/Resource/Doc/26350/0025273.pdf>

local authorities will have a duty to assist households who become homeless in these circumstances. The Regulatory Impact Assessment accompanying the Bill notes:

There may be some additional costs for local housing authorities under the homelessness legislation, in some of those cases where people are made homeless as a result of the closure. However, the occupiers of any property which is subject to a closure will have already received earlier interventions and the consequences of their behaviour will have been made very clear to them. Therefore, it is anticipated that most people who become homeless as a result of premises closure are likely to be found by the local authority to have become homeless intentionally as a consequence of their significant and persistent anti-social behaviour. The estimated net cost to a local authority per household application for housing assistance where the applicant is found to be in “priority need” but intentionally homeless is around £2,300 per year. Based on the experience in Scotland and the way we expect the closure to operate we estimate that this will only be relevant in around half of the cases.<sup>198</sup>

Local authorities have a duty to secure accommodation for homeless people and households (under Part 7 of the *1996 Housing Act*, as amended) who are deemed to be unintentionally homeless and in a priority need category. When a local authority decides that a household is “intentionally homeless” no long-term duty to secure accommodation arises.

If a person or household becomes homeless as a result of their own anti-social behaviour they could be deemed to be intentionally homeless. Sections 191(1) and 196(1) of the 1996 Act provide that a person becomes homeless, or threatened with homelessness, intentionally if:

- i) he or she has ceased to occupy accommodation (or there is a likelihood of him or her being forced to leave accommodation) as a consequence of a deliberate action or inaction by him or her,
- ii) the accommodation is available for his or her occupation, and
- iii) it would have been reasonable for the him or her to continue to occupy the accommodation.

The *Homelessness Code of Guidance for Local Authorities*, to which local authorities must have regard when making decisions on homeless applications, gives examples of acts or omissions which result in homelessness and which may be regarded as “deliberate”. This includes where someone “is evicted because of his or her anti-social behaviour, for example by nuisance to neighbours, harassment etc”.<sup>199</sup> However, the Code makes it clear that housing authorities should not consider an act or omission which leads to homelessness to be deliberate where:

- the housing authority has reason to believe the applicant is incapable of managing his or her affairs, for example, by reason of age, mental illness or disability; or where

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<sup>198</sup> RIA, p.119: <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>

<sup>199</sup> DCLG, *Homelessness Code of Guidance for Local Authorities*, July 2006, para 11.20(v): [http://communities.gov.uk/pub/625/HomelessnessCodeofGuidanceforLocalAuthorities\\_id1501625.pdf](http://communities.gov.uk/pub/625/HomelessnessCodeofGuidanceforLocalAuthorities_id1501625.pdf)

- the act or omission was the result of limited mental capacity; or a temporary aberration or aberrations caused by mental illness, frailty, or an assessed substance abuse problem.<sup>200</sup>

As it stands, the Bill contains no explicit duty for the court to consider the ability of people living at the premises to find alternative accommodation, or the vulnerability of any residents, before issuing a closure order. It is the Government's intention to issue "robust guidelines" for the consideration and operation of the closure process, which will include reference to the need to be sensitive to the needs of vulnerable adults and children.

## 5. Commentary

As noted above, the Government's summary of consultation indicated "overwhelming support" for the proposals, but also some dissent.<sup>201</sup>

5.4 The proposal received overwhelming support, with 86% (133) of those who responded to the question stating that the premises closure order would be a useful and effective tool. This included significant support from the police forces (96%), local authorities (91%), housing groups (91%) and CDRPs (95%) which responded to the question.

5.5 Support for the power came from the Local Government Association, Manchester City Council, St. Helen's Council, Rushmoor Borough Council, the National Housing Federation, the Social Landlords Crime and Nuisance Group, Impact Housing, the Police Federation of England and Wales, ACPO Youth Issues Group, the Metropolitan Police Service and the British Psychological Society.

5.6 The Police Federation of England and Wales responded: "The Police Federation is aware from debate with the Scottish Police Federation that Premises Closure Orders are a successful tool and therefore fully support (them)"

5.7 The National Housing Federation said: "We believe premises closure orders could be a useful additional tool in tackling anti-social behaviour and welcome the fact that such intervention will be tenure-neutral, applying equally to owner-occupiers and tenants. It will be important to define clearly what constitutes 'severe nuisance' in order to manage expectations and ensure premises closure is applied appropriately and in proportion to the anti-social behaviour caused."

5.8 The Mayor of London stated: "ASB affects everyone and the Mayor is a strong believer in the promotion of safer communities for all, without making distinctions and stigmatising those engaging in ASB. Therefore, the development of powers to tackle ASB must challenge offending behaviour and provide perpetrators with the opportunity to re-engage positively with society..... Following the introduction of new housing responsibilities for the Mayor, he is committed to creating communities that are strong, inclusive and sustainable. The

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<sup>200</sup> *ibid*, para 11.17

<sup>201</sup> Home Office, "Strengthening powers to tackle Anti-social Behaviour" Summary of responses to a Home Office consultation paper, 29 May 2007, <http://www.homeoffice.gov.uk/documents/cons-asb-powers/response-asb-powers?view=Binary>, site accessed 15 July 2007



use of Premises Closure Orders to provide residents with relief from ASB are welcomed in helping to achieve this vision – for all types of tenure.”

5.9 The British Psychological Society: “Much of human behaviour – including anti-social behaviour – is the product of, or is supported by external factors. It follows that changing the external environment can be very powerful in shaping behaviour. It makes as much (if not more) sense to close a premises associated with antisocial behaviour than to punish individuals.”

5.10 21 of the 154 (14%) that responded to this question did not agree that it would be a useful and effective power. This included Shelter which said “We agree that anti-social behaviour can have a devastating impact on neighbourhoods and communities and must be tackled.... However we have concerns that current approaches to anti-social behaviour rely too heavily on enforcement measures and possession action in particular.”

5.11 Liberty responded by saying: “.....we are concerned to see that drug related closures appear to be having unfortunate consequences” and referred to displaced drug dealers taking over properties of the vulnerable. They also stated that: “We do not accept that removal and displacement of a family could be a proportionate response to any annoyance caused by late night visitors”

Liberty continued to express concerns in its response to the Bill.<sup>202</sup>

49. The Government’s consultation emphasised that closure would only be considered as a last resort and would require multi-agency involvement. It also stated that the safety of the young and vulnerable would not be compromised, the implication being that a court would not have the power to make an order unless satisfied that proper arrangements were in place to protect their interests. On an initial reading of the Bill, this safeguard appears to be absent. It appears that an entire family could be displaced due to the disruptive and nuisance behaviour of one child or parent. Home closure remains a drastic step.

The Youth Justice Board also raised the issue of protection of children in its response to the consultation:

If the proposal for premises closure order is taken forward, the YJB is clear that it would be vital that the interests of any children or young people resident in, or connected with the household, remain paramount. As noted this would have to be a tool of last resort and part of a multi-agency approach. The proposed safeguards in relation to children and young people would need to be very strong.

The Regulatory Impact Assessment sets out how the Government intends to address these issues:<sup>203</sup>

Clear and sensitive distinctions will need to be made in relation to those who are being targeted as part of the order. On the one hand there will be a small hard-

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<sup>202</sup> Liberty’s Briefing on the Criminal Justice and Immigration Bill, June 2007, <http://www.liberty-human-rights.org.uk/pdfs/policy07/criminal-justiceand-immigration-bill.pdf>, site accessed 15 July 2007

<sup>203</sup> Criminal Justice and Immigration Bill Regulatory Impact Assessments, <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>

core and criminal element which needs to have their safe haven removed from use. But, we appreciate that on the other hand there may be vulnerable cases, including children. Their safety must not be comprised and the decision to pursue the closure as an option needs to remain sensitive to both these cases and measures should be put in place to safeguard them and promote their welfare if the closure goes ahead.

In these kinds of cases those children and vulnerable adults will already be at risk from what is happening at that property. The closure brings this to an end which in itself therefore improves that child or vulnerable adult's well-being. Where a vulnerable person has been preyed upon and has been unable to exercise control over their property then this should be part of a planned re-settlement move.

Existing 'crack house' powers are currently being used alongside support measures. This same approach will be promoted for the premises closure so that the order provides the opportunity for the local agencies to co-ordinate and offer a level of support which those subject to the closure may have previously rejected. The closure therefore should never be used in isolation but rather as part of a more strategic and holistic response aimed at tackling the underlying causes of the anti-social behaviour. It provides the opportunity with which to encourage, cajole and coerce people to accept those offers of support.

It is essential that support is matched to enforcement action if we are to put an end to the significant and persistent nuisance behaviour rather than simply shifting it on and placing the burden elsewhere, an issue raised by respondents to the consultation. It is also an approach being taken forward by the national network of family intervention projects launched by the Respect Task Force in April 2006. Practitioners in Scotland report that their use of closure orders has led to a change in behaviour.

## **D. Offence of causing nuisance or disturbance on NHS premises**

### **1. Background**

In June 2006, the Department of Health issued a consultation document on tackling nuisance or disturbance behaviour on NHS healthcare premises. The document described the problem of violence in the NHS:

Based on the number of physical assaults on NHS staff reported in 2004–05, it is estimated that violence against staff could cost the NHS between £10m and £270m per annum, depending on the degree of absenteeism due to sickness that can be attributed to an assault. Staff surveys carried out by the NHS SMS demonstrated that around 20% of staff did not feel that the NHS provided them with a safe and secure environment to work in and, from a public opinion poll, 76% of the public felt very concerned about violence against NHS staff.

It is clear that the emphasis needs to be on the prevention of crime, including assaults on staff, if the NHS is to deliver a truly safe and secure environment for both staff and patients, and if it is to reduce both the human and financial impact of crime on the service. It is recognised that simply prosecuting individuals when an assault has occurred, though important in itself, is a reactive measure and that



much more needs to be done to help prevent incidents such as physical assaults from occurring in the first place.

Nuisance or disturbance behaviour causes a particular problem for the NHS and needs to be tackled, due to its impact on staff and patients. In addition, if not dealt with, it has the potential to escalate into more serious incidents, such as physical assaults on staff, theft of NHS assets or damage to NHS property.

This type of incident may not be as immediately damaging as other more serious incidents of actual violence or abuse, but it is thought that the impact on the NHS in the long term – in terms of low staff morale, absenteeism and staff leaving the NHS – may nevertheless be significant.<sup>204</sup>

The document described measures already in existence to deal with the problem, in particular the national framework introduced by the Government and the work of the NHS counter Fraud and Security Management Service. However, it went on to explain why the Government believed that existing legislative powers were inadequate:

There is existing criminal legislation that deals with incidents of more serious anti-social behaviour. For example, it is an offence under section 5 of the Public Order Act 1986 to use threatening, abusive or insulting words or behaviour, or disorderly behaviour, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. In addition, the police may apply for an Anti-Social Behaviour Order (Asbo) under section 1 of the Crime and Disorder Act 1998 (c.37) in circumstances 'where a person has acted in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not in the same household as himself'.

These existing powers do not always provide NHS bodies with sufficient protection from those who behave in a disruptive manner on NHS premises. Certain behaviour may not satisfy the threshold for the public order offences but nevertheless have the potential to adversely affect the ability of NHS staff to deliver healthcare. Further, while disruptive behaviour may in some cases form a sufficient basis for the issuing of an Asbo, a person who is behaving in such a manner on NHS premises will not have committed an offence unless there is a relevant Asbo in place at the time.

Currently, NHS health bodies have two options open to them to deal with nuisance or disturbance behaviour. The first is to seek the assistance of the police to remove offenders. However, if the behaviour in question falls short of the existing public order and antisocial behaviour offences, it may not be appropriate for the police to respond. Where this is the case, NHS security personnel will have no power to remove the person from NHS premises. This creates an atmosphere which makes the occurrence of a more serious incident more likely and gives both staff and patients the misleading impression that the NHS tolerates such bad behaviour.

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<sup>204</sup> Department of Health, *Tackling nuisance or disturbance behaviour on NHS healthcare premises: A paper for consultation*, June 2006: [http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH\\_4130745](http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_4130745) paragraphs 4.2-4.5

Alternatively, NHS health bodies can resort to the use of the civil law to obtain injunctions against individuals who cause a nuisance or disturbance, to prevent them from entering NHS premises, but this can often be time-consuming, slow and costly. Legislation is currently being introduced to improve this situation; however, the use of injunctions remains more appropriate for persistent offenders.

As can be seen, these options do not present health bodies with an effective solution to nuisance or disturbance behaviour, nor do they adequately address the issue of tackling this behaviour before it escalates into more serious incidents, which impact on the delivery of healthcare.<sup>205</sup>

The document also referred to the partial Regulatory Impact Assessment, published alongside it, which contained an analysis of the potential benefits and impacts of the proposals in the document.<sup>206</sup>

One solution considered by the consultation document was to increase the number of security officers on NHS premises but the document argued that even if the number of security officers were increased, they would not have the necessary powers. Instead it proposed new legislation, which would create:

- i) an offence of causing a nuisance or disturbance on NHS premises and
- ii) a power for certain NHS employees to remove the person creating the nuisance or disturbance from NHS premises.

These would follow the lines of provisions for the education sector contained in section 547 of the *Education Act 1996*.<sup>207</sup> Commenting on how this had worked, the document said:

Although there are no national statistics on the use and impact of this legislation within schools, it is understood to have helped create a deterrent effect in some areas against such behaviour.

## 2. Responses

The consultation period ended on 1 September 2006 and produced over 150 responses. The Department of Health issued a report on the consultation in October 2006, which summarised the responses.<sup>208</sup> The Department's conclusion was that:

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<sup>205</sup> As above, paragraphs 4.6-10

<sup>206</sup> The Partial Regulatory Impact Assessment is available on the Department of Health's website at: [http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH\\_4130745](http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_4130745) The full Regulatory Impact Assessment, published with the current Bill, gives the annual estimated costs and benefits: <http://www.justice.gov.uk/publications/criminal-justice-bill.htm>

<sup>207</sup> The 1996 Education Act was a consolidation Act and the measures on nuisance and disturbance in schools & certain LEA sporting facilities predate it. There are separate analogous powers in relation to other educational institutions. [Source: Butterworth's *The Law of Education* ]

<sup>208</sup> Department of Health, Report on consultation October 2006: [http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH\\_4140248](http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_4140248)

Overall, the majority of respondents supported the proposals. There was widespread recognition of the problem that nuisance and disturbance behaviour causes for NHS health bodies. There was general agreement that a new offence was needed to tackle this sort of behaviour and a formalised process for the removal of these individuals was welcomed.

While most respondents felt that the proposals were more relevant to the acute setting, it was also recognised that there were some examples of nuisance and disturbance in other settings. However, the lack of suitably trained security staff, particularly in primary care and mental health settings, was highlighted by many respondents as a potential issue. Other areas of substantial debate and discussion were the potential impact on those with mental health problems or other conditions affecting their behaviour and the safeguards that could be implemented.<sup>209</sup>

An article in the *Health Service Journal* in September 2006 suggested that the health service unions were generally in favour of the proposals but that mental health charities had serious concerns. A letter from the director of the NHS Security Management Service written in response to the article took issue with some of the points made in the article and mentioned safeguards that would be built into the new measures.<sup>210</sup>

At the time of writing a few organisations had responded to the Bill itself. A joint response from several charities concerned with mental health, learning disabilities and Alzheimer's, available from Mencap, argues that:

We agree that nuisance and disturbance behaviour on NHS premises is a problem. But we do not support these proposals, which we believe are unnecessary and badly thought-through, and which we fear will fail to have the intended effect on nuisance and disturbance behaviour on hospital premises, while creating additional risks to vulnerable patients. In particular:

- The proposals could cause significant risks to the health and safety of disabled people and other vulnerable people on NHS premises.
- The Government has consistently failed to draw a coherent link between the problem of assaults on NHS premises and the proposed solution.
- The vast majority of people who do cause a nuisance or disturbance on NHS premises will not be covered by the proposals, which will not make the NHS safer.<sup>211</sup>

The BMA has not responded to the Bill or to the consultation document but has expressed concern on several occasions about violence against NHS staff. For example, a briefing document published in January by the BMA in Scotland describes the measures take in Scotland as well as some more general issues.<sup>212</sup> The Royal College of

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<sup>209</sup> As above paragraphs 8 and 9.

<sup>210</sup> 'Charities fear 'nuisance' penalties, *Health Service Journal* 21 September 2006.; and letter from Richard Hampton, Director, NHS Security Management Service, "Safety plans will have safeguards" *Health Service Journal* 5 October 2006.

<sup>211</sup> Mencap, the Mental Health Foundation and Foundation for People with Learning Disabilities, Mind, National Autistic Society, Rethink and Turning Point. Further details are available from Tom Hamilton, Mencap's Parliamentary Officer on 020 7696 5568

<sup>212</sup> British Medical Association, *violence against healthcare workers*, January 2007: <http://www.bma.org.uk/ap.nsf/Content/violenceagainstthehealthcareworkers>

Nursing, which did respond to the consultation, has welcomed the proposals in the Bill although it will be watching to see how well the proposals work in practice, for example whether extra staff would be necessary.<sup>213</sup>

### **3. The Bill**

Clause 104 creates the new offence of causing nuisance or disturbance on NHS premises; clause 105 creates the related powers to remove people from NHS premises; and clause 106 provides for guidance to be issued about the use of such powers. These clauses apply to England. Clause 107 introduces schedule 18, which makes similar provision for Northern Ireland. In brief and in non-technical terms, the Bill provides the following:

#### ***The offence***

A person commits the new offence if s/he causes a nuisance or disturbance to an NHS staff member in an NHS hospital (or hospital grounds and buildings and vehicles within them) without reasonable excuse AND refuses, without reasonable excuse, to leave the hospital when asked to do so by a Constable or an NHS staff member AND is not on the premises for the purpose of obtaining medical help (advice, treatment or care) for him/herself. A person is treated as no longer being on the premises for obtaining medical either once that help has been given or if it has been refused during the last eight hours.

The clause defines several of the relevant terms, including *NHS premises*, *hospital grounds*, *NHS staff member*, *relevant English NHS body* and *vehicle*. The term *nuisance* is not defined. In a Written Answer early in 2007, Rosie Winterton, then Minister at the Department of Health, said:

Nuisance is not defined in the proposed legislation but it is assumed that it is an ordinary word of the English language. It will be a matter of fact for the courts to decide whether an offence has been committed under the proposals.<sup>214</sup>

#### ***The power to remove***

A Constable has the power to remove someone whom he reasonably suspects is committing or has committed the new offence. An authorised NHS officer also has this power and may either remove the person him/herself or authorise an NHS staff member to do so. This power involves using 'reasonable force' if necessary.

An authorised NHS officer (i.e. authorised for this purpose) or NHS staff member authorised by the officer cannot use the removal power if s/he has reason to believe that person to be removed requires medical help or if removing that person would endanger his/her physical or mental health.

#### ***Guidance***

The Secretary of State has the power to prepare and publish guidance about the power to remove. The Bill lists matters to which the guidance may in particular relate, including

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<sup>213</sup> For further details about the RCN's view, please contact Alison Cairns, Head of its Parliamentary Unit; 0207647 3840

<sup>214</sup> HC Deb 20 February 2007 c676W

for example the way authorisation will work, training requirements for authorised officers and the degree of force that it may be appropriate for authorised officers to use.

### **Costs and Benefits**

The Bill's Regulatory Impact Assessment lists the estimated annual costs of the new offence as:

- £360,000 cost to Police
- £701,000 cost to Her Majesty's Customs and Excise
- £175,000 cost to the Crown Prosecution Service
- £68,000 cost to legal Services Commission
- £270,000 training cost to the NHS.

The benefits are listed as:

- Staff are able to carry out their duties unhindered by incidents of nuisance and disturbance
- An improvement in absenteeism, morale, recruitment and retention
- Prevention of more serious incidents<sup>215</sup>

## **E. Anti-Social Behaviour Orders and Individual Support Orders**

Section 1 of the *Crime and Disorder Act 1998* introduced ASBOs and authorised local authorities and the police to apply to the magistrates' courts for them in circumstances

- where an individual over 10 years of age has acted "in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household"; and
- an ASBO is necessary to protect people in that area from further antisocial acts by that individual.

The acts complained of do not have to amount to criminal offences (although they may do). The ASBO may prohibit any act or behaviour and will have effect for a specified period of at least two years or indefinitely until the court makes an order discharging or varying it. ASBOs may be "stand alone", or alternatively can be imposed on conviction of a criminal offence or in conjunction with county court proceedings. Further information on ASBOs is available in Library Standard Note SN/HA/1656 on the Library's intranet.

Individual Support Orders were introduced by the *Criminal Justice Act 2003*. They can be made in respect of 10-17 year olds who have been the subject of an ASBO, and impose positive obligations on them, intended to address the cause of the anti-social behaviour. If a magistrates' court is imposing an ASBO (stand-alone only) on a young person aged between 10 and 17 years, it is obliged to make an ISO if it takes the view that it would

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<sup>215</sup> The RIA is available on the Ministry of Justice website with material relevant to the Bill:  
<http://www.justice.gov.uk/publications/criminal-justice-bill.htm>

help prevent further anti-social behaviour. ISOs are not available for orders on conviction where it is expected that sentencing will address the underlying causes of the criminal offence.

**Clause 108** would create an obligation to carry out a one-year review of ASBOs where the subject was under 17. The Government guidance on ASBOs already states that a one-year review should be undertaken for juveniles.<sup>216</sup>

Orders issued to young people should be reviewed each year, given young people's continually changing circumstances, to help ensure that they are receiving the support they need in order to prevent breach. The review should be administrative rather than judicial, and should be undertaken by the team that decided upon the initial application. Where practicable, the YOT should provide the group with an assessment of the young person. Depending upon progress towards improved behaviour, possible outcomes will include an application to discharge the order or a strengthening of the prohibitions. Applications to vary or discharge the order will have to be made to the court in the usual way. The overriding considerations remain the safety and needs of the community, and the review would have to incorporate the community's views on the order's effectiveness.

The Bill would make this a statutory requirement.

Clause 109 would allow courts to make ISOs more than once, after the original ASBO was made.

## **XIV Police discipline**

### **A. Background**

Police officers are office-holders under the Crown rather than employees, and for this reason a number of employment rights given to workers in other occupations do not apply to them. These include, for example, the right to appeal to an Employment Tribunal against dismissal. Legislative provisions governing the management of police discipline are contained in the *Police Act 1996*, and the *Police Reform Act 2002*,<sup>217</sup> together with regulations made under them. The public's trust in the police to conduct themselves with integrity and not to abuse their authority has great importance for social cohesion, and the regulations deal with this separately from issues of efficiency and unsatisfactory performance.

Matters to do with police *conduct* are covered by the *Police (Conduct) Regulations*<sup>218</sup>, Schedule 1 of which contains the police Code of Conduct. The Code covers issues such as honesty, fairness and impartiality, politeness and tolerance and the use of force.<sup>219</sup>

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<sup>216</sup> Home Office, *A guide to anti-social behaviour orders*, August 2006, p45, <http://www.crimereduction.gov.uk/antisocialbehaviour/antisocialbehaviour55.pdf>, site visited 15 July 2007

<sup>217</sup> In both cases, as amended

<sup>218</sup> SI 2004/645, as amended

<sup>219</sup> The Code is reproduced at

There is a complaints framework under the 2002 Act. The Independent Police Complaints Commission can investigate the most serious complaints, and supervise the investigation of other complaints, and complainants unhappy with the way their complaint has been handled by a force may be able to appeal to the Commission.<sup>220</sup> While the present Conduct regulations were introduced in 2004, they replaced a very similar regime (the old “Discipline Code”) which hadn’t been substantially changed since 1985.

A convenient summary of the current system of police discipline system as regards conduct matters can be found at Appendix B to the Taylor Review (see below).<sup>221</sup>

Efficiency and unsatisfactory performance, by contrast, are dealt with under the *Police (Efficiency) Regulations 1999*.<sup>222</sup> Before these were introduced there had been a lack of any formal structure by which police managers could address poor performance, as opposed to bad conduct. However, they have not been much used, in part, according to the Bill’s regulatory impact assessment, because they are seen as “bureaucratic, lengthy and cumbersome”.<sup>223</sup>

## B. Criticisms of the current system

The police discipline system has been much scrutinised in recent years. In January 2004, the Metropolitan Police Authority ordered an inquiry under the chairmanship of Sir William Morris into the way in which internal complaints about ethnic minority officers were investigated. This followed a series of high-profile cases, including that of Superintendent Ali Dizaei who was cleared of allegations of dishonesty at the Old Bailey in September 2003 and reportedly later complained that the investigation against him had been “a witch hunt”.<sup>224</sup> The Morris report was published in December 2004.<sup>225</sup> It looked at the regulatory framework along with other issues, and “received overwhelming evidence criticising nearly all aspects of the current regime” and recommended:

- that officer status should be retained, but that employment law should be extended to police officers within the framework of the office of constable, including recourse to the Employment Tribunal;
- that the current regulatory framework be replaced by a disciplinary procedure based on the ACAS *Code of Practice on Disciplinary and Grievance Procedures*;
- that a new Code of Conduct be devised, possibly based on the Code of Ethics for the Police Service in Northern Ireland.<sup>226</sup>

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[http://www.ipcc.gov.uk/index/complainants/who\\_complaint/pol\\_codeconduct.htm](http://www.ipcc.gov.uk/index/complainants/who_complaint/pol_codeconduct.htm)

<sup>220</sup> Further information is contained in Library Standard Note SN/HA/2056 available on the Library intranet and on the IPCC website at <http://www.ipcc.gov.uk/>

<sup>221</sup> Review of Police Disciplinary Arrangements Report, January 2005, Appendix B, <http://press.homeoffice.gov.uk/documents/police-disciplinary-arrangements/appendices.pdf?view=Binary>

<sup>222</sup> SI 1999/732, as amended

<sup>223</sup> Ministry of Justice, *Criminal Justice and Immigration Bill Regulatory Impact Assessments*, June 2007, <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf> site visited 17 July 2007

<sup>224</sup> “Cleared police chief accuses Met of witch hunt”, *Financial Times*, 16 September 2003

<sup>225</sup> *The case for change: People in the Metrop*

<sup>226</sup> The Code of Ethics for the Police Service Northern Ireland is available at [http://www.psni.police.uk/nipb\\_ethics-nonotes-2.pdf#xml=http://www.psni.police.uk/scripts/texis.exe/webinator/search/xml.txt?query=Code+of+Ethics&p=r=internet&order=r&cq=&id=46969b6750](http://www.psni.police.uk/nipb_ethics-nonotes-2.pdf#xml=http://www.psni.police.uk/scripts/texis.exe/webinator/search/xml.txt?query=Code+of+Ethics&p=r=internet&order=r&cq=&id=46969b6750)



The Commission for Racial Equality also investigated the Police Service, and also favoured basing a new Code of Conduct on the Northern Ireland model. They recommended that comprehensive guidelines be developed on sanctions for racial misconduct, and that there be nationally agreed grievance procedures and ethnic monitoring of disciplinary action.<sup>227</sup>

In April 2007, the Conservative Party's *Police Reform Taskforce* led by the then shadow minister for police reform, Nick Herbert, published a lengthy interim report, *Policing for the People* which touched on the issue of police disciplinary structures alongside discussion of other reform issues. The report does not represent party policy which, it says, "will be agreed in due course".<sup>228</sup>

In any workforce, while the majority can be hardworking, dedicated and motivated, those who are not can have a disproportionate effect on the organisation's performance. It is therefore important that an officer whose performance is unacceptably poor can be removed. As David Cameron has said, "once a police officer has completed two years of probation and become a full constable, he or she is almost unsackable. It is bad for the public and bad for their colleagues that a simpler route is not available." It is clearly a huge problem if an unmotivated officer cannot be removed for poor performance. In spite of several recent changes, the dismissal process remains convoluted.

Recently two detectives from Cheshire Constabulary were finally dismissed for stealing money seized in a drugs raid after a three-year, £1 million inquiry. 200 Police tribunals are often conducted in a quasi-judicial adversarial manner not dissimilar from a military court martial, and often with a higher burden of proof than is reasonable. One chief constable has joked that it is easier to prove a murder than it is to prove that an officer is incompetent. A symptom of this is that lawyers are involved at each stage of the disciplinary process. In a review of police disciplinary arrangements, Bill Taylor recommended that "the involvement of lawyers should be minimised. They should retain a role at appeal stage and at other limited points." The Government is currently implementing recommendations of the Taylor review. It is essential that the mechanism for disciplining officers is proportionate, timely, transparent, fair and cost-effective. If after current changes have bedded in the mechanism still does not achieve these goals, further reform will be necessary.

### **C. The Taylor Review**

The main report on police discipline was produced by the Taylor Review, which was ordered by the Home Secretary, and chaired by William Taylor, a former commissioner of the City of London Police.

Amongst the recommendations were that:

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<sup>227</sup> *The Police Service in England and Wales Full list of recommendations of a formal investigation by the Commission for Racial Equality*, March 2005, [http://www.cre.gov.uk/downloads/PoliceFI\\_recsfinalA4.pdf](http://www.cre.gov.uk/downloads/PoliceFI_recsfinalA4.pdf)

<sup>228</sup> Police Reform Taskforce, *Policing for the People*, April 2007, <http://www.policereform.com/Files/MediaFiles/Policing%20for%20the%20People%20-%20Full%20report.pdf>



- A new Code of Professional Standards (incorporating conduct and ethics) should be produced
- New disciplinary arrangements based on Acas principles; and moving away from quasi-judicial hearings and investigations centred on the crime model
- The Unsatisfactory Performance Procedures should be reviewed.

Detailed recommendations on the disciplinary arrangements were as follows:<sup>229</sup>

2 Disciplinary arrangements should be established on the basis of the thirteen key areas set out below. These key areas need to be seen as a whole as there is an obvious inter-dependence and the impact of the proposals would be adversely influenced by inappropriate 'cherry picking' of the individual elements.

(i) The uniqueness of policing, the extraordinary powers of police officers and their role in society requires that, in the public interest, the disciplinary arrangements of police officers are most appropriately determined by Parliament after extensive consultation. Policing is an area that is too important to be left to the uncertainty of changes to and the case precedent decisions of mainstream 'employment law'. Conduct arrangements must be capable of control and shaping and this is best achieved by regulation. This will help secure a high level of democratic accountability, drive national consistency and, in the context of complaints by members of the public, ensure the system is citizen-focussed.

(ii) Taking account of (i) above the regulatory framework should be simple, minimal and meet the needs of modern policing by avoiding an overly legalistic or adversarial environment. It is accepted that The ACAS Code of Practice on Disciplinary and Grievance Procedures (September 2004)<sup>1</sup> should be the basis for the regulation. In this way the conduct arrangements can benefit from the experience of employment law and good employment relations practice, which touches on most people's life but still be capable of management by Parliament in the public interest.

(iii) The intention is to encourage a culture of learning and development for individuals and/or the organisation. Sanction has a part, when circumstances require this, but improvement will always be an integral dimension of any outcome.

(iv) The language and environment for handling police discipline should be open and transparent. It should be much less quasi-judicial. Investigations need not be centred on the crime model, the style of hearing should be less adversarial and similarities with a 'military court marshal model' avoided.

(v) Initial reports (whether from members of the public or internally generated) must be formally 'assessed' with the full range of options available for responding. (For example, crime investigation, misconduct, gross misconduct, unsatisfactory performance, grievance and mediation.) While initial reports need to be formally assessed, they need not necessarily be dealt with by way of formal procedures. In some cases a simple apology may suffice.

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<sup>229</sup> *Review of Police Disciplinary Arrangements Report*, January 2005, 17 March 2005  
[http://police.homeoffice.gov.uk/news-and-publications/publication/human-resources/Discipline\\_review\\_report\\_F11.pdf](http://police.homeoffice.gov.uk/news-and-publications/publication/human-resources/Discipline_review_report_F11.pdf)

(vi) Conduct issues should be separated into two distinct groups, namely 'misconduct' and 'gross misconduct' to promote proportionate handling, clarify the available outcomes and provide a better public understanding of the policing environment.

(vii) Conduct matters should be dealt with at the lowest possible line management level. Misconduct should not rise above the BCU (or equivalent) level and gross misconduct should be reserved for the most serious behavioural issues. The latter are likely to be handled by professional standards departments.

(viii) Investigations and (where appropriate) hearings should be less formal and managed in a manner proportionate to the context and nature of the issue(s) at stake and in accordance with the ACAS code.

(ix) The appeal mechanisms (re-worked from the present) should be singular for the policing environment including the capacity to consider the finding as well as the outcome. Job re-engagement should be a possibility. The experience of ACAS is to be harnessed in developing the mechanisms.

(x) The police service must manage the disciplinary arrangements dynamically and demonstrate this by actively engaging with all groups internally (including staff/staff support associations) to drive through the change to the internal culture of the organisation and promote the acceptance of responsibility at all levels of management.

(xi) In different but complementary ways the IPCC, Police Authorities and HMIC are the proactive guardians of public interest, accountability and transparency and must be robust in challenging poor practice and making change happen. Police Authorities are accountable for local arrangements. HMIC examine national performance and the performance of individual forces. IPCC oversee the investigation of serious allegations and in their guardianship role on complaints are setting relevant standards eg on proportionate investigations. This role is likely to develop overtime. Given the continued need for a regulatory framework the Home Secretary, advised by the Police Advisory Board, will continue to set the standard for conduct of disciplinary proceedings.

(xii) For all parts of the process there should be designated time limits to which all parties must adhere – with consequences for unreasonable failure to do so. The details will need to reflect the different conduct environments and thus being too prescriptive is not realistic. However that time scales should exist in each case is important and necessary. This includes managing the absence through sickness of any of the key participants and the ACAS model offers a handling methodology.

(xiii) Specific and further guidance is necessary to ensure that matters which are properly the domain of capability and performance are not inappropriately managed as matters of personal behaviour (ie misconduct). (Note, that in the ACAS code, where lack of ability rather than wilful conduct is the issue that would be referred to as a 'capability' matter whereas in the policing context it is more often referred to as a 'performance' matter. For this report they are usually interchangeable.)

## D. The Government response to the Taylor review

The then Police Minister, Hazel Blears, gave the following response to the review in a press release:<sup>230</sup>

I am grateful to William Taylor for his thorough review. There is clear agreement between the Government, police bodies, the CPS and the other participants in the review that police disciplinary arrangements need to move away from being lengthy, costly, heavily regulated and punitive. An effective, accountable police service that commands public confidence demands a more professional approach.

I agree that police disciplinary arrangements should be set by Parliament - this ensures national consistency and citizen focus. But within that regulation, they should follow the good practice laid down by the Arbitration and conciliation advisory service (Acas) code of practice on disciplinary and grievance procedures. This will bring modern management practice into police discipline and is supported by stakeholders.

The Government does not agree with the recommendation that police officers should be allowed to resign or retire while under suspension. Forfeiture of police pension, if a criminal charge linked to employment in the police service is proved, should continue to be an option.

In common with others, we prefer the model for police discipline to be an investigation followed by dismissal where appropriate.

A working group led by the Police Advisory Board (PAB) will now take the recommendations forward, taking into account relevant recommendations from the Commission for Racial Equality's investigation into the police service. I look forward to working with the PAB working group to help ensure that we have the structures and processes necessary to deliver a twenty-first century police service.

## E. Draft Regulations

In response to the Taylor review, a working party of the Police Advisory Board<sup>231</sup> has drawn up a new Code of Professional Standards to replace the current code of conduct. The Home Office put this out for consultation on February 2006 with a closing date of 19 May 2006.<sup>232</sup> The Working Party has also examined the Unsatisfactory Performance Procedures. Draft regulations have been circulated for statutory consultation, and the intention is to lay them before Parliament in spring 2008.<sup>233</sup>

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<sup>230</sup> Report of the Taylor Review of Police Disciplinary Arrangements, Home Office Press Release STAT 009/2005, 17 March 2005

<sup>231</sup> The Board is appointed by the Home Secretary and including representatives from the Association of Police Authorities, the Association of Chief Officers, the Chief Police Officers' Staff Association, the Police Superintendents Association, and the Police Federation

<sup>232</sup> <http://www.homeoffice.gov.uk/documents/police-code-consultation>

<sup>233</sup> Ministry of Justice, Criminal Justice and Immigration Bill Regulatory Impact Assessments, June 2007, pages 148 and 152, <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>

## **F. The Bill**

Clause 111 and Schedule 19 of the Bill make a number of changes to primary legislation in order to accommodate the new regulations. For example, regulation-making powers are amended to:

- allow regulations to set out the circumstances when a police officer has a right to legal or other representation
- allow police appeal tribunals to deal with the appellant in any way in which the original misconduct or performance proceedings could have dealt with him or her
- specify the circumstances in which a case may be determined without a hearing
- remove references to a disciplinary sanction of “requirement to resign” as this disciplinary outcome will not be available in the new misconduct or performance proceedings.

## **XV Restricted immigration status**

Part 11 of the Bill - the only part on immigration - introduces a restricted immigration status for designated foreign criminals whom the Home Secretary does not want in the UK but who cannot be removed for human rights reasons. The new status is separate from both the normal scheme of ‘leave’ to enter or remain and the various forms of ‘temporary admission’ which act as a limited licence to be in the UK, though it bears some resemblance to the latter. Designated foreign criminals would not be allowed to work or claim benefits, but would be entitled to a limited amount of public funding which is likely to be in kind or in vouchers.

This follows the ruling against the Home Secretary in the ‘Afghan hijackers’ case in 2006, in which the Court of Appeal held that the Home Secretary did not have the power on his own to place them on temporary admission instead of granting them leave as ordered by the immigration adjudicators.

### **A. Background**

In order to understand this new status, an explanation of the current forms of immigration leave and temporary admission, and how they can be refused and removed, may be helpful.

#### **1. Immigration ‘leave’ and temporary admission**

Unless they are EEA nationals or the family members of EEA nationals,<sup>234</sup> people who do not have the right of abode in the UK require specific permission from the immigration authorities to enter or remain in the UK. This is called ‘leave’, and may be either ‘leave to enter’ (for those who apply whilst outside the UK) or ‘leave to remain’ (for those who are already in the UK). It can be for either a limited or an indefinite period. The *Immigration Rules* set out the various categories in which people can be granted leave,

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<sup>234</sup> The European Economic Area (EEA) comprises the member states of the European Union plus Iceland, Liechtenstein and Norway. EEA and Swiss nationals are covered by European free movement rules.

the requirements which must be met by applicants and the period of leave which may be granted.<sup>235</sup> Any application may be refused if it is held that the applicant's presence is not conducive to the public good. Breaching the conditions of limited leave can lead to removal from the UK, and criminal offences or other behaviour 'not conducive to the public good' can lead to deportation. Indefinite leave cannot have any conditions attached to it, but in certain limited circumstances it may be revoked.<sup>236</sup>

There are two special categories, for people who claim successfully that their rights under the 1951 Refugee Convention or the European Convention on Human Rights (ECHR) would be breached by removing them from the UK. They may be granted five years' limited leave either as a refugee or in the 'Humanitarian Protection' category (HP).<sup>237</sup> Refugee status is determined by the Refugee Convention, which contains various exceptions for criminals and other undesirable people. HP is granted where the person does not meet the criteria for refugee status but would face a serious risk to life or person arising from the death penalty, unlawful killing or torture or inhuman or degrading treatment or punishment in the country of return.<sup>238</sup> "Serious criminals", including war criminals, terrorists or others who raise a threat to national security and anyone who is considered to be of bad character, conduct or associations, are excluded from these provisions;<sup>239</sup> even if they cannot be removed they will be given the more restrictive Discretionary Leave instead (see below). Refugees and people on HP may be subject to review by the immigration authorities, but if they complete five years in the UK, they will be eligible to apply for Indefinite Leave to Remain (ILR).

Leave may also be granted outside the Immigration Rules, as either Discretionary Leave (DL) or Leave Outside the Rules (LOTR). DL is granted where a person has been excluded from refugee status or HP but their life or freedom would be seriously at risk on return, or where removal would for example breach Article 3 of the ECHR on account of the person's medical condition or Article 8 of the ECHR (right to private and family life), or result in a flagrant denial of rights under other articles. Those in the first category would normally be granted only six months' DL at a time, whereas the others would usually be given three years in the first instance. A person will not become eligible to apply for ILR until they have completed six years of DL (or, in the case of persons excluded from refugee status or HP, until they have completed at least ten years of DL).<sup>240</sup> LOTR is the remaining category, and is granted only when no other category is appropriate and one of the following applies: the case falls within the ambit of a published concession or there are "particularly compelling" circumstances or it is deemed absolutely necessary to allow someone to enter/remain in the UK when there is no other

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<sup>235</sup> *Immigration Rules* (HC 395 of 1993-94 as amended):

<http://www.ind.homeoffice.gov.uk/lawandpolicy/immigrationrules/>

<sup>236</sup> *Nationality, Immigration and Asylum Act 2002* s. 76

<sup>237</sup> *Immigration Rules* (HC 395 of 1993-94 as amended), Part 11

<sup>238</sup> see Home Office Asylum Policy Instruction (API), *Humanitarian Protection*, October 2006:

<http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions>

<sup>239</sup> *Immigration Rules* (HC 395 of 1993-94 as amended) para. 339D. See para. 3.6 of the API on Humanitarian Protection for further elaboration.

<sup>240</sup> Home Office Asylum Policy Instruction (API), *Discretionary Leave*:

<http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions>

available option. The Home Office internal guidance for caseworkers, which is available on the internet, states that it should rarely be granted.<sup>241</sup>

The concept of temporary admission is quite different. It stems from paragraphs 16 and 21 of Schedule 2 to the Immigration Act 1971, and allows a person who is 'liable to be detained' to be temporarily admitted to the UK instead of being given leave. It is simply an alternative to detention and can be granted whenever there is a power to detain for immigration purposes - i.e. pending examination, a decision or removal. People who apply for asylum at the border are often granted temporary admission while their asylum claims are considered. Conditions such as residence restrictions, employment or occupation restrictions, reporting requirements and electronic monitoring may be imposed, and temporary admission can be withdrawn at any time. A person may be given temporary admission even if their continued detention would be unlawful (for example, where there are practical problems with removal), because 'pending' removal means simply 'until' removal; the person is still 'liable' to be detained.<sup>242</sup> However, this can lead to people spending lengthy periods in 'limbo', neither being removed nor given leave. The Home Affairs Committee in 2003 criticised this practice:

We believe it is absurd to refuse leave to remain to people who, for whatever reason, cannot be removed. We recommend that such people be granted a temporary status which will allow them to support themselves.<sup>243</sup>

## 2. Revocation of refugee status

Any protecting country is entitled to withdraw refugee status from a refugee who comes within the terms of one of the six cessation clauses in Article 1C of the 1951 Refugee Convention and can therefore no longer be regarded as a refugee. Paragraph 339A (i)-(vi) of the UK's *Immigration Rules* mirrors this by providing that a person's grant of asylum shall be revoked or not renewed where that individual has ceased to be a refugee.

The cessation, cancellation or revocation of refugee status does not in itself affect a person's leave to enter or remain. In practice however, where refugee status is withdrawn it will normally result in curtailment of any extant leave<sup>244</sup> and it may result in (and is normally done with a view to) taking action to remove the person concerned.

In addition, since 10 February 2003 the Home Office has had the power to revoke anyone's ILR if they cease to be a refugee.<sup>245</sup> If ILR is revoked on these grounds, refugee status will also be revoked. At the same time, the Government also established

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<sup>241</sup> Home Office *Immigration Directorates' Instructions* chapter 1 section 14, 'Leave Outside the Rules' (April 2006):

<http://www.ind.homeoffice.gov.uk/documents/idischapter1/section14.pdf?view=Binary>

<sup>242</sup> See the House of Lords case of *R v Secretary of State for the Home Department (Respondent) ex parte Khadir* [2005] UKHL 39, 16 June 2005:

<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd050616/khadir.htm>

The *Nationality, Immigration and Asylum Act 2002* s. 67 put this on a statutory footing.

<sup>243</sup> Home Affairs Committee, 4<sup>th</sup> report of 2002-03, *Asylum removals*, HC 654, para. 63

<sup>244</sup> Home Office *Immigration Rules* HC 395 of 1993-94 as amended, para. 339B

<sup>245</sup> *Nationality, Immigration and Asylum Act 2002* s. 76

a specific power to remove persons who have had their ILR revoked as a result of ceasing to be a refugee.<sup>246</sup> Where removal is not immediately possible, ILR can still be revoked and consideration given to granting a short period of Discretionary Leave instead.<sup>247</sup>

The Home Office has published its internal Asylum Policy Instructions (APIs) on *Refugee Leave*,<sup>248</sup> *Cessation, Cancellation and Revocation of Refugee Status*<sup>249</sup> and *Revocation of Indefinite Leave*.<sup>250</sup> These give details of how the law should be applied by officials. For instance, the API on *Refugee Leave* says that “The burden of proof is upon IND to show that a person is no longer eligible for refugee status and clear evidence will be required to justify that decision.”<sup>251</sup> It goes on to describe the process of reviews of refugee status for those with limited leave, which may be triggered either by the actions of the individual or on the basis of a significant and non-temporary change in the conditions in their home country. In the latter case, Ministers may make a declaration that conditions in a country have changed so significantly that all grants of refugee status to people from that country will be reviewed.<sup>252</sup> Where it is found that a person is no longer a refugee, consideration should be given to whether they qualify for Humanitarian Protection (HP) or Discretionary Leave (DL).<sup>253</sup>

The Government does not publish figures on revocations or withdrawals of refugee status. However, Home Office officials have stated that the total is currently less than ten per year on average, for all reasons and all nationalities.

### 3. Deportation of foreign national criminals

Foreign nationals who are convicted of a criminal offence may be deported either (1) where the court has recommended deportation and the Home Office has decided to pursue this; or (2) where the court has not made a recommendation but the Home Office has nevertheless deemed deportation to be “conducive to the public good”. Alternatively, if they entered illegally or have breached conditions of their leave, foreign criminals might instead be “removed” under less complex procedures.

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<sup>246</sup> new s.10(1)(ba) of the *Immigration and Asylum Act 1999*

<sup>247</sup> Home Office Asylum Policy Instruction *Revocation of Indefinite Leave* Version 111206, January 2006, para. 1:  
<http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions/apis/revocationofindefiniteleave.pdf?view=Binary>

<sup>248</sup> Version 2 131006, October 2006:  
<http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions/apis/refugeeleave.pdf?view=Binary>

<sup>249</sup> Version 051006, October 2006:  
<http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions/apis/cessation.pdf?view=Binary>

<sup>250</sup> Version 111206, January 2006:  
<http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions/apis/revocationofindefiniteleave.pdf?view=Binary>

<sup>251</sup> para 4.2

<sup>252</sup> para. 6

<sup>253</sup> para. 8.2



The rules are different for EEA<sup>254</sup> nationals and their family members on the one hand, and other foreign nationals on the other. This is because EEA nationals - and their family members of whatever nationality - may be deported only in the circumstances allowed by European Community law. These have always been tighter than the grounds for other foreign nationals (see below), and have recently become even more so.

Even if no human rights claim is made, the Home Office must consider the ECHR at all stages of the deportation process. Guidance on human rights issues relating to foreign national criminals is given in Home Office instructions to caseworkers.<sup>255</sup> One of the relevant provisions is Article 3 ECHR, on freedom from torture,<sup>256</sup> but removal from the UK may in some circumstances be challenged when the anticipated treatment in the receiving state would breach other articles of the ECHR.<sup>257</sup> Furthermore, anyone who has a spouse and/or child who is settled in the UK could argue that removing them from the UK is a breach of their rights under Article 8 ECHR (respect for private and family life) because of their need to be together with family members or because of the other connections they have developed with the UK.

The current *UK Borders Bill* seeks to introduce a presumption in favour of deportation for the more serious foreign criminals. More detailed information on deportation of foreign national criminals is given in a House of Commons Library Standard note<sup>258</sup> and Research Paper 07/11 on the *UK Borders Bill*.<sup>259</sup>

#### 4. The 'Afghan hijackers' case

On 4 August 2006 the Home Secretary lost the case of *S and others v Secretary of State for the Home Department*.<sup>260</sup> It concerned a group of Afghan men who had claimed asylum when they landed in Stansted after hijacking a plane in order to escape from Afghanistan. They were convicted in the UK of various offences relating to the hijacking but their convictions were set aside in June 2003 because there had been a misdirection to the jury in relation to the defence of duress of circumstances. The court did not direct a re-trial because most of the respondents had by then served their sentences in full. The way was then open for the consideration of their applications for asylum.

The following timeline outlines the asylum/immigration aspects of their case. The Home Office is unable to disclose the current immigration status of the men.

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<sup>254</sup> The European Economic Area (EEA) comprises the EU Member States plus Iceland, Liechtenstein and Norway.

<sup>255</sup> Home Office *Operational Enforcement Manual* chapters 75 and 76: <http://www.ind.homeoffice.gov.uk/documents/oemsectiong/>

<sup>256</sup> See House of Commons Library Standard Note SN/HA/4151, *Deportation of individuals who may face a risk of torture*, 2 October 2006

<sup>257</sup> *R (ex p Ullah) v Special Adjudicator; Do v Secretary of State for the Home Department*, House of Lords, 17 June 2004, [2004] UKHL 26: <http://pubs1.tso.parliament.uk/pa/ld200304/ldjudgmt/jd040617/ullah-1.htm>. See also *Independent Tuesday Law Report*, 22 June 2004

<sup>258</sup> Standard Note SN/HA/3879, *Deportation of foreign national prisoners*, 26 June 2007

<sup>259</sup> <http://www.parliament.uk/commons/lib/research/rp2007/rp07-011.pdf>

<sup>260</sup> [2006] EWCA Civ 1157, 4 August 2006: <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1157.html>. This was an appeal against the decision in the judicial review case of *R (S and others) v Secretary of State for the Home Department* [2006] EWHC 1111 (Admin), 10 May 2006: <http://www.bailii.org/ew/cases/EWHC/Admin/2006/1111.html>



**25 June 2003**

The men were refused asylum, Humanitarian Protection and Discretionary leave. They appealed against this decision to a panel of immigration adjudicators.

**8 June 2004**

The panel of immigration adjudicators dismissed the appeals on asylum grounds (because the hijacking was a serious non-political crime which excluded them from the protection of the Refugee Convention) but allowed them on human rights grounds (concluding that there was for each of the claimants a real risk that they would suffer violations of their rights under Article 3 of the European Convention on Human Rights if they were returned to Afghanistan).

**22 July 2004**

The Deputy President of the Immigration Appeal Tribunal refused the Home Secretary permission to appeal. The Home Secretary decided not to apply to the High Court for a statutory review of the Tribunal's decision. However, he did not grant the men the appropriate leave (Discretionary Leave).

**24 March 2005**

The claimants' solicitors wrote to the Treasury Solicitors made detailed representations "regarding the inordinate delay in the granting of leave to our clients following their successful appeal." Nothing was heard. In a further letter dated 17 June 2005, the claimants' solicitors contended that the delay in granting Discretionary Leave was unlawful and said that judicial review proceedings would be brought unless leave were granted.

**20 July 2005**

Judicial review proceedings were started.

**30 August 2005**

The Home Office issued revised policy instructions on Discretionary Leave which stated that:

Where a person would have qualified for Humanitarian Protection but for the fact that they were excluded from such protection, they should be granted Discretionary Leave [unless Ministers decide in view of all the circumstances of the case that it is inappropriate to grant any leave. Where it is decided that leave should not be granted, the individual will be kept or placed on temporary admission or temporary release.]

The words in square brackets were new.

**3 November 2005**

The IND wrote to the claimants' solicitors stating that the Home Secretary had decided (under the new policy) that Discretionary Leave was not appropriate and that they should remain on temporary admission.

**10 May 2006**

Sullivan J decided the judicial review case. He held that the Home Secretary's decision that it was inappropriate to grant discretionary leave to enter the United Kingdom to individuals whose need for humanitarian protection had been recognised by a panel of immigration adjudicators was unlawful. He added that "the personal involvement of Ministers in the decision-making process could not conceivably justify such a lengthy delay following the Panel's determination...a decision was deliberately delayed so that the claimants' application for Discretionary Leave could be refused in all but name under a revised policy that was eventually published on 30th August 2005" (para. 99-101). He ordered the following (para. 120):

- (1) a quashing order in respect of the decision letter dated 3rd November 2005;
- (2) a declaration that the delay in issuing a decision was unlawful;
- (3) a declaration that "the policy" (i.e. the words in parenthesis in the 2005 policy instructions) was unlawful;
- (4) a mandatory order requiring the defendant to grant the claimants six months' Discretionary Leave in accordance with either the 2003 policy or the lawful element of the 2005 policy within seven days;
- (5) the defendant to pay the claimants' costs

He concluded with "A Final Word" (para. 121):

Bearing in mind some of the newspaper headlines which reported the Panel's determination in 2004, it is important that there is no misunderstanding about the effect of this decision. The issue in this case is not whether the executive should take action to discourage hijacking, but whether the executive should be required to take such action within the law as laid down by Parliament and applied by the courts.

**19 May 2006**

The Home Secretary granted the claimants six months' Discretionary Leave, but appealed to the Court of Appeal against the order that part of the new policy on Discretionary Leave was unlawful as he wanted to have the power to place them on temporary admission rather than Discretionary Leave at the end of the six months.

**4 August 2006**

The Court of Appeal's judgment was issued. The court dismissed the appeal, holding that it was beyond the powers of Home Secretary to introduce a new category of "persons temporarily admitted" for successful applicants without Parliamentary sanction (para. 47). The Home Secretary accepted this ruling and did not seek to appeal further.

As Brooke LJ explained, the Court of Appeal's judgement was that the Secretary of State did not have the power to introduce a new status for those disentitled to discretionary leave - but this did not mean that Parliament could not do so:

Nothing in this judgment should be interpreted as meaning that it would not be open to Parliament to confer power on the Secretary of State to introduce a regime similar to the regime he sought to introduce through the August 2005 Discretionary Leave API (so long as the arbitrary elements of it are removed). If it is considered that a person (or a group of persons) has by his conduct disentitled himself to any discretionary leave at all, then it would be open to Parliament, if it thought fit, to create a new statutory category to accommodate him. The present twilight zone occupied by persons entitled to temporary admission was not designed for him. The only effect of the present judgment is that it was beyond the powers of the Secretary of State to introduce this new category of "persons temporarily admitted" of his own motion without Parliamentary sanction.<sup>261</sup>

## **B. Part 11 of the Bill**

### **1. A new restricted immigration status**

**Clauses 115 to 122** are designed to do what the Secretary of State on his own could not: to create a new restricted immigration status as an alternative to leave for persons who the Government wishes to deport (because they are excluded from the protection of the Refugee Convention or are serious criminals) but who cannot be removed from the UK for human rights reasons. The Government does not want these people to be given leave merely as a result of their irremovability.

The new status is specifically distinguished from temporary admission but its effects would be very similar, for example in the conditions that can be imposed and the possibility of withdrawing it at any time. It could not of itself lead to settlement in the UK.

There is a 'long residence' rule under which a person who has been in the UK continuously for 14 years may apply for settlement even if some or all of that period was without leave, but this is unlikely to apply to anyone given this new status, as time spent in the UK following service of notice of liability to removal or notice of intention to deport is not counted towards the 14 years and settlement can in any case be refused on public interest grounds or following a criminal conviction.<sup>262</sup>

### **2. "Foreign criminals"**

Under **clause 115** the Secretary of State "may" (but does not have to) designate people for these purposes, if they are "foreign criminals" or their family members who are liable to deportation but whose removal would breach their rights under the ECHR. Under **clause 116** there are three categories of foreign criminal for these purposes:

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<sup>261</sup> [2006] EWCA Civ 1157, 4 August 2006, para. 47

<sup>262</sup> Home Office *Immigration Rules* HC 395 of 1993-94 as amended, paras 276A-276D: <http://www.ind.homeoffice.gov.uk/lawandpolicy/immigrationrules/part7>. Time spent in the UK following service of notice of liability to removal or notice of intention to deport the person is not counted towards the 14 years

- those who cannot be considered a refugee according to Article 1F of the 1951 Refugee Convention (i.e. they have committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime committed outside the country of refuge prior to admission to that country as a refugee; or they have been guilty of “acts contrary to the purposes and principles of the United Nations”), regardless of whether or not they have actually applied for asylum;
- those convicted of any offence and sentenced to two or more years’ imprisonment; and
- those convicted of a specified offence and sentenced to any period of imprisonment.

One does not have to be convicted of an offence to be found to have committed an act contrary to the purposes and principles of the United Nations.

Less serious criminals would not be covered, and would therefore continue to be given Discretionary Leave if they are cannot be removed but are disqualified from refugee status or humanitarian protection.

This definition of foreign criminal overlaps, but is not the same as, that set out in the current *UK Borders Bill* for the purposes of ‘automatic deportation’ which excludes the first category above, includes those sentenced to twelve months’ imprisonment or more and applies only to foreign nationals who are convicted in the UK.<sup>263</sup>

The second two categories above are the same as those used by the UK to decide when a person has committed a “serious crime” for purposes of excluding them from the protection of Article 33 of the Refugee Convention. Article 33 allows those who have been recognised as refugees to be expelled if they are a danger to the host country (though they may instead be protected by other provisions such as Article 3 ECHR). So although clause 115(5) stipulates that a person cannot be designated if an effect of designation would breach his rights under the Refugee Convention, it is likely that anyone who is being considered for designation could in any case be excluded from protection under the Convention.

EEA nationals and their family members could be designated, but only if the effect would not breach their rights under European free movement laws. This is rarely likely to be the case as the public security threshold under those laws is very high.<sup>264</sup> British citizens and others with the right of abode in the UK could not be designated.

The Bill does not provide a right of appeal against designation. As it is an administrative decision as to whether or not to designate, it would however be susceptible to judicial review.

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<sup>263</sup> HL Bill 68, clause 31

<sup>264</sup> see the Free Movement Directive, 2004/38/EC, reflected for UK purposes in the *Immigration (European Economic Area) Regulations 2006* SI 2006/1003

The Government has suggested that fewer than 50 people would be affected at first.<sup>265</sup> It is intending to monitor the number of foreign nationals granted the new status and analyse the records twice a year to begin with.<sup>266</sup>

### 3. Restrictions

The Government says that it does not want these people to have access to employment or mainstream benefits.<sup>267</sup> Those granted refugee status, Humanitarian Protection, Discretionary Leave or Leave Outside the Rules have access to public funds and are entitled to work, unless specific restrictions have been applied. Otherwise, 'persons subject to immigration control' are usually excluded from a wide range of benefits and tax credits. Employment and public funds restrictions are frequently applied to immigration leave (other than Indefinite Leave, to which no conditions may be applied).

Under **clause 117(2)** designated persons would be considered 'subject to immigration control' and therefore not entitled to a number of benefits and tax credits, and under **clause 118** employment or occupation restrictions could be imposed. Other conditions could restrict where they are allowed to live and require them to report to the police or the immigration authorities or be electronically monitored.

Breach of a condition "without reasonable excuse" is a criminal offence, attracting a maximum sentence of 51 weeks' imprisonment and/or a fine of up to £5,000. This will match the sentences available for those who breach conditions of limited leave or temporary admission.<sup>268</sup>

It can be compatible with the European Convention on Human Rights (ECHR) to restrict the right to work, study and travel, if this is done lawfully and a balancing exercise is carried out to ensure that the restrictions are proportionate to the goal. For instance, in the Afghan hijackers case, the Home Secretary had conceded that the denial of leave amounted to an interference with the right to respect for private and family life under Article 8 ECHR, because the claimants could not work, attend university or travel. However, Article 8 is not absolute: interference with the right is allowed if it is "in accordance with the law" and "necessary in a democratic society", i.e. proportionate. In order to decide whether an interference with Article 8 rights is lawful, the decision-taker must carry out a balancing exercise, weighing the degree of interference against the justification for that interference. In that case, Sullivan J did not accept that the requirement was fulfilled by simply listing a number of factors that were considered:

It is true that the decision letter states that the defendant has given "careful consideration to all the circumstances" of the claimants' cases and mentions,

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<sup>265</sup> Ministry of Justice, *Criminal Justice and Immigration Bill: Regulatory Impact Assessments* p. 156: <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>

<sup>266</sup> Ministry of Justice, *Criminal Justice and Immigration Bill: Regulatory Impact Assessments* p. 159: <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>

<sup>267</sup> Ministry of Justice, *Criminal Justice and Immigration Bill: Regulatory Impact Assessments* p. 156: <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>

<sup>268</sup> *Immigration Act 1971* s. 24, as amended - see also Ministry of Justice, *Criminal Justice and Immigration Bill: Regulatory Impact Assessments* p. 160: <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>

among the four factors specifically referred to, the matters raised on behalf of the claimants in their Detailed Statements of Grounds. However, simply listing in "headline" form a number of factors to which regard has been paid does not amount to the carrying out of a balancing exercise for the purposes of Article 8, unless of course each of those factors has been considered in more detail earlier in the decision. Decision letters must be read as a whole and in a common sense way. But common sense tells one that there is a real difference between simply listing in summary form a number of factors and carrying out a balancing exercise. Indeed, the statement in the letter that there is "an overwhelming public interest" in deterring hijacking strongly suggests that the defendant did not consider that it was necessary to carry out a balancing exercise at all.<sup>269</sup>

In her opinion in the case of *Khadir*, Baroness Hale had suggested that continued denial of the right to work or make other contributions to society may at some point become unlawful:

There may come a time when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily, are so remote that it would irrational to deny him the status which would enable him to make a proper contribution to the community here.<sup>270</sup>

The human rights organisation Liberty has said that it will assess whether the conditions imposed are a "backdoor route to criminalisation", as breach of conditions will be a criminal offence.<sup>271</sup>

#### 4. Support

Designated persons who are 'destitute' would be able to get support from the Border and Immigration Agency, under **clauses 119-20**. The definition of 'destitute' is given in section 95 of the *Immigration and Asylum Act 1999*:

- (3) For the purposes of this section, a person is destitute if—
- (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
- (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.

More detail about what may be considered adequate accommodation or essential living needs is given later in section 95 and in the *Asylum Support Regulations*.<sup>272</sup>

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<sup>269</sup> Furthermore, the new policy of giving successful applicants temporary admission rather than leave to enter or remain was not lawful without primary legislation. The interference with Article 8 rights was therefore held to be unlawful. *R (on the applications of S; S; M; S; A; S; K And G) v Secretary of State for the Home Department* [2006] EWHC 1111 (Admin) at paras 108-114

<sup>270</sup> *R v Secretary of State for the Home Department (Respondent) ex parte Khadir* [2005] UKHL 39, 16 June 2005, para. 4:

<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd050616/khadir.htm>

<sup>271</sup> <http://www.liberty-human-rights.org.uk/pdfs/policy07/criminal-justiceand-immigration-bill.pdf>

<sup>272</sup> SI 2000/704

The support would be similar to asylum support, which is set at 70% of income support rates for adults and 100% for children.<sup>273</sup> However, according to **clause 119(4)** it would not normally be available in cash. This means it would have to be in kind or in vouchers, as is the case with 'hard cases' support for failed asylum seekers under section 4 of the 1999 Act.<sup>274</sup> The Government has estimated the cost of this support to be between £600,000 and £1,100,000 assuming 50 people are given the new status; but that overall it would be broadly cost-neutral because they would no longer be able to claim mainstream benefits and housing provision (this assumes that they are doing so at the moment).<sup>275</sup>

The Government envisages that it may have to amend the support provisions for designated persons so that they can get cash support, and has therefore included in **clause 120(6)** a "Henry VIII" clause to allow the primary legislation to be amended by statutory instrument. Its thinking is set out in a delegated powers memorandum:

The current intention is that clause 119(4) should not be disapplied and therefore it would not be possible to make provision for its disapplication other than by delegated power. However, it is important to have this power to ensure that the support scheme can be operated in a more flexible manner if the circumstances require it. Further, if the temporary difficulties which made the disapplication of clause 119(4) were to continue it might be necessary, after evaluating the circumstances, for the Secretary of State to exercise the power to repeal the provision.<sup>276</sup>

Under **clause 120(7)** the provision on housing in **clause 119(6)** may be repealed following the case of *R (Morris) v Westminster City Council and another*. In that case, the Court of Appeal made a declaration of incompatibility in relation to section 185(4) of the *Housing Act 1996*, which provides that a person from abroad who is not eligible for housing assistance shall be disregarded in determining for the purposes of Part VII of that Act whether another person is homeless or threatened with homelessness or has a priority need for accommodation. The Government's thinking is that allowing a remedial order to amend both the 1996 Act and this clause "would allow designated persons to be treated in the same manner as persons subject to immigration control".<sup>277</sup>

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<sup>273</sup> See <http://www.ind.homeoffice.gov.uk/applying/asylumsupport/>

<sup>274</sup> See [Library Standard Note SN/HA/2723](#), 9 January 2007

<sup>275</sup> Ministry of Justice, *Criminal Justice and Immigration Bill: Regulatory Impact Assessments* pp. 158-9: <http://www.justice.gov.uk/docs/reg-impact-assess-criminal-justice-immigration-bill.pdf>

<sup>276</sup> Ministry of Justice, *Criminal Justice and Immigration Bill: Delegated Powers Memorandum* para. 162: <http://www.justice.gov.uk/docs/delegated-powers-memorandum.pdf>

<sup>277</sup> Ministry of Justice, *Criminal Justice and Immigration Bill: Delegated Powers Memorandum* para. 166: <http://www.justice.gov.uk/docs/delegated-powers-memorandum.pdf>