JUSTICE 2 COMMITTEE

AGENDA

5th Meeting, 2007 (Session 2)

Tuesday 20 February 2007

The Committee will meet at 2.00 pm in Committee Room 6.

1. **Subordinate legislation:** Johann Lamont MSP (Deputy Minister for Justice) to move the following motion—

   S2M-5593 That the Justice 2 Committee recommends that the draft Police, Public Order and Criminal Justice (Scotland) Act 2006 (Modification of Agency’s Powers and Incidental Provision) Order 2007 be approved.

2. **Subordinate legislation:** Johann Lamont MSP (Deputy Minister for Justice) to move the following motion—

   S2M-5594 That the Justice 2 Committee recommends that the draft Sexual Offences Act 2003 (Notification Requirements) (Scotland) Regulations 2007 be approved.

3. **Custodial Sentences and Weapons (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 3).

4. **Serious Crime Bill (UK legislation):** The Committee will take evidence from—

   Johann Lamont MSP, Deputy Minister for Justice, George Burgess, Jill Clark, Justice Department, Paul Johnston and Stephen Crilly, Legal and Parliamentary Services, Scottish Executive.

   Tracey Hawe
   Clerk to the Committee
Papers for the meeting—

**Agenda Item 1**

Cover note (including SSI and Explanatory Notes)  J2/S2/07/5/1

**Agenda Item 2**

Cover note (including SSI and Explanatory Notes)  J2/S2/07/5/2

**Agenda Item 3**

Marshalled List

Groupings (to follow)

Members are reminded to bring with them copies of the Bill, Explanatory Notes and Policy Memorandum, available from Document Supply or from the Parliament’s website ([http://www.scottish.parliament.uk/business/bills/80-custsentwea/index.htm](http://www.scottish.parliament.uk/business/bills/80-custsentwea/index.htm)) together with any papers from the Stage 1 process that are considered relevant (such as the Committee’s Stage 1 Report).

**Agenda Item 4**

Legislative Consent Memorandum  J2/S2/07/5/3

Written submission from ACPOS  J2/S2/07/5/4

Lines of questioning (PRIVATE PAPER)  J2/S2/07/5/5

SPICe briefing  J2/S2/07/5/6

**Forthcoming meetings—**

- Tuesday 27 February 2007, 2pm, Committee Room 1
- Tuesday 6 March 2007, 2pm, Committee Room 6
JUSTICE 2 COMMITTEE
5th Meeting 2007 (Session 2)
Tuesday 20 February 2007


Type of Instrument: Affirmative

Meeting: 20 February 2007

Date circulated to members: 15 February 2007

Justice 2 Committee deadline to consider SSI: 19 March 2007

Deputy Minister for Justice to attend Justice 2 Committee meeting? Yes

SSI drawn to Parliament’s attention by Sub Leg Committee: No

1. The Subordinate Legislation Committee considered this instrument at its meeting on 13 February 2007. No points arose in relation to the instrument.

2. The Deputy Minister for Justice will attend this Committee meeting. The discussion will begin with an opportunity for members to ask any factual questions or ask for clarification whilst officials are seated at the table with the Minister. The Deputy Minister will then be asked to move the motion to open the debate. The Committee will then formally debate the motion. Officials cannot take part in that debate. The debate is limited to a maximum of 90 minutes (Rule 10.6.3), but may be much shorter. At the end of the debate, the Committee must decide whether or not to agree the motion and report to the Parliament accordingly.

3. If members have any queries or points of clarification on the instrument which they wish to raise with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible.

Clerk to the Committee
15 February 2007
JUSTICE 2 COMMITTEE
5th Meeting 2007 (Session 2)
Tuesday 20 February 2007

SSI title and number: The draft Sexual Offences Act 2003 (Notification Requirements) (Scotland) Regulations 2007

Type of Instrument: Affirmative

Meeting: 20 February 2007

Date circulated to members: 15 February 2007

Justice 2 Committee deadline to consider SSI: 12 March 2007

Deputy Minister for Justice to attend Justice 2 Committee meeting? Yes

SSI drawn to Parliament’s attention by Sub Leg Committee: No

1. The Subordinate Legislation Committee considered this instrument at its meeting on 13 February 2007. No points arose in relation to the instrument.

2. The Deputy Minister for Justice will attend this Committee meeting. The discussion will begin with an opportunity for members to ask any factual questions or ask for clarification whilst officials are seated at the table with the Minister. The Deputy Minister will then be asked to move the motion to open the debate. The Committee will then formally debate the motion. Officials cannot take part in that debate. The debate is limited to a maximum of 90 minutes (Rule 10.6.3), but may be much shorter. At the end of the debate, the Committee must decide whether or not to agree the motion and report to the Parliament accordingly.

3. If members have any queries or points of clarification on the instrument which they wish to raise with the Scottish Executive in advance of the meeting, please could these be passed to the Clerk to the Committee as soon as possible.

Clerk to the Committee
15 February 2007
LEGISLATIVE CONSENT MEMORANDUM

SERIOUS CRIME BILL

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Minister for Justice, is:

“S2M-XXXX Cathy Jamieson: Serious Crime Bill Legislative Consent Motion – UK Legislation - That the Parliament endorses the principle that the offence of breaching a Serious Crime Prevention Order should be extended to Scotland and that amendments to the Proceeds of Crime Act 2002 relating to the use of force in executing search warrants in Scotland under section 387 of that Act and the extension of production orders and search warrants to include cash seizures as set out in the Serious Crime Bill should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Cathy Jamieson, Minister for Justice, under rule 9B.3.1(a) of the Parliament’s standing orders. The Serious Crime Bill was introduced in the House of Lords on 16 January 2007. The Bill can be found at:

http://www.publications.parliament.uk/pa/pabills/200607/serious_crime.htm

3. The Serious Crime Bill will:
   • introduce Serious Crime Prevention Orders (SCPOs), a new type of civil order capable of being imposed against individuals or organisations, covering a wide range of potential prohibitions or requirements;
   • provide for the merger of the Assets Recovery Agency with the Serious Organised Crime Agency;
   • put in place a statutory mechanism to enable public sector bodies to share information between themselves and with the private sector on suspected frauds;
   • place the Audit Commission’s National Fraud Initiative, which matches data across a range of public sector bodies to identify fraud, on a statutory footing and expand its scope;
   • create new offences of encouraging or assisting crime to plug perceived gaps in criminal law; and
   • make amendments to the Proceeds of Crime Act 2002.

Merger of Assets Recovery Agency with Serious Organised Crime Agency

4. The merger of the Assets Recovery Agency with the Serious Organised Crime Agency is one of the key features of the Serious Crime Bill. The Bill will transfer certain functions and staff of the Director of the Assets Recovery Agency to the Serious Organised Crime Agency. The Assets Recovery Agency operates for England and Wales and has no operational powers for Scotland except for Revenue purposes, which is a reserved matter. The transfer of functions to the Serious Organised Crime Agency therefore does not have any effect for
operational issues relating to policing and criminal justice. In Scotland civil recovery and criminal confiscation will continue to be pursued through the Civil Recovery Unit and the Crown Office and Procurator Fiscal Service.

**Scottish Provisions**

5. Many of the provisions of the Bill are only relevant to England and Wales or Northern Ireland, or if they extend to Scotland, relate to reserved matters. The parts of the Bill which would require the Scottish Parliament’s consent to a Legislative Consent Motion are;
- the application of the offence of breaching a Serious Crime Prevention Order issued in England, Wales or Northern Ireland to Scotland;
- allowing the extension of production orders and search warrants under POCA for detained cash investigations; and
- the use of force in executing search warrants in Scotland under POCA provisions.

In detail the effect is as follows:-

**Serious Crime Prevention Orders**

6. Part 1 of the Bill establishes a new system of SCPOs which courts in England and Wales and Northern Ireland will be able to impose. These civil orders will be used to disrupt and prevent the unlawful activities of an individual or an organisation known by law enforcement to be acting unlawfully but who cannot be prosecuted because it is not possible to gather sufficient evidence or because of the costs involved. For example an order might be used to prohibit, restrict or place certain requirements on financial, property or business dealings, an individual's working arrangements, use of or access to premises or the provision of goods or services by that individual or organisation.

7. An order can contain such terms as the court thinks appropriate for the purpose of preventing serious crime – provided that they are preventative and not punitive in nature. The Bill will impose certain general limits on the types of conditions that can be imposed in order to ensure that the provisions are not too wide-ranging. Breach of an SCPO without reasonable excuse will be a criminal offence. The penalty for failing to comply with a SCPO is, on summary conviction imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both, or if convicted on indictment, imprisonment for a term not exceeding 5 years or a fine or both.

8. It is not proposed to extend these provisions to Scotland in the Bill. However, in order to ensure that Scotland does not offer a bolt hole for those subject to an English, Welsh or Northern Irish SCPO it would be sensible and beneficial to ensure that it is also an offence in Scotland to breach such an SCPO. As the creation of offences in this area is devolved, consent is being sought for the creation of this new offence to extend to Scotland. Linked to the offence the court is also provided with powers to order the forfeiture of any item in the possession of the subject of an order at the time of the offence, which the court considers to have been involved in the offence.
Amendments to the Proceeds of Crime Act 2002

9. The Bill proposes a number of amendments to the Proceeds of Crime Act 2002, a UK Act which contains a mix of reserved and devolved issues. These are:
   • merger of the Assets Recovery Agency with the Serious Organised Crime Agency;
   • to enable financial investigators who are police staff to exercise more of the powers under POCA;
   • extending the use of production orders to a new category of investigation known as a detained cash investigation;
   • to make explicit the power to use reasonable force in executing search warrants under POCA.

10. The merger of the Assets Recovery Agency with the Serious Organised Crime Agency (discussed at paragraph 4) and the allowing of financial investigators who are civilian police staff to exercise more power under POCA either do not apply or are not necessary for Scotland. Although the financial investigator provisions as drafted do not exclude Scotland, in reality they will not have effect here as the Scottish authorities do not use civilian financial investigators.

11. The POCA provisions in the Serious Crime Bill that affect Scotland are the extension of production orders and search warrants for detained cash investigations and the use of force in executing search warrants. Legislative consent is required for these provisions to take effect in Scotland via the Westminster Bill.

Production Orders and Search Warrants for Detained Cash Investigations

12. The Civil Recovery Unit, who act on behalf of the Scottish Ministers (and the Crown Office and Procurator Fiscal Service for criminal confiscation matters) make frequent use of production orders when granted in connection with civil recovery and other investigations requiring the production of material beneficial to an investigation. These investigations do not presently extend to cash seized when the police or revenue officers seize cash over £1000 if they have reasonable grounds for suspecting that it is profit of crime or intended for use in unlawful conduct. This is in terms of their powers under section 294 of POCA. Such money can be detained initially for a period of 48 hours. Thereafter, detention needs to be authorised by an order of a sheriff.

13. A production order can be used to obtain a copy of bank statements from financial institutions, which is useful when analysing a person’s finances and determining what income they have received in addition to any legitimate income. A production order is granted by a sheriff following on the application of the Civil Recovery Unit or the Crown Office and Procurator Fiscal Service. Where the cash has been seized because of suspicion surrounding the circumstances in which it is being held rather than as part of a continuing criminal investigation, law enforcement agencies are often limited in the further investigations they can conduct and at present production orders cannot be used when investigating cash seizures. The Scottish Executive would like to see the availability of production orders extended (with the associated ability to apply for search warrants under section 387 of POCA) to cash seizures so that information can be obtained from financial institutions and illegitimate income can be determined.
The Serious Crime Bill will make amendments to POCA to achieve this. This will extend powers of investigation in this area and allow for more effective and expedient investigations.

14. Similar provisions are being provided for England and Wales and Northern Ireland. Specific Scottish provisions have been included in the Bill for this purpose. These mirror the provisions being introduced for England and Wales whilst taking account of particular institutional and procedural differences in Scotland from the rest of the United Kingdom. While the Scottish Parliament could legislate in this area there is no suitable legislative opportunity in this Parliament. Legislating for this in the Serious Crime Bill will allow Scottish authorities to have the same powers as their colleagues in England and Wales and Northern Ireland at the same time and ensure that there is no gap in provision in Scotland.

**Use of Force in Executing search warrants in Scotland under POCA**

15. Under section 387 of POCA a search warrant can be issued in connection with confiscation, civil recovery and money laundering investigations, but there is no explicit power to use force to execute that warrant. This provision puts the use of reasonable force when executing a search warrant beyond doubt.

16. Whilst the Scottish Parliament could pass legislation in this regard in relation to warrants granted in respect of certain civil recovery investigations and some criminal confiscation investigations, the Parliament would not be able to make comprehensive provision here. This is because money laundering and confiscation in relation to drug offences are reserved areas. As these are the most frequent types of investigations for which production orders and hence search warrants are required in criminal investigations it would be unsatisfactory to legislate in Scotland, if these investigations could not be covered. The Bill puts beyond any doubt that the designated proper person (defined in section 412 of POCA as either a constable in a confiscation investigation or a money laundering investigation or the Scottish Ministers or a person named by them, in relation to a civil recovery investigation) can use reasonable force in the execution of a search warrant under POCA.

17. It is the view of the Scottish Ministers that those provisions relating to devolved matters in Scotland will be beneficial in targeting serious crime and will maintain a consistent approach in Scots Law. On SCPOs the extension of the offence to Scotland will ensure that Scotland is not seen as offering a safe haven from prosecution to those persons subject to a SCPO issued elsewhere in the United Kingdom.

**Consultation**

18. The main provisions of the Bill as they relate to England and Wales were set out in the Home Office consultation paper ‘New Powers Against Organised and Financial Crime’. The consultation period ended on 17 October 2006 and extended to England and Wales. Both the Association of Police Chief Officers (ACPOS) and the Law Society for Scotland responded to that consultation. On SCPOs the Law Society of Scotland raised concerns about the use of such orders mainly from an ECHR perspective and the potential to attach an
association with serious crime to an individual on the basis of action they have yet to take and without evidence which meets the current criminal standard. ACPOS are keen to have at their disposal another tool with which to combat serious organised crime but they also highlight the need for consideration to be given to the implications for law enforcement agencies of enforcing such orders.

Financial Implications

19. Production orders for detained cash production order applications will be dealt with by the Civil Recovery Unit. It is difficult to forecast how many applications will be sought each year, but this increased workload will be absorbed by the Civil Recovery Unit. All applications will be lodged with Edinburgh Sheriff Court, with consequent resource implications for Scottish Court Service. The police/HM Revenue and Customs will be instructed by the Civil Recovery Unit to follow up lines of enquiry which are established through the use of production orders.

Scottish Executive
January 2007
Dear Tracey

SERIOUS CRIME BILL

I refer to your correspondence dated 6 February 2007 in connection with the above subject, which has been considered by members of the Crime Business Area, and can offer the following by way of comment in relation to the Scottish Provisions contained in section 5 of the Memorandum.

The application of the offence of breaching a Serious Crime Prevention Order (SCPO) issued in England, Wales or Northern Ireland to Scotland.

The proposal to make it an offence to breach a SCPO in Scotland is fully supported, in order to prevent Scotland becoming a ‘safe haven’ for those subject to such an order. The associated forfeiture provisions outlined in the Memorandum are also supported.

Allowing the extension of production orders and search warrants under POCA for detained cash investigations.

For some time the asset recovery community in Scotland has recognised the limitations imposed by not allowing production orders, and associated search warrants, to be used when investigating cash seizures. Indeed, this forms the basis of a recommendation in the recent review of the Proceeds of Crime Act 2002 carried out by the Concerted Inter-Agency Criminal Finances Action (Scotland) Group (CICFAS). Consequently ACPOS fully supports this proposal.

To make explicit the power to use reasonable force in executing search warrants under POCA

Again, the absence of a clear provision in this area has been identified in the CICFAS Review and this proposal is endorsed.
Overall, there is no doubt that the provisions contained in the Memorandum are to be welcomed. However, it is unfortunate that there are no plans to extend the full range of measures to Scotland as these would provide even greater opportunities to disrupt the activities of organised criminals in Scotland.

I trust this is of assistance to you.

Yours sincerely,

Harry Bunch
Acting General Secretary
Ms Tracey Hawe  
Clerk to the Justice 2 Committee  
Tower 1, Room T3.60  
Scottish Parliament  
Edinburgh EH99 1SP  
email: tracey.hawe@scottish.parliament.uk

Dear Ms Hawe

SERIOUS CRIME BILL LEGISLATIVE CONSENT

The Criminal Law Committee of the Law Society of Scotland (the Committee), welcomes the opportunity to comment on the motion lodged by the Minister of Justice with regard to legislative consent. The motion is as follows:

“that the Parliament endorses the principle that the offence of breaching a Serious Crime Prevention Order should be extended to Scotland and that amendments to the Proceeds of Crime Act 2002 relating to the use of force in executing search warrants in Scotland under Section 387 of that Act and the extension of production orders and search warrants to include cash seizures as set out in the Serious Crime Bill should be considered by the UK Parliament”.

The Committee note that the consent of the Scottish Parliament is required with regard to the above.

1. Application of the offence of breaching a serious crime prevention order issued in England, Wales or Northern Ireland to Scotland.

The Committee previously submitted written evidence in response to the Home Office’s Green Paper entitled “New Powers Against Organised and Financial Crime” in October 2006. The Committee at that time stated that it had concerns about such an order. It was noted that while the order to be imposed against either individuals or organisations would not be punitive, it would impose binding conditions to prevent individuals or organisations facilitating serious crime. The Committee note that the penalty for breach of such an order in terms of Clause 25 (2) of the Bill is, on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both, or on conviction or indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both. The Committee further notes that, in terms of Clause 5 of the Bill, there is no limit with regard to the type of provision that may be made by
such an order but that examples or prohibitions, restrictions or requirements that may be imposed on individuals are listed in terms of Clause 5 (3) and examples of prohibitions, restrictions or requirements that may be imposed on bodies corporate, partnerships and other incorporated associations are further listed at Clause 5 (4) of the Bill. The Committee remains concerned that such prohibitions, restrictions or requirements will encroach upon the liberty of either an individual or an organisation in the absence of a criminal conviction and accordingly carry with it the connotation that either an individual or an organisation has been found guilty of being involved in organised crime without the fact of any criminality ever having been proved to the accepted criminal standard. The Committee questions whether such an order can be justified in the absence of a criminal conviction and to this end would refer to the House Of Lords Library Note LLN 2007/00/ published on 2nd February 2007. The Committee would therefore question the offence of breach of such an order being applied to Scotland given its concerns with regard to the use of the order itself.

2. Extension of production order and search warrants under the Proceeds of Crime Act 2002 for detained cash investigations.

The Committee note that production orders are at present used when granted in connection with civil recovery and other investigations requiring the production of material beneficial to an investigation such as the obtaining of a copy of bank statements from financial institutions in order to determine if any income has been received in addition to any legitimate income. The Committee notes that the Scottish Executive would like to see the availability of production orders extended (with the associated ability to apply for search warrants under Section 387 of the Proceed of Crime Act 2002) to cash seizures so that information can be obtained from financial institutions and legitimate income can be determined. The Committee notes the Executive’s comment that this will extend powers of investigation and to allow investigating authorities in Scotland to have the same powers as their colleagues in England, Wales and Northern Ireland and has no specific comment with regard to this point.


The Committee notes that in terms of Section 387 of the Proceeds of Crime Act 2002 a search warrant can be issued in connection with confiscation, civil recovery and money laundering investigations. The Committee further notes that there is no power at present to use force to execute that warrant. The Committee is of the view that it is appropriate to amend Section 387 to allow reasonable force in executing a search warrant in Scotland with regard to alleged money laundering and confiscation in relation to drug offences which are reserved areas and again welcomes this proposal.
I trust this information is sufficient for your purposes but should you require to discuss this matter any further, please do not hesitate to contact me.

Yours sincerely,

Alan McCreadie
Deputy Director
JUSTICE 2 COMMITTEE
SERIOUS CRIME BILL
BRIEFING PAPER ON UK LEGISLATION

INTRODUCTION

The Serious Crime Bill (the Bill as introduced) had its First Reading in the House of Lords on 16 January 2007. Much of the Bill only applies to England and Wales or Northern Ireland. However, as noted in the Explanatory Notes published along with the Bill, it does include a number of provisions which apply to devolved issues in Scotland, and thus trigger the Sewel Convention:

“At introduction, the Bill contains provisions that trigger the Sewel Convention. The provisions relate to creating an offence of breach of a Serious Crime Prevention Order (with reference to Part 1 of the Bill) and detained cash investigations and power of forced entry (with relation to Part 3 Chapter 2).”

(para 13)

A Legislative Consent Memorandum (LCM), produced by the Scottish Executive, sets out the following draft legislative consent motion:

“S2M-XXXX Cathy Jamieson: Serious Crime Bill Legislative Consent Motion – UK Legislation – That the Parliament endorses the principle that the offence of breaching a Serious Crime Prevention Order should be extended to Scotland and that amendments to the Proceeds of Crime Act 2002 relating to the use of force in executing search warrants in Scotland under section 387 of that Act and the extension of production orders and search warrants to include cash seizures as set out in the Serious Crime Bill should be considered by the UK Parliament.”

The House of Lords Library published a Library Note on the Bill in February 2007. The Bill had its Second Reading in the House of Lords on 7 February 2007 – see Lords Hansard (at columns 727 to 767).

SERIOUS CRIME PREVENTION ORDERS

Background

The Bill (Part 1) seeks to give courts in England and Wales and also Northern Ireland (but not Scotland) the power to impose a new civil order aimed at preventing serious crime in those jurisdictions – the Serious Crime Prevention Order (SCPO). The Director of Public Prosecutions (including the Director of Public Prosecutions for Northern Ireland), the Director of the Serious Fraud Office and the Director of
Revenue and Customs Prosecutions will be able to apply to court for an SCPO. The Explanatory Notes state that:

“These orders will be used against those involved in serious crime and the purpose of their terms will be to protect the public by preventing, restricting or disrupting involvement in serious crime. They will be made on application to the High Court, or the Crown Court upon conviction, and breach of the order will be a criminal offence. The Bill provides for rights of appeal and variation or discharge of the order.” (para 3)

Individuals, corporate bodies, partnerships and unincorporated associations may all be made subject to provisions of an SCPO.

The Bill provides that ‘involvement in serious crime’ includes the commission of a serious offence and conduct which is likely to facilitate the commission of such an offence (by the person subject to the order or by some other person). The Bill provides a list of offences which are to be treated as serious offences, whilst also allowing the courts to treat other offences as serious offences.

The terms of an SCPO must be aimed at protecting the public by preventing, restricting or disrupting future involvement in serious crime in England and Wales or Northern Ireland (depending on the location of the court imposing the SCPO). The Bill sets out some examples of the types of provisions that may be made under an SCPO. These include provisions relating to financial and working arrangements, the use of premises, employment of staff and travel. The UK Government’s consultation paper ‘New Powers Against Organised and Financial Crime’ (published July 2006) included a number of case studies outlining situations where SCPOS might be used and what provisions they might include (see pages 33 and 36-37).\(^1\)

Under the provisions of the Bill, failure to comply with the terms of an SCPO, without reasonable excuse, will be a criminal offence. Clause 25 provides for a maximum sentence (following conviction on indictment) of five years imprisonment and an unlimited fine. The court would, following conviction, also have powers of forfeiture in relation to items considered to be involved in the offence.

**Devolved Issues**

The Bill would not give Scottish courts the power to impose SCPOs. Any SCPO made under the provisions of the Bill would be granted by a court in England and Wales or in Northern Ireland, and would be aimed at protecting the public against the subject of the order having any involvement in serious crime in that jurisdiction (ie England and Wales or Northern Ireland). However, the terms of an SCPO could require the subject of the order to do, or not do, something in Scotland provided that the stipulation is aimed at preventing, restricting or disrupting the involvement of the person in serious crime in England and Wales or in Northern Ireland (see clause 5(2) of the Bill). With this in mind, provisions dealing with the enforcement of SCPOs apply to Scotland. Thus, a person could be prosecuted in Scotland for a breaching the terms of an SCPO imposed by a court in some other part of the UK.

\(^1\) The consultation paper is considered further below.
It has been reported that the Scottish Labour party could be in favour of introducing something similar to SCPOs in Scotland if it wins the Scottish Parliament election in May of this year (e.g. see the Scotland on Sunday article ‘Labour to target gangsters with super-Asbos’ (28 January 2007, p 9) and the BBC news report ‘Criminal memoirs to be outlawed’ (28 January 2007)).

Consultation


“The majority of respondents agreed that the creation of a flexible civil order, as proposed, would provide a useful tool to law enforcement in their fight against serious crime. There was concern from some of those who responded that any such order should be fully compliant with the European Convention on Human Rights in the terms it imposed on individuals. The Government is committed to balancing the rights of the victims of organised crime with those upon whom an order might be imposed in a way which is consistent with the Convention. Only the courts will be able to grant an order and, as public authorities for the purposes of the Human Rights Act, they will only impose such conditions as are compliant with the Convention.

Another concern which was raised was the potential impact of the orders on 3rd parties, i.e. those affected by the order but not subject to it. The comments made have been very helpful in developing policy on how this situation will be handled. We will provide that, as part of the procedure for making an application for an order, prosecutors will have to give consideration to, and bring to the court’s attention, the potential impact on 3rd parties. The courts will then be able to make an informed decision as to what terms of the order might be reasonable.

One issue on which the majority of respondents agreed was that, if the orders were to be useful, there would need to be flexibility in the terms of the order for the courts to be able to respond to the evolving threat posed by organised crime.” (p 7)

Both ACPOS and the Law Society of Scotland responded to the consultation. The Society raised a number of concerns in relation to the proposals on SCPOs: (a) they might be vulnerable to ECHR challenge and the courts would be left with the task of ensuring that any conditions attached to an SCPO are ECHR compliant; and (b) they would have the potential to link someone with serious crime without any criminal prosecution. Some of these concerns were more fully developed in Liberty’s

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2 In relation to SCPOs, see pages 9-11 and 28-37 of the consultation paper. The consultation paper sometimes refers to SCPOs as Organised Crime Prevention Orders.

3 In relation to SCPOs, see pages 7 and 21-23 of the summary of responses.
response to the consultation (which refers to SCPOs as Organised Crime Prevention Orders (OCPOs)).

“The motivation behind the OCPO seems to be principally the need to take action against those who ‘we think are criminal but can’t prove anything’. In this respect they are more similar to control orders than ASBOs. Tellingly, the consultation states that they are intended for use against the ‘significant numbers of individuals at the fringes who cannot be pursued in the main trial, and for who a separate trial is not thought worthwhile’. OCPOs are clearly intended to act primarily as an alternative to troublesome and costly trials while allowing preventative restriction and the badge of serious criminality to be attached to those receiving them.” (p 12)

Consideration at Westminster

(a) House of Lords Constitution Committee

The House of Lords Constitution Committee published a report on the Bill on 2 February 2007. The report focuses on the provisions in Part 1 of the Bill dealing with SCPOs. It notes a rise in the use of civil orders, backed by criminal sanctions, to prevent undesirable behaviour:

“The role of civil courts has historically been to intervene to grant an injunction only where the defendant had committed a wrongful act which he was likely to repeat; and then only to restrain a repetition of that act. Over the past 20 years, public policy has increasingly reflected the view that criminal prosecutions and sentences alone may be an inadequate legal response to criminal and other unacceptable behaviour. 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.” (para 5)

The Committee’s report goes on to raise some concerns in relation to SCPOs:

“We draw to the attention of the House the fact that the far-reaching restrictions of a SCPO may be placed on a person against whom no criminal proceedings have been instituted or who has been convicted of no criminal offence. Moreover, the restrictions which can be imposed are not limited to conduct forming part of the particular type of crime which has been proved, by civil standards, against the defendant. ASBOs and other types of control order that now exist on the statute book generally deal with small-scale anti-social behaviour and have little impact on third parties associated with the subject of those orders. SCPOs will have a much wider reach.” (para 9)

“A broad question for the House is whether the use of civil orders in an attempt to prevent serious criminal activity is a step too far in the development of preventative orders. Whether or not the trend towards greater use of

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4 See pages 12-14 of Liberty’s consultation response.
5 Created by the Prevention of Terrorism Act 2005.
preventative civil orders is constitutionally legitimate (a matter on which we express doubt), we take the view that SCPOs represent an incursion into the liberty of the subject and constitute a form of punishment that cannot be justified in the absence of a criminal conviction.” (para 17)

(b) Second Reading in the House of Lords

As noted above, the Bill had its Second Reading in the House of Lords on 7 February 2007 – see Lords Hansard (at columns 727 to 767). Most of the debate focussed on the provisions in Part 1 of the Bill dealing with SCPOs – in relation to which many of those speaking raised concerns.

Speaking for the Government, Baroness Scotland of Asthal sought to dispel concerns that SCPOs might be used where prosecution would be more appropriate:

“The Government are committed to ensuring that those who commit serious crimes are caught, brought to justice and punished appropriately. It is highly significant that the applicant authorities [ie those able to apply for SCPOs] also have the responsibility for deciding whether it would be appropriate in a particular circumstance to bring a prosecution. The principle behind the orders, though, is that there will be times when it is possible, through the imposition of reasonable restrictions or obligations, to prevent those involved in serious crime from committing further acts that will bring harm to others. Prevention is a key issue that we seek to address in these provisions.

(…) I know that in the press coverage of the publication of the Bill there has been much mistaken comment about these orders being a way for law enforcement agencies to get around troublesome prosecutions. I assure the House that that is not the intention. When deciding whether to make an order, the courts will apply a two-part test. First, there is a backward-looking element, in that it relates to a person’s previous behaviour. The court will have to be satisfied that a person has been involved in serious crime (…).

The second part of the test is forward-looking, in that it provides that the court must have reasonable grounds to believe that the terms of the order will prevent, restrict or disrupt involvement by the subject of the order in serious crime.” (cols 728-730)

However, a number of those speaking during the Second Reading debate remained concerned about the planned increase in the use of civil orders, with Lord Goodhart arguing that:

“We are now facing the fact that the Government’s use of civil penalties as a substitute for criminal convictions will rise to an unacceptable level under the Bill.

We started with ASBOs in the Crime and Disorder Act 1988. An argument can be made for ASBOs; in effect, they are similar to civil injunctions for harassment or nuisance, which victims could have obtained but they were deterred by costs and the possibility of revenge attacks by the person against whom they sought the injunction. (…)
The Government moved on from ASBOs to control orders under the Prevention of Terrorism Act 2005. We on these Benches accepted, with great reluctance, control orders in principle, although we did not accept the methods by which they are imposed. We accepted them because the aims of modern terrorists include the mass murder of ordinary people, and we see that as a unique case.

Part 1 pushes the boundaries of civil penalties further still – far too far.” (col 748)

A number of speakers raised concerns in relation to the tests applied before an SCPO is imposed. For example, Lord Dholakia stated that:

“(…) the Bill is vague about what activity counts as serious crime. As I said, Schedule 1 contains a list of offences, but they include offences such as fraud, which range very widely in seriousness. Particularly disturbingly, Clause 2(2)(b) also allows courts to pass a crime prevention order on people with previous offences that are not specified in the schedule but which, ‘the court considers to be sufficiently serious to be treated (...) as if it were so specified’. In other words, the court can regard any offence that it likes as serious. (…) That is an unacceptably wide degree of discretion to give courts in relation to powers that could potentially be used to impose significant restrictions on the liberty of individuals who have not been convicted of a new offence.” (col 759)

Lord Thomas of Gresford raised concerns about the way in which restrictions might be framed:

“The orders will have an effect on reputation, on people’s businesses and on their home lives. The restrictions are deliberately vague. Only examples of restrictions are given in the Bill, so that the order can be flexible. Clause 5(7) states that the restrictions do not need to be stated in the order but are at the discretion of law-enforcement officers, so the police can make their own restrictions. It is not like an ASBO, where the restrictions are told in court to an individual. The restrictions can be imposed by law-enforcement officers themselves.” (col 741)

For the Government, Baroness Scotland of Asthal sought to highlight the safeguards included within the Bill:

“(…) the court must have reasonable grounds to believe that the terms of the order will prevent, restrict or disrupt involvement by the subject of the order in serious crime. Not only does that test have to be met before an order will be granted, but, in deciding what these terms should be, the court, as a public authority for the purposes of the Human Rights Act, will have to ensure that any term of an order is compatible with the convention rights.

(…) the Bill provides for numerous safeguards, most notably in relation to third parties who might be affected by the terms of the order. We have included comprehensive rights to make representations at proceedings when the granting of an order is considered, rights to apply for the variation or discharge of an order at a later stage, and rights to appeal. I believe that the provisions of
the Bill are such that third parties will not be unreasonably affected by the terms of an order.” (cols 729-730)

Lord Goodhart questioned whether it was acceptable to rely on the courts to ensure that the practical implementation of SCPO provisions is compatible with human rights:

“The Government say that all this is okay because SCPOs will be made by judges who will act reasonably; they will be aware of the impact of the Human Rights Act and will apply it. That is true, but it is not an answer. We should not create laws which enlarge the scope for injustice and rely on the judiciary to apply them with moderation. What we want are just laws, not the just application of unjust laws.” (col 750)

In her concluding remarks, Baroness Scotland of Asthal acknowledged that Part 1 of the Bill had given rise to the most concern during the debate. She agreed with the point made by Lord Goodhart that law has to be just as well as being justly applied. In relation to the definition of serious crime, she stated that:

“This part of the Bill looks at prevention once patterns of serious crime have been established. It looks at how to prevent those who have been so identified continuing those patterns of behaviour. I anticipate that we will spend some time in Committee dealing with how to establish and define serious crime, what is its nature, its quantum and its continuity, and I understand why the House has identified this as an issue.” (col 765)

**CHANGES TO THE PROCEEDS OF CRIME ACT 2002**

Chapter 2 of Part 3 of the Bill makes a number of amendments to the Proceeds of Crime Act 2002 (POCA). The Executive’s LCM (para 5) notes that these include amendments affecting devolved issues in Scotland:

- allowing the extension of production orders and search warrants under POCA for detained cash investigations
- allowing the use of force in executing search warrants in Scotland under POCA provisions

**Detained Cash Investigations**

Clauses 67 to 69 of the Bill deal with the use of production orders and search warrants for detained cash investigations.

A production order requires a person in possession or control of relevant material to produce or provide access to it (eg such an order might be used to obtain copies, from a bank, of bank statements relating to a person under investigation).

Detained cash investigations are investigations, related to the recovery of cash thought to be connected with unlawful conduct, where the money has been detained by a customs officer or constable during the period of investigation.
The Executive’s LCM states that the Bill would extend the use of production orders and search warrants to detained cash investigations, thereby extending powers of investigation in this area.

The above sections include separate provisions for Scotland which would (under clause 81 of the Bill) come into force on such day as the Scottish Ministers may by order appoint. Similar provisions are included in the Bill for England, Wales and Northern Ireland. The Executive’s LCM states that including Scottish provisions in the Bill will allow Scottish authorities to have the same powers as their colleagues in other parts of the UK at the same time.

**Use of Force in Executing Search Warrants**

Clause 74 of the Bill seeks to amend section 387 of POCA by adding an explicit power for a ‘proper person’ to use reasonable force when executing a search warrant granted by a sheriff under powers contained in that section. The section allows the granting of search warrants for the purposes of confiscation, money laundering and civil recovery investigations. The clause would only extend to Scotland – the Explanatory Notes state that there is no need for an equivalent provision for other parts of the UK since the power to use reasonable force is implicit in their provisions. Section 412 of POCA defines ‘proper person’ as:

“(a) a constable, in relation to a confiscation investigation or a money laundering investigation;
(b) the Scottish Ministers or a person named by them, in relation to a civil recovery investigation”.

The Executive’s LCM states that the amendment “puts the use of reasonable force when executing a search warrant beyond doubt” (para 15). It goes on to state that:

“Whilst the Scottish Parliament could pass legislation in this regard in relation to warrants granted in respect of certain civil recovery investigations and some criminal confiscation investigations, the Parliament would not be able to make comprehensive provision here. This is because money laundering and confiscation in relation to drug offences are reserved areas.” (para 16)

Clause 81 of the Bill provides that the provisions in clause 74 would come into force on such day as the Scottish Ministers may by order appoint.

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6 The meaning of confiscation, money laundering and civil recovery investigations is set out in section 341 of POCA.