



Modern Slavery Bill
House of Commons
Public Bill Committee

Briefing and Suggested Amendments
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For further information contact:

Jodie Blackstock, Director of EU and Criminal Justice Policy

email: jblackstock@justice.org.uk direct line: 020 7762 6436

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100

fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. Established in 1957, JUSTICE works to improve access to justice and to promote protection of human rights and the rule of law.
2. This briefing considers the proposals for new civil prevention orders in Part 2 of the Modern Slavery Bill – Slavery and Trafficking Prevention Orders (“Prevention Orders”) and Slavery and Trafficking Risk Orders (“Risk Orders”). JUSTICE’s concerns are applicable to both orders, but are particularly acute in relation to Risk Orders. This is because while Prevention Orders need to be necessary *and* have an underlying conviction, the only threshold for a Risk Order is that they must be necessary, without any evidence having to be proved against the defendant. There are also interim versions of both Orders which are affected by the same concerns as outlined below.
3. While JUSTICE welcomes measures for the protection of victims of slavery and trafficking offences, it has concerns that the experience of similar civil prevention orders in the courts means that additional safeguards are needed for these measures to operate fairly and proportionately. In our view, it is possible to preserve the ability of law enforcement professionals and the courts to respond flexibly and tailor orders to the specific risk posed by individuals while ensuring that those individuals are not subject to orders that are unnecessary, overbroad or duplicate other regimes.

Background

4. The Modern Slavery Bill 2014 was introduced to the House of Commons on the 10th June 2014, read for the second time on the 8th July and is now being considered in Committee, which is scheduled to conclude on 14th October. Part 2 of the Bill was strongly criticised at the Draft Stage by the Joint Committee on the Draft Modern Slavery Bill (‘the Joint Committee’) which said that while it recognised that the measures would help combat slavery and human trafficking ‘in principle’, it disagreed that this was what the Orders would do in practice. In fact, it found the Risk Orders

had 'not been sufficiently thought through', to the extent that it recommended they should be removed from the Bill.¹

5. Concerns have been raised by the Court of Appeal about the way in which the similar sexual offences prevention orders ('SOPOs') have been used by prosecutors. The Court of Appeal has complained that judges are presented with orders that have been 'hastily and inadequately' drafted and given to the bench at a very late stage, leaving little time for consideration of the necessity of the order or its terms. Of particular concern, this appears to occur as a matter of routine rather than exceptionally.²
6. Not only has the Court of Appeal expressed concern that these orders are being rushed, there have been occasions where the guidance given by the Court of Appeal has not even been taken into consideration by the drafters. The Court of Appeal has said that 'all too often in the Crown Court prosecuting counsel puts before the judge a proposed SOPO which has not been drafted by him or her but by whatever is the relevant unit which is concerned. That unit seems to have been ignoring the decisions of this court as to what is appropriate.'³ This results in orders that are vague, unenforceable and disproportionate to the risk that they should be guarding against.
7. Such procedural flaws have serious consequences – not just in terms of safeguards, but also for efficacy. Orders cannot be tailored to prevent particular kinds of behaviour if they are not sufficiently thought through and may lead to gaps in the required protection, never mind being routinely sought in cases where they are not appropriate. Parliamentarians may want to ask the Home Office what steps have been taken to resolve these problems in requests for sexual offences orders and what steps will be taken to prevent them being repeated in relation to slavery orders.
8. While the Home Office has argued that Part 2 of the Bill does not give rise to any issues under Article 6 of the European Convention on Human Rights (ECHR), JUSTICE is concerned that there are a range of serious concerns pertaining to the right of

¹ Joint Committee on the Draft Modern Slavery Bill, *Report on the Draft Modern Slavery Bill*, Session 2013-14 HL 166/HC 1019 (8th April 2014), [58] (herein *Draft Modern Slavery Bill Report*)

² *R v. R* [2010] EWCA Crim 907 [11] (herein *R*); *R v. Smith & Others* [2011] EWCA Crim 1772 [5] (herein *Smith & Ors*); *R v. Wilkins* [2014] EWCA Crim 1175, 13th May 2014 (herein *Wilkins*)

³ *R v. Jackson* [2012] EWCA Crim 2602 [9] (herein *Jackson*)

a defendant to know the nature of the case against them and also to their ability to defend themselves. While these rights, which otherwise would be protected by Article 6(3) ECHR, do not arise in Risk Order cases pursuant to the Convention because no criminal charge has been invoked, they are still procedural safeguards that apply under the common law rules of procedural fairness.

Threshold

9. Clauses 15(2) and 23(2) of the Bill provide that the threshold test for Prevention and Risk Orders will be that –

The court may make the order only if it is satisfied that the defendant has acted in a way which means that—

- (a) there is a risk that the defendant will commit a slavery or human trafficking offence, and
- (b) it is necessary to make the order for the purpose of protecting persons generally, or particular persons, from the physical or psychological

JUSTICE has two concerns in relation to the way this threshold test will operate in practice. The first relates to Risk Orders alone, while the second applies to both orders.

Relationship to Prosecution

10. JUSTICE's first concern is that the role a Risk Order would play in contrast to a prosecution is not clear. If there is insufficient evidence for a prosecution, then there is also unlikely to be sufficient evidence for a court to deem a Risk Order necessary. If the order is not 'necessary' it cannot be imposed and in our view, it therefore serves little purpose. This is an observation that was shared by the Magistrates' Association in evidence to the Joint Committee on the Draft Bill:

[I]f there is not any evidence to lead to a prosecution, is there any evidence to lead to [a Risk Order]? Where is that line drawn? If it is at criminal proof, it is at a very high level – beyond reasonable doubt. There will need to be clarity

about what the potential risk is and specific evidence that that risk is in danger of materialising.⁴

It was also echoed by Professor Zedner⁵ of the University of Oxford and Liberty.⁶

11. In the absence of any clear statutory provision identifying the circumstances in which a Risk Order should apply, Risk Orders could be used as a shortcut to avoid a trial rather than as a complementary tool to a prosecution strategy. Equally, Liberty has argued, that civil orders have the potential to ‘run parallel to the criminal justice system, potentially diverting attention away and leaving people who may be extremely dangerous as a real danger to others in the community’⁷ if used when a criminal trial is appropriate.

12. In response to the evidence presented to the Joint Committee, the Home Office drew up a memorandum that suggested Risk Orders would be applicable in the following circumstances:

- Where there is insufficient evidence to bring a case, but there is clear evidence of future risk of the commission of trafficking or slavery offences;
- Where individuals have been convicted of offences linked to trafficking or slavery overseas (but not an equivalent overseas offence that would qualify for [a Prevention Order]), where there is evidence of a future risk of offending involving slavery or trafficking; and
- Where individuals have been charged, but not convicted of a slavery or trafficking offence.⁸

Additionally, the Police gave evidence to the Joint Committee that the Risk Order would be useful to disrupt peripheral activity while an investigation focused on the

⁴ Joint Committee on Draft Modern Slavery Bill, *Oral evidence: Draft Modern Slavery Bill*, HC [1019], Tuesday 11 February 2014, Q477 (Richard Monkhouse)

⁵ *Ibid*, Q445-7 (Professor Zedner)

⁶ *Ibid*, Q453-6, Q458, Q461-2 (Rachel Robinson)

⁷ *Ibid*, Q455 (Rachel Robinson)

⁸ Home Office, *Home Office Memorandum to the Joint Select Committee on the Draft Modern Slavery Bill: Further Information on Part 2 of the Draft modern Slavery Bill: Prevention Orders*, 20th March 2014 (herein *Home Office Memorandum*) p.2

core offenders.⁹ These criteria have not been included in the Bill, despite offering a clear framework for when Risk Orders should apply.

13. JUSTICE questions, as did the Joint Committee, whether this hinterland between sufficient evidence to prosecute and evidence of risk of the commission of an offence exists in practice. The type of evidence that would prove necessity is going to be evidence that should properly be used to construct a case with a view towards prosecution. If the need for Risk Orders is accepted, however, JUSTICE considers that the risk factors that would make it necessary should be made clear on the face of the Bill.

Duplication

14. A related concern is that the case law indicates that SOPOs (where there has been a conviction), rather than creating a tailored regime, are used to either create broad and general prohibitions or to effectively duplicate conditions which have already been imposed on the defendant¹⁰ – such as notification requirements or license conditions.¹¹
15. The Court of Appeal has warned that orders should not duplicate nor interfere with those parallel regimes and that those regimes may in fact render the imposition of an order unnecessary if they adequately provide for the protection of the victim. Equally, they should not be used to circumvent the statutory time limits of other regimes by imposing the same conditions but for a longer duration.¹²
16. The need to avoid duplication of existing legal regimes will most often be applicable to Prevention Orders, which are available upon conviction, rather than the Risk Order. However, it will arise if a Risk Order is applied after charge, but before conviction. In this circumstance, it would need to be drafted to avoid merely

⁹ Joint Committee on Draft Modern Slavery Bill, *Oral evidence: Draft Modern Slavery Bill*, HC [1019], Tuesday 25 February 2014, Q572 (Detective Inspector Hyland), Q576 (Chief Inspector Winters), Q577 (Detective Inspector Roberts)

¹⁰ *Smith & Ors* (n.2)

¹¹ *R v. P* [2013] EWCA Crim 67

¹² *Smith & Ors* (n.2). In that case a SOPO was put in place for life which included a duty to 'co-operate with the local police'. Not only was this vague and unenforceable in practice, it added nothing to the pre-existing notification duties for sex offenders

duplicating bail conditions which might adequately address the need for protection without an additional order.

17. Given that the intended purposes of Risk Orders are clear, that the Home Office's Impact Assessment concedes that the Risk Orders 'should not be used as a substitute for prosecuting criminal behaviour' and that the Bill should aim to make the purpose of the Risk Order clear to magistrates and law enforcement professionals, JUSTICE recommends that the following provision is inserted into the Bill at clause 23:

- (X) An order will be 'necessary' for the purposes of s.23(2)(b) where –
 - (a) there is insufficient evidence to bring a prosecution, but there is clear evidence of future risk of the commission of trafficking or slavery offences,
 - (b) the defendant(s) have been convicted of offences linked to trafficking or slavery overseas (but not an equivalent overseas offence under s.17(4)) and where there is evidence of a future risk of offending involving slavery or trafficking,
 - (c) the defendant(s) have been charged, but not convicted of a slavery or trafficking offence, and protection from the risk of the commission of a slavery or trafficking offence cannot be achieved by bail conditions alone, or
 - (d) the defendant(s) are part of or affiliated with a group or organisation engaged in slavery or trafficking offences and whose core offenders are currently being prosecuted

And that the following provision is inserted into clauses 18 and 24 to prevent unnecessary duplication in all orders:

- (7) The order may not include prohibitions which duplicate or interfere with conditions imposed upon the defendant by any another order

18. These amendments would help improve certainty by enabling the court and law enforcement professionals to ask critical questions that go to the necessity of imposing a Risk or Prevention Order. The statutory language would also focus their minds on why prosecution is not a viable option and whether the circumstances are serious enough to warrant a Risk Order.

Scope of Terms

19. Clauses 18 and 24 of the Bill provide that:

The only prohibitions that may be included in the order are those which the court is satisfied are necessary for the purpose of protecting persons generally, or particular persons, from the physical or psychological harm which would be likely to occur if the defendant committed a slavery or human trafficking offence.

This effectively makes the test of what is deemed 'necessary' the sole limitation and safeguard in the Bill on not only the threshold for applying orders but also the terms of prohibitions imposed under them. In relation to SOPOs, which have the same necessity requirement, the Court of Appeal has held that the court imposing the order must address three questions when considering its imposition:¹³

- i. Is the making of an order necessary to protect from serious sexual harm through the commission of scheduled offences?
- ii. If some order is necessary, are the terms proposed nevertheless oppressive?
- iii. Overall are the terms proportionate?

20. JUSTICE is concerned that without further safeguards there are two key risks that may develop. Firstly, that there will be a lack of certainty surrounding what prohibitions can legitimately be imposed under the orders. It is important that appropriate limits are available to the orders and that these are made clear, not just for the benefit of defendants, but for the courts and law enforcement officers as well. As the Bill stands, those limits are obscure and vague. Secondly, that the breadth of the provision will lead to drafting language which is insufficiently clear and easy to comply with. Orders need to be in plain and simple language so that the defendant, those who interact with them in their life and those responsible for the order's enforcement understand what a particular condition means. As currently drafted, the quality of language in the order rests upon the individual responsible for drafting it.

21. The Home Office justifies the breadth of the conditions that can be imposed as a form of 'flexibility' which will 'enable law enforcement and the courts to respond and take action in relation to changing slavery and trafficking practices, and to tailoring

¹³ *R v. Mortimer* [2010] EWCA Crim 1303

prohibitions to the specific risk posed by an individual.¹⁴ However, the current jurisprudence on SOPOs reveals that the operation of this flexibility has led to orders being quashed by the Court of Appeal for being broad, vague and disproportionate for a concerning range of reasons, such as where the conditions:

- were incapable of being complied with without the aid of a 3rd party¹⁵
- had a high risk of leading to inadvertent breach¹⁶
- were so broadly drafted that they prohibited aspects of ordinary life¹⁷
- added nothing to the mandatory notification requirements and, in any event, was too vague to be enforceable¹⁸
- prohibited conduct that if unlawful would be a crime anyway and should warrant prosecution and if lawful the prohibition would be unnecessary and far too wide¹⁹
- had the effect of prohibiting the defendant from any form of employment other than working at home or living off benefits²⁰

In addition, there are a number of other conditions that have been struck down as failing the basic tests of necessity and proportionality.²¹

22. This is of particular relevance, since the Government's intention is that:

'the provision in Part 2 of the Bill in relation to the orders broadly reflects the provisions of Part 2 of the Sexual Offences Act 2003 (specifically sections 104 to 129) which govern the making of equivalent orders in relation to persons who pose a risk of sexual harm.'²²

It is those orders that have generated the problems identified in the case law above.

¹⁴ Home Office, *The Government Response to the Report from the Joint Committee on the Draft Modern Slavery Bill Session 2013-14 HL 166/HC 1019* (Cm 8889, 2014), p. 10 (herein *The Government Response*)

¹⁵ *Hemsley v. R* [2010] EWCA Crim 225 [4] (herein *Hemsley*)

¹⁶ *Ibid.* [6], *Wilkins* [4] (n.2)

¹⁷ *Hemsley* [7] – [8] (n.5), *Wilkins* [4] (n.2), *Jackson* [13] (n.3), *Smith & Ors* (n.2)[32]

¹⁸ *Smith & Ors* (n.2)[32]

¹⁹ *Smith & Ors* (n.2)[32], *R v. Shires* [2013] EWCA Crim 579 [9] (herein *Shires*)

²⁰ *R. v Kimpriktzis* [2013] EWCA Crim 734

²¹ *R v Boyd* [2013] EWCA Crim 2384; *R v. KL* [2012] EWCA Crim 44; *R v Turnbull* [2010] EWCA Crim 3149; *R v TO* [2010] EWCA Crim 2511; *R v. Joslin* [2010] EWCA Crim 2430

²² *Home Office Memorandum* (n.8)

23. Therefore, JUSTICE recommends that the Bill be amended to include a non-exhaustive list of prohibitions that may be imposed under the Orders. This would bring the Bill into line with Serious Crime Prevention Orders and the non-exhaustive list under s.5 of the Serious Crime Act 2007. It is worth noting that the organisations and individuals who carry out serious crime have similar structures and methods to those engaged in slavery and human trafficking. In fact, one of the specified offences under Schedule 1 of the Serious Crime Act 2007 is people trafficking. Such a provision would improve the certainty and scope of orders made pursuant to the legislation while still allowing specific prohibitions if needed in accordance with the particular facts of the case.

24. The non-exhaustive list in s.5(3) of the Serious Crime Act 2007 provides for conditions that could be imposed in relation to:

- (a) an individual's financial, property or business dealings or holdings;
- (b) an individual's working arrangements;
- (c) the means by which an individual communicates or associates with others, or the persons with whom he communicates or associates;
- (d) the premises to which an individual has access;
- (e) the use of any premises or item by an individual;
- (f) an individual's travel (whether within the United Kingdom, between the United Kingdom and other places or otherwise).

Absence of a Minimum Age Threshold

25. The Bill contains no minimum age threshold for whom an order may be sought against. By way of contrast, the only other civil prevention orders that do not have a minimum age threshold are SOPOs and ASBOs. Every other order has a minimum age threshold of 18.²³

26. Furthermore, the Bill lacks any kind of safeguard to ensure the protection of a child who is the subject of a Risk Order. The old regime for ASBOs incorporated a mandatory yearly review for appropriateness²⁴ and a requirement to make supporting orders, such as a parenting order, to provide help and support.²⁵ The

²³ Maya Sikland, *Submission to the Joint Committee on the Orders in Part 2 of the Bill*, 19th March 2014, [81]

²⁴ s.1J Crime and Disorder Act 1998

²⁵ Sikland (n.23), [83]

same safeguards have been incorporated into the new Anti-Social Behaviour Injunctions and Criminal Behaviour Orders.²⁶ Both orders have separate maximum duration requirements for children (12 months and 3 years respectively) and the Criminal Behaviour Orders require a review every 12 months to ensure that the continued operation of the order is appropriate and that the child is receiving the help they need.

27. While the Joint Committee recommended the imposition of a minimum age threshold,²⁷ the Government rejected this as inappropriate. It envisaged that a Risk Order 'may be necessary to prevent serious harm to other (possibly younger) children. In some cases, it may be more appropriate to place a [Risk Order] on a young person rather than criminalise them through a conviction. The orders are designed to respond flexibly to such circumstances, and this reflects the approach taken in the Sexual Offences Act 2003.'²⁸

28. JUSTICE and the Standing Committee for Youth Justice have raised concerns about the imposition of civil prevention orders on children.²⁹ Civil orders act as an accelerator into the criminal justice system by criminalising children's behaviour when they may not appreciate the terms of the order or the gravity of breach. Particularly relevant in light of our concerns about the drafting and clarity of Risk Orders, data provided by the Ministry of Justice for the period 1999 to 2012 reveals that the overall breach rate by children and young people subject to ASBOs is 69% compared to 52% of adults.³⁰ Those breaches then lead to custody, which has been used as a sanction for breach by 10-17 year olds in 38% of cases.³¹ Moreover research published by the Prison Reform Trust highlights specific problems faced by

²⁶ Parts 1 and 2, Anti-social Behaviour, Crime and Policing Act 2014

²⁷ Draft Modern Slavery Bill Report (n.1), [57]

²⁸ The Government Response (n.14), p.11

²⁹ Most recently with regard to the Anti-social Behaviour, Crime and Policing legislation, see JUSTICE's written evidence to the Joint Committee on Human Rights (June, 2013), available here: <http://www.justice.org.uk/data/files/resources/350/JUSTICE-briefing-ASB-Crime-and-Policing-Bill-to-the-JCHR-and-PBC.pdf> and the Standing Committee for Youth Justice's evidence (2013), available here: http://scyj.org.uk/wp-content/uploads/2013/11/SCYJ_submission_to_JCHR_on_ASB_Bill_-_FINAL.pdf

³⁰ Ministry of Justice, Anti-Social Behaviour Order Statistics - England and Wales 2012 (October 2013), Table 16b

³¹ Ibid, Table 12

children and young people in complying with orders and the negative effects that breach has (including acceleration into custody).³²

29. Furthermore, the orders – if they are to be imposed on children at all – should be time-limited and subject to a regular review for appropriateness. They should not be subject to indefinite orders as the Bill currently provides and a regular review requirement would provide welcome oversight over whether they are receiving the support necessary to help them comply with the orders.
30. Children who find themselves caught up in a slavery and human trafficking network are overwhelmingly likely to be victims of some form of abuse themselves and require all necessary support to alleviate their situation rather than a draconian response. Risk Orders are not the right framework for achieving that aim and tellingly include no requirement for support or review of their continued appropriateness.
31. JUSTICE notes that the Government has not disclosed its evidence base for including children within the ambit of these orders and the prevalence of children participating in the commission of slavery and human trafficking offences. Parliamentarians may want to ask the Government to present what evidence they have for these orders being necessary for children.
32. JUSTICE recommends that the following amendments be introduced to safeguard children:
- (a) A statutory bar on the imposition of Prevention and Risk Orders on children under 18 years;
 - (b) In the alternative, a maximum duration of 3 years for Prevention Orders and 12 months for Risk Orders; and
 - (c) A requirement for review of the order's appropriateness every 12 months for Prevention Orders and 6 months for Risk orders

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³² D. Hart, *Into the Breach: the enforcement of statutory orders in the youth justice system*, (Prison Reform Trust, 2011), available at:

<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Into%20the%20Breach.pdf>