



**Serious Crime Bill (HL)
Briefing for House of Commons
Second Reading**

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**For further information contact:
Sally Ireland, Senior Legal Officer (Criminal Justice)
Tel: (020) 7762 6414 Email: sireland@justice.org.uk**

Introduction and summary

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists.
2. In relation to Part I of the Bill, we do not believe that the provisions creating 'Serious Crime Prevention Orders' should proceed because:
 - **'Serious Crime Prevention Orders' (SCPOs) should not be used as a substitute for criminal prosecutions;**
 - **Civil orders of this type cannot provide sufficient protection for the public in very serious cases;**
 - **SCPOs can be imposed in too wide a range of circumstances; even innocent people can be given an order because they have unwittingly facilitated crime;**
 - **An SCPO's conditions can be so severe as to amount to a criminal penalty; in these circumstances, the procedural protections of a criminal trial should apply;**
3. However, we support the amendments introduced in the House of Lords that would allow intercept evidence to be adduced in prosecutions for serious crime and offences relating to terrorism. While we have some concerns about the detail of these amendments, which will be outlined in our Committee stage briefing, we believe that they are a welcome measure in the interim.
4. In relation to Part II of the Bill, we are not opposed in principle to the creation of these inchoate offences but will suggest some amendments to the detail at Committee stage.
5. In relation to Part III of the Bill, we have concerns about the potential for invasions of privacy occasioned by the new powers relating to data, which we will detail for Committee stage. We are also concerned that the new clause 78 power to search for firearms is unnecessary and could prove disproportionate.

Part I: Serious Crime Prevention Orders

- **‘Serious Crime Prevention Orders’ (SCPOs) should not be used as a substitute for criminal prosecutions; civil orders of this type cannot provide sufficient protection for the public in very serious cases;**

6. In our view it is axiomatic that criminal prosecution should remain the primary legal response to serious criminal activity, for two main reasons: first, it enables the state to impose sanctions, such as imprisonment, which would not otherwise be legitimate, but which are necessary in the circumstances to protect the public from harm and deter crime. Second, as the House of Lords Constitution Committee have pointed out, the criminal process includes:

a range of procedural and substantive protections in the criminal justice system. These include: trial by jury for serious offences...a burden and standard of proof requiring prosecuting authorities to prove their case beyond all reasonable doubt...¹

These safeguards are designed both to prevent the particular coercive powers of criminal proceedings from being abused, and to prevent miscarriages of justice, which result in sanctions against the innocent while the guilty are unpunished.

7. We believe that civil orders applied for by the state against an individual are a legitimate response to criminal conduct in certain, limited circumstances:
- a) There has been no criminal conviction, but the order prohibits criminal or tortious behaviour, and is analogous to an injunction; there is no finding of serious criminality;
 - b) There has been no criminal conviction: the order may involve a finding of serious criminality but its primary purpose is the protection of one or more *identified* victims/potential victims; the order does not involve a serious curtailment of a person’s freedom;
 - c) There has been a criminal conviction: the purpose of the order is ancillary to sentence for that conviction (eg deprivation of criminal property) or is primarily

¹ House of Lords Constitution Committee, Second Report, Session 2006-7.

protective in purpose and does not involve a serious curtailment of the person's freedom.

8. However, the regime of SCPOs envisaged by the Bill goes far beyond these limited situations. In our view, a civil order is not a suitable replacement for criminal proceedings as a response to serious crime. Nor is it legitimate to use a civil order as a response to crime where its purpose is to incapacitate an offender through serious and wide-ranging restrictions upon personal liberties. Such incapacitation should be the preserve of the criminal process, with its extra protections for the individual against error and abuse.
9. Further, civil proceedings cannot provide the same level of protection for the public against serious criminals as a criminal conviction. Reports of absconding by individuals subject to terror control orders suggest that such measures will not be suitable to control the activities of serious and sophisticated organised criminals, at whom SCPOs are, in part, aimed.
 - **SPCOs can be imposed in too wide a range of circumstances; even innocent people can be given an order because they have unwittingly facilitated crime;**
10. While the title of 'Serious Crime Prevention Orders' might suggest that this legislation is designed to target genuinely severe criminality, the ambit of the measure is surprisingly wide. The offences listed in Schedule 1 to the Bill include some very serious offences but also some which can be of highly variable levels of seriousness (eg the offence of fraud under the Fraud Act 2006) or the inclusion of which is surprising (that relating to fishing). The order can also be triggered in relation to any offence that the court thinks sufficiently serious for these purposes in the particular circumstances of the case. This compromises legal certainty.
11. Further, and even more significantly, it is envisaged 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.'² One category of person eligible for a SCPO is someone who has been convicted of a 'serious offence'. However, a person can also receive a SCPO if – perhaps in all innocence – or their conduct – *which can include omissions, and statements*, by virtue of clause

² Ibid.

39 (interpretation: Part I) - was likely to facilitate such an offence. The Bill *expressly* removes the requirement that a person must have actually intended to facilitate a serious criminal offence or even to believe that his actions would do so (see sub-clause 5(3)).

12. It is easy to think of all kinds of third parties who could unwittingly facilitate the commission of a serious offence: the taxi driver who drives passengers to a destination, completely unaware that they plan to assassinate someone there; the computer retailer who sells a computer to a person who uses it to run a human trafficking syndicate; the landlord who rents premises to a tenant not knowing that they will be used for the manufacture and storage of controlled drugs. The orders are, in part, aimed at commercial/business activity, and it is particularly easy to see how businesspeople may innocently facilitate crime, in circumstances where they are either deceived by the criminal or are under no legal duties to make enquiries as to the criminal's plans for the goods, premises, etc, in question. While the court must disregard activity that the defendant shows to be reasonable, this criterion is both vague and subject to a reverse burden of proof.
13. Most ordinary retailers and businesspeople will, we expect, not find themselves facing SCPO proceedings. However, we have seen in the case of ASBOs that very broad criteria, drafted to make the orders more flexible, have in fact allowed them to be passed against wholly inappropriate subjects (autistic children; the suicidal; etc), despite guidance. One illustration of the breadth of scope of SCPOs is that, if the regime becomes law in its current form, it could render redundant many other civil orders aimed at criminal behaviour, as a SCPO could impose the same restrictions in each case.
 - **An SCPO's conditions can be so severe as to amount to a criminal penalty; in these circumstances, the procedural protections of a criminal trial should apply;**
14. One of the main faults of the SCPO is that there are few limits on the type and scope of its terms. The court must consider the terms appropriate for the purpose of the order; and there are certain limited categories of excepted requirements, but the range and severity of the terms of the order is still extremely wide. For example, the order can interfere with whom the person associates; where he lives; whether and where he may travel; his communications; and his working arrangements. The

regime available is similar to that under the Prevention of Terrorism Act 2005 (PTA): Part I of the Bill, in effect, makes quasi-‘control orders’ available not merely against terror suspects, but against anyone whose conduct may have facilitated a crime the court considers serious.

15. The very intensive supervision regimes that we have seen in relation to some subjects of control orders could not be extended to large numbers of SCPO recipients without very considerable resource implications. However, it is possible that under this Bill a number of SCPO subjects – for example, those who are suspected of a major role in organised crime – could be made subject to orders including requirements such as that they move to a Home Office approved flat, to notify the authorities of any contact with persons other than those on an approved list; not to use the internet or any telephone other than an approved land line; to give up their passport; etc.
16. The Bill does not share every flaw of the PTA: SCPOs, unlike non-derogating control orders, would be made by a court rather than by the executive. However, unlike the PTA, this Bill contains no provision for the consideration of whether a criminal prosecution is possible before a SCPO is applied for.³ If this Bill is passed, it will be possible for prosecutors to apply for SCPOs where they are not confident that they have enough evidence of a type admissible before a jury to obtain a conviction. The protections of the criminal process will therefore be circumvented.
17. The Human Rights Act 1998 and the ECHR provide special procedural protections for proceedings involving the determination of a criminal charge. The UK courts have found that ASBOs were civil rather than criminal in character,⁴ but have not finally determined this question in relation to terror control orders.⁵ It is in our view doubly inappropriate to create these orders while a case deciding this question in relation to control orders is pending before the House of Lords.
18. It is by no means certain that the European Court of Human Rights would agree that even ASBOs are civil in nature. Further, despite the finding that ASBOs were civil in character, the House of Lords in *McCann* found that the civil standard of proof was

³ See s8 Prevention of Terrorism Act 2005.

⁴ *Clingham v. Kensington & Chelsea London Borough Council: R. v. Manchester Crown Court, ex parte McCann and others* [2002] UKHL 39;

⁵ See *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; hearing dates in the House of Lords for this and related appeals are 5 July – 13 July 2007; JUSTICE is an intervenor.

not appropriate and that the court should be satisfied so that it was sure that the person had been responsible for anti-social behaviour. A fortiori, where involvement in serious crime is alleged and the consequent restrictions on liberty are likely to be much greater, the criminal standard is appropriate.

19. It is also vital that the defendant has the opportunity to participate effectively in the proceedings. While we oppose the creation of SCPOs, natural justice and the requirements of Article 6 ECHR require, in our view, that if these provisions are passed, such an order should not be made in the person's absence, unless he has deliberately absented himself from the proceedings. This is particularly important since there is no procedure on the face of the Bill for an interim SCPO and the order can last for up to five years.

- **Because of these very serious concerns, we believe that the provisions on SCPOs should not proceed.**

20. In our view therefore, the proposed regime of SCPOs goes beyond any legitimate role for civil orders in relation to criminal behaviour, threatening the primacy of the criminal process itself. While amendments could ameliorate this Part of the Bill (for example, by restricting the orders to post-conviction situations), it is our view that a better approach, if further civil orders are indeed necessary, is to create orders aimed at specific types of behaviour under which targeted and proportionate restrictions can be imposed, rather than to proceed on a generalist and sweeping basis.

Clause 78

21. We have serious concerns about the power to search for firearms created in clause 78 of the Bill. While the power to search for firearms is useful and legitimate in order to prevent serious crime, such a power must also be proportionate and must include adequate safeguards. Existing powers to search for weapons do include safeguards: for example, under s60 Criminal Justice and Public Order Act 1994, which allows searches for weapons, an authorisation must be in place in relation to a particular area from a senior police officer. In relation to s1 PACE, which can be used to search people and vehicles for offensive weapons, the police constable/officer must have reasonable suspicion in relation to the individual who is the subject of the search. Blanket powers to search any people/vehicles in a particular area should not be left to an individual police constable to determine – apart from the privacy issues

there is a danger that their erroneous use could damage community relations and even cause public disorder. The provision is also inappropriate in that it says 'by whatever means he considers appropriate' – a very wide discretion to be granted to a police constable. It is unclear what effect this would have on existing safeguards such as recording of stops and searches. For these reasons we oppose this clause.

JUSTICE
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