



**Serious Crime Bill (HL) Part I  
Briefing for House of Lords Second Reading**

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## **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. This briefing focuses upon Part I of the Serious Crime Bill (Serious Crime Prevention Orders), about which we have very serious concerns. We regard these orders as a dangerous departure from the principle that the criminal justice system should have primacy in controlling criminal behaviour. Later JUSTICE briefings will deal with the Bill as a whole. In relation to Part I of the Bill, we believe that:
  - **The proposed ‘Serious Crime Prevention Orders’ (SCPOs) should not be used as a substitute for criminal proceedings;**
  - **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, compromising legal certainty;**
  - **There is no requirement that a person intentionally participates in criminal activity; innocent people could be given a SCPO because they unwittingly facilitate a crime;**
  - **The controls that can be imposed on the recipient could be so severe as to amount to a criminal penalty; in these circumstances, the civil standard of proof is inappropriate;**
  - **A SCPO should not be made unless the person is present or they have deliberately absented themselves from the proceedings.**
3. **Because of these very serious concerns, we believe that this Part of the Bill should not proceed.**

## **Part I: Serious Crime Prevention Orders**

4. Part I of the Bill would empower the High Court to make a SCPO against a person if satisfied, on the balance of probabilities, that they had been involved in serious crime, and if it had reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in the jurisdiction. The SCPO could contain any prohibitions, restrictions, requirements, or other terms, that the court considered appropriate for that purpose (excluding certain limited exceptions). These could relate, for example, to the persons with whom the subject of the order associates, his travel, where he resides, and to the answering of questions, and the provision of documents or information to law enforcement officers. A person could be regarded as having been 'involved in serious crime' if he had a subsisting conviction for a 'serious offence', but also if he had unwittingly facilitated, or conducted himself in a way likely to facilitate, the commission of a 'serious offence'. A 'serious offence' could be any offence that the court considers sufficiently serious for these purposes. The Crown Court could also make a SCPO, following a conviction for a 'serious offence'.

### **The proposed 'Serious Crime Prevention Orders' (SCPOs) should not be used as a substitute for criminal proceedings;**

5. 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 place restrictions upon liberty and other freedoms, such as imprisonment, which would not otherwise be constitutionally legitimate, but which are necessary in the circumstances for legitimate purposes such as the protection of the public from harm, and deterrence of further 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...<sup>1</sup>

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<sup>1</sup> House of Lords Constitution Committee, Second Report, Session 2006-7.

6. There are several situations where civil orders applied for by the state may be a legitimate response to criminal behaviour:
  - 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 involves a finding of serious criminality but the 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 protective in purpose and does not involve a serious curtailment of the person's freedom.
7. However, the regime of SCPOs envisaged by the Bill goes far beyond these limited situations. We emphasise that a civil order is not a legitimate response to criminal behaviour 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.
8. Further, short of internment, which is an unacceptable response to criminality and which would contravene British constitutional principles in addition to our domestic and international human rights obligations, civil proceedings cannot provide the same level of protection for the public against serious criminals as a criminal conviction. Incidents of crimes committed while on licence and while subject to electronic monitoring, in addition to reports that an individual subject to a terror control order evaded supervision, suggest that such measures cannot be a suitable method of controlling the activities of serious criminals (in particular, the sophisticated serious organised criminals at whom this measure is, in part, aimed).

**SPCOs can be imposed in too wide a range of circumstances, compromising legal certainty;**

**There is no requirement that a person intentionally participates in criminal activity; innocent people could be given an SPCO because they unwittingly facilitate a crime;**

9. In its report on the Serious Crime Bill, the Constitution Committee draws the attention of the House to 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.’ Although one category of person eligible for a SCPO is someone who has a subsisting conviction for a ‘serious offence’, it is also possible, by virtue of clauses 2 and 3, for a person to receive a SCPO if – perhaps unwittingly – they have facilitated a ‘serious offence’ or their conduct was likely to facilitate such an offence.
10. It is easy to think of all kinds of third parties who, in all innocence, can facilitate the commission of a serious offence: the taxi driver who drives passengers to a destination, 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. The court must disregard activity that the defendant shows to be reasonable – however, this criterion is both vague, and subject to a reverse burden of proof.
11. It is of course highly unlikely to be the intention of the government or the prosecuting authorities that SCPO applications should be made against innocent retailers or tradespeople. However, we have seen in the case of ASBOs that overbroad criteria for the application of civil orders, drafted in order to make it easier to obtain such orders against a range of culpable individuals, have in fact allowed them to be passed against wholly inappropriate subjects (autistic children; the suicidal; etc), despite guidance. In order to prevent this it is essential to narrow the criteria in the legislation itself in order to target the orders at those for whom they are intended.

12. In this respect, the Bill is objectionable in two ways: first, it *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. Secondly, the category of 'serious offence' itself is not clearly defined. The list in Schedule 1 contains 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), and can also include any offence which the court thinks sufficiently serious for these purposes.
13. 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.

**The controls that can be imposed on the recipient could be so severe as to amount to a criminal penalty; in these circumstances, the civil standard of proof is inappropriate;**

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 in clauses 11-15, 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: 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, we may see under this Bill a number of SCPO subjects – for example, those who are suspected of a major role in organised crime - who are 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 Prevention of Terrorism Act: SCPOs, unlike non-derogating control orders, would be made by a court rather than by the executive. However, in relation to some instances of the offences on the list the seriousness of the restrictions that could be imposed is greater than the criminal penalty that would be imposed for the equivalent offence. It is therefore doubly objectionable that such restrictions could be imposed merely on the civil standard of proof in relation to *non-criminal conduct*, ie innocent facilitation of, or potential facilitation of, a serious offence, if the defendant cannot prove that his actions were reasonable.

17. We therefore endorse the House of Lords Constitution Committee's comment that:

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 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.

18. Further, in our opinion such provisions are also contrary to Article 6 of the European Convention on Human Rights (ECHR). The UK courts have found that ASBOs were civil rather than criminal in character,<sup>2</sup> and have not finally determined this question in relation to terror control orders.<sup>3</sup> It is by no means certain that the European Court of Human Rights would agree that such orders 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 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. The control orders regime, which offers a closer parallel to the SCPO than do ASBOs, is currently subject to appeal to the House of Lords, whose considerations will include its compatibility with Articles 5 and 6 ECHR. In our view, it

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<sup>2</sup> *Clingham v. Kensington & Chelsea London Borough Council: R. v. Manchester Crown Court, ex parte McCann and others* [2002] UKHL 39;

<sup>3</sup> *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140.

would be inappropriate to introduce legislation giving the courts order-making powers, which in the view of the Constitution Committee are ‘in several respects even broader than those created by the 2005 Act’, particularly before the Lords’ judgment in the control order cases has been given.

**A SCPO should not be made unless the person is present or they have deliberately absented themselves from the proceedings.**

19. Clause 10 of the Bill provides that a person may be given a SCPO if he has been represented at the proceedings (including in person) or if a notice setting out the terms of the order has been served upon him. This clause is ambiguous, particularly since in clause 9 third parties are expressly given the right to make representations about a SCPO if the High Court considers that the making of the order would be likely to have a significant adverse effect upon them. While we oppose the creation of these orders, natural justice and the requirements of Article 6 ECHR require, in our view, that such an order should not be made in the person’s absence, unless he has deliberately absented himself from the proceedings. If, contrary to our views, the Bill intends to create an ex parte procedure for applications for orders, this should be done on the face of the Bill and should not be the subject of vague provisions.

**Conclusions**

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. For this reason we believe that this Part of the Bill should not proceed.

**JUSTICE**  
**February 2007**