



House of Lords  
House of Commons  
Joint Committee on  
Human Rights

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# Legislative Scrutiny: Fifth Progress Report

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**Twelfth Report of Session 2006-07**

*Report, together with formal minutes and  
appendices*

*Ordered by The House of Lords to be printed 23 April 2007*

*Ordered by The House of Commons to be printed 23 April 2007*

**HL Paper 91  
HC 490**

Published on 25 April 2007  
by authority of the House of Lords and  
the House of Commons London:  
The Stationery Office Limited  
£0.00

## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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### Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), Jackie Recardo (Committee Assistant), Suzanne Moezzi (Committee Secretary) and James Clarke (Senior Office Clerk).

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## Summary

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The Joint Committee on Human Rights examines the human rights implications of all government and private bills, and selected pre-and post-legislative documents, in accordance with the new legislative scrutiny sifting system which it adopted from the start of session 2006-2007. A full explanation of the Committee's scrutiny procedures is given in the Committee's Twenty-third Report of Session 2005-06, *The Committee's Future Working Practices*, HL Paper 239, HC1575.

This is the Committee's Fifth Legislative Scrutiny Progress Report of this Session. In this Report the Committee draws the special attention of both Houses to some human rights compatibility concerns to which the Serious Crime Bill gives rise.

### *Serious Crime Bill*

The main purpose of the Bill is to introduce "Serious Crime Prevention Orders" (SCPOs), empowering courts to impose a wide range of prohibitions or requirements in order to prevent harm from serious crime. In the Committee's view the Bill's provisions on SCPOs raise three significant human rights issues:

- (1) whether SCPOs amount to the determination of a criminal charge for the purposes of the right to a fair trial in Article 6(1)ECHR;
- (2) whether the standard of proof in proceedings for an SCPO should be the civil or the criminal standard; and
- (3) whether the power to make SCPOs is defined with sufficient precision to satisfy the requirement that interferences with Convention rights be "in accordance with the law" or "prescribed by law" (paragraphs 1.1-1.6).

The Government argues that SCPOs do not involve the determination of a criminal charge and therefore do not attract the full panoply of fair trial protections contained in Article 6 ECHR. In the Committee's view, however, in most cases an application for an SCPO is likely to amount to the determination of a criminal charge for the purposes of Article 6 and therefore to attract all the fair trial guarantees in that Article. In the Committee's view, the human rights compatible way to combat serious crime is not to sidestep criminal due process, but rather to work to remove the various unnecessary obstacles to prosecution (paragraphs 1.7-1.15).

It can be said to be implicit in ECtHR case law that in criminal proceedings proof beyond reasonable doubt is necessary. The Bill, however, expressly provides that since proceedings for SCPOs are civil proceedings, the standard of proof to be applied by the court is the civil standard. But it follows from the Committee's view, expressed above, that SCPOs amount to the determination of a criminal charge, that the standard of proof should be the criminal standard not the civil standard. The Committee therefore recommends that the Bill be amended to make explicit on the face of the Bill that before making a SCPO the court must be satisfied *beyond reasonable doubt* that the person has been involved in serious crime (paragraphs 1.16-1.20).

In the Government's view the Bill provides the necessary legal certainty while maintaining

valuable flexibility. The Committee remains concerned, however, by a number of features of the Bill which in its view give rise to doubt about whether the power to interfere with various Convention rights by imposing a SCPO is sufficiently defined in law to satisfy the requirement of legal certainty, which is a fundamental feature of human rights law, including the ECHR. In the Committee's view, amendments should be made to the Bill in order to provide the requisite degree of legal certainty (paragraphs 1.21-1.30).

In the light of the Bill's provisions about information sharing, the Committee is concerned that the power of public authorities to share information with anti-fraud organisations is drafted in terms too general to satisfy the requirement in Article 8 ECHR that interferences with the right to respect for private life be sufficiently foreseeable. In order to make the effect of the new power more foreseeable, and therefore more legally certain, and to make it less likely that the power to share information will be exercised disproportionately, the Committee recommends that the Bill be amended. These concerns apply with even greater force to a still wider power contained in the Bill to share information by amending the Data Protection Act to allow the processing of sensitive personal data through an anti-fraud organisation, including contemplation of disclosure of sensitive personal data to any person to whom the arrangements of any anti-fraud organisation happen to provide for disclosure. In the Committee's view this amounts to an inappropriate delegation of discretion to anti-fraud organisations to decide to whom they will disclose sensitive personal data (paragraphs 1.31-1.41).

On data matching, the Committee is encouraged that what appear to it to be the necessary safeguards will be in place, although it would prefer many of these safeguards to be contained on the face of the Bill. The Committee looks forward to seeing a draft of the proposed new Code at the earliest opportunity (paragraphs 1.42-1.46).

# Bill drawn to the special attention of both Houses

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## *Government Bill*

### 1 Serious Crime Bill

Date introduced to first House	16 January 2007
Date introduced to second House	
Current Bill Number	HL Bill 59
Previous Reports	None

## Background

1.1 This is a Government Bill introduced into the House of Lords on 16 January 2007. Baroness Scotland has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying the Bill set out the Government's view of the Bill's compatibility with the Convention rights at paras 282-319. The Bill completed its Committee stage on 27 March 2007 and is scheduled for report stage on 25 April 2007.

## The effect of the Bill

1.2 The main purpose of the Bill is to introduce "Serious Crime Prevention Orders", a new civil order aimed at preventing serious crime. It also reforms the substantive criminal law on encouraging or assisting crime, by abolishing the common law offence of incitement and in its place creating new offences of intentionally encouraging or assisting crime or assisting crime believing that an offence, or one or more offences, will be committed. It also introduces, as part of a range of measures to prevent or disrupt serious crime, information sharing, including with the private sector, and data matching for the prevention of fraud. Finally, the Bill makes a number of changes to the law governing the recovery of the proceeds of crime.

1.3 On our preliminary consideration of the Bill we identified three groups of potentially significant human rights issues, concerning (1) serious crime prevention orders (2) information sharing and data matching and (3) reverse onus clauses. On 12 March 2007 we wrote to the Minister asking a number of questions in relation to these issues<sup>1</sup> and we received a response on 16 April 2007.<sup>2</sup> In light of that response we now report to both Houses in relation to serious crime prevention orders and information sharing and data matching.

1.4 As we have sought to make clear in previous reports, particularly in our work on counter-terrorism, the prevention of serious crime is an important public interest which is clearly recognised by human rights law. Interferences with a number of fundamental rights are capable of being justified as being necessary to prevent crime, provided they satisfy other requirements of human rights law including legal certainty and proportionality. In certain circumstances, the State may also be under a positive obligation under human rights law to take active steps to protect individuals' human rights, such as life, physical integrity and property, from the harm done to them by serious crime. It is in this context that we address some human rights compatibility concerns to which the Bill gives rise.

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<sup>1</sup> Appendix 1.

<sup>2</sup> Appendix 2.

## Serious crime prevention orders

1.5 The Bill creates a new type of civil order, “serious crime prevention orders” (hereafter “SCPOs”), modelled on anti-social behaviour orders (ASBOs), empowering courts to impose a wide range of prohibitions or requirements in order to prevent harm from serious crime. Such preventive orders raise similar human rights questions to those on which the Committee has already reported frequently to Parliament in the context of control orders.<sup>3</sup>

1.6 In our view the Bill’s provisions on SCPOs raise three significant human rights issues:

- (1) whether SCPOs amount to the determination of a criminal charge for the purposes of the right to a fair trial in Article 6(1) ECHR;
- (2) whether the standard of proof in proceedings for an SCPO should be the civil or the criminal standard; and
- (3) whether the power to make SCPOs is defined with sufficient precision to satisfy the requirement that interferences with Convention rights be “in accordance with the law” or “prescribed by law”.

## Determination of a criminal charge

1.7 The Explanatory Notes state the Government’s view that a serious crime prevention order is neither a criminal charge nor a criminal penalty for the purposes of Articles 6 and 7 ECHR.<sup>4</sup> We wrote to the Minister asking for a detailed explanation of the Government’s view that SCPOs do not amount to the determination of a criminal charge for the purposes of Article 6 ECHR, bearing in mind that they are premised on the view that the subject of the order has been involved in serious criminal behaviour.<sup>5</sup>

1.8 In its response the Government argues that the key question in determining whether a measure is civil or criminal is whether it is preventative or punitive in nature.<sup>6</sup> If a measure is preventative, in the Government’s view, it is likely to be classified as a civil measure for the purposes of Article 6 ECHR. In the Government’s view SCPOs are not criminal in nature because:

- The first part of the test for a SCPO, that a person “has been involved in serious crime”,<sup>7</sup> is not limited to the commission of a serious offence but includes conduct which facilitates, or is likely to facilitate, the commission of a serious offence;<sup>8</sup>
- The second part of the test which must be met for an order to be granted is that it must protect the public by preventing, restricting or disrupting the involvement of the subject of the order in serious crime, which points to the order being preventative rather than punitive in nature;

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<sup>3</sup> See e.g. Twelfth Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*, HL Paper 122/HC 915; Eighth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007*, HL Paper 60/HC 365.

<sup>4</sup> EN para. 282.

<sup>5</sup> Appendix 1.

<sup>6</sup> Appendix 2.

<sup>7</sup> Clause 1(1)(a).

<sup>8</sup> Clause 2(1).



- The only conditions that can be imposed by a SCPO are those that are appropriate for the purpose of protecting the public by preventing, restricting or disrupting the involvement of the subject of the order in serious crime;
- The court is required to ignore intention or any other aspect of the mental state of the subject of the order when determining whether the test for the making of an order is met;
- Breach of a SCPO is itself a criminal offence;
- Most SCPOs will be made by the High Court which is a court of civil jurisdiction;

1.9 For these reasons, the Government argues, SCPOs do not involve the determination of a criminal charge and therefore do not attract the full panoply of fair trial protections contained in Article 6 ECHR.

1.10 The classification of proceedings as civil in national law is of course not in itself determinative of whether those proceedings determine a criminal charge within the autonomous Convention meaning of that phrase. As a matter of Convention case-law, whether a particular measure amounts to a criminal charge or penalty, so as to attract criminal fair trial guarantees including the presumption of innocence, depends on the application of criteria which have been spelt out in the case-law of the European Court of Human Rights. Significantly, although the classification of the proceedings as a matter of domestic law is a relevant criterion, it is not determinative. Other, more substantive criteria include the nature and severity of the sanctions attached to the offence in question. Although a SCPO does not necessarily amount to official notification that the subject of the order has committed a criminal offence, nevertheless the European Court of Human Rights has held that a criminal charge “may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.”<sup>9</sup>

1.11 The Government also relies on the decision in the case of *McCann* in which the House of Lords upheld the Government’s argument that proceedings leading to the making of an ASBO do not involve the determination of a criminal charge for the purposes of Article 6 ECHR.<sup>10</sup> ASBOs generally concern relatively low-level anti-social behaviour which may not even be criminal. We consider serious crime prevention orders, however, to be a different matter, more analogous to control orders in terms both of the seriousness of the conduct in which the subject of the order is alleged to have been involved and in the severity of the possible restrictions which can be imposed.

1.12 We have consistently taken the view that control orders under the Prevention of Terrorism Act 2005 are likely to involve the determination of a criminal charge because they are premised on the view that the subject of the order has been involved in serious criminal behaviour and because of the severity of the restrictions such orders impose.<sup>11</sup> In the recent control order case of *Re MB*, Sullivan J. expressed “considerable sympathy” for that view and with our reasoning,<sup>12</sup> but considered the matter to be covered by binding precedent from the

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<sup>9</sup> See e.g. *Eckle v Germany* (1983) 5 EHRR 1 at para. 73; *Foti v Italy* (1983) 5 EHRR 313 at para. 52.

<sup>10</sup> *R (McCann) v Manchester Crown Court* [2002] UKHL 39, [2003] 1 AC 787.

<sup>11</sup> Twelfth Report of Session 2005-06, *op. cit.*, at paras 50-52.

<sup>12</sup> *Re MB* [2006] EWHC 1000 at para. 37.

Court of Appeal.<sup>13</sup> The issue will soon be considered by the House of Lords in appeals pending in control order cases.

1.13 We acknowledge that SCPOs can be imposed in respect of conduct which does not itself amount to a criminal offence. We also acknowledge that the Bill expressly provides that a court may only decide that a person has committed a serious offence if he has been convicted of that offence and that conviction has not been quashed on appeal.<sup>14</sup> **In our view, however, a combination of the implication that a person has been “involved in” serious crime, the severity of the restrictions to which they may be subject under a SCPO, and the possible duration of such an order (up to 5 years and indefinitely renewable) means that in most cases an application for a SCPO is likely to amount to the determination of a criminal charge for the purposes of Article 6 and therefore to attract all the fair trial guarantees in that Article.**

1.14 We note with interest that the House of Lords Select Committee on the Constitution reached a very similar conclusion as a matter of UK constitutional principles, concluding 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.<sup>15</sup>

1.15 **In our recent work on counter-terrorism policy and human rights we have drawn attention to the unsustainability in the long term of resort to methods of control which are outside of the criminal process and which avoid the application of criminal standards of due process. We are concerned that the introduction of SCPOs represents a similar step in relation to serious crime generally. In our view, the human rights compatible way to combat serious crime in the long run is not to sidestep criminal due process, but rather to work to remove the various unnecessary obstacles to prosecution, for example by relaxing the current prohibition on the admissibility of intercept material, lowering the charging threshold, allowing post-charge questioning and the drawing of adverse inferences (with appropriate safeguards), and enhancing the incentives to give evidence for the prosecution.**

### **Standard of proof**

1.16 Article 6 ECHR does not expressly state that the standard of proof required in criminal proceedings is proof beyond reasonable doubt. The Court of Human Rights, however, has emphasised on a number of occasions that “any doubt should benefit the accused”<sup>16</sup> and it can therefore be said to be implicit in the case law that proof beyond reasonable doubt is necessary.

1.17 In any event the matter is clear as a matter of the English common law of fair trial. In *McCann*, although the House of Lords held that proceedings for an ASBO were civil not criminal, they also held that they should carry the criminal standard of proof. The House of Lords in that case held that although in principle the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply to proceedings for ASBOs, there were good reasons, in the interests of fairness, for applying the higher standard when

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<sup>13</sup> *A v Secretary of State for the Home Department* [2004] QB 335, in which the Court of Appeal held that proceedings under Part IV of the Anti-Terrorism, Crime and Security Act 2001, which made provision for the detention of suspected international terrorists, were civil not criminal for the purposes of Article 6 ECHR. Although the Court of Appeal's decision was reversed by the House of Lords, it did not consider the Article 6 point, so the Court of Appeal's decision on that aspect of the case remains binding authority at the level of the Court of Appeal and below.

<sup>14</sup> Clause 4.

<sup>15</sup> House of Lords Select Committee on the Constitution, Second Report of Session 2006-07, *Serious Crime Bill*, HL Paper 41, at para. 17.

<sup>16</sup> e.g. *Barbera, Messegue and Jabardo v Spain* (1989) 11 EHRR 360 at para. 77.

allegations were made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they were made. It followed that in all cases in which an ASBO was applied for, magistrates should apply the criminal standard of proof: that is, they must *be sure* that the individual in question has acted in an anti-social manner before they can make an order.<sup>17</sup>

1.18 The Bill, however, expressly provides that since proceedings for SCPOs are civil proceedings, the standard of proof to be applied by the court in such proceedings is the civil standard of proof.<sup>18</sup> In our letter to the Minister we therefore also asked for an explanation of the Government's reasons for providing that the standard of proof should be the civil standard, rather than the higher criminal standard as the House of Lords held in *McCann* was appropriate for ASBOs.

1.19 The Government's response is that the civil standard of proof is not merely the balance of probabilities, but is a flexible standard, ranging from "balance of probabilities" at the lowest, to very close or identical to "beyond reasonable doubt" at the highest. The Government says that it has deliberately chosen the flexible civil standard, to enable the High Court to make a judgment as to the appropriate standard of proof in relation to each issue to be determined. It accepts, for example, that in relation to the first part of the test for a SCPO, namely whether the court is satisfied that a person has been involved in serious crime, the court is likely to require the standard of proof to be close or identical to beyond reasonable doubt.

1.20 It follows from our view above, that SCPOs amount to the determination of a criminal charge, that the standard of proof should be the criminal standard not the civil standard. Even on the Government's approach, however, we note that it is accepted that the criminal standard of beyond reasonable doubt is appropriate when the court is determining whether a person has been "involved in serious crime". In our view, if this is the case in relation to ASBOS, as has been held by the House of Lords, it is even more strongly the case in relation to an order premised on an even more serious allegation of involvement in criminality. **We therefore recommend that the Bill be amended to make explicit that the appropriate standard of proof in relation to this part of the test for a SCPO be the criminal standard, in accordance with the decision of the House of Lords in *McCann*. It should be spelt out on the face of the Bill that before making a SCPO the court must be satisfied beyond reasonable doubt that the person has been involved in serious crime.**

### **Legal certainty**

1.21 The Explanatory Notes to the Bill accept that a SCPO may engage a person's rights under Articles 8, 10, 11 and Article 1 Protocol 1 ECHR, but assert that any interference with those rights will be in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society.<sup>19</sup> The Notes state that any interference with those rights will be in accordance with the law because the power to make the orders will be set out in the Bill.<sup>20</sup> This formal approach to the requirement that interferences be prescribed by law is repeated in a number of places in the Explanatory Notes. As a matter of Convention case-law, however, formal authorisation of an interference is not sufficient to satisfy this requirement. The quality of the relevant law is also important: it must be accessible and foreseeable and enable

<sup>17</sup> [2003] 1 AC 787 at paras 37 (Lord Steyn) and 83 (Lord Hope).

<sup>18</sup> Clauses 33(2) and 34(2).

<sup>19</sup> EN para. 286.

<sup>20</sup> EN para. 287.

individuals to be able to predict with reasonable certainty how powers which might interfere with their fundamental rights will be exercised in practice. This means that open-ended discretions to interfere with Convention rights must be avoided.

1.22 We therefore wrote to the Minister asking for a more detailed explanation of the Government's view that the power to make SCPOs is defined with sufficient precision to satisfy the requirement of human rights law that interferences with Convention rights be "in accordance with the law" or "prescribed by law."

1.23 In its response the Government invokes the recognition in the case-law of the European Court of Human Rights that, although a law must be sufficiently precise, a certain amount of flexibility is acceptable and indeed is often desirable to ensure that the law can adapt to changing circumstances and demands. In the Government's view the Bill provides the necessary certainty while maintaining valuable flexibility. It argues that the necessary degree of certainty is provided by the following features of the Bill:

- The test for obtaining a SCPO is clearly set out on the face of the Bill;
- The different elements of that test are defined and expanded upon elsewhere in the Bill;
- "Involvement in serious crime" is expressly and extensively defined in the Bill, and "facilitation" is an ordinary term with a natural meaning of "making easier";
- "Serious offence" is defined in the Bill and based on a list of specified offences. The judicial ability to treat non-scheduled offences as if they were scheduled is said to be limited by the Schedule itself, because an offence must be sufficiently serious to be treated as if it were included in the Schedule;
- The Bill provides examples of the types of condition which a court can impose and is said to "establish the outer limit of the types of conditions that can be imposed;"
- The Bill contains a number of safeguards which limit the scope of the orders.<sup>21</sup>

1.24 We acknowledge the importance of the safeguards which are contained in the Bill, and that these are in many respects superior to the safeguards contained in the control orders regime. For example, SCPOs must always be made by a court, rather than the Executive, and the Bill makes detailed provision to ensure that the rights of third parties are properly taken into account in the process of an order being made. However, we remain concerned by a number of features of the Bill which in our view give rise to doubt about whether the power to interfere with various Convention rights by imposing a SCPO is sufficiently defined in law to satisfy the requirement of legal certainty.

1.25 First, the court is given an entirely open-ended discretion to include in an order "such other terms as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person concerned in serious crime."<sup>22</sup> We can find nothing in the Bill which restricts the scope of this discretion other than the purpose for which such terms can be imposed.

1.26 Second, the Bill contains only an illustrative, not an exhaustive, list of the sorts of restrictions which may be placed on an individual. It sets out "examples" of the type of

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<sup>21</sup> Clauses 6-15.

<sup>22</sup> Clause 1(3).

provision that may be made by a SCPO, but expressly provides that this “does not limit the type of provision that may be made by such an order.”<sup>23</sup> We cannot see how this establishes any “outer limit” on the type of conditions that can be imposed as the Government suggest in their response.

1.27 Third, the Bill provides that the prohibitions, restrictions or requirements that may be imposed by SCPOs may include some that are not specified in the orders but “are determined in accordance with provision made by the orders (including provision conferring discretion on law enforcement officers)”.<sup>24</sup> This seems to us to be a very broad delegation of power to interfere with Convention rights to individual law enforcement officers.

1.28 Fourth, a “serious offence” for the purposes of the Bill means either one specified in the Schedule or one which, in the particular circumstances of a case, the court “considers to be sufficiently serious to be treated for the purposes of the application or matter as if it were so satisfied.”<sup>25</sup> In our view this power can only give rise to uncertainty about when a SCPO is capable of being imposed. We do not accept that this open-ended power, in effect, to add to the Schedule of specified offences can in any meaningful sense be limited by the Schedule itself.

1.29 The House of Lords Constitution Committee in its report on this Bill had grave concerns as to whether the Bill as currently drafted is compatible with the constitutional principle of the rule of law and legal certainty, because of the lack of clarity about both the circumstances in which SCPOs might be made and their ambit when they are made.<sup>26</sup> **For the reasons we have summarised above, we have very similar concerns about whether the power to interfere with various human rights by imposing a SCPO is sufficiently defined in law to satisfy the requirement of legal certainty which is also a fundamental feature of human rights law, including the ECHR.**

1.30 **In our view, in order to provide the requisite degree of legal certainty, the Bill should be amended:**

- **to remove the court’s discretion in clause 1(3) to include in a SCPO such other terms as it considers appropriate;**
- **to make exhaustive (rather than illustrative) the list in clause 5 of the sorts of restrictions which may be placed on an individual;**
- **to remove the provision in clause 5(7) authorising prohibitions, restrictions or requirements not specified in the orders themselves but determined in accordance with provision made in the orders;**
- **to remove the power of the court in clause 2(2)(b) to treat an offence as if it were specified in the Schedule of offences to which the Act applies because the court considers it to be sufficiently serious.**

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<sup>23</sup> Clause 5(1).

<sup>24</sup> Clause 5(7).

<sup>25</sup> Clause 2(2)(b).

<sup>26</sup> *op. cit* at paras 12-14.

## Information sharing and data matching

1.31 The Bill contains significant provisions for information sharing, which enable the sharing of information both within the public sector and with the private sector,<sup>27</sup> and for data matching by the Audit Commission.<sup>28</sup> Data matching involves taking existing data sets from different organisations and comparing them to identify potential fraud (e.g. by matching payroll data against benefit data).

### Information sharing

1.32 The Bill enables a public authority<sup>29</sup> to share information with an anti-fraud organisation which has been specified by order by the Secretary of State, for the purposes of preventing fraud or a particular kind of fraud.<sup>30</sup> A public authority may disclose information as a member of such an anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation. An anti-fraud organisation is one which enables or facilitates any sharing of information to prevent fraud or a particular kind of fraud.<sup>31</sup> An example of such an organisation is CIFAS, the UK's Fraud Prevention Service.

1.33 The information which may be disclosed by a public authority is information “of any kind.”<sup>32</sup> It may be disclosed to the anti-fraud organisation itself, any members of it, or “any other person to whom disclosure is permitted by the arrangements concerned.”<sup>33</sup> Such disclosure does not breach any obligation of confidence owed by the public authority, or any other restriction on the disclosure of information, but the clause does not authorise any disclosure in breach of the Data Protection Act 1998 or the prohibition in Part I of the Regulation of Investigatory Powers Act 2000.

1.34 The Bill makes it a criminal offence to disclose further certain information which has been disclosed by a public authority pursuant to the new information sharing power,<sup>34</sup> with a maximum penalty of up to two years imprisonment.<sup>35</sup>

1.35 The Explanatory Notes to the Bill accept that this new information sharing provision engages the right to respect for private and family life in Article 8 ECHR because the information disclosed is likely to include sensitive personal data, but state that such disclosures will be justified as being necessary for the prevention of crime and for making significant savings to the public purse.<sup>36</sup> The Notes state that if public sector bodies were to participate in an anti-fraud organisation such as CIFAS, for example, they could make savings of up to £275m a year as a result of its database. They say that there are safeguards against disclosures in breach of Article 8 ECHR because, when making the disclosures, the public authorities are still subject to the duty to act compatibly with Convention rights in s. 6 of the Human Rights Act and any disclosure must also be consistent with the Data Protection Act 1998.

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<sup>27</sup> Clauses 61-64.

<sup>28</sup> Clause 65.

<sup>29</sup> Within the meaning of “public authority” in s. 6 of the Human Rights Act 1998: cl. 61(8).

<sup>30</sup> Clause 61(1).

<sup>31</sup> Clause 61(8).

<sup>32</sup> Clause 61(2)(a).

<sup>33</sup> Clause 61(2)(b).

<sup>34</sup> Clause 62(1).

<sup>35</sup> Clause 63(1).

<sup>36</sup> EN para. 295.



1.36 The power in the Bill to disclose information, including sensitive personal data, as a member of a specified anti-fraud organisation is a very broad power, with very few limits on the face of the Bill. Although information can only be disclosed for the purposes of preventing fraud or a particular kind of fraud, which is an important limit on the scope of the power, other important limits on the width of the power are missing. For example:

- There is no limit on the kind of information which may be disclosed;<sup>37</sup>
- The persons or bodies to whom the information can be disclosed are not specified on the face of the Bill but left to the unfettered discretion of the anti-fraud organisation: information can be disclosed to “any other person to whom disclosure is permitted by the arrangements” made by such an organisation;<sup>38</sup>
- Some of the normal safeguards against improper disclosure of personal information, such as the common law of confidence, are expressly disapplied;<sup>39</sup>
- The preservation of the restrictions on disclosure contained in the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000 do not amount to very significant safeguards, since both Acts contain broad exemptions from their protections for the purposes of preventing and detecting crime.

**1.37 In light of the above we are concerned that the power of public authorities to share information with anti-fraud organisations is drafted in terms too general to satisfy the requirement in Article 8 ECHR that interferences with the right to respect for private life be sufficiently foreseeable. Unless the law enabling the sharing of information indicates with sufficient clarity the scope and conditions of exercise of the power of disclosure, any interference with the right to respect for private life will not be in accordance with the law and will therefore be in breach of Article 8. We are also concerned by the absence of strong safeguards on the face of the Bill to ensure that the wide power to share personal information about an individual is only exercised in circumstances where it is proportionate to do so.**

**1.38 In order to make the effect of the new power more foreseeable, and therefore more legally certain, and to make it less likely that the power to share information will be exercised disproportionately, we recommend that the Bill be amended:**

- **to limit the width of the power, for example by specifying the kind of information which may be disclosed and specifying the categories of people to whom the information may be disclosed in place of the open-ended authorisation of disclosure to any person to whom disclosure happens to be permitted by the arrangements of a particular anti-fraud organisation; and**
- **to introduce additional safeguards on the face of the Bill, such as defining the threshold for reporting information on suspected fraud (the degree of suspicion that should be required), limiting disclosure so that only information on those suspected of fraud will be shared, prescribing the permissible use of shared information, and providing for individuals to have recourse to compensation if they are unfairly affected by the information held about them.**

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<sup>37</sup> Clause 61(2)(a).

<sup>38</sup> Clause 61(2)(b).

<sup>39</sup> Clause 61(3).

1.39 The Bill contains a still wider power to share information by amending the Data Protection Act to allow processing of sensitive personal data (including information as to the commission or alleged commission of an offence) through an anti-fraud organisation.<sup>40</sup> It permits the disclosure of sensitive personal data by a person as a member of an anti-fraud organisation, or otherwise in accordance with any arrangements made by such an organisation, or any other processing. The processing must be necessary for the purposes of preventing fraud or fraud of a particular kind.

1.40 This provision permits disclosure of sensitive personal data not only pursuant to the new power of public authorities to share information, but also covers disclosure under common law or other powers. The anti-fraud organisation does not need to have been specified by order by the Secretary of State. The Explanatory Notes acknowledge that such disclosures would engage Article 8(1) ECHR, but assert that the necessity test sufficiently protects people from breaches and reflects the exception in Article 8(2) for the prevention of crime.<sup>41</sup>

1.41 This clause is even broader than clause 61 because it contemplates disclosure of sensitive personal data to any person to whom the arrangements of any anti-fraud organisation happen to provide for disclosure. **In our view this amounts to an inappropriate delegation of discretion to anti-fraud organisations to decide to whom they will disclose sensitive personal data. Moreover, any anti-fraud organisation can make such disclosures, not merely those specified by order by the Secretary of State. The concerns we have expressed above about the lack of proper safeguards against improper disclosure on the face of the Bill therefore apply with even greater force in relation to this provision.**

### **Data matching**

1.42 The Bill provides for the Audit Commission to carry out data matching exercises or arrange for them to be conducted on its behalf for the purpose of assisting in the prevention and detection of fraud.<sup>42</sup> A data matching exercise is an exercise involving the comparison of sets of data to determine how far they match (including the identification of any patterns or trends).<sup>43</sup> This part of the Bill puts onto a statutory footing the data matching exercise that the Audit Commission has conducted for several years as part of the non-statutory National Fraud Initiative, which involves taking data sets from different organisations and comparing them to identify potential fraud. For example by matching payroll data against benefit data it is possible to identify those who may have fraudulently claimed benefit. Matches identifying potential fraud are then disclosed to the relevant organisations for investigation.

1.43 The Bill extends the data matching exercises which are currently conducted under the National Fraud Initiative by providing for the voluntary provision of data to the Audit Commission for it to conduct data matching exercises if it thinks it appropriate.<sup>44</sup> Such voluntary disclosure of data sets to the Audit Commission for data matching does not breach any obligation of confidence or any other restriction on disclosure, which are expressly disappplied, although restrictions contained in the Data Protection Act and the Regulation of Investigatory Powers Act still apply. The Bill also contains powers for the Secretary of State to broaden the scope of data matching in future, by adding to the purposes for which data

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<sup>40</sup> Clause 64, inserting new para. 7A into Schedule 3 of the Data Protection Act 1998.

<sup>41</sup> EN para. 297.

<sup>42</sup> Clause 65 and Schedule 6, para. 2, inserting new Part 2A (ss. 32A-32G) into the Audit Commission Act 1998.

<sup>43</sup> New s. 32A(2).

<sup>44</sup> New s. 32C(1).



matching can be carried out, to include assisting in the prevention or detection of crime other than fraud, in the apprehension and prosecution of offenders, or in the recovery of debt owing to public bodies.

1.44 The Explanatory Notes to the Bill acknowledge that information disclosed under the data matching provisions will include personal data and that the right to respect for private and family life in Article 8 ECHR will therefore be engaged.<sup>45</sup> They state, however, that such disclosures can be justified under Article 8(2) ECHR as being necessary for the prevention of crime, as well as leading to significant savings to both the public purse and to private sector organisations. The Notes also refer to a number of safeguards against disclosures in breach of Article 8: the duty on public authorities to act compatibly with Convention rights contained in s. 6 of the Human Rights Act 1998; the requirement that any disclosure be consistent with the Data Protection Act 1998; the fact that it is a criminal offence to disclose data provided to the Audit Commission for matching, or the results of data matches, other than for a purpose authorised by these provisions. The Commission is also under a statutory duty to prepare and keep under review a code of data matching practice,<sup>46</sup> to which all participating bodies as well as the Commission itself must have regard.<sup>47</sup>

1.45 Although data matching clearly engages the right to privacy under Article 8 ECHR, it is not inherently objectionable in Convention terms, but capable of justification as a proportionate interference with the right to privacy for purposes such as the prevention or detection of crime, or safeguarding public funds or the rights of others. The amount of money saved through the National Fraud Initiative (£300 million since its inception) suggests that data matching is quite successful in achieving these objectives. However, as the Information Commissioner points out in his Foreword to the Audit Commission's current Code of Data Matching Practice (May 2006), given that most of the extensive information drawn together is about people who are not subsequently identified as being involved in benefit fraud, the use of powerful data matching techniques raise "substantial data protection and privacy concerns."

1.46 In our letter to the Minister we asked for more details of the safeguards envisaged in the proposed data matching code of practice which the Audit Commission will be under a duty to prepare. The Minister responded that when drawing up the proposed Code of Practice, the Audit Commission will in practice consult the Information Commissioner, and that the new Code will be based on the same principles and requirements as the current Code on Data Matching. Those principles include, for example, that no assumption should be made that matches are fraudulent, a matter which can only be determined through further investigation; that data should be destroyed promptly once it is no longer required; and that data should not be further disclosed unless there is specific legal authority to do so. **We are encouraged that what appear to us to be the necessary safeguards will be in place, although, as we have often stated in previous reports when considering the disclosure of personal information, we would prefer many of these safeguards to be contained on the face of the Bill. We look forward to seeing a draft of the proposed new Code at the earliest opportunity.**

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<sup>45</sup> EN para. 304.

<sup>46</sup> News s. 32F(1) of the Audit Commission Act 1998.

<sup>47</sup> New s. 32F(2).

# Formal Minutes

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**Monday 23 April 2007**

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Judd	Mr Douglas Carswell MP
The Earl of Onslow	Dr Evan Harris MP
Lord Plant of Highfield	Mark Tami MP
Baroness Stern	

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Draft Report [Legislative Scrutiny: Fifth Progress Report], proposed by the Chairman, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.46 read and agreed to.

Summary read and agreed to.

*Resolved*, That the Report be the Twelfth Report of the Committee to each House.

Several papers were ordered to be appended to the Report.

*Ordered*, That the Chairman make the Report to the House of Commons and that Baroness Stern make the Report to the House of Lords.

[Adjourned till Monday 14 May at 4.00pm.]

# Appendices

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## Appendix 1: Letter dated 12 March 2007 from the Chairman to The Rt Hon Dr John Reid MP, Home Secretary

The Joint Committee on Human Rights is considering the compatibility of the Serious Crime Bill with the United Kingdom's human rights obligations. Having carried out an initial examination of the Bill, the Committee would be grateful if you could provide a fuller explanation of the Government's view that the proposals in the Bill are compatible with the Convention rights guaranteed by the Human Rights Act 1998 in the following respects.

### (1) Serious Crime Prevention Orders

The Committee is considering whether applications for "serious crime prevention orders" will constitute the determination of a criminal charge within the meaning of Article 6(1) ECHR so as to attract the full range of procedural protections in Article 6; if not, whether the procedural safeguards, including the standard of proof, are sufficient to satisfy the requirements of Article 6(1) in the determination of civil rights and obligations; and whether there are adequate safeguards to ensure that the interferences with rights to respect for private and family life, home, expression, association, and property under Articles 8, 9, 10, 11 and Article 1 of Protocol 1 ECHR will in practice be proportionate.

The Explanatory Notes explain the reasons for the Government's view that a serious crime prevention order is neither a criminal charge nor a criminal penalty for the purposes of Articles 6 and 7 ECHR.<sup>48</sup> These include the fact that the Bill states that proceedings for an order will be civil proceedings and that most orders will be made by the High Court which is a court of civil jurisdiction.

The classification of proceedings as civil in national law is not determinative of whether those proceedings determine a criminal charge within the autonomous Convention meaning of that phrase. The House of Lords in *McCann*<sup>49</sup> upheld the Government's argument that ASBOs do not involve the determination of a criminal charge, although they held that they should carry the criminal standard of proof. ASBOs generally concern relatively low-level anti-social behaviour which may not even be criminal. Serious crime prevention orders, however, might be considered to be a different matter: they require the Court to be satisfied that the person has been "involved in serious crime".<sup>50</sup> The Bill provides that the standard of proof is the civil standard of proof, on the balance of probabilities.

**Q 1 Bearing in mind that Serious Crime Prevention Orders are premised on the view that the subject of the order has been involved in serious criminal behaviour, please explain the detailed reasons for the Government's view that they do not amount to the determination of a criminal charge for the purposes of Article 6 ECHR.**

**Q 2 What are the Government's reasons for providing that the standard of proof required for a Serious Crime Prevention Order is only the civil standard of balance of**

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<sup>48</sup> EN para. 282.

<sup>49</sup> *R (on the application of McCann) v Manchester Crown Court* [2002] UKHL 39.

<sup>50</sup> Clause 1(1)(a).

**probabilities, when the standard for an Anti-Social Behaviour Order, as interpreted by the House of Lords in *McCann*, is the higher criminal standard?**

The Explanatory Notes also accept that a serious crime prevention order may engage a person's rights under Articles 8, 10, 11 and Article 1 Protocol 1 ECHR, but assert that any interference with those rights will be in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society.<sup>51</sup> They state that any interference with those rights will be in accordance with the law because the power to make the orders will be set out in the Bill.<sup>52</sup>

This formal approach to the requirement that interferences be prescribed by law is repeated in a number of places in the Explanatory Notes. As a matter of Convention case-law, however, formal authorisation of an interference is not sufficient to satisfy this requirement. The quality of the relevant law is also important: it must be accessible and foreseeable and enable individuals to be able to predict with reasonable certainty how powers which might interfere with their fundamental rights will be exercised in practice. This means that open-ended discretions to interfere with Convention rights must be avoided. The Bill contains only an illustrative, not an exhaustive, list of the sorts of restrictions which may be placed on an individual. It also leaves to the court an open-ended discretion to treat other offences, not listed in Schedule 1 to the Act, as constituting a serious offence where the offence is one which, in the particular circumstances of the case, the court considers to be sufficiently serious to be treated as if it were specified in the schedule.

**Q 3 Please provide a more detailed explanation of the Government's view that the power to make Serious Crime Prevention Orders is defined with sufficient precision to satisfy the requirement that interferences with Convention rights be "in accordance with the law" or "prescribed by law".**

**Data sharing and data matching**

The Committee is also considering whether the Bill's significant provisions for information sharing, which enable the sharing of information both within the public sector and with the private sector,<sup>53</sup> and for data matching by the Audit Commission,<sup>54</sup> contain adequate safeguards for the protection of the right to respect for private life in Article 8 ECHR.

The powers in the Bill are very broad and envisage extensive sharing of information between the public and private sectors. The Bill also contains powers for the Secretary of State to broaden the scope of data matching in future, by adding to the purposes for which data matching can be carried out, to include assisting in the prevention or detection of crime other than fraud, in the apprehension and prosecution of offenders, or in the recovery of debt owing to public bodies.

The Explanatory Notes accept that these provisions engage Article 8 ECHR because the information disclosed will include personal data, but argue that such disclosures will be justified as being necessary for the prevention of crime and for making significant savings to the public purse. The Notes also state that safeguards in the Bill, such as the requirement that

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<sup>51</sup> EN para. 286.

<sup>52</sup> EN para. 287.

<sup>53</sup> Clauses 61-64.

<sup>54</sup> Clause 65.

data matching be conducted in accordance with a code of practice, and the creation of a criminal offence for wrongful disclosure, ensure that any interference with Article 8 rights will be proportionate.

**Q 4 Please provide more details of the safeguards envisaged in the data matching code of practice.**

### Reverse onus provisions

The Bill contains three reverse onus provisions, which cast the legal burden on the defence to prove certain things in order to avail themselves of the statutory defence.<sup>55</sup> The Explanatory Notes give the Government's reasons for its view that it is fair and reasonable to place such a burden on the defendant (as required by the House of Lords decision in *Sheldrake v DPP*) in relation to one of these instances, in clause 25,<sup>56</sup> but not the other two, in clauses 45 and 46.

**Q 5 Please provide the Government's reasons for its view that it is fair and reasonable to place the legal burden on the defence in clauses 45 and 46 of the Bill.**

I would be grateful for your response by 27 March 2007.

### Appendix 2: Letter dated 16 April 2007 from Mr Vernon Coaker MP, Parliamentary Under-Secretary of State, Home Office

Thank you for your report dated 12<sup>th</sup> March which covered the Joint Committee on Human Rights' initial examination of the Bill. I am responding as the Bill Minister. There has been some confusion between our officials concerning receipt of that report, and I apologise that this has caused my response to be delayed. My officials agreed a revised deadline of 20<sup>th</sup> April for sending the government response to you, but I hope that in writing to you slightly earlier you may be able to take account of my response in the final report that you publish.

### Memorandum

This memorandum is submitted by the Home Office in response to the comments made in respect of the Serious Crime Bill by the Joint Committee on Human Rights in their letter dated 12<sup>th</sup> March 2007.

2 Baroness Scotland of Asthal made a statement under section 19(1)(a) of the Human Rights Act 1998 when the Bill was introduced in the House of Lords (our House of introduction), indicating that in her view, the provisions of the Bill are compatible with the Convention rights. She believes that, where the Convention rights are engaged, the proposals are a balanced and proportionate response to a pressing social need and that the judgements she has made about the balance to be struck between competing rights and responsibilities can be objectively justified.

3 This memorandum seeks to address the issues raised in the Committee's report with a view to further clarifying and assuring the Committee in respect of these matters.

<sup>55</sup> Clauses 25, 45 and 46.

<sup>56</sup> EN para. 290, concerning clause 25.

### ***Serious Crime Prevention Orders***

**Question 1: Bearing in mind that Serious Crime Prevention Orders are premised on the view that the subject of the order has been involved in serious criminal behaviour, please explain the detailed reasons for the Government's view that they do not amount to the determination of a criminal charge for the purposes of Article 6 ECHR.**

4 As the Committee has noted it is the Government's view that a serious crime prevention order does not amount to the determination of a criminal charge for the purposes of Article 6 of the ECHR. The case law of the Strasbourg Court has set out the following test for determining whether a measure amounts to a criminal charge or penalty:

- (a) the classification of the proceedings as a matter of domestic law;
- (b) the nature of the offence itself; and
- (c) the nature and severity of the penalty.

5 The key question in determining whether a measure is civil or criminal, is whether it is preventative or punitive. As made clear by Lord Hope in *R (McCann) v. Crown Court at Manchester* ("*McCann*"), if a measure is preventative it is likely to be classified as a civil measure (paragraph 76 of his judgment). Applying the principles set out in the case law the Government has concluded that these orders are not a criminal measure for the following reasons:

- (a) the second part of the test for the order is that it must protect the public by preventing, restricting or disrupting the involvement of the subject of the order in serious crime, this points to the order being aimed at preventing serious crime rather than being a punishment;
- (b) an order can only impose conditions that are appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime, this points to the order being aimed at preventing serious crime rather than being a punishment;
- (c) in determining whether the test for making the order is met the court must ignore intention or any other aspect of the mental state of the subject of the order, this has been included because in *McCann* the House of Lords attached weight to the fact that the test for obtaining an anti-social behaviour order did not contain any *mens rea*;
- (d) if an order is breached a person will commit a criminal offence which would suggest that the order itself is not a criminal charge;
- (e) the majority of orders will be made by the High Court which is a court of civil jurisdiction.

6 The Committee has specifically drawn attention to the fact that serious crime prevention orders are premised on the view that the subject has been involved in serious crime. However, I would draw to the Committee's attention two matters. Firstly, the test of "involved in serious crime" is not limited to the commission of an offence, it also encompasses those whose actions facilitate serious crime. It would, therefore, be wrong to suggest that a serious crime prevention order can only be given to a person who has committed a criminal offence. Secondly, the purpose of these provisions is to prevent the commission of further offences rather than to punish the subject for their conduct.

For these reasons, we do not believe that these orders amount to the determination of a criminal charge for the purposes of Article 6 ECHR.

**Question 2: What are the Government’s reasons for providing that the standard of proof required for an SCPO is only the civil standard of balance of probabilities, when the standard for an ASBO, as interpreted by the House of Lords in *McCann*, is the higher criminal standard?**

7 As set out in clauses 33(2) and 34(2), the standard of proof to be applied in proceedings relating to an order is the civil one. However, as has been made clear in *McCann*, the civil standard is not simply on the balance of probabilities. Rather it is a flexible standard which is, at the lowest, on the balance of probabilities, but which can be, at the highest, very close or identical to beyond reasonable doubt. See for example the judgment of Lord Hope in *McCann*:

“There is now a substantial body of opinion that, if the case for an order such as a banning order or a sex offender order is to be made out, account should be taken of the seriousness of the matters to be proved and the implications of proving them. It has also been recognised that if this is done the civil standard of proof will for all practical purposes be indistinguishable from the criminal standard.” (paragraph 83)

8 My noble friend, Baroness Scotland, drew attention to this point very clearly in the House during both Second Reading and Committee stages [7<sup>th</sup> February 2007, col. 729 and 7<sup>th</sup> March 2007, col. 244]. As these are civil orders, akin to the Football Banning Orders mentioned by Lord Hope, it is appropriate that the standard of proof should be the flexible civil one. As a consequence, the High Court will make a judgement as to the appropriate standard of proof in relation to each issue to be determined. In relation to the first part of the test in clause 1(1)(a), given the serious nature of the conduct alleged, the court is likely to require the standard of proof to be close or identical to beyond reasonable doubt. In contrast, in relation to the matters in clause 4(2) and (3), the standard is likely to be on the balance of probabilities because the matters fall to the respondent to prove.

**Question 3: Please provide a more detailed explanation of the Government’s view that the power to make Serious Crime Prevention Orders is defined with sufficient precision to satisfy the requirement that interferences with Convention rights be “in accordance with the law” or “prescribed by law”.**

9 Under the Strasbourg jurisprudence there are two limbs to the term “prescribed by law” and “in accordance with the law”. Firstly, a measure must have a legal basis in national law. Secondly, the measure must reach certain quality of law requirements. In particular, it must be publicly accessible, so that a person can determine the laws to which they are subject, and sufficiently precise, so that a person can regulate his conduct in accordance with the law and foresee the consequences of his actions.

10 The first limb can be fulfilled in a number of ways such as inclusion in a statute, secondary legislation, EC law and the common law. The provisions on serious crime prevention orders meet this requirement by their inclusion in an Act of Parliament. The Strasbourg jurisprudence has accepted that inclusion in an Act of Parliament is a clear example of a way of fulfilling this requirement.



11 As regards the first part of the second limb (public accessibility), an Act of Parliament is a publicly accessible document which is available to all members of the public through publication and appearance on the Office of Public Sector Information website. The Act will also have been subject to Parliamentary scrutiny and all the attendant publicity. There will be at least the customary two month delay between Royal Assent and commencement to ensure that members of the public have had a chance to familiarise themselves with the law.

12 As regards the second part of the second limb (sufficiently precise), the Strasbourg court has accepted that, although a law must be sufficiently precise, it does not need to have absolute precision. A certain amount of flexibility is acceptable and will often be necessary and desirable to ensure that the law can adapt to changing circumstances and demands.

13 It is the Government's view that the Bill provides the necessary certainty while maintaining valuable flexibility. There are a number of reasons for this view. Firstly, the test for obtaining an order is set out on the face of the legislation, so that it is clear in what circumstances an order will be applied for and made by the courts. Secondly, the different elements of the test are defined and expanded upon elsewhere in the legislation.

14 Thirdly, the terms "involved in serious crime" and "involvement in serious crime", are expressly and extensively defined in clauses 2, 3 and 4. As a consequence a person will know the conduct that should be avoided. That definition includes "facilitate" and "facilitation" but those terms are readily understood and will be given their normal and natural meaning of "to make easier".

15 Fourthly, a "serious offence" is defined in clauses 2(2) and (5), and 3(2) and (5). The definition is based on the list of offences in Schedule 1. The definition allows the courts to be flexible by treating offences that do not appear in Schedule 1 as serious but this flexibility is important and valuable and not without limits. The flexibility is important and valuable because not all offences are routinely committed by organised criminals and the provisions need to be able adapt to constantly changing criminal behaviour. For example, the court will be able to treat someone who has been involved in a bar fight differently from someone who routinely uses violence to coerce and intimidate. The limits are provided by the Schedule itself because an offence must be sufficiently serious to be treated as if it were specified in Schedule 1. The Schedule provides certainty as to the level of seriousness needed to attract an order. Fifthly, there is specific guidance for the court on when a person should be taken to have committed an offence (see clause 4(1)).

16 The sixth reason is that, clause 5 provides examples of the types of condition which a court may include in an order. This provides an important element of certainty while still maintaining the flexibility necessary to allow the courts to deal appropriately with the case in front of them on its merits. The clause provides the court with a framework and establishes the outer limits of the types of condition that can be imposed.

17 Further, a key part of the Bill is that there are a number of safeguards which also act to guide and limit the court's powers. In particular the court cannot impose an order on a person under 18 (clause 6), an order cannot require oral answers (clause 11), an order cannot require the production of information subject to legal professional privilege (clause 12), an order



cannot require the production of excluded material (clause 13(1)), information subject to banking confidence is only available in certain circumstances (clause 13(2)), and an order cannot require a disclosure that is prohibited under some other enactment (clause 14).

18 Finally, if an order is made, the subject will always know whether their actions will breach the terms of the order and therefore lead to a criminal charge because the order will only be effective if the person has notice of it; clause 10 ensures that the person is only bound if he is represented at the hearing, or a notice of the order is served in person or by recorded delivery.

### *Data sharing and data matching*

#### **Question 4: Please provide more details of the safeguards envisaged in the data matching code of practice.**

19 For data matching the Bill imposes the following obligations:

-The Audit Commission will be under a mandatory duty to prepare a Code of Practice in relation to data-matching, and to keep this document under review. This is consistent with the Commission's existing practice, whereby it produces a Code on a voluntary basis and publishes this on its website, ensuring that the public has access to (and can therefore scrutinise) the activities of the Commission;

-There will be a mandatory duty on all those conducting, and participating in, data-matching exercises to have regard to the Code of Practice. The stated purpose of the current voluntary Code is to ensure that all those involved in data-matching comply with their obligations under the Data Protection Act and the general law. It is envisaged that this will also be a key objective of the statutory Code;

-The Commission must consult the bodies required to participate in data matching exercises, and other such bodies as it sees appropriate, before it prepares or alters the Code. In practice the Commission will always seek to consult the Information Commissioner (as it has done in the past). The Information Commissioner has written the Foreword in the Commission's current Code (2006).

20 The key principles that underpin the current voluntary Code are set out at the front of the document. These include:

-new areas of data matching will be undertaken on a pilot basis, and only where those exercises demonstrate a significant level of potential fraud will they be incorporated into the National Fraud Initiative (which is the name given to the Commission's data-matching exercise);

-personal data will only be obtained and processed in accordance with the Data Protection Act 1998;

-supplying bodies must inform data subjects that their personal data may be disclosed for the purposes of identifying possible cases of fraud;

-the software, techniques and algorithms used in data-matching are capable only of identifying potential fraud, and will be refined in light of practical experience;

-no assumption should be made that matches are fraudulent; this can only be determined through further investigation by the relevant body;

-the data supplied by bodies should be the minimum that is required in order to undertake data-matching exercises. In practice the Commission prescribes in detail the data required at each exercise in order to ensure data is adequate and relevant (but not excessive);

-data should be of a good quality and accurate;

-data should be destroyed promptly once it is no longer required;

-data should not be further disclosed unless there is specific legal authority for doing so;

those involved in data-matching exercises should ensure that proper security arrangements are in place for handling and storing data. The Code sets out the minimum required security standards.

21 In addition, the current Code lays down specific requirements under the following headings:

*Governance arrangements*

-This imposes a requirement for there to be a named Senior Responsible Officer at each participating body who will oversee the exercise and ensure staff are suitably trained.

*Requirements for fair collection and disclosure of data*

-This sets out the key requirements of the Data Protection Act for the provision of notices to those whose data will be matched, and the extent of any exemptions relied upon.

*Quality and transmission of data*

-This deals with the need for checking accuracy of data before submission, and the appropriate security standards for transmission of data to and from the Commission.

*Output control*

-This lays down the requirements for deletion of data when no longer needed.

*Access control*

-This sets out the requirement for strict access authorisation procedures to named individuals only, under the control of the Senior Responsible Officer.

22 The Audit Commission proposes that these principles and requirements also form the basis of any future Code, made under the new provisions, suitably adapted where necessary in the light of the final statutory framework.

*Reverse onus provisions***Question 5: Please provide the Government's reasons for its view that it is fair and reasonable to place the legal burden on the defence in clauses 45 and 46 of the Bill.**

23 The defences provided in clauses 45 and 46 were proposed by the Law Commission in their Report "Inchoate Liability for Encouraging and Assisting Crime" on which Part 2 of the Bill is based. That Report recommended that a defendant seeking to rely on either of these defences would, in each case, have to prove that, on the balance of probabilities, he has acted reasonably. The Government has followed that recommendation.

24 The defence in clause 45, acting to prevent the commission of offence etc, extends to all the offences in Part 2. The prosecution will already have proved before the defence is raised that the defendant has done something to assist or encourage an offence intending or believing that it will be committed. The burden on the defendant is for him to prove that he acted for the purpose of preventing crime, or limiting harm, and that it was reasonable for him to act as he did.

25 The defence in clause 46, acting reasonably, only extends to the offences in clauses 40 and 41, the offences of belief. The prosecution will already have proved that the defendant has done something to assist or encourage an offence believing that it will be committed. The burden on the defendant is for him to prove that it was reasonable for him to act as he did in the circumstances which he knew or believed to exist.

26 In both cases, only the defendant will be in a position to explain why he acted as he did, and why it was reasonable for him to do so. These particular circumstances justifying his behaviour will be peculiarly within his own knowledge. As with all cases where the burden of proof is on the defendant, the standard of proof will be on the balance of probabilities.

27 We consider that it is fair and reasonable to impose a legal burden in the context of the defences in clauses 45 and 46. The burden of proving all the elements of the offence falls on the crown, whereas the defence turns on facts which are peculiarly within the knowledge of the defendant, and therefore very difficult for the prosecution to disprove. It is well established in case law that there are situations in which it is fair and reasonable to put a legal burden on defendants, where these criteria are taken into account. We consider this is such a situation and that the defences are compatible with Article 6.

## Bills and other documents reported on by the Committee (Session 2006-07)

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\*indicates a Government Bill

**Bills which engage human rights and on which the Committee has commented substantively are in bold**

<i>BILL TITLE</i>	<i>REPORT NO</i>
Bournemouth Borough Council Bill	2nd
<b>Concessionary Bus Travel Bill*</b>	<b>3rd</b>
Consolidated Fund Bill*	2nd
Consolidated Fund (Appropriation) Bill*	11th
<b>Consumers, Estate Agents and Redress Bill*</b>	<b>2nd and 11th</b>
<b>Corporate Manslaughter and Corporate Homicide Bill*</b>	<b>2nd</b>
Crossrail Bill*	2nd
Digital Switchover (Disclosure of Information) Bill*	2nd
<b>Fraud (Trials without a Jury) Bill*</b>	<b>2nd</b>
Further Education and Training Bill*	2nd
Greater London Authority Bill*	2nd
Income Tax Bill*	2nd
Investment Exchanges and Clearing Houses Bill*	2nd
<b>Justice and Security (Northern Ireland) Bill*</b>	<b>5th</b>
<b>Legal Services Bill*</b>	<b>3rd</b>
<b>Local Government and Public Involvement in Health Bill*</b>	<b>11th</b>
London Local Authorities Bill	2nd
London Local Authorities and Transport for London Bill	2nd
Manchester City Council Bill	2nd
<b>Mental Health Bill*</b>	<b>4th</b>
National Trust (Northern Ireland) Bill	2nd
Northern Ireland (St Andrews Agreement) Bill*	2nd
<b>Offender Management Bill*</b>	<b>3rd</b>
Parliament (Joint Departments) Bill*	11th
Planning-Gain Supplement (Preparations) Bill*	2nd
Pensions Bill*	2nd
<b>Serious Crime Bill</b>	<b>12th</b>
<b>Sexual Orientation Regulations</b>	<b>6th and 11th</b>
Statistics and Registration Service Bill*	2nd
<b>Tribunals, Courts and Enforcement Bill*</b>	<b>2nd, 5th and 11th</b>
<b>Welfare Reform Bill*</b>	<b>2nd and 11th</b>
Whitehaven Harbour Bill	2nd