

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:

To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

Current Membership

Viscount Bledisloe
Lord Goodlad
Lord Holme of Cheltenham (Chairman)
Lord Lyell of Markyate
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Declaration of Interests

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Publications

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Serious Crime Bill

Introduction

1. The Committee is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. In carrying out the former function, we regard our main task as being to identify questions of principle that arise from proposed legislation and which affect a principal part or parts of the constitution.
2. Part 1 of the Serious Crime Bill seeks to establish a new legal regime for restricting the activities of those convicted, or suspected of, engaging in serious criminal activities. It is not part of our remit to comment on the merits of this proposal as those will be for the House as a whole to assess. **We do, however, draw these measures to the attention of the House as relating to the constitutional principle in favour of liberty of the subject.**
3. Professor A.V. Dicey, writing in 1914, said:

“The right to personal liberty as understood in England means in substance a person’s right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restraint is in England *prima facie* illegal and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it”.¹

The growth of civil orders to prevent crime

4. Since Dicey’s heyday, there have been inroads into the sphere of personal liberty in the sense that he described it. However, until relatively recent times, criminal law was in practical terms the only legal mechanism to punish criminal activity. Recognising the risk of miscarriages of justice and the wrongful deprivation of the liberty of the subject, our constitutional arrangements have long included a range of procedural and substantive protections in the criminal justice system. These include: trial by jury for serious offences (often regarded as having its roots in the Magna Carta); a burden and standard of proof requiring prosecuting authorities to prove their case beyond all reasonable doubt; and a prohibition on hearsay evidence.
5. The role of civil courts has historically been to intervene to grant an injunction only where the defendant had committed a wrongful act which he was likely to repeat; and then only to restrain a repetition of that act. Over the past 20 years, public policy has increasingly reflected the view that criminal prosecutions and sentences alone may be an inadequate legal response to criminal and other unacceptable behaviour. The statute book now contains a growing number of examples of a different model: powers

¹ *Introduction to the Study of the Law of the Constitution*, 10th edition, London: Macmillan, 1959, with an introduction by E.C.S. Wade Q.C., pp 207–08.

enabling individuals or public authorities to seek civil orders from a variety of courts to prohibit undesirable behaviour, backed by criminal sanctions if the subject of the order breaches the order.

- The Company Directors Disqualification Act 1986 created a civil remedy of disqualification, which enabled the court to prohibit a person from acting as a director; breach of such an order is subject to criminal sanction.
 - Part 5 of the Criminal Justice and Public Order Act 1994 created a power for police to request that a local authority make an order to prohibit trespassory assemblies which could result in serious disruption of the life of a community or cause damage; breach of an order made under these provisions may result in criminal prosecution.
 - Part 4 of the Family Law Act 1996 conferred powers to make residence orders (requiring a defendant to leave a dwelling house) and non-molestation orders (requiring a defendant to abstain from threatening an associated person); criminal sanctions are available for disobedience to these orders.
 - The Protection from Harassment Act 1997 created a criminal offence of harassment (section 1), but section 3 also created a civil remedy, enabling individuals to apply for an injunction in the High Court or a county court to restrain another person from pursuing conduct which amounts to harassment, and breach of such an order was made a criminal offence.
 - The Crime and Disorder Act 1998 created anti-social behaviour orders (ASBOs); local authorities were empowered to seek orders from the magistrates' court where a person acted "in a manner that caused or was likely to cause harassment, alarm or distress" (section 1). The Act also created sex offender orders; a chief officer of police was given power to seek such an order where a person is a sex offender and that person acts "in such a way as to give reasonable cause to believe that an order under this section is necessary to protect the public from serious harm from him" (section 2).
 - The Football (Disorder) Act 2000 created "banning orders", designed to prevent known football hooligans from causing further trouble at home and abroad. Breach is subject to criminal penalty.
 - The Anti-social Behaviour Act 2003 amended Part 8 of the Housing Act 1996 to give powers to housing authorities to seek ASBOs.
 - Part 2 of the Sexual Offences Act 2003 (which repealed the Sex Offenders Act 1997) created "sexual offences prevention orders", "foreign travel orders" and "risk of sexual harm orders".
 - The Prevention of Terrorism Act 2005 created control orders "against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism" (section 1) and "a person who, without reasonable excuse, contravenes an obligation imposed on him by a control order is guilty of an offence" (section 9).
6. The character of ASBOs was considered for the first time by the Appellate Committee of the House of Lords in *R. (on the application of McCann) v Manchester Crown Court* [2002] UKHL 39. Their Lordships accepted that ASBOs should properly be classified as civil rather than criminal proceedings and that the making of an ASBO did not entail the determination of a criminal charge. Lord Hope stated "they do not involve the bringing of a

charge because the purpose of the procedure is to impose a prohibition, not a penalty” (paragraph 68). The normal consequence of an order being regarded as civil rather than criminal is that the burden of proof placed upon those seeking an order is the civil standard (balance of probabilities) instead of the criminal standard (beyond reasonable doubt); but the House of Lords held that, for reasons of fairness, the courts should apply the standard of “being satisfied so that they were sure”. Their Lordships held that hearsay evidence was admissible (in contrast to criminal proceedings where it is not admissible).

7. The courts have also considered the character and lawfulness of control orders made under the Prevention of Terrorism Act 2005. The Court of Appeal held that an order which confined a person to a small flat for 18 hours a day amounted to a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights (*Re JJ* [2006] EWCA Civ 1141). The Serious Crime Bill confers order-making powers on courts that are in several respects even broader than those created by the 2005 Act.

Serious Crime Prevention Orders

8. Part 1 of the Serious Crime Bill adopts the model described above, of creating a power to seek a civil injunctive order—in the form of a Serious Crime Prevention Order (SCPO)—disobedience of which is subject to criminal sanctions. SCPOs may be sought against individuals, as well as companies and limited liability partnerships (clause 29), other partnerships (clause 30) and unincorporated associations (clause 31).
9. The Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions, the Director of the Serious Fraud Office and the Director of Public Prosecutions for Northern Ireland may apply to the High Court or the Crown Court for a SCPO. The court making a SCPO must be “satisfied that a person has been involved in a serious crime” and it must have “reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime” (clause 1). “Being involved” in serious crime is given a wide meaning by clause 2—as well as committing a serious offence, involvement may include situations where a person “has facilitated the commission by another person of a serious offence in England and Wales” or “has conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence in England and Wales (whether or not such an offence was committed)”. **We draw to the attention of the House the fact that the far-reaching restrictions of a SCPO may be placed on a person against whom no criminal proceedings have been instituted or who has been convicted of no criminal offence. Moreover, the restrictions which can be imposed are not limited to conduct forming part of the particular type of crime which has been proved, by civil standards, against the defendant. ASBOs and other types of control order that now exist on the statute book generally deal with small-scale anti-social behaviour and have little impact on third parties associated with the subject of those orders. SCPOs will have a much wider reach.**
10. The constraints imposed by a SCPO may be wide and deep and are capable of having a considerable impact on third parties. In relation to individuals, clause 5 gives the following as illustrations of the areas of activity that a SCPO may constrain:

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

In relation to bodies corporate, partnerships and unincorporated associations, a SCPO may relate to the following:

- financial, property or business dealings or holdings of such persons;
 - the types of agreements to which such persons may be a party;
 - the provision of goods or services by such persons;
 - the premises to which such persons have access;
 - the use of any premises or item by such persons;
 - the employment of staff by such persons.
11. SCPOs may relate to a “private dwelling (including, for example, prohibitions or restrictions on, or requirements in relation to, where an individual may reside)” (clause 5(6)). An SPCO may also impose “requirements to answer questions, provide information or produce documents to law enforcement officers” (clause 5(5)).
12. Clause 5 does not provide a definition of the types of restrictions and prohibitions that may be contained in an order but merely gives “examples” of the types of prohibitions, restrictions or requirements that may be imposed by the court. Moreover, clause 5(7) makes it plain that:
- “The prohibitions, restrictions or requirements that may be imposed by serious crime prevention orders include prohibitions, restrictions or requirements 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).”
- The House will wish to consider whether clause 5 as currently drafted provides sufficient legal certainty, which is a key element of the rule of law.**
13. Schedule 1 provides a list of “serious offences”. These are offences relating to drugs, people and arms trafficking, prostitution and child sex, money laundering, fraud, corruption and bribery, counterfeiting, blackmail, intellectual property crimes, and environmental crimes (including, perhaps surprisingly, fishing for salmon, trout and freshwater fish with prohibited implements contrary to section 1 of the Salmon and Freshwater Fisheries Act 1975). The court is given a discretion to treat other offences, not expressly listed in schedule 1, 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 for the purposes of the application or matter as if it were so specified” (clause 2(2)(b)). **It must be open to doubt**

whether this circular definition provides a sufficiently firm legal basis for the making of orders which may place onerous restrictions on a person. The constitutional principle of the rule of law and legal certainty requires a greater degree of clarity about the ambit of SCPOs than is provided for by this clause.

14. The bill does provide a number of procedural and substantive limits on the use of SCPOs. Nobody under the age of 18 may be subject to a SCPO (clause 6). Third parties have rights to make representations before a SCPO is made (clause 9). Notice must be given of the application to make a SCPO and the person must be legally represented (clause 10). The right to silence is protected (clause 11), as is legal professional privilege (clause 12) and there are restrictions on compelling the production of certain material and banking information (clause 13). A right of appeal to the Court of Appeal from a High Court or Crown Court decision relating to a SCPO is created (clauses 23–24). **The House will wish to consider whether these limits and protections are sufficient, given the potential for SCPOs gravely to curtail personal liberty—including that of people who have been convicted of no criminal offence.**
15. In contrast to some of the examples of civil injunctive orders backed by criminal sanctions surveyed in paragraph 5 above, the bill expressly states that the standard of proof is “the civil standard of proof” (clauses 33(2) and 34(2)). **Given the gravity of the potential restrictions that may be placed on a person subject to a SCPO, the House may wish to consider whether the requirement of proof on the balance of probabilities is a sufficiently high degree of protection.** As we have noted above, the Appellate Committee in the *McCann* case held that a higher than normal standard was required (“being satisfied so that they were sure”) in relation to ASBOs.
16. Breach of a SCPO carries criminal sanction. Clause 25 provides for punishment in the form of a fine or up to 5 years imprisonment. Upon conviction, the court may order the forfeiture of anything in the possession of the subject of the order at the time of the offence which the court considers to have been involved in the offence (clause 26). An order may also be made for the winding up of a company or partnership (clause 27).
17. It is not for our Committee to consider whether the scope of SCPOs constitute a deprivation of liberty or amount to a criminal charge for the purposes of Article 5 and 6 of the European Convention on Human Rights. We simply note that the Appellate Committee’s ruling in the *McCann* case dealt with ASBOs and does not necessarily indicate that the courts will take the same approach to SCPOs. The issue here is whether a SCPO is simply a prohibition against conduct of the kind already committed by the defendant or amounts to a penalty depriving him of, or limiting him in, the exercise of his normal rights. Our concern is with constitutional principles. **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.**