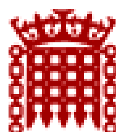
HOUSE OF LORDS LIBRARY  LIBRARY NOTE

The Serious Crime Bill [HL]

[HL Bill 27 of 2006–07]

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1. Introduction

The Serious Crime Bill [HL] [HL Bill 27 of 2006–07], was announced in the Queen's Speech on 15th November 2006[1], and was introduced in the House of Lords on 16th January 2007. It is due for second reading debate on 7th February 2007.

In their 2004 white paper, *One Step Ahead–A 21st Century Strategy to Defeat Organised Crime* (Cm 6167), the Home Office set out a new approach to deter and impede criminal gangs by introducing new powers to disrupt criminal activity and convict those responsible; by making better, more strategic use of existing powers; and by creating a Serious Organised Crime Agency. Some of the policy contained in the white paper was enacted by the Serious and Organised Crime and Police Act 2005, including the proposal for a Serious Organised Crime Agency, which was established in April 2006. Building upon the new strategy outlined in the white paper, the Home Office made further proposals in the green paper *New Powers Against Organised and Financial Crime* (Cm 6875) published in July 2006. The proposals are aimed at deterring those about to embark on organised crime and at making it harder for those already engaged in organised crime to operate effectively. The proposals include a new civil order designed to prevent criminal activities by imposing conditions on movements and transactions; improved data sharing between the public and private sectors; and new offences relating to encouraging or assisting a criminal act.

In the accompanying press release, the Home Secretary Dr John Reid said:

> Organised crime is an insidious scourge on our society and we want to ensure that the UK is tackling it at every level. The Serious and Organised Crime Agency is already doing much to halt the progress of these criminal networks and the dangers they present.
>
> The proposals we are putting forward are designed to prevent these criminals from operating on UK soil, to disrupt their activities, target them more effectively, and make it harder for them to evade detection. This includes those operating in the margins of criminal activity, and I welcome the Law Commission's recent work in this area.
>
> We also know that financial criminals are experts at exploiting and using information held by agencies, which is why we are focusing on improved data-sharing.
>
> We are determined to bear down on the people who are engaged in organised criminal activity in the UK, and we believe that today's proposals will help to bring them to justice faster and more effectively.
>
> (Home Office, 'New Proposals to Disrupt Organised Criminals', press release: 17th July 2006)

[1] HL *Hansard*, 15th November 2006, cols. 2–4.

The Government invited responses to specific questions posed in the green paper by 17th October 2006, and published a summary of responses in November 2006[2]. They received 118 responses, mainly from the police, business/commercial interest, and from academic/professional associations.

The Law Commission's work mentioned by the Home Secretary in the green paper press release refers to the review of the laws relating to complicity, including the doctrine of joint venture, incitement and innocent agency. The Law Commission published their first report, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300: Cm 6878) in July 2006, just prior to the green paper. The Commission's recommendations on inchoate offences are intended to deter people from encouraging or assisting others to commit crimes, irrespective of whether the crime is subsequently committed. The Commission are due to publish a second report on secondary liability in March 2007.

The majority of provisions contained in the Serious Crime Bill are based on the green paper and the Law Commission's report, but those relating to the powers of Revenue and Customs (clause 75, Schedule 11) are based on the consultation document *HM Revenue and Customs and the Taxpayer: Modernising Powers, Deterrents and Safeguards* (March 2006). This consultation was the second phase of a programme designed to review the powers of the new Department. The deadline for submitting comments was 23rd June 2006, and the Department issued a summary of the 58 responses in December 2006[3]. In addition, the provisions of the Bill relating to the abolition of the Assets Recovery Agency were announced in the House of Lords in a written ministerial statement in January 2007[4].

The Bill itself is divided into four parts, and contains 82 clauses and 13 Schedules:

> Part 1 creates Serious Crime Prevention Orders, a new civil order aimed at preventing serious crime. These orders will be used against those involved in serious crime and the purpose of their terms will be to protect the public by preventing, restricting or disrupting involvement in serious crime. They will be made on application to the High Court, or the Crown Court upon conviction, and breach of the order will be a criminal offence. The Bill provides for rights of appeal and variation or discharge of the order…
>
> [Part 2 of the] Bill abolishes the common law offence of incitement and in its place creates new offences of intentionally encouraging or assisting crime and encouraging or assisting crime believing that an offence, or one or more offences, will be committed. The Bill contains defences (where an offence has been committed in order to prevent crime or limit harm, and where the encouragement or assistance is considered to be reasonable in the circumstances) and an exemption from liability where the offence encouraged or assisted was created in order to protect a category of people (and the person doing the encouragement or assistance falls into that category).

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[2] Home Office, *New Powers Against Organised and Financial Crime–A Summary of Responses* (November 2006).

[3] HM Revenue and Customs, *HM Revenue and Customs and the Taxpayer: Modernising Powers, Deterrents and Safeguards–A Consultation on the Developing Programme of Work: Responses to the March 2006 Consultation Document* (December 2006).

[4] HL *Hansard*, 11th January 2007, col. 19WS.

> Part 3 is divided into 3 chapters. Chapter 1 makes provisions for the prevention of fraud. Chapter 2 makes a number of amendments to the Proceeds of Crime Act 2002. These transfer certain functions of the Assets Recovery Agency to the Serious Organised Crime Agency and other bodies; extend the powers of civilian financial investigators operating under that Act; provide investigation powers under Part 8 in respect of the cash forfeiture regime under Chapter 3 of Part 5 of that Act and powers in Part 8 to force entry in the execution of search warrants issued and executed in Scotland. Chapter 3 extends powers to officers of Her Majesty's Revenue and Customs.
>
> Part 4 deals with miscellaneous and general provisions within the Bill, including the making of orders under the Bill.
>
> (Serious Crime Bill [HL] 2005–06, *Explanatory Notes*)

In the press notice accompanying the introduction of the Bill in the House of Lords, the Home Office Minister Vernon Coaker said:

> Serious crime is a menace to our society. It brings misery to the lives of those it touches and the Government is determined to do everything possible to prevent it, to detect it and to make sure that criminals do not benefit from it.
>
> The new measures focus on critical aspects such as detecting, disrupting and preventing serious crime and build on existing legislation. For example, the new Serious Crime Prevention Orders will allow the courts to impose restrictive conditions on those involved in serious crime, making it very difficult for them to operate.
>
> We are committed to providing the best possible tools for our law enforcement agencies to ensure they stay one step ahead of those who commit serious crime and these tough new measures will strengthen their ability to crack down on criminals and disrupt their operations.
>
> (Home Office, 'New Powers to Tackle Serious Crime – Home Office Publishes Serious Crime Bill', press release: 17th January 2007)

Most of the Bill applies to England and Wales only, although some provisions also extend to Scotland and Northern Ireland or extend to Scotland or Northern Ireland only[5].

The House of Lords Constitution Committee published a brief report on the Serious Crime Bill for the second reading debate in the House of Lords, focusing on serious crime prevention orders (HL 41, 2006–07, 2nd February 2007).

This House of Lords Library Note looks at some of the key issues raised by the Serious Crime Bill. To date, none of the key pressure groups have produced written responses to the Bill.

[5] See clause 80 for further details, and pages 2–3 of the *Explanatory Notes*.

2. Serious Crime Prevention Orders

In March 2004, the Home Office published the white paper *One Step Ahead–A 21st Century Strategy to Defeat Organised Crime* (Cm 6167), outlining a new way of tackling organised crime. In particular, they envisaged policies that would go beyond the traditional focus of law enforcement operations and would prevent crime from happening in the first place. The resulting legislation, the Serious and Organised Crime and Police Act 2005, made provision, among other matters, for the establishment of the Serious Organised Crime Agency in April 2006. The Home Office green paper *New Powers Against Organised and Financial Crime* (Cm 6875) published in July 2006, builds upon the new strategy outlined in the white paper and says:

> In tackling organised crime, law enforcement is all too often faced with the choice of prosecution or no action. We have been working with law enforcement to identify possible new tools which could help prevent crime, examining in particular the sort of range available to agencies dealing with fraud and regulators.
>
> The widest range of such tools, covering administrative, civil and criminal remedies, tends to rest in the hands of some of the newer agencies like the Financial Services Authority. This wide range of potential disposals gives considerable flexibility and arguably increases the likelihood of voluntary settlement with those subjected to investigation. The purpose of the disposals includes preventing future harms and redressing past ones.
>
> (page 28)

The green paper points out:

> This approach reflects a general trend in regulation, exemplified in the Hampton Review[6], which stressed the importance of a risk based approach, targeting the more invasive regulatory tools in the areas where breaches are most likely.
>
> In a parallel process, successive Governments over recent years have introduced a new category of civil orders against individuals for harm or crime prevention purposes. There are a range of such orders, covering areas like anti-social behaviour, sexual offences, restraining orders and football banning orders. As Lord Steyn has noted [in *R (McCann)* v *Manchester Crown Court* [2002] UKHL 39]:
>
>> "The unifying element is ... the use of a civil remedy of an injunction to prohibit conduct considered to be utterly unacceptable, with a remedy of criminal penalties in the event of disobedience".
>
> (page 28)

[6] Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (March 2005).

The orders referred to are civil orders:

> As civil orders, civil rules apply, notably a different regime for disclosing material to the defence and greater use of 'hearsay' evidence. For example, professional witnesses like police officers or council officials are able to testify to anti social behaviour in cases where neighbours or other members of the public are too intimidated to do so.
>
> (page 29)

According to the green paper while such orders are available to tackle anti-social behaviour and certain crimes, relatively little is available, in comparison, to tackle organised crime:

> [The Serious Organised Crime Agency] and police forces are developing a range of regulatory and other responses to make organised crime more difficult to commit. The powers in [the Proceeds of Crime Act 2002] and the new Financial Reporting Orders in [the Serious Organised Crime and Police Act 2005] have considerable potential for disrupting convicted criminals' ongoing criminal finances.
>
> [The Serious Organised Crime Agency] is working hard with colleagues in the National Offender Management Service and the Immigration and Nationality Directorate to ensure full use is made of existing probation and immigration powers to target organised criminals who are on licence or potentially liable to immigration action.
>
> In addition, some police forces have developed approaches to using other administrative powers (e.g. planning, health and safety) against organised crime groups, working in partnership with local authorities and other regulators. But these approaches tend to be piecemeal and rely heavily on individual relationships. The use of such powers must obviously fall within the normal framework for action, if interventions are not to be seen as simple harassment.
>
> Moreover, these powers all have weaknesses. They are overwhelmingly focused on individual offenders. Most can only be used against offenders who have been convicted and only apply to the period of their sentence. Immigration powers obviously only apply to those who are subject to immigration control.
>
> (page 29)

The Government believe that the gap in legal mechanisms could be filled by serious crime prevention orders: "The purpose of the order would not be punitive, but to impose binding conditions to prevent individuals or organisations facilitating serious crime, backed by criminal penalties for breach" (page 29). This means that the conditions attached to the order must be designed to prevent harm, as if they are punitive, the order will be considered to be criminal and will therefore "attract the

additional protections article 6 of the ECHR[7]" (page 32). Article 6 of the Convention deals with the right to a fair trial.

The green paper proposes that serious crime prevention orders should not only be applicable to individuals:

> A unique feature of the orders we are proposing is that they should be capable of being imposed not only on individuals but also on organisations, for example companies or voluntary associations.
>
> The range of possible restrictions would be broad, depending upon what is necessary and proportionate in each case. They might include restrictions on how the enterprise carries out its business, it could require the removal of certain directors or office holders, or in extreme circumstances it could require the dissolution of an entity altogether. We also believe the court should be able to authorise the compulsory purchase of property or assets where this is necessary to prevent serious crime, and in the most serious cases to impose new office holders or a court ordered administrator at the entity's own expense. All the restrictions would, of course, have to be proportionate to the harm they were seeking to prevent.
>
> These sort of orders reflect recent trends in regulation of sensitive sectors. Government requires various sectors of the economy to be regulated where there is a pressing public interest in this, an interest which will often include the prevention of crime, but will also extend to consumer protection, public health and avoidance of systemic risks.
>
> Organised crime operates in a highly flexible manner. For some criminal activities (for example money laundering), particular sectors are especially vulnerable and are hence regulated. But many activities necessary to facilitate crime take place in sectors which are currently unregulated, and imposing regulation on them simply in order to catch the tiny minority of operators who are engaged in serious crime risks being disproportionate.
>
> These orders therefore would amount to a highly targeted imposition of controls, restrictions and obligations on entities which are already known to be supporting crime. In addition, however, these orders would enable the authorities to tackle the root cause of the problem where there is criminal infiltration of a particular entity. Any number of prosecutions cannot stop this infiltration where those convicted are simply replaced in the suborned organisation.
>
> (page 34)

[7] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms.

These proposals are based on the experience in the United States of America with Civil Racketeer Influenced and Corrupt Organisations[8] provisions:

> Civil RICO is an exceptionally broad power. USC §1964(a) sets out procedures for orders:
>
> > "including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person...or ordering dissolution or reorganisation of any enterprise, making due provision for the rights of innocent persons".
>
> From 1970, the Teamsters Union had had over 340 officers convicted for mafia related crimes, but these prosecutions altered nothing in the mafia domination of parts of the union, as convicted individuals were simply replaced. Only when civil measures began to be taken to introduce court ordered administrators into particularly corrupt 'locals' (union branches) did the threat of mafia influence begin to be tackled effectively.
>
> (Home Office, *New Powers Against Organised and Financial Crime* (July 2006), pages 34–35)

The Home Office published a summary of responses to the green paper in November 2006:

> The majority of respondents agreed that the creation of a flexible civil order, as proposed, would provide a useful tool to law enforcement in their fight against serious crime. There was concern from some of those who responded that any such order should be fully compliant with the European Convention on Human Rights in the terms it imposed on individuals. The Government is committed to balancing the rights of the victims of organised crime with those upon whom an order might be imposed in a way which is consistent with the Convention. Only the courts will be able to grant an order and, as public authorities for the purposes of the Human Rights Act, they will only impose such conditions as are compliant with the Convention.
>
> (Home Office, *New Powers Against Organised and Financial Crime – A Summary of Responses* (November 2006), page 7)

In relation to the kinds of conditions that might be attached to serious crime prevention orders, the summary states:

> … Respondents were concerned that, if the orders are to be both workable and proportionate they would need to be tailored specifically to the individual or organisation concerned and form a part of an intelligence-led and targeted approach to a particular problem
>
> (page 21)

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[8] For further information on RICO see Charles Doyle, *RICO: A Brief Sketch* (11th July 2006), CRS Report for Congress; and G. Robert Blakely and Brian Gettings, 'Racketeer Influenced and Corrupt Organisations (RICO): Basic Concepts–Criminal and Civil Remedies', in 53 Temp. L. Q. 1009 1980.

On the subject of the types of situations in which the orders could be useful, the summary says:

> A large proportion of those responding … felt that this option would be useful to law enforcement and could readily provide instances in which they thought the use of [a Serious Crime Prevention Order] would bring about a more positive outcome than was currently possible. The sorts of situations envisaged included imposing orders:
>
> - on owners of saunas or restaurants which have knowingly employed trafficked persons;
> - during investigations into very lengthy or complex fraud cases; or
> - where individuals regularly travel to particular locations to conduct illegal activity such as sourcing drugs, money laundering or sex tourism.
>
> This is not to say, though, that there were not concerns raised with regard to the orders and whether there would be the appropriate safeguards in place to ensure that they were not used oppressively or unreasonably by law enforcement.
>
> (page 22)

Turning to the provisions of the Serious Crime Bill [HL], Part 1, clauses 1 to 38 and Schedules 1 and 2, deals with serious crime prevention orders. Power to make such orders is given to the High Court by clause 1, where the Court is satisfied that a person has been involved in a serious crime, either in England and Wales or elsewhere in the world, and where the Court has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime in England and Wales (clause 1(1)). The order may contain such prohibitions, restrictions or requirements and such other terms as the Court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the subject of the order in serious crime (clause 1(3)). The term "serious crime" is defined in clause 2(1) as a serious offence committed in England and Wales, the facilitation of the commission by another of a serious offence in England and Wales, or conduct by the subject of the order likely to facilitate the commission by himself or another of a serious offence in England and Wales, whether or not such an offence was committed. A "serious offence" is one contained in the list set out in Part 1 of Schedule 1, or is an offence which is sufficiently serious that the Court considers it should be treated as if it were set out in that list (clause 2(2)). The list in Part 1 of Schedule 1 contains references to drug trafficking, people trafficking, prostitution and child sex, money laundering, fraud, corruption and bribery, counterfeiting, blackmail, intellectual property, environment and inchoate offences.

Examples of the types of conditions that a serious crime prevention order may contain are set out in clause 5 of the Bill. The examples do not limit the type of condition that

may be made by such an order, and include prohibitions, restrictions or requirements in relations to:

- places other than England and Wales;
- 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; and
- an individual's travel.

Similar conditions are set out in relation to bodies corporate, partnerships and unincorporated associations (clause 5(4)). General safeguards in relation to orders are set out in clauses 6 to 10, and include provisions on the minimum age of subjects, classes of applicants making orders, and the rights of third parties to make representations.

Safeguards on the use of orders to obtain information are contained in clauses 11 to 15. For example, clause 11 states that a serious crime prevention order may not require a person to answer questions, or provide information orally. Other clauses deal with legal professional privilege, excluded material under section 11 of the Police and Criminal Evidence Act 1984, banking information, and others. The duration, variation and discharge of orders is provided for in clauses 16 to 18.

Although the main route for making serious crime prevention orders is by application to the High Court, clauses 19 to 22 extend the civil jurisdiction to impose an order to the Crown Court where a person has been convicted of a serious criminal offence. Additional rights of appeal from the High Court (clause 23) and appeals from the Crown Court to the Court of Appeal (clause 24) are also provided for.

Mechanisms for enforcement are set out in clauses 25 to 28: A person who, without reasonable excuse, fails to comply with a serious crime prevention order commits an offence, and is liable, on summary conviction, i.e. in a Magistrates Court, to imprisonment for a term not exceeding twelve months or to a fine not exceeding the statutory maximum[9] or to both, and on conviction on indictment, i.e. in a Crown Court, to imprisonment for a term not exceeding five years or to a fine or to both (clause 25(1), (2)). Furthermore, a person convicted of an offence under clause 25 may be ordered to forfeit anything in his possession at the time of the offence which the Court considers to have been involved in the offence (clause 26(1)). Where a company, partnership or other relevant body has been convicted of an offence under clause 25, and where the applicant authority considers it to be in the public interest, the applicant authority may petition the Court for the winding up of the company,

[9] £5000 at the time of writing this Note.

partnership or relevant body (clause 27). Other clauses contain provision on particular types of companies, proceedings in the High Court and Crown Court, functions of applicant authorities, and others (clauses 29 to 38).

The House of Lords Constitution Committee report on the Serious Crime Bill draws attention to Part 1 of the Bill on serious crime prevention orders and it concludes 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 [serious crime prevention orders] represent and incursion into the liberty of the subject and constitute a form of punishment that cannot be justified in the absence of a criminal conviction.
>
> (House of Lords Constitution Committee report on the *Serious Crime Bill*, HL 41, 2006–07, para. 17)

3. Encouraging or Assisting a Crime

In 1993, the Law Commission published a consultation paper, *Assisting and Encouraging Crime–An Overview* (Consultation Paper No 131), in which they acknowledged that the current law relating to secondary and inchoate liability for encouraging and assisting others to commit crime was unsatisfactory, and proposed a new structure of statutory offences. In 2002, when the Commission reconsidered the subject, they took the responses to the consultation paper into account and published the first of two reports on 11th July 2006: *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300). The final report on secondary liability is due to be published in March 2007.

A brief explanation of the terms 'secondary liability' and 'inchoate liability' may be useful at this point. The Law Commission explain secondary liability as follows: "The area of criminal law that governs whether or not a person is guilty of an offence as an accessory is often described as the law of complicity and the liability of an accessory is often referred to as secondary liability" (Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (2006), page 3). Further elucidation is provided by Andrew Ashworth in *Principles of Criminal Law* (2006):

> The question of complicity arises when two or more people play some part in the commission of an offence … the criminal law regards offences involving more than one person as particularly serious—sometimes because they suggest planning and determination to offend and make it difficult for an individual to withdraw, and sometimes because group offences against an individual tend to be more frightening. There are, of course, different degrees of involvement in a criminal enterprise, and one of the main issues in the law of complicity is the proper scope of criminal liability: how much involvement should be necessary as a minimum.
>
> (page 410)

The Law Commission explains further:

> Secondary liability is a derivative form of liability in that D's liability derives from and is dependent on an offence committed by P. Although there are exceptions, the general principle is that, if P does not commit (or attempt to commit) the offence, D is not secondary liable.
>
> (Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (2006), page 3)

On inchoate offences, Ashworth writes:

> The word 'inchoate', not much used in ordinary discourse, means 'just begun', 'undeveloped'. The common law has given birth to three general offences which are usually termed 'inchoate' or 'preliminary' crimes—attempt,

> conspiracy, and incitement. A principle feature of these crimes is that they are committed even though the substantive offence (i.e. the offence it was intended to bring about) is not completed and no harm results.
>
> (Andrew Ashworth, *Principles of Criminal Law* (2006), page 444)

In their July 2006 report, the Law Commission proposed the creation of two new inchoate offences—encouraging or assisting a criminal act with intent, and encouraging or assisting a criminal act believing that an offence will be committed (Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (2006), page 8, and Part 5). In addition, their proposals included provision for the situation whereby a person provides encouragement or assistance believing that one of a number of different offences will be committed, but without the knowledge of exactly which one (page 9). The purpose of the new offences is to cure a defect in the law, whereby those who encourage a crime are instantly guilty of inciting the crime whether or not the offence takes place, but those who actively seek to assist a crime can only become guilty of assisting the crime if the offence is subsequently committed:

> Our recommendations are intended to deter people from encouraging or assisting others to commit crimes. Such conduct ought to be punished irrespective of whether the crime is subsequently committed. Increasingly the police, by the gathering of intelligence, can identify acts of encouragement or assistance before the crime is subsequently committed. Yet, at present the police may have to forego at least some of the advantages of intelligence led policing by having to wait until a crime is committed.
>
> (Law Commission, press release: 11th July 2006)

The Home Office green paper *New Powers Against Organised and Financial Crime* (Cm 6875), published after the Law Commission's report in July 2006, states:

> We are conscious of possible gaps in the criminal law as it applies to those who encourage and assist offences. This is particularly important in relation to organised crime where the relationships between those involved in offences are more complex and key players often go to great lengths to distance themselves from the actual commission of offences they have encouraged or assisted. The 2004 White Paper[10] highlighted a concern that the current law does not always provide a practical means of addressing peripheral involvement in serious crime and committed to review the law of conspiracy.
>
> (page 24)

The green paper goes on to comment on the Law Commission's report:

> The Government is very grateful to the Law Commission for the thorough and painstaking work they have done in this very complex area of the criminal law

[10] Home Office, *One Step Ahead–A 21st Century Strategy to Defeat Organised Crime* (March 2004: Cm 6167).

> and welcomes the recommendations in their report. It believes that the Law Commission proposals, if implemented, would help strengthen the criminal law …
>
> (pages 24–25)

The Government were particularly interested in canvassing opinion on whether the second offence proposed by the Law Commission of encouraging or assisting the commission of an offence believing that it will be committed or that one of a number of offences will happen but with no knowledge as to which one, should be widened "to cover those who might be able to claim not to have the degree of certainty implied in saying that they believe something would happen but who are nevertheless in a position where they know it is highly likely that it will or have a strong suspicion that this will be the case" (page 25). Although the majority of respondents to the green paper thought that it was right to criminalise this type of behaviour, opinions differed as to the exact behaviour that should be criminalised:

> Responses were split between those who felt that the offence should be restricted to those who "believe" that an "offence will" be committed (as suggested by the Law Commission) and those who thought it should be widened (as was suggested by the Government) …
>
> The main reasons put forward in favour of restricting the offence to "belief" were concerns about criminalising actions taken by legitimate businesses, concerns about overlaps with existing legislation (for example money laundering offences) and concerns about extending liability too far. Others thought an offence that went too wide would be difficult to prosecute. Some respondents set out their view that "belief" would not equate to certainty and would therefore sufficiently capture all behaviour that should be considered criminal.
>
> The main reason put forward in favour of widening the offence was a concern that "belief" would be difficult to prove. There was a concern that this could be given a narrow interpretation by the courts. As such several respondents put forward alternative suggestions including widening the offence to cover those with "reasonable grounds to believe", "suspicion" or "wilful blindness". Others concentrated on the use of the word "will" (i.e. belief that an offence will happen) and suggested this should be replaced with the word "may".
>
> Several respondents mentioned that although they would support the widening of the offence, they felt that it was important to ensure that the offence does not go too wide and should not criminalise individuals or firms where their actions are determined by legislation. An example given by one organisation responding was a financial institution that opens accounts for a person whom they believe might be involved in money laundering. In this situation the institution would report the suspicious transaction to the Serious Organised

> Crime Agency but would open further accounts so as to avoid tipping the suspect off. They thought it would be important to ensure this behaviour would not be caught by the new offences.
>
> (Home Office, *New Powers Against Organised and Financial Crime–A Summary of Responses* (November 2006), page 19)

The provisions relating to encouraging or assisting a crime are set out in Part 2 of the Serious Crime Bill [HL], and comprise clauses 39 to 60, and Schedules 3 and 4. The provisions relating to the new criminal offences would seem to be largely the same as those proposed by the Law Commission. The new offence of intentionally encouraging or assisting is set out in clause 39 of the Bill: A person commits an offence if he does an act capable of encouraging or assisting the commission of an offence and he intends to encourage or assist its commission. The second new offence is contained in clause 40, according to which a person commits an offence if he does an act capable of encouraging or assisting the commission of an offence and he believes that the offence will be committed and that his act will encourage or assist its commission. Provision is made by clause 41 in relation to encouraging or assisting offences believing one or more will be committed, it being immaterial whether the person has any belief as to which offence will be encouraged or assisted. Furthermore, a person may commit an offence under these provisions regardless of whether or not any offence capable of being encouraged or assisted by his act is actually committed (clause 44(1)).

Certain defences are available: A person is not guilty of an offence under clause 39, 40 or 41, if he proves that he acted for the purpose of preventing the commission of that offence or another offence or preventing or limiting the occurrence of harm and it was reasonable for him to act as he did (clause 45); a person is not guilty of an offence under clause 40 or 41 if he proves that he knew certain circumstances existed and that it was reasonable for him to act as he did in those circumstances (clause 46(1)); and a person is not guilty of an offence under clauses 40 or 41 if he proves that he believed certain circumstances to exist, that his belief was reasonable, and that it was reasonable for him to act as he did in the circumstances as he believed them to be (clause 46(2)).

Penalties are set out in clause 53, and include the provision that the maximum penalty for encouraging and assisting an offence of murder, whether under clauses 39, 40 or 41, will be life imprisonment, and the general rule that the maximum penalty available for an offence under these clauses will be the same as the maximum available on conviction for the relevant anticipated or reference offence (clause 53(2), (3)). The common law offence of inciting the commission of another offence is abolished by clause 54.

4. Information Sharing and Data Matching

According to the Home Office green paper *New Powers Against Organised and Financial Crime* (Cm 6875), published in July 2006, the new plan to tackle organised crime outlined in the March 2004 white paper *One Step Ahead–A 21st Century Strategy to Defeat Organised Crime*, and the resulting creation of the Serious Organised Crime Agency, "depends on a considerable improvement in the quality and use of our information about the [organised crime] threat" (*New Powers Against Organised and Financial Crime*, page 7). The green paper goes on to explain that:

> … Pilot exercises in the identity fraud arena and within [the Serious Organised Crime Agency] are throwing up striking examples of what can be done when public and private data is shared, with particular potential to reduce financial crime, money laundering and fraud. Pilot exercises within the insurance industry and analysis of fraud against the tax credit system are just two areas where closer scrutiny has revealed a much greater organised fraud component in what had previously been thought to be simple volume fraud.
>
> Whenever problems with data sharing crop up, the assumption is often that there are problems with the Data Protection Act 1998. In practice we have found no evidence that the Act places genuine obstacles in the way of sensible and proportionate data sharing. Excessive caution about the Act's provisions are a problem, as is the common fear that disclosure will have repercussions.
>
> A more significant problem we have identified is with public sector bodies and departments whose underlying powers do, or are perceived to, set unnecessary limits on data sharing within the public sector and beyond.
>
> (page 7)

The green paper goes on to outline current and hypothetical data sharing opportunities, as well as to discuss the legal mechanisms necessary to share and process data. In particular, the green paper emphasises the use of data sharing to investigate identity fraud, deceased persons fraud, sharing of information on fraudsters, the Audit Commission's National Fraud Initiative[11], data matching against money laundering and serious crime through suspicious activity reports, and data matching or mining to identify suspicious profiles (pages 12 to 23).

Responses to the green paper, published in November 2006, "were overwhelmingly in favour of more information sharing to prevent fraud, particularly across both the public and private sectors. Respondents cited problems with the existing data sharing gateways and so the Government intends to legislate to create a general power to allow cross-sector data-sharing on fraudsters to take place" (Home Office,

[11] The Audit Commission's National Fraud Initiative has run every year since 1998. The Initiative uses data matching techniques to tackle a range of fraud risks faced by the public sector. The latest survey is for 2004/05, and was published in May 2006.

New Powers Against Organised and Financial Crime – A Summary of Responses (November 2006), page 6). The summary of responses goes on to state that:

> The intention to move towards a situation where all applicants for public services should expect to have their details checked against a fraud prevention database was welcomed. Respondents were clear, though, that the proposed improvements in fraud prevention should be balanced by appropriate safeguards, including a high level of security for the sharing and warehousing of sensitive information and appropriate penalties for the wilful misuse of personal and sensitive data. We have worked closely with the Department of Constitutional Affairs and the Information Commissioner to ensure that the proposals are compliant with both the Data Protection Act and the Human Rights Act.
>
> (page 6)

The resulting provisions are contained in Chapter 1 of Part 3 of the Serious Crime Bill [HL]. Clause 61 provides that a public authority may, for the purposes of preventing fraud or a particular kind of fraud, disclose information as a member of a specified anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation (clause 61(1)). Clause 61 goes on to define the terms 'specified' and 'anti-fraud organisation', as any unincorporated association, body corporate or other person specified by an Order made by the Secretary of State, which enables or facilitates any sharing of information to prevent fraud or a particular kind of fraud or which has any of these functions as its purpose or one of its purposes (clause 61(8)). However, nothing in this provision authorises any disclosure of information which contravenes the Data Protection Act 1998 or is prohibited by Part 1 (communications) of the Regulation of Investigatory Powers Act 2000 (clause 61(4)).

Clause 62 of the Bill outlines the circumstances in which it will be an offence to disclose protected information. The penalties for prosecution for an offence under clause 62 are set out in clause 63. A new paragraph is inserted in Schedule 3 of the Data Protection Act 1998 by clause 64 of the Serious Crime Bill, to allow the processing of sensitive data through an anti-fraud organisation. Powers are given to the Audit Commission to carry out data matching exercises or to arrange for another organisation to do this on their behalf (clause 65, Schedule 6).

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