RESEARCH PAPER 04/88
2 DECEMBER 2004

The *Serious Organised Crime and Police Bill* – the new Agency; and new powers in criminal proceedings

Bill 5 of 2004-05

The Serious Organised Crime and Police Bill was published on 24 November 2004 and is due to be debated on second reading on Tuesday 7 December 2004.

The Bill would: establish the Serious Organised Crime Agency; give investigating authorities new powers to compel individuals to answer questions or produce relevant documents; formalise and add to the existing arrangements relating to "Queen's Evidence"; and introduce a power to impose financial reporting requirements post-sentence.

The Bill would also: make all offences arrestable; make search warrants more flexible; give Community Support Officers new powers; extend harassment laws to deal with animal rights extremists; bring in a new offence of incitement to religious hatred; and allow the police to impose conditions on protestors outside Parliament.

This Research Paper deals with the Serious Organised Crime Agency and the other measures to deal with organised crime in Parts 1 and 2 of the Bill, most of which derive from the White Paper, *One Step Ahead*. Other aspects are covered in Library Research Paper 04/89

Pat Strickland, Sally Broadbridge

HOME AFFAIRS SECTION

Tim Edmonds

BUSINESS AND TRANSPORT SECTION

HOUSE OF COMMONS LIBRARY

Recent Library Research Papers include:

04/72	The Defence White Paper: Future Capabilities	17.09.04
04/73	The *Mental Capacity Bill* [Bill 120 of 2003-04]	05.10.04
04/74	Social Indicators [includes articles: Renewable Energy; Summer Olympic and Paralympic Games - Facts and Figures 1896 to 2004]	08.10.04
04/75	The Treaty Establishing a Constitution for Europe: Part III	08.10.04
04/76	Unemployment by constituency, September 2004	13.10.04
04/77	The Treaty Establishing a Constitution for Europe: Part IV and Protocols	21.10.04
04/78	The *School Transport Bill* [Bill 162 of 2003-04]	25.10.04
04/79	The *Gambling Bill* [Bill 163 0f 2003-04]	28.10.04
04/80	Economic Indicators [includes article: The EU/US Airbus/ Boeing WTO Debate]	01.11.04
04/81	2004 US Presidential and Congressional election results	15.11.04
04/82	The collective responsibility of Ministers – an outline of the issues	15.11.04
04/83	Unemployment by Constituency, October 2004	17.11.04
04/84	Freedom of Information implementation	24.11.04
04/85	The Treaty Establishing a Constitution for Europe: Part II (The Charter of Fundamental Rights)	25.11.04
04/86	The *Railways Bill* [Bill 6 of 2004-05]	01.12.04
04/87	Economic Indicators, December 2004	01.12.04

Research Papers are available as PDF files:

- *to members of the general public on the Parliamentary web site, URL:* ***http://www.parliament.uk***
- *within Parliament to users of the Parliamentary Intranet, URL:* ***http://hcl1.hclibrary.parliament.u****k*

ISSN 1368-8456

Summary of main points

Part 1 of the Bill provides the legal basis for the Serious Organised Crime Agency, which is due to start work from 2006

The new Agency will bring together the National Criminal Intelligence Service (NCIS), the National Crime Squad (NCS), the investigative and intelligence work of Her Majesty's Customs and Excise (HMCE) on serious drug trafficking and the recovery of related criminal assets, and the Home Office's responsibilities for organised immigration crime.

The creation of the Agency was announced in February 2004, and proposals were published in March 2004 in a White Paper, *One Step Ahead: - a 21st Century Strategy to Defeat Organised Crime*.

SOCA will not be a police force, but will be staffed by civilians, who can be given police, customs and immigration powers as necessary.

Part 2 of the Bill includes new powers, similar to those already enjoyed by the Serious Fraud Office, for authorities investigating serious crimes to compel individuals to answer questions or produce relevant documents. These are subject to some restrictions as to what can be asked about and what use can be made of what is produced under compulsion.

Part 2 also formalises and adds to the existing arrangements relating to "Queen's Evidence", with the intention of encouraging more offenders to cooperate in investigations and prosecutions.

A new sentencing power will enable courts to require offenders to make regular reports about their finances. Existing arrangements for the protection of witnesses are also put on a statutory footing, supported by a new duty for public authorities to provide assistance and criminal sanctions against individuals who reveal information about protection arrangements.

The creation of SOCA has been widely welcomed and has cross party support. However, there were mixed views on the new powers in responses to the White Paper.

Other parts of the Bill are covered in Library Research Paper 04/89. In brief these will:

- make all offences arrestable, but only if particular reasons for arrest apply;
- make search warrants more flexible, allowing for multiple use and targeting offenders with multiple addresses;
- give Community Support Officers new powers, including searching detained people for dangerous articles and deterring begging;
- extend harassment laws to deal with animal rights extremists;
- introduce a new offence of incitement to religious hatred;
- and allow the police to impose conditions on protestors outside Parliament.

CONTENTS

I Introduction

The Serious Organised Crime and Police Bill was published on 24 November 2004 and is due to be debated on second reading on Tuesday 7 December 2004.

Parts 1 and 2 of the Bill, which are discussed in this paper, establish the Serious Organised Crime Agency; give new powers to compel individuals to answer questions or produce relevant documents; formalise and add to the existing arrangements relating to "Queen's Evidence"; and introduce a power to impose financial reporting requirements post sentence.

Parts 3, 4 and 5 of the Bill are discussed in Library Research Paper 04/89. Part 3 of the Bill provides new police powers. Under the provisions, all offences would become arrestable, rather than just the more serious ones, and search warrants would become more flexible. There are also new powers for Community Support Officers. Part 4 deals with public order offences. It introduces changes to harassment laws to deal with animal rights extremists; introduces a new offence of incitement to religious hatred; and allows the police to impose conditions on protestors outside Parliament. It also criminalises trespass on designated sites, including the Queen's private property. Part 5 contains miscellaneous provisions including police powers to seize uninsured vehicles.

The SOCA provisions of the Bill and provisions on financial reporting orders, witness protection, international obligations, and Proceeds of Crime will apply throughout the UK. The provisions relating to the investigatory powers of the Director of Public Prosecutions will extend to England Wales and Scotland. The Queen's Evidence provisions will extend to England, Wales and Northern Ireland.

Criminal law is a devolved matter in Scotland. Scottish ministers support the Bill and will seek the Scottish Parliament's approval of a "Sewel Motion" that it consents to Westminster enacting those provisions within that will establish a new UK Serious Organised Crime Agency (SOCA).[1] The Agency's operations in Scotland, and its relationship to Scottish ministers and agencies, are considered below.

II The Serious Organised Crime Agency

A. Background – Serious Organised Crime

Organised crime groups are essentially businesses. Their activities may include drug and people trafficking, financial and business fraud, intellectual property theft, counterfeiting, VAT and excise duty evasion.

---

1 "Serious Crime Legislation extends to Scotland", Scottish Executive Press Release 24 November

The Government announced that it would be establishing a Serious Organised Crime Agency on 9 February 2004, following a review of organised crime.[2] A White Paper followed at the end of March 2004,[3] which included the following definition, derived from that used by the National Criminal Intelligence Service: [4]

> For the purpose of this paper, we have taken the definition of organised criminals used by NCIS:
>
> "those involved, normally working with others, in continuing serious criminal activities for substantial profit, whether based in the UK or elsewhere."
>
> This captures the essential point that many organised crime groups are, at root, businesses and often sophisticated ones. In practice, most criminal groups exist on a spectrum of organisation. There is no clear cut-off point at which any group should be categorised as being involved in organised crime. But those at the top end of the spectrum pose a unique threat.

It is very difficult to accurately measure the scale of organised crime and there has been little work carried out on this topic, either in the UK or internationally.

The Home Office has launched a programme of research that will look at the economic and social costs of organised crime, the level of public concern about such crime and the size of the criminal market. Preliminary results suggest that the losses and harms caused by all forms of organised crime may be up to £40bn.[5]

The abuse of class A drugs, produced by or smuggled into the UK by organised criminals, has costs of at least £13bn a year[6]. Estimates suggest that up to 35 tonnes of heroin are smuggled into the UK each year, along with 45 tonnes of cocaine.[7]

It is estimated that in 2002/03, £7bn in revenue was lost from all forms of indirect tax fraud; much of this was the result of organised fraud activity.[8] National Economic Research Associates (NERA) has estimated the economic cost of all fraud to the UK at £14bn per year.[9]

---

2 HC Deb 9 February 2004 cc58-60WS

3 *One Step Ahead – A 21st century strategy to defeat organised crime*, Cm 6167, March 2004, http://www.homeoffice.gov.uk/docs3/wp_organised_crime.pdf

4 *One Step Ahead*, section 1.1

5 *One Step Ahead*

6 *One Step Ahead*

7 NCIS,*UK Threat Assessment 2003*

8 *One Step Ahead*

9 NCIS, *UK Threat Assessment 2003*,

The overall size of criminal proceeds in the UK is not known nor is the amount of money that is laundered. HM Customs and Excise have suggested that the annual proceeds from crime are in the region of £19bn to £48bn[10].

The Proceeds of Crime Act 2002 imposed an obligation on the regulated sector to submit Suspicious Activity Reports (SARs) to NCIS where they had knowledge or suspicion of money laundering activities. Since 2000 the number of SARs has been steadily increasing, with almost 95,000 submitted in 2003. There were 67,000 SARs submitted to NCIS in the first half of 2004, an increase of 55% on the first half of 2003[11]

B. The Serious Organised Crime Agency

The Serious Organised Crime Agency will be in operation from April 2006. It will carry out the responsibilities currently undertaken by:

- The National Criminal Intelligence Service (NCIS), which provides criminal intelligence to police forces, and has developed the National Intelligence Model, which has been rolled out through all 43 forces in England and Wales;
- the National Crime Squad (NCS), formed in 1998 to provide a national response to organised crime following recommendations by the Home Affairs Committee in a 1995 report;[12]

together with:

- the Home Office's responsibilities for organised immigration crime;
- the investigation and intelligence responsibilities of HM Customs and Excise in tackling serious drug trafficking and recovering related criminal assets.

HM Customs and Excise is itself merging with the Inland Revenue to form Her Majesty's Revenue and Customs[13], and a separate Revenue and Customs Prosecutions Office (RCPO) is to be formed under the *Commissioners for Revenue and Customs Bill* which was introduced in the Commons on 24 November 2004.[14] This follows a series of collapses of high profile prosecutions by HC Customs and Excise, which had led to a decision that the prosecution and investigation arms of customs should be separated. [15]

---

10 UK Threat Assessment 2003, NCIS
11 HL Deb 11/10/04 c19wa
12 Home Affairs Committee, *Organised Crime*, HC 18, 1994-95, 17 May 1995
13 HC Deb 17 March 2004 c 331
14 HC Deb 24 November 2004 c 102
15 See Library Standard Notes SNBT/2944 and SNBT/106, and forthcoming Research Paper on *Commissioners for Revenue and Customs Bill*

1. Governance and staffing

SOCA will be an executive Non Departmental Public Body, with a Board, Chairman and a Director General all appointed by the Secretary of State. The Chairman designate is Stephen Lander, former Director General of MI5, and the Director General designate is Bill Hughes, former Director of the National Crime Squad. Both appointments were announced in August 2004.[16]

SOCA will not be a police force. It will be staffed by around 4,500 civilians.. Those staff who transfer from precursor organisations will no longer automatically have the powers which went with their earlier offices, and those who transfer from the police will have their police officer status suspended. However, under clauses 38-45 of the Bill, the Director General can designate staff as having:

- the powers of a police constable;
- the customs powers of an officer of Revenue and Customs;
- the powers of an immigration officer.

The White Paper discussed the reasons for civilian staff with such powers, stating that the agency would draw on "a range of specialist and technical skills, from economists to linguists, from electronic engineers to forensic experts" with intelligence officers probably forming the largest single group.[17] It will also include financial investigators who will work closely with the Serious Fraud Office. The White Paper continued:

> These intelligence analysts and financial investigators are signs of the new face of law enforcement.
>
> In the past, 'support' or 'civilian' staff have sometimes appeared to enjoy a lesser status, or be seen as a cheaper alternative to 'real' police or enforcement officers. Fortunately, this attitude is now being left behind. The Government is clear that in future the route for promotion within the agencies dealing with organised crime will be open to all, subject only to the criterion of merit.

2. "Lawfully audacious"

Following pilots, where Crown Prosecution Service lawyers based in police stations have offered early advice on charging, the *Criminal Justice Act 2003* transferred responsibility for charging in all but the most straightforward of cases from the police to the CPS. The relevant provisions came into force in January 2004,[18] and have been implemented in

---

16 *Leading the fight against organised crime: Key SOCA posts announced,* Home Office Press Release 274/2004, 13 August 2004, http://www.homeoffice.gov.uk/n_story.asp?item_id=1056

17 *One Step Ahead,* section 4.2

18 section 28 *Criminal Justice Act 2004*, inserting new sections 37a-d in *the Police and Criminal Evidence Act 1984*

priority areas. *One Step Ahead* gave the success of these changes as evidence for the desirability of closer links between SOCA staff and prosecutors, although it rejected the idea of putting them together in the new agency because it wished to "ensure the independence of both groups". Advice from prosecutors would be crucial in fulfilling the Government's ambition that SOCA should be "lawfully audacious":[19]

> It is also crucial, however, that organisations do not adopt an over-defensive interpretation of the law, shying away from fully using powers which Parliament has given them. To avoid this, they will need high quality legal advice from prosecutors building on the early advice and charging model and pilot arrangements with the NCS (National Crime Squad). There appear to be a number of areas where legal uncertainty may be holding back operations. In addition to the issues around the retention and sharing of intelligence information discussed above, other uncertainties relate to the use of informants, of surveillance, and the handling of suspects who may have privileged material. The Attorney General will be providing guidelines over the course of the year to give agencies confidence in the exercise of their powers in these areas.

3. Functions

SOCA's core functions are set out in clauses 2 and 3. In brief, they are:

- to prevent and detect serious organised crime
- to contribute in other ways to "the reduction of such crime and the mitigation of its consequences"
- to gather, store and analyse relevant information and disseminate it to police forces and law enforcement agencies and other appropriate people.

4. A British FBI?

The US Federal Bureau of Investigation is the principal investigative arm of the US Department of Justice, employing around 12,300 special agents and 16,600 support staff.[20] After the creation of SOCA was first announced in February 2004, the press were quick to dub it the "British FBI". However, representatives of SOCA have rather played down such comparisons. The Chairman, Sir Stephen Lander, pointed out in a radio interview that the two have different remits, as SOCA will not deal with terrorism, unlike the FBI.[21] According to *Police Review*, SOCA's specialist adviser on communication made the following comments to police press officers at a Leeds conference in November 2004:[22]

---

19 *One Step Ahead*, summary, p 4, and section 4.3
20 http://www.fbi.gov/aboutus/faqs/faqsone.htm
21 Radio 4's PM, 24 November 2004
22 "SOCA will not 'trample over local concerns'", *Police Review* 19 November

> It is not the UK Federal Bureau of Investigation. It does not have the same remit, but it is a fact that the FBI has a reputation for trampling over local concerns. We want to forge links with local policing and not be elitist and a cavalier organisation.

The FBI's own website stresses the role of cooperation with local forces:[23]

> State and local law enforcement agencies are not subordinate to the FBI, and the FBI does not supervise or usurp their investigations. However, through cooperation, the investigative resources of the FBI and state and local agencies often are pooled in a common effort to investigate and solve the cases.

In an August 2004 interview with Police Review, the Director General of SOCA Bill Hughes reportedly said that, unlike the FBI which has special legal powers, SOCA would be working in the same legal system and with the same issues as local forces. This was in response to questions about possible clashes with local forces.[24]

The Association of Chief Police Officers (ACPO) gave the following assessment in a press release responding to the White Paper:[25]

> SOCA will not be a British FBI. It will not have federal powers such as those covering significant single crimes, which are subject of US Federal Law. Under UK law, most crimes can be dealt with by any one of several agencies, including local police forces. The SOCA is a bespoke UK solution to our organised crime problem, which combines national expertise and law enforcement networks to provide a more focused and discrete high level intervention. These are UK designed solutions to UK problems in a world of organised crime.

5. Relations with Police

Clearly this is a potentially sensitive area. The White Paper spoke of the need for partnership with law enforcement agencies, other arms of Government and international partners, but stated that "..(o)f these, the relationship with individual forces will be particularly important."[26] It went on to say that the Government had identified ways of recognizing and encouraging this co-operation in the performance monitoring regime of both national and local agencies.

Under clause 5 of the Bill SOCA could act in support of a police force's activities at the request of that force's chief officer. Section 24 would permit voluntary arrangements for mutual assistance between SOCA and law enforcement agencies, including the police.

---

23 http://www.fbi.gov/aboutus/faqs/faqsone.htm

24 "SOCA will not be 'elitist super agency', *Police Review*, 20 August 2004 p 7

25 ACPO Press Release 40/04, *ACPO respond to Organised Crime White Paper*, 29 March 2004 , http://www.acpo.police.uk/news/2004/q1/org_crime.html

26 *One Step Ahead*, section 3.3

However, where satisfactory voluntary arrangements cannot be made, and it appears to the Secretary of State that a police force or law enforcement agency has a special need for assistance, he can direct the chief officer of the force, or head of the law enforcement agency or the Director General of SOCA to provide assistance. The Secretary of State would need the consent of Scottish ministers before issuing directions to Scottish police forces. The Explanatory Notes state that any direction to the Police Service of Northern Ireland would, as a matter of practice, be made by the Secretary of State for Northern Ireland.

Clause 35 places a general duty on any police constable (as well as any Revenue and Customs officer, member of the armed forces or coast guard) to provide assistance to SOCA in the exercise of its functions.

6. Role in Scotland and Northern Ireland

The agency is to have a UK-wide remit. However, Scotland has already has a Scottish Drug Enforcement Agency which seeks to prevent and detect serious and organised crime as it affects Scotland. In Northern Ireland, organised crime is tackled by the Police Service of Northern Ireland. In both cases, these agencies will continue to exercise these functions and SOCA will be expected to work closely with them.[27]

SOCA will not have the power to institute criminal proceedings in Scotland, and clause 23 would require it to secure the agreement of the Lord Advocate (Scotland's principal law officer) before carrying out its activities in relation to an offence which it suspects has been committed in Scotland.

7. Oversight

Under the Bill's provisions, the Secretary of State could determine strategic priorities and set performance targets for SOCA in consultation with the Agency and Scottish ministers. SOCA would have to produce an annual plan having consulted Scottish ministers about provisions for Scotland. This and an annual report would have to be sent to the Secretary of State, Scottish Ministers, the Commissioners for Her Majesty's Revenue and Customs, each police authority and each police force. In addition, the Secretary of State could require SOCA to submit other reports.

SOCA would be inspected by Her Majesty's Inspectorate of Constabulary, who would make a report to the Secretary of State. If the inspection showed that SOCA were not efficient or effective, then the Secretary of State could direct SOCA to submit an action plan setting out remedial measures. Once again, this would have to be done in consultation with Scottish ministers where appropriate.

---

[27] Explanatory notes paragraph 107 and Foreign Office briefing *The Response to Organised Crime, at* http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044551746259

SOCA will come under the remit of the Independent Police Complaints Commission in England and Wales, and the Police Ombudsman in Northern Ireland. IN Scotland, criminal matters would be investigated by the Lord Advocate and the Procurator Fiscal, and non-criminal complaints would be handled by SOCA's internal complaint process.[28]

8. Finance

The Bill would allow the Secretary of State to make annual grants to SOCA. The annual determinations of these would have to be set out in a report to be laid before the House of Commons, rather as the Police Grant Report is.

The set up costs of SOCA in 2005/6 are estimated to be £37m over and above the existing costs of its constituent agencies (£341m). Thereafter the agency will cost around £372m in each of 2006/7 and 2007/8.[29]

9. Reactions to the creation of SOCA

Both the Liberal Democrats and the Conservatives have welcomed the creation of the new Agency[30] and responses to the White Paper were supportive of this decision. ACPO was confident that the new structure would improve the response to organised crime:[31]

> The sophistication of criminal organisations has meant organised crime enforcement requires a 21st Century approach. ACPO responded to Prime Minister's Review in to Organised Crime last Summer and recommended an organised crime agency made up of NCIS, NCS, HMCE and Immigration, and more specific powers aimed at combating this unique area of criminal enterprise. The new agency will enable intelligence and operations to combine in a seamless approach. The new whole will be greater than the sum of the individual agencies.

A number of organisations raised concerns about the new powers to be given to authorities investigating organised crime. These are discussed below. However, these organisations generally supported the creation of the Agency itself.[32]

The Police Federation, while it felt that "a fully integrated SOCA should bolster our capability to combat serious and organised crime", did raise concerns about the status of

---

28 Clause 50 and Explanatory Notes, paragraph 145.

29 Explanatory notes, paragraphs 422 and 447, http://www.publications.parliament.uk/pa/cm200405/cmbills/005/2005005.htm

30 See for example HC Deb 29 November 2004 c387 and c401.

31 ACPO Press Release 40/04, *ACPO respond to Organised Crime White Paper*, 29 March 2004 , http://www.acpo.police.uk/news/2004/q1/org_crime.html

32 See for example Justice's *Response to the White Paper – 'One Step Ahead – a 21st Century strategy to defeat organised crime'* *http://www.justice.org.uk/images/pdfs/orgcr.pdf*, paragraph 4

National Crime Squad officers as police officers if they transferred to the Agency.[33] Later, in response to the Queen's Speech, the Federation warned of the need for SOCA to co-operate with local forces and avoid elitism.[34]

III Investigations, prosecutions and the proceeds of crime

A. Compelling individuals to give evidence

1. Existing powers in fraud investigations

Chapter 1 of Part 2, headed "Investigatory powers of DPP etc" contains 13 clauses concerned with compelling individuals to give evidence. These are modelled on powers contained in the *Criminal Justice Act 1987*,[35] whose effect was summarised in a Law Commission consultation paper on corruption as follows: [36]

> 12.3 Section 2 of the 1987 Act confers on the Director of the [Serious Fraud Office] extensive powers of investigation. Section 2(2) provides:
> The Director may by notice in writing require the person whose affairs are to be investigated … or any other person whom he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation … .
> Other provisions under section 2 include the power to require the production of documents, and the power to search for and seize documents.
>
> 12.4 Section 2(13) provides that it is an offence to fail, without reasonable excuse, to comply with any requirement imposed under section 2, and section 2(14) further provides that it is an offence to make, either knowingly or recklessly, a statement that is false or misleading in a material particular in purported compliance with any such requirement.
>
> 12.5 When a person is required to attend an interview under section 2(2), the Director is not obliged to provide the interviewee with advance information as to the subject-matter of the interview (although the Director may do so if the view is taken that it would be helpful and not likely to prejudice the investigation). The fact that a statement may incriminate its maker is not a reasonable excuse for failing to comply with the Director's order; nor is the fact that the person required to answer questions is the spouse of a person charged with fraud. The powers conferred by section 2 do not cease on a suspect being charged, and section 2 interviews may be conducted even after the delivery of a case statement by the defence.

---

33 Police Federation, *Consultation Response One step ahead – a 21st Century Strategy to Defeat Organised Crime*,10 August 2004

34 *Federation warns stand alone SOCA is a recipe for disaster*, http://www.polfed.org/default_6A48255730DA4E6193A4A5F4A7360636.asp

35 and followed in the *Enterprise Act 2002*

36 "Legislating the criminal code: corruption", March 1997, Law Commission CP145

Safeguards

12.6 The "reasonable excuse" defence in section 2(13)11 provides one safeguard against the section 2 powers. Another can be found in section 2(8), which provides that a statement given by a person in compliance with a requirement imposed under section 2 may only be used in evidence against him or her
(1) on a prosecution for an offence under section 2(14) (knowingly or recklessly making a statement which is false or misleading), or
(2) on a prosecution for some other offence where, in giving evidence, he or she makes a statement inconsistent with the statement made under section 2.

Furthermore, section 2 cannot bite in circumstances where a person would be entitled to refuse to disclose information or to produce a document on the grounds of legal professional privilege, or where a person is bound by banking confidentiality.

Justification for section 2 powers

12.7 The Roskill Committee described the problems of the investigation of serious fraud in this way:

> Fraud … must be concealed from its victim if it is to succeed, and indeed may not be identified until long after the event. Even when the fraud is detected, it is to be expected that in serious cases the criminals will have taken steps to conceal the way in which the fraud was perpetrated, so as to make the process of investigation and prosecution more difficult. To this end, documents may be falsified or destroyed, and arrangements may be made for some transactions to take place in other jurisdictions, and for the proceeds of the offence to be removed there later perhaps to be followed by the fraudsters themselves. Thus, in large-scale or complex fraud cases, the task facing investigators is formidable.
> …..

Section 2 and the [ECHR]

12.16 Article 6(1) of the Convention provides
In the determination of his civil rights or obligations or of any criminal charge against him, everyone is entitled to a fair public hearing within a reasonable time by an independent and impartial tribunal established by law.

12.17 In Funke v France, …the Strasbourg Court took the view that a provision which compelled a person to produce documents under threat of prosecution if he or she did not do so contravened Article 6(1), which conferred on anyone charged with a criminal offence a right to remain silent and not to self-incriminate.[37] Similar decisions were reached in Miailhe v France and Cremieux v France.

12.19 It would appear, therefore, on these authorities, that there is a risk that the SFO's section 2 powers are vulnerable to challenge before the Strasbourg Court.

---

[37] The Strasbourg Court also held there to have been a contravention of Article 8:1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. The new powers

Clause 54 of the Bill confers closely similar powers relating to the investigation of particular crimes, on investigating authorities, which are the DPP, the Director of Revenue and Customs Prosecutions, and the Lord Advocate. They may, however, delegate to Crown prosecutors, procurators fiscal or equivalent office holders. The new powers are to be exercised by the service of "disclosure notices", and are exercisable when it appears to the investigating authority -

> (a) that there are reasonable grounds for suspecting that a person has committed an offence to which this Chapter applies,
> (b) that some other person has information (whether or not contained in a document) which relates to a matter relevant to the investigation of that offence, and
> (c) that there are reasonable grounds for believing that information which may be provided by that other person in compliance with a disclosure notice is likely to be of substantial value whether or not by itself) to that investigation (clause 56(1)).

A notice may then be given to that "other person" but a disclosure notice may also be served on the person who is under investigation if all those conditions apply to him and there are exceptional circumstances making it expedient to do so. The Explanatory Notes do not offer any illustrations of when it might be considered expedient to give a disclosure notice to a suspect. The disclosure notice may require the recipient to answer questions, to provide information and/or to produce documents relevant to the investigation. There are some restrictions on the information which may be sought, and some restrictions on the use which can be made of statements obtained under compulsion, but clause 61 would make it an offence punishable by up to 51 weeks' imprisonment to fail to comply with a requirement in a disclosure notice "without reasonable excuse". It would also make it an offence, punishable by up to two years' imprisonment, to make a false or misleading statement, either knowingly or recklessly.

a. Reasonable excuse

In one case an applicant who faced criminal charges sought leave to apply for judicial review of a s2 notice served on his wife, claiming that his wife had a reasonable excuse by virtue of the marital relationship.[38]

> It was held, inter alia that although s 80 of the Police and Criminal Evidence Act 1984 prevents a person from being compelled to give evidence against his or her spouse there is no analogous provision in the 1987 Act, that Act being a designedly draconian statute concerned with the investigation of fraud rather than

[38] *R v Director of Serious Fraud Office ex p Johnson* [1993] COD 58

> the admissibility of evidence. Further, it was held inappropriate to create by judicial review a class of persons who would have a reasonable excuse within section 2(13); the question whether the applicant's wife could rely on the defence of reasonable excuse in the particular circumstances of the case if criminal proceedings should be taken against her under that section should be decided by the court seised of those proceedings.[39]

The width of the exception of "reasonable excuse" in s2 of the *Criminal Justice Act 1987* was recently considered by the Court of Appeal.[40] The Court said:

> [21] The 1987 Act imposes on a person served with a notice under s 2(3) a statutory duty, sanctioned by the criminal law, to provide the documents in question unless he has a 'reasonable excuse' for failing to do so (s 2(13)). There is no statutory definition of reasonable excuse. Subject to the director's submission that s 3(3) overrides the restriction now contained in r 31.22, it might seem that that restriction, subject to its being lifted, could and should amount to a reasonable excuse.
>
> …we reject Mr Qureshi's submission that it is only in the rare cases of what Hoffmann J there described as "national security, diplomatic relations and the administration of central government" that a reasonable excuse may be found. Hoffmann J was only giving examples (he used the expression "such as") and was in any event perhaps concerned to give obvious examples of public interest immunity in order to make his point that the demands of the 1987 Act were not all-encompassing. His decision in In re Arrows itself shows that a reasonable excuse may be found in considerations of the public interest which go wider than the trilogy of his examples.'

b. Restrictions on use of statements

A statement obtained under the new powers may not be used as evidence against the person who made in any criminal proceedings other than prosecution for one of the offences relating to compliance with disclosure notices, or perjury, unless in some other proceedings the maker makes a statement in evidence which is inconsistent with it, and has adduced evidence relating to it or asks questions about it himself (clause 59).

c. Restriction on what can be required

What may not be required by a disclosure notice is material subject to legal professional privilege, material which is "excluded material" as defined by PACE,[41] and (unless

---

39 *Archbold Criminal Pleading Evidence and Practice*, 2004, 1-286

40 *Marlwood Commercial Inc v Kozeny* [2004] 3 All ER 648 CA (Civil Division)

41 Personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence; human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence; journalistic material which a person holds in confidence.

specifically authorised) confidential banking information. The power to give specific authorisation to require confidential banking information appears to be delegable just as the other powers are, and does not seem to be limited in any way (clause 58).

d. The offences for which they may be used

The powers are limited so that they can only be used in connection with investigation of specified offences (clause 55). The Explanatory Notes summarise these offences as:

> drug trafficking, money laundering, directing terrorism, people trafficking, arms trafficking, counterfeiting, intellectual property theft, pimps and brothels, blackmail, terrorist funding and certain tax and excise fraud offences.[42]

But the list is extensive, incorporating (inter alia) the lists of "lifestyle offences" set out in the *Proceeds of Crime Act 2002* (POCA), and it may be amended by order subject to affirmative resolution procedure. The POCA list runs to offences under more than 30 statutory provisions, and includes such offences as possession of counterfeit coins, keeping a brothel, unauthorised use of a trade mark, and making an article which infringes copyright.

The White Paper had sought views on what sort of cases the powers might be used for, conceding that all "serious crime" might be too broad and suggesting:

> An alternative approach would be to link the exercise of the powers to the sort of investigations which are particularly likely to need them. Complex organised crime or terrorism conspiracies, potentially involving money trails and extensive use of facilitators with varying degrees of complicity in the underlying criminality, are obvious candidates.
> This might be achieved by linking the exercise of these powers to a series of listed offences such as drug trafficking, terrorism, people smuggling, serious tax fraud and money laundering.[43]

e. Reactions

The Home Office summary of responses to the White Paper mentions that there were mixed views on the proposal to extend to organised crime investigations the SFO style powers to compel the production of documents and to ask questions relating to these, and that "some respondents" supported the proposals. It summarises some of the substantial risks and safeguards that other respondents had said would need to be in place as follows:

- Compelling people could lead to false, misleading or partial evidence.

---

[42] Explanatory Notes to the Bill, prepared by the Home Office, Bill 005- EN: http://www.publications.parliament.uk/pa/cm200405/cmbills/005/en/05005x--.htm, para 152

[43] Securing the attendance of witnesses in court: a consultation paper, Home Office, October 2003, para6.2.1 http://www.homeoffice.gov.uk/docs2/secureattendancepaper.pdf

- Risk to those giving evidence because of the sometimes violent nature of organised crime. A number of respondents highlighted the difference in nature between organised crime investigations and those conducted by the SFO.
- There is a risk to subsequent trials if the person being compelled is later a defendant.
- Concern about possible consequences for client-solicitor confidentiality.
- The existence of these powers could discourage people from coming forward for fear of subsequent compulsion.

Safeguards

- There should be defined limitations to the use of the powers.
- There should be a right of appeal against authorisation.
- An annual report should be made to Parliament with details of the frequency of the investigations, their success/ failure and any complaints arising.
- Authorisation to use the powers should have to be signed off at director level.[44]

The Law Society noted the different social culture surrounding some cases of serious fraud compared with money laundering from organised criminal activities. The disincentive not to co-operate if similar powers were employed against a different form of serious crime involving organised groups might be stronger than the penalties the State threatens for non-cooperation.[45] Both Justice and Liberty were strongly opposed in principle to the proposed extension of these powers.[46] Liberty queried the wisdom of underlying voluntary assistance with compulsion, suggesting that witnesses might not come forward voluntarily, for fear of subsequent compulsion, and that compulsion could affect the quality and reliability of evidence so obtained. If it was expected that the powers would primarily be used to obtain evidence from those who were on the fringes of criminal conspiracies, those were among the witnesses most likely to give false, misleading or partial evidence. A witness who, in effect, had to say something or face criminal penalties for their silence, was not one whose reliability could be assured.

Justice pointed out that while privilege against self incrimination would prevent compulsorily extracted admissions from being used in evidence, other information gained as a result of the statement could be used, in a potentially unfair way against the maker. Justice was also concerned that the scope of legal privilege had been narrowed significantly by the Court of Appeal judgment in the *Three Rivers* case. That is the case

---

44 Summary of responses to the White Paper "One Step Ahead, a 21st Century Strategy to Defeat Organised Crime" Cm 6167, Home Office, November 2004, http://www.homeoffice.gov.uk/docs3/organised_crime_responses.pdf

45 Law Society response to One Step Ahead: July 2004

46 One Step Ahead, Liberty's response to the Home Office consultation on organised crime, July 2004, http://www.liberty-human-rights.org.uk/resources/policy-papers/2004/organised-crime.PDF , Justice Response To White Paper, 'One Step Ahead – A 21st century strategy to defeat organised crime' http://www.justice.org.uk/images/pdfs/orgcr.pdf

brought by the liquidators of BCCI against the Bank of England, which has raised fundamental questions about legal professional privilege.[47] The Court of Appeal had adopted a narrow analysis of what constituted "legal advice", causing great consternation among the legal profession. However, since Justice's comments, on 11 November 2004, the House of Lords gave its reasons for allowing the bank's appeal and authors have responded: "Sense has prevailed. We are back to a workable test as regards what types of communications should be protected by legal advice privilege".[48]

Justice went on to urge that the powers should be subject to strict limitations, including that compulsory questioning should be subject to authorisation by a senior prosecutor equivalent to the level of Assistant Director of the Serious Fraud Office. [The SFO has a total staff of about 300 and the Director is supported at senior management level by seven assistant directors, while the CPS has a Chief Prosecutor in each of its 42 areas and, as at March 2004, employed a total of 2,612 prosecutors.[49] But the powers under s2 of the *Criminal Justice Act 1987* may be delegated, even to a "competent investigator (other than a constable" who is not a member of the SFO.[50]] Questioning of a suspect's legal advisor ought to be authorised by a judge. There should be a right of appeal against an authorisation and the investigating authorities should be required to provide annual reports to Parliament, showing the frequency of such investigations, their success or failure, and any complaints arising. Justice felt that use of this potentially draconian power should be limited to serious offences, clearly defined in statutory form.

Other respondents also expressed concern about the range of offences for which the powers could be used. The Police Federation thought that the powers should apply only for the most serious types of offences, for example, terrorism, murder and conspiracy to kill, and offences which were likely to affect the public interest, such as paedophilia and human trafficking.[51] The Institute of Chartered Accountants submitted:

> The list of the kinds of investigations where compulsion could be used currently includes money laundering investigations, though the current Proceeds of Crime Act definition of money laundering is so wide that this could include any acquisitive crime, no matter how minor. Also, we note that a general category of "organised crime" could be included. We acknowledge that this would provide flexibility to extend the provisions to future areas where significant complex areas of crime emerge, but believe that it would be essential to ensure that it excluded small scale conspiracies between a limited number of common criminals. If "money laundering" is included, this should be given a much

---

47 Three *Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)* (2004) 11 November 2004, [2004] UKHL 48

48 see: Fortnam and Lobo, "Three Rivers: comfort or missed opportunity?" NLJ 2004 Vol.154 pp 1750-1751

49 see the SFO and CPS Annual Reports 2003-04

50 s2(11)

51 "We need a coordinated response to tackle organised crime", Police Federation press release, http://www.polfed.org/FBI-StyleAgencyToBeLaunched.pdf

> narrower definition than the one in the Proceeds of Crime Act 2002, which throws up a large number of trivial instances, and a similarly narrow approach taken to the definition of conspiracy and organised crime investigations.[52]

The Bill does not provide any avenue of appeal against a disclosure notice, but such decisions may be amenable to judicial review.[53]

B. Reforming criminal trials

The White Paper proposals for "reforming criminal trials" were not concerned with changes to criminal trial procedures, but with ways in which offenders might be induced to assist in investigations and prosecutions. The introductory paragraphs explain:

> There has been a growing belief over recent years that the law has emerged in a way that has tilted the balance excessively towards the defence. No category of defendant is able to make better use of this than organised criminals, with access often to the best legal advice…
> Organised criminals become particularly adept at frustrating the trial process in their attempts to evade justice. Examples include the systematic use of the pre-trial process to seek to undermine prosecution evidence and ideally have it rendered inadmissible. Tactics here have included extensive "voir dire" hearings, challenging every aspect of the prosecution case, and looking for every reason to exclude prosecution evidence.[54]

This explanation prompted some reactions of dismay, for instance from Justice, which regretted the "very partisan tone" and the implication that there was a duty on the defence to actively assist in the prosecution process, and that challenging the admissibility of evidence, the fairness of police tactics, or the existence of a warrant were simply tactics designed to frustrate the police and prosecution.[55] Liberty thought that the implication was that all defendants must be guilty and the defence's intent was simply to frustrate rightful conviction. If there were any justice gap or weighting of the criminal process towards the defendant the heavy legislative load of recent years had removed it. They went on to say:

> 24. The right to properly challenge evidence whether by voir dire or through cross examination of witnesses is a right which cannot be limited without the most severe consequences for the justice system. Unfounded, time wasting or unarguable applications are already the subject of effective restraint: proactive management of serious trials by Judges; wasted costs orders made personally

---

52 Memorandum prepared by the Business Law Committee of the Institute of Chartered Accountants in England and Wales, in July 2004, in response to the White Paper, issued by the Home Office in March 2004. TECH 30/04 : http://www.icaew.co.uk/viewer/index.cfm/AUB/TB2I_68333

53 see *R v Director of the Serious Fraud Office ex p Evans* [2003] 1 WLR 299

54 "One Step Ahead, a 21st Century Strategy to Defeat Organised Crime" Cm 6167, March 2004, http://www.homeoffice.gov.uk/docs3/wp_organised_crime.pdf Para 6(3)

55 Justice Response To White Paper, 'One Step Ahead – A 21st century strategy to defeat organised crime' http://www.justice.org.uk/images/pdfs/orgcr.pdf

> against lawyers; the professional obligations of trial counsel. Whilst legal challenges to their case may be frustrating for investigators, who inevitably take a different view of the guilt of the accused than the Judge or jury may, the trial of a defendant is on behalf of the public and not the prosecuting authority.[56]

The Law Society did not see the language of the White Paper as constructive and asked what "tactics" the paper was referring to and why these were not set-out in the consultation.[57] The Fraud Advisory Panel also took exception to what they saw as an unjustified sweeping slur on the legal profession, but went on to suggest that weak case management was to blame. They said:

> Where there is a legitimate point to make in the defence of a client's interests, whether at the pre-trial or trial stage, a lawyer is duty bound to make it, however infuriating it may be to the prosecution or the investigator. It is a matter for the judge to rule out frivolous or time-wasting applications or submissions. Many judges are incapable or unwilling to show effective management of pre-trial hearings, so as to eliminate possible abuses where they do take place.[58]

The White Paper proposals for reforming criminal trials covered ways in which trials might be made shorter and more effective, by encouraging offenders to plead guilty at an early stage, and to cooperate with the prosecution, especially (but not exclusively) by giving evidence against other defendants (turning "Queen's Evidence"), in return for an expectation of a reduced sentence or even immunity from prosecution.

a. "Plea bargaining"

The White Paper described the long established practice of criminal courts to recognise the benefits to the system which resulted from a defendant's entering a timely guilty plea by reducing the sentence imposed. It discussed whether defendants should be able to seek an indication of the sentence they would be likely to receive if they pleaded guilty at some point, and explained that arrangements for sentence indication would not require legislation. The summary of responses mentions that:

> The Sentencing Guidelines Council has recently published a draft guideline establishing a sliding scale of sentence discounts depending on the stage of the proceedings when a guilty plea is entered…..
> This tariff will be reinforced by arrangements allowing defendants to seek an indication of the sentence they would be likely to receive if they were to plead guilty at that point.

---

56 One Step Ahead, Liberty's response to the Home Office consultation on organised crime, July 2004, http://www.liberty-human-rights.org.uk/resources/policy-papers/2004/organised-crime.PDF

57 Law Society response to One Step Ahead: July 2004

58 Fraud Advisory Panel Response to the Home Office Consultation Paper One Step Ahead: A 21st Century Strategy to Defeat Organised Crime, August 2004, http://www.fraudadvisorypanel.org/pdf/FAP%20Response%20to%20One%20Step%20Ahead%20Aug04.pdf

> These arrangements will be developed in consultation with the judiciary, and will take account of the points made in responses to the White Paper.[59]

The other proposals for securing offenders' cooperation in exchange for immunity or reduction in sentence were regarded as not necessarily requiring legislation, but the Government's view was that Queen's Evidence could be strengthened by enshrining the existing case law in statute and introducing a system of binding cooperation agreements between the prosecution and defendants. Accordingly, Chapter 2 of Part 2 of the Bill (clauses 65-68) puts Queen's Evidence on a statutory footing, with some extension.

b. Immunity

Clause 65 allows prosecutors to give "immunity notices" which will have the effect of proscribing prosecution of the recipient for specified offences, if the prosecutor –

> thinks that for the purposes of the investigation or prosecution of any offence it is appropriate to offer…immunity from prosecution.

This is an extremely wide power, without any apparent requirement for there to be any connection between the offence being investigated/prosecuted and the offence for which immunity is offered. While the White Paper states an assumption that the majority of cooperating defendants would be offered sentence reduction rather than full immunity, and the clause envisages that immunity notices would contain conditions, breach of which would cause the immunity notice to cease to have effect, there is no requirement that conditions must be imposed.[60]

c. Restricted use of statements

Clause 66 introduces the "restricted use undertaking", which again may be offered when the prosecutor "thinks that for the purposes of the investigation or prosecution of any offence it is appropriate", and will have the effect that the information described in it must not be used against the recipient in any criminal proceedings or civil recovery proceedings under the *Proceeds of Crime Act 2002*. Again, the undertaking ceases to have effect if the recipient fails to comply with any condition specified in it.

d. Lesser sentences

Clause 67 appears to bring forward the "binding co-operation agreements" suggested in the White Paper. It provides that the court may take into account the extent and nature of the assistance given or offered by a person who has pleaded guilty to an offence and has,

---

[59] Summary of responses to the White Paper "One Step Ahead, a 21st Century Strategy to Defeat Organised Crime" Cm 6167, Home Office, November 2004, http://www.homeoffice.gov.uk/docs3/organised_crime_responses.pdf

[60] "One Step Ahead, a 21st Century Strategy to Defeat Organised Crime" Cm 6167, March 2004, http://www.homeoffice.gov.uk/docs3/wp_organised_crime.pdf para 6.3.2

"pursuant to a written agreement" assisted an investigator or prosecutor in relation to that or any other offence. It requires the court to state in open court what the greater sentence would have been if it does pass a lesser sentence (unless disclosure would not be in the public interest). It also spells out that minimum sentence requirements in other legislation are not to affect the court's power. The Explanatory Notes say that:

> Subsection (5) provides that this clause applies to offences for which there is a minimum sentence and also to sentences fixed by law in determining the minimum period of imprisonment that a person must serve. The intention is that the court can in exceptional circumstances exercise its power under subsection (2) to reduce a person's sentence or minimum period of imprisonment that a person must serve.[61]

In addition to the mandatory life sentence for murder, legislation now provides for mandatory minimum sentences to be passed for particular offences, including unauthorised possession of certain types of firearm, and a third Class A drug trafficking offence or domestic burglary. In all those cases some element of judicial discretion is preserved, allowing departure either when there are "exceptional circumstances which justify it", (as in the firearms offences) or "particular circumstances" which would "make it unjust" to pass the otherwise prescribed minimum sentence (as in the "three strikes and you're out" provisions).[62]

e. Review of sentence

Clause 68 is a new provision allowing cases to be referred back to the sentencing court for review. This can be done in three situations. The first is that the offender has received a reduced sentence on the basis of an agreement to assist, but knowingly fails to any extent to give assistance in accordance with the agreement. The court can then increase the sentence but not to exceed the sentence which would have been passed but for the agreement. Although the Explanatory Notes say that the conditions are that the defendant received a reduced sentence "but then knowingly failed" to give the assistance, the clause could technically apply if a failure had predated the sentence.[63] The other two situations allow for downward review, firstly when the defendant has already received a reduced sentence, but gives or agrees to give further assistance under another agreement, and secondly when his original sentence was *not* discounted but he subsequently gives or offers to give assistance.

---

61 Explanatory Notes to the Bill, prepared by the Home Office, Bill 005- EN: http://www.publications.parliament.uk/pa/cm200405/cmbills/005/en/05005x--.htm para163

62 see the *Powers of Criminal Courts (Sentencing) Act 2000*, and the *Criminal Justice Act 2003*

63 Explanatory Notes to the Bill, prepared by the Home Office, Bill 005- EN: http://www.publications.parliament.uk/pa/cm200405/cmbills/005/en/05005x--.htm, para 164

f. Reactions

The White Paper had specifically sought views on the creation of a power to refer cases back for possible resentencing where a convicted criminal provided material assistance after conviction, as the Court of Appeal will not ordinarily reduce a sentence to take account of information supplied to the authorities by the defendant after sentence. The summary of responses said that views were mixed on this issue, with some believing that it would be a useful tool, while others questioned the proposal and effects of overturning the original sentence.[64] For example the Police Federation suggested that it might send out the wrong message to the criminal fraternity.[65]

Reservations about encouraging people in these ways to give evidence against criminal associates included concerns about the reliability of such evidence and juries' likely mistrust of it, as well as the common theme that the risks of turning Queen's Evidence could be very serious and that providing adequate protection could prove extremely expensive. Liberty commented that taking on a violent drug cartel tended to require more protection and reward than a mere shortening of sentence and in some circumstances prison might be the safest place to be.[66] Justice too thought that while it might be partly true, as suggested in the White Paper, that the reason why Queen's Evidence cooperation was now rare was that the incentives were not seen as clear or substantial enough, a greater reason might be fear of the consequences of testifying.[67]

Liberty thought that the principle of sentence reduction for cooperation was already established and was uncontroversial, but the issue of "binding cooperation agreements" was more controversial. It was not logically apparent how a cooperation agreement between the witness and the Crown could remedy the legitimate concerns about cooperation being abused:

> The fact that a prosecution witness is "bound" by an agreement to give truthful testimony in return for a reduction in sentence (the extent of which will not be known until after the testimony is given and the effect of it analysed) does not exclude the possibility of abuse nor guarantee the truthfulness of evidence.

Justice warned that:

---

64 Summary of responses to the White Paper "One Step Ahead, a 21st Century Strategy to Defeat Organised Crime" Cm 6167, Home Office, November 2004, http://www.homeoffice.gov.uk/docs3/organised_crime_responses.pdf

65 "We need a coordinated response to tackle organised crime" Police Federation press release, http://www.polfed.org/FBI-StyleAgencyToBeLaunched.pdf

66 One Step Ahead, Liberty's response to the Home Office consultation on organised crime, July 2004, http://www.liberty-human-rights.org.uk/resources/policy-papers/2004/organised-crime.PDF

67 Justice Response To White Paper, 'One Step Ahead – A 21st century strategy to defeat organised crime' http://www.justice.org.uk/images/pdfs/orgcr.pdf

> Encouraging the more widespread use of "Queen's Evidence" means that the decision as to the relative roles of the criminal participants is taken away from the court and put into hands of the prosecution advised by the police. One may question whether this is right. What if the police or prosecution are misled and get their assessment wrong, so entering into a deal with the wrong person, and causing the less culpable participant to get a greater sentence? Entering into deals with those who have much to gain in the form of a reduced sentence or immunity from prosecution, or who wish to settle an old score with a criminal rival, creates a significant potential for miscarriages.

Justice and Liberty both suggested that consideration should be given to reintroducing the mandatory requirement that juries be warned as to the danger of convicting on the uncorroborated evidence of an accomplice, to mitigate the danger of unreliable evidence. That requirement was abolished by the *Criminal Justice and Public Order Act* 1994, in accordance with recommendations made by the Law Commission and others.[68]

Particular concerns have been expressed about how the agreements would work in practice. The White Paper had suggested:

> defendants are likely to be more prepared to co-operate when they have the binding assurance that the prosecution will apply to the judge for a reduced sentence in return for co-operation. We would see the prosecution having the option to suggest a discount, or simply to set out the scale of co-operation. In either case, the final decision would obviously rest with the judge.
> …
> The most common approach, however, appears to be for the prosecution to set out to the judge the degree of cooperation, leaving the precise discount to be decided by the judge. On balance, this looks like the right approach.
> …
> Holding over sentencing until the co-operation and testimony have been delivered appears to be the more common approach, although there are always likely to be cases where continuing co-operation post sentence is required. This makes all the more important the existence of the prosecution's right to appeal against sentencing, if the co-operation is not forthcoming or the testimony turns out to have been false or misleading.[69]

Justice was wary that:

> The existence of a formal cooperation agreement would seem to be approaching the sort of US-style pleas-bargaining agreement that we, and the courts, oppose. It should be for the judge, not the prosecution, to decide on the appropriate amount of reduction in each case, and there should be no suggestion that the prosecution may suggest or promise a certain sentence, or reduction in sentence.

---

[68] see "Criminal Law Corroboration of Evidence in Criminal Trials" Law Com 202, 1991

[69] "One Step Ahead, a 21st Century Strategy to Defeat Organised Crime" Cm 6167, March 2004, http://www.homeoffice.gov.uk/docs3/wp_organised_crime.pdf para 6.3.2

Liberty was particularly concerned by the White Paper proposal that if evidence was not "truthful" the Crown would be entitled to treat the witness as having failed to cooperate.

> By whose terms or analysis would evidence be deemed untruthful? In a clear case such as wilful failure to come up to proof, or giving entirely contradictory evidence, there would be little problem of analysis, but the situation where a defendant was acquitted is more problematic. If a jury did not accept the evidence given by a witness put forward by the Crown as a witness of truth, does this invalidate the binding agreement?

While the Bill does not follow the wording of the White Paper in this respect, similar questions could arise in relation to the testing of whether an offender has failed to give assistance in accordance with an agreement (or whether a person has failed to comply with conditions specified in an immunity notice or restricted use undertaking). Nor is there any guidance as to what obligations on the part of the prosecution might form part of the written agreement between a defendant and the investigator or prosecutor or what consequences should follow in the event of a breach of such obligations.

C. Financial reporting orders

Chapter 3 (clauses 69-73) introduces a new sentencing disposal to be known as a "financial reporting order". It is to be available on conviction for a wide range of offences, including specified offences under the *Theft Acts*, as well as "lifestyle offences" specified in the *Proceeds of Crime Act 2002*, but only if the court is satisfied that the risk of the offender committing another offence on the list is sufficiently high to justify the making of the order (clause 69). The maximum duration when imposed in the magistrates' court is 5 years, and 15 years when imposed in the Crown Court (20 years if the offender is sentenced to life imprisonment).

The effect of the order will be to require the offender to make reports containing specified particulars of his financial affairs. Failure to comply (or inclusion of false or misleading information) will be a separate offence punishable with up to a year's imprisonment (clause 71).

The White Paper envisaged that these would be ancillary orders, taking effect after the offender's release from a prison sentence.

> This could constitute a requirement to file every six months after release detailed returns setting out income, assets and expenditure. Released offenders would be obliged to report all bank accounts, credit cards etc being used and be forbidden to carry out transactions using any other route…
> Such an obligation would inevitably impose a considerable burden on the released prisoner but one which is fully compatible with the normal goal of probation to encourage those released to turn away from crime. In the event that offenders returned to unlawful activities, the returns would provide a vein of

> information for law enforcement, while the criminal offence of non-compliance would offer a valuable tool in pursuing investigations.[70]

The summary of responses reported that the majority of responses which mentioned this proposal supported it. It does not say how many respondents did mention it. Justice regarded the use of tailored licence conditions post release as a more creative response than simply seeking increased custodial penalties, but said that they should only be imposed where they were proportional to the offence and the risk of reoffending, given the potential infringement of the right to privacy that reporting all financial records would involve, and the consequences of failing to do so. Liberty was more dismissive, doubting whether such a provision would be Human Rights Act compliant, and also doubting whether unrehabilitated prisoners would be likely to file returns stating their income from criminal activities.

D. Witness protection

The White Paper recognised that defendants' willingness to cooperate against co-conspirators depended on strong assurances of their safety, and commented on the differences between witness protection arrangements available, suggesting that there were obvious advantages in adopting a national programme. Unsurprisingly, many responses agreed with the need for an improved system. However, following a pathfinder review of the case for a national scheme,[71] the recommendation was that witness support should be rationalised, with a central national unit to support consolidated regional units rather than establishing a national agency.[72]

In answer to a written PQ in September 2004, Caroline Flint explained what had been done so far:

> David Davis: To ask the Secretary of State for the Home Department (1) what the average number of police officers deployed on witness protection schemes was in the last year for which figures are available, broken down by police force;
> (2) what police resources have been allocated to witness protection schemes in each of the last five years, broken down by police force.
>
> Caroline Flint: This information is not currently available. The Home Office, in conjunction with the Scottish Executive, the Northern Ireland Office and the Association of Chief Police Officers, has appointed an independent consultant to carry out an assessment of witness protection arrangements nationally. The

---

70 "One Step Ahead, a 21st Century Strategy to Defeat Organised Crime" Cm 6167, March 2004, http://www.homeoffice.gov.uk/docs3/wp_organised_crime.pdf para 6.6

71 by the Home Office, ACPO and the Witness Support Network, concluded in September.

72 Summary of responses to the White Paper "One Step Ahead, a 21st Century Strategy to Defeat Organised Crime" Cm 6167, Home Office, November 2004, http://www.homeoffice.gov.uk/docs3/organised_crime_responses.pdf

> assessment is covering all cases where witness protection is afforded by UK law enforcement agencies including the police. It will provide us with valuable information about the numbers and circumstances in which witness protection is provided and the amount of police time allocated to it.
>
> The assessment commenced on 2 January; it was announced in the White Paper "One Step Ahead—a 21st century strategy to defeat organised crime", which I published on 29 March. The assessment is due to be completed over the summer, and a final report will be available in the autumn.
>
> However, even after completion of this assessment, we are not intending to make available publicly any of this information below national level. Such information broken down by individual police forces is obviously operationally sensitive and could compromise the integrity of witness protection programmes and the officers who work on them.[73]

Chapter 4 (clauses 74-86) puts existing arrangements on a statutory footing, without *requiring* protection to be provided in any particular cases. The arrangements are to apply not only to witnesses but to a wide range of categories including those who are, or have been, judges, jury members, prison or police officers and prosecutors, as well as persons who are associated with them. Although the list is described in the Explanatory Notes as "exhaustive", clause 74(7) expressly provides that nothing in the section affects any (other) power which a person has to make arrangements for the protection of another person. Chapter 4 also creates new obligations and new criminal offences, which had not been proposed for consideration in the White Paper.

a. New duty to provide assistance (public authorities)

Clause 77 imposes a duty on public authorities to take reasonable steps to provide any assistance requested by a "protection provider". The definition of "public authority" follows that in s6 of the *Human Rights Act 1998* to include –

> any person certain of whose functions are of a public nature

except that courts and tribunals are excluded as well as Parliament. The DCA website offers the following guidance on identifying "public authorities":

> The Act requires public authorities to act compatibly with the Convention rights. 'Public authorities' are not defined exhaustively but the term covers three broad categories:
>
> - obvious public authorities such as a Minister, a Government Department or agency, local authorities, health authorities and trusts, the Armed Forces and the police. Everything these bodies do is covered by the Act.

---

[73] HC Deb 9 September 2004 c1345W

Parliament, though, is not a public authority for the majority of its functions.

- courts and tribunals.
- any person or organisation which carries out some functions of a public nature. Under the Act, however, they are only considered a public authority in relation to their public functions. So, for example, Railtrack is a public authority in relation to its work as a safety regulator for the railways, but not when acting as a commercial property developer.

In some cases it will be difficult to know if a body is a public authority. You will need to take legal advice to clarify this. However, some key characteristics of a public authority include:

- whether the body performs or operates in the public domain as an integral part of a statutory system which performs public law duties
- whether the duty performed is of public significance
- whether the rights or obligations of individuals may be affected in the performance of the duty
- whether an individual may be deprived of some legitimate expectation in performance of the duty
- whether the body is non-statutory but is established under the authority of government or local government
- whether the body is supported by statutory powers and penalties
- whether the body performs functions that the government or local government would otherwise perform
- whether the body is under a duty to act judicially in exercising what amounts to public powers.[74]

Questions as to whether particular bodies were public authorities for *Human Rights Act* purposes have arisen in a number of cases. In March 2004, the Joint Committee on Human Rights published a report on *The Meaning of Public Authority under the Human Rights Act*, explaining the problems which had arisen.[75]

b. New offences and defences

Clauses 78 and 80 create new statutory offences of disclosing information about protection arrangements, or relating to persons assuming new identity, both punishable by up to two years' imprisonment. Specific defences are set out, including where disclosure was made for the purposes of the prevention, detection or investigation of crime. Although these offences relate principally to arrangements made under chapter 4 when it comes into force, there is transition provision for them to apply to some arrangements which were made before the new statutory provision was commenced (which may be treated as if they had been made under it). Clause 82 provides a new statutory defence for persons who might otherwise be liable for making false or misleading statements about

---

74 http://www.dca.gov.uk/hract/coregd.htm#Public%20Authorities

75 Joint Committee on Human Rights, 7th Report of 2003-04, HC 382 HL Paper 39, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf

protected persons' identities. The example given in the Explanatory Notes is that protected persons and their families might otherwise be committing offences when making statements that they have never been known by any other name.

E. Amendments to the Proceeds of Crime Act 2002

The White Paper describes the radical new powers under the 2002 Act (POCA), and outlines some early use which has been made of them, suggesting that these are among the existing powers which could be used more widely. The Bill would make a number of amendments to the Act. Clause 89 would allow magistrates' courts to make confiscation orders up to £10,000. One of the new clauses inserted by clause 90 is to enable the Director of the Asset Recovery Agency to apply for an asset freezing order in civil recovery cases, without there having to be an appointment of an interim receiver. Clause 90 would also replace the existing absolute prohibition on making exclusions for the purpose of enabling any person to meet any legal expenses in respect of civil recovery proceedings with a court controlled regime which would allow reasonable legal expenses to be drawn down.

In a recent case on restraint orders in *criminal* proceedings, the Court of Appeal has held that s41 (which provides that exception to *restraint* orders may be made for reasonable legal expenses, but not those relating to the offence) does not permit the release of frozen assets to be used for legal advice and representation in relation to the restraint order.[76] POCA imposed a complete prohibition on such expenditure but, in exchange, made sure that public funding was readily available.

F. Money laundering provisions[77]

Money laundering is a term used to describe the processes by which individuals turn money which has been acquired as a result of criminal activity into legitimate funds, lawfully acquired. These processes are typically complex and by design hard to trace.

Funds, whether generated by organised crime, terrorism or drug trafficking, will be placed within the mainstream economy or financial sector and the source and origin of the funds will be progressively concealed with each transaction. It was thought that the introduction of the Euro prompted a wave of 'laundering' as criminals in Europe had to turn large amounts of heritage currencies into euros. Sales of luxury cars, yachts and villas boomed in a wave of cash only purchases. Even lottery tickets that had won prizes were bought, at a premium prices by criminals anxious for 'clean' funds.

In the UK, powers to address some forms of money laundering have long existed, for example under the *Theft Act 1968*, which makes it an offence to handle stolen goods

---

[76] *S v Customs & Excise Commissioners* [2004] EWCA Crim 2374 , 8 October 2004

[77] This section contributed by Timothy Edmonds, Library Business and Transport Section

(s.22(1)). The creation of more specific offences followed and these first were targeted at particular crimes and then at widening sectors of the financial services industry. These offences were brought together in a more cohesive way under the Proceeds of Crime Act 2002 (POCA). UK law has also been determined by the imperative of implementing two EU money laundering directives. Regulations implementing the latest of these (*The Money Laundering Regulations 2003/3075*) revised the *Money Laundering Regulations 1993 and 2001* in order to:

- implement the requirements of the Second EC Money Laundering Directive by including new professions and activities within the regulated sector; and
- consolidate, clarify and update the existing provisions of the Money Laundering Regulations 1993, with some substantive changes where problems have become apparent.

The new regulations affect financial and credit institutions, money services businesses, firms providing legal or accountancy services, casinos, estate agents, and some dealers in high value goods. The new regulations, made under POCA, came into force on 1 March 2004.

Essentially, there is now a general legal requirement on financial services' professionals who deal with financial affairs of clients, or other individuals who accept large sums of cash from customers, to disclose suspicious activities and transactions to the National Criminal Intelligence Service (NICS).

Because the legislation is relatively new and the concepts drawn very broadly (for example concepts such as 'suspicious' are difficult to define) it has been difficult for legislators and practitioners' bodies to give authoritative guidance on how the law operates in practice. For example, the Consultative Committee of Accountancy Bodies (CCAB) produced guidance on the new rules in February 2004 and hoped to have had Treasury confirmation of their advice before the rules came into effect. The Treasury declined, however. In the published guidance, the CCAB noted:

> The interpretation of certain sections of the law remains uncertain at the present time, and the CCAB is in urgent consultation with Government, to obtain clarification as soon as possible. In particular, additional Guidance will be issued as soon as possible, on differential reporting for matters of lesser intelligence value and on whether suspicions should be reported in cases where they have been formed in circumstances which would otherwise be legally privileged.[78]

A Treasury document published in October 2004 reflected the relative newness of the legislation and the need for consideration of how the law might develop or need adapting. The document highlights a range of goals and targets, spread across a number of departments and agencies. Against that it states:

---

[78] CCAB website at: http://www.ccab.org.uk/

> Parts of the current regime are relatively new – the money laundering provisions of the Proceeds of Crime Act came into force in February 2003 and the Money Laundering Regulations in March this year. The regime will need time to "bed down" so that the new controls can be properly tested. During this time, the UK government will monitor carefully the effectiveness of the regime.[79]

Clauses in this bill make various amendments to the existing body of law to reflect changing experience of current difficulties and deficiencies. In several cases the change eases restrictions or requirements. Clause 94, for example provides a defence to failure on the part of an individual to report a transaction if they know, or believe that the possible relevant criminal conduct occurred overseas where the conduct is legal under local law. Similarly, Clause 96 adds another requirement to the conditions that currently provoke a disclosure statement.

Currently, under section 330 of POCA, a person that does not make a disclosure of a transaction commits an offence if

- he, knows or suspects, or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering; and
- the information or other matter on which his knowledge is based or which gives grounds for his knowledge or suspicion, came to him in the course of his business in the regulated sector; and
- that he did not make the required disclosure as soon as is practicable after the information or other matter comes to him.

Clause 96 adds a further condition, namely that

- The obligation to report suspicions of money laundering will apply only if: the person knows the identity of the person engaged in the money-laundering offence or the whereabouts of any of the laundered property; or the information which would have to be reported discloses, or may assist in uncovering, the identity of the person engaged in that offence or the whereabouts of any of the laundered property.

Clause 95, however, appears to be a response to one of the main complaints by the financial services community, namely that there is no de minimi limit on the size of transactions that they are supposed to be alert to. If introduced Clause 95 would mean that a bank or other deposit-taking body would not commit an offence in operating an account when the amount of money concerned in the transaction was below £100 (or such higher threshold amount as may be specified by a constable or customs officer, or by a

---

[79] HM Treasury, *Anti-Money Laundering Strategy* available on the Treasury website at: http://www.hm-treasury.gov.uk./media/D57/97/D579755E-BCDC-D4B3-19632628BD485787.pdf

person authorised by the Director General of NCIS (or, in future, authorised by the Director General of SOCA)).

A higher threshold amount can be requested by the bank and, such a request might be accepted dependent upon, for example, the quality and standard of the general procedures adhered to in the institution. Different thresholds may be specified in relation to the operation of the same account (for example, a threshold could be specified for deposits that is higher than the threshold specified for withdrawals).

The absence of a de minimi limit in the regulations has been one issue that has caused concern in the financial services industry. Ironically, where the legislation applies to other sectors there is a limit of €15,000. As well as to financial services providers the legislation also applies to 'high value dealers' – mainly luxury shops or car dealers and the like. When cash in excess of this sum is presented for payment for goods such as boats, vehicle, jewellery etc, such dealers are under similar disclosure rules as banks and financial institutions.

Some proposals in the Bill appear to tighten up the regime. For example, clause 97 abolishes the latitude granted businesses to set up their own disclosure procedures. The clause replaces section 339(2) and (3) of the POCA, under subsection (1) of which the Secretary of State has the power to prescribe by order the form and manner in which disclosures of money laundering should be made. Thus in future a person commits an offence if he makes a disclosure in a non-standard way unless he has a reasonable excuse for not so doing.

Lastly, Clause 100 amends section 447(3) of POCA and extends the meaning of an external investigation to include the extent and whereabouts of criminal property. Section 445 of the Act gives power to enable assistance to be given in the UK for investigations that are of an international nature.

G. "One Step Ahead" proposals for new powers which are not in the Bill

a. Indication of sentence, and conspiracy

Several of the proposals considered in the White Paper do not appear in the Bill, either because they do not require legislation (like the proposal that defendants should be able to seek an indication of the likely sentence on a guilty plea) or because further work was needed. Proposals for changes to the law on conspiracy have proved particularly controversial. The Fraud Advisory Panel had regarded these as perhaps the most far-

reaching and important changes proposed in the White Paper, while Justice had questioned whether there was any basis for concluding that there was any deficiency in the substantive law as opposed to its practical application.[80] It appears to have been concluded that legislation based on the USA's Racketeer Influenced and Corrupt Organisations (RICO) Statutes would not be appropriate for the UK. But while reforms to conspiracy law remain a long term aim, it seems improbable that the necessary further work would be completed during this Bill's passage. In particular, the Government has said that it would wish to take into account the Law Commission's Report on Participation in Crime, which will probably be published by the end of the year.[81]

b. Intercept evidence

A proposal to allow the evidential use of intercept material is also still under consideration. Ministers are expected to announce their conclusions on the findings of a Home Office review (which have not been published) before the end of the year, which could make it possible to add new clauses. The reservations which have been expressed about this proposal are not defendant oriented, but more concerned with the risk of disclosure of "sensitive capabilities". Arguments for and against were concisely summarised in the White Paper:

> 6.2.2 On the one hand, the evidential use of intercept may hold out the prospect of prosecutions in some cases where they would not otherwise have been possible, and might encourage earlier guilty pleas. On the other hand, there is a concern that the evidential use of intercept would reveal capabilities which could undermine the effectiveness of intercept and damage the co-operation between our intelligence and law enforcement agencies in tackling and preventing terrorism and serious crime.[82]

The UK's internationally unusual blanket ban on the use of intercept evidence has come under particular scrutiny in the context of terrorism. It has been argued that if such evidence could be used in prosecuting terrorism suspects, that might obviate any need for the detention provisions in Part 4 of the *Anti-terrorism Crime and Security Act 2001*. In their Report on that Act, published in December 2003, the Privy Counsellor Review Committee explained their reasons for considering that the balance (between the public interest in prosecuting particular cases and the public interest in maintaining the

---

80 Fraud Advisory Panel Response to the Home Office Consultation Paper One Step Ahead: A 21st Century Strategy to Defeat Organised Crime, August 2004, http://www.fraudadvisorypanel.org/pdf/FAP%20Response%20to%20One%20Step%20Ahead%20Aug04.pdf Justice Response To White Paper, 'One Step Ahead – A 21st century strategy to defeat organised crime' http://www.justice.org.uk/images/pdfs/orgcr.pdf

81 Summary of responses to the White Paper "One Step Ahead, a 21st Century Strategy to Defeat Organised Crime" Cm 6167, Home Office, November 2004, http://www.homeoffice.gov.uk/docs3/organised_crime_responses.pdf

82 "One Step Ahead, a 21st Century Strategy to Defeat Organised Crime" Cm 6167, March 2004, http://www.homeoffice.gov.uk/docs3/wp_organised_crime.pdf

effectiveness of intelligence gathering techniques and capabilities) has not been struck in the right place if intercepted communications can never be used evidentially.[83]

A very different conclusion was reached by the Hon Mr Justice Butterfield in his *Review of criminal investigations and prosecutions conducted by HM Customs and Excise* following the collapse of the London City Bond cases. [84] His view was that there was no realistic scope for the use of intercept material for evidential purposes in criminal proceedings.

---

[83] Privy Counsellor Review Committee: Anti-terrorism, Crime and Security Act 2001 Review: Report, December 2003, http://www.homeoffice.gov.uk/docs3/newton_committee_report_2003.pdf

[84] Review of Criminal Investigations and Prosecutions conducted by HM Customs and Excise, July 2003 http://www.hm-treasury.gov.uk/newsroom_and_speeches/speeches/statement/butterfield03_report_index.cfm,