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Criminal Justice and Immigration Bill: Committee Stage Report

Bill 1 of 2007-08

This is a report on the Committee Stage of the Criminal Justice and Immigration Bill produced in response to a recommendation of the Modernisation Committee in its report on *The Legislative Process* (HC 1097, 2005-06).

The Bill is very wide-ranging, and draws together a large number of disparate and sometimes controversial policy issues.

It includes measures on youth justice, sentencing, the release and recalls of prisoners, criminal appeals, allowing non-legal staff to prosecute in magistrates' courts, and restricting the compensation payable for miscarriages of justice.

The Bill also covers aspects of pornography and prostitution, offences relating to nuclear material and facilities, data protection penalties, international cooperation in criminal matters, a new 'violent offender order', more measures against anti-social behaviour, and changes to police disciplinary procedures.

It creates a new restricted immigration status for foreign criminals who cannot be removed from the UK.

As amended in Committee, the Bill also contains measures on a new offence of incitement to homophobic hatred, and on sexual offences and offenders.

Sally Broadbridge

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I Introduction

The *Criminal Justice and Immigration Bill* (Bill 130 of 2006-07) was introduced in the House of Commons on 26 June 2007 and was given a Second Reading, without division, on 8 October 2007.[1] The Bill was committed to a Public Bill Committee on a programme motion which provided that Committee proceedings should conclude not later than 30 October. The motion was carried on a division of 294 to 188, and there was also a division (296 to 183) on a motion to carry the Bill over to the 2007-08 session.

At its first sitting, on 16 October, the Committee agreed a new programme motion of 16 sittings, including four at which oral evidence would be taken, concluding on 29 November. All 16 sittings were held. In the new session, the Bill was given formal First and Second Readings on 7 November 2007, as Bill 1 of 2007-08.[2]

The Committee took oral evidence from the Ministry of Justice, the Home Office, the Magistrates' Association, the Probation Boards Association, the Police Federation of England and Wales, Stonewall, the Youth Justice Board, the Children's Society, the Prison and Probation Ombudsman, Liberty and the Local Government Association. It received and reported over 400 written submissions.

The Bill as amended was published as Bill 15 of 2007-08, in two volumes. Since the Bill now contains 47 new clauses, most of which deal with issues not covered at all in the Bill as introduced, this report uses the numbering of the latest version.[3]

The Bill is very wide-ranging, drawing together a number of disparate policy issues. The Ministry of Justice press notice announcing publication of the Bill said that it would

- End automatic sentence discounts for offenders re-sentenced to an indeterminate sentence after initial sentencing decision ruled unduly lenient;
- Stop the plainly guilty having their convictions quashed because of procedural irregularities;
- Give powers for Courts to make dangerous offenders given a discretionary life sentence serve a higher proportion of their tariff before eligible for parole consideration;
- Create a presumption that trials in magistrates' courts will proceed in the absence of the accused;
- New offence of possession of extreme pornography;
- Extend of existing crack house closure powers to tackle premises at the centre of serious and persistent disorder or nuisance, regardless of tenure;
- Create a new offence of causing nuisance or disturbance on NHS premises;

1 HC Deb 26 June 2007 c180, 8 October 2007 cc59-131
2 HC Deb 7 November 2007 c142
3 unless stated otherwise in the text

- Violent Offender Orders, which will allow courts to impose post-sentence restrictions on those convicted of violent offences e.g. residence or movement restrictions;
- Removing the power to impose Suspended Sentence Orders for summary only offences;
- Providing for non-dangerous offenders who breach the terms of their licence to be recalled to prison for a fixed 28 day period;
- Creation of the Youth Rehabilitation Order a generic community sentence for children and young offenders, simplifying the current sentencing framework;
- Creation of the Youth Conditional Caution for young offenders aged 16 and 17;
- Bringing compensation for the wrongly convicted into line with that for victims of crime;
- A new special immigration status for terrorists and serious criminals who cannot currently be removed from the UK for legal reasons.[4]

In Committee, the Government added provisions to extend the offence of incitement to hatred to cover hatred on the grounds of a person's sexuality, to create a presumption that the relevant authorities should disclose a child sex offender's convictions to members of the public if a child was at risk, and adding provisions to the *Sexual Offences Act 2003*. Other additions extended certain provisions of the Bill to Northern Ireland and provided for a Northern Ireland Commissioner for Prison Complaints.

A House of Commons Library Research Paper The *Criminal Justice and Immigration Bill* (RP 07/65) provides briefing on the main provisions of the Bill and the background to them. Documents relating to the Bill, including Library publications are available on the Library's Bill Gateways page at:
http://hcl1.hclibrary.parliament.uk/parliament/bills/gateways.asp?session=2007-08&billid=370 and
http://hcl1.hclibrary.parliament.uk/parliament/bills/gateways.asp?session=2006-07&billid=97
Letters from the Ministry of Justice to stakeholders, and to the Committee explaining amendments proposed by the Government are available on the Ministry's website.[5]

II Second Reading, 8 October 2007

In opening the Second Reading debate, Jack Straw, the Lord Chancellor and Secretary of State for Justice, said that he was not able to cover the whole of the Bill in what was to be a "foreshortened debate".[6] He explained the rationale behind some of the provisions already in the Bill and outlined a number of additions and other amendments which the Government proposed to make. Some time was taken in debating whether the measures were calculated to increase or decrease the prison population at a time when prisons were seriously overcrowded, and the provision of new prison places. He agreed that it

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4 Criminal Justice and Immigration Bill, Ministry of Justice press release, 26 June 2007

5 http://www.justice.gov.uk/docs/crim-justice-corres-gov-amends.pdf http://www.justice.gov.uk/docs/crim-justice-min-corres.pdf

6 HC Deb 8 October 2007 cc59-70

was unsatisfactory that there were so many prisoners serving imprisonment for public protection (IPP) sentences (nearly 400) whose tariffs had expired and whose cases had not been processed; only 11 had so far been released.

Mr Straw referred to Part 6 of the Bill, which relates to the possession of extreme pornographic material, as an example of where legislation was needed to meet changing circumstances, in that case the current revolution in technology and communications. He said that Part 2 introduced a range of measures to ensure proportionality in sentencing, including the removal of magistrates' powers to impose suspended sentences for summary only offences (because such sentences were being used where non-custodial sentences would be more appropriate), taking away the "double jeopardy" discount when the Court of Appeal substituted an indeterminate sentence on an appeal against an unduly lenient sentence, and giving judges more discretion - in exceptional cases when they believe that an offence is sufficiently serious - to set the sentence that they see fit and not to have to halve the determinate sentence as presently required.

A. Proposed changes and additions

a. Criminal appeals

Mr Straw said that he would bring forward a replacement of clause 26, dealing with the circumstances in which the Court of Appeal could quash convictions "to recalibrate a little the test … in favour of the victim, not the offender", to meet criticisms which had been made of the drafting. Also, there would be a new clause to provide that the court could determine appeals against old convictions on the basis of what the law was at the time of the conviction.[7]

b. Homophobic hatred

He said that the Government would table amendments to extend the offence of incitement to racial hatred to cover hatred against persons on the basis of their sexuality.[8]

c. Sex offenders

Another addition would impose a positive duty on the multi-agency public protection arrangements (MAPPA) to disclose information about convicted sex offenders to members of the public when they considered that offenders presented a risk of serious harm to children.[9]

B. Reaction to the Bill and the proposed additions

Nick Herbert, the Shadow Secretary of State for Justice, was critical that the Bill was repealing parts of the Government's recent legislation, and that it was a typical

7 HC Deb 8 October 2007 c65
8 HC Deb 8 October 2007 c67
9 HC Deb 8 October 2007 c68

"Christmas tree Bill" where the Government were certain that they wished to legislate about something but were not sure what.

He outlined the elements of the Bill which could be agreed. The Conservatives supported the principle of the clauses which dealt with possession of extreme pornographic images and indecent photographs of children, and of those creating a new offence of causing nuisance or disturbance on NHS premises, also the creation of a prison commissioner. They would, however, oppose the proposals to limit prison recalls to 28 days and to abolish the power of magistrates to impose suspended sentences. He suggested that the effectiveness of quasi-criminal measures such as ASBOs (half of which were breached), which blurred the line between the criminal and civil law, must raise great concern about whether violent offender orders would be "similarly robust". He also said that the proposal to extend the powers of non-legally qualified staff to conduct trials in magistrates courts and the proposed offence of inciting homophobic hatred would have to be examined very closely in Committee.
In the context of the new special immigration status for foreign prisoners, he said that a major flaw in relation to the Bill was the *Human Rights Act 1998* which prevented deportation in some cases.

Both main Opposition parties indicated that the wanted to see more "honesty in sentencing", as there was a crisis in public confidence when prisoners were released much sooner than the public might expect from the sentence as pronounced. David Heath for the Liberal Democrats said that when a sentence was handed down it should say what was going to happen, for the benefit of victims, witnesses, the public and indeed defendants.[10] He said that he welcomed the abolition of suspended sentences for summary offences, but expressed reservations about violent offender orders and the need for a special offence of disturbance on hospital premises. He also said that homophobic hate crime should be stamped out, and indicated that the Liberal Democrats would support a workable solution, one which would not compromise people who were simply professing faith or expressing themselves in ways which others might not agree with, but were not intended to incite crime.[11]

In interventions and 10 minute speeches over 30 backbenchers raised a number of issues, most of which were aired more fully in Committee.

C. What is not in the Bill

1. The law of self-defence

At the end of the Labour Party Conference in October 2007, Mr Straw announced "an urgent review of the law on self-defence...aimed at ensuring that those who seek to protect themselves, their loved ones and their homes, as well as other citizens, have confidence that the law is on their side".[12] At Second Reading he confirmed that he wanted to look again at the law on self-defence to ensure that the focus was correct, and

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10 HC Deb 8 October 2007 c86
11 HC Deb 8 October 2007 c91
12 "New laws protect have-a-go home owners" 1 October 2007, *Telegraph.co.uk*

that those who acted proportionately were not treated like criminals: his aim was to complete the review in time for the issue to be addressed in the Bill. Shadow Justice spokesman Nick Herbert said that the Conservatives had repeatedly urged a change in the law so that people could protect themselves against intruders in their homes, but that Labour had fought them on that idea year after year. Mr Straw said that the proposals contained in two private Members' Bills needed some changes in their wording. He would be happy to sit down with the promoters of those Bills as part of the consultation process, with a view to tabling amendments on Report and to see whether consensus could be reached.[13]

In Committee Edward Garnier raised the topic by tabling new clauses taken from Ann McIntosh's Private Member's Bill.[14] He knew that the Government intended to table some provision on Report or later, but thought that should not inhibit the Committee from having a brief discussion about the issue.[15] The Liberal Democrats have indicated that they see no need for change.[16]

2. Prostitution

At Second Reading, Lynne Jones (Labour) expressed disappointment that there had been no opportunity for a comprehensive review of the laws on prostitution. The Bill does contain provisions relating to prostitution, removing the statutory reference to "common prostitute" and introducing new orders to promote rehabilitation in cases of persistent loitering for the purposes of prostitution. This gave rise to concerns in Committee about the effect on young people, and the risk of driving prostitution underground. It also stimulated wider debate on the subject of prostitution, and an opposition amendment proposing to make it an offence to offer to pay for sexual services, based on the Swedish model.[17] The Minister said that he would reflect on points made in the debate.

3. Police efficiency

In July 2007 the Prime Minister had said that the Government stood ready to introduce new measures into the *Criminal Justice Bill* – "including as a result of the review of policing by Sir Ronnie Flanagan which reports later this year".[18] At Second Reading, the Lord Chancellor was asked what measures would be brought forward in amendments to the Bill to implement recommendations to improve police efficiency made in the Flanagan Review. He said that the Government had recently received an interim report, but the final report was not due until the New Year, so the chances of any provision from it being included in this Bill were "extremely unlikely".[19]

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13 HC Deb 8 October 2007 c69

14 The *Criminal Law (Amendment)(Protection of Property) Bill*. Bill 18 of 2005-06 see Library Research Paper 05/83, November 2005

15 PBC Deb 29 November 2007 c736

16 PBC Deb 29 November 2007 c739

17 PBC Deb 27 November 2007 cc535-570

18 http://www.number10.gov.uk/output/Page12422.asp

19 HC Deb 8 October 2007 c72

4. Extradition

Press reports had suggested that the Home Secretary was to have new powers to bar requests for extradition if a significant part of the alleged crime had taken place in Britain.[20] In Committee, Edward Garnier sought to add a new clause to that effect.[21]The amendment was rejected on a division by 10 to 5 votes.[22] In a written answer on 3 December, the Home Secretary referred to "inaccurate claims in the press" and said that the Government had no plans to introduce such a bar to extradition.[23]

III Committee stage 16 October – 29 November 2007

The following commentary focuses on amendments which added new provisions to the Bill, or made major changes to existing ones, and on other provisions which proved either controversial or in need of clarification in Committee.

A. Additional and replacement clauses

The additions and substitutions made to the Bill are described below in the order in which they appear in the Bill, which is not necessarily the order in which they were debated.

1. Release of prisoners after recall

Clause 16 would provide that, where a prisoner who had been released early from prison breached the conditions of his licence, he would be recalled to prison for a fixed period of 28 days, rather than to serve the rest of his sentence, as currently happens. In Committee, the Government made amendments intended to put the provisions into a structure which would be easier for practitioners to understand.[24] The Minister explained that the provisions defined three groups of determinate sentence prisoners for whom different re-release procedures following recall must apply. He said that the Government was trying to demonstrate swift and effective enforcement of licence conditions, which had to be managed in the context of the prison population. There was some debate about the different roles of the "Lord Chancellor" and "the Secretary of State for Justice".[25]

Edward Garnier said that the 28-day automatic recall period was sensible, based on the experience of the state of New York, where recall rules had been changed for people who committed minor acts of misconduct on parole. However, there should be more judicial input rather than decisions being made by the Secretary of State. David Heath saw why the Government was proposing the clause, and would not argue against it, but said that young people were a special case. He said that the existing arrangements for them worked reasonably well, and asked the Minister to consider the possibility of

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20 "Minister gets power to veto US extraditions", 14 October 2007, *The Times*
21 PBC Deb 29 November 2007 c725
22 PBC Deb 29 November 2007 c732
23 HC Deb 3 December 2007 c770WA
24 PBC Deb 20 November 2007 c369
25 PBC Deb 20 November 2007 c371

pursuing the issue at a later stage.[26] The Minister said that he would reflect on what was said, although he stressed that the purpose of the provisions was to help refocus the heavily burdened Parole Board on looking at the parole needs of serious, dangerous, violent and sexual offenders.[27]

2. Criminal appeals

a. Amendment of test for allowing appeals: clause 26

Section 2(1) of the *Criminal Appeal Act 1968* provides that:

> (1) Subject to the provisions of this Act, the Court of Appeal—
> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
> (b) shall dismiss such an appeal in any other case.

In September 2006 the Home Office published a consultation paper entitled *Quashing Convictions*, putting forward for consideration three options as to the form which amending legislation might take to ensure that, where the Court of Appeal are of the view that a conviction is, in the normal sense of the word, 'safe', it should not be possible to quash it.[28] These were to:

> A: re-instate a proviso similar to that which was part of the original statutory test so as to provide that the appeal should not be allowed, even if there is a procedural irregularity, if the Court consider no miscarriage of justice actually occurred;
> B: replace the proviso with another formulation, designed to achieve the same end, and perhaps addressing more directly the Court's view (where they have reached one) of the guilt of the appellant;
> C: recast the test and the task of the Court of Appeal so as to require a substantial re-examination of the evidence (akin to the task of the jury).

The paper referred to the case of *R v Mullen*,[29] where the court had quashed a conviction, of a man who had been rendered to the UK by the Zimbabwean authorities without legal process instead of being extradited, although the court identified no failure in the actual trial process.

Clause 26 of the Bill as introduced in June 2007 would have amended s2 of the *Criminal Appeal Act* by providing that

> A conviction is not unsafe if the Court of Appeal are satisfied that the appellant is guilty of the offence

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26 PBC Deb 20 November 2007 c376
27 PBC Deb 20 November 2007 c377
28 http://www.homeoffice.gov.uk/documents/cons-2006-quashing/cons-2006-quashing-convictions2?view=Binary
29 [2000] Q.B. 520

although the court would still be able to allow an appeal in such a case if it thought that dismissing the appeal would be incompatible with the appellant's rights under the European Convention on Human Rights.

On 8 October 2007 the Government published a one page summary of responses to the consultation paper, commenting that although the paper had made it clear that the Government was seeking views about how, not whether, the test for quashing convictions should be changed, most legal respondents had expressed the view that no reform was needed.[30] The summary made no reference to the three options on the form of amendment, but noted the suggestion of some respondents that another reform was needed, namely to enable the Court of Appeal to uphold a conviction where the appellant was properly convicted under the law as it was when he was tried, although there has been a later change in judicial interpretation of the law, which could not have been foreseen at the time of the trial.

On Second Reading, the same day, the Secretary of State for Justice, Jack Straw, said that almost all the responses had been critical of the drafting contained in clause 26,[31] and that he was comprehensively reviewing it with a view to tabling a replacement. He said that he would also bring forward amendments to clarify the law so that the Court of Appeal could deal with an appeal relating to a conviction of many years standing on the basis of the law at the time of conviction. Nick Herbert, the shadow Secretary of State said that the question was why the Government had introduced the Bill without consulting properly on the measures in it.[32]

The Government amendment to clause 26 brought forward in Committee was made on a division of 9 votes to 6, so that the Bill now provides that

> the conviction is not unsafe if the Court think that there is no reasonable doubt about the appellant's guilt

but the provision does not require the Court to dismiss the appeal if they think that it would seriously undermine the proper administration of justice to allow the conviction to stand.

The Minister explained that the intention was to ensure that the court was not prevented from allowing an appeal, even when the appellant's guilt was not in doubt, when there has been serious misconduct by the investigating or prosecuting authorities.[33] She said that the original clause would have affected only a small number of cases, but that they could do a great deal of damage to the reputation of the criminal justice system.[34]

The clause was opposed by Conservative and Liberal Democrat Members, who maintained that no change to the existing law was needed. Edward Garnier thought that there was a false notion underling the proposal, that defendants who were clearly guilty

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[30] http://www.justice.gov.uk/news/announcement_081007b.htm
[31] HC Deb 8 October 2007 c66
[32] HC Deb 8 October 2007 c74
[33] PBC Deb 20 November 2007 c392
[34] PBC Deb 20 November 2007 c394

regularly escaped punishment because the Court of Appeal quashed their convictions on account of "footling" irregularities: in the comparatively rare cases where the court considered a procedural flaw too grave for the conviction of a visibly guilty person to be allowed to stand, it would usually order a retrial, which could cure the problem. At Second Reading David Heath said:

> If we in this country are to accept circumstances in which extraordinary rendition is whitewashed by legal procedure, we are on a very slippery slope indeed. I think that the Lord Chancellor now recognises that that is the purpose of the amended wording that will be introduced, and I welcome that and am grateful to him for it.[35]

In Committee he said that the Lord Chancellor had been unable to come up with a single concrete example of a case in which the discretion available to the court was not sufficient to deal with the supposed mischief.[36] He and David Burrowes said that the clause, even with the amendment, would still put the court in the position where it would be required to act as a court finding on fact, usurping the primary role of the jury, which was not satisfactory.[37]

b. Power of Court of Appeal to disregard developments in the law

Clause 28 was a new clause brought forward by the Government to meet concerns expressed by the judiciary that, while the court would normally refuse leave to appeal against an old conviction which was in accordance with the law at the time of conviction, nevertheless in appeals where the court's leave was *not* needed (as is the case on referrals by the Criminal Cases Review Commission), the court had no alternative but to quash such a conviction if it could not be upheld under the law current at the time of the appeal.

There were no objections to the principle of the new clause, but both Edward Garnier and David Heath were critical of the drafting. They referred to the concerns expressed by Professor Graham Zellick, the current Chairman of the Criminal Cases Review Commission, that the clause gave no guidance as to when a development in the common law might be disregarded – it did not follow that the statutory provision was to be applied in line with the court's long established "substantial injustice" test in respect of applications for leave to appeal out of time. Professor Zellick had said that the Commission regarded the drafting as "seriously defective", and the words "and are satisfied that it would not give rise to substantial injustice" should be added. The response of the Parliamentary Under-Secretary of State for Justice, Maria Eagle, was that the Government was not persuaded that the words were desirable or even appropriate, partly because the meaning was insufficiently clear to the Court to give it effective guidance: the implication might be that when it was not required to consider such a test, the court spent its time creating injustice. She said that the clause as it stood reflected the work which had gone on with the senior judiciary.[38]

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[35] HC Deb 8 October 2007 c89
[36] PBC Deb 20 November 2007 c403
[37] PBC Deb 20 November 2007 c404
[38] PBC Deb 20 November 2007 c414

3. Sexual offences

Clauses 102 and 103 and Schedule 20 were Government amendments to Part 7 of the Bill.

a. Offences committed outside the United Kingdom

The *Sexual Offences Act 2003* allows for the prosecution of UK citizens and residents for sex offences against children that are committed abroad. Clause 102 would remove the dual criminality provision which currently provides that the act must be criminal in the country where it was committed, and would extend the extraterritorial jurisdiction to offences against children up to the age of 18 instead of 16. The Minister said that this would act as a significant deterrent for British offenders who contemplate travelling abroad for the purposes of sexually exploiting children.[39]

b. Grooming and Adoption

Clause 103 introduces Schedule 20, which is to strengthen the offence of meeting a child following sexual grooming, under s15 of the *Sexual Offences Act 2003*, (so that police will be able to apprehend offenders at an earlier stage in the process of grooming), and would make it an offence for an adoptive parent to have sex with the adopted child when over the age of 18.[40]

4. Hatred on the grounds of sexual orientation

On Second Reading Jack Straw said that homophobic abuse, lyrics and literature were every bit as abhorrent to those concerned as material inciting hatred based on race or religion, and that the Government would table an amendment in Committee to extend the offence of incitement to racial hatred to cover hatred against persons on the basis of their sexuality.[41] The addition was welcomed in principle, subject to the need to ensure a proper balance with the right of free speech. Mr Straw also invited views on whether the offence could or should be extended to cover hatred against transgender and disabled people, saying that he would consider amendments to that end if a case could be made.

The Chief Executive of Stonewall told the Committee that there had been a recent increase in what seemed to be very obvious examples of incitement to hatred for gay people, which would not be caught by the law.[42] He said that reggae music was a key area, and gave examples to make their offensiveness clear. These included lyrics which meant “Hang lesbians with a long piece of rope”, “All gay men should die”, and encouraged the killing of gay people with various weapons.[43] He said that Stonewall’s view was that intent was an important part of the offence. The Chairman of the Police

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39 PBC Deb 29 November 2007 c723
40 ibid
41 HC Deb 8 October 2007 c67
42 Stonewall is an organisation which works for ”equality and justice for lesbians, gay men and bisexuals”
43 PBC Deb 16 October 2007 c70

Federation told the Committee that proper guidance would have to be provided to ensure that jokes and sermons were not covered.[44]

In Committee the Government brought forward a new clause (clause107) introducing a new schedule (Schedule 22) amending the *Public Order Act 1986,* to extend the incitement offence under Part 3A to include incitement to hatred on the grounds of sexual orientation.[45]

The Minister said that the new clause and schedule were aimed at words and behaviour which were threatening, not merely insulting or abusive, and that there must be an intention, not merely a likelihood, of inciting hatred. The emphasis on intention should allay concerns (which had been widely expressed) about people inadvertently stumbling into committing offences, for example by preaching religious doctrine or telling jokes. The provision was to fill the lacuna - that the present law did not make it an offence to incite hatred of a group of people, without picking out an individual, on the basis of their sexuality.[46]

Philip Hollobone said that the huge worry of many people who held faith—not just Christian, but Muslim and other religions—was that such a provision would have "a huge chilling effect on their ability to pronounce their faith".[47] He was the only Member who voted against the clause on a division. [48]David Burrowes said that it was important that the chill factor, which people already felt, was not increased by the new clause. The Conservatives accepted (on the basis of the evidence presented to the Committee, and the Government's material) that there was a need for a new law, but proposed an alternative new clause which laid more emphasis on ECHR rights (eg freedoms of thought, expression and peaceful assembly). They thought that the Government's provisions were unnecessarily complicated and difficult to follow. [49] David Heath for the Liberal Democrats agreed that the provisions were extremely complex, but thought that the Government had come forward with a workable proposal.[50]

5. Sex offenders

Clauses 165-167 were Government new clauses added in Part 13.

a. Disclosure of information about convictions etc of child sex offenders to members of the public

Clause 165 follows from the Review of the Protection of Children from Sex Offenders published by the Home Office in June 2007.[51] The Review rejected the idea of a

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44 PBC Deb 16 October 2007 c59
45 PBC Deb 29 November 2007 cc658-692
46 PBC Deb 29 November 2007 c663
47 PBC Deb 29 November 2007 c678
48 PBC Deb 29 November 2007 c750
49 PBC Deb 29 November 2007 c668
50 PBC Deb 29 November 2007 cc672-674
51 http://www.homeoffice.gov.uk/documents/CSOR/chid-sex-offender-review-130607?view=Binary

"Megan's law" but concluded that greater use of controlled disclosure was necessary. The Minister explained that [clause 165]

> builds on the existing duty to co-operate placed on all MAPPA-responsible authorities, which is included in the Criminal Justice Act 2003. It will ensure that MAPPA authorities are under a specific duty to consider the disclosure of a child sex offender's convictions to members of the public. There will be a presumption that convictions will be disclosed, if a child is at risk of suffering harm through the offender's committing another child sex offence, and the disclosure is necessary to protect the child.
> …The list of offences, convictions or cautions that could be the subject of disclosure is included in [schedule 30]
> … It includes sexual offences that can be committed only against children, such as sexual activity with a child, and other sexual offences that are not specifically child sex offences, such as sexual assaults, in cases in which the victim was under 18.[52]

He stressed that the duty placed on multi-agency public protection arrangements (MAPPA) authorities would be to *consider* disclosure, not necessarily to disclose, although there would be a presumption that information will be disclosed if a child sex offender managed by MAPPA authorities poses a risk of harm to any child or children generally.

In response to amendments which would have limited the presumption to cases where there was a risk of "serious" harm to children, the Minister said that the Government would put the word in on Report.[53]

The Liberal Democrat and Conservative spokesmen had reservations about the clause, suggesting that the new presumption would raise expectations which could not be satisfied if the authorities were to do their job, and that it would be impossible in practice for notified individuals to keep the information confidential. Their view was that successful good practice was already in place and that the new provision was tabloid driven.[54]

Gareth Crossman, the policy director of Liberty, described in oral evidence where he thought problems would arise with the clause and why he thought it would not work.[55]

The amendment was passed on a division of 10 votes to 4.[56]

b. Sexual offences prevention orders

The *Sexual Offences Act 2003* introduced sexual offences prevention orders which are used to impose prohibitions on violent offenders or sex offenders who pose a risk of

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52 PBC Deb 29 November 20007 c695
53 PBC Deb 29 November 2007 c696
54 PBC Deb 29 November 2007 cc699-707
55 PBC Deb 18 October 2007 c128
56 PBC Deb 29 November 2007 c755

serious sexual harm. Clause 166 addresses a potential anomaly that allows offenders convicted of certain violent offences to be made subject to a sexual offences prevention order in a wider range of circumstances than offenders convicted of sexual offences. It will widen the circumstances in which those in the latter category can be made subject to an order.[57]

6. Persistent sales of tobacco to persons under 18

Clause 168 was described by the Minister as "a negative licensing scheme".[58] It is to enable magistrates to impose orders on retailers prohibiting the sale of tobacco for up to a year for persistent flouting of the law restricting the sale of tobacco to under 18s. Orders may be made if there are more than two offences within a two year period, and they may relate to premises and/or individual salesmen. The Minister said that there was a need to encourage retailers to comply with the recent changes in the law to raise the minimum legal age (from 16 to 18): this took effect in October 2007.[59]

Concerns raised during debate in Committee included that tobacco sales accounted for a high proportion of the sales of small retailers, who often also had rapid turnover of staff, and whether the approach to tobacco sales should be the same as that for alcohol. The *Licensing Act 2003* makes it an offence for the underage person to attempt to buy and for a person to buy on behalf of an underage person, and under the *Violent Crime Reduction Act 2006* an offence is committed if on three or more different occasions in a period of three consecutive months alcohol is unlawfully sold on the same premises to a person aged under 18: on conviction the court may make an order suspending the premises licence for up to 3 months.[60]

The Minister said that the Government could not accept Opposition amendments which would have reduced the reference period from 2 years to 3 months and also the maximum ban period to less than one year. He said that time frames for alcohol differed owing to its potentially serious consequences for individuals and the community, and that it would not be practical for local authorities (who often undertook underage test purchasing only once or twice a year) to carry out test purchases within the suggested three month period.

However, he agreed to take away an amendment which would have required notice of the offence to be given to the person having management functions in the premises and to look again at the proposal for an offence of buying on behalf of an underage person: he offered no commitment to introduce such measures.[61]

There was also some concern about lack of publicity for the changes made in October 2007.

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57 PBC Deb 29 November 2007 c698
58 PBC Deb 29 November 2007 c713
59 PBC Deb 29 November 2007 c713
60 PBC Deb 29 November 2007 cc713-716
61 PBC Deb 29 November 2007 c 717

B. Other provisions prominent in Committee debates

The commentary below outlines some of the issues which arose in Committee, but does not pretend to be an exhaustive summary.

1. Abolition of suspended sentences for summary offences

The Minister said that the use of suspended sentence orders had increased dramatically since they were introduced in April 2005, with approximately 40% being for summary only offences: this indicated that many people now receiving suspended sentences would have received community sentences before.[62] The opposition spokesmen referred to evidence from the Magistrates' Association and the Police Federation, both of whom opposed clause 10, which would abolish the power to pass suspended sentences for summary only offences. In passing a suspended sentence, the bench had to have been satisfied that the "custody threshold" had been reached and a community sentence was not appropriate for the offence. Thus, the effect of the clause would be to increase the number of immediate custodial sentences. They said that the concern about magistrates' misusing suspended sentences, if there was one, could be met not by removing magistrates' discretion but by encouraging them to have training to apply existing legislation properly.[63] Removal of the discretion would do great damage to the ability of magistrates' courts to sentence appropriately. The Minister accepted that that there had been points within the evidence which were worthy of reflection, and that the clause would have some impact on the prison population.

The Committee divided and agreed the clause by 10 votes to 6.[64]

2. Indeterminate sentences: determination of tariffs

Clause 12 would give judges a discretion when setting the minimum period (tariffs) to be served by prisoners in particularly serious cases. The new provision was a response to cases like *R v Sweeney*,[65] where the current rules had required the judge to set a tariff of a mere six years on a conviction for kidnap and sexual assault of a 13 year old girl, and the then Home Secretary had criticised the sentence. The Conservatives approved the principle of the clause but described it as "gobbledegook" and offered (but did not press) an alternative draft which they considered could achieve the same result more simply.[66] The Liberal Democrats agreed that clause 12 was the antithesis of clarity in drafting,[67] and the Minister agreed that the clause was difficult to comprehend. He said that, in simple terms, the clause would ensure that courts had the discretion to set appropriately high tariffs for particularly serious crimes, which would not include murder, but would

62 PBC Deb 20 November 2007 c332
63 PBC Deb 20 November 2007 c332
64 PBC Deb 20 November 2007 c338
65 June 2006
66 PBC Deb 20 November 2007 c345
67 PBC Deb 20 November 2007 c347

include crimes for which an offender could receive a life sentence. He said that the Conservatives' alternative draft left a number of gaps.[68]

3. Her Majesty's Commissioner for Offender Management and Prisons

The creation in Part 4 of the statutory office of Commissioner to replace the non-statutory Ombudsman was welcomed and uncontroversial. In giving oral evidence to the Committee the present Ombudsman, Stephen Shaw, said that under the Bill as drafted the new Commissioner would be operating within a structure determined by the Secretary of State. He thought it would be better for the Commissioner to be accountable directly to Parliament, which would have the benefits of more conspicuous independence and greater accountability. An ombudsman operating under a departmental umbrella was likely to be challenged about the degree of independence he enjoyed – the Parole Board had recently been "found wanting" on those grounds. While Mr Shaw had experienced no improper interference with his decision making, complainants saw who appointed and funded the ombudsman, and the legitimacy of his decision making would, in their eyes, be enhanced with greater independence.[69] Also, his office would like to see an extension of its remit to complaints in respect of children held in secure training centres.

The Minister recognised that the Secretary of State's laying of reports might give rise to concerns about independence, so what was provided in the Bill was for the commissioner to publish reports in his own right, then the Secretary of State would be required to lay them.[70] On eligibility of complaints the Secretary of State would have power to specify matters which would be excluded. When invited to indicate what sort of matters the Government had in mind to exclude, the Minister said that there was a working list (covering matters within other ombudsmen's remits, and police complaints) which she would let the Committee see.[71]

Edward Garnier suggested that the list should be published rather than just sent to Committee members.[72] He also tabled amendments to extend the time limits for prisoners to make complaints (12 months from when the person first became aware and within three months of the responsible authority's response), suggesting that although there was a discretion to extend the deadlines, it would be preferable to start with longer periods. He withdrew his amendment but urge the Government to consider reconsidering the limitation periods if there were a lot of out of time applications.[73]

A parallel new Part 5 of the Bill was added in Committee, to set up a Northern Ireland Commissioner for Prison Complaints.[74]

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68 PBC Deb 20 November 2007 c348
69 PBC Deb 18 October 2007 cc111-118
70 PBC Deb 20 November 2007 c442
71 PBC Deb 20 November 2007 c427
72 PBC Deb 20 November 2007 c428
73 PBC Deb 20 November 2007 c432
74 PBC Deb 29 November 2007 c762

4. Trial or sentencing in absence of accused in magistrates' courts

David Burrowes said that clause 85 (formerly 57) would create a presumption that, if a defendant failed to attend a trial in a magistrates' court without good cause, the magistrates would use their powers to try them in their absence, but that magistrates already had that discretionary power and often used it.[75] Representatives of the Magistrates' Association said that they were not in favour of the presumption, and had not been properly consulted. [76] Concern was also expressed about vulnerable people who might fail to attend, not deliberately, but because they had myriad problems and were "chaotic". Being sentenced in absentia, they would have maximum penalties imposed, and it was very difficult to stop the enforcement process once it had started. The Minister said that the presumption was being introduced because the current discretion was not used uniformly across the country, and that there were safeguards to deal with individual circumstances of the kind mentioned by Opposition Members.[77]

5. Extension of powers of non-legal staff

Clause 86 (formerly 58) would extend the powers and rights of audience of the Crown Prosecution Service's designated caseworkers (who do not have to be legally qualified) so that they could, for example, conduct summary trials in magistrates' courts.

The Magistrates' Association, the Bar Council and the Law Society were among those who were opposed to the extension, and David Burrowes said that he wanted to "bang the drum for the victim sitting at the back of the court" seeing a prosecutor who did not have the same qualification or expertise as the defence lawyer. He also said:

> The criticism, quite rightly, is that the clause reveals a desire to get justice on the cheap.[78]

Several members of the Committee expressed concern that the legal and judicial system was being downgraded. During debate, the Minister said that the Crown Prosecution Service was in favour of the extension, although there had been a suggestion to the contrary, and that *The Times* newspaper's reporting that the Director of Public Prosecutions could not imagine a situation in which caseworkers could be entrusted to handle cases in which a defendant might go to jail was not necessarily an accurate quote.[79]

She said that she understood the concerns expressed in Committee, and wanted to achieve as much of a consensus as possible. Discussions of an exploratory nature were taking place with the Institute of Legal Executives regarding possible membership of the institute for designated caseworkers and the CPS training programme for them.[80]

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75 PBC Deb 22 November 2007 c491
76 PBC Deb 16 October 2007 c51
77 PBC Deb 22 November 2007 cc486-494
78 PBC Deb 22 November 2007 c496
79 PBC Deb 22 November 2007 c499
80 PBC Deb 22 November 2007 c501

There was a division 9 to 6 on the question that the clause stand part.[81]

6. Compensation for miscarriages of justice

Clause 92 (formerly clause 62) would impose a time limit of two years for making claims for compensation for a miscarriage of justice and would cap the compensation payable at £500,000.

At Second Reading the clause was criticised by several Members, including David Heath who said that the Government had "got things completely the wrong way round" and should be extending the capacity for compensating victims of crime (beyond £500,000) rather than limiting compensation for "people who have had the worst thing inflicted on them that a state can inflict - imprisonment for a crime that they did not commit".[82] In Committee, five Members spoke against the clause and only the Minister spoke in support of it. The motion that the clause stand part was carried on a division of 9 votes to 6.

Those who spoke against were critical of the Government's presentation of the proposed limitation as part of a rebalancing of the scales between perpetrators and victims of crime. They said that there was no link between victims of crime, and victims of miscarriages of justice – who were

> victims of the worst possible manifestation of state action short of judicial execution[83]

and it was wrong to imply that the two sets of victims were competing for the same pot of money. In the Home Office press release announcing the plan to change the scheme, the then Home Secretary Charles Clarke had said:

> The Government is committed to putting victims' interests at the heart of the criminal justice system. These changes will save more than £5 million a year which we will plough back into improving criminal justice and support for victims of crime.[84]

Members argued that victims of crime had the option of taking civil action against the criminal, with the state having a role when it was not possible for the criminal to compensate the victim, whereas the state alone was responsible for correcting its own mistakes. The Minister responded that it was perfectly open for any individual who had been the victim of a miscarriage of justice to bring civil claims if they wished, but she did not specify how such a claim might be brought.[85]

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81 PBC Deb 22 November 2007 c502
82 HC Deb 8 October 2007 c89
83 PBC Deb 22 November 2007 c505
84 *Home Secretary outlines changes to system for compensating miscarriages of justice*, Home Office press release 19 April 2006
85 PBC Deb 22 November 2007 c508

The Minister explained that the limitation period of two years from the date of the conviction being quashed (or pardon granted) had been chosen because it equated to the time crime victims had for making claims to the Criminal Injuries Compensation Authority.[86] Other Members of the Committee suggested that, if there were to be a time limit, it should equate to the 6 years which crime victims had to bring civil claims against the criminals. They also queried the rationale behind an arbitrary cap of £500,000. Charles Walker referred to the case of Stefan Kiszko who

> spent 16 years in prison being violently beaten for a crime that he did not commit. After 16 years, he was released. ... I do not understand how we can set an arbitrary limit of £500,000. Today, the money would not begin to compensate a man for spending 16 years in prison, wrongly convicted of killing a child, with the brutality that such a person would experience in prison and the difficulties that he would experience after release.[87]

The Minister said:

> a victim of a miscarriage of justice receives, on average, 50 times more compensation than a victim of a violent crime, and we do not believe that that is right.[88]

She added that the Government was seeking to place reasonable limits on the time and the amount that could be paid out, and that the statutory scheme fulfilled the international obligation to pay compensation. She said that in some cases it was clearly wrong that people could receive the level of compensation which had been received, and offered three anonymised examples of cases which appeared to be undeserving (£27,000 for a sexual offence, £2 million for a smuggling offence and an interim payment of £500,000 for fraud offences). Edward Garnier suggested that the figures did not mean very much as the Committee knew nothing of the background to the cases, for instance a career might have been blighted.[89]

The Minister said that the system was not properly balanced and that comparisons about how the system dealt with victims of crime were legitimate. She rejected Edward Garnier's suggestion that the Government was dressing up arguments that it could not afford the current scheme, and referred to the statement made in April 2006, as showing that the changes arose out of concerns expressed in the statement, not simply a matter of cost but fairness.

In that statement the Home Secretary had also announced the ending of the discretionary compensation scheme under which in some circumstances ex gratia payments were made to people who had been acquitted after spending time in custody awaiting trial.

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86 PBC Deb 22 November 2007 c509
87 PBC Deb 22 November 2007 c511
88 PBC Deb 22 November 2007 c507
89 PBC Deb 22 November 2007 c510

7. Possession of extreme pornographic images

Clause 94 (formerly 64) would make it an offence for a person to be in possession of an "extreme pornographic image". Extreme images would be those depicting life threatening acts, acts which cause or could cause serious injury to a person's anus, breast or genitals, and acts of necrophilia or bestiality: an image would be "pornographic" if it "appears to have been produced solely or principally for the purpose of sexual arousal".

The Home Office consulted on the proposal for this new offence in 2005, following a campaign instigated by Mrs Liz Longhurst after the conviction of her daughter's murderer. She wrote to Members saying:

> If these measures can be enacted, I feel this will be a fitting memorial to my lovely daughter Jane who was murdered by a man addicted to extreme violent internet pornography.[90]

At Second Reading Mr Straw said that he would like to pay tribute to her on behalf of the whole House, and to applaud the campaign that she had so skilfully and resolutely waged.[91] The Opposition supported the principle of the clause, commenting that the whole House would share a determination to protect society from images that could provoke violence.

A number of concerns were flagged up at Second Reading and explored in greater depth in Committee. While Members who took part in the debates were generally of the view that such images were "vile", "awful", "unpleasant", "horrible", "obscene and disturbing" and "nasty", some questioned whether a causal link between the images and offences of violence had been established. In the 2005 consultation, the Government had said that it was

> unable, at present, to draw any definite conclusions based on research as to the likely long term impact of this kind of material on individuals generally, or on those who may already be predisposed to violent or aberrant sexual behaviour."

There was anecdotal evidence, such as that given by Jan Berry, chairman of the Police Federation, to the effect that for a few days after the showing of television programmes depicting incidents (such as people throwing stones off motorway bridges) police were called to deal with similar incidents.[92] David Heath said that anyone would be against it if there was a causal relationship between the images and violence against women, but the evidence was extremely thin.[93] The Minister said that the Government believed, on what it knew, that there was some link and some evidence of harm in some people. She referred to a "rapid evidence assessment" produced by the Government in September 2007,[94] which had not commissioned specific research but had looked at all the research which had been done, which

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90 HC Deb 8 October 2007 c114
91 HC Deb 8 October 2007 c60
92 PBC Deb 16 October 2007 c68
93 PBC Deb 22 November 2007 c518
94 *The evidence of harm to adults relating to exposure to extreme pornographic material: a rapid evidence assessment* (REA), Ministry of Justice Research Series 11/07 September 2007

> showed that there was cause to have concern in certain circumstances for what is, no doubt, a smallish number of the population who might be susceptible to their behaviour being affected by viewing extreme pornography.[95]

Charles Walker was also concerned at an apparent contradiction in that possession of pornographic clips or stills from a film which had been granted a certificate for general release could amount to an offence.[96]

The Government explained that the production and publication in the UK of the images targeted by the clause were already offences under the *Obscene Publications Act 1959*, but that the new offence of possessing images was needed because the makers and distributors were often operating across borders. It believed that hardly any of the material being discussed was hosted in this country. Martin Salter said:

> The extreme material that will be outlawed by the Bill covers acts and imagery that are already illegal under the Obscene Publications Act. But that legislation was introduced in an age before computers and the internet to deal with newsagents and publishers. We cannot go after the publisher of material if it is from an internet site whose server may be based in Guatemala and contains, produces or puts into cyberspace images of young women being captured, raped live on camera and sometimes killed to feed this evil trade and to promote private profit and sexual gratification. We have to go after the imagery itself. [97]

It was, however, suggested that the new offence was broader, using a different definition from that in the *Obscene Publications Act*. Harry Cohen quoted from a letter written to him by Deborah Hyde of Backlash, saying:

> The breadth of the proposal will make illegal the possession of a wide range of currently legally published material, material that is not clearly illegal under the Obscene Publications Act, criminalising large numbers of people who have bought such material legally. The Government admit that the proposal breaches articles 8 and 10 of the European Convention on Human Rights. Their justifications are unlikely to meet the convention's requirement for such interference. [98]

The Minister said that the Government did not seek to change the law in respect of what was obscene or pornographic, or extend the *Obscene Publications Act 1959*, but needed to create the possession offence in order to enforce the current law, with a

> high threshold for the offence, focusing on material that we believe is already illegal to publish.[99]

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95 PBC Deb 16 October 2007 c31

96 PBC Deb 22 November 2007 c517, HC Deb 8 October 2007 c 118

97 HC Deb 8 October 2007 c112

98 An umbrella organisation formed "to fight plans to criminalise ownership of material the Home Office finds abhorrent"

99 PBC Deb 22 November 2007 c524

In Committee, Opposition Members and one Labour Member queried in particular an apparently "subjective" test in the repeated use of the words "appears to" e.g. in defining an image as pornographic "if it appears to have been produced solely or principally for the purpose of sexual arousal"(clause94(3)) – asking to whom it must appear that the image had been so produced. Was it to hardened police officers who specialised in working in that area of criminal activity, or to the man on the Clapham omnibus?[100] The Committee debated Harry Cohen's series of amendments to take out the wording "appears to". The Minister said that those amendments would limit the scope of the offence to images which could be proved to be real depictions of events which actually took place, which would be extremely difficult to prove. She said that she would reflect on any concerns raised by Members and see whether the wording could be improved.[101]

The amendment was withdrawn and the clause ordered to stand part, without division.

8. Imprisonment for unlawfully obtaining etc personal data

Clause 109 (formerly 75) would allow a custodial penalty of up to two years to be imposed for the existing offence of knowingly or recklessly obtaining, disclosing or procuring the disclosure of personal information without the consent of the data controller.

The Department for Constitutional Affairs (as it then was) issued a consultation paper on the proposal in July 2006, with a closing date in October 2006.[102] The Government said that the majority of responses, "at least 82%" of the 63 responses were fully supportive of all the questions: there had been a joint "press group" response - which generally opposed the proposals, as well as some opposition voiced by other organisations.

Concerns had been expressed that this might impede legitimate investigative journalism.[103]

In Committee, Edward Garnier urged the concerns of the press, saying that there had so far been 55 prosecutions of which two had resulted in fines exceeding £5,000 – which called the need for custodial penalties into question. He also commented on an apparent anomaly in that a defendant who had proceeded in the honest and reasonable (but mistaken) *belief* that publication would be in the public interest would be exempt from civil liability under the *Data Protection Act 1998* but would not have a defence to a criminal charge under the Act on the same facts. The public interest defence to a criminal charge depends on showing

> that in the particular circumstances, the obtaining disclosing or procuring *was justified* as being in the public interest [italics added].[104]

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100 PBC Deb 22 November 2007 c521
101 PBC Deb 22 November 2007 c526
102 *Increasing penalties for deliberate and wilful misuse of personal data*, Department for Constitutional Affairs CP 9/06
103 HC Deb 25 October 2007 c409
104 s 55(2)(d)

The Minister said that the purposes of the two provisions were very different, but she would look closely at what had been said, and talk to Mr Garnier and the Newspaper Society further about it.[105] She said that there was no intention to create a "chilling effect" and inhibit responsible investigative journalism: not everyone accepted that the new custodial penalties would have a chilling effect.

9. Violent offender orders

There was extensive debate in Committee on a number of issues relating to the new violent offender order (VOO) under Part 9 (formerly Part 8). Harry Cohen tabled several amendments on behalf of Liberty and, with the Conservatives and Liberal Democrats, questioned whether it was really necessary to have another civil order, breach of which would be an offence, on the ASBO model. Liberty had said that VOOs were not necessary because, under the *Criminal Justice Act 2003*, offenders convicted of violent offences could be given indefinite periods of imprisonment for public protection and be on licence for at least 10 years. Moreover, non-molestation orders could be used, specifying the individual(s) at risk of serious harm from the offender.[106] David Burrowes added that the focus should be on ensuring that the criminal sanctions and sentences were effective.[107]

The Minister's response was that the aim of VOOs was to protect the public from offenders who still presented a risk of violent harm at the end of their sentences, when there was no other risk management mechanism in place. Non-molestation orders could be used only to protect individuals who were known to the offender, not the public. He said that about 100 orders a year were expected. He later said that the Government thought that about 100 people might breach orders,[108] requiring 20 prison places: David Burrowes said that the National Association of Probation Officers had estimated that around 3,000 additional places would be required in any one year.[109] Clause 124 (formerly 83) introducing VOOs was agreed on a division of 9 to 7.[110]

The opposition parties argued that VOOs should not be made in respect of offenders under 18: there were already stringent reporting requirements, and youth offending teams for young people when they were released.[111] The Minister agreed that there were issues about under-18s which needed to be considered and said that the estimated number of YOOs for young people was 20 or less. A Government new clause (now clause 131) requiring yearly reviews of such YOOs was agreed without division but David Heath indicated that he might return to the matter.[112]

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105 PBC Deb 27 November 2007 c587
106 PBC Deb 27 November 2007 cc592-593
107 PBC Deb 27 November 2007 c595
108 PBC Deb 27 November 2007 c598
109 PBC Deb 27 November 2007 c601
110 PBC Deb 27 November 2007 c601
111 PBC Deb 27 November 2007 cc602-603
112 PBC Deb 27 November 2007 c606

There was further debate about whether applications for YOOs should be made by the police, or some other authority, and whether the standard of proof required by the legislation should be the criminal standard of "beyond a reasonable doubt" or the civil standard (which was in practice likely to be equivalent, although the proceedings were civil). The Minister agreed to explain on Report whether change was needed to the test to be applied on applications for interim orders which, unlike the "main" application, did not require it to be shown that the offender had acted in such a way as to require a VOO to be made (clauses 126 and 129).[113] An opposition amendment to insert the words "beyond a reasonable doubt" was defeated by 8 votes to 5.[114]

10. Premises closure orders

Clause 145 (formerly 103) allows for closure orders to be made in respect of premises associated with persistent disorder or nuisance. This could apply to homes, including owner-occupied ones. The provisions are closely modelled on the powers to close crack houses introduced in 2004.

In Committee, concerns were expressed about the effect of closure orders on family members (especially children) and other residents of the premises who are not in any way associated with the behaviour which was the basis for the closure order, and "cuckooing" when a closure order displaces people who may then target vulnerable people and move into their premises. The Minister gave an assurance that there would be robust guidance on how the orders operated and he would ensure that housing considerations would be included. He said that, although it sounded contradictory, closing premises would force the system to deal with the needs of children and vulnerable people.[115]

11. Offence of causing nuisance or disturbance on NHS premises

Both at Second Reading and in Committee, there was general support for the principle of clauses 146-148 (formerly 104-106) regarding a new offence of causing nuisance or disturbance on NHS premises and powers to remove offenders from hospital premises, amid great concern about the volume of assaults on NHS staff. There were, however, reservations about the need for any further provisions, and their usefulness. These focused on the limitations that they would apply only to hospitals and not to other NHS premises, such as GP surgeries, or to other public service premises affected by disruptive behaviour, and that they would not apply to patients, who might be the most likely people to be on NHS hospital premises. Police Federation evidence was that a separate offence would send an important message to NHS staff.[116] The Minister's response was that health bodies felt that the existing law was inadequate for dealing with low-level nuisance behaviour, and that there were practical difficulties about extending

[113] PBC Deb 27 November 2007 c612
[114] PBC Deb 27 November 2007 c615
[115] PBC Deb 27 November 2007 c621
[116] PBC Deb 16 October 2007 c62

the offence to a broad range of NHS health care settings, but that the Government was committed to looking further at it and would reflect on what had been said.[117]

12. Inspection of police authorities

Clause 156 (formerly 114) would extend Her Majesty's Inspectorate of Constabulary's powers of inspection in police authorities. David Heath told the Committee that Association of Police Authorities was disappointed that the Bill did not reflect what it thought had been agreed with the Home Office, namely that peer review would form part of the inspection process. The Minister said that that he Government intended to make it possible for inspections of police authorities to be carried out jointly by and the Audit Commission. He explained that peer review by authorities was seen as forming an integral part of the programme of inspections, but the detail would be set out in the protocol rather than in legislation.[118]

13. Special immigration status

At Second Reading Mr Straw explained that the new special immigration status was to ensure that foreign criminals and terrorists who could not be deported could not expect a settled status in this country. Keith Vaz, the Chairman of the Home Affairs Select Committee, said that he did not object to the purpose of the clauses, but urged the Government to consider seriously whether the proposals were necessary given the strong concerns that many groups had expressed. He was not sure that it was in the interest of the Home Office to add yet another immigration status for it to manage, possibly costing another £1.1 million to administer over the next three years, and was concerned that the broad criteria for designating individuals with special immigration status might encompass foreign individuals who posed absolutely no threat to this country. He said that he would welcome the Minister's providing more detail on what types of restrictive condition could be imposed on individuals having that status.[119]

In Committee, Members raised a number of concerns which had been expressed by Liberty, the Refugee Council, the Joint Council for the Welfare of Immigrants, the Immigration Law Practitioners Association, the United Nations High Commissioner for Refugees and the Joint Committee for Human Rights. The clauses (now 157-164) were agreed without division and without amendment.[120]

a. Designation: clause 157 (formerly115)

Harry Cohen and David Heath questioned whether it was appropriate for the children, as well as the spouse, of a "foreign criminal" to be subject to designation, which would

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[117] HC Deb 8 October 2007 c61,73, PBC Deb 27 November 2007 c623-630
[118] PBC Deb 27 November 2007 c636
[119] HC Deb 8 October 2007 cc84-5
[120] PBC Deb 27 November 2007 cc636-651

prevent them from having any capacity to do things which might be normal for a person resident in the country (such as working).[121]

The Minister responded that it was Border and Immigration Agency policy that a person's claim to apply for leave as the dependant of another person stands or falls with that of the principal applicant, so if the principal applicant was given the new status there must be power to designate the family as well, but a family member would be able to apply for leave in their own right and, if they qualified, be granted it. One of the aims of imposing conditions was to prevent a foreign criminal from establishing links with this country which might constitute an additional obstacle to his eventual deportation and another was to maintain contact with him and his family until such time as removal was possible. Harry Cohen was not convinced, being unhappy with a provision which would have the activities, chances and income of children restricted in their growing independence: he asked this aspect should be looked at again.

There was also concern about the absence of any provision for appealing against designation (which might involve less delay than an application for judicial review).

b. Need for a new immigration status

David Heath found it impossible to reconcile the Government's stated objective of simplifying immigration law and its introduction of an entirely new immigration status. He summarised the arguments against: that the new status was unnecessary, would be disproportionate and punitive (without an offence for which it was punishment) putting people into legal and economic limbo and condemning them to progressive poverty.[122]

The Minister said that the new status was needed in order to deny immigration leave and its benefits to foreign criminals (which the courts had held impossible in the case of the Afghans who arrived at Stansted by hijacking a plane).There would be no designation of recognised refugees.

c. "Foreign criminal": clause 158 (formerly 116)

Harry Cohen put forward Liberty's point that it was inappropriate that people who had not been convicted of anything could be designated, and the fear of the Joint Committee on Human Rights' that

> it will be used to deny asylum to individuals who may have been engaged abroad in resistance to an oppressive regime, but are caught by the UK's very broad definition of terrorism.

David Heath referred to the United Nations High Commissioner for Refugees' questioning whether it was appropriate to designate persons excluded under Article 1F of the 1951 Refugee Convention as "foreign criminals".

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[121] PBC Deb 27 November 2007 c637
[122] PBC Deb 27 November 2007 c640

David Burrowes sought clarification as to whether European Economic Area nationals (and their families) could be designated. The Library Research Paper had said:

> EEA nationals and their family members could be designated, but only if the effect would not breach their rights under European free movement laws. This is rarely likely to be the case as the public security threshold under those laws is very high.[123]
>
> .

The Minister stated that they could not be designated. He drew attention to clause 115(5) (now 157(5)) which provides that the Secretary of State may not designate a person if he thinks that an effect of designation would breach the person's rights under the Community treaties.

d. Conditions: clause 160 (formerly 118)

Harry Cohen and David Heath tabled (and subsequently withdrew) amendments which would have spelled out that any conditions imposed on designated people must not be excessively restrictive, have a punitive impact or be intended to prevent the commission of further offences. The Minister responded that although the amendments appeared reasonable on the face of it, nevertheless they were

> unnecessary, to some extent undesirable and overall they appear to be based on a misunderstanding of the new status.

He said that as conditions had to be reasonable and it was clear that they could not be unduly restrictive, nor was the purpose of conditions to punish or to prevent commission of further offences.[124] He said that the conditions which could be imposed matched those which applied to individuals with temporary admissions under the Immigration Act 1971, which had been in operation successfully for over a third of a century and that the Government did not believe that it was necessary to alter wording that was already established in immigration law.

e. Support: clause 161 (formerly 118)

Some Members expressed disappointment that the Government was reintroducing the voucher system, which had caused problems.[125] (Use of vouchers is implicit in the provision that support should not normally be provided wholly or mainly by way of cash, clause 161(4)). The Minister explained that the Henry VIII provision (now clause 162 (6) would provide opportunities to change (for example the support) provisions if found necessary.[126]

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[123] The *Criminal Justice and Immigration Bill*, RP 07/65 p107
[124] PBC Deb 27 November 2007 c648
[125] PBC Deb 27 November 2007 cc640, 649
[126] PBC Deb 27 November 2007 c650

IV Annex - Members of the Public Bill Committee

Chairmen: Frank Cook , Mr. Edward O'Hara , Sir Nicholas Winterton

Members

Burrowes, Mr. David (Con)
Coaker, Mr. Vernon (Parliamentary Under-Secretary of State for the Home Department)
Cohen, Harry (Lab)
Eagle, Maria (Parliamentary Under-Secretary of State for Justice)
Garnier, Mr. Edward (Con)
Hanson, Mr. David (Minister of State, Ministry of Justice)
Heath, Mr. David (LD)
Hollobone, Mr. Philip (Con)
Howarth, David (LD)
Hurd, Mr. Nick (Con)
Keeble, Ms Sally (Lab)
Khan, Mr. Sadiq (Lab)
Michael, Alun (Lab/Co-op)
Sharma, Mr. Virendra (Lab)
Walker, Mr. Charles (Con)
Waltho, Lynda (Lab)
Wilson, Phil (Lab)